

**MASTER
GROCERS
AUSTRALIA**

**National Review
into
Model Occupational Health and Safety Laws**

**Submission by Master Grocers Australia
July 2008**

1. About Master Groccers Australia

The Master Groccers Association Australia (MGA) is a National Employer Industry Association representing all Independent Groccery and Liquor Supermarkets in Victoria, New South Wales, Western Australia and the ACT. Independent Supermarkets trade under brand names, such as IGA and FoodWorks, and they range in size from small, to medium and large businesses.

Independent Supermarkets play a major role in the retail industry and make a substantial contribution to the communities in which they trade. There are 2100 independently owned supermarkets employing over 70,000 full time, part time and casual staff, representing \$12 billion in retail sales. Many MGA members are small family businesses, employing 25 or fewer staff.

MGA is a strong supporter of the need to maintain safe workplaces and assists its members to deal with a range of OHS issues. Safety at work is one of the highest priorities for MGA members

MGA welcomes the proposal by the Australian, State and Territory governments to work together to harmonise occupational health and safety legislation. MGA also thanks the Minister for Employment and Workplace Relations, the Hon. Julia Gillard MP for appointing an advisory panel to conduct the national review

MGA commends the Review Panel for the extensive work that has been undertaken in preparing the Issues paper and thanks the Panel for the opportunity to comment on a number of the questions.

Jos de Bruin



CEO
Master Groccers Australia

11 July 2008

National Review into Model Occupational Health and Safety Laws

Chapter 1. Legislative Approach

1.1 Regulatory Structure

Q1. Determining the preferred regulatory approach involves a consideration of the various parties who might impact on the workplace at different stages. These may include employers, self employed occupiers, manufacturers suppliers and designers and employees. The preferred regulatory approach for model OHS legislation is one that combines general duties of care and performance based standards for all these parties. The legislation should provide a clear understanding of the responsibilities and duties that are imposed on them, and the outcomes that are expected in order to achieve safe workplaces.

Q2. The model OHS legislation should contain a broad set of principles and guidelines which will indicate overall what is required by those who have responsibilities under the Act. The legislation should be supported by more detailed provisions concerning particular industries in the regulations and codes of practice. This would provide guidance and clarity as to the respective duties of the parties.

1.2 Title, Objects and Principles

Q3. Adopting the most common words referred to in the various statutes are, 'Health and safety' and adding the word "national" could combine to give clearest title for the new Act. Hence, the "National Occupational Health and Safety Act" would seem to be appropriate.

Q4. It is recognised that in some jurisdictions an objectives clause is omitted from the early part of the Act. It is suggested that an objectives clause be included in the model OHS Act as it can provide the form for the guiding principles that identify what the Act is seeking to achieve.

The objectives could act as a guide to regulators and duty holders and they should reflect the concepts of prevention, equity, participation, co-operation and acceptance of responsibility.

The Victorian Occupational Health and Safety Act which was enacted in 2004 states the purposes, objects and principles as a guide, which MGA believes the national model should follow.

Chapter 2. Scope, Application and Definitions

2.1 Industry Sectors

Q7. It is recognised that there are multiple pieces of safety legislation applying to industries, particularly those in various branches of the mining industry, and as a result there are the inevitable complexities, resulting from a multiplicity of laws and the numerous government departments and statutory bodies which support them. This only serves to cause confusion and masses of red tape.

It would seem to be a progressive step forward if the multiplicity of laws and regulations were reduced.

A single Act should be the primary objective whilst still recognising that there are industries that have specific requirements and that they may require special arrangements. It may be appropriate if there was a regulator for each industry that operates with the supporting regulations for that industry, with an opportunity for all regulators to be in communication with each other when necessary.

Q8. A way of drawing together all various state-wide industry specific legislation would be to modernize them into single industry codes of practice or subordinate regulations to support the Model Act. This would ensure the nationalisation of safety procedures, which should be a goal of the legislation.

Q9. If the various jurisdictions are going to cooperate to achieve true uniformity it would be essential for the regulators to work together to achieve the objectives of the legislation. The model Act should make provisions for regular contact meetings between the representatives of the various jurisdictions

2.2 Workplaces and Non Workplaces

Q 11 Section 23 of the Victorian OHS Act refers to the general extension of general duties of care to persons identified as “others.” MGA supports this inclusion in a national legislative model.

2.4 Definitions

Q14. Definitions which are critical to a comprehensive national model that ensures national symmetry include the key terms listed in the Issues paper being, “worker”, “workplace”, “undertaking”, “control”, “reasonably practicable” and “consultation”; in addition to those already listed in the Victorian OHS Act.

Q15. The scope of the model legislation should cover all workplaces and apply equally to all duty holders. MGA believes a strong unified approach to the legislation would provide the best result in ensuring symmetry across public and private sectors in the varying States and Territories. The concept of scope should equally apply within industry based codes of practice, thereby simplifying the duties and compliance procedures for employers.

Chapter 3. Duties of Care – Who owes them and to whom?

3.2 Control

Q16. The provisions within the Victorian legislation ss. 4, 21(3), and 26 provide a workable option for the national legislation.

However, a definition of control should be provided to reduce confusion and provide a clearer understanding for all parties who may be affected by the legislation as to “who has control”.

One possible definition is that provided by WorkSafe Victoria that,
“Employers/Individuals/Corporations having control over budget and health and safety resources in the workplace are best placed to control the health and safety of their employees and others affected by their undertaking”

Q17. The role of control should not be used to create any further duty holders. We note that the test of control assists for the purposes of determining who is the duty holder, the nature and extent of the duty in addition to whether defences arise for the purposes of lack of control. Due to the importance of the concept of control in terms of prosecution and defence, clarity concerning this concept should be provided in the model national legislation.

Q18. MGA supports the proposal to retain the focus of responsibility on the person who has the control of the business. Once the line of responsibility is extended or delegated then the lines of responsibility can become blurred. The national laws should provide for all persons in the workplace to contribute the safety standards that exist but the ultimate responsibility for overall safety should not be extended beyond the already defined duty holders.

3.4 Duties of Employers.

Q 23 While an employer has a general obligation to provide for the health and safety of employees it is appropriate that the legislation provides guidance as to how the employer is able to meet those obligations.

In Section 21 (2) of the Victorian OHS Act the duties of the employer are clearly defined and this definition should be included in the model Act. This section provides the duty holder with an understanding of how the obligations can be met by the duty holder.

3.5 Duties of Workers and Others

Q25/26. Worker’s duties of care should be identified within the national legislation and should require employees to make their own contribution to achieving healthy and safe workplaces. The duty of care should include that the worker must take responsibility for his/her own safety and for the safety of others.

A worker should be responsive to the directions of the employer and in circumstances where the worker suffers an injury as a result of failing to comply with the employer’s direction then the Act should provide a penalty for such failure.

The need to ensure the maintenance of a safe workplace should be incumbent on all persons who are present in the workplace at any time.

Accordingly the model OHS Act should reflect this obligation.

3.6 Appointed Persons and Officers

Q27. The national OHS legislation should provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities. However, such an appointment should be dependent on the size of the business. In particular, any provision that is designed for this purpose should take into account the difficulties experienced by small to medium sized employers in attaching an individual to this extra position. The number of employees and industry basis should be some of the criteria within which the appointee is chosen.

Q28. Liabilities should be attached to officers who have the ability to make or participate in decisions making that affect the health and safety of the workplace under their control and management. These officers are expected to take reasonable care and assume liability for breaching their obligations based on an objective test of what a reasonable person in the officer's position should know.

Chapter 4. 'Reasonably Practicable' and Risk Management

4.1 Concept of 'Reasonably Practicable'

Q 37/38 In order to limit the general duties of persons who are responsible for maintaining safe workplaces most Australian OHS statutes include references to either what is "practicable" or "reasonably practicable" when carrying out the duties attached to a particular position of responsibility.

There have been a number of court decisions that have provided some certainty as to the meaning of what is "reasonably practicable" for responsible persons and how it should be applied. However, despite the fact that an understanding of what is meant by reasonably practicable has developed, there are still some concerns that its application is not always consistent.

The term, "reasonably practicable" is intended to limit the general duty on duty holders. In some states there are absolute duties without qualification. Where general duties are limited by what is reasonably practicable duty holders have a greater understanding of what is expected of them. MGA supports the inclusion of the term "reasonably practicable" in the model legislation to assist those who carry a heavy burden of responsibility. The inclusion in the Act would not derogate from that high level of duty that is required by persons who hold these positions.

The model Act should provide guidance on this issue similar to that provided under Section 12 of the Victorian Act.

4.2 Risk Management

Q 42 It would appear to be unnecessary to define the meaning of hazard or risk in a model Act as definitions may become complex where there are different connotations for different industries.

Q 44 The inclusion of risk management processes should be included in a model Act as a minimum. It may be helpful to those who have workplace responsibilities for risk management to have the processes stated in the Act as exists in the Queensland Act. Many people familiarise themselves with the contents of the legislation but do not always look beyond the statute for fuller explanations. The availability of the processes which

may be reinforced with a Code of Practice is a practical means of assisting responsible persons with their obligations.

Chapter 5. Consultation, Participation and Representation

5.1 Duty to consult

Q.45 Consultation between employers and employees in the workplace has largely become an essential part of OHS laws in Australia. It has been successful in encouraging employees and employers to resolve between themselves what are appropriate OHS solutions for a particular workplace.

However, there are often limitations on the ability to consult where employers may have little direct communication with employees. In the retail industry there may be times when the employer who operates a small business is not always present to arrange suitable workplace consultation. Guidance should be provided by way of advisory support as to how this should be accomplished.

The Victorian Statute provides an explicit obligation for employers to enter into workplace consultation and despite some initial reluctance in some areas to provide for this requirement it appears that it has largely been successful. Provided that there is flexibility as to how the consultation is conducted it would appear appropriate to provide for mutual consultation between the employer and employees in the Model Act.

Q.46. It is arguable as to whether consultation should be mandatory in respect of contractors. In most cases contractors are present for a limited period of time and a requirement for consultation could become too demanding or impossible in many cases. That is not to say that such consultation should not be optional and encouraged where possible.

Q.47 Consultation in larger worksites will usually be through the Health and Safety Representatives and through the Committees therefore in many cases employers have come to rely on this process to establish effective lines of communication. There appears to be little difficulty in this area. Similarly employers who operate across more than one site are usually able to establish lines of communication for consultation. The greater problem arises where employees work in remote workplaces and they may never see the employer.

5.2 Participation and Representation

Right of Entry

Q59-62. When the Victorian legislation was enacted in 2004 the rules for right of entry by trade unions for the purpose of investigating a suspected breach of OHS were carefully considered. The Victorian OHS Act s.87 provides the requirements for 'right of entry' by trade Unions where there is a specific suspected breach of the Act. These requirements appear to have operated successfully since the commencement of the Act and their implementation in a national model would be appropriate.

Issue Resolution

Q 63-66. Consultative provisions should be included to resolve issues as they arise. This requires the definition of 'issue' to be included in the legislation in addition to 'immediate risk' in order to provide a basis from which the resolution procedures can be activated.

The issue resolution procedures should be mentioned in part within the legislation, and the principles/objects for them should be included. The content/resolution procedure should be contained within regulations which can be updated as new developments in resolution arise.

Resolution procedures should contain a strong consultative approach with duty holders at the workplace. This enables resolution of issues to be understood, worked on and agreed upon at the workplace level.

Right to Cease Unsafe Work

Q67. The common law and OHS laws throughout Australia all recognise an employee's general right to refuse unsafe work. MGA supports the right of workers to refuse unsafe work for inclusion in the national legislation.

Q69. The Victorian OHS legislation provides under s.75(4) the payment of wages where an employee has exercised their right to cease work in accordance with the Act. MGA supports the inclusion of this provision in the national model.

5.3 Protection from Discrimination and Victimisation

Q71-78. MGA opposes any victimization of employees for raising issues relating to occupational health and safety issues or conducting health and safety functions or refusing to perform unsafe work. MGA supports the view that all employees who are victims of discrimination on such grounds should have a right of action. However, the Occupational Health and Safety Act is not the appropriate statute to seek a remedy. The Equal Opportunity Act in each State should be the statute where a remedy may be sought.

Chapter 6. Regulator Functions, Powers and Accountabilities

6.1 Role and Functions of Regulators

Q79/80/81. The national legislation should contain the authority to create provisions for the establishment, functions, powers and accountability of regulators. The provisions should require regulators to publish enforcement and prosecution policies to ensure that each State and Territory has information concerning their responsibilities. The Act or regulation should allow for the creation of interpretative documents on selected issues.

Q82. An OHS inspector should not have the power to prosecute, make regulations, codes or rulings. The role of the inspectorate is to conduct investigations and make recommendations as to how any unsatisfactory work processes are being conducted. If an employer fails to remedy any non compliance then a series of warnings, for example

improvement notices, should be issued and the matter remains unresolved then the matter should be referred to a another part of the Regulating authority to be dealt with accordingly

Q83. The advisory and enforcement functions of an OHS regulator do not need to be separated within the Act as these functions are viewed as part of a continuum of interventions.

Chapter 7. Compliance and Enforcement

7.2 Measures Exercised at the Workplace

Q93. Provisional improvement notices should have compliance recommendations this would enable the issue to be resolved without further disruption to the workplace.

Q97. Infringement notices are not supported by MGA.

7.3 Measures Exercised Beyond the Workplace

Q100. The model OHS Act should not provide injunctions to ensure compliance with the model OHS Act. There are alternative, already well established, compliance provisions which are as equally suitable to deal with issues that arise.

Enforceable Undertakings

Q101. Enforceable undertakings should be included within the model OHS Act as an alternative to prosecution for an offence against the Act. These undertakings would be suitable for all but the most serious of offences.

Q102. Enforceable undertakings should not result in an admission of fault or liability and should be made between the parties as such. If enforceable undertakings rely on an admission of fault or liability this could affect the duty holder's willingness to be bound by the undertaking, for fear of later prosecution.

Chapter 8 Prosecutions

8.1 Criminal or Civil liability

Q104-105 It is suggested that there should be provision for both types of liability in the model Act. Where there is a breach of a duty holder's duty of care it may be necessary to implement criminal proceedings but there should also be the capacity for administrative procedures to resolve other issues.

Q106-109 If a prosecution is initiated against an alleged offender then it should be commenced in the appropriate Court, and not in the Industrial Relations Commission. Although it is recognised that the judiciary in the Industrial Relations Commissions are more than able to hear cases relating to OHS matters it is more appropriate that the State criminal courts are used with a right of appeal to higher courts with provision for jury trials for indictable offences.

Q110-113 MGA does not support the right of trade unions to initiate proceedings for breaches of OHS legislation. The only persons or organizations who should have this

right should be either the Director of Public Prosecutions or the Regulator in each State or territory. MGA supports the view that the State should have exclusive right of prosecution in criminal matters. It would be appropriate for a model Act to have prosecution guidelines and there should be a national uniform compliance and enforcement policy.

Q116. It is appropriate to follow strict rules of evidence in OHS matters as it is in any other case. However, there may need to be some discretion in some cases and compliance with a code should be deemed to be compliance with the Act to the extent the code is relevant.

Q117-121 MGA supports the “reasonably practicable” responsibility of the duty holder as an appropriate standard for the model OHS Act. This will provide greater certainty and clarity to the duty holder by requiring that person to do all that is possible to reduce or eliminate risks in the workplace. Where the duty holder is required to what ever is “reasonably practicable” then the prosecution should bear the onus of proving that the duty holder failed to do what was reasonably practicable.

Q122-127 Officers of a corporation are those who have the ability to make, or participate in, decisions on behalf of a Company. They should be required to take all reasonable care to ensure the safety of workers in the organization.

8.7 Sentencing options

Q128-133 There should be a structured framework of penalties including sentencing options for serious crimes, fines, enforceable undertakings, publicity orders and community based orders. A national register of cases should be available.

Chapter 9 Other Issues

9.1 Regulation Making Powers

Q 142 A Regulation should only be developed if there is sufficient evidence that a problem exists and this requires the making of a regulation. It will depend on the circumstances of the particular case as to whether a regulation is necessary. The extent of the problem would need to be assessed and a decision made following the assessment. When making a new regulation the extent of any additional administrative burden needs to be taken into account.
