

**SUBMISSION FOR NATIONAL REVIEW INTO MODEL
OCCUPATIONAL HEALTH & SAFETY LAWS**

**DEVELOPMENT OF
A MODEL
OCCUPATIONAL HEALTH & SAFETY ACT**



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PREAMBLE

Australia holds occupational health and safety obligations under International Law and more specifically the International Labour Organisation's (ILO) Convention on Occupational Safety and Health. Part 4 Article 16 of the ILO Convention on Occupational Safety and Health requires employers to ensure, '*so far as reasonably practical*', that workplaces under their control are safe and without risk to health. It follows, that what is required of any Model Occupational Health and Safety Act across Australia is a clear threshold test for employers' obligations based on the ILO Convention and more specifically the concept of reasonable and practicable.

Across some Australian jurisdictions the ILO Convention is contradicted by adoption of a non-prescriptive risk management philosophy but at the same time assigning absolute undertakings to '*ensure*' safety. In order to achieve widespread acceptance any Model Occupational Health and Safety (OHS) Act within Australia must align with the ILO Convention and in particular the concept of reasonably practicable.

Together with employers' duties, those of employees require equal consideration in the framing of any Model Occupational Health and Safety Act. Presently legislative frameworks require employees to take reasonable care and to cooperate with employers, which provides little incentive for employees to watch out for their fellow workers, report unsafe conditions or take ownership of safety management at the shopfloor level. Yet, engagement of employees in the management of OHS is well recognised as a positive aspect of successful OHS management and workplace or organisational culture. The ILO Convention Part 4 Article 19(f) supports the concept of reporting unsafe conditions and stopping a work task if considered unsafe. Article 17 provides protection for employees that raise a breach of statutory requirements or a serious inadequacy. The adoption of both concepts would go some way to engaging employees or others in workplace reporting of OHS while at the same time protecting employees against prejudice.

Overall, to gain widespread acceptance across all Australian jurisdictions the proposed Model OHS Act must define an *umbrella* framework for OHS. That is, a framework which does not address '*industry specific*' legislative requirements but provides a supporting top-tier provisional framework for such legislation to be expressed within supporting regulations, codes or other instruments.



CHAPTER 1: LEGISLATIVE APPROACH

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

Answer:

Adoption of a formal performance-based standard approach to any Model OHS Act is strongly recommended. This approach enables both small and large employers and their employees to have the autonomy to arrive at an outcome that best serves the needs of that organisation or industry sector.

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

Answer:

Overall, to gain widespread acceptance across all jurisdictions the proposed Model OHS Act must define an *umbrella* framework for OHS. That is, a framework which does not address industry specific legislative requirements but rather provides a supporting top tier provisional framework for such legislation to be expressed by supporting regulations, codes or other industry specific information.

Q 3: What is an appropriate title for the model OHS Act?

Answer:

‘Occupational Health & Safety Act of Australia’

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

Answer:

Objectives should be specified. This approach should be consistent with the majority of Acts within the commonwealth.

The following are recommended:

1. to promote and secure the health, safety, and welfare of persons at work
2. to protect persons at work against hazards
3. to reduce, eliminate and control hazards and associated risks to which persons are exposed at work;
4. to assist in securing safe and hygienic work environments;
5. to involve employees and employers in issues affecting occupational health, safety and welfare;



6. to provide for the formulation of policies and for the coordination of the administration of laws governing occupational health and safety.

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

Answer:

Yes, the Act should clearly set out the principles. These should include the safety principles as set out in the 'Federal Safety Commissioners – Safety Principles & Guidance document' dated 2006, which can be rephrased in a generic sense to cover all industries not just construction.

Q6 Are there any other issues that should be considered in the legislative approach of the Model OHS Act?

Answer:

Part 4 Article 19(f) ILO Convention, which supports the concept of reporting unsafe conditions and stopping a task if considered unsafe; and Article 17, provides protection for employees that raise a breach of statutory requirements or a serious inadequacy. The adoption of both concepts would go some way to engaging employees or others in workplace reporting of OHS while protecting employees against prejudice.

Uniformity of the concept of safe design of buildings and structures across all jurisdictions as research profoundly implicates design as a significant factor in injury causation.



CHAPTER 2: SCOPE, APPLICATION DEFINITIONS

2.1 Industry Sectors

- 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 model OHS Act and industry specific legislation?**

Answer:

To ensure its application across all jurisdictions the Model OHS Act should define an ‘umbrella’ framework for OHS. That is, a framework which does not address industry specific legislation but rather provides a supporting top tier provisional framework for such legislation. Industry specific frameworks should be addressed in a consolidated regulation(s) national and industry specific codes or other supporting documents which underpin a Model OHS Act.

- 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)?**

Answer:

Industry specific framework should be addressed in regulations and supporting codes which are supporting by the overarching legislative framework of the Act. In this way the Act retains greater flexibility while regulations or codes continue to be created and reviewed.

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

Answer:

In the interests of standardisation of OHS legislation and supporting codes or other frameworks across all jurisdictions it is necessary to provide defined provisions within a model OHS framework. This can include the mandatory requirement for a minimum representation of all jurisdictions in a committee forum designed to develop ‘standardised’ legislative frameworks, codes or other supporting material. This is paramount for businesses operating within a national framework. The recent harmonisation initiative in Eastern States is a theoretical model from which lessons can be drawn in the development of such a consultative arrangement. Consideration should include mandatory membership of such a forum to include all jurisdictions, together with consideration of what constitutes a quorum and unanimous or majority decision making.



2.2 Workplaces and Non-Workplaces

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

Answer:

In order to address changing work routines the definition of a workplace as defined in any Model OHS Act should be tied to any place where work is to be performed by a worker or a person conducting a business or undertaking. In this way the Act will accommodate the increasing changes to what constitutes a work environment including: home based work; volunteer work; temporary workplaces, public places, vehicles or other.

The conduct of work should be included within the general duty of care for employees to provide some onus back on employees in their personal management of OHS.

Non-employees should be tied to the specific workplace.

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

Answer:

No. The current OHS Duty of Care legislative framework extends to visitors at a workplace. A Model OHS Act should continue to extend to the public to the extent that:

- such persons are visitors to a workplace;
- work activities which impact on surrounding public space, e.g. operation of an overhead crane; or excavation of a public footpath

The above would include the conduct of the undertaking as applied to the specific workplace and its immediate surroundings. To extend duties beyond the above concepts would impact on the ability of employers to adequately control work or other conditions that impact on the public and is more than adequately addressed in current civil liability. Similarly, trespassers need to be treated under the same civil liability fundamentals.

Duty of Care should also reference Dangerous Goods and other similar legislation so a link exists.



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?

Answer:

The scope of a Model OHS Act should be sufficiently broad to encompass evolving work arrangements. Assuming a *'workplace'* is appropriately defined, working relationships such as: contracting; subcontracting; apprentices; volunteer labour, labour hire; part/full time, home based can be accounted for by appropriate definition of the employer's Duty of Care to employees and to contractors and other persons in respect of risks arising from conduct of the employer's undertaking.

However, it must be highlighted that the test of *'reasonably practical'* in regard to new and evolving types of work arrangements, for employers must be for those workplaces *'under their control'*. For example, the capacity of an employer to *'control'* a home-based work environment may be very limited.

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?

Answer:

A Model OHS Act would maintain a requirement to identify hazards and assess risks in any workplace. The Act needs to remain as a broad top tier approach to OHS rather than identifying specific hazards – this detail should be applied to regulations or specific codes of practice to achieve flexibility. Emerging hazards are difficult to quantify or identify and usually emerge as a result of research or an incident. The Act needs to be flexible to accommodate the concept of new and emerging hazards. Ultimately the test of any action arising out of a breach is the *'foreseeability'* of the hazard.



2.4 Definitions

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

The following terms and their definitions are critical to achieving a national consistency:

Answer:

Assuming that the Model OHS Act is an umbrella top tier approach to the management of OHS the following definitions would need to be standardised nationally depending on the scope of the Act.

Competent person: For any task means a person who has acquired through training, qualification or experience, or a combination of them, the knowledge and skills to carry out that task.

Designer: Those whose profession, trade or business involves:

- (a) preparation of designs for buildings or structures, including variations to a plan or changes to a building or structure; or
- (b) arranging for people under their control to prepare designs for buildings or structures.

Hazard: Something, which has the potential to cause injury or illness to people.

Incident: Any occurrence, which results in actual or has the potential to cause injury or ill health or damage to the environment.

Non Disturbance Occurrence (see also Notifiable Incident – and lack of consistency nationally in what needs to be reported):

- (a) an incident that has resulted in a person being killed, or
- (b) an injury to a person that results in the amputation of a limb,
- (c) the placing of a person on a life support system,
- (d) any incident listed below that presents an immediate threat to life:
 - (i) the loss of consciousness of a person caused by impact of physical force, exposure to hazardous substances, electric shock or lack of oxygen,
 - (ii) major damage to any plant, equipment, building or structure,
 - (iii) an uncontrolled explosion or fire,
 - (iv) an uncontrolled escape of gas, dangerous goods or steam,
 - (v) imminent risk of explosion or fire,
 - (vi) imminent risk of an escape of gas, dangerous goods or steam,



- (vii) a spill or incident resulting in exposure or potential exposure of a person to a notifiable or prohibited carcinogenic substance,
- (viii) entrapment of a person in a confined space,
- (ix) collapse of an excavation,
- (x) entrapment of a person in machinery,
- (xi) serious burns to a person.

Notifiable Incident: exposure of a person in the immediate vicinity of plant & equipment to an immediate risk to the person's health and safety through:

- (a) the collapse, overturning, failure or malfunction of, or damage to, any item of plant.
- (b) an implosion, explosion or fire.

A person who is in charge of prescribed equipment at an equipment site must notify the Authority immediately after the person becomes aware of an incident involving the equipment which results in—

- (a) the death of any person; or
- (b) a person requiring medical treatment within 48 hours of exposure to a substance; or
- (c) a person requiring immediate treatment as an in-patient in a hospital; or
- (d) a person requiring immediate medical treatment for: the amputation of any part of his or her body; or a serious head injury; or a serious eye injury; or the separation of his or her skin from underlying tissue (such as degloving [see definition] or scalping); or electric shock; or a spinal injury; or the loss of a bodily function; or serious lacerations.

Plant: Includes any machinery, equipment or appliance.

Risk: What can happen or the potential event(s), which may occur as a result of a workplace hazard.

Workplace: any place persons are required to be in the course of undertaking their work.

Work Activity: any work task undertaken for or on behalf of a business enterprise or undertaking whether for profit or not.

Other standardised definitions required within Regulations can be adopted from the National Code of Practice for Construction Work. Other definitions should include:

Building & construction work:

- (a) the construction, alteration, extension, restoration, maintenance, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent;



- (b) the construction, alteration, extension, restoration, repair, demolition or dismantling of railways (not including rolling stock) or docks;
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:
 - (i) site clearance, earth-moving, excavation, tunnelling and boring;
 - (ii) the laying of foundations;
 - (iii) the erection, maintenance or dismantling of scaffolding;
 - (iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site;
 - (v) site restoration, landscaping and the provision of roadways and other access works.

Principal Contractor: the person or entity authorised on behalf of the Owner or Client as the Controller of a defined area and the construction works undertaken within that area to the extent necessary to discharge those responsibilities defined under relevant occupational health and safety legislation.

The NSW & VIC legislation requires appointment of the Principal Contractor for construction work (which can include maintenance depending on which definition is considered) by the Owner or responsibility reverts to the 'Owner'. **This frequently creates difficulties in particular in leasing where tenants may undertake such works within a tenancy without the knowledge of the Owner, e.g. shopping centre. Alternatively the QLD model requires appointment of the Principal Contractor by those commissioning the construction work – this overcomes some of the issues surrounding leases and tenants and is the recommended approach.**

When a principal contractor must be appointed for construction work – this currently varies from QLD - \$80,000; NSW - \$250,000; VIC - \$250,000 or high risk construction work; and WA - \$0. This requires standardisation across jurisdictions for business consistency.

Q15 Are there any other issues relating to the scope, applications and definitions of a Model OHS Act?

Answer:

In some jurisdictions where a principal contractor is not appointed for construction work responsibility for OHS reverts to the Owner. A standard definition of Owner is required under the Model OHS Act. Furthermore, this definition should include for a tenant that may contract construction work within its leased area without the knowledge of the Owner.



CHAPTER 3: DUTIES OF CARE – WHO OWES THEM & TO WHOM?

Q16 Should the OHS Act include a ‘control’ test or definition? Is so why and what should it be?

Answer:

The Model OHS Act should explicitly define workplace control so that responsibility bearers under OHS legislation are clear in determining their responsibility. The notion of a practical ‘control test’ would benefit individuals in determining their responsibility and a series of examples would benefit understanding. By way of describing such a test a controller is typically defined as the: ‘test of the capacity of a person or entity to control or influence work or workplace conditions’. The test has been typically a matter for determination by a Court after a workplace incident has occurred signalling the necessity for a control test or definition to assist in crystallising such responsibilities.

Control is integral in establishing corporate liability for a number of other civil and criminal offences. Evolving work arrangements should be highlighted in any control test. For example the ability of an employer to control a home-based work environment ‘so far as reasonably practicable’ may be very limited.

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?

Answer:

Duty holders should be defined as those persons or entities that have the capacity to directly control or influence work or a workplace. Defences may include the extent of the control within the defined standards and knowledge in place at the time; and the capacity of the individual or entity to influence control.

In determining the nature and extent of control requirements the Model OHS Act should consider the requirement to provide defined roles and responsibilities down to supervisor level and a specific organisational responsibility chart down to supervisory level for all workplaces.

Q18 Should the model OHS Act include a control test or definition? If so why and what should it be?

Answer

Yes a control test or definition should be included to aid in clarifying the extent to which control may apply to Duty of Care responsibilities. It should include definitions which clarify what is regarded as control over a workplace or place at which work is conducted on behalf of a business or its undertaking. Examples where control may not extend



need to be conceptualised,
e.g. travel to/from work on public transport or flying to and from work locations or home-based work.

It is paramount that the 'sphere' of control is defined so there is some certainty for employers and employees alike.

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

Answer:

Situations commonly arise where responsibilities are shared and could be dealt with by the following –

If more than one person is under a duty or obligation imposed, each person must –

- (a) clearly communicate roles and responsibilities of different parties or entities;
- (b) satisfy the duty or obligation imposed on the person without regard to the fact that another person may also be responsible for satisfying that duty or obligation; and
- (c) co-operate with any other person who is performing that obligation.
- (d) consultation between parties with obligations, which interface or overlap.

Q 20 Is primary reliance on employment relationships a valid basis for framing safety obligations?

Answer:

No. Unless the definition of 'employment' is broadened to include those contracted or engaged in work in connection with a business activity carried on by an employer. This would include volunteer or contracted work where workers are deemed to be employed by the employer for the purpose of that business activity

Q 21 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?

Answer:

See Answer to Q20.

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



Answer:

Yes. Duty of Care applies to those contracted or engaged in work in connection with a business activity carried on by an employer. This would include volunteer or contracted work where workers are taken to be employed by the employer for the purpose of that business activity.

Similarly, there needs to be consideration in relation to visitors and persons affected by activities at a workplace

Q23 Specification of employer’s duty of care: How and to what extent should the model OHS Act specify an employer’s duty of care?

Answer:

Part 4 Article 16 of the International Labour Organisation’s (ILO) Convention on Occupational Safety and Health requires employers to ensure, ‘*so far as reasonably practical*’, that workplaces ‘*under their control*’ are safe and without risk to health. In Australia, the Duty of Care assigned to employers in some cases contradicts this Convention by adopting on the one hand a non-prescriptive risk management philosophy while on the other hand assigning absolute undertakings to *ensure* safety. In order to achieve widespread acceptance it is essential that the concept of a Model Occupational Health and Safety (OHS) Act within the Australian context aligns its approach with the ILO Convention.

A test for reasonable practical should also include (Refer WA Act)

- the likelihood of the risk concerned eventuating;
- the degree of harm that would result if the risk eventuated;
- what was known or ought reasonably to be known, about the risk and any ways of eliminating or reducing the risk;
- the availability and suitability of ways to eliminate or reduce the risk; and
- the cost of eliminating or reducing the risk.

Q24 Extent of duties: To whom should these duties be owed?

Answer:

Together with employers’ duties, those of employees require equal consideration in the framing of any Model Occupational Health and Safety Act. Presently legislative frameworks require employees to take reasonable care and to cooperate with employers, which provides little incentive for employees to watch out for their fellow workers, report unsafe conditions or take ownership of safety management at the shopfloor level. Yet, engagement of employees in the management of OHS is well recognised as a positive aspect of successful OHS management. The ILO Convention Part 4 Article 19(f) supports the



concept of reporting unsafe conditions and stopping a task if considered unsafe; and Article 17 provides protection for employees that raise a breach of statutory requirements or a serious inadequacy. The adoption of both concepts would go some way to engaging employees or others in workplace reporting of OHS while at the same time protecting employees against prejudice.

The extent of any defined duties needs to take into the account the purpose of the legislation and to what extent those at the workplace can truly control those parties impacting on the workplace.

The extent of the duties should be confined to persons employed in, engaged in and affected by work. This would include employers, persons performing gratuitous work, persons engaged at the workplace not the employees or subcontractors of the employer, principals, controllers of workplaces (with respect to visitors), contractors, self-employed persons, designers, manufacturers, importers, suppliers and installers, service providers, owners and employees. There is some interest in ensuring that the full supply chain participants contribute positively to the workplace and as such discharge their duties accordingly.

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

Answer:

Employees' duties should encompass the following –

- Take reasonable care of their own and other persons health and safety that could be affected by an act or omission;
- Comply with any direction to the employer;
- Use safety equipment or clothing provided
- Not endanger themselves or others by presenting in an unfit state due to the effects of drugs or alcohol
- Not intentionally or recklessly interfere with, misuse or damage anything provided in the interest of health or safety
- Not intentionally or recklessly engage in any form of activity that causes or could cause damage to plant or equipment or put at risk the health or safety of any other person;
- reporting unsafe conditions and stop a task if considered unsafe



Q26 Visitors, Public etc: 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?

Answer:

Visitors to the workplace are under the control of the workplace manager and as such should follow normal visitor protocols i.e. sign in / out, complete visitors induction or other and comply with any health and safety requirements or instructions

People in the vicinity of the workplace, for say recreation or leisure, are to be protected from injuries or risks to health and safety from activities in the workplace for example, blasting or demolition or excavation.

The concept of trespass should still apply under civil law and not be included in the Model OHS Act.

Q27 Appointed Persons and Officers: Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Answer:

Yes. This concept should be supported if there is a demonstrated value to the workplace and there is evidence that their presence has resulted in a reduction in workplace injuries. The concept of a Workplace Occupational Health and Safety Officer appointment where 30 or more workers exist at a workplace is strongly recommended. Other approaches such as those where the majority elect to have an OHS Committee or representative are less prescriptive but have been demonstrated as far less effective hence the recommendation to adopt the mandatory QLD model for a WHSO. The definition of a workplace would need to be clearly defined to accommodate this requirement, e.g. how to determine the requirement in a shopping centre with multiple employers and workplaces.

The appointment of a principal contractor requires harmonisation but should be relegated to a regulation not the Act. The NSW & VIC legislation requires appointment of the Principal Contractor for construction work (which can include maintenance depending on which definition is considered) by the Owner or responsibility reverts to the 'Owner'. This frequently creates difficulties in particular in leasing where tenants may undertake such works within a tenancy without the knowledge of the Owner, e.g. shopping centre or the Owner of land can be responsible for land development (construction) works over which is exercises no control.



Alternatively the QLD model requires appointment of the Principal Contractor by those commissioning the construction work – this overcomes some of the issues surrounding leases and tenants and is the recommended approach. Where a principal contractor is not appointed responsibility should not revert to the Owner but rather to the entity which commissions the construction work under the test of the Controller of the workplace.

When a principal contractor must be appointed for construction work – this currently varies from QLD - \$80,000; NSW - \$250,000; VIC - \$250,000 or high risk construction work; and WA - \$0. This requires standardisation across jurisdictions for business consistency both the dollar value and the definition of high risk construction work.

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

Answer:

Liabilities should be limited to their level of knowledge, skills, competency and most importantly their level of control over activities at a workplace.

Importantly, appointed OHS Representatives should not be liable for the same duty breaches as employers. The employer should remain determinable based on the 'control' test outlined in Chapter 3. There may be occasions when these roles may be filled by the same person, however it is unlikely an appointed OHS Representative will exercise 'control' over the workplace.

Inaction by appointed officers or any others at the workplace to address identified health and safety issues should be clearly understood and penalties considered but only after the test of control is applied.

Q29 Duty Holder vs. Appointed Persons: What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

Answer:

The appointed person is the agent of the employer and assists the Employer in discharging its duties. If the appointed person is to be effective then they need to have sufficient authority to perform their duties. Appointed persons must have defences available to them if they perform as far as reasonably practicable their duties and use all due diligence to prevent a failure in performing their duties.

Nevertheless, nothing the appointed does or doesn't do should remove the responsibility from the duty holder.



Q30 Duties for officers of body corporate: Should the model OHS Act include positive duties for officers of bodies corporate?

Answer:

This review of the OHS instruments affords an opportunity for the engagement of body corporate officers in health and safety issues at the workplace not simply governance issues. Consideration should be given to specific duties for body corporates as applied in the NSW legislation. The Body Corporate should be specifically identified as a Controller with duties and should be required to appoint a consultant or train a member to ensure the Body Corporate is aware of its responsibilities.

For a Body Corporate that is incorporated responsibilities should be included for officers.

Q31 Duties of persons in control: 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?

Answer:

Generally the provisions in most jurisdictions are similar and clearly express who owes a duty as controller of the workplace in the case of leased, owned or a provided workspace. This duty is imposed on the controller to maintain a safe workplace and equally the employer is to ensure that workplace is also safe.

Consideration is required where an Owner may exercise no control whatsoever over a tenanted space yet works are undertaken within that space by the tenant and its request. Unless the works relate to base building the Owner is unable to exercise any control over the works.

Q32 Specification of duties to controllers of temporary and permanent work areas: 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?

Answer:

Yes. If there is to be a complete coverage of all workplaces for health and safety purposes, then all of the workplace participants that impact on the workplace need to have specified duties so that there is a clear path of accountability and responsibility. This means controllers will be positively served with some clear expectations. This can be related back to the definition of a controller where clear responsibility lies over those undertaking work within an area (temporary or not) over which an entity or person exercises control of that work.



Q33 Obligations for various activities: 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?

Answer:

Yes. Research indicates design is implicated as a key cause of workplace injury. Therefore any Model OHS Act should include responsibilities for designers of plant and equipment; buildings or structures or products and materials. Currently inconsistency exists across all jurisdictions in this key area.

In respect of design concept, detailed and end use need to be included. The inclusion of disposal or demolition/decommissioning is problematic due to the extended lifecycle of buildings or structures.

Q34 Cross jurisdiction issues: 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?

Answer:

Yes. A national consistency across all jurisdictions with respect to safe design would enable cross jurisdictional issues (within the Australian context) to be resolved. The capacity to resolve imported or international design deficiencies, which impact on safety, can be dealt with at a supplier or distributor level.

Q35 Definition of supply: 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)?

Answer:

Supply means the provision of an item, including plant, equipment, products or materials by way of sale, lease or hire, whether as a principal or agent.

Supply should occur every time an item is despatched to a workplace and as such established safeguards should be in place at all times.



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

Answer:

If any other duties are to be included in the proposed Act then they should be consistent across all jurisdictions to achieve a common approach nationwide.



CHAPTER 4 - REASONABLY PRACTICABLE & RISK

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

Answer:

The general duty should be to ensure safety so far as *reasonably practicable* those workplaces within the employer’s control are safe and without risk to health.

This is aligned with the obligations set out under Article 16 of the ILO Convention. The Convention recommends governments apply a standard consistent with reasonably practicable when determining the duty owed. This is applicable both at a national policy level and at the level of the undertaking.

The legislation should contain a test for ‘reasonably practicable’. Currently, case law is used to establish this concept. Each case turns on its particular facts and the courts do not consistently apply the standard.

The Act should be similar to at least Western Australia and Victoria in providing guidance on what is reasonably practicable.

Q38 If not, what alternative standard should be included?

Answer:

No answer as Q37 is in the affirmative.

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

Answer:

The standard should be similar to the guideline issued by the National Transport Commission “Meaning of So Far As Is Reasonably Practicable (SFAIRP) – Consultation Draft March 2007, and Victorian WorkSafe, ‘How WorkSafe applies the law in relation to reasonably Practicable – November 2007’.

Q40 Should control be an element of the standard? (see chapter 3)

Answer:

Yes it should. It is agreed that the recommendation made by Chris Maxwell QC, March 2004 be adopted (excerpts reprinted below).

“As a matter of principle the legislation should not have the effect of imposing obligations on



employers concerning circumstances over which they have no control, such as when employees are normally working neither at their home base nor at other premises or sites within the control of the employer” – Robens Committee.

Part 4 Article 16 of the International Labour Organisation’s (ILO) Convention on Occupational Safety and Health requires employers to ensure, ‘so far as reasonably practical’, that workplaces ‘under their control’ are safe and without risk to health. Clearly, for the legislation to be effectively implemented control and a test of the same must be included.

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?

Answer:

No. A test including examples is paramount but this can be included in guidance information to maintain flexibility over emerging work arrangements.

Q42 Should ‘hazard’ and “risk” be defined in the model OHS ACT?

Answer:

It is recognised that for the purposes of consistency, both terms should be defined, even if broadly, to ensure that the processes involved in risk management are understood when determining if there has been a breach of the duty.

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?

Answer:

Yes. The current guideline issued by the National Transport Commission “Meaning of So Far As Is Reasonably Practicable (SFAIRP) – Consultation Draft March 2007, and Victorian WorkSafe, “How WorkSafe applies the law in relation to reasonably Practicable – November 2007 both contain references to risk management principles and process.

Ultimately the test of reasonably practicable will hinge on the foreseeability of the hazard and its related risk. Therefore, the promotion of a risk management approach is highly desired.



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

Answer:

No. It would not be sensible for a failure to comply with risk management principles and processes to be a criminal offence. Risk management requires individual circumstances to be taken into account in assessing, managing and controlling risks. It is a dynamic process that should not be impeded by being enshrined in legislation.



CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

5.1 DUTY TO CONSULT

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

Answer:

- Need for cooperation between employer and employee to achieve safety outcomes
- Need for cooperation between controller and workforce, e.g. contractors on a construction site, to achieve safety outcomes
- Method of consultation should be based on those agreed between employer and employee
- Method of agreed consultative arrangements to be documented
- Process for dealing with disputes between parties in relation to consultation need to be clearly outlined
- Allowance for “other agreed arrangements” to be determined between employer and employees with no interference from other parties
- Act should provide reference to guiding principles for consultation with employees and other parties
- Training requirements to assist with effective consultation. To include training for HSC/HSR and ‘other agreed arrangements’

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

Answer:

- Consultation should be encouraged between all stakeholders in a given workplace, e.g. principal contractor and contractors. Therefore, the Act should provide the flexibility for the employer and employees to agree on the involvement of other parties in the consultation process.

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

Answer:

- Yes. Consultation arrangements must exist to accommodate consultation between employees and all levels of management; in particular the level at which workplace control is exercised.



- Also, in relation to employees engaged by subcontractors to Principal Contractors there needs to be a recognition of the need for subcontractor employers to consult with their workers

Q48 How should consultation be provided for:

Answer:

- 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.
- Consultation should be provided in accordance with that agreed between the employer and employees consistent with the recommendations in supporting guidance information (eg Code of Practice).
 - The effectiveness of workplace consultation arrangements should be assessable under the model Act.
 - While it is too difficult to include specific requirements on how to determine the effectiveness of a consultation arrangement, the model Act should include an obligation to review arrangements on a regular basis.
 - Details on what constitutes an effective consultation arrangement could be provided in the regulations and include indicators such as “hazard notification rate”, subsequent correction rate and average correction time.

5.2 PARTICIPATION AND REPRESENTATION

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

Answer:

- Yes. HSRs should be limited to employees at the workplace and be elected by the majority of employees. The QLD model which requires a workplace health and safety officer where 30 or more employees exist in a workplace is a recommended model for consideration nationally provided clarity is provided around what constitutes a workplace, e.g. shopping centre with multiple employers and workplaces.



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?

Answer:

The model Act should make reference to the importance of employer/employee cooperation in the management of safety. This is achievable through employer obligations, but also through employee obligations and rights.

- Effective employee participation is therefore crucial. What is difficult will be the assessment of the “effectiveness” of employee consultation. Details on what constitutes an effective consultation arrangement could be provided in the regulations and include indicators such as “hazard notification rate”, subsequent correction rate and average correction time.

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

Answer:

- The Act should require the establishment of HSC or HSR at a workplace consisting of 30 or more workers. Other models where the majority of employees agree are not effective.

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

Answer:

- All “workers” affected should be entitled to vote where consultation requires an election or motion. The definition of a worker must therefore be broad enough to include all affected personnel such as contractors.

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

Answer:

- Powers limited to ‘recommendations’ to employer. Disputes that cannot be resolved directed to the Authority.

Q54 What should the structure and functions of HSCs be?

Answer:

- Employee representatives should outnumber employer representatives.
- Employer representatives must have ‘control’ of the workplace i.e. the ability to rectify action items issued by the Committee.



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

Answer:

- HSC / HSR / WHSO training as per current requirements under OHS legislation.
- Training needs to address 'safety culture, time management, investigation techniques, more emphasis on communication and general motivation/leadership skills development.

Q56 Are there alternative mechanisms that should be considered?

Answer:

- Other agreed arrangements (need to provide guidance on the type of processes that would fall under this category).

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

Answer:

- Requirements should be stipulated in the Act to ensure consistency across jurisdictions.

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

Answer:

- Yes. Contractors, volunteer workers and others. Make the obligations apply to all "workers", regardless of their status.
- Representation must take account of language difficulties.
- Communication methods also need to take account of literacy levels at the workplace

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

Answer:

- Yes but only for WorkCover officials.

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

Answer:

- It is imperative that these persons are qualified to inspect, observe or participate in safety related advice or management activities.



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

Answer:

- For the Regulatory Authority the Right of Entry should be exercisable at any workplace without prior notice. Right of entry by Union Officials should only be exercisable by an Official with a valid permit; where 24 hours notice is formally given; and a written request to investigate by an employee who is a member of the Permit Holders organisation can be demonstrated.

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

Answer:

- Current OHS legislation deals adequately with these powers.

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

Answer:

- Provision for employers to have a documented procedure, agreed between the employer and employees (through the process of consultation) for complaint resolution including a clear chain of command and escalation procedures where issues cannot be resolved
- Clarify provision for protection for workers who make a valid complaint
- A requirement for Employers to consult with employees on their right to stop work at any time due to unsafe practices/ conditions
- A requirement for Employers to document issues, resolve them in a timely manner and report them back to the workforce in a communicated forum.
- Provision to ensure that complaint resolution is a constructive and consultative process
- Encourage internal complaint resolution rather than regulatory
- This would be greatly aided by a the 'duty of care' section of the act making further provision to encourage that all persons are responsible for safety and should be allowed as much authority to stop an unsafe job.

In the *Protection of the Environment Act*, greater emphasis is placed on the role of the individual to be responsible, to report and to be prosecuted. The OHS Act needs to consider the provision of a similar approach to complaint resolution and individual responsibility to *duty of care* to encourage open and transparent reporting of health and safety



issues increase the success of complaint resolution. Part 4 Article 19(f) of the ILO Convention supports the concept of reporting unsafe conditions and stopping a task if considered unsafe; and Article 17 provides protection for employees that raise a breach of statutory requirements or a serious inadequacy. The adoption of both concepts would go some way to engaging employees or others in workplace reporting of OHS while at the same time protecting employees against prejudice.

Q64 When should issue resolution procedures be activated?

Answer:

- When an employer or employee is of the view that there is a risk to health and safety which cannot be resolved by the HSC/HSR process and/or discussion with the employer

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

Answer:

- Unless there is an appropriate directive in the Act, industry will be less empowered to make positive and effective changes to complaint and issue resolution.
- The Act should specify the requirements and the regulations outline how these requirements will be achieved

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

Answer:

- Include a provision to ensure the complaints/issue resolution procedure is agreed with the workforce through consultation and documented by the employer or controller at the workplace.
- Continuation of the function and protection of the Safety Committee as a tool for issue resolution and consultation and decision making

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?

Answer:

Yes. Providing that this requirement is clearly communicated to employees, along with their obligation to report unsafe situations in a



timely fashion, to reduce lost productivity and to allow a quick response from the employer to rectify and make safe.

However, the Act should distinguish between “stop work” and “stop the task” to avoid stopping entire workplaces due to isolated risks. Part 4 Article 19(f) of the ILO Convention supports the concept of reporting unsafe conditions and stopping a task if considered unsafe and its inclusion in the Model OHS Act is strongly supported.

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?

Answer:

- Yes. An analytical response from a HSR would quickly pinpoint the problem, possible outcomes if not rectified, how the problem could be reduced/eliminated, possible training or resources required to rectify. Restrictions should include the right to stop a work task not an entire workplace where the risk identified is isolated to a particular task or work area.

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?

Answer:

- Only in situations where the employer is unable to redeploy the workers to other parts of the workplace that are safe

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

Answer:

- Yes

5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION

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

Answer:

Consistent with the ILO Convention, employees undertaking activities in relation to safety should be protected from



discrimination/victimisation where they show proactive or obligatory involvement in OHS matters.

- Provision should be made for those protections specified in the NSW OHS Act part 2 Div 3 ;23
 - (a) makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health, or
 - (b) is a member of an OHS committee or an OHS rep, or
 - (c) Exercises any functions conferred on the employee under Div 2
- Right of employees to refuse to undertake work they consider unhealthy or unsafe should be adopted as per the ILO Convention.

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

Answer:

- Every body should be able to bring an action including reps, employees or other workers at a workplace.

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

Answer:

- Both would be available but only one chosen

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?

Answer:

- Authorities such as WorkCover with the criminal standard of beyond reasonable doubt.

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

Answer:

- Yes - victims may intend seeking employment with another company and find their history has travelled with them and is a barrier to gaining employment, the protection must be ongoing.



Q76 What remedies should be available to the victims?

Answer:

- Pursue a civil case independently if satisfaction has not been achieved via the authorities

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?

Answer:

- Yes

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

Answer:

- Current legislative frameworks do not adequately deal with the need for employees to take an active role in reporting safety issues, created by others or through unintentional 'acts or omissions' by the employer. The ILO Convention Part 4 Article 19(f) supports the concept of reporting unsafe conditions and stopping a task if considered unsafe; and Article 17 provides protection for employees that raise a breach of statutory requirements or a serious inadequacy.

END