

**ALWAYS  
SAFE** 

**ALWAYS** speak up - don't  
look the other way

**ALWAYS** make time  
for safety

**ALWAYS** lead by example

**ALWAYS** look out for  
yourself and your  
workmates

**ALWAYS** think of your  
family and loved ones

## National Review into Model OHS Laws

**ALWAYS SAFE** 

**Response to the National Review into Model Occupational Health and Safety**

**Law**

**11 July 2009**

This submission, which is available for publication, is made on behalf of:

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## **Introduction**

### **Ergon Energy**

Ergon Energy Corporation Ltd (Ergon Energy) welcomes the opportunity to make this submission with respect to the National Review into Model Occupational Health and Safety Law.

This submission is provided by Ergon Energy Corporation Limited, in its capacity as an electricity distribution network service provider in Queensland.

Ergon Energy believes that it can provide a valuable contribution to the review of the model laws and welcomes the opportunity to be involved in this process.

### **Summary of Key Issues**

#### Legislative Approach

As the review is committed to “no reduction or compromise in standards for legitimate safety concerns” that is a highest common denominator approach will be taken, it is foreseeable that standards of conduct across all jurisdictions will rise. This being the case any thought of setting national standards for State interpretation is fraught with danger and accordingly we endorse a Unitary approach to Model OHS laws. The Queensland model and laws offer a higher standard than other jurisdiction and would serve as useful tool.

#### Scope and Application

There is some confusion over the nature of the current legislation across Australia Robins, a risk based philosophy and the current trend to move to more prescriptive model. Governments struggle with this approach as it allows employers/workers the freedom to manage risk as they determine appropriate. Accordingly if the legislation only prescribe the minimum and then allow business manages their risks, legislation will always lag behind.

#### Duties of Care

The greatest hurdle to the OHS review is the deviation between states on the standard for general duties. NSW and Queensland have an absolute duty to ensure the health and safety of the workers any other person at work or affected by work undertaken where as all other states have a duty which is qualified by what is reasonably practicable. The NSW and Queensland model is preferred.

#### Reasonably Practicable

#### Consultation, Participation and Representation

NSW, Queensland and Victoria now have an express duty on employers and Principal Contractors to consult on matters relating to health and safety. However the triggers in NSW and Victoria are quite onerous. It is considered that the model laws should also provide for comprehensive Industry consultation in the operations of the new laws.

#### Regulator Functions, Powers and Accountability

A service whereby the employer could consult the regulator and get a ruling would be of immense value and could be based on the Australian Tax Offices “Rulings” model.

#### Compliance and Enforcement

The concept of publicly reporting of injunctions, major breaches, repeat offenders or major failures etc. of an entity’s health and safety system would be seen as a positive step in improving an entity’s health and safety performance. Naming and shaming.

#### Prosecutions

It is not supported that Union Officials could initiate an action under the model OHS laws.

#### Other Issues

A comparison of OHS laws across Australia has confirmed that the Queensland model and laws are superior to other jurisdictions and should be used as a framework for developing a Unitary OHS laws for Australia. A service whereby the employer could consult the regulator and get a ruling would be of immense value and could be based on the Australian Tax Offices “Rulings” model.

## **Response to Issue Paper**

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

The Robins approach still has a great deal to offer, i.e. Act, Regulation, Codes of Practice (COP). It is only the application in the different jurisdictions that have varied. When dealing with high risk activities on specified plant, prescriptive regulations should apply. For other activities, hazards, work practices and work environments, principle based standards or codes of practices could apply.

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

Given the nature of an Act, Regulation or a COP, the detail should be the same. The basis of this lies in the goal of OHS laws to prevent injury/illness and save lives.

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

The Australian Workplace Health and Safety Act or the Commonwealth Workplace health and Safety Act.

The Australian Workplace Health and Safety Regulation or the Commonwealth Workplace health and Safety Regulations.

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

Objectives should be stated.

The Queensland statute is clear and easy to read and interpret.

Objectives should be modelled on the Queensland statute are: to prevent a person's death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use in a workplace.

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

The principles appear to cover the same subject matter as various Parts of the Queensland statute. Changing the title adds no value and in fact may downgrade the worth of the equivalent Parts in the Queensland law. In addition, some of the principles included in the preamble (eliminating risk, risk management) are simply

elements of risk management. As such the principle should be called an instrument to be used to control a hazard OR to treat a risk when no accepted method exists. It is considered that the addition of these terms do not enhance the goals of the OHS laws. (Similar to the privacy Principles)

**Q6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?**

The Queensland laws for OHS are simple to read and easy to interpret. The real issues arise with the conflict for COP's (State Based), Industry COP's (Nationally based) and instruments from authorities like ASCC, Australian Standards (refer further comment below at Question 7).

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

Yes, the status quo for industry safety legislation should remain. In Queensland, the separation of industry based safety laws have enabled industry participants to focus their attention on meeting their industry specific statutory requirements. Separating OHS, Electrical Safety, Workers Compensation and Dangerous Goods has simplified compliance to the relevant laws.

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

If it is determined to migrate to a more holistic approach to industry specific needs, the Queensland model for Transport is worth reviewing. It is made up of a series of statutes including Road Use, Passengers, Marine, Dangerous Goods and so on. If the same approach was adopted there could be an overarching OHS law then industry specific laws i.e. Electricity, Mining and Maritime developed under the OHS umbrella.

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

If the intent is to create a National Model, it is presumed it would be administered Federally with state based operational staff. This being the case, it would be a matter for the Federal Department to consider. Simplifying the management of the Department would improve the administration of the laws and simplify compliance to the laws by all workplaces.

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

General duties/obligations should be tied to the function and location where the work is being performed, as it is in Queensland.

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

OHS laws should protect the public from the affects of conducting work, regardless of geographical indicators. The simple approach to ensure coverage is to include the public and property/geographical characteristics under the obligations. Where there is an environmental impact, it should be captured by State or Federal Environmental laws. We remain concerned in relation to the publics 50% in ensuring their own health and safety.

**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?**

It is considered that no new relationships for work were identified. Workers are employed by an entity or an individual and as such that entity or individual has duty to look after the worker's health and safety. This could simply be included under the section of obligation holders as it is in the Queensland laws.

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

The Queensland laws do not discriminate about the nature of the injury – the questions to be answered are has an injury or illness occurred, has a worker/person/plant been put at risk, is there a safe system of work, is the worker competent/authorised, is the workplace safe, are hazardous substances managed appropriately.

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

The terms and definitions used in the Queensland Act are considered to be a worthwhile starting point for the development of a model OHS law for National consistency.

**Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?**

Definitions within the Queensland Act are simple, easy to apply in practice and could be easily applied to a new model OHS Act. As a member of a National Body of Health and Safety professionals, it has been an enlightening to demonstrate the simplicity of the Queensland laws. Their readability and application is straight forward. (Refer 14).

**Q16. Should the model OHS Act include a ‘control’ test or definition? If so, why and what should it be?**

The Queensland laws are quite clear on this matter, however the Transport's view on “the chain of responsibility” has merit. As such, it would be an advantage to the OHS laws. Sections 15 (b) &(c) of the Queensland Act provide good guidance on a “control” test.

**Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?**

The level of “control” for both a worker and a workplace is paramount in determining the nature of a duty. Apart from issues of worker obligations, the chain of control is critical in ensuring safety in the workplace. As such, the duties and offences should be clearly defined.

**Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?**

It is considered that there is no advantage in developing a process for the delegation of control within the OHS laws, rather, this element should be addressed by individual entities to suit their business needs and processes. However, the OHS laws must define obligation holders and their obligations, the result may be more that an obligation holder can hold more than one obligation at a particular point in time.

'Comment shared responsibilities page 12 of the Issue Paper'. Consideration could be given to the 'person in control' concept, and then dependent on the facts to hand, obligations could be determined.

**Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?**

In complex workplaces where more than one entity is working, it is inevitable that multiple obligation holders will arise simultaneously. This being the case, it may be easier to ensure that obligations and obligation holders are defined in the laws and then resolve any cross over issues when an accident occurs and the facts are determined. The consequences of this could be that a worker is injured because no person had control, in this case HSC for a worksite is an ideal solution.

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

The concept of relying on employment relationships is a well tested area in Australia. The concept on control in a workplace appears a more sensible approach.

**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?**

The model put forward in Queensland is considered suitable although the Western Australian approach to labour hire has merit.

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

One of the issues with prescribing a 'broader' concept is that it will lead to misinterpretation. The OHS Act should be very prescriptive and very detailed in its approach to obligation holders and obligations and their subsequent discharge. An industry based Tribunal could establish if any relationship exists

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

Refer to 22. Section s28 of the Queensland Act sets out clearly an employer's obligation.

**Q24. To whom should these duties be owed?**

Again the Queensland model is easy to read, interpret and clearly defines to whom the duties are owed. Employer obligations should be treated in the same regard as that of a worker/employee which would require them to take reasonable care to ensure their own health and safety. This would be considered a common sense approach to employer obligations and or duties for the management and standardisation of OHS laws.

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

Workers have the ultimate control of their Health and Safety and accordingly should be held accountable under OHS law. The Queensland model is appropriate for model OHS laws for application federally. Workers have apposite obligation to watch out for their workmates and the new model should include similar provisions to section s36 1c), 36 2 (a), (b) & (f) of the *Mining and Quarrying Safety and Health Act 1999*. In the Queensland OHS laws the term "wilfully" is the trigger for determining a workers' mind set in the event of a self injury, it is considered that a more suitable term could be either knowingly, recklessly or on the balance of probability.

**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?**

No. Visitors and members of the public by their description are not 'workers', and being a worker at a workplace is a basic element of the concept of OHS laws. If, however, by visitor you are describing delivery workers and similar, then this is a different issue, and as such the obligation to ensure their own safety should be dealt with as an obligation holder else where prescribed under OHS laws.

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

Yes in Queensland, the Workplace Health and Safety Officer has responsibilities, and those responsibilities allow the business to meet its obligations by providing expert/professional resources onto the shop floor. This approach if taken up under the OHS laws would contribute greatly to increased worker/employee participation.

**Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?**

If their (appointed person) responsibilities are not met through reckless behaviour, misconduct, deliberate and wilful action the liabilities should sit with the appointed person.

**Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?**

The entity positions this appointed person to support Health and Safety performance and provide technical advice and support to the shop floor. As such, the relationship should be one of employer/employee.

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

An officer of a body corporate is considered an officer of any legal entity incorporated or unincorporated and as such should have positive obligations placed on them in relation to the health and safety of the entity's workers, contractors and affected members of the public. Schedule 3 "Definitions" of the Queensland Act will also assist here.

**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?**

In Queensland, yes. However in Queensland obligations for a safe work place can be owed by more the one obligation holder at the same time and under no circumstance can an obligation holder contract out, delegate or otherwise avoid their obligations.

**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?**

Regardless of whether a workplace is temporary or not, it is at some time a workplace and accordingly the OHS laws should apply without introducing additional terms for temporary workplace. This could be achieved by adding the word 'temporary' to the workplace definition. The inclusion of assigning obligation/duties

to owners of temporary workplace within the model OHS laws would be seen as beneficial and lead to improvements in the management and standardisation of OHS laws.

**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?**

Yes. Obligations should reach from design/concept, build, maintain, operate and decommission. If the item is manufactured elsewhere, installed and then commissioned, the same obligations should be imposed, this should be read to include “supply”. The concept of financiers is not an area/term used in Queensland, but logically thinking, if the financier’s role is to supply money to third party for the purchase or construction of an item, then they should have obligations placed on them to reflect their involvement in the process.

**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?**

Regardless of the construct of the contract to supply, manufacture or install, all parties should share the same obligations. Overseas parties must be included the scope of this discussion and should be read as to include Importers and Exporters of property, plant, equipment and hazardous substances. Also refer 33.

**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)?**

Supply should be defined so to maintain the obligatory links regardless of the number of resales and/or donations of a piece of plant or equipment. That is, there should always be an obligation placed on the sale agent and should include a financier if required (refer 33). This logic would cause to lease/loan/hirer’s of plant or equipment in a work setting to as a minimum communicate known hazards to the operator.

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

Please note comments made to overseas and interstate parties in responses 33, 34 and 35.

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

The model used by Victoria and Western Australia are worthwhile. However, in the absence of a clear definition of ‘reasonably practicable’ lawyers will always be active. On this basis, it would be better to set the framework to include the Victoria and Western Australia model with the addition of the indicators” reasonable precautions and “exercising proper diligence” from the Queensland statute. A definition would be of great benefit.

**Q38. If not, what alternative standard should be included?**

No comment.

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

No comment.

**Q40. Should control be an element of the standard? (See Chapter 3)**

It is considered that there is a relationship between reasonable and practicable, therefore a person, presumably the person in control or another obligation holder would have to make a decision. On this basis control would be a factor. The use of the term standard is not supported as this area of OHS laws is normally used a defence or an alternative approach when there is no prescribed method for dealing with a hazard or risk a more forceful term should be used.

**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?**

It is difficult to provide examples or tests..

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

The concept of risk management and therefore the desire to define risk management is a related but separate area to OHS laws. This being the case, a reference to the Australian Standards for a ‘Risk’ definition may be of value. Although the refined model of risk management included within the Queensland legislation would be easily transferable to model OHS laws. Schedule 3 “definitions” of the Queensland Act will assist as “risk” has been defined.

**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?**

If a definition can be developed that is indestructible, defensible and unable to be misinterpreted then a definition would be of great value. Refer 42.

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

Yes. Refer to 43, 42, 40 and 37. Risk is a related subject and can be used to support OHS laws.

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

Consultation is key to effective OHS laws implementation. They should include but not limited to the following elements:

- Employer to facilitate consultation
- Employee to participate in consultation
- All employer parties on a shared site to facilitate participation
- All workers on a shared site to participate in consultation
- Provisions similar to section s32 of the Northern Territory Act and the Queensland Act should be included as employees should be interested and involved.

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

Refer to 45.

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

If all workers participate in the consultation, there is no need to stratify the consultation process. If, however, the entity is complex in nature or structure, there would be merit to develop a 'structure' for 'management and participation' in OHS matters.

**Q48. How should consultation be provided for:**

- a multi-employer worksite;
- an employer with operations across more than one worksite;
- small business;
- remote workplaces;
- precarious employment; and
- workers from culturally and linguistically diverse backgrounds.
  - For an employer with more than one worksite the same obligations for an employer with one work site should apply.
  - Same as above.
  - Same as above.
  - Same as above.
  - Employees with different cultures or languages should be supported by employers in their participation in OHS consultation as required by anti discrimination laws. Refer 45 & 46.

**Q49. Should there be a requirement for establishing HSRs and HSCs?**

Yes. HSRs and HSCs should be mandatory.

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

The answer to this question follows on from section 5.1. Participation by workers, employees and appointed persons section 3.6, and it should be mandated.

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

HSRs are pivotal in the uptake of OHS matters. They are the nexus between the workers and the HSCs and the employer/entity. Elections should be compulsory, which implies HSRs can not be appointed. HSCs should operate at all workplaces. The dimension or coverage of the workplace HSC should be established via consultation between employees/workers and employers. The involvement of Unions should be allowed and supported by the employer. Inclusion of a staff establishment of less the 30 for small business may be suitable, as per the Queensland Act.

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

All employees should be allowed/entitled to vote, however, it has been quite widely accepted that Trade Unions will conduct/facilitate these elections for the workplace, if not for their members. On a multi employer worksite, all workers should be allowed to vote regardless of the tenure of employment.

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

The model prescribed in the Queensland laws deliver better outcomes than other jurisdictions.

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

Refer 53.

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

Both HSRs and members of the HSCs need basic education in the application of the OHS laws, their role and in particular as the laws apply to their workplace or work activities. The first element, OHS laws, could be delivered standardised across Australia. The second element could be developed by appointed persons, section 3.6, and subject matter experts from within the entity.

**Q56. Are there alternative mechanisms that should be considered?**

No comment.

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

The obligation for an employer within the Act, should prescribe the requirements to have appointed persons, HSCs and HSRs. The regulation could then provide description on the activities, functions and responsibilities. Inclusion of a staff establishment of less the 30 for small business may be suitable, as per the Queensland Act.

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

No. Utilisation of the Queensland model has seen workers support and benefit from their participation in the election of HSRs and their own involvement in HSCs.

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

Trade Unions and other Professional Bodies who represent the interest of their members. As such, the right of entry on the grounds of suspicion or the actual occurrence of a HS matter should be included in OHS laws. Duly appointed Union Officials should be ascribed 'right of entry provisions'.

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

The nature of the 'right of entry' should not be seen as in conflict to business operations and should be interpreted as an opportunity to save lives or prevent injury/illness. To this end it is essential that Union Officials understand OHS laws (their entitlements, duties, obligations and responsibilities) and have sound working knowledge of the operating elements of the entity's specific OHS matters.

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

Right of entry should be exercised by a duly appointed and trained worker representative/official when there has been an event or where there is evidence to support an event may occur. There has to be the existence of a genuine concern.

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

The Official (from the Regulator's Office) should be able to access records that assist in the determination that an event may occur. If an event has occurred, the Official should have access to information of the entity to allow a complete and thorough investigation of the event; this should be done in conjunction with the appointed person, the HSR and employer representation. Evidence would not include items such as production information and financial matters.

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

'Issues' should be dealt with by the entity and the Regulator. The OHS laws should establish a framework for the identification, notification and consultation to address deficiencies identified and clearly stated in the notification. If unresolved to the Regulators satisfaction, the matter should be escalated to the courts/commission. The identification of an 'issue' by a worker, Appointed Person, HSR, HSC or the Regulator's Agents, should be registered by the Regulator to initiate the process. A service whereby the employer could consult the regulator and get a ruling would be of immense value and could be based on the Australian Tax Offices "Rulings" model.

**Q64. When should issue resolution procedures be activated?**

Refer 63.

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

Resolution framework should be clearly stated with the OHS Act, with detail of notification, resolution and escalation processes being detailed in OHS Regulations.

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

If the Regulator can not secure an undertaking for the resolution of a matter procedures should be put in place, then the Regulator could escalate the matter to a separate Tribunal.

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

Yes.

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

Yes. If limitations are to be ascribed it should only be in regard to the duration to which the work activity should cease (i.e. until appropriate controls are implemented). Limitation on restriction that work should cease until the situation is rectified or task modified to eliminate or control to as ALARP the unsafe/unhealthy aspect of the work.

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

The OHS Act should ensure that a worker who has been directed to cease work on OHS grounds is not disadvantaged by following that direction.

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

If OHS laws are to mandate 'no disadvantage' then it follows that the Regulator should have the power to direct an entity/employer to rectify a dispute.

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

To victimise a worker for raising an OHS issue, carrying out a function or refusing to undertake unsafe work, strikes at the very centre of OHS objectives. As such, the OHS Act should provide all workers with a 'binding assurity' that he or she will be protected and not disadvantaged. Furthermore, the OHS laws should empower the Regulator to treat any such wrong doing as a major breach of the laws. Prosecution and public naming should be provided for.

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

Any individual being either a worker/employee, Regulators representative, or their representative should be able to initiate such an action with the Regulator.

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

It would depend on the extent of the damage. If for example the workers lost a part days income, then he should be dealt with by the Regulator. If however, the worker lost his job and was “black banned” from a particular company or industry, then the matter should be heard by the Criminal Courts. A simple table detailing loss values could be used to determine penalties and where the case would be heard.

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

Currently the onus of proof lies with the accused, in a criminal court the prosecutor would have to prove beyond a reasonable doubt.

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

Yes. Refer 71.

**Q76. What remedies should be available to the victims?**

Compensation should be limited to remedies available to the entity, i.e. reinstatement, reimbursement of costs, payment of wages. If the matter is directed to the criminal courts as described 73 above A system similar to compensation for victims of crime could be introduced, the alternative a civil claim for damages pursued by the aggrieved person would place too much of a burden on the injured party.

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

No. Regulators in all jurisdictions have limited resources. In addition the skill base i.e. conciliation or arbitration is not provided by the Regulatory authority. On this basis, civil or criminal prosecution is favourable or a tribunal.

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

No.

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

For any statute to operate, the Act must contain details of the establishment, functions, power and accountability of the law for the Regulatory agency. As such, details similar to the laws administrative provisions contained in the Queensland Act would be beneficial.

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

Yes if the motive to publish these notices is to improve H&S in an industry or location.

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

Yes. Regardless of how well a law is developed, it will always need to be applied to a particular circumstance. This being the case, an entity may have a need to obtain an authoritative interpretation from the Regulator. A service whereby the employer could consult the regulator and get a ruling would be of immense value and could be based on the Australian Tax Offices "Rulings" model.

**Q82. Are there any functions and powers that should be available to an OHS Regulator that should not be exercised by an inspector?**

There will be certain functions that an inspector would not be suitable for, i.e. conducting industry based committees. It is considered that an inspector should be as the title suggests, an inspector. Functions such as Advisors should be provided by the Regulator but the individual should be titled an Advisor. As functions are split into enforcement, advisory, policy and administration, it would be appropriate that the position holder's titles reflected their remit. A service whereby the employer could consult the regulator and get a ruling would be of immense value and could be based on the Australian Tax Offices "Rulings" model.

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

Yes. Refer 82.

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

Again, it is considered that the Queensland model is satisfactory.

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

Inspectors should be inspectors and advisors should be advisors. This would support separation of powers and would avoid the situation of an inspector not acting on an issue because he or she was part of the development of the solution. Advice when solicited by a worker, employer, entity, employer etc. should be committed to writing by the advisor and confirmed by the requester. The same process should be followed for the development and provision of the advice.

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

No.

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

It has occurred that a notice has been issued based on incomplete evidence/facts, but it was very complicated to withdraw the notice. So the ability for an Inspector to amend/withdraw or cancel a notice would be beneficial. An avenue to appeal the Inspectors' decision should also be provided.

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

Enforcement is pivotal in OHS laws, therefore the OHS Act must contain the framework for an internal review. The detail of the review process (evidence, time

frames, notification etc) should be prescribed in OHS Regulations. A service whereby the employer could consult the regulator and get a ruling would be of immense value and could be based on the Australian Tax Offices “Rulings” model.

**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?**

No comment.

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

This matter has been touched on in our responses 71 and 78. It is considered that for every construct of the OHS laws, there should be a consequence for non compliance. If resolution or compliance is not achieved in a specified time frame, then the OHS laws should prescribe the escalation process for both parties. If by the time ‘measures’ you mean consequences and enforcement instrument, then the OHS laws must prescribe the framework in the Act and the detail in the Regulations. As regard to the hierarchy it is proposed that a Notice be issued for the nature of the event i.e. work practice needs improving= improvement notice, order to cease doing a task/activity = injunction, infringe/breach of law= infringement notice, prohibition notice when there is a work practice, activity or place exists that needs to cease.

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

They should be statutory principles and called up in the Act and Regulations as described in Q90.

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

The concept of a HSR having the ability to issue a PIN is not endorsed. Appointed Person and HSR should have the ability to stop work until the defect is rectified. If the Appointed Person or HSR feels it necessary he or she could contact the Regulators Inspectorate and have the inspector issue an Improvement/Prohibition/Infringement Notices. The Regulator must have the power to issue Improvement/Prohibition/Infringement Notice



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

An Improvement notice should contain the nature of the defect and recommended improvements. Then if the entity needed assistance in developing the appropriate controls the entity could develop the Advisor. Refer 82.

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

If by 'review' it is implied that the review is carried out by the Regulator when a HSR issues the notice, then the answer is no – refer Q92. If by 'review' you mean review of a notice issued by an Inspector the answer is yes. Refer to Q87 and Q88.

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

Excluding PINs, (as this concept is not supported in this submission), then yes, timeframes should be detailed in any and all enforcement notices.

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

No. If there is a defect in the notice, then the notice should be amended, withdrawn or cancelled (refer Q87). If however, the notice has identified a defect or uncontrolled hazard, then the notice should stand until it is remedied and the appeal/review process would occur after remedy. The notion that an Inspector could issue a deficient Notice has been addressed at Q87, and accordingly a notice could be amended, withdrawn or cancelled BUT if the Notice is valid then the entity must remediate before seeking a review or instigating an appeal.

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

Infringement means breach or infraction of law. So in any situation where OHS laws have been breached, then an Infringement Notice should be issued. (Reference to a breach should be read as a contravention of the Act)

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

It has been noted that the Regulator is not adequately resourced to administer this component of law enforcement. As such, the OHS Laws must provide the resources for its administration within the Regulator. If this review does not provide for suitable resourcing, then the Queensland model is suitable.

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

A review of current fine structures across Australia has identified areas for improvement. A simple response to this question would be to double the fines and jail terms currently existing in Queensland or to match the maximum set in any other jurisdictions.

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

Yes, Injunctions could be issued when a prohibition or improvement notice has not been satisfied. (Escalation process mentioned Q90) And if a third party or Government Agency believes an entity should take a specific action or refrain from a specific action. The level of evidence to issue an injunction should be set and administered by the Tribunal taking into consideration the opportunity for procedural fairness.

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

Yes. It is considered that a breach should not determine if an Enforceable Undertaking should be initiated but rather the circumstances surrounding the breach and the entity involved. I would consider that a material breach of OHS laws by an entity that has never received a notice and has a history of good OHS performance be given a 'softer' treatment to Enforcement Undertaking. If on the other hand the entity has a poor OHS performance record and is a 'known' offender, then this option is suitable and consideration to an injunction.

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

Obviously if the Regulator has requested certain remedial action be taken, there is an acceptance that there is a deficiency in the entity's HSMS. This being said, the issue of fault should be determined by the level of awareness to a deficiency, and lack of reaction to the deficiency by the entity.

**Q103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?**

No comment

**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?**

Breach of obligations should be treated as a criminal offence with criminal penalties applied. Refer 105.

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

Breach of specific obligations/duties should be treated as criminal breaches. Breaches of general obligation/duties should be assessed for their potential impact and treated as a civil breach or criminal based on impact severity and risk. Risk being interpreted as event that has not occurred.

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

The determination of whether a matter will be heard by a Magistrates Court or with special leave to appeal to the Supreme Court, Federal Court or High Court is determined by the 'worth' of the case at hand, following from that for criminal matters the court is determined by the nature and the severity of the case. The thresholds are public knowledge. A second element to court selection is determined by appeal of a lower court's decision. There is no reason to vary this approach to OHS matters.

In regard to a Tribunal's capacity the Queensland model is well respected. Ideally a Federal Court or a specialist Tribunal similar to the Anti-Discrimination tribunal or the industrial Commission.

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

Refer to 106.

**Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?**

Refer to 106.

Appeals should be based on accepted criminal proceedings and or the process for conducting Tribunals.

**Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?**

Trial should not be by jury, trial should be by judge only, and the logic behind this preference is that the case should be statement of fact and interpretation of matters that would not be the normal domain of the common person.

**Q110. Who should be entitled to commence criminal proceedings?**

The Regulator, anyone authorised to act on behalf or empowered to act on behalf of the Regulator, injured or aggrieved worker/employee, injured or aggrieved worker/employee's dependant or beneficiary, member of the public or victim.

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

Refer to 110

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

Prosecution should commence within six months of the offence occurring on the Regulator being notified of the offence.

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

No the OHS laws should not include specific provisions for the conduct of prosecutions. The rules for this conduct of a prosecution should be left in the control of the relevant court/tribunal.

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

No. refer to 113

**Q115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?**

No. Refer to 113. The usual rules for "Evidence" should apply, prosecution has to prove beyond reasonable doubt.

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

There is already a hierarchy for Acts, Regulations etc.. down to Industry Codes of Practice. This being the case there is no question about the level of evidence required in relation to these instruments only a level of compliance to a particular matter and there has been a contravention. Codes of Practice should be admissible in evidentiary proceedings and any judicial decision made in evidentiary proceedings should have regard to any Codes of Practice.

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

Yes.

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

The Duty Holder. It would seem logical that the duty holder must demonstrate the exercise 'reasonable practicable" to prove a defence, that is defence to a prosecution run by a prosecutor. Or by contrast the prosecutor must demonstrate that the duty holder failed to do all that was "reasonably practicable".

**Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?**

No.

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

The OHS laws should provide guidance for a defence if there is no law, standard, code of practice, industry agreement or accepted process to perform a task. The defence outlined in the Queensland laws, is well accepted, easy to understand and administer.

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

No.

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

Yes.

**Q123. How should officer be defined?**

By the *Corporations Act 2001* (Cth)

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

The liability of an “officer” should be proven by the prosecutor and should demonstrate “reasonable doubt” that the “officer” took an action or refrained from an action leading to the breach.

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

The Test should be the same as section s.167 (4) of the Queensland Act.

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

An “officer” should be treated the same as any “entity” which would avail the “officer” to then same defences provided by the new OHS laws.

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

All entities except charitable organisations and volunteer groups should be exposed to the full coverage of the OHS laws.

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

Any offence against the OHS laws should incur a financial penalty. The real question here is what is an offence? If there is existing law it is easy to determine if an offence has occurred, however as this law has not been developed and is construct is unknown then it is in appropriate to respond. But to provide a suitable response it is suggested that the Queensland model be accepted adding provisions for repeat offenders and aggravated OHS offenders as provided for in the soon to be released Northern Territory laws. All offences if proven guilty or when an improvement notice has been issued should incur a monetary penalty.

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

Yes.

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

Yes. Breaches of specific duties and or obligations should incur a higher penalty than a breach of a general duty. Breaches of laws relating to high risk activities, high risk plant, asbestos removal and so on should also expose the entity to a higher financial cost.

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

No comment.

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

Most fines cover a span of values, in the case where an entity or person has acted recklessly or with intent then the maximum of the span should apply. In the case where an entity or person has injured a worker/employee then the fine should be commensurate with the nature of the injury. The same approach should be taken for repeat offenders that is repeat offenders should be penalised more severely than first time offenders.

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

If the OHS laws are uniform throughout Australia then a “register” will develop for decided cases, as for criminal cases the “register” is called case law.

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

Throughout this response we have repeatedly articulated that the penalty for a breach should be dealt with by the criminal courts determined by the nature, severity and other factors relevant to the matter. The conduct of these courts should not be addressed in OHS laws. Escalation, review and appeal procedures should also fall outside OHS laws (although the court procedures should be noted). On this basis it is logical and indeed it currently operates in all jurisdictions that matters dealt with by the Criminal Code could attract jail sentences *and* pecuniary costs.

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

For reckless behaviour, doing or refraining/failing to do something resulting in a multiple death:- 10 years

For reckless behaviour, doing or refraining/failing to do something resulting in a single death:-5 years

For reckless behaviour, doing or refraining/failing to do something resulting in a grievous bodily injury:- 3 years

For reckless behaviour, doing or refraining/failing to do something resulting in a grievous bodily injury:- 1 years

For a breach of an obligation/duty resulting in a multiple death:- 5 years

For a breach of an obligation/duty resulting in a single death:- 3 years

For failing to comply with an injunction:- 1 years

For failing to comply with an improvement notice or remediate any form of notice:- 1 year.

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

Yes refer 135

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

Yes refer 134 and 135

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

Some would say that existing H&S laws is a risk based statute, as such consequences of the hazard or event play an important role in the allocation of resources by the entity. On this basis it stands to reason that the consequences should play a key part in the calculation of the penalty imposed in the event of an event. Also refer 134,135,106 and 73.

**Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?**

In the preamble to this question there is comment that some entities had not paid fines due to the winding up of the business. So is the issue here should OHS laws allow the Regulator to take a new but related action against the owners and officers of the entity in question. In this regard the answer is yes. Also refer 134. In general the model should to rely on the Corporations Act 2001 (Cth) and go beyond the corporate veil to pursue recovery of the penalty from an individual.

**Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?**

The only conditions or limitations that should be provided for are that the officer or person has been charged or found guilty of an offence, that is enforcement of a penalty is deemed necessary. Also refer 134 and 139. Enforcement of penalties could also be referred to the relevant State Penalty Enforcement Registry (SPER)

**Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?**

No.

**Q142. Should the power to make regulations be limited and if so, in what way?**

No. As workplaces continue to evolve there will always be a need to make new regulation.

**Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?**

Regardless of the breach emanating from the Act or the Regulation the summary of offences should be the same. This is justified on the basis that the Act does not stand alone but calls the Regulation into being. Summary offences with lower penalties are appropriate for minor breaches e.g. failing to report an incident on time.

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

Codes of Practice (COP) should hold the same standing as the Act and or Regulation. This being the case the development of a COP should be consulted in the community and approved and gazetted by the Government of the time. Refer to section s.41 of the Queensland Act.

**Q145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?**

It is stated that all jurisdictions have a reporting system the issues here are that the requirements to report and the nature of the event or loss have different meanings in different states. On this basis it is suggested that if the new OHS laws prescribe what events, what impacts, how to report, what form to report in and by when then the issue will diminish to a matter of compliance.

**Q146. What provisions should be made in the model OHS Act for the external review of Regulatory decisions?**

As discussed earlier there is an existing structure (criminal) to decide on OHS matters which has both appeals and review processes and this model is suitable.

**Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?**

No. In most jurisdictions there are arbitration and conciliation processes attached to the Magistrates Courts/Criminal courts including Family Law Courts. It would be duplication of effort to introduce similar structures into the regulatory OHS regime to deal with OHS matters specifically.

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

Yes. Again the Queensland model is sound and easy to administer. It is suggested that a wider range of committees be established to cover all major industries. An education and a “development” committee would be also beneficial. The “development” committee would be tasked with looking at new and emerging issues, that the Regulator, Employer or Employee group has identified. An example of this would be stress and bullying.

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

Yes. Refer 148.

**Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?**

Any licence, authorisation or permit issued under the model OHS laws should establish Nation wide transportability and administration. Currently under the umbrella of the Energy Networks Association (ENA) and in accordance with Australian Training Quality Training Framework all ENA members have been developing a National scheme to address this matter (National Passport Scheme).

**Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:**

- better OHS outcomes;**
- greater efficiency and effectiveness;**
- lower Regulatory compliance and enforcement burdens; and**
- improved harmonisation of the requirements for such permits and licensing for industry across Australia?**

A key issue for the OHS laws to address in this regard are:-

- Mandatory expiry dates
- Test and retest procedures
- Authorisation based on competency with national training levels
- All permits, licences and authorisations to be recognised Nationally
- All permits, licences and authorisations to be administered nationally
- If the laws are administered centrally and Nationally recognised then compliance and enforcement would be simpler and more cost effective

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

The model OHS laws should be constructed and applied in such a way that this issue of cross border matters are dealt with by either state Regulator, that is to say an offence in one state is an offence in the next state and either State Regulator can initiate actions jointly or severally against an entity or individual.