

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

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## SPECIFIC COMMENTS

*This summary table lists the general provision, a best fit example and the relevant article from ILO Convention 155 and other relevant ILO instruments eg ILO Convention 176 and C187 Promotional Framework for Occupational Safety and Health Convention, 2006*

- **WA Occupational Safety & Health Act 1984 amended 2006, WA OSHA**
- **Vic Occupational Health and Safety Act 2004: Vic OHSA 2004**
- **NSW OHSA 2000**
- **Qld. Workplace Health and Safety Act 1995: Qld WHSA**
- **South Australia HSWA 1986**
- **Tasmania: Workplace Health and Safety Act 1995 (Tas WHSA, 1995)**
- **ACT OHSA 1989**

My work history required that I was familiar with or worked in most jurisdictions, however I have had a longer work experience in Victoria and the Commonwealth, and therefore the choices made as preferred examples are likely to reflect that bias.

This submission proposes an overall structure of the Model OHS Law based on

1. Objects and principles: NSW OHS 2000 s3 and Vic OHSA 2004 s4
2. Definitions Vic OHSA 2004 s6
3. Broad employer duties NSW OHSA 2000 s8
4. Specific employer duties SA HSWA s19
5. Hierarchy of control using either Vic OHSA s20
6. Duties of persons with control: Vic OHSA 2004 s21(3) and s23
7. Duties of workers: Vic OHSA 2004 s25
8. Duties to others Vic OHSA s23/24

<b>Provision ILO Convention i.e. wide governing principle</b>	<b>Brief Rationale</b>	<b>Preferred Example</b>
<p><b>GOVERNANCE</b> Model for tripartism</p> <p>Convention # 155 Art 4(1) and (7) Enshrines employer and workers orgs in the development of OHS policy</p> <p>Convention 187 Promotional Framework for Occupational Safety and Health Convention, 2006</p> <p>Separation from workers compensation</p>	<p>The principles outlined in ILO Convention 155 refer to the participation of employer and worker organisations in the <i>“formulation of its national policy, .....and in consultation with the most representative organizations of employers and workers, shall promote basic principles such as assessing occupational risks or hazards”</i>.</p> <p>The provisions in WA are the preferred example as it establishes an H&amp;S Commission with representatives from the social partners, outside experts and for the appointment of a Commissioner.</p> <p>The functions of the WA commission are broad ranging and ensure active participation of the social partners in the making and delivery of ohs law (regulations, codes, guidelines etc).</p> <p>Any tripartite body must have the ability to conduct an inquiry; this is of particular importance in the investigation of new or emerging hazards or events that require investigation that the regulator has failed to address eg fatigue, nanotechnology, precarious employment and its impact on behaviour of the regulator.</p> <p>In many other jurisdictions the role of advisory bodies are circumscribed, advisory only or answerable to a Board. These later arrangements are not in line with the principles of the ILO Convention.</p> <p>Currently health and safety regulators monitor their performance by the use of workers compensation statistics, i.e. insurance data. For most diseases, this is inadequate.</p> <p>Explanation and discussion of this can be in <a href="#">number 6</a> of 24</p>	<p><b>WA OSHA 2006</b> s6: Formation of Commission s9: Appointment of Commissioner s14: Functions of the Commission</p> <p><b>A Tripartite Commission which reports to the Minister.</b></p> <p>Health and Safety regulator independent of the workers compensation agency.</p>

	<p>Australia research publications e.g. asthma, occupational cancer, mental health, occupational dermatitis.</p> <p>The Model law needs to be constructed such that health and safety regulators are required to measure health and safety performance comprehensively and are not solely reliant on insurance data. Such a population health approach requires that data collection is a prime responsibility of a national system which uses a multitude of data sources eg ABS, coronial reports, population health surveys etc.</p>	
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## Legislative Approach:

<b>Coverage</b> Consistent with Robens Report the reach of legislation to be broad and cover all those who work	<p>Definition of workers embracing all persons performing work regardless of "employment relationship" and regardless of industry/sector etc</p> <p>Given the labour market, the Model Act must cover all workers including the precariously employed, the multitude of contractor arrangements including obligations on the self employed not to endanger others and themselves.</p>	<b>Vic OHS 2004</b> s.5 and sections 21 including 21(3), s23 and s24.
<b>Shield of the Crown</b>	<p>Coverage needs to extend to the Crown</p> <p>(if the NSW model is not adopted then Vic OHS 2004 s6 is preferable to Qld as Victoria, makes it clear that the Crown is to be regarded as a corporation)</p>	<b>NSW OHS 2000</b> s 118
<b>Objects and principles</b>	<p>Objects broad, including roles for employer and worker organisations</p> <p>OHS principals which are used as a bench mark when interpreting the Act.</p> <p>Provides for consultation between employers and workers (NSW OHS 2000 s 3.d.)</p>	<p><b>NSW OHS 2000</b> s3. with addition of</p> <p><b>Vic OHS 2004</b> s.4 health and safety principles include welfare in title as in <b>SA</b></p>

## Scope, Application & Definitions:

<p><b>Scope</b> ILO Convention #155 Art 1 and 4(2)</p>	<p>Inclusion of all industry and work scenarios i.e. all workers, mines, quarries, major hazard facilities, high risk work, off shore etc.</p> <p>There seems to be no justification for workers/employers in different industries to be covered by different laws.</p> <p>The Model laws should apply to ALL work.</p> <p>Administrative arrangements and specific regulations for particular working arrangements and high risks e.g. mining, off shore etc.</p> <p>All health and safety i.e. physical and psychological</p>	<p><b>Vic OHS 2004 s2</b></p> <p><b>Vic OHS 2004 s5.</b> For definition of employee, work, definition of health</p> <p>or</p> <p><b>NSW OHS 2000 s3</b> which encompasses the adaptation of work to worker</p> <p><b>NSW OHS 2000 s.3(c)</b> ..... that is adapted to their physiological and psychological needs</p>
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## Duties of Care – Who owes them and to whom?:

<p><b>EMPLOYERS</b></p> <p>General Duties: Concept of ensuring health and safety #155 Broad duties Art. 16</p> <p>and</p> <p>note the 1995 Industry Commission supported Qld approach which is based on the NSW approach</p>	<p>General duties to be broad, applicable in a modern labour market without decreasing the protection afforded to ALL types of employment categories, noting the fragmentation of the labour market.</p> <p>Currently ALL jurisdictions have absolute duties. The debate is rather over where the onus of proof lies during the prosecution phase.</p> <p>The UK Act and NSW OHSA 2000 place the onus on the defendant to prove that the measures were not reasonably practicable. This model is supported. For detailed argument, including case studies, please refer to published work by Neil Foster, Newcastle University.</p> <p>Additionally, to enhance and provide clarity, the hierarchy of control to be needs to be included in the legislation, noting that this supplements and reinforces the principles of health and safety.</p> <p>Employers' duties are generally consistent across jurisdictions.</p> <p>Organisations and individuals (e.g. workers) to have (or have access to) knowledge and capacity commensurate with responsibility and risks</p>	<p><b>NSW OHSA 2000</b> s.8(1) and s28 grounds for defence including practicability</p> <p>a provision based on <b>Vic OHSA 2004 s20.</b></p>
<p><b>Self Employed</b></p>	<p>Persons in control</p> <p>Responsibility may be shared between different persons with responsibility, to the extent of their control. Responsibilities overlap such that each party with responsibility must comply regardless of other's compliance.</p> <p>The broader Vic provisions have not been difficult for the courts to interpret and allow for a wide variety of relationships, which otherwise can be restricted by more prescriptive or detailed provisions.</p>	<p><b>Vic OHSA 2004 s24</b> which could be supplemented by <b>Qld</b> provisions of s28(3)</p> <p>with deletion of the words “ so far as is reasonably practicable” as the NSW approach is recommended</p>
<p><b>Non workers</b></p>	<p>The provisions imposes a hierarchy of non-delegable, overlapping and complementary responsibilities on the different levels of contracts and subcontractors and cover all types of workers and the public</p>	<p><b>Vic OHSA 2004 s23/24</b></p> <p>and</p>

	<p>H&amp;S must not to be jeopardised by the conduct of undertaking, noting that broad duties allow flexibility to cover franchises etc.</p> <p>(NSW OHSA 2000 s8(2) is of no use as it limits the duty to <i>place of work</i>)</p>	<b>Qld WHSA</b>
<b>Specific employer duties</b>	<p>Specific Employer Duties which require employers to monitor health, conditions of workplace and safeguard access and egress to the work site.</p> <p>SA OHSWA is preferred as it includes provisions for those whose first language is not English.</p>	<p><b>SA OHSWA s 19</b> (excluding (d) as this refers to hazardous work which is a definition under the SA law)</p> <p>and</p> <p><b>Vic OHSWA 2004 s26</b></p>
<b>Persons in control are responsible</b>	<p>Liability of officers of company: To provide certainty that an individual manager may also be liable to an offence as the corporate employer: noting that corporations law shields individuals from liability in many cases</p>	<b>Vic OHSWA 2004 s.143-145</b> as a back up if NSW approach not adopted
<b>Defences</b>	<p>To be consistent with the lack of a limitation “<i>so far as reasonably practicable</i>”, employers must be able to defend themselves against charges.</p> <p>There are a number of erudite legal explanations of the NSW OHSA 2000 approach eg Neil Foster, Richard Johnstone, Andrew Hopkins</p>	<b>NSW OHSA 2000 s28</b>
<b>Occupational health and safety services ILO C161 Occupational Health Services Convention, 1985 and R</b>	<p>A significant shortcoming for all Australian jurisdictions is the lack of easily accessible OHS advice and support from professionals and centres of excellence. The Scandinavian approach is preferred. This could also have the longer term effect of workplaces and regulators paying more attention to work related illness. This would be a welcomed reform and contribute to improving overall population health. See brief discussion in general comments.</p>	

<p><b>Designers, Manufacturers Suppliers Installers etc Designer of Buildings</b> ILO Convention No. 155 Art. 12 Broad duties</p>	<p>Risks are eliminated or controlled in the planning, design/development, manufacture/construction, implementation/ installation, ongoing use/operation etc through to decommissioning/disposal of workplaces, work equipment, materials and systems of work</p> <p>Need to ensure that the provisions do not allow the manufacturer etc to abrogate their duty of care, by the words “use as intended” i.e. the Model law should not to include this qualifier of the duty.</p> <p>Need to link with consultation rights for HSRs for structures etc in the design phase not confined to the end of the process.</p> <p>Need to make sure that obligations apply to, construction and manufacture as well as the end users of the building.</p>	<p><b>SA OHSWA</b> s 23A, s24 &amp; s24A</p> <p>re upstream duties, as clearer and concise than other examples</p>
<p><b>Workers</b> ILO Convention No155 Art. 13 Art. 19 (not to return to unsafe work)</p>	<p>Broad Duty of Care to ensure all types of workers are in scope eg managers etc.</p> <p>Vic OHSA 2004 requires workers to take reasonable care without reference to obligation to follow employers instructions which could be erroneous and therefore exposing workers to undue harm eg see example page 107 Johnstone et al 2005</p> <p>Worker rights are covered by employer obligations : provision of information training and supervision</p> <p>Culturally and linguistically Diverse communities Needs to refer to provisions of Language Other Than English Code in Victoria</p>	<p><b>Vic OHSA 2004</b> <b>s.25</b> plus <b>s32</b>, which refers to recklessly endangering others</p> <p>(this is broader than NSW OHSA 2000 s20 and SA HSWA 21 (2))</p> <p><b>NSW OHSA s8 and Vic OHSA 2004 s22</b></p>
<p><b>Right to cease work</b> ILO Convention 155 Art. 13 Art. 19 (right not to return to unsafe work)</p>	<p>Worker right to cease unsafe work</p> <p>WA s26 includes provisions for workers to refuse unsafe work, however the provision is qualified and not clearly stated. WA s27 and 28 refer to work being entitled to pay and to continue in safe work.</p>	<p><b>Tas WWSA s.17</b></p> <ul style="list-style-type: none"> <li>- gives workers the right to refuse unsafe work. Workers are to be paid as if continuing to work, obligation to work in alternative safe work and</li> </ul>

	<p>This needs to link with right not to be discriminated against for taking action over health and safety risks and is supported by the power of worker representatives to order unsafe work to cease.</p>	<p>- WA s27/s28</p>
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### **‘Reasonably Practicable’ & Risk Management:**

<p><b>Risk Management</b></p>	<p>Enable positive, proactive and systematic preventive effort to establish organisational capacity for continuous improvement in OHSW standards at work (as distinct from ad hoc responses or reactive approaches when something goes wrong).</p> <p>This is reflected in court decisions and should be one of the principles of any OHS Act.</p>	<p><b>Preferable is the positive language of Vic OHSA s20</b></p> <p><b>or</b></p> <p><b>Qld WHSA</b> s. 27A (1)</p>
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## Consultation, Participation and Representation:

<p><b>Consultation</b> – recent OHS reviews have clarified the nature, structures and circumstances of consultation with workers and HSRs and HS committees.</p>	<p>Any provision needs to cater for ALL employment categories; there is support outside of the workplace for those involved in the consultative processes with a range of choices available especially given the nature of work and work arrangements; rights of workers are supported by internal and external mechanisms that recognise the dependant relationship of workers to their employer.</p> <p>Consultation cannot be dependant upon the employment arrangements or size of an employer. The duties on contractors etc must not be limited to the general duties; consultation, workers representation and support for those representatives from outside work eg regulators and trade unions are essential.</p> <p>Consultation Mechanisms: via HSR and for workers to be represented by HSR.</p> <p>Note there is generally a lack of primacy of HSR for consultation, however SA OHSWA places an onus on employers to consult with HSRs s34/32, but does not have general consultation provisions.</p> <p><b>Note: individually none of the current Acts are adequate as they were based on the work arrangements of 30 years ago, despite recent reforms.</b></p>	<p><b>Note the Model law needs to be constructed in a manner that incorporates all workers and all work in the consultation &amp; representation provisions.</b></p> <p><b>NSW OHSA 2000</b> definitions and broad duties s.13 (modified) s14 &amp;15 <b>with an obligation</b> to consult with HSRs as well as workers.</p> <p>HSRs consultation as per <b>SA HSWA s34 (1)</b></p> <p>or</p> <p><b>Vic OHSA 2004 s 35 / 36</b>, with modification of s36 to note that HSR to take primacy in the consultation process.</p>
<p><b>Worker Representation</b> The participation and right of workers to be represented on H&amp;S matters improves health and safety performance at the workplace  eg Nth Ireland research that</p>	<p>Johnstone et al have explained change is required in the structural arrangements for worker representation. The law needs to allow flexibility in arrangements which include a role for trade unions, when present, to train, elect and have access to support those representatives.</p> <p>Processes for negotiation for processes for election HSR needs to include access to Union if requested by workers. Unions to have the right to enter workplaces for this purpose.</p>	<p><b>Qld WWSA definition of HSR s 67(2) &amp; (3) &amp; ss 71-80</b> (includes explicit re role for trade unions)</p>

<p>presence of safety rep improved safety more than the activity of Regulatory Authority inspectorate.</p> <p>Worker right to representation must include provisions that normalises the position of precarious workers, ensures coverage of all those who work at the workplace eg casuals, contractors etc and those from CALD communities.</p> <p>Worker right to representation Right to assistance Right to information Right to training Right to trade union support Representatives to have powers to act in the promotion and protection of health and safety. Employers NOT to be involved in the formation of work groups or selection of worker representatives (likewise HSR not to have a role in determining an employers representative for the purposes of managerial responsibility)</p>	<p>Qld allows Trade Union rights and includes s. 61(2) and (3) which mandate that employers CANNOT elect HSRs and that HSRs do not need any qualification to be a HSR.</p> <p>The process of negotiation and clear. It also includes obligations on employers regarding informing new workers re HSRs, and must inform HSR of certain events.</p> <p>(inadequate provisions allow for workers represent them; <b>Vic OHS 2000 s 41(1) &amp; (2)</b>, who is to be included)</p> <p><b>Note: individually none of the current Acts are adequate as they were based on the work arrangements of 30 years ago, despite recent reforms</b></p> <p>HSRs need to be exempt from civil liability eg <b>WA OSHA s33(3)</b></p>	<p><b>WA OSHA s33(3)</b></p>
<p><b>Electoral grouping for HSR.</b> Principle that the workforce decide on the numbers and the groupings of workers for election of HSR</p> <p><b>ILO Convention 155</b></p>	<p>This is an Australian invention which creates undue difficulties in temporary and small workplaces and in any arrangement where workers are not permanently employed in a fulltime capacity at a permanent and non changing place of work.</p> <p>Flexibility needs to be introduced eg workers right to decide how they are to be represented, employers and regulators to</p>	<p><b>SA HSAW s. 27 for worker groups and</b></p> <p><b>Qld WHSA s.71 (excluding subsections 2 and 3) - 80</b></p>

<p>All workers and all workers right to representation, <b>irrespective of employment arrangements</b></p>	<p>facilitate such arrangements.</p> <p>Therefore provisions such as roving health and safety representatives/workplace advisors.</p> <p>The SA HSWA provisions are clear and refer to the role of unions however the provisions for the election process from SA HSWA are NOT the best option, as the process is restrictive and bureaucratic.</p>	
<p><b>Election process</b></p> <p>Right of workers to have their union processes as part of the election process, i.e. how election, who to conduct election preference is given to union structures if they exist, if not up to the workers to decide</p>	<p><b>Election process</b></p> <p><b>The Qld approach outlines a clear role for unions, allows unions to conduct elections and requires the employer to facilitate elections. However the time frames are not at all applicable for work which is not at a permanent site or with permanent employees.</b></p> <p>Victorian approach is self regulation by the workforce allowing them to determine the mechanism for their representation. The process of electing HSRs: i.e. the mechanism of the election that is not very prescriptive.</p> <p>This is consistent with self regulation and the broad principles of consultation (note other jurisdictions like SA can be quite prescriptive, secret ballots etc)</p>	<p><b>Qld WHSA preferred option see above</b></p> <p>(or Vic OHS 2004 s.54 excluding (5))</p>
<p>Deputy HSRs</p>	<p>Deputy HSRs</p> <p>Representation when the elected HSR is on leave; this is so that the workers have access to representation ALL of the time.</p>	<p><b>ACT OHS 1989 s. 66</b></p>
<p>Multiple employers:</p>	<p>Multiple employers: the ability for HSR to work across employers is a mechanism for labour hire and small employers (WA, VIC and NT Bill). The provisions are relatively new and untested.</p>	<p>See attachments on Roving Representatives</p>

	<p>Note of the provisions are particularly clear, see attachments</p> <p>Alternatively, see a section that was submitted to the Maxwell Review in Victoria.</p> <p>A good description and proposal suitable for Victorian conditions provides useful background and explanations</p>	
<p><b>Union role</b>  <b>ILO Convention 155</b>  Art. 19  Unions enquire and consult.</p>	<p>Worker right to representation</p>	<p><b>SA HSWA s. 27 for role of unions</b></p> <p>(or with modification Qld, see above)</p>
<p><b>Health and Safety Representative: Powers</b>  Essential line of communication with workers as per Robens and that maybe more useful than Committees as the later require “two to tango” (reference: Shaw Idea Review of NT Act)</p> <p>HSR: primacy within consultation and representation process, as have rights and powers and access to training and outside support, with complementary functions for HS Committees.</p>	<p>Generally SA HSWA and Vic OHSA 2000 are preferred.</p> <p><b>SA HSWA</b> provision on HSR are ok except reference to outside consultants ( which better covered in Vic</p> <p><b>ACT OHSA 1989</b> s 59 makes the HSR secondary to HSC for some powers of consultation, so therefore not preferred option</p> <p>Qld WHAS s81 is ok but Vic provisions overall are the most comprehensive and least restrictive.</p> <p>No need for limitation on size of workplace but could have limitation of no more than 1 for worksite less than 10 workers</p>	<p><b>Vic OHSA 2004</b>  s.58 and</p> <p><b>SA HSWA s34(2) (i)</b>  as this includes obligations on employer to tell HSR about an injury in their DWG.</p>
<p><b>Powers not limited to work group</b></p>	<p>Powers not limited to work group, if requested by worker in another work group and/or if there is an immediate risk.</p>	<p><b>Vic OHSA 2004 s59</b></p>
<p><b>Training</b></p>	<p>HSR: Training and reimbursements need to ensure that HSR have right to choose their course and all costs are covered. Unions are able to conduct courses that are industry specific without interference from employers.</p>	<p><b>Vic OHSA 2004</b>  s.67 &amp; 68</p>

	<p>Note: Initial health and safety training is to be for HSRs only. This is essential as the HSRs needs training on both the law and their roles in consultation and representation.</p> <p>Additional training can have the option of delivered jointly to those with roles other than the worker representative role eg hazard specific, health and safety committee functioning or post initial training</p>	
<b>Term of office resignation etc</b>	<p><b>Term of office resignation etc</b> Qld very clear and without as many qualifications..</p>	<b>Qld:</b> s. 82-85
<b>Right to assistance.</b>	<p><b>Right to assistance.</b> The Vic OHSA allows HSR to obtain outside assistance from any party <i>with the knowledge to assist.</i></p>	<b>Vic OHSA 2004:</b> s 58(1)(f) and s70
<p><b>Right to worker representation</b> Which needs to include the right to consult with fellow workers i.e. their constituency</p>	<p>List of representatives to be kept</p> <p>And ability for HSR to consult and discuss matters with their representative group</p>	<b>NT WHSA s 44</b>
<b>Issue Resolution</b>	<p>Resolution of issues: <b>Vic. OHS Regulation 2007 Part 2.2</b> clearly outlines the mechanisms for reporting, addressing and resolving H&amp;S risks at a workplace i.e. obligations on employer to talk with H&amp;S reps, for workers to report to HSRs.</p> <p>Vic OHSA 2000 includes reference to “agreed procedures” . This continues to create difficulties of interpretation for the regulator and at the workplace eg can the health and safety committee override the wishes or workers etc. These words need to be deleted and the Model Law to include the procedures in the Vic OHS Regulations 2007.</p>	<p><b>Vic OHSA 2004</b> s.73 with Regulations Part 2.2 2007 with deletion of “agreed procedure” in s73(1)</p>
<b>Provisional Improvement Notice</b>	<p><b>Provisional Improvement Notice:</b> a formal mechanism that allows for workplace self- regulation with an option for inspectorate review.</p>	<b>ACT OHSA 1989:</b> section 67-70

	<p>The experience in jurisdictions with this right (expressed in different names eg default in SA: safety notice in WA: PIN in ACT, Vic, Commonwealth, written notice in Tassie) show that it is used judiciously and that it ensures consultation and participation of HSRs in encouraging employers to meet their legal obligations. This is of particular importance when employers are slow to implement change.</p> <p>The best provision is for one that allows a timeframe that is applicable to the ever-changing nature of the construction industry eg ACT.</p>	
<b>Right to order Cease work</b>	<p><b>Right to order Cease work</b> i.e. worker representative power to protect fellow worker at immediate risk without censorship by the employer, if conducted in good faith. Most jurisdictions require consultation with employer representative prior to issuing a cease work order. Given that that the circumstances in which this is used is often an emergency, this obligation prior to action is counter intuitive therefore ACT OHSA 1989 approach which requires consultation but not prior to action.</p>	<p><b>ACT OHSA 1989</b> s72 Cease work</p>
<b>Health and Safety Committees</b>	<p>Committees are a very useful structure in the workplace and their existence is linked with improved performance the functions need to be broad as well as ensuring that the day to day risks and hazards of a worksite are dealt with by more immediate mechanisms i.e. HSR and consultation with workers. HSC create overall policies and procedures but require “2 to tango” and are a cumbersome and ineffective place for dispute resolution for health and safety issues.</p> <p>These are best handled through the issues resolution approach of the Victorian or ACT Acts.</p> <p>The SA Act allows committee to look at return to work of people with injuries.</p>	<p><b>ACT</b> <b>Division 5.5 s85-88</b> <b>but include SA OHSWA s33(1)(f)</b></p>

<p>Note: Primacy of direct representation (HSR) over HS Committees as Committees function on agreement and consensus. Must have a process for worker representation that increases the ability of employees to negotiate</p>	<p>NSW 2001 Regulation 23 (4) asserts primacy of Health and Safety Committee over HSR, <b>this approach is not a preferred position: see discussion</b> NT Review pages 11 -113</p>	
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### Regulator Functions, Powers & Accountability:

<p><b>Specific Hazards: Dealing with Bullying</b></p>	<p>Given the broad duties of the OHA Act there does not seem to be any reason why particular hazards need to reference in the Act; these all should be covered by regulation.</p> <p>Regulation making provision need to include the ability to cover all types of risks to health i.e. physical and psychosocial.</p>	<p><b>Vic OHS ACT 2004</b> Section 158 (1)</p>
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## Compliance & Enforcement:

<b>Inspectors</b> 1. Entry into workplace	Entry into workplace The Inspectorate in their day to day activity need to embody the principles of consultation and worker rights therefore must acknowledge consultative structures. Vic OHSA 2000 includes obligations on Inspectorate to notify and report to HSRs.	<b>Vic OHSA 2000</b> s102 -103 Include NSW union reporting
2. Powers	Broad powers with regard to H&S, not just breaches therefore the NSW approach is better than Vic (note despite Maxwell recommended a change but this was not adopted) Right of Entry, non disturbance etc Ability to give directions Prohibition Notices	<b>NSW OHSA 2000</b> s 50-75 Noting that s69 allows inspectors to be accompanied by union person  <b>NSW OHSA 2000</b> s86-88 re non disturbance for serious incidents <b>NSW OHSA 2000</b> Part 6 Div 2 and 3
3. Instruments for exercise of powers	Dealing with Provisional Improvement Notice, issued by HSRs	<b>Vic OHSA 2004</b> <b>s.63-66</b>
4. HSR cease work	Dealing with direction to cease work by HSR is clear in the SA HSWA as this requires the inspectorate to act within certain time period	<b>SA OHSWA</b> s.37(1)
<b>Review of Inspectors decisions internally within the Regulatory Authority</b>	Internal Review of Inspectors Decisions	<b>Vic OHSA 2004</b> s. 127-129
<b>Appeal of Inspectors Decisions</b> Processes external to workplace additional to the internal review process	<b>Tribunal</b> (not a body like VCAT in Vic)	

<p><b>Disputes</b> Processes external to workplace to properly constituted review structures with industrial and OHS expertise</p>	<p>WA provisions appear to offer a good appeal process.</p> <p>The WA requirements for the OHS Commissioner are preferred ie health and safety expertise and industrial relations experience.</p>	<p><b>WA OSHA</b> amend. 2006 Part VIB s.51f-k</p>
<p><b>Union right of entry</b> Health and safety literature acknowledges that workplaces often need outside assistance to improve health and safety. One mechanism for this is the right of union representatives to enter worksites (note employers already have this right as they are in control of the workplace)</p>	<p>To assist workplaces this should relate to <b>all</b> work sites, irrespective of union membership and <b>all</b> matters of OHS not just suspected breaches.</p> <p>Note: there is no current legislation that effectively meets these requirements. (Creighton and Rozen, page 291).</p> <p>The approach by Sweden etc for Roving HSR or UK Work Safety Advisors could have addressed some of these issues.</p> <p>The NSW approach is the best as it allows for Union right of entry; Union right to prosecute and Criminal proceedings; need to include right of union rep.</p>	<p><b>NSW OHS</b>A 2000 s. 76-85</p>
<p><b>Regulation making Power</b> Consultation with representative bodies during Regulation and code making</p>	<p>Ability to regulate high-risk work, classes of work or work arrangements vis increased permits or licensing arrangements eg Major Hazards, Mining, Confined Spaces etc.</p> <p>Note: none of the jurisdictions (to my knowledge) have used this approach for high risk work arrangements. There would appear to be no logical reason why this could not occur eg labour hire in major hazards facility or labour hire in the meat industry</p>	<p><b>Vic OHS</b>A 2004 <b>section: 158</b> Reg 158(1.b.ii) allows for regulations for special classes of persons and s158 (2) allows for permits, licences etc.</p>

<p><b>Development of OHS standards from regulations to guidance material</b></p>	<p>Development, and enforcement policy and practice are evidence-informed.  Stakeholder experience: OHS standards development, and enforcement policy and practice facilitate cooperation, consultation and exchange of information between stakeholders</p> <p>Ability to cover broad range of harm including physical and psychosocial hazards  Standards Developed through consultative structures</p>	<p><b>WA OSHA amend. 2006</b>  Tripartite Commission, functions of s.14</p> <p><u>Consultation on process:</u> <b>SA HSWA s68</b>  <u>Regulations:</u> <b>Vic OHSA 2004s158</b>  <u>Codes:</u> <b>NSW OHSA 2000 s 33 , 40-46</b></p>
<p><b>Board of Inquiry</b></p>	<p>Ability for the Minister to establish a board of inquiry into any gazetted workplace incident</p>	<p><b>Qld WHSA 2006</b> sections 129 -147</p>

## Prosecutions:

<p><b>Prosecution/ Penalties</b></p>	<p>Ability to prosecute etc</p> <p>Use of broad duty of care for breaches of the Act and regulations or non-compliance with Codes.</p> <p>No infringement notices due to questionable usage, inspectorate focus on lower levels of hierarchy of control Penalties to be consistent across jurisdictions and to have high maximum penalties ( i.e. at the top of the pyramid)</p> <p>Ensure prosecutions do not just focus on fatalities etc, require prosecution guidelines that emphasis “pure risk”</p> <p>Include broad sentencing principles</p>	<p><b>NSW OHS Act 2000 s.106</b> <b>NSW OHS Act 2000 s. 105-131</b></p>
<p><b>Range of sanctions</b></p>	<p>A broad range of sanctions from enforceable undertaking to jail sentences.</p> <p>Penalties commensurate with the conduct Privilege that individuals do not have to incriminate themselves, but not allowed to withhold information if a duty holder/representative of a company</p>	<p><b>NSW Part 6/7</b> Including <b>ACT Industrial Manslaughter which related to the Crimes Act</b> Vic OHS Act s154 regarding self incrimination <b>(if the ACT OHS Act 1989 approach is not adopted then Vic OHS Act s32, s 144-45 and s154)</b></p>

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

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## GENERAL COMMENTS

### General Comments:


The National Review has been asked to make recommendations on the optimal content of a model OHS law [Term of Reference 11(e)]. In an attempt to do this, my submission uses the template in a tabulated form and in most cases, makes suggestions on the best option from existing OHS law, where applicable. There are some circumstances, in my opinion that all Australian laws are deficient and suggestions are taken from previous submissions or overseas examples.

Australia has signed ILO Convention 155 and any model law will need to meet these basic requirements. Other applicable ILO Conventions and Recommendations, to which Australia is not yet a signatory, should also form the “bottom line” to any model law.

Occupational health and safety laws were revised in the later part of the 20<sup>th</sup> Century due to active campaigning by trade unions, interested professionals and social groups who were responding to the poor protection of offered by the existing workers health and safety law. Any model OHS law must acknowledge that this legislation is necessary because as economic structures and “market” consistently fail to protect the health and safety of those at work.

Effective protection from the ill effects of work (as safe and healthy work contributes positively to health), laws need to be understood, implemented and enforced. Many of the factors that mitigate against good health and safety are outside the scope of health and safety laws, i.e. industrial legislation, workers compensation systems, concepts of industrial democracy and the political will by governments to challenge poor performance for the social good. The effects of the global economy and our society’s response are increasingly challenging Australia’s ability to control our working conditions. For example: high levels of precarious employment arrangements, government priorities for the reduction of “regulatory burdens”, increased opening of markets to free trade agreements, will all have effects on occupational health and safety performance, many deleterious. The National OHS Review is not tasked with such a broad mandate, but any review that fails to note the overall context of health and safety laws will fail to create laws appropriate for the 21<sup>st</sup> century. This is recognised in the following comments by the ILO Secretary General, April 28<sup>th</sup> 2008

*Labour is not a commodity and markets must serve people. Nearly 90 years ago the protection of workers’ lives and health was set out as a key objective in the founding charter of the Organization. Today, rapid technological change and a fast-paced and globalized economy bring new challenges and pressures for all areas of the world of work. Safety and health remain integral elements of the ILO’s Decent Work Agenda.....*



*It calls for sustained advocacy, effective social dialogue, and the promotion of relevant international labour standards, including the **Promotional Framework for Occupational Safety and Health Convention, 2006 (Convention 187)**.*

The ILO Secretary General called for sustained advocacy, effective social dialogue, and the promotion of relevant international labour standards.

As the bulk of the costs of workplace injury and illness are borne by workers and their community, any Model OHS Law must enshrine structural mechanisms aimed at promoting advocacy and social dialogue. For example

**Social dialogue:** tripartite structures reporting directly to the elected government; effective broad data collection by bodies responsible for tracking population health measures to inform government, social partners and the community; up-skilling and training of health workforce and the use of occupational health services for prevention and treatment services etc


**Sustained advocacy:** enshrining the role of organisations' whose roles includes advocacy, particularly as representatives of workers who bear the costs of illness and injury i.e. trade unions, and community support groups in tripartite structures responsible for policy, research and programs targeted at improving health and safety performance.

It is important and imperative when discussing any legal reform that any provision is measured against the sentiment and priorities indicated in the above: Protection from the ill effects of work on health and safety is a core foundation of the right to Decent work from the ILO.

- Health and safety law is social legislation
- Health and Safety law is about protecting ALL workers, including the precariously employed, the self employed, those employed in large and small enterprises, across gender, sexual preference, race and ethnicity
- Health and safety law is based on the principles of democracy which include the right of workers to collectively bargain.
- Health and safety law is not primarily designed to protect the efficiency of government or business; these outcomes are not precluded as an outcome of the implementation of the law but are NOT the driving force.

There are particular elements of any OHS law that need to be met for increase the likelihood of implementation of good social legislation; these include

1. tripartitism; engagement of the social partners in the development of standards and policy
2. up stream duty holders
3. broad range of duties for duty holders
4. all health and safety i.e. encompassing physical and psychological health
5. ensuring that unions have formal roles at both peak and directly at the workplace i.e. election/assistance/training of HSRs and
6. union rights to represent and protect workers
7. current workplace arrangements i.e. 25% of workforce casual
8. involvement of representative bodies for access and support at the workplace level

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9. worker representation that acknowledges the role of worker representative bodies, encompasses all types of workplaces and labour arrangement, refers back to the Robens model for representative workplace structures and builds on the experience of overseas models
  10. duty holders broad duties are used for an enforcement regime that allows for range of sanctions, penalties commensurate with the “crime”
  11. appeal mechanisms which rely on expertise outside of the workplace that are independent from the regulator, with specialist workplace and ohs and industrial knowledge to mitigate the lack of ohs law understanding in the main stream judicial system.
  12. law needs to be easy to enforce for the regulators, with a hierarchy of enforcement approaches which uses a broad range of options and does not limit particular outcomes to particular sanctions i.e. the ability to prosecute for exposure to risk
  13. Other issues to consider are the “context of these laws” and the link with other Regulatory bodies eg ASIC

The principle of tripartitism, through the engagement of the representative bodies of employers and workers is essential for any model OHS law. The concept of involvement of those whose health outcomes in the design and delivery of protection is also embodied in the Ottawa Charter of Health Promotion 1986, WHO.

Concerns are often raised about the protection of the “unrepresented”, which is usually code for workers who are not members of trade unions. Trade unions are an essential feature of representative democracies. Trade unions have a role in addressing the power imbalance at the workplace level, by using their collective resources to provide assistance, training and education to working people. There are no other representatives and the overwhelming evidence in health and safety research is that trade unions create environments that support all working people, not just those who are their members. In other words, trade unions through their work raise the standard for all, not just their members.

There is regular discussion about the difficulties for small workplaces, their owners and workers, to access advice and assistance to improve their health and safety performance. Despite numerous reports, regulators persistently ignore suggestions and fail to pilot programs that provide VERBAL advice and access to information for these workplaces. Such programs and trials include

1. Roving health and safety representatives eg various European initiatives, both legislated and industrial agreements
2. Workplace safety advisors eg HSE UK, CC OO Spain
3. Business collaboration eg Club Zero in Western Sydney
4. Regional based occupational health services eg Scandinavian countries (implementation of ILO Convention on Occupational Health Services)
5. Information services providing verbal, in person advice from skilled personnel who are able to visit workplaces. This service must be separate from the inspectorate, as the inspectorate’s role must be focussed on compliance (information help-lines or web based services are useful adjuncts but cannot replace personal assistance).

These programs would be independent from the regulators, but require funding and resourcing. The model OHS law needs to include requirements on the regulator to provide such resources to workplaces, groups of workers and employers. As our labour market becomes more reliant, on the “informal economy”, access to these services increases in importance.

**Promotion of relevant international labour standards:** Any promotion of good health and safety must include mechanisms to improve occupational health outcomes. Occupational health that does not receive the same attention from the community, government or regulators as industrial safety performance and it is as an integral part of the ILOs Decent Work agenda. Advice from occupational health experts would be of assistance in addressing this recurrent lapse in addressing working health.

Currently Australian OHS regulators measure their performance using workers compensation data. The shortcomings of insurance data (workers compensation claims) as a reliable and accurate measure of health and safety performance are as well known as they are ignored. Regulators persist in comparing their performance using this data, base the bulk of their projects on such data and have generally ignored or perverted attempts of redress e.g. the National OHS strategy. For example, it has taken years of lobbying and representations for the initial conduct of the draft National Hazard Exposure Surveillance (NHEWS) survey (May 2008). The ABS has conducted the second self reported work-related injuries survey in 2005-6.<sup>1</sup> Both the 2000 and 2005/6 data indicate that workers compensation is a poor measure of self reported work related illness and injury, yet the jurisdictions measure their performance for the National Strategy by insurance data. In fact, jurisdictions heavily promote lower workers compensation claims in their interactions with the social partners and business plans e.g. "11 in 07", 11 standard claims per 100,000 employees as a performance targets in 2007.

#### **Final Note**

The NOHSC, *The cost of work Related Injury and Illness for Australian Employers, Workers and Community (August 2004)*<sup>2</sup> estimated that **3% of the total cost of workplace injury and illness is borne by employers, 44% by workers and 53% by the community.** Given this distribution of costs, good model OHS law is more in the general interests of the working people than any other sector of the economy (workers bear the costs and pay taxes to fund community services).

I will end with a quote, which refers to the world markets, but the point is the same for occupational health and safety. As Ronald Labonte notes, the principal of handicapping the rich whilst discriminating in favour of the poor **guided** the WTO. If it is good enough for gamblers, this principal of discriminating in favour of those with least power *must have some resonance* when designing and implementing our occupational health and safety laws.

*The key point here is a simple one: Equal rules for unequal players will only produce increasingly unequal results. A fair trading system is one that handicaps the rich while discriminating in favour of the poor. That was the principal that guided world trade before the WTO, and **still guides how we play golf or race horses.** Ronald Labonte Canada Research Chair, Globalization/Health Equity Institute of Population Health, University of Ottawa*

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<sup>1</sup> ABS 6324.0 Work related Injuries Australia, 2005-06 and Sept 2000

<sup>2</sup> NOHSC, The cost of work Related Injury and Illness for Australian Employers, Workers and Community (August 2004)

## References and Bibliography

ABS 6324.0 Work related Injuries Australia, 2005-06 and Sept 2000

Johnstone R et al, *Statutory Occupational Health and Safety Arrangements and the Modern Labour Market*, J Ind Relations Mar pp 79-92, 2005

Seoul Declaration on Safety and Health at Work The Safety and Health Summit. Accessed 11<sup>th</sup> July 2008  
[http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/statement/wcms\\_095910.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/statement/wcms_095910.pdf)

## **Relevant ILO Conventions and Recommendations**

[Recommendations:R097 Protection of Workers' Health Recommendation, 1953](#)

[Recommendations:R112 Occupational Health Services Recommendation, 1959](#)

[Conventions: C135 Workers' Representatives Convention, 1971](#)

[Conventions: C155 Occupational Safety and Health Convention, 1981](#)

[Recommendations:R164 Occupational Safety and Health Recommendation, 1981](#)

[Conventions: C161 Occupational Health Services Convention, 1985](#)

NOHSC, The cost of work Related Injury and Illness for Australian Employers, Workers and Community (August 2004)

Shaw Idea and New Horizons Consulting, *Review of the NT Work Health Act and Mining Management Act*  
Final Report, 22 June 2007

Employment Conditions Knowledge Network WHO *Employment Conditions and Health Inequalities: Final Report to the WHO Commission on Social Determinants of Health (CSDH)*