



Submission on the National Review into Model Occupational Health and Safety Laws

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EXECUTIVE SUMMARY

The Australian Mines and Metals Association (AMMA) represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector. The resources sector is a significant contributor to the Australian economy, with minerals and energy exports representing approximately two thirds of Australia's total commodity export earnings.

The resources sector is committed to improving health and safety and many resources sector employers have committed to achieve a target of zero harm to their employees. Mining operations exist across Australia and many resources sector employers operate in more than one jurisdiction and employees, particularly those working for contractors, can be required to work across multiple mining sites and jurisdictions. AMMA welcomes the government's commitment to harmonisation of occupational health and safety laws and the opportunity to contribute to the National Review into the Model Occupational Health and Safety Laws.

AMMA supports a model OHS Act that provides coverage to all industries, based on the principles enunciated in the National Mine Safety Framework. The National Mine Safety Framework, which is supported by AMMA, seeks best practice OHS regulation for the mining industry and espouses a set of principles that are relevant considerations for a model OHS law.

Each state and territory law includes a general duty on the employer to take care for the health and safety of employees. The duty is drafted in a similar fashion for each state, with the exception of New South Wales and Queensland. For example, in Queensland and NSW the duty on employers is to 'ensure safety', and where safety is not ensured, the employer has the onus of establishing a defence to the breach. The NSW *Occupational Health and Safety Act 2000* is perhaps known as the strictest of all the jurisdictions for its obligations placed on duty holders and is an approach that is not supported by AMMA, nor does it confirm with ILO Convention 155. The NSW Act imposes an absolute duty on employers to ensure the health, safety and welfare of employees and non-employees at the employer's place of work¹ and places an obligation on the duty holder to establish a defence based on 'reasonable practicability' that reverses the burden of proof.

This is a much stricter standard than the obligations imposed by other OHS laws such as exist in South Australia, Tasmania, ACT, Victoria and Western Australia. These jurisdictions impose similar obligations on duty holders; however they are

¹ *Occupational Health and Safety Act 2000 (NSW)* s 8.

consistently qualified by the notion of “reasonable practicability”² that lays the burden of proof at the feet of the prosecution.

The NSW Act is a system of OHS regulation that is not supported by AMMA. It is AMMA’s view that in order to achieve the outcomes of harmonisation put forward by the Government, namely improved safety, less red tape, greater certainty and more efficiency, AMMA supports a model OHS Act based on the following principles:

- The model OHS Act should contain general duties qualified by a test of “reasonably practicable” as exists in the majority of states and territories and which is consistent with ILO Convention 155. An absolute liability based on the NSW OHS Act must not be imposed on duty holders;
- The model OHS Act should achieve a balance between a prescriptive approach and the more flexible performance and process based approach that encourages innovative health and safety practices. Where prescription is considered necessary, this should be contained in the regulations or codes of conduct.
- The model OHS Act should apply to all industries, including mining, in order to ensure national consistency. Any industry specific requirements should be contained in industry specific regulations and codes of practice;
- Consultation is supported but the means by which consultation is achieved should be determined by individual workplaces according to their circumstances and needs. Any guidelines for consultation should be contained in the regulations;
- Right of entry must be limited to regulators and inspectors with the responsibility for administering and enforcing the model OHS Act. Employees can continue to exercise their right to be represented by their union, which can raise any health and safety issue with the employer and inspector without any need to enter the workplace. Any right of entry afforded to unions under the model OHS Act must set appropriate boundaries to ensure such rights are not used as a means to pursue industrial agendas. The limitations contained within the current *Workplace Relations Act 1996* are considered appropriate. Mechanisms must be available to remove any right of entry where it is abused;

² See *Occupational Health, Safety and Welfare Act 1986 (SA)*, s 5; *Occupational Health & Safety Act 2004 (Vic)*, 21; and the *Occupational Health & Safety Act 1984 (WA)*, s 19.

- Employees are entitled to cease work where there is an imminent danger to health and safety however appropriate measures are required to limit frivolous, vexatious or manufactured health and safety concerns; and action that halt an entire operation where the danger is be confined to a particular area. This right should not be used to support or advance industrial agendas.

AMMA supports the submission made by the Minerals Council of Australia.

ABOUT AMMA

AMMA is the national employer association for the mining, oil and gas and associated processing and service industries. It is the sole national employer association representing the interests of Australia's onshore and offshore resources sector and associated industries.

AMMA member companies include all the major producers in the metalliferous, coal and hydrocarbons sectors. Member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Oil and Gas
- Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport
 - Support and seismic vessels
 - General aviation (helicopters)
 - Catering
 - Bulk handling of shipping cargo

AMMA represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector.

SUBMISSION APPROACH

AMMA has had the benefit of viewing the submission of the Minerals Council of Australia and supports its submission.

Additional comment on key issues identified by AMMA and which will impact the broad membership base of AMMA are contained within this submission.

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

INTRODUCTION

In March 2008 the Council of Australian Governments agreed that occupational health and safety harmonisation is a top priority and that harmonisation can be best achieved by the development of model legislation.³ This has been encapsulated in the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (Intergovernmental Agreement), which was made on 3 July 2008.⁴

State and territory responsibility for creating OHS laws was appropriate 100 years ago when business operations were largely confined within state borders but today, many businesses are operating on a national basis and are required to comply with multiple OHS laws, regulations and codes of practice that lack any national consistency.

The inconsistencies across the state and territory principal OHS laws include:

- The standard of care owed by an employer;
- The ability for a union to enter the workplace;
- The ability for a union to initiate a prosecution for breaches or issue provisional improvement notices;
- The level of penalties imposed on individuals and corporations;
- The approach to health and safety representatives;
- The differences in reporting requirements; and
- Who can be held liable for a breach of OHS duties and the circumstances this will arise.

The inconsistencies between jurisdictions impose a number of compliance burdens and costs on business, particularly those that operate across state and territory borders. This is exasperated by the frequency of reviews of OHS laws undertaken by the respective governments and the consequent requirement on business to keep track of legislative amendments and implement changes to their OHS practices in order to remain compliant. Duplication of resources by

³ Council of Australian Governments' Business Regulation and Competition Working Group, Commonwealth-State Implementation Plan and Forward Work Plan, 26 March 2008, viewed 23 June 2008, http://www.coag.gov.au/meetings/260308/docs/brcwg_implementation_plan.rtf

⁴ Workplace Relations Ministers Council, *Communique from Australia, State and Territory and New Zealand Workplace Relations Ministers Council*, Media Release, 23 May 2008 viewed 23 June 2008, http://www.workplace.gov.au/NR/rdonlyres/FEA8D1F2-B515-4686-9891-E348D9204647/0/WRMC_76_Communique.pdf

state and territory governments to maintain existing regimes is unnecessary and costly.

The concerns associated with having multiple OHS laws have not gone unnoticed and indeed harmonisation has been the subject of review and debate for some time now. Johnstone provides a list of concerns noted by various writers since the 1980s, that the OHS laws:

- cause difficulties and economic inefficiencies (including increased costs of compliance) for employers, unions, workers, importers, manufacturers, suppliers and designers, particularly where their activities extend beyond the borders of one jurisdiction;
- mean that workers who face essentially similar risks at work are afforded different levels of legal protection;
- result in inconsistencies in standards which may undermine attempts to improve OHS;
- result in governments duplicating scarce resources;
- undermine moves to integrate the Australian economy and make it more competitive internationally⁵..

The benefits of a harmonised scheme are expected to include simplified systems for multi-jurisdiction employers, cost savings and one system for workplace management of safety. Multi-jurisdiction employers currently spend significant time and resources understanding their obligations and implementing systems under more than one OHS legislative regime, and educating employees that work across state and territory borders. Under a single national OHS regime greater time and resources could be dedicated towards improving health and safety in the workplace.

The transition towards a model OHS Act will create challenges to business due to the level of uncertainty during the review period and a risk that the most onerous duties and penalties and highest level of third party intervention in current OHS laws will characterise the model OHS Act. Union calls for tougher obligations that include 'an absolute duty of care on employers and allowing unions to prosecute safety breaches'⁶ deserve rigorous scrutiny

The Aim of OHS Laws

Each state and territory OHS law has substantially the same aim or purpose and that is to prevent workplace injury, disease and death. It is AMMA's view that the policy aim for the model OHS law should be *prevention*, achieved primarily by way of education and advice, as opposed to a focus on punitive measures that are merely retributive. Assisting employers to remedy breaches of OHS law,

⁵ Richard Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials* (2nd ed, 2004) 88.

⁶ Steven Scott, Unions call for tougher liability laws, *Australian Financial Review*, 2 July 2008, 14.

rather than imposing pecuniary penalties, is the best means of ensuring compliance with OHS laws.

Prosecutions are time consuming for both OHS inspectorates and businesses, are costly and can create adversarial relationships between business and inspectors. Prosecutions should be restricted to the most serious breaches of OHS law. An educative approach to OHS will result in greater OHS improvements by creating working relationships between inspectors and businesses, whereby a business may be more inclined to contact an inspector for assistance or advice if a problem arises.⁷

Barriers to Harmonisation

The process of harmonisation could be undermined if states and territories insist on retaining control over enforcement policies. It cannot be understated that a model OHS Act will not achieve the desired results for improved safety, less red tape, greater certainty and more efficiency, if significant efforts aren't made to ensure all state and territory regulators are unified in their approach.

There is particular concern over whether the reforms will lead to a 'uniform' national system (a system of regulation that cannot be altered jurisdictionally) or merely a 'consistent' system, which would leave room for each state or territory to alter their own workplace safety laws to a certain extent.⁸

Harmonisation that allows state and territory governments to retain control over the level of consistency that it chooses to achieve defeats the purpose of this review. Harmonisation will not be achieved where a state or territory government amends its 'consistent' OHS laws and will merely create a 'snowball' effect for further change by the states and territories. This is particularly concerning where governments may be strongly influenced by stakeholder demands in a particular state or territory.

It is AMMA's view that in order to achieve the outcomes sought by the government (to 'cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties,⁹) that uniformity, not consistency, should be sought. This would entail creating an OHS Act and supporting regulations that apply nationally and cannot be amended by individual states or territories.

⁷ Richard Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials* (2nd ed, 2004) 63.

⁸ Steven Scott, States revolt over work safety laws, *Australian Financial Review*, 22 May 2008, 14.

⁹ Australian Government, National Review into Model Occupational Health and Safety Laws, *Terms of Reference*, Commonwealth of Australia, Canberra.

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

CHAPTER 1: LEGISLATIVE APPROACH

1.1 Regulatory Structure

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

The legislative approach for a model OHS Act should follow the three tiered approach recommended by the 1972 Robens Report and described on page five of the Issues Paper.¹⁰ The Robens Report envisaged a three tiered framework comprising a principal OHS Act containing general duties supported by regulations, codes of practice and guidelines.

Such an approach should be consistent with ILO Convention 155 and ensure that the general duties are qualified by a test of reasonable practicability.

The model OHS Act should take an approach focused more on providing general duties of care and less on prescription, which has traditionally encouraged more regulation that produces a complex maze of obligations. A prescriptive approach is considered inflexible because it tells an employer how something should be done rather than actually what should be achieved. Rather than providing certainty and clarity to duty holders, high level prescription merely makes OHS laws difficult to implement at the workplace level and is an impediment to innovative OHS practices. Prescription-based standards can have the result of imposing undue cost on business that is better able to determine its own means of achieving the same level of safety outcomes that responds to the individual circumstances of the business but in a more efficient manner. Following set 'instructions' will not encourage employers to develop initiatives for continuous improvement.

There are many benefits in the all-encompassing character of general duties as they require attention to be given to a wide range of risks. Their broad scope means that they do not date quickly and provide room for duty holders to decide their own solutions to OHS problems.

Significantly, this does not involve arguing for the removal of all prescription based standards but rather an approach that achieves a balance between flexibility (achieved by principles, process and performance based standards)

¹⁰ British Committee on Safety and Health at Work released a report in 1972, *Report of the Committee on Safety and Health at Work 1970-1972*

and prescription. Australian reviews of OHS laws have advocated non-prescriptive approaches and a limit on prescriptive standards to 'when the risks to health and safety are particularly high.'¹¹

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

The model OHS Act should contain general duties of care. The general duties should be supported by subordinate regulations and codes of practice that can provide performance and process based standards in order to give greater guidance and enable compliance with the OHS Act.

The principal OHS Act should be largely 'enabling in character' such that it can be supported by a combination of regulations and non-statutory codes and standards.¹² The Committee responsible for the Robens Report believed that greater detail was more appropriately left to the lower levels of the hierarchy: codes of practice. This approach is supported by AMMA.

CHAPTER 2: SCOPE, APPLICATION AND 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?

It is AMMA's view that the model OHS Act should not maintain the status quo in each jurisdiction regarding industry specific safety legislation, such as exists in Queensland, Western Australia and New South Wales. The development of separate mine specific safety laws inevitably results in inconsistencies between the individual states and as against the principal OHS laws, as reform measures for mine safety laws can lag behind reform of principal OHS laws or vice versa.

The mining industry will benefit greatly from a model OHS Act that is capable of applying nationally and which removes duplicity, complexity, cost and uncertainty experienced by companies that operate across multiple jurisdictions. Moreover, a single national OHS Act will ensure improved health and safety is the key focus as opposed to dealing with multiple administrative burdens and time spent understanding and educating employees on multiple OHS laws. This is

¹¹ Richard Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials* (2nd ed, 2004) 66, 159

¹² Ibid 64-65

particularly pertinent in respect to employees that are required to work on multiple mine sites in more than one jurisdiction.

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)?

A model OHS Act that contains general duties, leaving greater detail to subordinate regulations and codes of practices, should be sufficiently broad enough that it is capable of applying to all industries.

An all industry approach was one recommended in the Robens Report and is supported by AMMA. A failure to provide all industry coverage under the model OHS Act will further risk the continuance of inconsistencies across jurisdictions to the detriment of the industry and improved health and safety outcomes.

Industry specific guidance, which may take into account different mining sectors (i.e. metalliferous, oil and gas, coal) should be dealt with under subordinate regulations and codes of practice.

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

Improved regulation of occupational health and safety will not be achieved by a model OHS Act alone. There will need to be significant efforts to ensure that consistency is achieved with respect to state and territory OHS regulators, such as by way of a national enforcement policy. Lack of coordination between state and territory regulators has the potential to result in different interpretations of the same legal requirements, limiting any benefits to be gained from a national OHS Act. In that respect AMMA welcomes the agreement reached at point 5.1.5 of the Intergovernmental Agreement for a national compliance and enforcement policy.

CHAPTER 4: REASONABLY PRACTICABLE AND RISK MANAGEMENT

4.1. Concept of 'Reasonably Practicable'

- Q37 Should a test of “reasonably practicable” be included in a model OHS Act?
- Q39 How should the standard be defined? What level of detail should be provide?
- Q40 Should control be an element of the standard?

An absolute liability that exists in NSW is inappropriate, undermines confidence in the law and focuses duty holders on methods to reduce their legal liability rather than focusing on best practice safety systems. A test on what is “reasonably practicable” should be included in the model OHS Act as a qualification to the duties owed. A majority of states and territories include a “reasonably practicable” qualification in their OHS laws, but it is currently interpreted and applied differently across those states and territories.

Clear guidance on what “reasonable practicability” means and how it is interpreted should be provided in the model OHS Act to overcome the inconsistencies that have developed across the states and territories. This is particularly pertinent for multi-jurisdictional employers who require clarity and certainty in the performance of their duties. This should largely reflect the specific circumstances and safety systems of a business and provide such guidance as is required to ensure it is interpreted consistently. The Victorian WorkSafe guideline is supported by AMMA.

Particular regard should be given to ‘control’ to recognise that some persons have greater control than others and therefore, what is reasonably practicable for one person, may not be for the other.

CHAPTER 5: CONSULTATION, PARTICIPATION AND REPRESENTATION

5.1 Duty to Consult

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

AMMA believes that consultation between employers and employees is a necessary component of workplace health and safety.

The model OHS Act should include a requirement to consult but the requirement should be limited to the inclusion of broad principles of consultation. The particular means by which consultation must occur should be capable of determination by the employer, which will depend on the nature and size of the business. Guidelines for consultation, if given, should be contained in regulations or codes of practice.

Q47 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 model OHS Act should not provide this level of detail. As stated in question 45, while consultation should be a requirement, the precise manner in which consultation occurs should be determined by the employer and employees to suit the particular circumstances of each site etcetera. Guidance for consultation could be included in codes of practice or guidelines.

5.2 Participation and Representation

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?

There should be no union right of entry provisions under model OHS laws. Third party entry should be limited to independent government regulators/inspectors

with responsibility for administering the OHS Act. However, this does not mean that employees should not be encouraged to raise OHS concerns with their union representative. Employees should be encouraged to identify and report safety concerns with their employer, union representative or directly with the OHS inspector or regulator.

If an employee wishes to raise a safety issue with their union, the absence of right of entry provisions does not prevent a union official from engaging in dialogue with the employer seeking that the issue be addressed. A union official has the option of raising any unaddressed safety issues directly with the regulator should its dialogue with the employer prove unsuccessful. Similarly, the union official can raise any health and safety issue that it considers to be an immediate danger with an inspector. Right of entry is not required to achieve these ends.

In the alternative, if right of entry is provided to union officials under the model OHS Act, appropriate boundaries are required to ensure that this right is not abused. In particular, measures should be in place to ensure that the right of entry is used solely for occupational health and safety purposes as opposed to pursuing industrial agendas. The following requirements, consistent with the current union right of entry provisions under the *Workplace Relations Act 1996* should be adhered to by the union official – a union official must:

- Hold a valid entry permit (under the *Workplace Relations Act 1996* if entry is in respect to a constitutional corporation);
- Suspect, *on reasonable grounds*, that a breach has occurred, or is occurring;
- Provide a minimum of 24 hours written notice of the intention to enter;
- Specify, in writing, the particulars of the suspected breach;
- Enter on the day specified in the notice; and
- Exercise their right during working hours.

A union official should only be able to exercise their right of entry under the model OHS Act in respect to a particular workplace if one or more employees are a member of the union official's organisation. The decision of employees to not join a union should be respected. These employees continue to have the ability to report health and safety issues direct to the employer or inspector.

The union official must be required to undertake a site safety induction and adhere to all health and safety instructions while on site. An official that fails to adhere to any reasonable requests of the occupier, including a requirement to produce a permit, will lose right of entry privileges immediately.

A union official exercising their right of entry to investigate a suspected breach must be suitably qualified in occupational health and safety.

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

It is AMMA's view that right of entry should be limited to independent OHS inspectors (see question 59 above). These persons should be suitably trained and qualified. Training and qualification requirements should be set nationally to ensure consistency.

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

A right of entry should only be exercised where the inspector has *reasonable grounds* to suspect that a breach of health and safety laws has occurred or is occurring.

ISSUE RESOLUTION

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

The model OHS Act should require appropriate dispute resolution procedures to be put in place but should allow individual workplaces to develop their own dispute resolution procedures. Any direction in the model OHS Act should be limited to specifying the stage at which the OHS regulator is contacted, which should occur only after all other measures have been taken. This will encourage internal dispute resolution at first instance.

Q64 When should issue resolution procedures be activated?

The parties should be required to resolve the matters themselves before activating any formal dispute resolution procedure.

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?

AMMA supports a model dispute resolution procedure that will apply to those workplaces that have not developed their own dispute resolution procedure. A model dispute resolution procedure should be contained within the regulations.

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?

Employees are afforded right to cease unsafe work under common law. AMMA does not oppose the insertion of an express statutory right to cease work due to imminent danger to safety or health. However, a worker should be required take all reasonable steps to notify the employer of the refusal to work so as to enable the employer to rectify the issue. The employer should also be able to request the employee to perform alternative safe work where this is available.

The right to cease work should not have the consequence of causing an entire operation or workplace to stop operating if the health and safety concern can be confined to one area or machine for example.

The right to cease unsafe work must be accompanied by appropriate penalties for inappropriate use, i.e. vexatious or frivolous claims or manufactured or exaggerated health and safety concerns, particularly where this is done in support of or to further industrial claims.

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?

The decision to refuse work or cease work should be made by the employee(s) affected based either on a right in the model OHS Act or as exists under common law. The model OHS Act should not afford a union official or HSR the power to direct work to cease. A union official or HSR should have the capacity to represent the employee and raise health and safety concerns on their behalf but not have the power to order work to stop. This right should only be available to inspectors.

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?

An employee, prima facie, should be entitled to receive payment of wages and/or associated benefits if they have refused to perform unsafe work. However, this should not apply where the employee has refused to perform alternative safe work and/or has left site without permission.

However, the payment of wages is determined in the industrial arena, by awards, agreements or set by the federal minimum wage under the *Workplace Relations*

Act 1996. Any issue arising here may be more appropriately dealt with under workplace relations legislation.

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

If there is an issue with respect to a decision to cease or refuse work the dispute resolution procedures, as determined at the workplace level, can be utilised.

CHAPTER 8: PROSECUTIONS

8.3 Who May Commence Prosecutions and Relevant Procedures?

Q110 Who should be entitled to commence criminal proceedings?

Criminal proceedings should be commenced by the Director of Public Prosecutions (DPP). Criminal acts are considered actions against the public – hence criminal proceedings are brought by the State against the alleged offender. The DPP is to represent the interests of the State (the wider public) in criminal prosecutions.

It is AMMA's view is that unions should not be given the power to initiate prosecutions – as representatives of employees they are not independent, and they do not represent the State in proceedings. Consequently they are not obliged to uphold the integrity of the criminal justice system as officers of the Crown. Neither should unions receive a 'bounty' or reward for successful prosecutions.

8.5 The Burden of Proof and Defences

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

"Reasonably practicable" is an appropriate standard for the model OHS Act and meets the requirements specified in ILO Convention 155.

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

The burden of proof should rest on the prosecutor, who must prove all elements of the offence. A reversal of the burden of proof will result in an absolute liability as exists in the New South Wales OHS system and is not supported by AMMA.

8.6 Workplace Death and Serious Injury

Q136 Should there be specific offences relating to workplace 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 criminal law has long had the capacity to address the criminal responsibility of corporation officers for the death of another due to recklessness. The current criminal law provides legal protections for individuals charged with serious criminal offences.

Individuals, who act consciously and voluntarily in a grossly negligent manner where there is a high risk of death or serious injury and actually cause death, are rightfully prosecuted according to our current criminal justice system. Employers, managers and other senior staff should not be treated differently to other members of the community and in particular, should not face different standards or tests. The introduction of an offence such as industrial manslaughter sends the message that workplace death is of a different class to non-industrial related deaths and thus is treated differently.

If such an offence were introduced, employers may focus on protecting themselves and their management from significant sanctions, in lieu of learning from the accident and preventing a re-occurrence. An industrial manslaughter offence is unlikely to achieve a reduction in the number or severity of fatalities. The focus should primarily be on actual preventative measures rather than punishment in order to assist employers, in a proactive and consultative fashion, to meet their legislative obligations.

CHAPTER 9: OTHER ISSUES

9.2 Notification and Incident Reporting

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

There should be a national standard reporting template that is administered by a single department. All jurisdictions should have the same reporting requirements in order to minimise the regulatory burden on multi-jurisdictional employers.