



SUBMISSION BY THE
Housing Industry Association

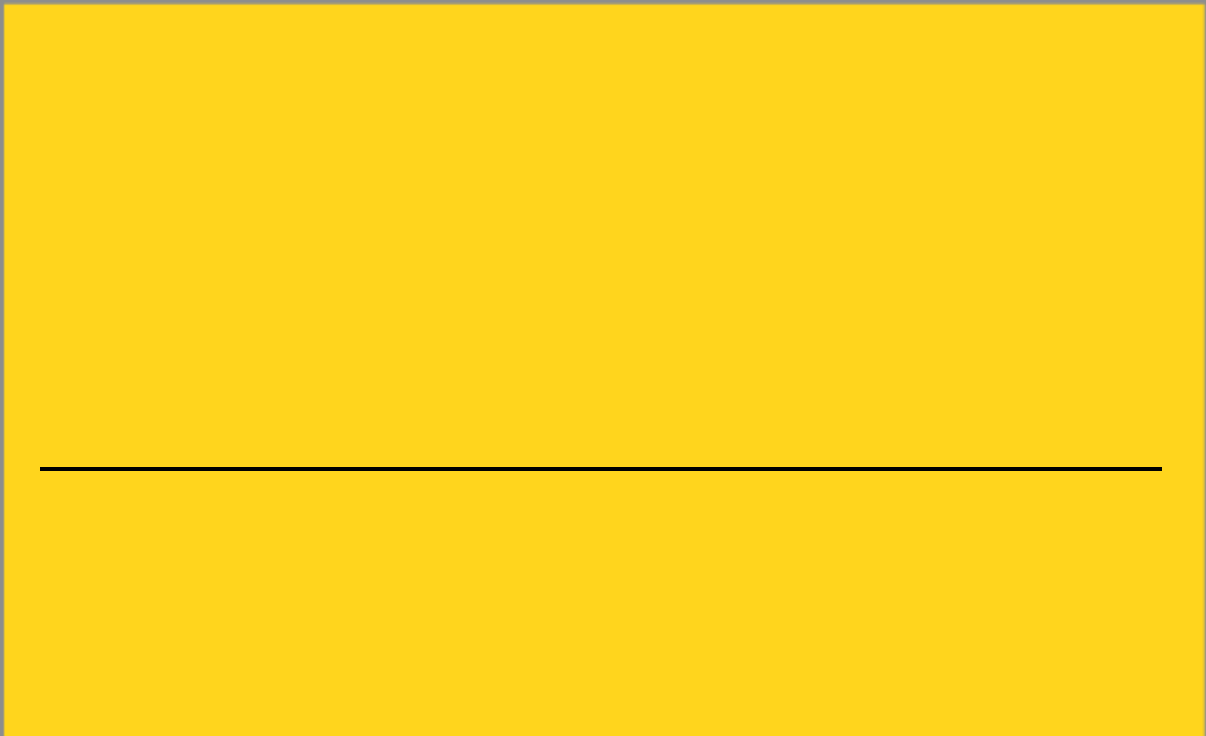
to the
National OH&S Review Panel
on the
Model OH&S Legislation

11 July 2008

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1 General Comments

1.1 Duties should be placed on the Parties in control of the activity (Liability based on “Actual” control)

The residential construction industry advocates Occupational Health and Safety laws that clearly identify responsibility for the management of Health and Safety in the workplace. Legislation in all jurisdictions restates the principle that OHS is the responsibility of all. However, the implementation of existing state-based legislation in relation to construction sites in practice directs the responsibility at the principal contractor (usually the builder). This has not resulted in the best and safest OHS outcomes, as the principal contractor may not have the most effective control over all matters in respect to safety on a building site.

By making the principal contractor the person who is required to enforce OHS requirements upon subcontractors and suppliers, those subcontractors and suppliers tend to develop a culture that OHS is not their responsibility. This does advance safer work sites.

To change this culture, model OHS legislation should impose accountability appropriate to the level of actual control the person or entity has whilst carrying out the work activity. The legislation should embrace the principle that the primary responsibility to address an OHS risk should lie on those in the best position to control that risk.

1.2 Reasonable Practicability

This principle of reasonable practicability needs to be incorporated into model OHS legislation, not only as a means to identify what control measure(s) need to be implemented but to also allow the industry to use reasonable practicability as a defence.

HIA support the notion of reasonable practicability on the basis that the regulator bears an onus of proof. In all jurisdictions except in the Queensland and New South Wales the prosecutor must prove a duty holder has not taken reasonably practicable measures in order to demonstrate a breach of the legislation. The reversal of the onus of proof results in practice in a presumption of guilt before trial and does not assist industry in meeting compliance by identifying what practical compliance looks like or requires.

Where the reverse onus operates, employers and occupiers effectively have no defence in the case of an accident; almost all accidents could have been prevented. Larger employers are well aware of how the law operates in this area, and are fearful of the risks to which they are exposed, over which they have limited control. However, imposing such absolute liabilities on employers has not



been shown to improve safety outcomes or to improve the quality of OHS efforts on the part of employers in those jurisdictions which have such provisions.

HIA contends the reverse onus law in fact effectively discourages accident prevention efforts, since no amount of accident prevention effort will provide a legal defence if an accident actually occurs - by definition, those efforts were ineffective and the employer gets no credit for them. Comments by academic observers that the reversal of onus makes little difference in practice are ill-informed and out of touch with the actual operation of the law.

1.3 Risk Management

The OHS legislation requires employers and principal contractors to not only undertake a general duty of care but they are required to identify all risks. Once they identify the risks they must then select and implement control measures and/or OHS management systems. This general duty requires duty holders to implement occupational health and safety management systems.

The Queensland and New South Wales models provide greater clarity to duty holders of what is expected. The Queensland model, in particular, with its inclusion of regulations and codes of practice, provides a comprehensive outline of how duty holders can meet their requirements. This approach also translates more appropriately at the workplace level, avoiding disputes between employers and safety representatives to what might be practicable in any instance.

1.4 Control

Legislation in all jurisdictions except Queensland specifies that the employer has OHS obligations at all times, regardless of whether or not the employee is under the control of the employer. State/ Territory regulators (except in Qld) have not taken into account that it is not reasonably practicable for principal contractors, group apprenticeship scheme or labour hire companies to discharge these obligations in the same manner as a conventional employer. The legislation does not consider that the residential construction sector is predominately contractor based and that the principal contractor only has notional control of trade contractors.

A review of precedent case law, in particular *Drake Personnel Ltd v WorkCover* [1999] NSWIR Comm 341 and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* [2005] VSCA 185 (21 July 2005), revealed that the employer retained the OHS obligations whilst the employee is under the control of a third party.



Both cases have similar facts in that they relate to labour hire companies, where the employees of these companies sustained injuries during placement with a third party. In both instances the labour hire company had no direct control over the work activities being undertaken by the employees. However, regardless of this fact it was held that the whole obligation of OHS remained with the labour hire company, being the employer.

This is clearly unjust – the employer should be responsible for those things they can control or influence, but not for those aspects that, in the very nature of things, are outside their control because they have no day to day presence in the workplace. The approach adopted by Queensland in this area has merit. The Queensland legislation (s.10 of the Act) provides that a group apprenticeship scheme is not to be taken to be the employer of an apprentice during the period the apprentice was placed with a ‘host employer’.



2 Detailed Comments

The following section addresses those questions, set out in the Issues Paper, which are relevant to domestic residential construction. Therefore not all of the questions in the Issues Paper are addressed in this submission.

2.1 Chapter 1: Regulatory Approach

Section 1.1 REGULATORY STRUCTURE

Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

Model OHS legislation should be written in plain English to allow for improved compliance by all industry sectors. The wording, concepts and terminology should be identifiable by the persons or entity undertaking specific work activities. The legislation should be easily read and understood by all persons who must comply with it.

An achievable regularity approach is one that is underpinned by performance-based standards in conjunction with general duties of care. A practical solution should be priority-based, reflecting both risk to safety and the most appropriate methods/processes to manage this risk. The identification of this risk and indeed the most appropriate methods of managing and/or preventing this risk should be in part derive from an analysis of nationally consistent data collected from the residential construction sector.

Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

It is important that the details contained in the model OHS Act clearly define the general duties, and the persons on whom they lie, consistent with the following principles:

- *Fairness of enforcement:* Where an OHS breach is a criminal offence the prosecution procedure should be subject to the usual criminal principles and heard in the usual forums with the accused presumed innocent until proven guilty. Prosecutions should be commenced in a timely manner and should only be initiated by the regulator, not a third party. Rights of appeal should exist for error of law.
- *Liability based on "Actual" Control:* The extent of a person's liability should be determined by the level of control that person or entity has whilst carrying out the activity. There should be no negative impact on the principal contractor where they could not be reasonably expected to have control, or where their control and authority has been ignored.



- A *nationally consistent data collection* mechanism for capturing incident and injury data from the residential construction sector should be set up.

The Act should establish clear principles. The level of detail left to the regulations should be confined to specific standards implementing these principles, with emphasis being placed on positive actions to achieve compliance that are based on appropriate real world situations. In the case of the residential construction industry, this should be the standard build process. The practical safety solutions will allow the industry to know with certainty what they have to do to achieve compliance.

1.2 TITLE, OBJECTS AND PRINCIPLES

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

HIA recommends the following title: 'The Australian Workplace Health and Safety Act'.

Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?

HIA recommends that the following objectives should be considered:

- to secure the health and safety of employees and other persons at work;
- to provide for a transparent, accountable and effective regulatory process;
- to promote public awareness and discussion of occupational health and safety;
- to provide for effective mechanisms by the regulatory authority to constructively engage stakeholders in relation to the management of health and safety issues;
- to provide for effective mechanisms by the regulatory authority to develop and implement programs and provide incentives to assist duty-holders to improve occupational health and safety;
- in consultation with employers, employer associations and other interested parties, to collect analyse and publish relevant incident and compliance data and statistics relating to occupational health and safety and the effectiveness of safety control measures.

Q5. Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

HIA believes there is value in defining a set of principles to assist employers and employees with health and safety protection. These principles should advance the importance of practical measures and the importance of ownership of safety procedures by all individuals. Recommended principles include:



- Responsibilities for health and safety in the workplace should rest primarily with those persons best able to exercise effective control over hazards and risks.
- Safe work outcomes are the product of co-operative efforts by all those present in the workplace and all those persons should take their share of responsibility for safety.
- The primary strategy for implementation of a safe work regime should be through education, information, safe work design and compliance with codes of practice rather than prosecution.
- Where there is a breach of a duty laid down by the Act, those alleging an offence should bear the onus of proving every element of the alleged offence, including negating a statutory defence that the duty holder had taken all reasonably practicable measures which were available to prevent, and which would have prevented, the accident.
- Prosecutions should be commenced in a timely manner and should only be initiated by the regulator, not a third party.
- Rights of appeal should exist for error of law.

2.2 Chapter 2: Scope, Application & Definitions

2.1 INDUSTRY SECTORS

(Answers Questions 7 and 8)

Maintaining the status quo will defeat the purpose of the review. The result of the review should identify ways of better organising what is contained in the Act, Regulations and other Codes of Practice or Guidance material.

The ability of people to understand what compliance “looks like” is a common problem in most industries. However there is a need for the correct balance between providing enough prescription to give understanding of compliance and enough flexibility to encourage innovation and alternative practical safety solutions.

HIA believes Industry-specific legislation should not be part of the Act and that the Act should be limited to general duties, responsibilities, powers, enforcement and offences and defences or those matters common to all industries.

Any industry specific legislation should be covered under separate regulations for that industry. It would also be recommended that when considering what should and shouldn't be included in the various regulations that a comprehensive review of current provisions be undertaken to ensure practicality and validity to that particular industry or industry sector.



The content of Regulation should be limited to minimum standards and incorporate the concept of “deem to comply”.

Detailed methods of work and the “how to comply solutions” should not be incorporated in Regulation but should be provided to industries through Codes of Practice or Guidance material that again incorporate the “deem to comply” concept. At no time should a Code of Practice or guidance document be called up in a regulation.

“Deem to comply” is a concept that will allow innovation and will encourage improvement in safety, but will also allow enough flexibility for small business and those who want firm and clear guidance on what is an appropriate standard.

HIA recommends that the construction industry not be considered as a whole but be considered in sectors and that each sector have their own specific requirements. These sectors would include housing construction, commercial/ industrial construction, and civil construction.

In addition to providing general duties and “how to comply” solutions within the legislative framework it is also important that an appropriate research, data collection and review process be incorporated to ensure that all sectors of all industries are adequately assessed and represented.

Currently residential construction statistics and data only exist as part of the construction industry data as a whole, however the differences between the safety control methods, scheduling and building processes within the industry warrant different safety solutions and review processes. Without separated data collection and research the housing industry is being inappropriately assessed.

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

The Act should mandate and provide a mechanism for co-ordination across states and territories and require mutual recognition of actions by the safety regulators.

2.2 WORKPLACES AND NON-WORKPLACES

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

General duties should be tied to the Workplace and not for the entire journey from home to work and return.



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

There should be no specific duty to protect members of the public that does not already exist at common law.

2.3 RESPONDING TO CHANGE

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

Any OHS duties placed on persons should be dependant on their relationship with the likely source of risk and their actual ability to effectively control the risk. The Act should apply principles rather than address particular types of work arrangements. Also refer to other discussion contained in this submission relating to control and liability.

2.4 DEFINITIONS

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

The Act should contain the following definitions, and in establishing correct definitions other laws containing similar definitions should be considered so as to maintain consistency in business related legislation.

- Employer – common law definition
- Employee – common law definition
- Self-employed person – common law definition
- Worker – person who does work under a contract
- Volunteer – common law definition
- Health and safety representative – common law definition
- Person – depends on the purpose for which the definition is to be used
- Person in control – person who has control, to any extent, of a workplace
- Occupier – common law definition
- Owner – common law definition
- Officer – as per Corporations Act
- Workplace – place at which work is done
- Reasonably practicable – see answer to Q 37.
- Control – should not be further defined.



2.3 Chapter 3. Duties Of Care – Who Owes Them And To Whom?

3.2 CONTROL

(Answers Questions 16 – 19)

When considering the issue of control in relation to the common working arrangements in the housing industry it is important to appreciate that there are many variables that will affect the ability to control health and safety matters on each and every work site.

In most states, liability currently rests with the principal contractor or person in charge of the building works. This strict liability has led to disproportionate OHS penalties imposed on builders, complacency by contractors and workers and does not suit the transient and flexible nature of the residential construction industry.

When a person is “liable” for something, the term “liability” should mean that a person is responsible and accountable for their actions. In the residential construction sector, regardless of which party undertakes the work activity (i.e. employee, employer or contractor), liability should rest with the person undertaking the activity and that person must be responsible for their actions and for the health and safety of themselves and others that may be affected by their actions.

The introduction of liability based on “actual control” will define who is responsible for implementing safe controls for the work activity being undertaken and will share a fairer portion of risk between parties. Responsibility will lead to accountability and will result in safer workplaces.

The general principles of liability based on “actual control” should be:

- The extent of accountability should be dependant upon the level of control the person or entity has whilst carrying out the activity.
- The level of liability should not have a negative impact on principal contractors where they can not be expected to have control, or where their authority has been ignored.
- Generally, obligations and responsibility for safety should be shared by all persons directly involved in carrying out a work activity.



HIA considers that OH&S laws should make it clear that employers or principal contractors do not have automatic liability for any negligent behaviour of subcontractors but rather that their obligations are limited to exercising reasonable and prudent control.

Given the importance and the complexity of defining and providing details sufficient to explain the concepts of control and the operation of such HIA would like to arrange further discussions with the panel in order to further clarify the issue of control.

3.3 WORK RELATIONSHIPS

Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations?

HIA believes that reliance on employment relationships would be a valid and effective basis for framing safety obligations. It would facilitate clarity and provide a legal/contractual notification of responsibilities and obligations.

Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Duties should be owed to all those at risk in the workplace regardless of their legal status. There should no "deeming" of contractors as employees for the purpose of the duties. The focus should be on contractors being responsible for their own health and safety and that of others who may be affected by their undertaking.

Q22. Is there a broader concept that more effectively covers the various work arrangements?

If the issue of "control" is sufficiently addressed in accordance with the principals covered in section 3.2 this should adequately cover all the responsibility, accountability and liability for all work arrangements.

3.4 DUTIES OF EMPLOYERS

Q23. How and to what extent should the model OHS Act specify an employer's duty of care?

General OH&S duties should be framed as performance-based duties that protect workplace health and safety while giving duty holders freedom to develop their own solutions.



General OHS duties should require the duty-holder to:

- eliminate risks to the health so far as is reasonably practicable; and
- if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

The duties should be tempered by the extent of the employer's ability to effectively exercise control.

Q24. To whom should these duties be owed?

Duties of employers should be owed to all persons at the workplace but without "deeming" of contractors to be employees for the purpose of the duties.

The duties should be tempered by the extent of the employer's ability to exercise effective control and should recognise contractual relationships as being external to an employer-employee relationship.

3.5 DUTIES OF WORKERS AND OTHERS

Q25. How, and to what extent, should the model OHS Act specify worker's duties of care?

An Employees duty should be simply that to take reasonable care for their own and other's health and safety in the workplace.

Q26. Should the model OHS Act include duties of care for persons who are not performing work (e.g. visitors to a workplace, members of the public)? If so, what should the duties be?

Duties should not be included for those not undertaking work. HIA believes that the common law duty of care owed to and by these persons is adequate in these circumstances.

3.6 APPOINTED PERSONS AND OFFICERS

Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Appointment of persons with specific OHS responsibilities should be left entirely up to the duty-holder.

Q30. Should the model OHS Act include positive duties for officers of bodies corporate?



Positive duties for officers of the body corporate should not be included under the Act. This should be left primarily to the duty-holder how they choose to comply with their obligations under OHS law.

3.7 DUTIES OF PERSONS IN CONTROL

Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

Refer to commentary on control in section 3.2

Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

Persons in a position to be able to exercise effective control should have duties that are based upon their relationship with the likely source of risk and their actual ability to effectively control the risk, i.e. the control able to be exercised and the likely effect of exercising that control.

For this reason also the model act should apply to owner builders who engage persons such as contractors to carry out construction work in the same way in which it would apply to a principal contractor.

3.8 ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

HIA opposes the use of a lifecycle approach to describe the duty held by a person in relation to buildings and structures and the use of an indefinite chain of responsibility approach. The uncertainties created are too great and more often than not do not represent contractual arrangements made by builders, trade contractors and other specialised consultants. It would be better to address such issues through Codes of Practice for particular activities.

Designers of buildings and Structures

It is recognised that the design of a building or structure can affect workplace health and safety and that designing out hazards and risks can be an effective way of improving safety.



Some jurisdictions place duties on the designers of buildings or structure to ensure that it is designed to be safe for those using it as a workplace once it has been constructed. Some jurisdictions expand this designer duty to also include the 'buildability' i.e. the safety of those involved in the construction of the structure. In this latter case, designers may have little or no knowledge or control over how a building or structure is constructed. In most instances they have no control over the decisions and activities of the builder or about the planning, scheduling, plant to be used, and the system of work of the building process to be able to discharge this duty.

This begs the question of how can a designer, factor in safety during the construction process if they do not know how the building or structure will be built and cannot in any way control the process?

It should also be noted that designers have some current liability provisions under *Trade Practices Act 1974*

Designer duties for 'buildability' should not be included in the Model OHS Act, as there are serious practical difficulties that would make these duties unworkable and unenforceable.

Other downstream duties

There should be no further downstream duties other than the duties currently existing for those operating a business to take all reasonably practicable steps to ensure that no-one is exposed to a risk to their health and safety from the way their business is conducted.

No further downstream duties should be placed on builders once a building or structure has been commissioned, other than the ordinarily common law duty of care provisions already available and provisions for defect liability. For example, a builder may be quite competent at constructing a building or structure in a safe manner, but may not understand the intent and effect of the design features of the building or structure such as the relationship between properly designed cooling tower systems and Legionella.

While the designer may be charged with a responsibility to ensure that the design of the structure is safe, if it used for a purpose for which it was designed, and the builder with a responsibility to ensure that the building or structure is constructed in a competent manner and in accordance with the design, it would be inappropriate to require the builder to ensure the safety of the cooling towers or other aspects of the building or structure once commissioned.



If such duties are included in the model OHS Act they should be restricted to ensuring that obligations are tied to the risks that the duty-holder can reasonably and effectively control.

Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

HIA does not believe it would be practicable or appropriate to hold a manufacturer responsible for the failing of a designed in the situation described. Manufacturers produce product in accordance with various standards that are codified, should a building product fail against a predefined requirement the manufacturer is likely to be liable, however, in respect to a specific design a manufacturer can not specify the appropriateness of a particular product in all circumstances, this is responsibility of a designer.

Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

This is a question can only be answered when taking into consideration the context of the Act as a whole.

Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

One key goal of the model OHSA should be to achieve consistency with COAG's resolutions and the recommendations of the Banks Red Tape Reduction report. In particular, the model OHSA should not seek to impose additional red tape via obligations such as record-keeping recommendations that are not reasonable and have no direct OH&S benefit, or where no subsequent duty is dependent on the keeping that record.

The model OHSA should be drafted to streamline rather than expand the number of duties and duty-holders. Record keeping should flow as a matter of practical necessity out of the requirement to perform the duties rather than be a separate requirement unrelated to any other duty.

Another key goal should be to minimize potential for confusion or unintended consequences and potential 'sleepers'.



2.4 Chapter 4: 'Reasonably Practicable' & Risk Management

4.1 CONCEPT OF REASONABLY PRACTICABLE

Q37. Should a test of “reasonably practicable” be included in the model OHS Act?

Current practicability tests focus on eliminating or reducing workplace risks by considering the likelihood and severity of the hazard or risk, the state of knowledge about the issue and ways of controlling it and the cost of these measures.

The term “reasonably practicable” refers to what can be done by a duty-holder and what it is reasonable for the duty-holder to do under the specific circumstances, both of which can be impacted by what the duty-holder is able to control. Therefore control is key part of determining reasonably practicable. It is probably the most important issue for industries heavily reliant on contractors, such as the construction industry.

For clarity and fairness OH&S law should set out the factors that need to be considered when deciding what is reasonably practicable and it should explicitly address the issue of control where concurrent and overlapping duties are involved by including an "effective control" provision. This should be based on the concept of proportional liability.

Q39. How should the standard be defined? What level of detail should be provided?

The standard should state that that regard must be had to the following matters:

- the likelihood, degree and severity of harm that may occur;
- what the person concerned ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- the availability and suitability of ways to eliminate or reduce the hazard or risk;
- the cost of eliminating or reducing the hazard or risk; and
- the level of control reasonably able to be exercised by the person concerned and the likely effectiveness of exercising that control at eliminating or reducing risk.



Q40. Should control be an element of the standard?

Control should be an element of the standard. An 'effective control' provision will provide more clarity about the extent of the general duties and assist duty-holders to decide whether they have capacity to exercise effective control and therefore what is reasonably required of them in their circumstances.

It will also lead to greater awareness of the fact that 'effective control' is highly relevant objective factor to be given appropriate consideration by not only duty-holders but also regulatory inspectors, prosecutors and the courts. This will also open up the test to a greater level of fairness and justice for duty-holders during compliance and enforcement activities by inspectors.

An additional advantage is that once control is acknowledged as a key concept for determining reasonable practicability, it will moderate overlapping duties and help address modern work arrangements.

(Also see commentary in Chapter 3)

Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

In jurisdictions that have a reasonable practicability standard, the test for determining what is reasonably practicable is an objective test based on a number of factors. No one test factor alone, determines what is reasonably practicable in relation to ensuring health and safety. Careful consideration must be given to each of the factors. This involves a careful weighing-up of each of the factors in the context of the circumstances and facts of the particular case.

The reasonable practicability factors require objective assessment but there are several matters that require subjective value judgments to be made. An example of this is the mostly subjective determination of "likelihood of a hazard or risk eventuating".

Even where matters can be objectively assessed there may be uncertainties involved. For example, in calculating the cost of implementing a particular control measure to be applied it would be clear to most that costs include cost of purchase, installation, operation and even maintenance of the control measure but should the calculation include a discount for potential savings from fewer incidents, or for improved productivity or reduced turnover of staff? What can be reasonably included?

A reasonable practicability standard on its own will be confusing to duty-holders without separate subordinate instruments or guidance to help them assess the



test factors and to contextualize and weight each of the factors so they can decide the extent of their control and therefore what is reasonably required of them in their circumstances.

4.2 RISK MANAGEMENT

Q42. Should ‘hazard’ and ‘risk’ be defined in the model OHS Act?

The terms “hazard” and “risk” are common terms associated with health and safety and form the basis of any risk management approach. These terms are commonly confused and it should be made clear as to their difference.

Q43. Should a definition of ‘reasonably practicable’, or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Refer to response in question 41.

Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

The only risk management principles that should be included in the model Act is the need to identify hazards and to control risks.

Specifically, there should be no mandatory requirement for written risk assessments.

The current general requirement to carry out a formal risk assessment in most legislatures has been recognised as problematic, unnecessarily prescriptive, and inconsistent with COAG’s recommendation that legislation should, whenever possible, focus on clearly identifiable outcomes rather than inputs or the means of achieving that outcome.

There is also general frustration in Australian workplaces, particularly amongst small business, that compliance with the law requires scarce resources to be redirected to produce risk assessment paperwork to demonstrate compliance, rather than focusing resources on more effective control of risks.

HIA would like the review panel to consider the fact that these problems led Victoria to remove the duty to carry out and document risk assessments in 2007. Instead, the Victorian Government decided to place the focus on the proper identification and control of risks to health and safety. The Victorian Government argued that:



“A regulatory duty to carry out risk assessment means that it must be done in every single case to which the regulation applies. A duty holder who does not perform a risk assessment is in breach of the regulation, regardless of whether adequate risk controls are in place. “

And that:

“Mandating risk assessments may be a barrier to the implementation of risk controls. For example, where hazards and risks are well known and there are universally accepted control measures, a duty holder may identify the hazard and implement the appropriate control without doing a risk assessment. In these cases, a risk assessment would yield no new knowledge and would be likely to delay the implementation of controls.”

The Victorian Government also cited a study conducted by WorkSafe which found that in practice many duty holders were implementing adequate control measures without undertaking a formal risk assessment.

Full details of the reasoning and evidence used by the Victorian Government to support the removal of the risk assessment duty are contained in the Victorian Regulatory Impact Statement¹.

No problems have surfaced as a result of the removal of the risk assessment duty since its implementation. The notion of risk assessment is generally second nature and a subconscious activity to most persons facing a significant risk. An example is the way people risk-assess every day activities such as crossing a road.

It can also be argued that when formal risk assessments are actually carried out the quality of such assessments tends to be poor and the outcome misleading and possibly dangerous.

The favoured risk assessment model of much of industry, OH&S training and OH&S practitioners is to categorise risk with a subjective priority rating using a risk score matrix, rather than to carry out a comprehensive assessment that considers, amongst other things, the real potential for harm and the factors that can increase risk.

There are many such models but their levels of probability and consequence are far from consistent, and so is the assignment of scores from different scorers. Such models often provide unreliable results and downplay seemingly ‘low category’ risks which may not be adequately addressed as a result. An example

¹ Regulatory Impact Statement. Proposed Occupational Health and Safety Regulations 2007.
Victorian WorkCover Authority 2007



of this is the risk of musculoskeletal injury, which is almost always scored as “low”. The risk may not only be inadequately assessed using this process, but the “low” rating also perpetuates an implication of ‘acceptability’ and possibly taking no further action other than to 'train workers to lift safely'. All this ostensibly based on a myth that a risk assessment has been carried out.

There is every reason to believe that placing the focus on hazard identification and control wherever possible will be advantageous to most Australian workplaces. Where a ready control measure is available, it is considered much more practical to simply implement the control measure rather than having to go through a formal justification process. Most Australian businesses would benefit significantly from the reduced administrative burden if they were able to go directly to a well known and accepted risk control measure.

2.5 Chapter 5: Consultation, Participation & Representation

5.1 DUTY TO CONSULT

Q45. What provisions should be made in the model OHS Act for consultation?

The model OHSA should provide for flexible consultation arrangements that are subject to consideration of what is reasonable and practicable in the circumstances.

Current consultation requirements in some jurisdictions are too prescriptive, inflexible and problematic. In particular, consultation provisions that place a duty on principal contractors (as persons in control) in housing construction to consult with all persons that carry out work on a site about the identification, assessment and control of hazards and risks are unworkable. The onus for consultation in regards to these matters should be with the worker’s employer.

A requirement for a principal contractor to consult on OH&S matters should be limited to consulting on those hazards and risks that the workers would not normally be aware of through their normal training and induction processes and that only the principal contractors has knowledge of. This would include, for example, the presence and location of underground services; whether asbestos is present in a building and must not be disturbed; and similar issues identified in the site induction process.

The model OHSA should not give preference to consultation with any particular parties such as for example Health and Safety Representatives (HSRs). Such provisions are undesirable and would not necessarily ensure consultation with employees, as there is no guarantee that HSRs will pass information to others. If so, employees may potentially be excluded from the consultation process. This



can frustrate employers and employees alike should they feel that the necessary flow of information is not occurring.

Furthermore, by prescribing such arrangements for consultation, jurisdictions may prevent the establishment of optimum consultation arrangements for specific workplaces. Rather than enhance consultation this may lead to less effective outcomes.

Another potential problem is that if consultation requirements are not subject to considerations of practicability, an employer would technically be guilty of an offence if for some reason it was not reasonably practicable to consult, for example, if the relevant HSR was away on leave, or if the HSR fails to pass on relevant information.

Any consultation provisions should be performance-based, flexible and subject to the ability to consult being “reasonably practicable”. The regulations should not mandate that consultation be through any particular body or person. The consultation provisions should allow workplaces to decide the most appropriate means of consultation that best suits their workplace.

Q46. What are the work relationships to which a consultation provision should apply?

The only relationship to which a consultation provision should apply is the Employer and Employee relationship. This should be qualified by the employers ability to decide whom they need to consult with on a and on what matters.

Q47. Should there be different levels of consultation required for different work relationships?

Different work relationships have different levels of communication and types of communication methods. one issue that would need to be addressed is how to provide for fair and balanced consultation arrangements in construction work sites where various arrangements and numbers of subcontractor employers and self-employed persons are involved. This is primarily due to the fact that the workforce on a hosing site is dynamic and constantly changing, even on a on a daily basis.

It would be inappropriate for such workplaces to require the same level of consultation that can be reasonably expected of a workplace with a fixed and stable workforce. In such workplaces, making workers aware of any site-specific OH&S co-ordination arrangements and site-specific OH&S issues such as those in the example provided in response to Q45 should be all that is required to discharge the duty.



5.2 PARTICIPATION AND REPRESENTATION

(Answers Questions 49 – 58)

HSRs and HSCs

It is widely accepted that employees have a right to elect, if they wish to do so, a member of their work group to represent them on OH&S matters. Accordingly, there should be no mandatory requirement for HSRs other than employees being empowered to elect a HSR to represent them. This is particularly important for housing construction, as mandating such a requirement would be impractical, due to the fact that the workforce at such workplaces is transient and continuously changing.

It is unnecessary and inappropriate to mandate the establishment of HSCs as HSCs are not practical in many workplaces, particularly small business and for businesses with multiple workplaces and changing workforces. There is no evidence to suggest that the establishment of HSCs result in improved safety outcomes.

Where employers and employees decide to form a HSC to deal with OHS issues some basic rules about the operation of the HSC e.g. membership, meeting frequency etc. may be appropriate in the model OHS Act. The Victorian OHS Act 2004 provides a useful model.

Right of Entry

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

HIA's view is that adequate right of entry provisions for unions are already provided by the WR Act. The model OHS Act should not contain any additional union right of entry provisions. Safety issues can adequately be dealt with by those already on site in conjunction with Inspectors.

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

This should be in accordance with the WR Act.

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

This should be in accordance with the WR Act. If additional union right of entry provisions were to be included in the OHS Act, they should be subject to a requirement to provide written notice with specific details of the alleged OHS



contravention that Identifies the contravention, location and persons affected. Unions should not be entitled to go on ‘fishing expeditions’ for potential safety breaches.

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

This should be in accordance with the WR Act

Issue resolution

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

HIA recognises that an employer and his employees may come into dispute in relation to a health and safety issue and have no objection to an obligation for those parties to attempt to resolve the issue

It is HIA's experience that OHS issues are usually resolved using current provisions for consultation and representation. As such, there is no need to mandate issue resolution procedures. However, if it were to be mandated, the following matters would need to be considered

What is an “issue” should be defined. It should be restricted to matters concerning health and safety. A matter should not be an “issue” until a health and safety concern has been raised by employees and has been considered by the employer but it still remains in dispute. A view that any concern or matter relating to health and safety is an issue even if it has not been discussed with the employer is not supported by HIA.

Care should be taken to ensure that the existence of such an issue does not trigger any significant disruption to the workplace such as a direction to cease work. It should only trigger an obligation for the employer and relevant employees to attempt to resolve the issue.

If a HSR has been elected to represent the employees affected by the issue that HSR can be involved in addition to or as an alternative to the involvement of the employees affected by the issue but there should be no requirement to involve the HSR in preference to any other employees.



2.6 Chapter 6: Regulator Functions, Powers & Accountability

6.1 ROLE AND FUNCTIONS OF REGULATORS

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

The Model OHS Act must define the establishment, functions, powers and accountability of the regulators. These definitions will require transparency and be consistent from state to state to allow national entities to minimise red tape impediments.

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

The residential construction sector is continually challenged by changes to health and safety enforcement requirements. Often the changes are not written in legislation but result from health and safety regulators' interpretations of existing legislation. The shift in interpretation may or may not have resulted from a precedent set by case law.

Regardless of why regulators alter their interpretation of laws, a change in enforcement and prosecution policies must be disseminated to industry. If regulators fail to advise industry of the relevant enforcement and prosecution policies it is unrealistic to expect workers to comply with the additional expectation.

If industry is shown what compliance looks like there will be a better chance that health and safety compliance will be achieved, resulting in real safety gains.

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

Interpretive documents should be allowed under the Act. One of the key issues for employers, principal contractors and other duty holders is certainty of compliance. To assist in increasing health and safety within the residential construction sector all interpretive documents must be made public for industry to see. This will allow consistency of regulators interpretation within all jurisdictions and assist in the longevity of national consistent data collection and assessment of work practices.



Q89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

Industry has the fundamental moral right to initiate an appeal process to review decisions made by inspectors. All review processes in all jurisdictions should be undertaken by an external body to allow for a transparent decision-making environment.

2.7 Chapter 7: Compliance And Enforcement

7.2 ENFORCEMENT MEASURES

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

An enforcement hierarchy should be defined. This hierarchy needs to be consistent in all jurisdictions. The Model OHS Act must clarify this hierarchy in detail to assist industry to achieve a healthier and safer workplace.

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

Regulators need access to a range of enforcement measures of appropriate severity. Most jurisdictions currently utilise Improvement notices, prohibition notices and infringement notices. HIA has some concerns regarding the enforcement of some of these notices. In particular, Improvement and prohibition notices requiring rectification prior to the continuation of work. These notices are issued in respect to a specific circumstance that has occurred on a site. However, after the notices are complied with they remain in force and in the event of a similar situation an inspector has the right to reference the original notice and enforce a higher level notice for an independent set to circumstances. This is inappropriate.

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

With all regulatory authorities there is a need to effectively influence a minority of industry to comply with their OHS obligations. This form of notice may be available for minor infringements on the basis that the person undertaking the workplace activity should be held accountable for the breach (e.g. if a carpenter has failed to use appropriate Personal Protective Equipment then that carpenter should be held accountable). This form of notice is not appropriate for moderate to serious breaches.



If a matter is of a moderate or serious nature without causing actual illness or injury there should be a process of advice and assistance to educate industry.

If the matter is moderate to serious and causes illness or injury then in cases where a prosecution is appropriate there needs to be a uniform process for prosecution with the appropriate onus of proof.

Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances are and what evidence should be required to apply for an injunction?

An application for an injunction to restrain a breach of the OHS Act will be likely to be a rare occurrence, appropriate to cases of an imminent risk to health and safety which cannot be satisfactorily addressed through normal mechanisms such as improvement notices. There is no reason why the Act should not permit injunctions, but the Act should leave questions of circumstances and evidence to the normal legal processes governing such procedures.

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

HIA supports the use of enforceable undertakings as an alternative to prosecution where this leads to a satisfactory safety outcome. It enables focus on the safety outcome and encourages compliance without the need to invoke the deterrent of a successful prosecution. There should be appropriate safeguards to ensure that undertakings are not sought as a matter of routine but only where a prima facie case of breach of the Act exists. Some sort of internal appeal mechanism should be available in relation to the terms of the undertakings which are sought.

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

Enforceable undertakings should not result in an admission of fault or liability. The giving of an enforceable undertaking should not require an admission of guilt and the giving of an undertaking should not be available as evidence in a civil litigation process. It would be the equivalent to a plea available in some English speaking jurisdictions of 'no contest'.

At present, injured parties welcome a successful statutory prosecution because it forms part of their supporting evident in a civil proceeding. If enforceable undertakings were to have the same status it would make them much less attractive.



2.8 Chapter 8: Prosecutions

8.1 CRIMINAL OR CIVIL LIABILITY

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

Some states have civil prosecution standards and some have civil standards. HIA considers that it should be open in respect of some breaches of duty for a civil penalty to be sought or a criminal prosecution to be taken, at the option of the enforcement authority, depending on the gravity of the case and moral blameworthiness involved.

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

Criminal proceedings would appear only appropriate where there is a breach occasioning death or severe injury.

8.2 WHERE PROSECUTIONS SHOULD BE HEARD

(Answers Questions 106 – 109)

OHS prosecutions should continue to be criminal offences and the defendant should as a matter of natural justice have the same rights of appeal as other person charged with a criminal offence. Civil penalties should be heard in any court of competent jurisdiction. HIA opposes specialist courts or tribunals hearing OHS matters, including industrial tribunals.

8.3 WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES

Q110. Who should be entitled to commence criminal proceedings?

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

The relevant regulatory authority should be the only entity with the rights to investigate and launch an OHS prosecution. It is inappropriate to allow a third party to undertake investigation or launch any form of prosecution. Third parties are not independent and they are not subject to governments codes of practice and transparency.



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

Any prosecution should not be unnecessarily delayed. When setting a time limit consideration needs to be given to the type of offence and the extent of the breach.

Q113 Should the model Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rule of criminal law and rules of the relevant court or tribunal?

Provisions for the conduct of a prosecution should be left to the rules of criminal or civil law and the rules of the relevant court or tribunal. There is no reason for an OHS breach to be treated in any other way.

8.4 EVIDENCE

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

Evidentiary procedures should be those that are normally required for criminal or civil matters and as required by the relevant rules of the court.

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

These should be persuasive only and should not be used as defining evidence against defendant. Codes of practice in particular should be guidance material only and only used as persuasive evidence if it is considered that the defendant did not comply with the code or provide a better solution to that contained in the code.


8.5 THE BURDEN OF PROOF

(Answers questions 117 – 121)

In addition HIA contends that the burden should be in accordance with criminal/civil law.

Evidentiary procedures should be consistent and independent. The OHS Act must define a procedural process that is both transparent and instructive to all parties. Independent should also be maintained throughout the process to ensure that each party is treated fairly and without prejudice.

Defence's should extend to that of what was or is reasonably practicable.





8.6 LIABILITY OF OFFICERS

(Answers Questions 122 – 127)

As mentioned above the extent of accountability should be dependant upon the level of control the person or entity has whilst carrying out the activity. The level of liability should not have a negative impact on principal contractors where they can not reasonably be expected to have control, or where their authority has been ignored; and

As a general principle, obligations and responsibility for safety should be shared by all persons directly involved in carrying out a work activity.

In addition to the principle outlined. Liability should be severable to the extent of control and/or negligence. A party or officer who intentionally or negligently undertakes, supervises or allows an action to occur that constitutes a known breach of safety should be in part liable for their negligence/role.

The officer should once again be defined against the principle outlined above, that being the individual or entity who had control.

2.9 Chapter 9: Other Issues

9.2 CODES OF PRACTICE

Q144 What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?

The Act should allow for the making of codes of practice for matters requiring a technical solution or for the purpose of providing practical guidance. As previously mentioned, codes of practice should not be called up individually in the Act or Regulation so as to make them a requirement of law. The intention of a code of practice has always been to provide practical guidance at a minimum level for person to comply with or improve upon.

Codes of practice should be developed through consultation with appropriate stakeholders and the solutions should only be developed after appropriate research, data collection and industry trial to ensure the most practical and efficient measure is proposed.

9.5 TRIPARTITE MECHANISMS

Q148 Should the model OHS Act facilitate tripartitism in the administration of OHS regulation and if so, how?



Q149 Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

Currently most jurisdictions provide for some form of tripartite committee either ministerially appointed or otherwise. Whilst HIA encourages tripartite consultation, HIA is concerned that the committees that are established do not have the expertise to provide sufficient contributions on all matters relating to OHS in all industries.

If committees are to be established they must have appropriate representation for those matters to which they will be providing advice and feedback to government. Committees should be industry based and in cases such as construction they should be sector based.

HIA does not support tripartite decision making. Tripartitism should be limited to consultation only. Where tripartite decision making has occurred in the past, there has been a tendency for these decisions to be delayed or bias towards the view of that party who has greatest representation or political stature. It has also been common for decisions being made based on political agendas rather than on real research and data.

Where there is an issue of a deficiency in safety or there proves a need for a practical safety solution, there should be a mechanism in place for interested stakeholders to provide feedback, research and data about the most appropriate way to deal with the issues. It should then be up to the regulator or appointed body/person to make an informed decision based on that real data and research.



3 Conclusion

HIA welcomes the opportunity to discuss any aspect or additional issues raised within this submission. Residential construction requires a separate and appropriately structured OH&S regulation that is cognisant of the specific operational and functional requirement of the industry. For too long complexity and inconsistency have plagued building practitioners. These inconsistencies have compromised safety and arguably led to a higher risk of injury than necessary.

As mentioned HIA is making active contributions to improving safety in residential construction. The 2007 HIA NPC unanimously resolved *“that HIA take a leadership role for improved safety in the residential building industry, including adopting a proactive approach in developing and showcasing practical safety solutions.”*

As a result of that resolution, HIA has developed a set of general OH&S principles that can be used in addressing current and future OH&S issues in the residential construction industry. We would be happy to provide a further explanation of how these policies may be covered in the proposed Act.