National OHS Review

July 2008

Submission by the Australian Industry Group

ENGINEERING EMPLOYERS ASSOCIATION SOUTH AUSTRALIA

AUSTRALIAN INDUSTRY GROUP

NATIONAL OHS REVIEW

SUBMISSION IN RESPONSE TO ISSUES PAPER

JULY 2008

NATIONAL OHS REVIEW ISSUES PAPER
SUBMISSION BY Ai GROUP and EEASA

> **"We are one country. There should be one set of laws covering the whole country. Foreign owned parent companies find it mind boggling that we have so many laws, bureaucrats and governments."**
>
> Ai Group Member Company

INTRODUCTION

We welcome the opportunity to make a submission to this Review and thank the Review panel for extending the invitation to do so. This submission is made on behalf of the Australian Industry Group (Ai Group) and the Engineering Employers Association of South Australia (EEASA). When we refer to Ai Group herein, it includes EEASA.

In preparing this submission, Ai Group has sought to achieve two simultaneous objectives:

- To suggest a framework that will result in better occupational health and safety outcomes in Australia than currently; and
- To address concerns of our members about how elements of the current law work.

We believe the two objectives are valid in the context of a review about such an important piece of operational legislation that affects so many people. In order to reconcile the two objectives, we have sought to apply the first principle as the primary objective and to ask, when concerns about current law and practice are raised, what solution would address the problem with an increase in safety outcomes or, at least, no decrease.

Members have discussed and accepted this approach as a threshold issue in all individual and collective discussions on our approach to the review, and to this submission. As a result there are some issues that cause members frustration and anxiety, but we cannot think of an alternative solution that meet the safety outcomes test, and so in relation to those issues we accept that the law must be as it is.

The principal issue in this regard is the fundamental conflict between the expression of general duties and the desire we all have for certainty. No matter how "reasonably" general duties are expressed, in the absence of a judicial determination after an incident, there is no regulation, code, authority or precedent that can assure a duty holder, at any given time, that they have met their duty. This is particularly so where the duties of several duty holders overlap.

However we accept that uncertainty is inevitable if we are to adopt the continuous improvement model of OHS regulation, working to improve safety, rather than just maintain current levels. Our members understand the need for the law to express duties in general enough terms so that they can be applied to a myriad of circumstances that could not be anticipated effectively by more detailed regulatory framework. They accept that the law quite deliberately challenges them to anticipate things that may go wrong, even if they have never gone wrong before, and even if they could only go wrong if an individual decided to do something unexpected or plainly at odds with common sense.

The law requires a reliance on systems to get most things happening automatically in a complex workplace; and to demonstrate compliant thinking.

However it also simultaneously requires constant testing and questioning of those same systems to make sure they are adaptive to new or unexpected circumstances or behaviours.

This level of abstract thinking can be very difficult for all those involved in the workplace, and stressful for those who have responsibilities.

> *"You never know you have broken them as it is hard to understand what they are in the first place."*

It is also very dangerous, for those who make the law, to expect that this abstract thinking and aggressively proactive approach will happen either spontaneously or simply because it is legally required. It requires constant support for duty holders to assist them to understand the nature of their duties, the options they have to progress towards compliance, the experience of others facing similar risks, and the criteria upon which they might be judged to have failed to meet their obligations.

This means the regulators also have a difficult job. However, if the legislative framework is to work, it just as vital for regulators to seek to execute their role properly, and with all due diligence, as it is for duty holders to do so.

> *"Often information is not clear and is too wordy. I need to know, as a small business, that I am up to date with my information - this is the most difficult aspect - I do not have the $'s and the time to attend seminars etc."*

Therefore, our strongest submission in this paper is that as much effort, thought, innovation and energy as possible be put into the role of the regulators in helping workplace parties understand and meet their responsibilities under the law, however it is written. We submit that the Robens model relies on this.

How the law is written matters, but how it is enforced matters as much.

Ai Group Identification

Australian Industry Group (Ai Group) is a national industry organisation representing 10,000 employers; the Engineering Employers Association of South Australia (EEASA), an affiliate of Ai Group, represents 450 employers in South Australia. Our members operate in manufacturing, construction, automotive, telecommunications, IT & call centres, transport, labour hire and related sectors. Our members operate businesses of all sizes throughout Australia and represent a broad and expanding range of sectors. We provide policy representation as well as comprehensive advice and assistance to help members run their businesses more effectively and to become more competitive on a domestic and international level, in areas of employee relations, OHS and workers compensation, vocational education and training, environment and energy management, trade and export and general business and economic conditions.

We are represented in ongoing tripartite consultative forums with state governments and occupational health and safety regulators in Queensland, New South Wales, Victoria and South Australia.

Consultation with Members

In June/July 2008, over 200 Ai Group members attended 10 consultation sessions in Victoria, NSW and Queensland on the National Review of OHS Laws. The attendees included owners, senior managers, OHS and HR managers from companies of all sizes including manufacturing, construction, labour hire and transport/logistics companies.

We have also conducted a number of individual consultations with CEOs of a range of companies who operate in more than one state.

Our state Councils have discussed the framework for this submission. Those Councils consist of 60 CEOs, Chief Operating officers or Directors of a range of small, medium and large companies, public and private, local, national and multinational. They operate in general manufacturing, engineering, food, defence, aerospace, recycling, steel, rail, civil, building and engineering construction contracting and specialist subcontracting, labour hire, ITC and other sectors.

The following is a summary of the principal issues that emerged in the consultations. Quotations have been taken from the results of our current on-line survey.

- A national model law applying in all states would be a significant improvement on the current legal regime, but only if it is accompanied by enforcement protocols that ensure consistent application of the law on the ground. Different standards of responsibility and safety regulations in different states make it difficult to manage safety in an holistic way.

- The most effective enforcement regime includes a significant emphasis on education, guidance and knowledge as well as graduated penalties and prosecutions. There is a strong desire for more guidance on what is good safety. There is support for safety awareness to be an integral part of school and vocational education.

> *"One OHS law for all states would significantly lessen the administrative burden on OHS staff. It would also help company policy development and implementation and assist in making compliance much easier and ensure higher compliance levels."*
>
> *"Just one set of regulations please."*

"Need to standardise across States, having a regulatory body to develop and implement OHS law, separate body to enforce (inspectors) with appropriate training to ensure consistent process for advice and infringement."

"Unified system please."

- The law should limit, and should be seen to limit, employers' general duty of care to what is reasonably practicable in relation to matters over which they have control. In NSW the absence of this limitation in the primary employer duty is a major frustration to employers who feel (regardless of the available defence) they are judged unfairly against a very high standard in an environment focused on blame apportionment rather than support. This feeling exists for prosecutions and for interactions with the regulator outside the prosecution process.

- There are deep concerns about the reverse onus of proof that operates in New South Wales and Queensland for breaches by employer corporations and in particular, the separate reverse onus that applies in the prosecution of senior company officers.

"Resist any attempt to harmonise national OHS laws using the NSW model – it is clearly biased against employers."

- Members strongly perceive that there is no effective onus on employees to take reasonable care for their own safety, or if there is, it is not enforced. They believe many employees think there are no consequences for stupid acts. This absence makes it difficult to achieve the highest standards of safety. Companies contrast, and are perplexed by, this perceived 'hands off" approach in OHS with the strong focus on individual driver responsibility in publicity as part of road safety campaigns.

"Empower the employees rather than seeking to remove their responsibility to think for themselves."

- There are a range of views on the sanctions that employees should face if they act irresponsibly in regard to their own safety. These range from purely employment contract sanctions, like discipline and dismissal, through to formal admonishment or fines from the regulator.

- Companies often don't know how their responsibilities as an employer or as a controller of a workplace fit in with those of other companies whose employees are on the same site. There is an awareness of overlapping responsibilities but no certainty as to how much you can rely on another company's expertise if you have contracted them to do work in circumstances ranging from merely supplying you with labour (labour hire) through to doing very specialist work with their own employees on your premises (e.g. electrical maintenance)

- Therefore there is cautious support for greater clarity where overlapping duties are held by multiple parties in the one workplace (e.g. construction sites and labour hire) even if that means more specific duties being assigned to principal contractors or companies who use labour hire (without necessarily reducing the responsibility of others).

- Management generally, but supervisors in particular, feel the law requires them to be an expert in all manner of fields and be supervising all employees at all times.

- Companies feel that the law equips a regulator with the ability to base any alleged breach on the catch-all criteria of insufficient supervision, induction or training, unsafe system or place of work. They feel this can happen without any realistic assessment of the practicality of the proposed remedial action in the particular circumstances of the breach or as part of the ongoing operation of the employer.

- There is general agreement that a higher level of awareness among managers about the scope of their general obligations for safety would contribute to better safety outcomes and less exposure to penalties. The best outcomes occur where there is clear safety leadership from senior management, advice from functional OHS managers and a safety culture/responsibility embedded in line management roles.

> *"It would be great if older generation management realised that provisions for safety and the associated expense is necessary to keep our people safe and productive."*

- Companies need to guard against giving out conflicting messages, either deliberately or unwittingly, about the relative importance of safety and production undermining safety focus.

- There is support for the broad concept of the appointment of Workplace Health and Safety Officers (WHSOs) similar to those required under the Queensland legislation. Companies must appoint WHSOs to carry out certain requirements under the law but they do not carry personal liability in the event of a breach. Some members expressed a concern that appointing a WHSO can sometimes lead to other managers stepping back from safety responsibilities and 'leaving it all to the WHSO". There is also some support for the responsible officer provisions in the SA law, although the allocation of liability to this role is seen as problematic.

- Generally the current range of consultation options work reasonably well and contribute to safer outcomes. The options should be flexible enough to allow for safety committees, safety representatives or other arrangements depending on the size and structure of the company. Safety committees can get bogged down in housekeeping issues and not focus on strategic safety issues. The most effective consultation occurs at workgroup level through toolbox talks etc.

- Members in states like Victoria and Western Australia where Workplace Health and Safety Representatives (HSRs) have the right to issue Provisional Improvement Notices (PINs) in their workplace have found that, despite some instances of abuse, on balance it has had a net positive effect on the management of safety. It could be improved by a right for an employer to seek for the power to be removed where it is proven to be abused or used for industrial relations purposes.

- Members do not support union officials having the ability to exercise enforcement powers, such as issuing improvement notices or causing work to cease.

- There is a very strong rejection by members of any right for unions to initiate prosecutions.

- There is a general acceptance of an employee's right to refuse to perform any work they genuinely feel is unsafe.

- Members generally agree that terms of imprisonment may be appropriate in the most serious cases of reckless behaviour provided legal processes are of the highest level reflecting the severity of possible penalties.

- The behaviour of the regulator and inspectors was a crucial area of concern. Particular issues include:
    - Conflicting opinions given by different inspectors;
    - Inspectors who will confidently declare that work is unsafe but give no guidance or assistance on how a company can comply with the law or at least be closer to compliance, even after issuing an improvement notice;
    - Inspectors who take no action at all with an employee (not even to provide that feedback) when their poor behaviour obviously contributes to an incident;
    - Inspectors who only take notes of what you have done wrong, and deliberately ignore the positive steps you have taken to control a risk;
    - Inspectors indicating during an accident investigation that the employer is unlikely to be prosecuted, which is later proved wrong;
    - Regulators who produce guidelines and codes of practice without adequate consultation with industry; and
    - Advertising by regulators that only concentrates on employer responsibilities and ignores the opportunity to highlight the role of personal attitudes in achieving the highest safety outcomes.

      "Become an Authority that business wants to talk with, not one that they are afraid of. Over-regulated --- too much emphasis on punishment rather than prevention."

Principles underpinning this Submission

Having consulted with members and placed their responses in the context of the two objectives set out at the beginning of this submission, we have developed a number of overarching principles we seek to see reflected in the outcomes of the Review. They will not all have legislative form, but as far as possible the model Act should support their achievement:

- Employers accept that they hold very high standards of responsibility in relation to workplace safety, for good reasons of driving continuous improvement in OHS. Legal and enforcement processes should encourage parties to take responsibility by recognising what they have done in a positive way to meet those high standards rather than concentrating on where they have fallen short;

- Enforcement should be a regime based on learning, support and fair sanction upon breach, not on reaction and blame;

- A safe workplace requires all parties to understand and accept their responsibilities;

- Empowering employees properly, and with responsibility, through consultation, representation and limited enforcement rights contributes to a safer workplace;

- Rights should be accompanied by responsibilities and fair sanction for breach of those responsibilities; and

- A jurisdiction with criminal consequences, high levels of fines and possible jail terms should be subject to the highest standards of process and appeal.

The Relationship between OHS law and OHS outcomes

This submission is made with a view to the current regulatory environment and its performance in producing safer workplaces.

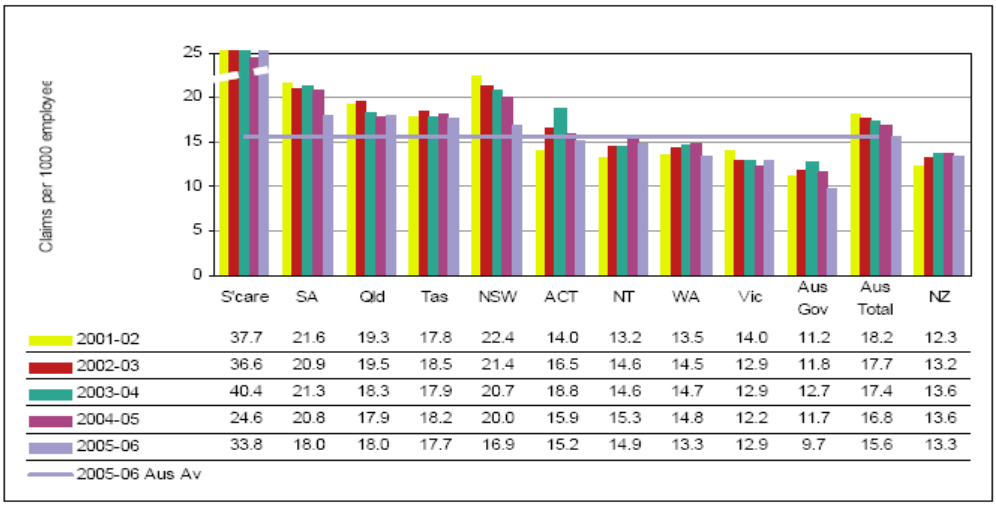
At times an assumption is made that strict or absolute standards of responsibility, expressed blandly as legal concepts, actually lead to safer outcomes. What is the evidence for this?

In New South Wales and Queensland, unlike all other states, the primary employer duty does not include a reasonably practicable test, and senior officers in New South Wales assume liability from a breach by the corporation. If these standards were effective, we would expect demonstrably better outcomes in New South Wales and Queensland. However, there is no evidence to support that contention. Both states have injury rates higher than the Australian average.

The best and latest statistics on OHS outcomes come from the Comparative Performance Monitoring Report (9th Edition) released in February 2008 by the Workplace Relations Ministers' Council. It sets out workplace injury and disease incidence and frequency rates for all Australian jurisdictions.

Incidence rates for the most recent five years are set out below:

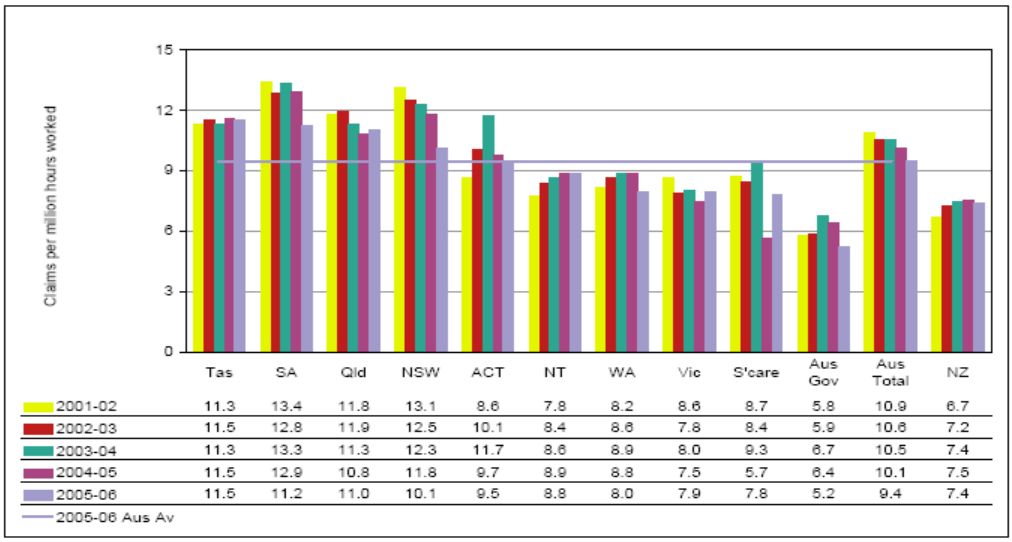
Indicator 5 – Incidence rates of serious* injury and disease claims by jurisdiction



	S'care	SA	Qld	Tas	NSW	ACT	NT	WA	Vic	Aus Gov	Aus Total	NZ
2001-02	37.7	21.6	19.3	17.8	22.4	14.0	13.2	13.5	14.0	11.2	18.2	12.3
2002-03	36.6	20.9	19.5	18.5	21.4	16.5	14.6	14.5	12.9	11.8	17.7	13.2
2003-04	40.4	21.3	18.3	17.9	20.7	18.8	14.6	14.7	12.9	12.7	17.4	13.6
2004-05	24.6	20.8	17.9	18.2	20.0	15.9	15.3	14.8	12.2	11.7	16.8	13.6
2005-06	33.8	18.0	18.0	17.7	16.9	15.2	14.9	13.3	12.9	9.7	15.6	13.3
2005-06 Aus Av												

And similarly frequency rates:

Indicator 6 – Frequency rates of serious* injury and disease claims by jurisdiction



	Tas	SA	Qld	NSW	ACT	NT	WA	Vic	S'care	Aus Gov	Aus Total	NZ
2001-02	11.3	13.4	11.8	13.1	8.6	7.8	8.2	8.6	8.7	5.8	10.9	6.7
2002-03	11.5	12.8	11.9	12.5	10.1	8.4	8.6	7.8	8.4	5.9	10.6	7.2
2003-04	11.3	13.3	11.3	12.3	11.7	8.6	8.9	8.0	9.3	6.7	10.5	7.4
2004-05	11.5	12.9	10.8	11.8	9.7	8.9	8.8	7.5	5.7	6.4	10.1	7.5
2005-06	11.5	11.2	11.0	10.1	9.5	8.8	8.0	7.9	7.8	5.2	9.4	7.4
2005-06 Aus Av												

We submit that these results point to the reality that absolute standards do not produce the best results in OHS law. The best regulatory framework has appropriate standards sensibly enforced. We suggest that, of the current jurisdictions, Victoria (while not perfect) is closest to that model, a conclusion supported by the above statistics and the views of our members who operate across state boundaries.

> *"I believe the Victorian model is quite strong and WSV have done a significant amount to change how they provide advice to help you comply, but there is a knowledge and experience issue."*
>
> *"The regulator should work in pre-emptive action to stop accidents & illnesses by on site inspection, training and explanation and advice. Fines should be last resort."*

CHAPTER 1: LEGISLATIVE APPROACH

1.1 REGULATORY STRUCTURE

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

Principles-based standards (duties of care)
Performance-based standards (specifying only the outcome to be achieved)
Process-based standards (specifying a process or a series of steps to be followed, i.e. risk management)
Prescriptive standards (describing precisely what measures should be taken and requiring little interpretation).

We support the model Act adopting the framework that is currently used to underpin the existing state legislation, based on Acts that set out duties of care under the Robens principles, regulations that provide detailed process standards and guidance material and Codes of Practice that are more prescriptive.

Process based standards are appropriate for encouraging the adoption of general risk management approaches, but they should provide for flexibility when concerned with issues like consultation.

Prescriptive standards generally emerge for high risk work where there is a narrow range of variability in work environments and generally agreed steps that lead to safer outcomes.

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

The model Act should establish key principles and duties that can operate effectively, and with clarity, despite changes in the way work is undertaken or commercially structured and the way safety is best managed over time. Subsequently, the focus in the model Act should be only principles-based and performance-based standards.

It is more appropriate to have process-based and prescriptive standards in subordinate legislation such as regulations and/or codes. It may be necessary to include some prescriptive duties such as those related to incident notification, which relate more to regulatory administrative processes than ensuring safety.

1.2 TITLE, OBJECTS AND PRINCIPLES

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

The term Occupational Health and Safety is broadly understood in industry and is used in the titles of the current principal legislation in six of the nine jurisdictions. We believe the most appropriate title for the model Act, when enacted in each jurisdiction, is:

> The Australian Occupational Health and Safety (<name of jurisdiction>) Act.

The title is important. Legislation that has the wide operational impact on business that OHS law does should be readily identified from its title, or a short form of it. Such recognition is useful in the education process upon which the efficacy of the law relies.

Industry and employer associations, like Ai Group, are a significant part of the infrastructure underpinning the dissemination of knowledge on OHS expectations, responsibilities and practice. Having a commonly understood term to label a bundle of important responsibilities would make this task easier. If the model law is to be, as advocated in this paper, an amalgam of existing state laws within a familiar framework of legal responsibilities rather than a fundamental shift in the nature of those responsibilities, it may be counterproductive to adopt a dramatically new term.

For similar reasons, we would not support adding the term Welfare to the title. Outside South Australia this would represent a change and possibly invite a backlash among employers falsely believing the model law has expanded their liability significantly into new areas of an employee's life outside work, (even though it may well not have). This may invite unnecessary angst.

The term workplace, while more intuitive than occupational, may have the opposite effect. It could leave the impression that responsibility is limited to what occurs on an employer's own premises. Ai Group is not advocating any such material reduction in the scope of the legislation.

The title should also help highlight and distinguish the purpose and content of the Act from the related area of workers compensation, for reasons set out elsewhere in this submission.

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

It is appropriate that the Act include objectives, and that these objectives should be considered whenever decisions are being made about the detail of legislation and/or the manner in which the legislation will be enforced.

There should not be too many objectives. It is important that the objectives are succinct and general in nature, clearly reflecting the intention of the legislation. They should be broad enough to capture all the key agendas without so much detail that they become overwhelming and thereby lose their effectiveness in identifying the key messages of the Act for the behaviour of workplace parties.

Most of the current legislative approaches to objectives would be appropriate, subject to the following observations:

- The Queensland Act objectives are too detailed.

- The primary object should be to secure, so far as is reasonably practicable, the health safety and welfare of employees and other persons at work. This is consistent with Article 4.2 of ILO Convention 155.

- The Victorian objects were reviewed most recently, by Chris Maxwell in 2004. They previously took on an expanded form similar to NSW, however as the review observed the objects in the Victorian Act that were similar to those found in s3(a), (b) and (c) of the NSW Act effectively all said the same thing.

- Paragraph 2(1)(b) of the Victorian Act states the object of eliminating risks, at source. At a conceptual level this is inconsistent with the principal tools that employers are required to use in respect of risks, risk management and hierarchy of controls, both of which imply acceptable outcomes that do not always include elimination of risks at source. This contradiction between the objects and the operative provisions of the legal framework causes confusion and anxiety to employers in particular. We suggest "eliminating or minimising" is a more appropriate term than eliminating (see Qld Act s 7(2)). Alternatively, to "seek the elimination" would also be less contradictory.

- Subsection 3(g) of the NSW Act expresses what might be colloquially called the continuous improvement objective of modern OHS law: "to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices". This is a very important principle at the heart of not only meeting standards, but in driving improvements in safety. However it is also the source of much of the frustration of employers facing what they often perceive to be unattainable perfection. If it is to be the practical effect of the model Act, we believe it is best spelt out as an object so that it is very clear. We would suggest consideration might be given to using the term continuous improvement, which is well known in many industries. Whatever the words, such an object may give those to whom the model Act speaks a better understanding of how the expectation of safety regulation has shifted to require dynamic behavioural responses.

- Given the focus on harmonisation in a model Act that is not present in current state laws, in addition to the general objectives around making work safer, it would be essential for there to be an objective to establish a harmonised approach to OHS regulation and enforcement across Australia.

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

The 2004 Act introduced principles into the Victorian OHS legislation.

In our members' experience, at times the principles have seemed to take on a greater level of importance than the wording of the duties. This has particularly been the case in relation to principle (5) where it is stated that "employees are entitled, and should be encouraged, to be represented in relation to safety issues", whilst the detail of the Act states that HSRs are required only if they are requested by employees.

This is the danger in principles, they can dilute messages or support other agendas, rather than provide clarity.

We do not support principles being put in the model Act; objects, duties and supporting material are sufficient.

If principles were to be included in the Act, we would suggest that the Victorian principles could be the starting point for development. However, the principles also need to include a stronger focus on the importance of workplace parties working together to achieve safer workplaces.

The following draft principles would address the concerns of Ai Group members that the law, and the way that it is enforced, encourages employees to believe that they have no responsibilities in relation to OHS. We highlight that our recommended Principle 1 is not currently in the Victorian Act, and some modifications have been made to the some of the other principles.

(1) All persons in the workplace should work cooperatively with others, and take reasonable care for themselves and others, to contribute towards a safe workplace.

(2) The importance of health and safety requires that all persons in the workplace, or affected by the conduct of work, be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.

(3) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
(4) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
(5) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
(6) Employees are entitled to participate directly in consultation or to be represented in relation to health and safety issues.

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

A positive approach

The legislative approach of a model OHS Act should be a positive one, focused on assisting duty holders to understand what they need to do to improve safety in the workplace, rather than being focused on blame when things go wrong.

There are two key examples from current legislation:

The general duty

As part of the employer's general duty, the Victorian OHS Act 2004 states at 21(2) "without limiting sub-section (1), an employer contravenes that sub-section if the employer fails to do any of the following"

Conversely, the New South Wales Act states at (8)(1) "the duty extends (without limitation) to the following"

Both statements are designed to achieve the same outcome, but the negative nature of the Victorian provision implies a focus on "catching the employer out", rather than specifying what is expected.

Senior officer obligations

In spite of the important role played by senior officers in achieving a safe workplace, and the significant individual liability placed on senior officers, most Acts do not state a positive duty for senior officers.

In the Victorian Act, senior officer's liability is outlined in s.144 (123 sections later than the employer duty). In the New South Wales Act, the liability of directors and managers are listed in the "ancillary provisions". The South Australian Act requires the appointment of a "responsible officer', however the provision is at s.61 (within Part 8, Miscellaneous), under the heading "offences by bodies corporate".

It is essential that senior officer obligations (discussed separately in this document) are stated as a positive duty, directly after the employer's duty.

Grouping of duty holders

It is essential that the structure of the Act establishes a strong and interacting relationship between the duties of parties within the workplace.

Currently, this is most effectively done in the South Australian Act which has the employer duties in sections 19 and 20; the duties of workers in section 21.

This is a much better approach than in some other legislation:

- Division 1 of the New South Wales Act outlines the "general duties" including those of: employers; controllers; and designers, manufacturers and suppliers of plant and substances. The duties of employees are outlined in Division 3 "related duties", placing them after the functions of committees and OHS representatives.

- The Queensland Act specifies the employer duties in section 28 (Part 3, Division 1) and the obligations of workers and others 13 pages later, in section 36 (Part 3, Division 3)

Full expression of extent of limit of powers

Parts of OHS law are widely used and interpreted by people in the workplace not used to the rules of statutory construction. It is important that expressions of powers that may be used in the workplace are self contained as far as possible. If a provision gives a person a power, the extent and limits to that power should expressed explicitly and unambiguously in that power.

For example s.84 of the NSW Act is expressed as follows:

> A person must not, without reasonable excuse, refuse or fail to comply with a requirement made by an authorised representative in accordance with this Division.

Ai Group members have experienced authorised representatives interpreting this to mean the employer has to comply with any requirement they may make, not just the requirements specified in the Division (which should ideally be repeated in s.84).

Clear indication of all duty holders

There should be a clear statement in the Act that there are a range of duty holders; providing a list of them before outlining the details in subsequent sections. Section 23 of the Queensland legislation is illustrative of this approach, however, in line with our comments above, we would like to see a full list of those with obligations.

Variations to the Model OHS Act

Section 5.1.8 of the Inter-Governmental Agreement allows jurisdictions to give effect to "additional provisions", provided these do not materially affect the operation of the model legislation".

Consideration needs to be given as to how this can be implemented whilst maintaining the major advantage of harmonisation – duty holders understanding that each jurisdiction has the same approach to the law and that the systems and culture they develop will help meet their obligations in all states.

Further, it will be of benefit to duty holders if all the Acts have the same layout and numbering; this might not be achieved if additional elements are included in the body of the principal Act.

It may be appropriate to require that jurisdiction specific amendments are in a separate division at the end of the relevant jurisdiction Act with notes in the main body of the Act to cross reference where necessary. This would ensure that numbering remained consistent and would mean that duty holders could refer to the separate division to identify variations from state to state.

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 the model OHS Act and industry specific legislation? 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)?

Our submission on principle is that a single OHS model law should operate in all industries. Even within existing arrangements, the general OHS legislation applies to a very wide range of industries with varying hazard profiles. If one believes there are industries with such high risks that special legislation is needed, then one might equally argue that there are industries with very low risks, where the cost-benefit of applying the quite onerous consultation and systems requirements of the general law is not justifiable.

We make no such argument here, except to make the point that all persons should have the right to equal legislative protection with respect to OHS. Our submission, as a whole, attempts to draw on the principles that emerge from successful safety regulation in all sectors. We believe that a sound model Act combined with effective and innovative enforcement protocols would deliver outcomes that would work in every industry. Looking at mining, rail safety or aviation, for example, there is a clear imperative to avoid state based differences, either jurisdictionally or by co-operative efforts.

There is currently significant variation between the jurisdictions regarding industry specific safety legislation. Model OHS legislation cannot be achieved if status quo is maintained.

There are two ways, this issue could be addressed:

- Roll existing industry specific legislation into the model OHS Act, with industry specifications being covered in regulations. This is the preferred approach, although it may only be achieved over time; or
- Allow separate legislation for specific industries, with the principal Act for each industry based as far as possible on the model OHS Act, adopting all the policy and enforcement principles that are determined by the WRMC and COAG.

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

There needs to be a legislated process for regulators to work together, within and across, jurisdictions, in order to minimise inconsistencies which cause frustration and deflect attention from desired outcomes. This is particularly important where state/territory workers are located in Federal workplaces or co-located with national self-insurers, governed by Comcare.

We do not support overlapping general OHS and industry specific laws. They tend to demonstrate a certain legislative schizophrenia and send mixed messages to those regulated. Since a regulatory regime is the product of the law and enforcement behaviour, it is important to, as far as possible, have one Act with its own regulator, applying to each workplace. Overlapping or dual law coverage can result in a confusing, ineffective or counterproductive matrix of regulation and regulators.

2.2 WORKPLACES AND NON-WORKPLACES

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

The duties to employees should be tied to the conduct of work rather than the workplace.

PUBLIC SAFETY

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

It is appropriate to establish a duty to protect members of the public. However extension of it as far as the "conduct of the undertaking", as specified in section 23 of the Victorian Act is too open ended.

We believe the current s8(2) of the NSW Act gets the balance right between the responsibility of a business not to cause harm in the conduct of its operations, and the need to protect businesses from an unlimited exposure to areas more appropriately covered by tort law.

2.3 RESPONDING TO CHANGE

WORK ORGANISATION

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?

The general duties should be structured to encompass the full range of work arrangements that can occur, now and in the future. These are likely to include a move from a predominance of direct employment to more independent subcontracting and labour hire.

Where workers who are not direct employees are substantially working as if they were employees, as in the case of labour hire, there is little argument against a structure that locates a substantial duty with the host employer.

On the other hand many subcontractors operate as genuine stand alone specialist businesses who are hired precisely for their expertise in the work, including its safety aspects. It is unfair to hold the host fully responsible for matters neither of the parties contemplated them having control of. Asbestos removal is a good example where regulations mandate use of such specialist contractors in the interests of safety.

The key to framing a duty of employers that would fairly apportion responsibility in such a wide range of cases is the degree of control the host employer has.

We suggest the framework provided by s.21 of the Victorian Act provides a good basis here.

EMERGING HAZARDS AND RISKS

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 general duties of care currently provide sufficient breadth of cover to deal with any current or emerging hazards or risks. However, the focus in some general duties on plant and substances may misdirect the focus away from the broader range of OHS issues that need to be considered.

2.4 DEFINITIONS

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

This is a difficult question to answer without draft legislation. In principle, any term which is crucial to the correct application of the law will need to be defined if its normal meaning is not universally understood in a work context. In addition, definitions must be provided for any term which is currently subject to significantly different definitions under various legislation.

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

Not at this time.

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

THE CURRENT APPROACH

CONTROL

CHAIN OF RESPONSIBILITY

Q16. Should the model OHS Act include a 'control' test or definition? If so, why and what should it be? 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? 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? Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

Control is an issue which raises major concerns for our members. Consistent with our response to question 12 above, this issue must be addressed in the model Act as the major determinant of how overlapping duties are reconciled

The test of control should be generally based on the control inherent in the nature of the work being performed.

For example in a typical labour hire or group training situation it would be difficult for the host employer to argue that he did not want full control over the person he has hired in to work much as an employee would. At the same time, a labour hire or group training company who has taken reasonable precautions when placing a worker, should be able to expect that their employee will be managed appropriately by the host employer.

On the other hand, engaging an independent contractor typically involves willingly ceding control over the conduct of the work to the contractor, although the host may retain control over latent environmental factors like access and egress. The contractor generally is engaged to produce a result, using whatever means he determines. To the extent this equation varies, then so would control for the purposes of allocation of responsibility under the model Act

To assist in creating better certainty in situations where this test is applied we suggest a provision such as s.24(3) of the Queensland Act be considered:

(3) If more than 1 person has a workplace health and safety obligation for a matter, each person –

(a) retains responsibility for the person's workplace health and safety obligation for the matter; and

(b) must discharge the persion's workplace health and safety obligation to the extent the matter is within the person's control; and

(c) must consult, and cooperate, with all other persons who have a workplace health and safety obligation for the matter.

Failure to achieve this level of certainty creates the potential to unreasonable outcomes, and in the case of Group Training Companies, which generally operate as "not for profit" organisations, may lead to the demise of a major source of employment and training for our future workforce.

3.3 WORK RELATIONSHIPS

SELF-EMPLOYED PERSONS

THE TREATMENT OF WORKERS IN OHS LAWS

Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations? Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work? Q22. Is there a broader concept that more effectively covers the various work arrangements?

See question 12 above

3.4 DUTIES OF EMPLOYERS

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

The general duty of employers should be that prescribed by the Victorian Act:

> An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

The onus should be on the prosecution to prove all elements of the offence. Ai Group believes the Victorian duty is the fairest and most effective structure.

The issues paper refers to the structure of the general duties of employers under the Health and Safety at Work etc Act 1974 (the UK Act). Whilst we do not believe this is an appropriate solution, it would be preferable to the provisions of the current NSW and Qld legislation. This would see the duty being expressed as above with a separate clause stating that the onus of proving what was "reasonably practicable" rests with the defendant employer. This regime could only be acceptable if the legal processes of prosecution were subject to the tests spelt out elsewhere in this submission, and the reverse onus did not apply to prosecution of individuals, as set out below.

Subsets of the employer duties

Consideration should be given as to the appropriateness of current issues/items included in the "explanatory" sections of the current Acts, which follow the general statement of the employer's duties. There are a number of similarities between the duties, but also many variables. In the current, and future, working environment, it would seem that the focus on the tangibles (plant and substances) within these sections might take away the focus from other equally relevant issues in the workplace.

Further, it is essential that these subsets are appropriately qualified: with "reasonably practicable" for most issues (see our later discussion on this issue); and in the case of the case of information, instruction, training and supervision, with "as reasonably necessary"

It is recommended that the following issues be considered for inclusion listed in these explanatory sections:

- A safe working environment
- Safe systems of work
- Consulting with people on matters directly accecting their safety
- Information, instruction, training and supervision for employees to enable them to work safely
- Information, instruction and training for managers and supervisors to enable them to contribute to the provision of a safe workplace
- Appropriate facilities for welfare
- Monitoring conditions

Q24. To whom should these duties be owed?

The parties identified in s.21 of the Victorian Act and s.8(2) of the NSW Act

3.5 DUTIES OF WORKERS AND OTHERS

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

There should be four explicit employee duties, generally expressed as follows (taken from the Victorian Act:

While at work an employee must:

1. take reasonable care for his or her own health and safety; and
2. take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace; and
3. co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this act or the regulations (including a requirement not to intentionally or recklessly interfere with or misuse items provided for safety).

In order to assist the promotion of the shared responsibility concept, we suggest it would be useful to co-locate these duties in the model Act along with the duties of employers and controllers of workplaces under a division headed General Duties of Parties at the Workplace.

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

Generally we support the concept that people who are in the workplace, but not involved in performing work, should have a duty similar to that of employees.

3.6 APPOINTED PERSONS AND OFFICERS

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

During consultations with members, this concept was specifically discussed, particularly the experience of employers covered by the Queensland and South Australian legislation which provide for such appointments, although in different terms.

It was reported that the Workplace Health and Safety Officers (WHSOs) in Queensland and Responsible Officers(ROs) in South Australia generally facilitated an improvement in the ability of an organisation to meet its responsibilities and provide safer workplaces.

The general feedback was positive in relation to the provisions requiring such appointments and we provide qualified support for their consideration as part of the model Act. Our deepest concern is that the appointment of such persons will detract from the collective sense of responsibility among others in the workplace

Issues that need to be addressed if such a requirement is included in the model Act are:

- At what organisation/workplace size the obligation should be triggered. We suggest 50 employees and above.
- Concerns that the WHSO or RO may tend to become the sole focus of responsibility for OHS, allowing others to avoid accepting their share of responsibility; and
- An apparent contradiction in the South Australian Act between the significant liability of responsible officers, and the role of other senior officers in an organisation.

We strongly suggest the model Act make explicit provisions that:

- no avoidance can be interpreted from the duty to allocate specific OHS responsibilities;
- The nominated person does not carry with them any personal liability for a breach of the law; and
- companies which can show they have other mechanisms in place that duplicate the functions of the appointed person should be able to apply for exemption from the obligation to make such an appointment.

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

They should have no greater liability under the model Act than any other employee or person concerned with the management of the company. The appointed persons should be answerable under their contract of employment, to the employer or other duty holder.

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

The appointed person would be part of the mechanism a duty holder engages to meet their responsibilities as a duty holder. One of those duties would be to make such an appointment and ensure its functions are performed.

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

Consideration should be given to including a duty on officers of bodies corporate to inform themselves about the nature of their duties, as individuals and as officers of a corporation holding duties.

Otherwise see the answer to Question 6 above.

3.7 DUTIES OF PERSONS IN CONTROL

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

We refer the discussion on questions 16-19 which effectively deal with this issue from another perspective.

In relation to clarity, a different issue arises from confusion created by the term persons. In a workplace environment this can often be taken to mean only individual persons rather than the normal legal meaning that includes bodies corporate. As a result supervisors and managers can feel they are taking on the reponsibilities of a "person in control" when in fact it is the company they work for that the law is speaking to.

To help avoid the anxiety this can give rise to, we suggest a term such as "controlling entity", rather than person be considered in the model Act.

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?

We would have thought proper construction of the duties of employers and controllers of workplaces, with principles covering the overlapping of duties, would cover these situations.

3.8 ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

DESIGN, MANUFACTURE, SUPPLY, IMPORT, INSTALLATION AND ERECTION, DECOMMISSION AND DISPOSAL

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. However we believe they adequately do so now, as expressed in section 30 of the Victorian Act or s11 of the NSW Act (provided it is amended to be subject to what is reasonably practicable). There must be conceptual limits to the role of OHS legislation with criminally enforceable duties, and a point at which tort law is the appropriate remedy.

Liability arising from such obligations should be limited by what was reasonably known at the time the item was last under the control of a party.

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?

A Model OHS Act which is consistently applied in all Australian jurisdictions should allow for cross-jurisdictional enforcement within Australia. With this in mind, it would appear appropriate for the duties within the Act to apply to the first Australian link in the chain, whether that is the manufacturer or supplier.

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 to include any time that a commercial transaction occurs which results in the change of control, other than when plant or equipment is sold as scrap. When considering the issue of supply it is important to ensure that the provision of finance in a hire-purchase arrangement does not create an obligation on the provider of the finance.

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

Not at this time.

CHAPTER 4: 'REASONABLY PRACTICABLE' & RISK MANAGEMENT

4.1 CONCEPT OF 'REASONABLY PRACTICABLE '

Q37. Should a test of "reasonably practicable" be included in the model OHS Act? Q38. If not, what alternative standard should be included? Q39. How should the standard be defined? What level of detail should be provided?

The general duties, including those of the employer, should all include so far as is reasonably practicable in the statement of the duty, not as a separate defence. This enables duty holders to understand what things they need to consider in order to meet their obligations under the Act.

If reasonably practicable was not put in the principle duties, it would need to be included in the defences. However, we would strongly argue against this approach, as it leads to a disconnect between the obligation, and information for the duty holder about how they shoul meet that obligation.

The definition should include all the current provisions in the Vic Act:

> To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety—
>
> (a) the likelihood of the hazard or risk concerned eventuating;
>
> (b) the degree of harm that would result if the hazard or risk eventuated;
>
> (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
>
> (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
>
> (e) the cost of eliminating or reducing the hazard or risk.

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

Control should not be an element of the standard of reasonably practicable. Control should be a factor in establishing the division of obligations between multiple duty holders; the test of reasonably practicable helps establish whether any given duty holder has met their obligations.

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?

No. Tests and examples should be in interpretive documents.

4.2 RISK MANAGEMENT

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

If the terminologies hazard and risk are to be used in the Act and are not commonly understood definition may assist. If they are commonly known , definition will make things less clear. This definition must be based on the accepted OHS interpretation of hazard and risk which is not always consistent with the dictionary definitions.

The definitions should be:

- Hazard – something that has the potential to cause harm
- Risk – the potential for a given level of harm to actually eventuate based on the likelihood that harm will eventuate and the severity of that harm.

We are unable to see how confusion between the terms might lead to an adverse outcome for any party under the law, particularly if the Victorian definition of reasonably practicable is adopted in the model law, as it uses the terms interchangeably.

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?

See answer to Q39 above.

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

The issues paper identifies that the "cases interpreting the employer's duty of care indicate that the employer should not just be responding to demonstrated risks, but should have a system of identifying and assessing all possible risks, and instituting reasonable and appropriate measures. Effectively the general duties required the duty holders to engage in systematic OHS management"

It is possible to extrapolate from this statement that the Act should mandate the requirement to undertake risk controls and to have a formal OHS Management system. However, it is our view that the focus for duty holders should always be on risk control, at the highest level that is reasonably practicable.

With this in mind the Act should focus on the requirement to apply the hierarchy of controls. The approaches of either Victorian or Queensland in this regard would be appropriate.

In the Victorian Act this is specified, at section 20, as:

> To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person—
>
> (a) to eliminate risks to health and safety so far as is reasonably practicable; and
>
> (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

The Queensland Act at 27A(2) specifies the hierarchy of control in more detail:

> To properly manage exposure to risks, a person should consider the appropriateness of control measures in the following order—
> (a) eliminating the hazard or preventing the risk;
> (b) if eliminating the hazard or preventing the risk is not possible, minimising the risk by measures that must be considered in the following order—
> (i) substituting the hazard giving rise to the risk with a hazard giving rise to a lesser risk;
> (ii) isolating the hazard giving rise to the risk from anyone who may be at risk;
> (iii) minimising the risk by engineering means;
> (iv) applying administrative measures;
> (v) using personal protective equipment.

The Act (and regulations) should not specifically require a duty holder to undergo a formal risk assessment process prior to implementing risk controls. Risk assessment is often arduous, ineffective and time-wasting, distracting all parties identifying and implementing risk controls.

The focus of the Act and Regulations should be on controlling the risk, so far as is reasonably practicable. Codes can be utilised to ensure that risk assessment is identified as one option to identify appropriate controls.

The rationale for this position is that "known" controls should be implemented without delay. This is what happens effectively with many day to day risks. If it has been accepted that seat belts need to be worn in forklifts (what is known, or ought reasonably be known about the risks and the ways to reduce or mitigate the risks), why undertake a risk assessment to determine if you are going to require that from employees; with no-lift policies working in most hospitals and healthcare facilities, why would you do a risk assessment to determine if lifting patients created a risk.

If the Act was to specify a "risk management process", it should focus on identifying hazards/risks and implementing, so far as is reasonably practicable, controls that are consistent with the hierarchy.

CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

5.1 DUTY TO CONSULT

Ai Group strongly believes that effective consultation is a corner stone of effective OHS management. Effective consultation enables access to the wealth of information available from those who are exposed to hazards and risks in the workplace; and effective consultation ensures that those who are to be protected from risks understand the importance of the risk controls that are implemented.

At the same time, it is recognised that duty holders have an obligation to make the workplace safe, and can only do so if they are in a position to make an informed decision and introduce the best solutions they can, within the realms of what is reasonably practicable.

When addressing the questions asked in this section, we have kept in mind the key principle that specific provisions in the Act must facilitate the best possible consultation processes to enable the best possible safety outcomes in the workplace?

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

Obligation to consult

There should be an obligation to consult with affected workers whenever a duty holder is making decisions that may impact on OHS and when determining actions to be taken to comply with the Act.

Definition of consultation

The Act or regulations must define consultation to reflect the following issues:

- Recognition that the level of consultation will vary dependant on the significance of the issue, i.e. a more inclusive and longer process of consultation would be required for a major change.
- An understanding that consultation involves:
    - providing information;
    - providing an opportunity for those affected to have input;
    - taking the views of workers into account; and
    - providing feedback about the outcomes of consultation.
- It must be clear that consultation is not about agreement. Duty holders have an obligation to make decisions and minimise risk. Attempts to reach agreement may unduly delay decisions and could result in a lower level of risk control than would otherwise be implemented.

The role of HSRs and committees

Where there are elected health and safety representatives and/or committees they should be part of the consultative process. However, it is not appropriate to have legislative provisions which could lead a duty holder to believe that they have discharged their duty to consult by only talking to the HSR or the committee.

The issue of effective consultation is too important for the process to be diminished by one or more of the following scenarios:

- Information not being correctly communicated to and from employees by the HSR and/or committee, i.e. the “chinese whispers” phenomenon;
- Employers not hearing the “passion” of issues that are important to individuals because this was lost in the translation;
- HSRs or members of the committee representing their own interests, rather than those of the workers they represent; or
- Employers not being able discuss and explore options directly with those who are doing the work.

Any of these preceding scenarios may result in duty holders not receiving an accurate understanding of the issues in the workplace, which would subsequently lead to poorer OHS outcomes.

It is important that the legislative obligation to consult is supported by flexibility in the way this can be achieved.

Prescriptive consultation requirements can lead to the establishment of structures that may be outside the mainstream processes for communicating within the organisation; making OHS an issue apart from the normal way of doing business.

Consultation will only be genuine and effective, and therefore lead to improved outcomes, if the parties believe they have control over the process.

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

The consultation provisions are designed to ensure that relevant information is obtained from those who have an understanding of the workplace and the hazards and risks that might be involved with the workplace, or the work to be done.

For this reason, the consultation provision should apply to any ongoing relationship, i.e. including long term contractors or ongoing labour hire; and any significant one-off jobs with a contractor.

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

Any variations to the levels of consultation should be based on the level of risk, not the employment relationship.

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.**

The Act needs to create flexibility to allow workplaces to put in place arrangements that suit the workplace and the circumstances.

There is a lot of discussion about the value of "roving" HSRs, and this has been catered for in the Victorian Act, through the ability to have an HSR for multiple employers. The Victorian provisions can only be implemented if there is agreement from the employer, and there are protections in place against coercion. If a similar provision is included in the model OHS Act, it needs to continue the Victorian approach of voluntary participation by employers.

5.2 PARTICIPATION AND REPRESENTATION

HEALTH AND SAFETY REPRESENTATIVES
HEALTH AND SAFETY COMMITTEES

An important consideration in this section is that individual employees must have the right to speak for themselves, or to be consulted by the employer if an issue is going to have a significant impact on them. Enforced and rigid processes for representation can lead to an individual worker feeling that they have no opportunity to influence decisions in the workplace; this is particularly the case if a worker does not feel represented by their HSR or committee.

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

It is not appropriate to impose a requirement for HSRs and/or HSCs. If such a provision was introduced, it would result in an employer being non-compliant if there was no interest amongst workers to become a HSR or a member of a committee.

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?

Participation and representation are often used in OHS as intermeshed concepts. However, the Oxford English dictionary defines participation as "taking part", whilst representation involves "a person chosen to act and speak for another". It is our view that representation effectively reduces participation of the workforce generally.

Consultation provisions which allow a workplace to agree on the nature of consultation, through discussion with all workers, will encourage workplaces to determine the appropriate level of participation of all workers and/or representation through committees and/or HSRs.

Representation relies on the integrity and balanced approach of every elected HSR and/or committee member. One of the challenges with representation is that, using the Victorian Act as an example –

- One employee can request the establishment of HSRs, and subsequently a committee;
- Other workers may be comfortable with the existing consultative arrangements and not feel the need for HSRs or a committee;
- The one employee that requested HSRs or a committee may be the only one who stands to be a HSR (maybe because everyone wants them to be; maybe just because they are the only one interested);
- That one employee becomes the "elected" representative, and has the right to talk on behalf of the workers, even if they would prefer another form of consultation;
- The employer can choose to talk only to that person, who may have no interest in other people's views, and the rest of the workers do not get a say.

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

Most jurisdictions currently require the establishment of HSRs and/or HSCs if they are requested. In line with the commentary above, it may be more appropriate to require the establishment of HSRs and/or committees, if this is agreed during the process of determining how consultation will be done in the workplace. This would overcome the current situation where one person can attain a position of "power" because they asked for it.

Where HSRs and committees are introduced, there should be:

- terms of office;
- the ability for the workers represented to cause the HSR to step down; and
- strong penalties for HSRs or committee members who misuse their powers.

There should also be a legitimate role for the employer to initiate elections; especially when terms of office expire.

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

Every worker who is regularly engaged in that DWG should be entitled to vote.

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

General

It is Ai Group's view that "with rights come responsibilities". For this reason, we believe it is appropriate to call the role of an HSR as a function, rather than a power. This is consistent with most Australian jurisdictions. Queensland refers to entitlements, whilst Victoria and the ACT are the only jurisdictions that refer to the role of HSRs as powers; the current exposure draft for new OHS legislation in the ACT refers to the roles as "functions".

It is our view that there is generally too much detail in most Acts about the functions of HSRs, and that the functions do not generally carry any responsibilities to represent the views of those they have been elected to represent and/or to advise the employer of issues they identify in the workplace. The Act should include some general statements about HSR's roles, with the detail provided in the regulations

It is suggested that a general statement such as the following be included:

> A HSR has such powers as are necessary for the carrying out of their functions, and in particular, but without limiting the generality of this provision may ….

Section 33 of the Western Australian Act provides some balance in the HSRs functions by stating that they are required to (d) report hazards, (f) consult and cooperate with the employer, and (g) liaise with the employees. Consideration should be given to including these types of functions in the model OHS Act.

Powers of HSRs

Six of the nine jurisdictions create a power (as distinct from function) for an HSR to issue a notice requiring the employer to take specific action to rectify a contravention (dependant on the jurisdiction these are known as either a provisional improvement notice (PIN); default notice; or notice of safety hazard). In New South Wales and Queensland, where this power does not exist, the Act specifies that the HSR can call in an inspector to investigate the issue.

Four of the nine jurisdictions provide HSRs with a right to intervene, when there is an immediate risk, with the ability to cause work to cease.

In states where HSRs can issue notices or cause work to cease, our members have indicated that these powers, though subject to some abuse, are on balance a positive influence on safety. Where there was an abuse of this power, it was believed that HSRs would find other ways to derail the issue resolution process if this power was not available to them, so the problem was probably not with the ability to issue a PIN per se. One member identified that whilst PINs were used to short circuit the process in Victoria, the same employer found that HSRs in New South Wales short circuited the agreed process by calling in an inspector.

On balance, we believe that the ability to issue a PIN or cause work to cease is an appropriate function for trained HSRs to be able to exercise, when consultation and issue resolution procedures have failed.

However, these powers should only be included in the Model OHS Act if:

- employers are able to call inspectors to adjudicate on the exercise of these powers;
- inspectors consider the context of the PIN / cease work, not just the validity of the issue, and ensure that HSRs understand that they cannot exercise these powers unless consultation has occurred;
- in the case of an abuse of the power, employers can apply to have the right to issue notices removed from the HSR; and
- there are robust processes through which an HSR can be disqualified for abuse or misuse of their powers.

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

The structure of the committee should be such that it enables the functions of the committee to be fulfilled. Current provisions in some Acts which require that at least 50% of the committee are workers, is not always appropriate. This is particularly the case where the workplace has difficulty getting workers to be involved.

The function of the committee should be to review the operation of the organisation's safety "system", with a focus on the "big picture" items. Committees should be discouraged from using the meeting to address a shopping list of safety issues that should be addressed on a day to day basis through consultation and/or issue resolution processes.

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

HSRs and members of HSCs should be provided with training which enables them to understand:

- their functions and the duties of all parties in the workplace;
- the role of consultation in managing OHS;
- risk management principles;
- legislative requirements; and
- how to communicate and work effectively with other parties to address and resolve OHS issues.

In order to facilitate the development of effective relationships in the workplace, wherever possible, training should be provided jointly to committees, HSRs, managers and supervisors.

Q56. Are there alternative mechanisms that should be considered?

Consultation options must enable flexibility to allow workplace participants to implement processes which are consistent with the structure of the company and other processes of the workplace. For example, employers in high risk environments report that the most effective consultation occurs through toolbox meetings, generally at the start of a shift.

Employers have a duty to consult, at large, and this has tended to be confused with Q58 obligations to form committees or recognise safety representatives. Nothing in the regulatory regime dealing with consultation mechanisms should effectively restrict an employer consulting in any manner that is demonstrably effective for that workplace.

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

The Act should identify the consultation duties, including how consultation is defined, and when it must take place. All other issues should be agreed at the workplace. Guidance on how to implement consultation in the workplace should be included in codes and/or guidance material.

The Victorian Regulations currently require employers to provide information to the health and safety representative a reasonable time before providing the information to the employees, unless it is not practicable to do so. This is a totally inappropriate prescription, as it restricts the workplace from establishing consultation processes that are inclusive of all workers.

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

It should be recognised that representation is not always the best form of consultation. The focus of this question should be on whether there are some classes of workers for whom current consultation arrangements are not effective?

It must be recognised that representation may not always be the best form of consultation.

The model OHS Act or Regulations could address this by requiring employers to identify the special needs of groups or individuals in the consultation process.

RIGHT OF ENTRY

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

Union right of entry provisions have been relatively recent inclusions in the legislation in Victoria, Queensland and the Northern Territory. Whilst they were introduced with much trepidation amongst employers they do not generally appear to have caused significant issues in industry.

Our members report that the role of unions assisting them in the workplace is often positive. However unions also exist for reasons of representation in bargaining over wages and employment conditions, and the legislation needs to assume that there is always the potential for OHS right of entry to be confused with other issues. This is essential for the protection of employees as constant mixing of OHS and industrial relations issues can blunt an employer's sensitivity to real OHS issues, and lead to a cry wolf syndrome.

Therefore, if union right of entry is to be included in the Model OHS legislation it must carry the types of protections that are currently in place to discourage an inappropriate mix of OHS and industrial agendas. It should be restricted to an appropriately authorised official of a registered trade union who has members, or people entitled to be members, at the place of work.

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

The model Act must specify minimum training and qualifications for authorised representatives. They will have no credibility in the workplace, and be of little assistance to workers or employers, if they don't have at least the same level of OHS knowledge as an HSR, supported by a higher level understanding of the how to exercise their powers.

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

The right of entry should be available to investigate a contravention of the Act.

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

The conditions on entry set out in s.88(1) and 88(2) of the Victorian Act are appropriate.

On powers upon entry, we do not agree with the ability to access "employment records" as specifically included in the Queensland Act; to do so may breach many privacy and confidentiality obligations and, as listed in s.90I(5), it is difficult to see how many of these could be of relevance to an OHS breach.

In relation to the conditions and limitations, a provision that has served well in the Victorian Act is section 90(2) which states:

> Despite anything else in this Part but subject to sub-section (3), an authorised representative of a registered employee organisation is not entitled to exercise a power under this Part in respect of a place, except with the consent of the employer who has, or a person who on behalf of the employer has, the management and control of the work, if the exercise of that power would cause any work at the place to cease.

ISSUE RESOLUTION

A major concern in relation to "issue resolution" is actually defining when an issue exists. There is often confusion between talking about safety (consultation) and having an issue that needs to be resolved.

The Act needs to clearly delineate between consultation and issue resolution. This is not clear in the Victorian Act where the default regulations require an employer who identifies an "issue" to raise it with the HSR and implement issue resolution procedures.

This approach contradicts the focus on consultation and cooperative approaches to OHS when all discussions have the potential to be issue resolution processes, which will always carry with them some areas of disagreement.

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

There should be a requirement to establish agreed procedures for issue resolution, in line with the organisations general management system. If procedures are not agreed, a default regulation should apply.

Q64. When should issue resolution procedures be activated?

Issue resolution processes should be activated when matters are unresolved, and in dispute. Issue Resolution should sit completely separately from consultation processes.

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?

The requirement to have issue resolution procedures should be specified in the Act. Default regulations should exist for those who do not have agreed procedures.

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

This can be achieved by requiring that, if there are no agreed procedures, the default will apply.

RIGHT TO CEASE UNSAFE WORK

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?

There are common law rights to withdraw labour. If they are to be included in the Act, they need to be described as a right to request reassignment to safe work and reflect the ILO words about imminent and serious danger, not a right to stop work altogether if there is a concern about work being unhealthy or unsafe. However, these provisions can only apply if the issue resolution process has been activated and failed. There must be the ability to immediately refer the issue to an inspector for resolution.

We support the right to cease work but have concerns about it being colloquialised and abused if codified poorly.

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?

As outlined above, the power to direct a cessation of work may be a legitimate power for a HSR. However, it is important that appropriate safeguards are in place to ensure that the power is not abused.

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?

If the decision to cease work was based on reasonable grounds, employees should not suffer detriment. However, the provisions regarding cessation of work should specifically relate to the "unsafe" activity, allowing the employer to allocate the employees to other work whilst the issue is resolved. If the decision to cease work was vexatious and/or there is a refusal to carry out alternate work, employees should not receive payment of wages and associated benefits.

The common law right is a right arising from each individual's employment contract, and any codification should preserve this concept to avoid it becoming seen as a right exercisable through collective action involving employees not affected by the safety concern.

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

There must be provisions for dealing with disputes regarding cessation of work. The regulatory policies should include a response time of less than two hours in which an inspector will attend the workplace to determine the appropriateness of such actions, if the employer does not agree with the action.

5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION

No employee should be discriminated against and/or victimised for raising an OHS issue; nor should they feel threatened that this may occur.

The challenge is writing law that protects the small number of cases where this occurs, without bringing into the equation a broad range of circumstances where this could be abused, e.g. a HSR becomes a “protected species” because any discipline or change of job role can be seen as victimisation; a person who fears termination for unrelated reasons initiates an OHS complaint so that they are protected; an unrelated issue is called safety to initiate the protection.

A review of the provisions in all jurisdictions, indicates a varying approach to this issue.

Generally the discrimination provisions provide that the prosecutor must prove the facts, whilst the defendant must prove that the facts were not the reason for the action taken by the employer. However, some legislation is silent on this issue.

Penalties associated with a breach range from 40 penalty units in Queensland, through to 2500 penalty units in Victoria and the risk of terms of imprisonment in Victoria and ACT (6 months) and the Northern Territory (12 months).

There are varying approaches to issues of compensation and reinstatement, with some jurisdictions allowing the body hearing the prosecution to determine the remedy, whilst others refer this issue to the industrial legislation.

Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected? Q72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions? Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both? 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?

Ai Group believes that:

- The tests and burden of proof should be consistent with the Federal discrimination jurisdiction;
- It is not appropriate to have terms of imprisonment associated with this offence; and
- Access to remedies such as reinstatement and/or reimbursement should be dealt with in the industrial relations arena.

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

The difficulty with this situation is that, until the case is proven, discrimination and harassment are merely "alleged" and it is not appropriate for the regulator to intervene in circumstances which might ultimately be proven to be unrelated to the operation of the OHS legislation. We would urge caution when considering this potential expansion of the OHS regulator's role.

In Victoria, there is currently a "protocol" which says that an inspector can issue an improvement notice (after an internal process within WorkSafe to determine if the decision is warranted) directing reinstatement, based on this provision of the Act. This protocol is in place even though the Act only prescribes that a magistrate can order reinstatement, if the employer is found guilty. Ai Group believes this is inappropriate (and may be out of power); such a provision should not be included in model OHS legislation.

Q76. What remedies should be available to the victims?

The victim should be able to pursue their rights under the appropriate industrial jurisdiction.

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?

Conciliation and arbitration should be handled in the industrial relations jurisdiction.

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

Some jurisdictions allow the HSR to seek assistance from "any person". In Victoria this is worded as "an employer…must allow a person assisting a health and safety representative access to the workplace unless the employer considers that the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety"

The application of this provision, results in a union organiser attending the site under this provision, rather than through right of entry; it is extremely difficult to manage this in the workplace:

- there is no requirement on the HSR to advise the employer, or give notice of the visit;
- it is unclear what assistance means in this context;
- unions often use this provision to justify undertaking a full audit of the site, and leaving the employer with a list of actions.

We do not believe this type of provision should be in the model OHS Act. If such a provision is included, there must be more detail about what type of assistance can be provided, a requirement for notice, and an understanding that this does not enable the union to do a full workplace audit and enter into discussions and negotiations with the employer.

CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

ROLE AND FUNCTIONS OF REGULATORS

ACCOUNTABILITY
EDUCATION, ADVICE AND ASSISTANCE
COMPLIANCE AND ENFORCEMENT POLICIES

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

The model Act should outline the functions, powers and accountability of the regulator generally and inspectors specifically. The provisions currently contained in the Victorian Act would seem to be an appropriate starting point for specification.

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

Regulators should be required to publish enforcement and prosecution policies.

However, national consistency of regulator behaviour is considered to be as important as national consistency of legislation. For this reason, a nationally agreed enforcement and prosecution policy should be developed and be endorsed by WRMC and COAG.

Regulators should be required to adopt the protocol and to demonstrate that they have fully implemented the protocol.

Of particular importance in this protocol is a commitment to consider how each and every dutyholder has contributed to achieving the safety outcomes specified in the legislation, with a view to ensure equitable distribution of responsibility amongst duty holders.

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

OHS legislation should create a framework for the ongoing improvement of safety outcomes within the context of work. Through necessity, the law must be written in a way that it will enable the courts to appropriately interpret the application of the law within the context of the courts.

For this reason, it is essential that interpretive documents are developed to assist all those involved in the conduct of work to understand their duties, rights and responsibilities.

In line with our focus on consistent implementation of the model OHS legislation, it is Ai Group's position that these interpretive documents need to be agreed at a national level, and applied consistently.

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

A key responsibility of a regulator is the issuing (and revocation) of licenses. This power can not be exercised by an inspector.

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

It has been argued elsewhere in this submission that the "enforcement" process is a continuum. Therefore, inspectors must be able to give advice as part of their enforcement activities. If an employer wants free one on one advice from the regulator they must accept that the inspector will use their powers to issue notices if necessary and relevant.

It is not appropriate to create a false delineation between the regulator as adviser and the regulator as enforcer (other than the potential separation in relation to prosecution, as discussed elsewhere in this submission).

In addition to the advisory role of the inspectorate, the regulator also has a role in the development of guidance material and interpretative documents.

6.2 INSPECTORS

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

Powers, functions and accountabilities should be in the Act. Appointment and qualifications are administrative in nature and may be left to regulations

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

This role is crucial, and must be supported by powers and by training. If they know the employer is not compliant, they must have some idea of how the employer might comply. It is not appropriate for the inspector to withhold this information from the duty holder.

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

No. All decisions must be open to internal scrutiny.

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 may be appropriate for an inspector to make minor amendments to aid clarification and/or modify compliance dates, or where a notice has been issued on the basis of a mistake of fact. Quickly written notices can shut a whole plant or process down where that was not the intent based on the hazard or risk. If appropriate consultation and discussion is entered into prior to the issuing of a notice, the need for modifications should be reduced.

Any amendment should not be to the detriment of the person issued with the original notice.

Alternatively, an efficient internal review process should enable these issues to be dealt with relatively quickly, and will protect the inspector from undue pressure to be able to refer the employer to a separate review process.

6.3 INTERNAL REVIEW OF INSPECTORS' DECISIONS

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?

Internal review appears to have worked well in Victoria. The ability for all persons affected to take their case to a cost effective and timely review process has been welcomed by most. A process similar to the Victorian system should be included in the model OHS Act.

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?

As outlined elsewhere in this submission, it is crucial that the adoption of model OHS legislation is accompanied by a common compliance, enforcement and prosecution protocol that is uniformally adopted in all jurisdictions.

CHAPTER 7: COMPLIANCE & ENFORCEMENT

7.1 ENFORCEMENT MEASURES

One of the current difficulties with the range of enforcement measure available is there is often a disconnect between:

- The employer's obligation to consult with employees; and
- The prescriptive focus of compliance tools, especially if compliance with a notice requires an employer to redirect resources from other control measures that have been developed in consultation with employees.

When the regulator utilises enforcement tools, it is essential that consideration is given to how compliance with the notice will impact on other safety initiatives in the business, and recognise the need for consultation with those who will be affected by the requirements of the notice.

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

Warnings, negotiated outcomes and voluntary compliance need to be part of the enforcement options, with supporting documentation that could result in a prosecution, or administrative penalty, for non-compliance.

In circumstances where it is obvious that the organisation does not have a structured approach to addressing safety in the workplace, negotiated outcomes could include the requirement to establishment of a "risk control plan", in consultation with workers. This could be utilised instead of a large number of improvement notices, but still be an enforceable compliance tool.

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?

Inspectors and the regulator should know how and when each type of enforcement tool should be used. General principles need to be clearly described in the Act, and an enforcement protocol must be developed.

7.2 MEASURES EXERCISED AT THE WORKPLACE

SAFETY DIRECTIONS, WARNINGS AND CAUTIONS
PROVISIONAL IMPROVEMENT NOTICES (PINS)
IMPROVEMENT NOTICES
PROHIBITION NOTICES

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

Generally, the provisions in the Victorian Act seem to be appropriate.

It is important that the Act ensures that a PIN can only be issued after appropriate consultation with the employer.

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

It is essential that a notice issued by an inspector (improvement or prohibition) provides recommendations on how to comply. The Victorian Act enables an inspector to provide interim directions or conditions to minimise risk prior to compliance with the final requirement of the notice. This appears to enable a more flexible approach for the workplace, whilst ensuring that risk is mitigated during the implementation of compliance requirements.

It would be of benefit if a PIN also provided this information, but as it is issued by an HSR the same level of rigour should not be expected.

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

PINs should be reviewed by inspectors. The decisions of inspectors, in relation to their review of PINs and the issuing of improvement notices and prohibition notices, should be subject to internal review. The approach introduced in Victoria in 2004 seems to be working effectively

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

The nature of prohibition notices means they must be complied with immediately. PINs and improvement notices should have minimum timeframes. The enforcement protocol should establish an agreed process for issuing improvement notices, which should include a discussion with the duty holder about the appropriate solution, and about an appropriate timeframe for achieving compliance.

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?

When an application for internal review or appeal is lodged, the following should occur:

- improvement notices should be automatically stayed; and
- prohibition notices should remain in place, but the duty holder should be able to apply for a stay, which will be heard in a timely manner.

INFRINGEMENT NOTICES (ON-THE-SPOT FINES)

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

The enforcement pyramid shown in the Issues Paper does not provide a good illustration of where infringement notices are located in a practical sense. Most regulators would say that an improvement notice is only a "warning", not a punishment – if the employer complies nothing else will happen. However, an infringement notice is a punishment; for this reason it could be argued that it sits higher than the notices, and below probation. Alternatively, infringement notices could be seen as something which can operate in conjunction with improvement and prohibition notices.

Most people understand the concept of infringement notices in relation to breaching road laws. In those circumstances, a minor infringement will attract a fine and demerit points, more significant breaches will attract higher fines and more demerit points, the most significant breaches will result in a loss of licence etc. It is recognised that there is an escalating scale of penalties as the breach becomes more significant.

In the safety arena, this does not always occur. As highlighted above, improvement and prohibition notices are not seen by the regulator as imposing a "punishment"; they simply require the employer to meet their OHS obligations. Hence, there is a significant "gap" between infringement notices as one level of punishment, and prosecution as the next level of punishment.

It is our view that infringement notices can only really be used in circumstances where the breach is black and white in nature, i.e. failure to have a license, failure to have plant registered; failure to display signage. Most of these breaches are relatively minor in nature.

Breaches of the general duties, which are more significant, can only be addressed by improvement or prohibition notices, not summary action. Prosecutions are very rare, as they should be, in the overall scheme of the enforcement process for general duties.

Therefore, having infringement notices in the enforcement system gives an employer the impression that not having signage displayed is a more important breach than not controlling a significant risk of a manual handling injury.

For these reasons, Ai Group does not generally support the use of infringement notices. It may be appropriate to have a system of "fines", escalating to prosecution, for failing to comply with an improvement or prohibition notice.

This is consistent with a more balanced and graduated enforcement regime.

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

If infringement notices are introduced they need to be part of the OHS law.

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

If the regime suggested in answering question 97 is adopted the fines could be at the level of those currently applying in NSW.

7.3 MEASURES EXERCISED BEYOND THE WORKPLACE

REMEDIAL ORDERS AND INJUNCTIONS

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?

The ability to seek injunctions should be part of the model OHS Act. It is not expected that this power would be exercised regularly, but it is appropriate to be able to utilise it when there are particularly recalcitrant duty holders. They would be exercisable only by the regulator.

ENFORCEABLE UNDERTAKINGS

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?

Enforceable undertakings are a very appropriate compliance tool. They should be an alternative for all offences. It should be possible for a duty holder to agree to undertakings without the need for a full investigation.

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

There is generally no real value in an admission of guilt, and the process will certainly be slowed by this requirement. It should be possible to enter into an enforceable undertaking without admission of guilt.

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

Enforcement protocol

Ai Group would like to see the establishment of an enforcement and investigation protocol which ensures that regulators have consistent approaches to enforcing the law. Without such a protocol, the model OHS Act is unlikely to achieve the desired outcome of consistent OHS standards across Australia.

Balanced approach to investigations

In developing this protocol there needs to be a focus on a balanced investigation of the role of all duty holders when an inspector undertakes a workplace visit and/or an investigation of an incident.

During member consultations held in relation to this review, one of the consistent issues raised by members was that inspectors never seemed to take into account whether an employee had contributed to the circumstances of an incident. It was felt that no matter how much the employer had done to provide a safe workplace, if the employee did something stupid, the employee was not held accountable.

As we engaged in discussions about the circumstances of examples provided we often found that the employer was told by the inspector that the worker also contributed to the incident, but this was never communicated to the worker.

In one example, an employer was told that there would be no action taken against the employer because they had done all that they could have done to prevent the incident and the only fault lay with an employee who had gone out of his way to override the safety measures that had been put in place. The inspector then left the site without even telling the worker of that conclusion.

Another employer reported that they had been prosecuted and this was reported in the local press. One of the mitigating factors in determining their penalty was the contribution to the incident by the injured worker; this was not reported in the press. Hence, the message this communicates to society generally is that an employer is guilty even when the worker does something that the "reasonable person" would see as obviously negligent.

As most employers do not want to publicly highlight the contribution of employees, it should be the role of the regulator to do so.

The prosecutor should have to present all the facts, good and bad, not just highlight the failures of the duty holder.

Employers recognise that they have the primary role in making the workplace safe, and to ensure that employees comply with the safety provisions established in the workplace. However, employers cannot provide around the clock supervision and, where an employee clearly fails to meet their obligations under the Act it is expected that they will receive some negative outcomes. These could include feedback directly from the inspector, a letter from the regulator, an enforceable undertaking, withdrawal of relevant licenses, or in some cases prosecution.

Sharing learnings from prosecutions and investigations

Prosecutions should provide opportunities for duty holders to identify what is required of them to meet the test of what is "reasonably practicable". For this reason detailed prosecution outcomes should be published, with a focus on all aspects of the incident, such as what was done well, what was not, and which parties contributed to the outcomes.

The majority of workplace incidents do not result in prosecutions, and when there is a prosecution a large percentage of defendants plead guilty. Hence the ability to learn from prosecutions is limited.

A mechanism should be established for sharing the full details of an incident and subsequent decision, to prosecute or not prosecute, including information about what a duty holder did that enabled them to demonstrate that they had done all that was reasonably practicable, and how other duty holders may have contributed to the incident. This may need to be done without identifying the specific incidents.

CHAPTER 8: PROSECUTIONS

8.1 CRIMINAL OR CIVIL LIABILITY

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both? Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

Ai Group accepts that breaches of OHS legislation are treated as criminal offences. This is consistent with the current approach of most jurisdictions within Australia. This means that breaches need to be proven beyond reasonable doubt, rather than any lesser standard. The legislation should not provide to the contrary on the issue of standard of proof.

Our acceptance of criminal offences, depends on ensuring that the normal provisions of criminal law apply to the defendant's position, including independent prosecutor, onus of proof on the prosecutor, appeal rights, expedient justice etc.

8.2 WHERE PROSECUTIONS SHOULD BE HEARD

Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences? Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

We don't necessarily have a strong view either way on whether it is appropriate to hear prosecutions for OHS offences in courts specialising in OHS or the normal courts having experience in hearing criminal matters, provided that the presiding judicial officer does not, in reality, have a dual role in respect of an arbitration or conciliation function under industrial relations legislation.

We believe that this dual role creates a difficult conflict for a judicial officer who may regularly have interactions with an industrial party, and then be required to deal with them as a criminal defendant; it also creates difficulty in maintaining a perception of judicial independence.

This position has nothing to do with the competence of the judicial officers concerned, but reflects our view that it makes the difficult job of presiding over, and maintaining public confidence in, a criminal jurisdiction unnecessarily harder.

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

Regardless of which court has the original jurisdiction for OHS matters, appeals should be processed through the full normal appeal processes within the criminal court system, and be subject to the same procedures and limitations.

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

OHS legislation in Australia generally provides for offences which are either indictable (often with the option of being dealt with summarily) or summary offences.

Wherever a duty holder is prosecuted for an indictable offence it is essential, for the purposes of natural justice, that there is a recognised entitlement to request trial by jury for defendants who are natural persons.

8.3 WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES

Q110. Who should be entitled to commence criminal proceedings?

The regulator, in their corporate name, should be able to initiate prosecutions. It is not appropriate for other parties, including individual inspectors and registered industrial organisations, to commence criminal proceedings,

For reasons canvassed often in this submission, it is vital that the criminal jurisdiction underpinning OHS law operates, and is seen to operate, in accordance with the normal protections and processes of criminal law.

We understand the union position that they wish to ensure that the prosecutor's focus always includes newly emerging risks and behaviours, and does not allow issues to fall between the cracks in terms of legal consequences.

To this end, as an alternative to union prosecution, it may be appropriate to establish a process for any party to inquire into why a prosecution has not commenced and ask the regulator to investigate. S.131 of the Victorian Act is a model in this regard.

However there is a higher level issue going to the question of whether the regulator should share, or even cede, the prosecution role to a separate public prosecutor. We are attracted to a view that separating the regulatory and prosecution functions would assist to allow the regulator to concentrate on actions that would obviate the need for prosecutions in the first place.

We do not think that prosecutions aren't necessary. Indeed, the risk of prosecution should always be seen as a real possibility. It merely goes to the question of who performs that role, and how that helps the total enforcement regime to work better in terms of producing safer workplaces. We would not support such a separation if it did the opposite.

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

We do not believe it is appropriate to have civil proceedings for OHS breaches.

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

It is crucial for the effective operation of the law that prosecutions are commenced within 12 months of the incident giving rise to the prosecution; where there is no incident, the 12 months should run from when the regulator first became aware of the issue.

Delays in the commencement of prosecutions create unnecessary disruption in the workplace, and additional stress for those who are involved, including injured workers and their families and the duty holders potentially involved. Delay places the defendant at a severe disadvantage in preparing a defence as workplaces and personnel can change quickly over time. Most importantly, the behavioural impact of a prosecution is diluted by delay between the event and the legal result.

Further, the alternative penalties which are now available to the courts are more appropriately applied when the prosecution is completed in a timely manner, e.g. it is not appropriate to apply an enforceable undertaking five years after an incident has occurred.

When, following investigation, the regulator decides not to prosecute, duty holders are often unaware of this decision, or the reasons for it; this leads to ongoing uncertainty and undue concern by duty holders until the time for launching the action has expired. There should be a process in the enforcement protocol which requires the regulator to advise duty holders if they make a decision to terminate the investigation and "close the file".

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?

In line with our earlier contention that OHS breaches should be prosecuted in the criminal courts, it is our view that the rules of evidence should be consistent with the normal requirements of that jurisdiction.

8.4 EVIDENCE

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

Generally the normal rules of evidence should apply.

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

We support statutory recognition of the right of a defendant to claim compliance with a prescribed class of instrument as an absolute defence for the matter to which instrument applies.

8.5 THE BURDEN OF PROOF AND DEFENCES

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

As discussed elsewhere, reasonably practicable is an appropriate standard for the model OHS Act. Reasonably practicable should be defined in the same manner as the current Victorian legislation.

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

OHS law is criminal law, with potentially serious consequences. Duty holders must be considered innocent until proven guilty. The prosecutor must have the burden of proof.

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?

The onus of proof should be consistent on all issues – innocent until proven guilty by the prosecutor beyond all reasonable doubt.

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

We restate that there should not be a reverse onus of proof; without a reverse onus of proof there will be no need for defences.

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

We submit that the principle of the burden of proof resting with the prosecution is unarguable for offences for natural persons.

We also submit the burden of proof for a corporation must be the same as for a natural person (an individual), for the following key reasons:

- In a small organisation, the business owner will bear both the reputational and financial costs of a prosecution of the corporate person and should therefore have the same protection as that of an individual prosecution; and
- The prosecution of a senior officer is generally only considered (and in some jurisdictions currently only possible) when the corporation has been found to have breached its duty; hence the reverse onus of proof for a corporation immediately and unfairly "lowers the bar" for the prosecution of a senior officer.

8.6 LIABILITY OF OFFICERS

Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence? Q123. How should officer be defined? 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?
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? Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

It is appropriate that, n some circumstances, senior officers of a corporation may attract liability arising from a finding that the corporation has committed an offence.

It is not appropriate for an officer to have personal criminal liability for the aggregated failures of the organisation (as was considered during the industrial manslaughter debate in Victoria and New South Wales in the last decade).

Further, it is not appropriate to have the assumption of liability (subject to defences and tests) that currently exists in some jurisdictions, particularly s26 of the NSW Act. This effectively reverses the normal criminal onus of proof. By way of contrast, s.144 of the Victorian Act establishes that:

> "… if the contravention [of the body corporate] is attributable to an officer … the officer is guilty of an offence", with regard being given to:
>
> (a) what the officer knew about the matter concerned; and
>
> (b) the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned; and
>
> (c) whether the contravention by the body corporate is also attributable to an act or omission of any other person; and
>
> (d) any other relevant matter.

This would be an appropriate approach for the Model OHS Act.

It is appropriate to define a senior officer in the same terms as the Corporations Act, as these are definitions that are clearly understood and generally accepted by industry. However, an equal level of liability must be applied in relation to partnerships and agencies of the crown. This issue appears to have been appropriately addressed in Part 11 of the Victorian Act.

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

Generally there should be the same risk of prosecution whether the officer is employed by a corporation, a partnership, and association etc which is a business entity.

However, volunteers on boards or acting as officers in charities should not be subject to these provisions. Creating these types of obligations for volunteers would significantly decrease the willingness of people to take on such roles.

These issues are well-covered in Part 11 of the Victorian Act.

8.7 SENTENCING OPTIONS

FINES

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

All offences should have the capacity for fines to be imposed. The quantum of fines needs to be established according to the severity of the breach.

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

It is appropriate to have maximum fines in the legislation.

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

The level of potential fine has to reflect the seriousness of the issue and the significance of the breach in terms of its direct effect on the safety of the workplace. Higher penalties should be available for breaches of the general duties, than for example, for failing to properly constitute a safety committee.

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

It is not appropriate to have a statutory minimum fine.

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

For good reasons of principle, the level of penalties, and the decision to proceed with prosecutions, should depend on culpability not outcome. This is generally the theoretical application of current law.

However, it is more complex in practice for two main reasons:

- where there is a fatality or serious injury, prosecution and serious penalties are often expected by the public, the injured's worker and their family and other stakeholders, to demonstrate that "justice has been done"; and
- fatalities and serious injuries are more likely to come to the attention of the regulator.

In both cases the level of culpability might be relatively low compared to the behaviour which led to a serious risk, resulting in a non-fatal injury, or no injury at all.

If the model Act is to maintain that liability is on the basis of culpability and not outcome, the two issues above need to be addressed so that defendants don't face tests based on both culpability and outcome. An independent prosecutor (other the regulator) would be one method to help prevent prosecutions that are more related to outcomes than culpability. It is just as important that the enforcement protocols for the model Act are cognisant of this problem and that the regulator seeks to educate both duty holders and the public on the implications of this approach.

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

With common legislation, a detailed database of outcomes would be helpful.

OTHER SENTENCING OPTIONS

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

Enforcable undertakings should be a key part of the penalty options, particularly those which require the employer to spend money on improving safety in the industry generally, not just fixing their own backyard.

Adverse publicity orders may be appropriate in some circumstances, however, this is dependant on the ability for the publicity to be educative in nature, rather than designed merely to "blame and shame".

Given the timeframes between incident and prosecution, an adverse publicity order may be inappropriate, as much may have changed in the workplace since the incident which led to the prosecution. Further the discretionary nature of prosecutions means that an organisation that is prosecuted might be a better corporate citizen than their competitor who, to date, has just been lucky to avoid a significant incident and subsequent prosecution.

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

Ai Group and our members recognise that terms of imprisonment may be appropriate in the most culpable circumstances. It is our view that the offence of reckless endangerment should be included in the Model OHS Act with terms of imprisonment.

All other breaches should attract appropriate monetary or alternative penalties.

8.8 WORKPLACE DEATH AND SERIOUS INJURY

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

If liability under the model Act is based on culpability and not outcomes, it is difficult not to accept that there should be a specific offence relating to creating the risk of death or serious injury, based on reckless behaviour by any person.

In NSW, at section 32A, the Act states:

> A person:
>
> (a) whose conduct causes the death of another person at any place of work, and
>
> (b) who owes a duty under Part 2 with respect to the health or safety of that person when engaging in that conduct, and
>
> (c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct, is guilty of an offence.

In Victoria the Act states (at section 32):

> A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence…

The provisions in the Victorian Act are reliant of the culpability of the person (who does not have to be a duty holder), whilst the New South Wales legislation can only be applied if there is a death. Given that the level of culpability could be the same, it does not appear appropriate for a prosecution if there is a death, but not if a person becomes a quadriplegic, or is placed at serious risk of death or serious injury.

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

The fact that an offence relating to "reckless endangerment" is included in the OHS legislation is useful in reinforcing the seriousness of consequences for poor safety. In Victoria and New South Wales the reckless endangerment provisions were put into the OHS Act to deal with a perception that you couldn't go to gaol for killing someone at work. The appearance of the provisions in the OHS Act makes it clear that there is a range of options for prosecuting serious breaches in the Act.

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?

See question 136 above.

8.9 ENFORCEMENT OF PENALTIES

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

If the breaches are to be heard in the general criminal courts, the same provisions should apply.

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?

If the breaches are to be heard in the general criminal courts, the same provisions should apply

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

Not at this time.

CHAPTER 9: OTHER ISSUES

9.1 REGULATION MAKING POWERS

The making of regulations and codes must include a process of tripartite consultation during development, and a period of public comment.

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

There is a danger that regulations are promulgated that start to undermine the general duty nature of the legal framework and become a substitute for enlightened and determined education and enforcement of the general duties.

Regulations should be limited to matters requiring more detail in order for them to work effectively in accordance with the Act. They should not change the fundamental duties.

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?

This would depend on the nature of the regulations. Prosecutors often prosecute under the Act, using the regulations as evidence, rather than prosecuting under the regulations, where a lower penalty would apply.

In Victoria, the regulations specify the level of offence, and clearly identify if the offence is an offence under the Act. This would appear to be a good approach.

9.2 CODES OF PRACTICE

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

Development of Codes should be done in a tripartite manner with appropriate exposure periods for the relevant stakeholders covered.

9.3 NOTIFICATION OF INCIDENTS AND REPORTING

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

This is largely dependant on the reason for notification. If it is for the purposes of developing statistics, information from the workers compensation system should be sufficient.

If it is to enable a swift response by the regulator to serious incidents, it needs to focus only on what truly is serious.

There needs to be a clear definition of serious injury for reporting requirements (in Victoria it has become far too vague, with a serious laceration being interpreted by some to include an injury which needs only one stitch). We need to make sure that the reporting requirements do relate to injuries and incidents that are truly serious – particularly if there is a requirement to for the site to be preserved, as is currently the case in some jurisdictions. Site preservation also means that the regulator needs to respond quickly to the incident to allow work to recommence in an appropriate timeframe.

9.4 EXTERNAL APPEALS AND ISSUE RESOLUTION

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

The processes for reviewing administrative matters should be utilised for OHS legislation.

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

No.

9.5 TRIPARTITE MECHANISMS

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

The ILO convention sees tripartism as a key approach to the development of law and the administration of the law. We would certainly support an ongoing tripartite approach.

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

Yes, but is this an internal administrative approach, rather than a requirement for the Act

9.6 MUTUAL RECOGNITION

PERMITS AND LICENSING ARRANGEMENTS FOR WORKERS ENGAGED IN HIGH RISK WORK

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

Any licensing or registration requirements should be recognised across all jurisdictions.

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.

This is one of the few areas where the current approach seems to be working; albeit transition approaches are slowing things down a bit.

9.7 CROSS-JURISDICTIONAL COOPERATION

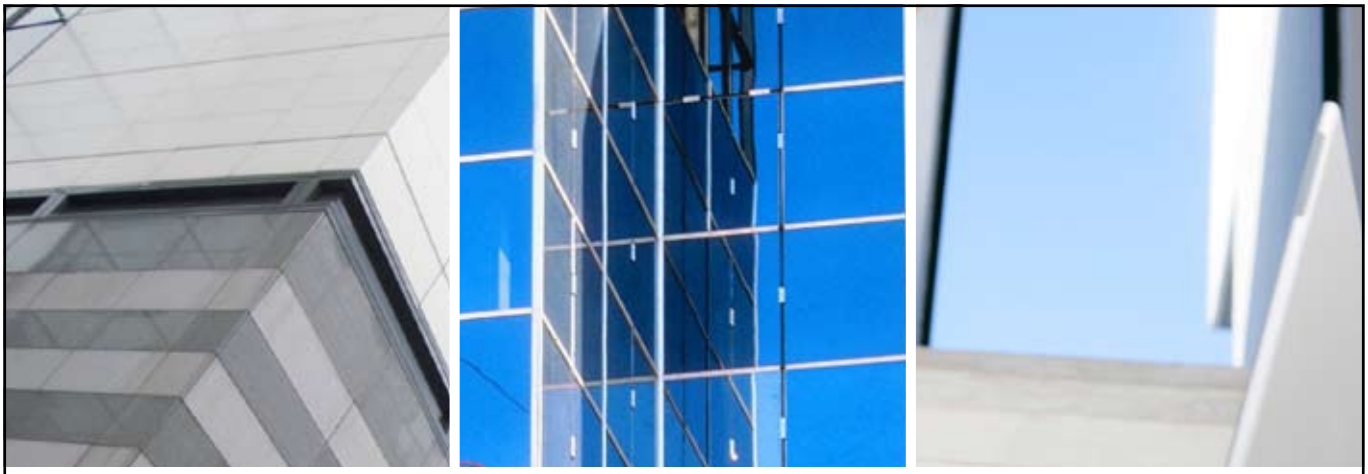
9.8 INTERACTION OF FEDERAL AND STATE LAWS

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 federal jurisdiction must adopt the Model OHS Act so that all jurisdictions are setting the same standards. Once this occurs there are two options for achieving the most efficient outcomes:

- State/territory inspectors having the right to exercise their powers on a federal site, if they believe the state/territory duty holder cannot meet their obligations unless something is done by the organisation which comes under the federal jurisdiction (and vice versa), e.g. issuing a notice on the state/territory duty holder to modify a piece of plant that belongs to the Federal government.

- Having an MOU which ensures that an inspector (or their superior) from either the Federal or State/Territory jurisdiction will participate in joint inspections with notices issued to address collective risks.



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