



National OHS Review

Telstra Corporation
Limited

Submissions seeking fair,
effective and consistent
OHS regulation in
Australia

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1 Structure of these submissions

In making these submissions, Telstra has sought to provide a comprehensive response to the major issues that have been raised by the review panel.

As part of preparing its submissions, Telstra has considered what should be the overall 'vision and values' that the Model OHS Act should strive to achieve.

Rather than attempting to respond to each of the questions asked by the panel separately, this submission seeks to deal with the major areas identified by the review panel in a holistic way. Key 'drafting recommendations' are made throughout this submission.

In addition, attached to the submissions are:

Appendix 1: A summary of Telstra's drafting recommendations; and

Appendix 2: A table setting out in summary form a response to the questions relevant to Telstra asked by the review panel.

2 Fair, effective and consistent: Telstra's vision for OHS regulation in Australia

Telstra Corporation Limited's (**Telstra**) primary objective in the OHS harmonisation process is for the development of fair, effective and consistent laws throughout all Australian States and Territories, and for those owing duties under Commonwealth laws.

Telstra itself operates under a single, national OHS regime (the Federal Comcare system), but in its business dealings with contractors, service providers and various State government authorities, is subjected to the morass and complexity of differing OHS regulation throughout Australia.

Until now, attempts to harmonise OHS regulation have been blocked by various State interests, each seeking to unnecessarily localise regulation in this area.

In Telstra's view, however, what is safe for an employee in Queensland, ought to be safe for an employee in New South Wales or Western Australia. An effective system for the regulation of OHS in Victoria, will be effective in the Northern Territory. An employee in Tasmania should have the same protections as an employee in South Australia.

For this reason Telstra does not see that there is any need to accept or adopt local variances in principles-based OHS legislation.

Telstra's primary submission to the review panel is to urge the development of a single national OHS system regulated by a single federal regulator. Without this, compliance with the model OHS Act will necessarily entail compliance with the differing views and wishes of the relevant regulator in each State and Territory. It is the vision of Telstra that, ultimately occupational health and safety in this country must be regulated by a single national OHS regulator.

Telstra appreciates that the time may not yet be right for such a significant evolution of OHS laws in this country. However, it implores State and Federal governments to move towards a rapid consolidation of regulatory function in this area, and the referral of OHS regulation to a single jurisdiction.

At the very least, Telstra's hope for this review process is that each State and Territory undertakes to promptly adopt, unamended, the legislation proposed by this review and agreed by the community of governments in COAG.

3 What should the model legislation achieve?

Telstra hopes that the model legislation achieves the following:

It is fair.

- It sets a fair standard for employers and other duty-holders.
- It applies general criminal law protections, including the protection from reverse onus of proof.
- It encourages collaboration and active and ongoing consultation with all stakeholders in safety (the primary stakeholders being the employee and their employer).
- It recognises the complex arrangements in Australian workplaces, including arrangements where labour is provided through labour hire companies, services are provided through contractors and goods and services are provided by specialist suppliers.

It is effective.

- It provides a legislative framework to secure the health and safety of people where work is being conducted.
- It provides for the clear delineation of otherwise overlapping or competing duties to secure safety.
- It clarifies the current confusion regarding duty-holders and the question of control and confirms where obligations sit.
- It clearly separates employment and industrial issues from occupational health and safety issues and does not encourage the overlap between third party involvement in safety and third party involvement in those other issues.

It is consistent.

- The law is enforced by an appropriately trained, responsive, experienced and knowledgeable inspectorate.
- It provides clear guidance and certain parameters for the courts to apply the law consistently in each jurisdiction.
- The emphasis and the focus of the inspectorate is on providing tools and mechanisms for compliance where requested, with coercive enforcement as a last resort.
- Positive steps to ensure health and safety are recognised and encouraged in a meaningful way.
- It provides certainty for the Court on key concepts.

4 Why Telstra is making a submission

Telstra is Australia's leading telecommunications and information services company, offering a full range of services and competing in all telecommunications markets

throughout Australia and certain overseas countries. It is one of the largest employers in Australia and has a diverse workforce.

Telstra is an employer covered by the requirements of the *Occupational Health and Safety Act 1991 (Cth)* (**Commonwealth OHS Act**).

It is Telstra's strong submission that nothing proposed in the harmonisation process, short of federalisation of OHS regulation, should seek to remove employers currently covered by the Commonwealth OHS Act and place them in any other jurisdiction.

Telstra is committed to undertaking work safely and ensuring its employees are supported and encouraged to make a real difference to the health and safety of themselves and others.

It considers that this review is a singular opportunity for real reform and the development of a consistent and world-class OHS regime in Australia. Telstra implores State, Territory and Federal governments alike to fully use this opportunity to achieve real reform in this area.

Telstra takes its OHS, rehabilitation and workers' compensation obligations seriously. It voluntarily reports progress in regards to OHS through its Annual Report and to the Safety Rehabilitation and Compensation Commission as part of its licence conditions.

Comcare has granted Telstra 'Tier 3' status for prevention, the highest recognition level, within the Federal scheme.

5 Telstra's guiding principles for the development of model legislation

5.1 The law in this area should be fair, effective, and consistent

This achievable ideal informs this submission and some general observations on these principles are made below

Fairness:

The approach to enforcement should be balanced and common principles of legal fairness should apply

Telstra believes that the review should propose model OHS laws that provide a fair basis for enforcement in this area.

The law should have as its primary object the facilitation of the safe conduct of work. It should allow for guidance to be provided by the regulator, and positively require duty-holders to do all that is reasonably practicable to ensure work is conducted safely.

Where a duty-holder has failed to meet the standard expected, and this can be proven in proceedings, then that breach should be prosecuted swiftly and effectively, with a range of sentencing options or remedies available to the sentencing judge.

However, Telstra believes that where civil penalties or criminal sanctions are a possibility, the onus of providing breaches of standard in the model OHS Act should fall to the prosecution.

It is simply inappropriate to reverse the onus of proof on defendants, as is the effect of the current safety laws in New South Wales. Defendants must be innocent until

proven guilty on all elements of an offence.

This right to a just and fair trial should not be eroded lightly. Occupational health and safety is not some special category of regulation requiring abandonment of core principles of Australian criminal law.

Effectiveness: The object of ensuring safety must inform the development of the model legislation

Ultimately, the model OHS laws should be effective in securing the safe conduct of work.

Telstra supports the *National OHS Strategy 2002-2012*¹ produced by the Department of Employment and Workplace Relations. In particular, Telstra supports the call for a 'nationally consistent regulatory framework'.

Telstra considers the empanelling of this review to be a critical step forward in the development of that regulatory framework.

Telstra notes that the National OHS Strategy provides that

a nationally consistent approach to OHS regulation is essential for employers and employees. Regulatory requirements must remain relevant, effective, clear and practicable and not unnecessarily prescriptive. Outcomes must be expressed clearly in terms of the level of performance required.

In considering what is 'effective', the model OHS Act must provide an achievable set of objectives to provide duty-holders (and in particular, employers) with the ability to achieve a state of ongoing legal compliance.

In this way, the objectives of **fairness** and **effectiveness** are intertwined.

It is the submission of Telstra that the law should set a high standard against which duty-holders' actions ought to be judged, but that standard should not be absolute or so high as to make defending allegations of breaching the model legislation impossible. That standard should be enforced in accordance with community expectations and the reality of the corporate experience.

Where the standard is raised to an unattainable level, such as its current interpretation of the law in New South Wales, employers have little incentive to improve their systems of work knowing that it is almost impossible to comply with the law and successfully defend any prosecution that is brought.

The Australian experience has shown that requiring those with control over the conduct of work to do all that is reasonably practicable to ensure that risks are appropriately controlled, has been effective in achieving

¹ National OHS Strategy 2002-2012, ASCC

safety in workplaces.

In Telstra’s view, the proposed model legislation should require employers to do **all that is reasonably practicable** to ensure the safe conduct of work.

Proving an alleged failure to do so must be the obligation of the prosecuting authority.

Consistency: The system must be uniform across the jurisdictions, in form and effect

Finally, OHS law should be consistently applied throughout Australia.

Telstra considers it to be inequitable, inappropriate and unsustainable for employees to have different rights, obligations and protections dependent solely on the geographical location in which they happen to be carrying on work.

The current variances between jurisdictions regarding the formulation and enforcement of key duties and obligations is an inefficient and unsophisticated approach to national regulation in this area.

In order to achieve this consistency, and in order to ensure its effectiveness and fairness, in Telstra’s submission it is essential that:

- the model OHS legislation be adopted verbatim in all States and Territories; and
- it is enforced consistently in all jurisdictions, with the ability for courts to impose a range of possible sanctions. Such sanctions should extend beyond purely monetary fines, and include a range of sentencing options aimed at improving safety rather than purely retributive outcomes.

6 How should duties arise under the model legislation?

6.1 The model OHS Act should be principally concerned with the safe conduct of work

Issue:

What should the Model OHS Act seek to regulate?

Drafting recommendations:

The model OHS Act should seek to regulate the ‘conduct of work’ and those able to directly control the conduct of work, so far as reasonably practicable.

Telstra considers that the model legislation should focus on regulating those with the ability to control the ‘safe conduct of work’ so far as reasonably practicable.

The general obligations to properly instruct employees, provide safe systems of work, etc. would then cascade from this specific obligation.

That is, work should be conducted in a manner which is immediately safe to those employees conducting the work, without risk to those proximate with or connected to the work and performed in a manner in which the state of the workplace is left safe at the conclusion of conduct of work.

Telstra believes that a formulation of the general duty to ensure health and safety which is connected not with a notional 'workplace' but rather with the *conduct of work* itself would provide better clarity for principals and contractors, for employees and employers in relation to precisely how those duties are delineated.

In considering the nature and extent of the duty owed by a particular duty-holder, the question to be asked is:

'Can I exercise control over the actual conduct of the work?'

If the answer is yes, then that person ought owe a duty to do all that is reasonably practicable to ensure that that work is completed safely.

Starting from this question may assist in properly characterising the duties owed in varying employment relationships.

6.2 The arrangements between different employment relationships should be dealt with separately and effectively

Issue:

How should the Model OHS Act treat the obligations owed to employees, labour hire workers and the employees of a contractor?

Drafting recommendations:

The model OHS Act should:

- provide a duty owed by an employer to its employees;
- treat labour hire employees working at a host employer as deemed employees of the employer (noting that their direct employer will owe the primary, and concurrent duties); and
- not deem contractors to be employees, but provide guidance for the relationship between a contractor and principal.

At present, the OHS regimes in most States and Territories, and the Commonwealth OHS Act, set out a general duty for employers in relation to their employees.

Either by a 'deeming' provision or an extension of that general duty, the obligation is then extended to employees of specialist contractors. By inference, this has been extended to cover the relationship between an employer and a 'labour hire' employee performing work for a host employer.

Such deeming provisions then attempt to extend the single, general, duty to ensure OHS to three key working relationships:

- 1 employer and its employees performing work for that employer;
- 2 employer and a labour hire employee (where the employer is the 'host' employer) performing work for that employer; and
- 3 employer and the employees of a specialist contractor.

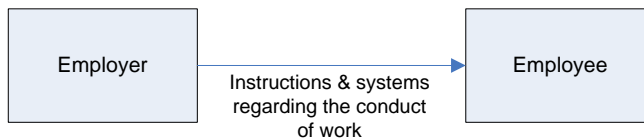
However the ability of the employer to provide for the safe conduct of work of the individual in each case is quite different.

This might be expressed in terms of the provision of instructions and systems relating to the conduct of the work.

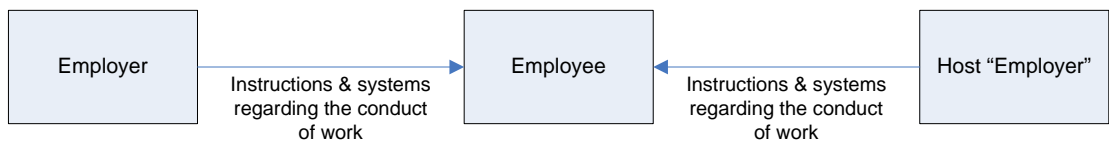
For the duty referred to in 1 above, the ability to instruct and provide systems for the employee is direct. In 2 it is likely to be shared with the actual (not host) employer, while in the third case the ability to directly impact on the conduct of work of the individual does not arise in the same way.

This may be expressed diagrammatically as:

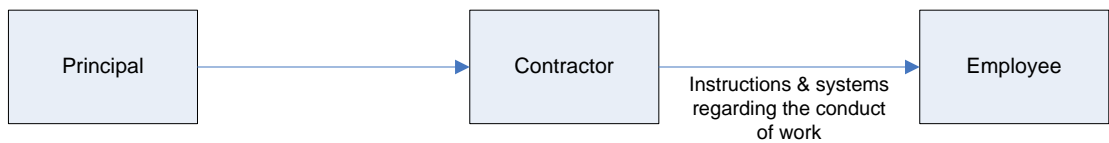
1. Employment arrangement



2. Labour hire arrangement



3. Contractor arrangement



In Telstra's submission, the three situations described above (currently the three most common situations relating to the conduct of work by employees) should be dealt with separately in the model OHS Act.

In particular any duty owed by a principal to the employee (in Duty 3 above) should be clarified, and only extend so far as the principal has control over the actual conduct of work and so far as reasonably practicable.

6.3 Duty 1: The duty owed by an employer to its employees

Drafting recommendation:

An employer should be required to ensure the safe conduct of work of its employees, so far as reasonably practicable.

An employee's employer has the greatest control of the employee's work and the most significant legal contractual ability to ensure the safe conduct of that work.

Indeed, the relationship between the employer and employee is governed by a contract of service. Compliance with all lawful and reasonable directions by that employer is an implied term of their contracts of employment.

More importantly however, the expertise regarding the safe conduct of a particular enterprise rests with the employer and its employees.

The general duty of employers to their employees is central, and critical, to the development of the Model OHS legislation.

For the review panel's consideration, Telstra proposes a formulation as follows, which contains the key elements it considers important.

Drafting recommendation – The duty of an employer to its employees and workers it directly controls:

An employer must, so far as reasonably practicable, ensure that the conduct of the work of its employees is safe and without risk to the health of any person.

'Employees' include persons whose work is directly controlled by the employer, irrespective of whether those persons are in fact employees of that employer, or if a duty is also owed by another person towards them.

6.4 Duty 2: Labour hire arrangements

Equally, where labour hire employees are placed at a host employer site they are required to adopt and comply with the host employer's systems and procedures for the safe conduct of work, in addition to the directions imposed by their direct employer.

In Telstra's view, current attempts to regulate these arrangements are unclear. Current OHS legislation provides no clear guidance for employers or labour hire providers as to where responsibilities and obligations to ensure safety lie.

Telstra believes that the primary duty to ensure safety should rest with the worker's direct employer.

In addition, the 'host' employer should then owe a duty to ensure that the conduct of the work carried out by the worker is, so far as reasonably practicable, safe. This approach would clarify the extent of the duty owed by:

- the host employer (who would bear the bulk of the obligations in relation to the way work was conducted); and
- the labour hire employer (who would be required to ensure as far as reasonably practicable that the employee was able to complete the work safely).

Approaching the duty in terms of the 'conduct of work' in this way might better clarify the duties of each party and reduce inefficient and overlapping duties.

6.5 Duty 3: The duty owed by an employer to employees of a contractor

Issue:

How should the model OHS Act treat the duty owed by a principal contractor to employees of the contractor?

Drafting recommendations:

Contractor's employees should not be 'deemed' employees of the principal.

A separate duty should be drafted for principal contractors, requiring them to ensure so far as they can control it, the safe conduct of work of the contractor's employee, so far as reasonably practicable.

The principal shall be required to ensure so far as reasonably practicable that the risks which are not controlled by the contractor are eliminated or controlled so far as reasonably practicable.

'Control' over the conduct of work should be defined, and should extend the duty to circumstances where there is more than a mere theoretical or contractual ability to control the conduct of the work.

A separate duty should be inserted into the model Act setting out the requirements of a principal contractor. It is insufficient to merely 'deem' the contractor's employees to be employees of the principal.

Clearly the relationship between those parties is different to an employment relationship, and the duty should be separately expressed².

The critical issue is then, to what extent should the duty-holder have a duty. The response is over those things which it can control. They are likely to be issues regarding the state of the workplace in which the contractor is required to work (which will be dealt with separately under the duty to have a safe workplace) and any residual issues which are not dealt with by the contractor.

(a) **Dealing with the issue of control**

It is generally accepted that the question of 'control' is a core issue in the allocation of duties under OHS legislation.

However as has been noted by leading observers in this area, there is no clear direction in the legislation setting out what the question of 'control' really means. What has resulted is a series of contradictory cases setting out imprecise meanings of what control is said to be, particularly in relation to the management of contractors and the safety of contractor's employees.

The factors determining control are unclear on any reading of the cases. Ongoing control over a work site, or a commercial contractual ability to control the corporate entity has been found to give rise to duties relating to the actual conduct of work.

In making sense of the law in this area, Telstra supports the comments of the Victorian Civil and Administrative Tribunal in *Mildura Rural City Council v Victorian Workcover Authority*³ when they confirmed that:

It would be a wild and unjustified leap for someone to conclude merely that because a project was being carried out on Council land and that it was in a general sense a Council project that Council was "in control" of the activity rather than the head contractor, the subcontractor, their servants and agents.

(b) **The meaning of control should be more than a mere contractual ability to exercise control**

It is in the purview of all principal contractors to exercise some degree of control over the way in which work is conducted by the specialists to which they contract.

For commercial and other reasons, Telstra will always retain some degree of contractual 'control' over services provided by its contractors. At present, applying the very broad concept of control envisaged by the AIRC,⁴ and on the basis of some theoretical ability to control the contractor, to do so will always attract concurrent duties to the employees of the principal contractor.

However, as a principal contractor, Telstra may simply not possess the skills, knowledge and expertise of its contractors. And yet, because of an almost limitless inference of an ability to 'control' the work it may be exposed to breaching a duty it cannot fulfil.

Such an outcome is neither effective nor fair, and at present with the different application of the law between different courts in different jurisdictions it is not consistent.

² See for example, s.31 of the *Workplace Health and Safety Act 1995 (Qld)* which sets out the responsibilities of a principal contractor. The duties there are in essence the duty to ensure that the working environment is safe, to ensure the supervision of the conduct of work and to act where it believes the work is unsafe. This formulation provides greater certainty as to the parameters of control and to the extent possible minimises any overlap.

³ [2006] VCAT 2366

⁴ See *Telstra Corporation Ltd v Comcare Australia Pty Ltd* [2007] AIRCFB 438 (*Burwood Telephone Exchange Improvement Notice*) in which the AIRC found that because Telstra employees could access the site and 'retained the right to audit the contractor's occupational health and safety procedures and to direct that its health and safety plans be altered' it had 'control' over the workplace for the purpose of s 14 of the Commonwealth OHS Act.

(c) **What principles should inform the provisions of the model OHS Act dealing with contractor management?**

Without any clear guidance in the legislation regarding the extent of the duty, and case law suggesting that in nearly all circumstances the principal can exercise control, a principal can expect to have a potential liability arising from all the actions of a contractor.

Telstra proposes that the following principles guide the development of a separate section in the model OHS Act dealing with the obligations to contractors:

- 1 First, requiring those with the **actual ability to control the conduct of work** to do all that is reasonably practicable to be done to ensure that this work be done safely, so far as they can exercise that control.

This provides for fairer outcomes, as those with the actual ability to influence the conduct of work (rather than those who have a theoretical ability) are given responsibility under the model OHS Act.
- 2 Second, those with **specific expertise** (i.e. employees of the contractor) **are the appropriate persons to undertake supervision**. Some ubiquitous obligation to supervise contractors, when such supervision is not informed by expertise, but rather by common and perhaps contradictory understandings of their systems of work and the risk of their faith, is not effective in ensuring health and safety.
- 3 Third, requiring the principal contractor to ensure so far as reasonably practicable that the **risks which are not controlled by the contractor** are eliminated or controlled so far as reasonably practicable. This may include controlling the risks relating to the state of the workplace, or the conduct of work by other parties in the workplace. This requires the principal to take responsibility for the 'residual' risks at the place of work.

6.6 What practical measures can be implemented through the model OHS Act to better ensure safety in contractor/principal relationships?

Drafting recommendations:

Contracting parties should have the option of drafting a 'pre-work plan' setting out the responsibilities of each party regarding the safe conduct of work.

This plan should have evidentiary value in resisting assertions that one party had 'control' over a certain matter.

The allocations of responsibilities should be rebuttable where they are not reasonable.

The model OHS legislation should seek to provide clarity so far as possible for employers and contractors regarding the obligation to ensure the safe conduct of work.

There are currently options for determining where the boundaries of responsibility lie in contractual relationships.

Telstra supports inclusion of an option for the contracting parties to develop a 'pre-work plan'. This would allow the parties to clearly delineate the obligations of each party prior to the work commencing. That plan should then have some evidentiary effect, in the event of an alleged breach of the Act.

Such an approach is not without precedent in safety legislation. Some of the below examples should be considered by the review panel in proposing the model laws.

Chapter 9 of the *Petroleum and Gas (Production and Safety) Act*

Under this Act there is the opportunity to develop a safety management plan and make appointments, such as:

- an operator of operating plant;
- an executive safety manager; and
- site safety manager.

Each of these appointees is deemed to be responsible for certain duties which, but for the appointment, would be shared amongst other parties.

A person must comply with their obligations under this safety management plan. Indeed, the duties arising are limited by this plan.

Paraphrasing this Act, the limit of the obligations under the plan is expressed as follows:

Each person, to the extent of the person's duties and responsibilities under the Act or the safety management plan for the plant, take all necessary and reasonable action to ensure no person or property is exposed to more than an acceptable level of risk.

Various State OHS Acts and Regulations

Under the various construction regulations operating in the States, there is a similar mechanism for the development of safety co-ordination plans setting out the obligations of each party, and the responsibilities of each.

Telstra believes that the opportunity to set out the responsibilities of a principal and a contractor in relation to the safe conduct of work would allow greater certainty in contractual relations and hence provide more effective safety outcomes, and would allow parties to apportion responsibility to those who are best able to ensure safety.

The Regulations could set out a 'pro-forma' document which parties could then adopt to suit their needs.

(a) **What should the evidentiary weight of such allocation plans be?**

Should an incident occur, there would be a clear record of responsibilities as agreed between the parties which would establish which aspect of the conduct of work was the responsibility of each party.

This allocation, as agreed between the contracting parties should then have some evidentiary weight when considering how safety was dealt with during the contract and who (if anyone) may have breached the Act.

Of course, it would be difficult to imagine how a principal could place all the obligations to ensure safety on a contractor, as there will be some issues such as the state of the workplace etc, which are out of the contractor's control.

If they are to provide this basis for responding to allegations of a failure by one party, such allocations of responsibility may need to be judged against an objective standard.

This might include a consideration of whether the allocation is reasonable in all the circumstances. Even if the allocations do not provide an absolute response to allegations of breach by one party, over a matter which they had no expertise or ability to properly control, they should be afforded some significance.

6.7 New work arrangements that may arise in the future

It is difficult to predict what new types of work arrangements may arise in the future (for example, the concept of dual employers may, at some stage, be clearly recognised under Australian law). So it is likely beyond the scope of this review to imagine how they should be regulated.

Telstra considers that a focus purely on traditional concepts such 'employer' and 'employee' may not be sufficient to capture these new, flexible working arrangements.

However, if the focus of the model OHS legislation is on the 'conduct of work', it will not matter how the working arrangements are structured, as the nexus of the obligations owed will be the conduct of work. As long as there is work to be performed, then there will be duty-holders that can be identified as having obligations.

7 Other key duties

7.1 Duties to have a safe workplace

Drafting recommendations:

Workplace should be defined as a place where work is being conducted, or an ongoing course of work is being conducted.

In addition to the duties regarding the way in which work is conducted, Telstra recognises that there should be a duty to ensure a safe workplace.

This duty, as expressed in most jurisdictions, is a duty to ensure that the physical state of the workplace is safe and the means of accessing and leaving the workplace are unimpeded.

However, for organisations such as Telstra, work can be conducted at a variety of different locations in any given time period. It is unfair and ineffective to deem every possible area where Telstra, or its contractors, may conduct work to be a 'Workplace'.

Rather, Telstra accepts that at the time work is being conducted at a place it is a 'workplace' (again, the concept of the 'conduct of work' is central here). Where a course of work extends over a period of days there is a general obligation to ensure that the state of the workplace is safe between, say, each day's work.

However, where a place is visited, work is completed, and the workplace is left in a safe state, then that place should not be deemed to be a place of work for all time.

For Telstra, and other utility providers with many, many thousands of places where work is conducted, clarity on this issue is essential.

7.2 Duties owed to others

Telstra has considered whether a specific 'duty to members of the public' needs to be included in the model OHS Act.

As discussed above, a focus on ensuring the safe conduct of work requires an employer or duty holder to ensure that work is conducted in a way which is safe to those conducting the work, and safe to those who may be affected by the way in which the work is conducted. This will include members of the public who are affected by the conduct of work.

In addition, Telstra envisages that there will be a duty on those with control of the workplace to ensure that the state of that workplace (including the means of entering and exiting it) be safe. Again, this will provide protection to members of the public or persons who are not employees of the duty holder.

Further regulation in this area is unnecessary. It is important to recall this is a model Act regulating *occupational* health and safety.

For this reason, it is inappropriate for the Act to be extended to provide general obligations to ensure safety to other persons. Rather, this is an area of responsibility best dealt with under general principles of negligence.

7.3 Duties regarding the supply of plant

Drafting recommendations:

Duties should be owed in relation to the supply of plant, equipment and substances only by those with control over their design or manufacture.

In Telstra's submission, those with the ability to design or manufacture plant owe an obligation to ensure that, at the point of supply, that plant or equipment is safe for use. This includes an obligation to provide such sufficient instructions to those persons who are required to use that plant or equipment.

In Telstra's submission, once supply has occurred from those with the responsibility for the design or manufacture of the plant or equipment, no further obligation should arise in relation to later supply of those goods.

It is inappropriate, and unfair, for persons who had no control over the way in which plant or equipment was designed or manufactured to owe later duties under OHS legislation in relation to that later supply.

There are other legal remedies available to persons who may be wronged by the supply of equipment down the supply chain (consider the *Trades Practices Act* for example), however, this is not the appropriate realm for regulation under OHS legislation.

It is simply inefficient to require the regulator to turn its attention to these issues.

8 Duties owed by employees

Drafting recommendations:

Employees should be required to take reasonable care to look after their own safety, and the safety of others affected by the conduct of their work.

Workers should be able to cease unsafe work, and not be penalised for doing so.

Employees should not be victimised for raising a legitimate safety issue, and this should include the possible remedy of reinstatement if the employee is terminated by their employer for raising legitimate safety issues at the workplace.

Such reinstatement should not be in the powers of the inspectorate as there is already an established forum with appropriately qualified experts to deal with the issue.

Telstra believes that the current focus of OHS regulation on the employer or the person with control over the conduct of work (however expressed) is appropriate.

However, Telstra believes that in addition to this obligation, employees ought to owe an obligation to take reasonable care for themselves and others affected by their work, to the extent that they can control that work or their individual actions.

Telstra notes that the formulation of this employee obligation in s 25 of the *Occupational Health and Safety Act 2004* (Vic) (**Victorian OHS Act**) appears an adequate and effective way of achieving this.

8.1 Right to cease unsafe work

Telstra has considered the questions posed by the review in relation to whether employees should have the right to cease work in circumstances where it is unsafe to continue. However, where an employee ceases to work because of safety issues, they should be obliged to undertake other tasks which do not raise safety concerns (for example work in other areas of the employer's premises, undertake other tasks within the employee's training and experience or undertake training).

Telstra believes that the general law right to not perform unsafe work should be maintained in the model OHS Act. Importantly though, this would provide a power for only the individual to cease work, and not direct others to do so.

The power of health and safety representatives to issue directions to cease work to other employees is an appropriate corollary protection which should be afforded to employees.

In Telstra's experience, the arrangements in place under s 37 of the Commonwealth OHS Act⁵ appear to provide appropriate safeguards for the exercise of this power.

8.2 Payment for ceasing unsafe work

Where the employee removes themselves from a dangerous situation, and follows the appropriate issue notification process and is willing to undertake other tasks which do not expose the employee to unacceptable risks, they should not suffer any loss of pay.

Where they do so for an improper reason, this will be dealt with under other legislation and need not be referred to in the model OHS Act.

8.3 Protection of employees

Telstra accepts that some employers may treat employees to their detriment for raising issues regarding unsafe work practices, including possible termination of employment (if an employee) or termination of engagement (if they are a contractor).

In order to prevent this from occurring, protections similar to those contained in the Commonwealth OHS Act should be included in the model OHS Act.⁶

Telstra generally supports the inclusion of anti-victimisation provisions in the model OHS Act, including possible reinstatement where the termination was on the basis of such victimisation. These matters should be dealt with promptly by an appropriate jurisdiction used to dealing with such complaints. Given this issue raises questions which are analogous to other discrimination jurisdictions, guidance should perhaps be sought from reference to that legislation. Low-level damages to a victimised employee may be appropriate.

Importantly, however, Telstra does not support the empowerment of inspectors to make orders for reinstatement 'on the spot' (as the Victorian regulator claims its inspectors are empowered to do).

⁵ This provides for notification of a serious risk to a supervisor by the HSR in the first instance. If the supervisor does not remedy the risk, then a direction to cease work can be implemented as a last resort.

⁶ See for example, s 76 of the Commonwealth OHS Act.

Termination of employment raises complex issues, and are properly dealt with judicially, although they can be dealt with expeditiously. It is inappropriate for an inspector to reach conclusions as to facts and order the reinstatement of employees, particularly when there is already in place an appropriate forum for employees to bring such claims (i.e. the 'unfair dismissal' and 'unlawful termination' provisions in the relevant workplace relations legislation) that are already dealt with by specialist tribunals.

9 Director's duties

Issue:

Should directors have a separate duty to ensure safety?

Drafting recommendations:

Directors should be required to exercise reasonable care in the discharge of their duties.

There should be no automatic attribution of responsibility via deeming provisions in the legislation or otherwise. It should be for the prosecution to prove the failing.

This obligation should not extend to managers (as they already owe a general duty as employees to take reasonable care).

Telstra accepts that in some situations directors of companies may fail to meet community expectations of their role and knowingly (or recklessly) turn a blind eye to known (or easily foreseeable) risks.

In those cases, where a director personally and knowingly (or recklessly) fails to take reasonable care⁷, there should be the opportunity for criminal sanctions to be brought against that person.

However, before this breach can be established there must be some special, personal, failing by a director or directors.

(a) **There should be no automatic attribution of responsibility**

As discussed above, a director should have the right to be presumed innocent until proven guilty by the prosecution in such a circumstance.

Indeed, this is a fundamental basis upon which the Australian criminal legal system operates. It is a principle which has been expressed as the 'golden thread' of the common law⁸.

Indeed, this principle was repeated in the *Universal Declaration of Human Rights* which states that:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.

For this reason, Telstra does not support adoption of the automatic attribution of guilt on a director for a corporation's failings - which currently exists in the New South Wales and Queensland legislation.

Rather, evidence of a personal failing should be a matter for the prosecution to prove.⁹

⁷ The concept of exercising all 'due diligence' has proven ineffective in New South Wales. Indeed, it is entirely unclear from a review of recent cases precisely what compliance with that standard might actually mean.

⁸ *Woolmington v DPP* [1935] AC 462: Viscount Sankey LC stated emphatically that "Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt"

Again, Telstra seeks to apply the principle of fairness and the presumption of innocence to the drafting of the model OHS Act.

Provisions that apply automatic attribution to a director have led to the outcome, in New South Wales at least, that it is almost impossible for a director to successfully establish a defence to charges relating to the corporation's failings.

Whilst it is arguable that the total number of directors prosecuted under the existing OHS law is relatively small, it is plainly increasing. In Telstra's submission this is a potentially significant deterrent in preventing good candidates from seeking and accepting board positions.

Telstra submits that the review panel ought consider the wider implications of the terms of any model legislation on the development and encouragement of good corporate governance in Australia.

(b) **There is no need to extend this duty beyond directors**

Directors hold a special range of duties which other officers of corporations do not. In Telstra's submission, the special duties on directors referred to above should not be extended to some undefinable level of senior management.

Managers, as employees, owe a general duty to take reasonable care for themselves and others to the extent that they can control risks arising from the conduct of work. Telstra submits that this is an effective tool for regulating those managers' conduct without extending the directors' duties to some lower level of management.

10 What should the compliance standard be?

Issue:

To what standard must duty holders be held?

Drafting recommendation:

Duty-holders should be required to do all that is reasonably practicable, so far as they can control the conduct of work, to ensure it is safe and without risks to health.

This standard should be an element of the offence, and a matter for the prosecution to prove.

It should be codified in the model OHS Act.

Consistency in the application of this standard is essential, hence guidance should be provided to the courts in determining what this means,

(a) **Those with control over the conduct of work should be required to do all that is reasonably practicable**

Telstra has considered the Issues Paper provided the review panel, and agrees that in nearly all Australian jurisdictions, the obligation to comply with the general and indeed, in many cases, specific duties is already subject to what *is reasonably practicable*.

Like many employers, Telstra takes a proactive, imaginative and thorough approach to risk management and ensuring safety. It considers itself a leader in ensuring the safety of those affected by the conduct of its work.

⁹ Telstra notes the formulation of the duty under the UK law. In that jurisdiction where a breach by the company occurred with 'the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly'. See S 37, 'Offences by bodies corporate.' *Health and Safety at Work etc. Act 1974* (UK)

It does not do so because of the possibility of prosecution or imposition of a monetary penalty, but because doing work safely is one of its core values.

However, as discussed at the commencement of this paper, it is not appropriate that the onus of proof in defending allegations of breaches of the general duty rest with the employer. Rather, the standard which a corporation must meet should be to do all that is reasonably practicable, so far as they can exercise control over the relevant thing.

In Telstra's experience, the test established in the Commonwealth OHS Act that:

an employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees

is a generally acceptable standard of conduct to be expected of all employers.

Equally, the formulation of the duty in the Victorian OHS Act is a useful starting point:

An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health

Ideally however, Telstra submits that this duty should be limited by the notion of control and the ability to regulate the conduct of work.

10.2 Clear guidance must be given to the courts through the construction of the general duty

However, in the event of an unpreventable incident, Telstra believes that the standard applied to it should be the same as the standard applied to any employer in Australia. The primary method of achieving this will be for the development of model OHS regulation to be enacted consistently throughout all Australian jurisdictions.

More importantly, however, clear guidance should be provided for the courts in determining the standard.

Current experience makes it clear that, while the wording of the legislation may appear subtly different between the jurisdictions, the application of that legislation is fundamentally different.

In Victoria for example, the construction of the duty to do what is reasonably practicable (or merely 'practicable' as it was in the *Occupational Health and Safety Act 1985*) is expressed as follows:

The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment.

...

If the danger is slight and the installation of a guard would be impossibly expensive, or render the machine unduly difficult to operate, then it may be that the installation of that guard is properly to be regarded as impracticable.¹⁰

While in New South Wales, the law is stated in the following terms:

Whilst employers are not liable for risks to safety which are merely speculative or unduly remote ..., the terms of [the general duty] specify that the obligation under that section is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety. It is inappropriate to seek to substitute a different test for that specified in [the general duty]¹¹.

¹⁰ *Holmes v R E Spence & Co Pty Ltd* (1993) 5 VIR 119

¹¹ *Drake Personnel Limited v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432

What is an employer to do to meet such a standard?

If the boundaries of the duty are set at these extremes, it is almost inconceivable to foresee how a defendant duty-holder could establish a defence of having done what was reasonably practicable. Indeed, the interpretation of the duty in the New South Wales legislation referred to above is almost inconsistent with having an available defence.

Such differences are not academic, and do not arise from mere idiosyncrasies of particular members of the courts. They arise directly as a result of the legal construction of the standard in the legislation.

In this way, the intention of the harmonisation process could be thwarted by 'judicial activism' between jurisdictions. For this reason, Telstra believes that great care should be taken in the drafting of the duties under the Act to ensure that the duty itself contains the standard to which employers and other duty-holders are to be held, rather than setting an impossibly high duty and leaving a defendant to counter that with an almost inconsistent defence.

10.3 Codification of 'reasonably practicable'

Telstra supports the Victorian and Western Australian approaches to codification of what is reasonably practicable in the relevant OHS Act.

Telstra submits that it is appropriate that this national review ought formulate a meaning of what is reasonably practicable to include in the model OHS legislation.

The question of what is reasonably practicable is derived from commonly accepted risk assessment procedures, and indeed arises from the principles governing the 'calculus of negligence'.

The assessment is familiar and involves a common-sense assessment of:

- likelihood of a hazard or risk occurring; and the
 - degree of harm which could arise in the event of the hazard or risk;
- set against the;
- state of knowledge (subjectively or objectively) of the duty-holder; and
 - the available ways, and costs, of removing those risks.

It is the essence for commonly used risk assessment procedures. Telstra does not propose that the OHS review panel unnecessarily expand on this commonly understood meaning.

The discussion of the elements of 'reasonably practicable' in s 20 of the Victorian OHS Act achieves this in a generally effective way, and that should provide a sufficient basis for the development of model OHS legislation.

10.4 Clarification of the elements of offences under the Act

Issue:

How will the model OHS Act ensure consistent application of its standards and duties between jurisdictions (and hence, achieve actual harmonisation)?

Drafting recommendation:

The prosecution should be required to prove a failure to do what is reasonably practicable in relation to each of the elements of that, defined, standard.

The prosecution should be required to prove control over the relevant conduct of the work by the duty holder.

In addition to codification of the meaning of reasonably practicable, Telstra submits that the drafters of the model legislation make two significant additions to the way in which the model laws are drafted.

- 1 First, in proceedings for a breach of legislation, it ought require the prosecuting body to **provide evidence of the failure of the alleged duty-holder in respect of each of the elements of what is reasonably practicable.**

This may be achieved by guidance in the legislation confirming what the prosecution must prove to make out its case.

In this way, it will compel courts and prosecuting authorities to adhere to what is reasonably practicable. Doing so will provide guidance over time for employers as to the extent and limit of the duties, and will provide a body of reference material against which an employer can assess whether its procedures or systems are sufficient. It will ensure that the question of what is reasonably practicable is closely assessed in each and every case.

Indeed, such a requirement would focus the attention of the Court and the prosecuting authority on this critical question of what is reasonably practicable.

- 2 Second, as a matter of legal application, the question of **control ought to be expressly referred to as an element of the offence to be proven by the prosecution.**

Again, the model OHS legislation should ensure that courts do not simply infer control in circumstances where, for example, a contractual relationship exists, and hence the contracting parties share (at least theoretically) elements of control. Equally, some theoretical ability to exercise a blunt contractual right to enter a worksite or terminate the contract ought to be insufficient to make a finding of control in respect of a principal contractor.

If, as Telstra submits, the key duties to ensure health and safety attract to the conduct of work, then the actual, practical ability to ensure the safe conduct of that work ought to establish the boundaries of duties under the OHS Act.

11 The importance of unimpeded consultation with employees

Issue:

How is consultation best achieved?

Drafting recommendations:

An employer should be required to consult directly with its employees, and not through third parties.

Further recommendations are set out below.

11.1 Consultation with employees should be direct

Telstra's experience with effective management of risks in the workplace is that it is best achieved with the active and positive involvement of employees in the decision-making process.

While Telstra has the ability to control and implement effective safe systems of work, it does so on the basis of informed and active consultation with employees regarding the development of those systems prior to implementation.

The employees of Telstra are the key stakeholders in Telstra's health and safety objectives. They have the greatest practical knowledge of the particular risks associated

with their work and are generally best placed to consult with Telstra regarding the development of safe systems for doing so.

(a) **Consultation is critical to safety**

The model OHS legislation should provide that an employer must consult with employees in certain circumstances¹².

Those circumstances should include circumstances where an employer is seeking to implement new systems of work or change the way in which existing systems of work are carried out, or to make any other change to the workplace which will affect the health and safety of employees.

These duties should be expressed in their most general terms, and should encourage positive, active and on-going dialogue between an employer and its employees.

(b) **Consultation is most effective when it is direct, and unencumbered by third party involvement**

It is Telstra's strong submission that there is no space in that consultation for non-stakeholder third parties to intervene.

Telstra's experience is that third party involvement in the consultation process with its employees does not produce more effective health and safety outcomes than direct consultation between Telstra and its employees. The knowledge which Telstra seeks to draw on in consulting with its employees is in the minds and experiences of its employees alone.

Telstra strongly submits that third party involvement in the consultation process should not be mandated by the model OHS Act or the regulations it is proposed should accompany it. However, if both the employer and the employees agree to third party involvement, then it can be in the manner that the employer and employees have agreed.

(c) **Principles which should apply in the consultation requirements**

For the purpose of guiding the drafting process, Telstra submits that the following principles should inform the development of the consultation provisions.

- 1 It is inherent in the employment of employees that the employer has adequate resources to develop new systems of work and possess the ability to implement them. Accordingly, it is entirely appropriate that the employer be required to properly consult with its employees. This is consistent with Telstra's values, in directly engaging with its employees wherever possible.
- 2 Employees of an employer have a right to be consulted on OHS matters which directly affect their safety.

However, where an employer such as Telstra is required to implement a business-wide change, direct consultation with each employee is practically and commercially impossible. Reasonable consultation with employees should be the standard required of employers.

Accordingly, the model legislation should require consultation to this, or a comparable, standard¹³.
- 3 Consultation requires fluid and dynamic involvement of employees in the decision making process of employers. These decision making processes may result in new documented policies and procedures, or they may require involvement in the making of low-level decisions at a particular part of the workplace.

¹² The list of occasions requiring consultation in s.35 of the Victorian OHS Act provides a useful starting point for drafting occasions requiring consultation for the model OHS legislation.

¹³ Telstra notes that the setting 'reasonably practicable' as the required standard of consultation, where that phrase is used with a quite separate defined meaning, may give rise to confusion and should be avoided.

For this reason the method of consultation will vary from situation to situation, and the model OHS legislation and/or regulations ought not be overly prescriptive in this regard.

- 4 Consultation should be limited to the employer/employee relationship (or those deemed to be employees under the test established above). For this reason, contractors in the contractual chain should be required to consult with their own employees regarding the implementation of new systems of work, or any changes affecting health and safety of their employees.

It would be unduly onerous for the model legislation to require a principal contractor, such as Telstra in many circumstances, to consult with the employees of its contractors. The obligation to consult should be an obligation which exists only between an employer and its employees.

(d) **Issue resolution**

Significant issues should be decided between the employer and its employee. Therefore, Telstra submits that the issue resolution process (if any) is a matter for the determination of those parties, not a matter which should be prescribed in the OHS Act or regulations.

11.2 Rights of entry

Consistent with Telstra's principal view that OHS is a matter best dealt with between employers and their employees, Telstra does not consider that there is a demonstrable need for right of entry provisions to be inserted in the model legislation.

Where an employee wishes to raise a safety issue, they are empowered to:

- raise that issue directly with their employer and seek a negotiated solution; failing that
- seek the involvement of the relevant regulator, or in circumstances of immediate risk of injury
- cease working on the unsafe work process.

Moreover, where there is a properly trained and resourced inspectorate with specialist knowledge and experience, it is unnecessary and ineffective to involve a third party in negotiating safety issues.

11.3 Health and Safety Committees (HSCs) and Health and Safety Representatives (HSRs)

(a) **There should be no mandated requirement to establishment HSCs or appoint HSRs**

Where there are general and effective requirements to consult, Telstra does not believe that the model OHS Act should mandate the establishment of HSCs or the appointment of HSRs.

Where the requirement to consult with employees is clear, the need for the mandated establishment of HSCs or the requirement to appoint HSRs is unnecessary.

The employer and the relevant employees should have the freedom to determine the consultation arrangements that best suit the workplace and the nature of the workforce. Where a HSC is established, it follows that HSRs should be members of the HSC to ensure that there is a level of knowledge and awareness of safety issues amongst the members of the HSC.

If, as a result of consultation, these offices or committees are requested by employees in a particular work group, then the employer should facilitate for this to occur in the manner agreed between the employer and the relevant employees.

Should it be necessary for representatives to be chosen, Telstra supports the ability of relevant employees (for example, those in the workgroup to be represented by the representative) having the right to vote by whatever means agreed between the employer and employees to choose their HSCs and HSRs.

(b) **Training and qualifications of HSRs**

Once HSRs have been elected or appointed, they should be required to undertake a competency based training program to ensure that they have the necessary skills and knowledge to allow them to undertake their role. This training does not necessarily need to be provided by the regulator, but could be provided by registered training organisations that have been accredited by the regulator.

(c) **Power of HSRs**

Where elected, Telstra submits that the HSRs should have the powers as specified in the Commonwealth OHS Act, including:

- (1) undertake inspections of the workplace;
- (2) request the regulator to investigate an issue at the workplace;
- (3) if there is no HSC to represent employees in discussions with the employer; and
- (4) investigate issues raised by employees concerning apparent risks to the health and safety of that employee.

12 Regulator functions, powers and accountability

Issue:

How is OHS best regulated?

Drafting recommendations:

There should be a single, central regulator.

The regulator should only be permitted to make recommendations regarding prosecution to the relevant public prosecutor in each jurisdiction.

The regulator should be required to publish guidelines setting out when it will undertake enforcement activity and when it will recommend a prosecution under the model OHS Act.

Consistent with Telstra's view that there should be a uniform system of OHS regulation throughout Australia, it submits that there should be one central regulatory agency that is tasked with the role of administering the legislation. Staff for the regulator could be drawn from the existing experienced regulators that exist in the States and Territories, as well as at a federal level.

Alternatively, OHS regulation could remain the responsibility of the States and Territories. In Telstra's view, over time this will be recognised as representing the unnecessary duplication it clearly is.

However, while disappointing, Telstra recognises that the development of a single OHS regime and regulator may be unachievable at present. Telstra's submissions in relation to a single regulator could be applied equally to the regulator established in each State or Territory (and, of course, federally).

This does not mean that the regulator should be the sole agency with responsibility under the legislation, as it will be necessary for specific government authorities to be involved in specific areas (for example, the Director of Public Prosecutions (**DPP**) in relation to the commencement and conduct of prosecutions and other legal proceedings).

The legislation should deal with the following broad matters in respect of the regulator:

- (1) its establishment;
- (2) functions;
- (3) powers; and
- (4) accountability.

12.1 Establishment

The regulator should be established as a statutory authority under the provisions of the legislation.

The legislation should set out in broad terms what the aims of the regulator are to be (which should be consistent with the objectives of the legislation), and can then be expanded upon by the regulator through the development of a common service charter (discussed below).

12.2 Powers

The regulator should have the following powers:

- (1) through its inspectorate, to attend and investigate incidents at a workplace;
- (2) attend, upon request by an employer at its place of work to assist in the resolution of issues in the workplace relating to health and safety;
- (3) through its inspectorate, issue improvement and prohibition notices;
- (4) commence civil proceedings in relation to low-level alleged breaches of the legislation;
- (5) request (but not direct) the DPP to commence criminal proceedings in relation to alleged breaches of the legislation; and
- (6) enter into enforceable undertakings with duty-holders to work together with the duty-holder to assist them in improving safety at their workplace.

In respect of the regulator's enforcement powers, the model OHS Act should require the regulator to set out clearly in a published enforcement/prosecution policy, the considerations that it will take into account when considering the various options available to it to seek compliance with the legislation. This policy should be binding on the regulator.

The enforcement/prosecution policy should make it clear that the regulator will only recommend to the DPP whether or not a prosecution should be commenced. However, the ultimate decision is a matter to be determined by the DPP in accordance with its published enforcement/prosecution guidelines.

In exercising its powers, the regulator should be required to provide to the duty-holder in writing full details of any alleged failures or breach of the legislation under investigation.¹⁴

The provision of this information will assist the duty-holder in being able to respond to the specific issues that are alleged to exist, rather than expending valuable resources attempting to determine what issues are alleged to exist.

¹⁴ An exception to this might be in a situation where the regulator has a reasonable belief that the disclosure of such information would lead to the destruction of evidence or some other attempt to frustrate its investigation.

12.3 Organisational accountability

The regulator should be accountable to Parliament through a requirement to provide annual reports which are tabled in Parliament.

The annual reports should include information in relation to the activities that the regulator has undertaken that have had a direct impact on ensuring that safety in the workplace has been improved. Telstra submits that such an objective would be unlikely to be satisfied purely by referring to the number of successful prosecutions that have been undertaken.

Instead, activities such as:

- (1) the number of site visits conducted by the inspectorate;
- (2) the number of requests for advice and assistance dealt with by the regulator; and
- (3) the number of codes of practice and guidelines issued

are likely to be more indicative of the positive contribution made by the regulator to the improvement of health and safety in the workplace.

The operational accountability of the regulator will also be achieved through the review mechanisms that exist for its actions (discussed below).

12.4 Operational accountability: The inspectorate

Drafting recommendations

The regulator should be required to publish the core competencies required of its inspectorate.

Inspectors should be limited to undertaking their activities to those areas where they are competent.

Inspectors should have the power to vary or rescind notices.

Decisions of inspectors should be the subject of internal review.

(a) The importance of the inspectorate

Inspectors play a vital role in the regulator's undertaking of its duties under the legislation. The inspectors are the 'human face' of the regulator, and as such, need to be able to deal effectively with the myriad of issues that arise in promoting safety.

Given the important role that inspectors have, Telstra believes it is critically important that they have the requisite skills and experience.

As part of ensuring that inspectors are able to deal with these issues, the legislation should require the regulator to publish the key competencies of an inspector.

One practical method of achieving this may be for identification cards or permits issued to inspectors to note the particular industries in respect of which they have the requisite skills, training and experience to be able to deal with.

Issues that arise in a call centre industry are vastly different to those that arise in the construction or the primary production industry, and it makes little sense to have inspectors trying to be 'a jack of all trades'. Inspectors that have the relevant understanding of the industry in which they are operating will be in a much better position to be able to provide practical advice to duty-holders on how they can comply with their obligations. The skills needed to investigate an incident and those necessary to provide constructive assistance are equally important.

(b) Qualifications of the inspectorate

The regulator should have a primary responsibility for assisting duty-holders to comply with the legislation.

This should, in the first instance be done through a process of educating and assisting such duty-holders as request assistance as to their obligations and what they can do to comply with their obligations.

These activities will be conducted through an inspectorate, which must contain appropriately qualified individuals who have the necessary skills and training to be able to provide practical advice and assistance to duty-holders.

The inspectorate plays a pivotal role in administering the OHS regime. It is the responsibility of the regulator to ensure that its staff are competent to be able to undertake their tasks.

Telstra submits that to ensure the standard of the inspectorate is maintained, the model OHS Act should require the regulator to publish a core set of competencies that its inspectorate will, at a minimum, have before they commence as an inspector.

It is not intended that the publication of this information will provide duty-holders with the ability to challenge either the appointment or the activities of an inspector.

(c) Provision of advice and assistance

In Telstra's submission, the inspectorate needs to be seen as a resource that can be accessed by a duty-holder to assist them in improving safety in the workplace, rather than as an authoritarian body existing solely to prosecute a duty-holder.

The approach promoted by Comcare and, latterly, Worksafe Victoria is consistent with this objective. A more collaborative approach will assist in achieving the objectives of a safer workplace for all, which would assist in the achievement of one of the key objectives of the legislation.

In order to encourage inspectors to be able to provide practical assistance, Telstra supports the inclusion of provisions in the model OHS Act indemnifying inspectors from liability in respect of bona fide advice and assistance given to a duty-holder in their role as an inspector.

(d) Review of decisions of an inspector

All decisions of an inspector to issue any type of infringement or enforcement notice or proceeding (or not do so) should be able to be reviewed by the duty-holder affected. Initially, this should be able to be achieved by negotiation with the inspector in the first instance, and then through an internal review mechanism within the regulator.

Second, the process for the internal review should be set out in the legislation.

Parties seeking an internal review should have full rights of legal representation throughout the process.

If a duty-holder is not satisfied with the outcome of the internal review, they then should have the right to seek to have the matter reviewed externally through an appropriate court or administrative tribunal system. The legislation should clarify that this should be way of a *de novo* hearing.

Importantly, documents issued by inspectors should be able to be promptly modified and amended as required.

For example, where a series of steps are required to be taken to improve safety, and unforeseen circumstances arise and it can be demonstrated that certain measures are no longer required or a change to the timetable is required, then the inspector, after discussion with the duty-holder should have the ability to amend, modify or cancel the notice or document. There should be no need for formality or constraints in this process.

While 'internal review' mechanisms are of use, they should not be enacted in a way which prevent responsive review of notices where they are subject to error, or where minor changes such as extensions to time are sought.

In circumstances where a duty-holder can show to an inspector that there has been an error in the document, the inspector should have the power to exercise their discretion to revoke the notice without having recourse to the cost and time of a formal review mechanism.

13 Compliance and enforcement

13.1 Enforcement measures

(a) Hierarchy of enforcement mechanisms

Telstra submits that it is appropriate that there should be a hierarchy of enforcement mechanisms which escalate in severity, depending on the nature of the alleged failure.

The determination of which level of enforcement mechanism should be determined in accordance with the published enforcement/prosecution policy (as discussed above).

Given the level of discretion that will be required to be exercised, it would not be appropriate to include such guidance in legislation.

Having a published enforcement/prosecution policy allows the regulator the freedom to amend it as required to deal with trends or patterns that develop over time (for example, if research indicates that particular enforcement mechanisms are more successful than others).

(b) Notices

As part of the hierarchy of enforcement mechanisms, the regulator, through the inspectorate should be able to issue a variety of notices, including:

- (1) Improvement notices; and
- (2) Prohibition notices.

Obviously, these notices should only be able to be issued by an inspector authorised under the legislation.

(c) Review of notices

All notices should be subject to internal review by the regulator at the written request of the duty-holder. An application for a review must be lodged with the regulator within a specified period of time (for example, 21 days) with the opportunity for an agreed extension.

In respect of Improvement notices, once the review process is commenced, this must operate as a stay on the time period to comply with the notice. Once the review has been determined, and if the notice has not been revoked (i.e. it has been upheld or modified in some respect), then the time for compliance should commence anew.

In respect of Prohibition notices, the same process as for Improvement notices should apply, with the exception that the duty-holder must apply for a stay, rather than it being granted as of right.

A duty-holder may appeal the results of the internal review to the appropriate court or administrative tribunal system for further review. Again, for the avoidance of doubt, the model OHS Act should confirm that this is by way of *de novo* hearing.

(d) Time for compliance with notices

Improvement notices should require compliance within a period of time, being no less than 7 days.

Prohibition notices should require compliance within a reasonable period of time.

(e) Injunctions

It is appropriate that the model OHS Act include provisions allowing the regulator to seek mandatory injunctions, particularly in circumstances where the regulator has issued infringement notices (for example, a prohibition notice), and the duty-holder is failing or refusing to undertake steps to comply with the notice.

However, actions taken to challenge the validity of the notice, either through internal or external review cannot provide a basis for the grant of an injunction against a duty-holder.

(f) Publication orders

In a situation where an offence has been found to have been committed, as an alternative to any other form of penalty, it may be appropriate to allow the Court to have the power to require a defendant to publish in the relevant media, information regarding the details of the prosecution, including any remedial steps that will be put in place to seek to ensure that further contraventions do not occur.

(g) Enforceable undertakings

As an alternative to the commencement of proceedings, and as part of the ethos of the legislation in seeking to assist duty-holders to comply with their obligations under the legislation, the regulator should be able to enter into enforceable undertakings.

The terms of the enforceable undertakings will need to be determined by the parties, but the regulator's general approach should be articulated as part of the published prosecution/enforcement policy.

A key aspect of the enforceable undertaking will be that as long as the duty-holder complies with the provisions of the enforceable undertaking, this will operate as a bar to the commencement of proceedings or the imposition of any other penalties in respect of the alleged breach.

Critically, the entering into an enforceable undertaking must not be considered to be an admission of liability. Without this express requirement, then the concept of enforceable undertakings will be clearly curtailed. Why would a duty-holder seek to actively admit a breach of the Act? Similarly, an undertaking must not be considered as a prior conviction for the purposes of any sentencing legislation for subsequent offences.

14 Prosecutions

14.1 Nature of offences

Breaches of the duties under the legislation should be a mixture of civil and criminal offences, with both civil and criminal penalties. A potential matrix of how this would operate is set out below.

	Civil offence	Criminal offence
Civil penalty	Breach of duties that does not result in serious injury	

	Civil offence	Criminal offence
Criminal penalty		Breach of duties that results serious injury/death

14.2 Jurisdiction for the hearing of offences

Proceedings for alleged breaches of the legislation should be commenced in the Federal Court of Australia, with the judge having the ability to transfer the matter to the Federal Magistrates Court of Australia at their discretion.

From the decision of a judge at first instance, appeals should lie as of right to the Full Bench of the Federal Court of Australia. This includes appeals in respect of interlocutory decisions, which would require leave (to be determined by a single judge of the Federal Court of Australia).

As discussed throughout this submission, existing criminal law notions as to how hearings are conducted and the applicable rules of Court will determine how proceedings are undertaken. Importantly, notions of the 'presumption of innocence' and the obligation of the prosecution to prove an offence 'beyond reasonable doubt' (in criminal proceedings) and 'on the balance of probabilities' (in civil proceedings) should be maintained (i.e. there should not be a reversal of the onus of proof).

14.3 Trials

Issue:

How should criminal trials under the model OHS Act proceed?

Drafting recommendations:

Where a duty-holder is alleged to be in breach of an indictable offence, that duty-holder should have the right to a trial before a jury.

Where the offence is triable summarily, then the accused can elect to have the matter heard in the summary jurisdiction (with reduced potential penalties).

Where serious breaches are alleged, Telstra supports the right to a trial by jury.

Telstra understands that, pursuant to section 80 of the Constitution¹⁵, any trial on indictment for any offence against any law of the Commonwealth shall be by jury.

Accordingly, any criminal prosecution under the nationally consistent model legislation must give the right for the accused to have a trial by jury (irrespective whether the offences arise under State law, in Telstra's view the rights of Comcare - duty-holders should be the same as all others).

At the defendant's election, they can have the proceedings heard summarily.

This should mean that the maximum penalty that can be imposed is reduced. Accordingly, defendants will be put to an election as to whether or not they wish to have their matter heard before a jury.

¹⁵ *Commonwealth of Australia Constitution Act* (Cth) 1901

14.4 The risk of a potentially higher penalty is likely to operate as a mechanism to limit the number of defendants seeking to have a hearing before a jury, and thereby limiting the Commencement of proceedings

Drafting recommendations:

Criminal proceedings must only be commenced by the DPP (however described) in each jurisdiction.

All proceedings for criminal offences under the legislation should only be able to be commenced by the DPP (however described) in each jurisdiction.

The DPP, in accordance with its published enforcement policy, should work with the regulator in streamlining and ensuring the efficient operation of the prosecution process.

By having a separate prosecutorial body which is separate from the regulator, this can assist duty-holders to be more willing to accept assistance from inspectors. Knowing that the inspector is not going to commence criminal proceedings against a duty-holder is likely to encourage duty-holders to be more willing to seek the assistance from the inspector in resolving issues that arise with compliance with the legislation.

Telstra's firm view and strong submission is that prosecutions should only be able to be commenced and prosecuted by the State. It does not support adoption of the right of other parties to prosecute.

14.5 Time limits for commencement of proceedings

Drafting recommendations:

Proceedings under the model OHS Act must be commenced within 12 months of the alleged breach, or from the date of a coronial finding. No extension should be available.

Subject to the notification provisions contained in the legislation, the DPP should have 12 months from the date of the alleged breach to commence proceedings. In a situation where a coronial inquest is required, then the DPP should have 12 months from the date upon which the coroner hands down their findings or the date upon which a written decision is made to dispense with a public enquiry.

Given the well resourced, and responsive regulator, it is not clear why any further time for bringing a prosecution is necessary.

14.6 Onus of proof

This is discussed in detail above.

As with most criminal matters, the onus should be on the prosecution to prove the offence 'beyond reasonable doubt' in respect of criminal offences, and to negative any defences that may be available.

In respect of civil offences under the legislation, the prosecution should be required to prove 'on the balance of probabilities' that the offence was committed, as well as having to negative any defences that may be available.

These standards should not differ depending on whether or not the defendant is a natural person or not.

14.7 Penalties

Drafting recommendations:

Guidance should be provided to the courts in the model OHS Act regarding the imposition of penalties.

There must be no 'minimum penalty' proscribed in the model OHS Act.

'Prior offences' must only be admissible evidence where they are relevant to the breach currently alleged.

The maximum amount of the financial penalty imposed should vary between the types of offences.

Factors such as:

- (1) the relative culpability of the defendant in the breach; and
- (2) certain outcomes that occur (for example, serious and permanent disability or death)

should be factors that will allow for a higher maximum penalty to be imposed. Given the specific nature of the offence alleged, the prosecutor should be required to focus on the actual harm that has occurred, rather than being able to choose between the risk of the harm, and the actual harm that has occurred (whichever tends to be the greater).

Aside from the sentencing options such as those set out at 13.1(f) above, the Court will have the ability to impose monetary penalties in respect of offences that are proved against a duty-holder. The model OHS Act should specify a maximum penalty amount that a Court may impose.

It should not provide for a minimum amount, as this should be a matter of discretion for the Court to determine, having heard and considered all of the relevant evidence. As a practical matter, it may be more efficient for the legislation to specify the amount of the fine in terms of 'penalty units', so that the quantum of the maximum fine will be indexed in accordance with changes to the definition of a 'penalty unit'.

In considering repeat offences, the Court will need to be careful to ensure that only relevant prior offences are taken into account.

In addition, prior offences that do not relate to a similar nature of offence should not be taken into account when considering the appropriate penalty to be imposed. Many large organisations may, over time, be prosecuted for a variety of offences. However, unless the prior convictions reveal a history of failures to deal with similar issues (for example, a continual failure to adequately guard machines), the previous convictions are not relevant matters, and should not be taken into account by the Court when considering the penalty to be imposed.

The enforcement of any penalties can be dealt with under the appropriate Court rules.

14.8 No separate offence of 'industrial manslaughter'

Drafting recommendations:

There should be no separate offence for 'industrial manslaughter'.

Whilst some jurisdictions have sought to deal with workplace deaths through specific amendments to their criminal legislation, it is Telstra's submission that such an approach does not lead to the more effective outcome.

By having comprehensive OHS legislation, overseen by a competent regulator, and proceedings commenced by a specialised body, this will ensure that consistent outcomes are provided.

To the extent that specific provisions are required to deal with 'workplace death' or serious injury, then these provisions should be contained in the legislation.

14.9 Codes of practice

The legislation should make provision for the distribution of codes of practice and other advisory material.

This advisory material should provide guidance on the options available to manage risk. It is then open to a duty-holder as to how they will use that information and implement it into their workplace.

The preparation of codes of practice should be co-ordinated by the regulator, and as part of the process, input from duty-holders should be sought to ensure that the material is practical, applicable and easily understandable by the target audience.

14.10 Conciliation and arbitration

It is not appropriate for mandated conciliation and/or arbitration to be included in the legislation.

Duty-holders should be able to determine their own arrangements in relation to dealing with disputes that arise internally. In respect of disputes with the regulator, the mechanisms proposed above provide an adequate method for resolution.