

18 May 2009

**COMMUNIQUÉ FROM AUSTRALIAN, STATE, TERRITORY AND
NEW ZEALAND WORKPLACE RELATIONS MINISTERS' COUNCIL**

Today's 81st meeting of the Workplace Relations Ministers' Council (WRMC) held by teleconference marks an historic moment in the history of occupational health and safety (OHS) legislation in Australia.

Eighteen months after WRMC commenced this process, the Council has today agreed to a framework for uniform OHS laws which will address the disparate and inconsistent OHS laws across jurisdictions.

Overall, the provisions that will be included in the model OHS Act will lead to enhanced safety protections for Australian employees and greater certainty for employers.

WRMC considered and responded to the recommendations of the National Review into Model OHS Laws (the Review) and in so doing, decided on the optimal structure and content of a model OHS Act to be adopted by the Commonwealth, state and territory governments.

The model OHS Act will include enhanced duty of care provisions so that all persons who conduct a business or undertaking will owe a duty of care to all workers and other persons. This will ensure that OHS legislation applies to all hazards and risks arising from the conduct of work.

The model OHS Act will maintain that breaches of duties of care are criminal offences to reflect the seriousness of non-compliance with a duty of care and will provide for significant penalties in OHS legislation.

The model OHS Act will recognise the importance of consultation in securing safe workplaces and provide for consultation obligations on the person conducting the business or undertaking.

The model OHS Act will provide protections from discrimination, victimisation and coercion over OHS matters which will go beyond what is currently available through anti-discrimination and other laws.

Decisions were made in accordance with the historic Inter-Governmental Agreement for OHS Reform. The Inter-Governmental Agreement expresses the commitment of all governments to work together to harmonise OHS legislation, including through agreed procedural and voting arrangements for WRMC. These provide that decisions on the Review recommendations can be carried by a two thirds majority of members. All jurisdictions participated in the voting process where this was necessary.

WRMC agreed that the focus of OHS harmonisation is on achieving the best possible approach to health and safety for all Australian workers. WRMC agreed to a balanced and inter-related package of measures that will lead to enhanced safety protections for all Australian workers and greater certainty and protections for all

workplace parties. WRMC acknowledged that each jurisdiction will face changes in current OHS arrangements in order to achieve the goal of uniform OHS laws.

WRMC has provided detailed instructions to the Safe Work Australia Council to enable commencement of drafting of the model OHS laws in accordance with the decisions made today.

The WRMC's response to the Review recommendations are released with this communiqué and will also be placed on the Safe Work Australia website at www.safeworkaustralia.gov.au.

Today the Commonwealth agreed with the WRMC that the issue of OHS coverage of self insurers under the Comcare scheme needs to be addressed as part of OHS harmonisation and further agreed this would be a matter for consideration at the next meeting.

WRMC agreed to convene the next meeting of the Council in June.

Attendees included:

- Deputy Prime Minister the Hon Julia Gillard MP, Minister for Employment and Workplace Relations (Cth)
- The Hon Joseph Tripodi MP, Minister for Finance (NSW)
- The Hon Tim Holding MP, Minister for WorkCover (VIC)
- The Hon Cameron Dick MP, Minister for Industrial Relations (QLD)
- The Hon Paul Caica MP, Minister for Industrial Relations (SA)
- The Hon Troy Buswell MLA, Minister for Commerce (WA)
- The Hon Lisa Singh MP, Minister for Workplace Relations (TAS)
- Ms Liesl Centenera, proxy for Mr John Hargreaves MLA, Minister for Industrial Relations (ACT)
- Ms Laurene Hull, proxy for the Hon Robert Knight MLA, Minister for Public Employment (NT)

Apologies:

- Mr John Hargreaves MLA, Minister for Industrial Relations (ACT)
- The Hon Robert Knight MLA, Minister for Public Employment (NT)
- The Hon John Hatzistergos MLC, Minister for Industrial Relations (NSW)
- The Hon Martin Pakula MP, Minister for Industrial Relations (VIC)
- The Hon Kate Wilkinson MP, Minister of Labour (NZ)

WRMC RESPONSE TO RECOMMENDATIONS OF THE NATIONAL REVIEW INTO MODEL OHS LAWS

WRMC Response to OHS Review Recommendations

In a key step toward making the harmonisation of OHS laws a reality, the National Review into Model OHS Laws (the Review) concluded in January this year with the provision of the Review panel's second and final report to the Workplace Relations Ministers' Council (WRMC). The two Review reports make recommendations on the optimal structure and content of a model OHS Act that can be adopted in all jurisdictions.

WRMC welcome the Review reports which represent a balanced and inter-related package of measures for the purpose of informing the development of a model OHS Act. WRMC commend the Review panel on its contribution to the important task of achieving uniform OHS laws.

WRMC note that in formulating its recommendations, the Review panel had regard to the views of all interested stakeholders expressed through submissions to the Review and during stakeholder consultations conducted by the panel. WRMC further note that the Review recommendations are designed to be read as an overall package of OHS reform.

WRMC gave detailed consideration to the package of recommendations outlined in the Review reports. In taking decisions on the Review recommendations, WRMC was guided by the opinions of the expert panel as well as stakeholder and jurisdictional views. WRMC was also conscious of the directive from the Council of Australian Governments that the model OHS laws do not compromise standards for legitimate safety concerns. The result of WRMC's deliberations on each of the 232 Review recommendations is outlined in the table below.

WRMC has asked the Safe Work Australia Council to develop the model OHS laws in accordance with its decisions. The development of the model OHS Act and its regulations will involve extensive stakeholder consultation including the release of an exposure draft bill for public consultation. Matters raised during these consultation processes will help to shape the final products for WRMC's decision.

Notwithstanding the responses outlined against each specific recommendation in the following table, the drafting of the model OHS Act should also be guided by and take account of the following areas.

Application of the primary duty of care to any person conducting a business or undertaking

The panel recommends that the primary duty of care should be owed by any person conducting a business or undertaking. The objective of this recommendation is to move away from the traditional emphasis on the employment relationship as the determiner of the primary duty, to provide greater health and safety protection for all persons involved in, or affected by, work activity. Care needs to be taken during drafting to ensure that the scope of the duty is limited to matters of *occupational* health and safety and does not further extend into areas of public safety that are not related to the workplace activity.

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Volunteers

While the model OHS Act should protect volunteers in their capacity as workers, it should not have the unintended consequence of discouraging voluntary participation in community-based activities. Drafting will need to ensure that the model Act does not place inappropriate duties on volunteers. In particular regard must be given to the extent to which the model OHS Act should place duties on volunteer directors of organisations and the extent to which duties of care should be owed to persons who undertake work in a voluntary capacity.

Intersection with others laws or processes

A number of recommendations (primarily related to recommendations which cover ‘duty of care’ offences and defence) would cause unwarranted and in a few cases irreconcilable conflicts with existing criminal and procedural laws in the jurisdictions. These matters (which have been kept to a minimum) should be dealt with, as far as possible, outside the model OHS laws. Careful consideration will need to be given to these matters during drafting. In so doing, these matters will need to be coordinated in order to ensure as much consistency as possible in line with the Inter-Governmental Agreement for OHS Reform.

Subordinate legislation

A number of recommendations are overly prescriptive and would be best dealt with in subordinate OHS legislation rather than the model OHS Act.

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<p>Recommendation 1</p> <p>The model Act should contain a set of principles including, amongst other things, the following to guide duty holders, regulators and the courts on the interpretation and application of the duties of care:</p> <ul style="list-style-type: none"> a) Duties of care are imposed on those who are involved in, materially affect, or are materially affected by, the performance of work. b) All duty holders (other than workers, officers and others at the workplace) must eliminate or reduce hazards or risks so far as is reasonably practicable. c) Workers and other individuals at the workplace must co-operate with persons conducting businesses or undertakings at the workplace, to assist in achievement of the objective of elimination or reduction of hazards or risks and must take reasonable care for themselves and others. d) Officers must proactively take steps to ensure the objective of elimination or reduction of hazards or risks is achieved within their organisation. <p>Note: Recommendations relating to principles other than those relating to the interpretation of the duties of care will be dealt with in our second report.</p>	<p>Response: Agreed</p> <p>Parts (a) and (d) of this recommendation are more in the nature of duties than objectives or principles and this should be taken into account during drafting.</p>
<p>Recommendation 2</p> <p>The model Act should include provisions explicitly providing for the following common features applicable to all duties of care:</p> <ul style="list-style-type: none"> a) Duties of care are non-delegable. b) A person can have more than one duty by virtue of being in more than one class of duty holder and no duty restricts another. c) More than one person may concurrently have the same duty. d) Each duty holder must comply with an applicable duty to the required standard (reasonably practicable, due diligence or reasonable care) notwithstanding that another duty holder has the same duty. e) Each duty holder must comply with an applicable duty to the extent to which the duty holder has control over relevant matters, or would have had control if not for an agreement or arrangement purporting to limit or remove that control. f) Each duty holder must consult, and co-operate and co-ordinate activities, with all persons having a duty in relation to the same matter. 	<p>Response: Agreed</p> <p>Further clarity may be needed during drafting in relation to part (e) of this recommendation which includes a provision for ‘control’, noting there won’t be a ‘control’ test in the model Act.</p>
<p>Recommendation 3</p> <p>The model Act should adopt an approach whereby:</p> <ul style="list-style-type: none"> a) the duty of care provisions together impose duties on all persons who by their conduct may cause, or contribute in 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>OHS service providers, as</p>

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<p>a specified way, to risks to the health or safety of any person from the conduct of a business or undertaking;</p> <p>b) the duties of care are focused on the undertaking of work and activities that contribute to its being done, and are not limited to the workplace (except where a duty relates specifically to the workplace or things within it, or the limitation is needed to place reasonable limits on the duty – e.g. the duty of care of a worker or visitor);</p> <p>c) there is a primary (general) duty of care imposed on the person conducting a business or undertaking (whether as an employer, self-employed person, principal contractor or otherwise) for the health and safety of:</p> <ul style="list-style-type: none"> i) ‘workers’ within an expanded definition; and ii) others who may be put at a risk to their health or safety by the conduct of the business or undertaking; and <p>d) even though many of the following persons will be covered by the primary duty of care of a person conducting a business or undertaking, for certainty and to provide guidance through more detailed requirements, duties of care should be imposed on specified classes of duty holders who are involved in the undertaking of work or activities that contribute to it being done, or are present when work is being done. These are:</p> <ul style="list-style-type: none"> i) those with management or control of workplace areas; ii) designers of plant, substances and structures; iii) manufacturers of plant, substances and structures; iv) builders, erectors and installers of structures; v) suppliers and importers of plant, substances and structures; and vi) OHS service providers; vii) officers; viii) workers; and ix) other persons. 	<p>referenced in part (d)(vi) of this recommendation, are to be removed as they would already be covered by the general duty of care. Including them as a specific class of duty holder could lead to unintended consequences in the scope of coverage of the model Act.</p>
<p>Recommendation 4</p> <p>Reasonably practicable' should be used to qualify the duties of care, by inclusion of that expression in each duty of care, except for the duties of officers, workers and other persons for whom different qualifiers are proposed.</p>	<p>Response: Agreed</p>
<p>Recommendation 5</p> <p>‘Reasonably practicable’ should be defined in the model Act.</p>	<p>Response: Agreed</p>
<p>Recommendation 6</p> <p>‘Reasonably practicable’ should be defined in the model Act in a way which allows a duty holder to understand what is required to meet the standard.</p>	<p>Response: Agreed</p> <p>There are some issues to be considered during drafting in relation to the ‘reasonably practicable’ examples provided in the review panel’s first report.</p>

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<p>Recommendation 7</p> <p>The meaning and application of the standard of reasonably practicable should be explained in a code of practice or guidance material.</p>	<p>Response: Agreed</p>
<p>Recommendation 8</p> <p>‘Control’ should not be included in the definition of reasonably practicable.</p>	<p>Response: Agreed</p>
<p>Recommendation 9</p> <p>The principles of risk management should:</p> <ul style="list-style-type: none"> a) be identified in a part of the model Act setting out the fundamental principles applicable to the model Act; b) while implied in the definition of reasonably practicable, <u>not</u> be expressly required to be applied as part of the qualifier of reasonably practicable; and c) <u>not</u> be expressly required to be applied by the duties of care. <p>Note: The principles will be dealt with in our second report.</p>	<p>Response: Agreed</p>
<p>Recommendation 10</p> <p>The model Act should provide in a single section a primary duty of care owed by a person conducting a business or undertaking to a broad category of ‘workers’ and others.</p>	<p>Response: Agreed</p>
<p>Recommendation 11</p> <p>To ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships and arrangements, the duty should not be limited to employment relationships. The duty holder is any person conducting the business or undertaking.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The principle of this recommendation is supported, however, there are issues that will need to be worked through during drafting. In particular, drafting will need to ensure that the coverage of the model Act is confined to <i>occupational</i> health and safety and does not extend into areas more appropriately classified as public safety (see also recommendations 77 and 78). In addition, drafting will need to ensure that the model Act does not place inappropriate duties on volunteers.</p>
<p>Recommendation 12</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p>

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<p>The primary duty of care should clearly provide, directly or through defined terms, that it applies to any person conducting a business or undertaking, whether as:</p> <ul style="list-style-type: none"> a) an employer, or b) a self-employed person, or c) the Crown in any capacity, or d) a person in any other capacity; <p>and whether or not the business or undertaking is conducted for gain or reward.</p>	<p>The comments at recommendation 11 also apply here.</p>
<p>Recommendation 13</p> <p>The primary duty of care should exclude workers and officers to the extent that they are not conducting a business or undertaking in their own right.</p> <p>Alternatively, guidance material should make clear that the primary duty of care is not owed by such persons.</p>	<p>Response: Agreed</p> <p>Self-employed persons should not be excluded and should be considered to be a person conducting a business or undertaking.</p>
<p>Recommendation 14</p> <p>The primary duty of care should not include express reference to control.</p>	<p>Response: Agreed</p>
<p>Recommendation 15</p> <p>The primary duty of care should be sufficiently broad so as to apply to all persons conducting a business or undertaking, even where they are doing so as part of, or together with, another business or undertaking.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 11 also apply here.</p>
<p>Recommendation 16</p> <p>The model Act should include a definition for ‘worker’ that allows broad coverage of the primary duty of care. The definition of ‘worker’ should extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.</p>	<p>Response: Agreed</p>
<p>Recommendation 17</p> <p>The primary duty of care should not be limited to the workplace, but apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking.</p>	<p>Response: Agreed</p> <p>The model Act should provide for its extra-territorial operation for activities conducted overseas eg. Australian embassies.</p>
<p>Recommendation 18</p> <p>To avoid the exclusion or limitation of the primary duty of care, the model Act should specifically provide that the duty should apply without limitation, notwithstanding anything provided elsewhere in the model Act (that is, more specific duties that may also apply in the circumstances should not exclude or limit the primary duty of care).</p>	<p>Response: Agreed</p>

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<p>Recommendation 19</p> <p>The primary duty of care should include specific obligations, namely ensuring so far as is reasonably practicable:</p> <ul style="list-style-type: none"> a) the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health or safety of any person; b) the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances; c) each workplace under the control or management of the business operator is maintained in a condition that is safe and without risks to health; d) the provision of adequate welfare facilities; and e) the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their safety and health from the conduct of the business or undertaking. 	<p>Response: Agreed</p> <p>In relation to parts (a) and (b) of this recommendation, the phrase is to be amended to ‘provision or maintenance’.</p>
<p>Recommendation 20</p> <p>The model Act should extend the primary duty of care to circumstances where the primary duty holder provides accommodation to a worker, in circumstances where it is necessary to do so to enable the worker to undertake work in the business or undertaking (along the lines of that currently found in Part III, Division 4 of the WA Act). Detailed requirements and the specified scope should be contained in regulations.</p>	<p>Response: Agreed</p>
<p>Recommendation 21</p> <p>In giving effect to the recommendations relating to the primary duty of care, the proposed model clause at paragraph 6.125 should be taken into account.</p>	<p>Response: Agreed</p> <p>The comments at recommendation 11 are to be taken into account during drafting.</p>
<p>Recommendation 22</p> <p>The primary duty of care should be supported by codes of practice or guidance material to explain the scope of its operation and what is needed to comply with the duty.</p>	<p>Response: Agreed</p>
<p>Recommendation 23</p> <p>The model Act should include a specific duty of care owed by a person with management or control of the workplace, fixtures, fittings or plant within it to ensure that the workplace, the means of entering and exiting the workplace, and any fixtures, fittings and plant within the workplace are safe and without risks to health and safety.</p>	<p>Response: Agreed</p> <p>The inclusion of ‘commissioning of plant’ is to be considered during drafting.</p>
<p>Recommendation 24</p> <p>The model Act should define ‘management or control’ of the workplace, fixtures, fittings and plant to make it clear who owes</p>	<p>Response: Agreed</p>

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<p>the duty of care. Note: A definition of ‘management or control’ will be provided in our second report.</p>	
<p>Recommendation 25</p> <p>The duty should make it clear that more than one person can have management or control of the same matter at the same time or at different times. The duty should be placed on a person who has, to any extent, management or control of:</p> <ul style="list-style-type: none"> a) a relevant workplace area (or part thereof); b) any area adjacent to a relevant workplace area; c) fixtures; d) fittings; or e) plant. 	<p>Response: Agreed</p>
<p>Recommendation 26</p> <p>The duty of care should be owed to any person at the workplace or any adjacent areas.</p>	<p>Response: Agreed</p> <p>In drafting, ‘adjacent areas’ are not to be used to limit the application of the duty.</p>
<p>Recommendation 27</p> <p>The duty of care of a person with management or control of a workplace etc should be qualified by the standard of reasonably practicable.</p>	<p>Response: Agreed</p>
<p>Recommendation 28</p> <p>Domestic premises should be excluded from the definition of a workplace for the purposes of the duty of care of the person with management or control unless specifically included by regulation. Note: ‘Workplace’ will be defined in our second report.</p>	<p>Response: Not agreed</p> <p>Workers who work in private homes should be subject to OHS protections. While the best way to give effect to this principle will need to be considered in the drafting of the model Act, a possible alternative approach would be to define ‘workplace’ to include any place where work is carried out, and to exclude domestic premises to the extent they are being used as domestic premises. OHS inspectors should also have right of entry to domestic premises for OHS purposes. There is a need for consistency with recommendations 17 and 20 and to be mindful of issues raised by common property in strata titles.</p>
<p>Recommendation 29</p> <p>The model Act should provide for separate duties of care owed</p>	<p>Response: Agreed</p>

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<p>by specific classes of persons undertaking activities, as noted in recommendation 30, in relation to plant, substances or structures intended for use at work.</p>	
<p>Recommendation 30</p> <p>The model Act should place specific duties of care on the following classes of persons:</p> <ul style="list-style-type: none"> a) designers of plant, structures or substances; b) manufacturers of plant, structures or substances; c) builders, erectors or installers of structures; and d) importers or suppliers of plant, structures or substances. 	<p>Response: Agreed</p>
<p>Recommendation 31</p> <p>The duty of care would be to ensure that the health and safety of those contributing to the use of, using, otherwise dealing with or affected by the use of plant, structures or substances is not put at risk from the particular activity of:</p> <ul style="list-style-type: none"> a) construction; b) erection; c) installation; d) building; e) commissioning; f) inspection; g) storage; h) transport; i) operating; j) assembling; k) cleaning; l) maintenance or repair; m) decommissioning; n) disposal; o) dismantling; or p) recycling. 	<p>Response: Agreed</p> <p>The list should be inclusive rather than exclusive. Regard should also be given, during drafting, to the comments at recommendation 11.</p>
<p>Recommendation 32</p> <p>The duties of care should apply in relation to any reasonably foreseeable activity undertaken for the purpose for which the plant, structure or substance was intended to be used (e.g. construction, installation, use, maintenance or repair).</p>	<p>Response: Agreed</p>
<p>Recommendation 33</p> <p>The duties of care are owed to those persons using or otherwise dealing with (e.g. constructing, maintaining, transporting, storing, repairing), or whose health or safety may be affected by, the use of the plant, substance or structure.</p>	<p>Response: Agreed</p>
<p>Recommendation 34</p>	<p>Response: Agreed</p>

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<p>The specific duties of care should incorporate broad requirements for:</p> <ul style="list-style-type: none"> a) hazard identification, risk assessment and risk control; b) appropriate testing and examination to identify any hazards and risks; c) the provision of information to the person to whom the plant, structure or substance is provided about the hazards, risks and risk control measures; and d) the ongoing provision of any additional information as it becomes available. 	
<p>Recommendation 35</p> <p>The model Act should include a definition of 'supply'. Note: The definition of 'supply' will be dealt with in our second report.</p>	<p>Response: Agreed</p>
<p>Recommendation 36</p> <p>The model Act should exclude passive financiers from the application of the duty of care of a supplier. Note: Passive financiers are persons who may own the plant, structure or substance concerned only for the purpose of financing its acquisition.</p>	<p>Response: Agreed</p>
<p>Recommendation 37</p> <p>The model Act should place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act.</p>	<p>Response: Not agreed</p> <p>This duty is considered unnecessary as it would be covered by the general duty which applies to persons conducting a business or undertaking.</p>
<p>Recommendation 38</p> <p>The model Act should include a definition of a 'relevant service' and a 'service provider' to make it clear what activities fall within the duty and who owes the duty. The definition will be discussed in our second report.</p>	<p>Response: Not agreed</p> <p>The comments at recommendation 37 also apply here.</p>
<p>Recommendation 39</p> <p>The duty of care should require the service provider to ensure so far as is reasonably practicable that no person at work is exposed to a risk to their health or safety from the provision of the services.</p>	<p>Response: Not agreed</p> <p>The comments at recommendation 37 also apply here.</p>
<p>Recommendation 40</p> <p>The model Act should place a positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care of that entity under the model Act.</p>	<p>Response: Agreed</p>

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<p>Recommendation 41</p> <p>For the purposes of the model Act, officers should be those persons who act for, influence or make decisions for the management of the relevant entity. Note: The definition of ‘officers’ will be dealt with in our second report.</p>	<p>Response: Agreed</p>
<p>Recommendation 42</p> <p>The provision should apply to officers of a corporation, unincorporated association, or partnership or equivalent persons representing the Crown. Note: These terms will be defined in our second report.</p>	<p>Response: Agreed</p> <p>Consideration will need to be given to how this will apply in relation to the Crown.</p>
<p>Recommendation 43</p> <p>If our preferred position in recommendation 40 for a positive duty for officers and associated recommendations is not accepted, we recommend that provisions based on s.144 and s.145 of the Victorian OHS Act 2004 be adopted in the model Act.</p>	<p>Response: N/A</p>
<p>Recommendation 44</p> <p>The model Act should place on all persons carrying out work activities (‘workers’) a duty of care to themselves and any other person whose health or safety may be affected by the conduct or omissions of the worker at work.</p>	<p>Response: Agreed</p>
<p>Recommendation 45</p> <p>The duty of care should be placed on ‘workers’, defined in a way as to cover all persons who are carrying out work activities in a business or undertaking. Note: The definition of ‘worker’ is to be dealt with in our second report.</p>	<p>Response: Agreed</p>
<p>Recommendation 46</p> <p>The duty of care should require workers to:</p> <ul style="list-style-type: none"> a) take reasonable care for their own health and safety; b) take reasonable care that their acts and omissions do not adversely affect the health or safety of others; and c) cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act. 	<p>Response: Agreed</p> <p>The meaning of ‘cooperate with any reasonable action’ in paragraph (c) of this recommendation should be examined further during drafting.</p>
<p>Recommendation 47</p> <p>The workers’ duty of care should be qualified by the standard of ‘reasonable care’ being the standard applied for negligence</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The drafting of this provision will need to take account of how</p>

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<p>under the criminal law.</p>	<p>negligence and absolute liability operate in the Criminal Code. The qualifier of ‘reasonable care’ should not be equated with the standard of negligence under criminal law (being ‘gross negligence’) as per comments at recommendation 55.</p>
<p>Recommendation 48</p> <p>The model Act should place a limited duty of care on other persons present at a workplace (not being a worker or other duty holder under the model Act) involved in work activity:</p> <ul style="list-style-type: none"> a) to take reasonable care for their own health and safety; and b) to take reasonable care that their acts and omissions do not adversely affect the health and safety of others; and c) to cooperate with any reasonable action taken by the person conducting the business or undertaking in complying with the model Act. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The duty should include persons other than those involved in work activity, and the inclusion of the phrase “involved in work activity” appears to be an error. Drafting should examine the meaning of ‘cooperate with any reasonable action’ in paragraph (c) of this recommendation.</p>
<p>Recommendation 49</p> <p>The duty of care of such other persons present at the workplace should be qualified by the standard of ‘reasonable care’, being the standard applied for negligence under the criminal law.</p>	<p>Response: Agreed</p> <p>The comments at recommendation 47 also apply here.</p>
<p>Recommendation 50</p> <p>To emphasise the seriousness of the obligations and to strengthen their deterrent value, breaches of duties of care should only be criminal offences, with the prosecution bearing the criminal standard of proof for all the elements of the offence.</p> <p>Note: We discuss and make a recommendation about the onus of proof in chapter 13 and in recommendation 62.</p>	<p>Response: Agreed</p>
<p>Recommendation 51</p> <p>Penalties should be clearly related to non-compliance with a duty, the culpability of the offender and the level of risk, not merely the actual consequences of the breach.</p>	<p>Response: Agreed</p>
<p>Recommendation 52</p> <p>Offences for a breach of a duty of care should continue to be absolute liability offences, and clearly expressed as such, subject to the qualifier of reasonable practicability, due diligence or reasonable care, as recommended earlier.</p>	<p>Response: Agreed</p> <p>Drafting will need to take account of the requirements that apply to the framing of offences in the criminal code jurisdictions.</p>

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<p>Recommendation 53</p> <p>Prosecutions for the most serious breaches (i.e. category 1 offences, see recommendation 55) should be brought on indictment, with other offences dealt with summarily.</p>	<p>Response: Not agreed</p> <p>This issue should be dealt with outside the model OHS laws on the basis that the recommendation would cause unwarranted and in a few cases irreconcilable conflicts with existing criminal and procedural laws in the jurisdictions.</p>
<p>Recommendation 54</p> <p>There should be provision for indictable offences to be dealt with summarily where the Court decides that it is appropriate and the defendant agrees.</p>	<p>Response: Not agreed</p> <p>The comments at recommendation 53 also apply here.</p>
<p>Recommendation 55</p> <p>There should be three categories of offences for each type of duty of care,</p> <ul style="list-style-type: none"> a) Category 1 for the most serious breaches, where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent; b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness or gross negligence; and c) Category 3 for a breach of the duty without the aggravating factors present in the first two categories; <p>with maximum penalties that:</p> <ul style="list-style-type: none"> d) relate to the seriousness of the breach in terms of risk and the offender's culpability; e) strengthen the deterrent effect of the offences; and f) allow the courts to impose more meaningful penalties, where that is appropriate. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Three categories of offences for each duty of care are agreed but with the following alternative model:</p> <ul style="list-style-type: none"> a) Category 1 for the most serious breaches, for an offence of recklessly endangering a person to risk of death or serious injury at a workplace; b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness; and c) Category 3 for a breach of the duty without recklessness or high risk of serious harm. <p>The alternative model removes 'gross negligence' from the categories of offences on the basis that 'gross negligence' offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences.</p>
<p>Recommendation 56</p> <p>The model Act should provide that in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was serious harm (fatality or serious injury) to any person or a high</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 55 also apply here.</p>

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<p>risk of such harm, the highest of the penalties under the Act should apply, including imprisonment for up to five years. Note: This would be a Category 1 case in our recommended 3 category system. Recommendation 57 proposes a range of penalties for each category and for the holders of the various recommended types of duty.</p>	
<p>Recommendation 57</p> <p>The model Act should provide for the penalties for category 1, 2 and 3 offences relating to duties of care, as set out in Tables 11, 12 and 13.</p>	<p>Response: Agreed</p>
<p>Recommendation 58</p> <p>The model Act should separately specify the penalties for natural persons and corporations, with the maximum fine for non-compliance by a corporation being five times the maximum fine for a natural person.</p>	<p>Response: Agreed</p>
<p>Recommendation 59</p> <p>The model Act should provide for custodial sentences for individuals for up to five years in circumstances (category 1 offence) where:</p> <ul style="list-style-type: none"> a) there was a breach of a duty of care where there was serious harm to a person (fatality or serious injury) or a high risk of serious harm; and b) the duty holder has been reckless or grossly negligent. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 55 also apply here.</p>
<p>Recommendation 60</p> <p>In light of our other recommendations for higher maximum penalties and a greater range of sentencing options, the model Act should not provide for a further penalty for a repeat offender.</p>	<p>Response: Agreed</p>
<p>Recommendation 61</p> <p>The model Act should provide for the following sentencing options in addition to fines and custodial sentences:</p> <ul style="list-style-type: none"> a) adverse publicity orders; b) remedial orders; c) corporate probation; d) community service orders; e) injunctions; f) training orders; and g) compensation orders. <p>Note: We support making provision for enforceable undertakings but they are dealt with in our second report to allow a full examination of the options, including providing for such an undertaking as an alternative to a prosecution and as a</p>	<p>Response: Agreed</p>

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sentencing option.	
<p>Recommendation 62</p> <p>The prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.</p>	<p>Response: Agreed</p>
<p>Recommendation 63</p> <p>The model Act should provide for a system of appeals against a finding of guilt in a prosecution, ultimately to the High Court of Australia, commencing with an application for leave to appeal to the Supreme Court.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The principle of a system of appeals is supported, however, this issue should be dealt with outside the model OHS Act on the basis that it would require consequential amendments to non-OHS laws which govern the procedures and appeal rights in the various courts and tribunals which hear OHS matters in the jurisdictions.</p>
<p>Recommendation 64</p> <p>The model Act should not provide for appeals from acquittals.</p>	<p>Response: Agreed</p>
<p>Recommendation 65</p> <p>Crown immunity should not be provided for in the model Act.</p>	<p>Response: Agreed</p>
<p>Recommendation 66</p> <p>Prosecutions for non-compliance with duties of care should be commenced within two years of whichever is the latest of the following:</p> <ul style="list-style-type: none"> a) the occurrence of the offence; b) the offence coming to the regulator's notice; <p>or within 1 year of a finding in a coronial proceeding or another official inquiry that an offence has occurred.</p>	<p>Response: Agreed</p> <p>The drafting process should address instances where there is a failure to properly notify the regulator.</p>
<p>Recommendation 67</p> <p>The model Act should provide for or facilitate the presentation of a victim impact statement to any court that is hearing a category 1 or category 2 case of non-compliance with a duty of care, including by or on behalf of surviving family members or dependants.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The principle that victim impact statements should be admissible in OHS proceedings is supported, however, this issue should be dealt with outside the model OHS laws on the basis that victim impact statements and their relevance to sentencing differ between jurisdictions and are generally</p>

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	dealt with in the general sentencing law or criminal procedure legislation.
<p>Recommendation 68</p> <p>Subject to wider criminal justice policy considerations, the model Act should provide for the promulgation of sentencing guidelines or, where there are applicable sentencing guidelines, they should be reviewed for national consistency and compatibility with the OHS regulatory regime.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>This issue should be dealt with outside the model OHS laws on the basis that the provisions for sentencing guidelines differ between jurisdictions and are generally dealt with in the general sentencing law or criminal procedure legislation.</p>
<p>Recommendation 69</p> <p>The model Act should provide that two or more contraventions of duties of care may be charged as a single offence if they arise out of the same factual circumstances.</p>	<p>Response: Agreed</p>
<p>Recommendation 70</p> <p>The model Act should enshrine the rule against double jeopardy by providing that no person is liable to be punished twice for the same offence under the Act or for events arising out of and related to that offence.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The rule against double jeopardy is supported, however, it should be dealt with outside the model OHS laws. This is on the basis that the rule currently exists in all jurisdictions whether in statute or common law and it is considered unnecessary to include it in the model OHS Act.</p>
<p>Recommendation 71</p> <p>Penalties for non-compliance with duties of care should be specified in the same provisions as the duties to which they relate.</p>	<p>Response: Agreed</p>
<p>Recommendation 72</p> <p>If recommendation 71 is not accepted, the provisions relating to penalties for non-compliance with duties of care should be collocated with the provisions specifying the duties.</p>	<p>Response: N/A</p>
<p>Recommendation 73</p> <p>The model Act should expressly state the dollar amounts of the maximum fines for each category of breach of a duty of care.</p>	<p>Response: Not agreed</p> <p>Penalty units should be used instead of dollar amounts which make it easier to update the</p>

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	maximum penalty amount either through linking them to the CPI or through regulatory amendments. Guidance material could set out the monetary amounts.
<p>Recommendation 74</p> <p>Further advice should be sought on the effects of other laws relating to the jurisdiction, powers and functions of the courts with jurisdiction over OHS matters to identify whether those laws have any unintended consequences inimical to the objective of harmonising OHS laws.</p>	Response: Agreed
<p>Recommendation 75</p> <p>In light of our recommendations about who should bear the onus of proof in relation to reasonable practicability, the model Act should not provide for defences to prosecutions for non-compliance with duties of care.</p>	Response: Agreed
<p>Recommendation 76</p> <p>We recommend that Ministers agree that:</p> <ol style="list-style-type: none"> a) in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws, (including where they form part of an Act that has other purposes) for particular hazards or high risk industries that are within the responsibility of the Ministers, should only continue where they have been objectively justified; b) even where that justification is established, there should be an on-going, legislative and administrative inter-relationship between the laws and, if there are different regulators, between those regulators; c) as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws; d) where the continuation of the separate legislation is not justified, it should be replaced by the model Act within an agreed timeframe; e) where specific provisions are necessary, they should normally be provided by regulations under the model Act, with specific provision in the model Act relating to the matters previously regulated by the separate legislation kept to a minimum; and f) this approach should be recommended to COAG so that, subject to COAG agreement, it is extended within a reasonable timeframe to other legislation that pertains to OHS but which is within the responsibilities of other Ministers. 	Response: Agreed
<p>Recommendation 77</p> <p>To establish a clearer application of the model Act to public</p>	Response: Agreed

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<p>safety:</p> <ul style="list-style-type: none"> a) the underlying OHS objectives of the model act should be clearly articulated, including the protection of all persons from work-related harm; and b) when the model Act is drafted and when it is amended after it is in operation, care must be taken to avoid giving it a reach that is inconsistent with those objectives. 	
<p>Recommendation 78</p> <p>To avoid misunderstandings about the protection of public safety, the model Act should facilitate the publication by the regulator of up-to-date advice and information about how the model Act relates to the protection of the safety of the public.</p>	<p>Response: Agreed</p>
<p>Recommendation 79</p> <p>The general structure of the model Act should be:</p> <ol style="list-style-type: none"> 1. Scope, objects and definition provisions. 2. Duties of care and other obligations. 3. Workplace consultation, participation and representation. 4. Functions and powers of the regulator and inspectors. 5. Legal proceedings. 6. Other matters. 	<p>Response: Agreed</p>
<p>Recommendation 80</p> <p>The model Act should contain:</p> <ul style="list-style-type: none"> a) objects and principles along the lines of those set out in 22.31 which are based on those in existing Australian OHS Acts; and b) a new object that expresses the aim of ensuring that the Act facilitates and supports the ongoing harmonisation of Australia's OHS laws. 	<p>Response: Agreed</p>
<p>Recommendation 81</p> <p>The model Act should define a "business or undertaking".</p>	<p>Response: Agreed</p>
<p>Recommendation 82</p> <p>The model Act should define a "business or undertaking" in broad terms, but provide for the exemption of specific organisations or activities or specific types of organisations or activities in a Schedule to the model Act or in Regulations.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The definition should be robust enough so that exemptions are not required, or in very limited circumstances such as matters relating to national security, Australia's defence and certain police operations.</p>

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<p>Recommendation 83</p> <p>The model Act should define a “business or undertaking” to be activities carried out by, or under the control of, a person (including a corporation or other legal entity or the Crown in any capacity):</p> <ol style="list-style-type: none"> a) whether alone or in concert; b) of an industrial or commercial nature or in government or local government; c) whether or not for profit or gain; and d) in which: <ol style="list-style-type: none"> i) workers are engaged, or caused to be engaged, to carry out work; or ii) the activities of workers at work are directed or influenced, or iii) things are provided for use in the conduct or work (e.g. a workplace, plant, substances, OHS services); by the person conducting the business or undertaking. <p>For avoidance of doubt, a ‘business or undertaking’ does not include the engagement of workers solely for private or domestic purposes.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The definition requires further examination during drafting. Particular issues for consideration are:</p> <ul style="list-style-type: none"> • ensuring that the scope of the model Act does not extend to public safety or to activities carried out by some volunteers; • paragraph (b) does not appear to capture welfare organisations; • the inclusion of ‘control’; and • whether the proposed definition covers self-employed contractors.
<p>Recommendation 84</p> <p>The model Act should not include a definition of “control”.</p>	<p>Response: Agreed</p>
<p>Recommendation 85</p> <p>To provide certainty that the model Act operates in relation to all aspects of health, the model Act should:</p> <ol style="list-style-type: none"> a) include objects that clearly relate to the elimination or minimisation so far as is reasonably practicable of risks to physical and psychological health; and b) contain a definition of “health” that recognises that health relates to: <ol style="list-style-type: none"> i) both physical and psychological health; ii) immediate and long-term health; and iii) freedom from disease or illness or incapacity. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>This will need further examination during drafting. For example, the concept of ‘welfare’ or ‘well-being’ may capture the underlying principle.</p>
<p>Recommendation 86</p> <p>The model Act should define an “officer” for the purposes of the duty of care of an officer of a body corporate, partnership or unincorporated association:</p> <ol style="list-style-type: none"> a) to have the meaning given by s.9 of the Corporations Act 2001 (Cwth); and b) to include directors and senior managers of the Crown, public sector agencies and statutory authorities. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The definition proposed by the panel is not agreed. The following principles should instead be applied to the drafting of the definition of officer in the model OHS Act:</p> <ul style="list-style-type: none"> • Officers should include those

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	<p>persons who influence or make decisions that affect the whole, or a substantial part, of the entity, but should not include Commonwealth and State Ministers.</p> <ul style="list-style-type: none"> • Officers should include equivalent persons representing the Crown. • Volunteers and local government councillors, to the extent to which they fall within the definition of ‘officer’, should have a positive duty but should not be liable to prosecution.
<p>Recommendation 87</p> <p>The model Act should provide that an officer who is a volunteer is only liable to prosecution and a penalty for a breach of the duty of care of an officer where the breach is a Category 1 offence.</p> <p>Note: See Recommendation 55 in our first report for the categories of offence.</p>	<p>Response: Not agreed</p> <p>Officers who are volunteers should not be liable to prosecution under the model OHS Act, noting that this would not preclude them being prosecuted under the general criminal law.</p>
<p>Recommendation 88</p> <p>The model Act should define “due diligence” for the purposes of the duty of care of officers, to provide direction as to the appropriate role of an officer in OHS and how compliance may be achieved.</p> <p>The definition should be stated to include the following elements:</p> <ol style="list-style-type: none"> 1. The standard for the officer is to be assessed against what a reasonable person in the position of the officer would do 2. The officer is required to take reasonable steps proactively and regularly to ensure: <ol style="list-style-type: none"> a) up to date knowledge of OHS laws and compliance requirements; b) an understanding of the nature of the operations of the entity and generally the hazards and risks associated with those operations; c) that the entity has available and uses appropriate resources and processes to enable the identification and elimination or control of specific OHS hazards and risks associated with the operations of the entity; d) verification of the implementation by the entity of the matters referred to in c; and e) a process for receiving, considering & ensuring a timely response to information regarding incidents, identified hazards and risks. 	<p>Response: Not agreed</p> <p>Case law should be relied upon to define ‘due diligence’.</p>

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<p>Recommendation 89</p> <p>The model Act should define an “OHS service provider” to <u>include</u> persons engaged by another duty holder to provide any or all of the following (“OHS service”) in the course of conducting a business or undertaking, (other than in the capacity of a worker or officer):</p> <ul style="list-style-type: none"> a) advice or information on any matter related to the health or safety of any person; b) systems, policies, procedures or documents relevant to the management of OHS, broadly or in relation to specific matters; c) training on matters relating to OHS; and d) testing, analysis, information or advice (including, but not limited to, mechanical, environmental or biological matters) <p>but not to include:</p> <ul style="list-style-type: none"> a) a person providing an OHS service as part of the performance or exercise of a function, role, right or power under the model Act; or b) a person providing an OHS service while undertaking activity specifically required or authorised by or under any Act or regulation; or c) a member or employee of an emergency service organisation, providing advice or information during the course of responding as a matter of urgency to circumstances giving rise to a serious risk to the health or safety of any person; or d) a legally qualified person practising as a barrister or solicitor when, and to the extent only to which, that person is providing advice to which legal professional privilege may apply. 	<p>Response: Not agreed</p> <p>The comments at recommendations 37-39 apply here.</p>
<p>Recommendation 90</p> <p>The model Act should define “plant”, using the definition in s.5 of the Vic Act as a model.</p>	<p>Response: Agreed</p>
<p>Recommendation 91</p> <p>The model Act should define “supply” to be, and occur at the time of, passing of physical possession of a relevant item:</p> <ul style="list-style-type: none"> a) directly or through an intermediary; b) whether by way or sale, re-supply, exchange, lease, hire or hire-purchase or otherwise; c) including by sale of business assets including the relevant item or all of the shares in a company that owns the relevant item; d) but not including an act by which the owner resumes possession at the conclusion or termination of a lease or other agreement. 	<p>Response: Agreed</p> <p>The definition should be consistent with the principle in recommendation 36 that passive financiers should be excluded.</p>

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<p>Recommendation 92</p> <p>The model Act should define the term ‘union’ so that it covers: an association of employees (or whatever term is locally used) registered or taken to be registered under the relevant Commonwealth or State industrial relations Act.</p>	<p>Response: Agreed</p> <p>The drafting of the model Act should ensure that the definition of ‘union’ is consistent with how the term is defined in the <i>Fair Work Act 2009</i>.</p>
<p>Recommendation 93</p> <p>The model Act should define a “worker” for all purposes of the model Act consistently with the definition of that term in the NT Act, with appropriate modification to replace references to ‘employer’ to ‘person conducting a business or undertaking’.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The drafting of the definition will need to have regard to the following issues:</p> <ul style="list-style-type: none"> • the scope is not broadened to include certain volunteers eg. referees at children’s sporting activities, assistants at school tuckshops; • ensuring outworkers are captured; • ensuring long-distance truck drivers are captured; • ensuring independent contractors are captured; • ensuring students are captured when they are in a work situation; and • ensuring that Australian Defence Force personnel are captured.
<p>Recommendation 94</p> <p>The model Act should define a “workplace” to be any place at or in or upon which work is being undertaken (including during recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work. For avoidance of doubt, workplace should specifically include a vehicle, ship, aircraft and other mobile structures when used for work.</p> <p>Note: Recommendation 28 in our first report regarding the exclusion of domestic premises unless included by regulation.</p>	<p>Response: Agreed</p>
<p>Recommendation 95</p> <p>The model Act should adopt s.15B of the Qld Act to define a person with management or control of a workplace.</p>	<p>Response: Not agreed</p> <p>A definition in the terms proposed by the panel is not needed, but the definition of workplace (as per recommendation 94) should explicitly capture workplace structures.</p>

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<p>Recommendation 96</p> <p>The model Act should include a broad obligation for the person conducting the business or undertaking most directly involved in the engagement or direction of the affected workers to consult with those workers (and their representatives), as far as is reasonably necessary, about matters affecting, or likely to affect, their health and safety. Consultation should occur when any of the following activities is undertaken:</p> <ul style="list-style-type: none"> a) identifying hazards and assessing risks arising from the work performed or to be performed at the business or undertaking; b) making decisions about ways to eliminate or control those risks; c) the adequacy of facilities for the welfare of workers; d) proposing changes that may directly affect the health and safety of workers; e) making decisions regarding procedures for the resolution of health and safety issues, consultation mechanisms, monitoring the health of workers and conditions at the workplace; and f) the provision of information and training for workers. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The concept of ‘reasonably necessary’ should be replaced with ‘reasonably practicable’.</p>
<p>Recommendation 97</p> <p>The model Act should make it clear that consultation that is ‘reasonably necessary’ is that which enables the person conducting the business or undertaking to make timely, informed decisions about matters affecting, or likely to affect, the health and safety of their workers.</p>	<p>Response: Not agreed</p> <p>The comments at recommendation 96 also apply here.</p>
<p>Recommendation 98</p> <p>The model Act should include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 96 also apply here.</p>
<p>Recommendation 99</p> <p>The model Act should define “consultation” and the definition should provide for:</p> <ul style="list-style-type: none"> a) sharing relevant information with workers and other persons directly affected by the health and safety matter; b) providing workers and other persons directly affected by the health and safety matter with a reasonable opportunity to express their views and to contribute to the resolution of OHS issues; and c) taking into account those views. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>There should be a definition of ‘consultation’, but such a definition is more appropriately contained in the regulations rather than the Act.</p>

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<p>Note: Consultation does not imply agreement.</p>	
<p>Recommendation 100</p> <p>The model Act should contain a provision for workers to collectively elect health and safety representative(s) (HSRs) to represent them in health and safety matters.</p>	<p>Response: Agreed</p>
<p>Recommendation 101</p> <p>The model Act should provide for:</p> <ol style="list-style-type: none"> a) workers to initiate the election of HSRs by advising the person conducting the business or undertaking most directly involved in the engagement or direction of the workers that they wish to elect HSR(s) for that workplace; and b) a person conducting the business or undertaking most directly involved in the engagement or direction of affected workers to commence the process for the election of HSRs. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The principles underlying recommendations 101 to 104 are supported, however, much of the detail should be dealt with by a head of power in the Act with detail to be covered in the regulations.</p> <p>In part (b) of this recommendation, the word ‘commence’ should be replaced with ‘facilitate’.</p>
<p>Recommendation 102</p> <p>The number of HSRs to be elected at a workplace should not be limited by the model Act, but rather determined following discussions between the workers who wish to be represented and the person conducting the business or undertaking who is most directly involved in the engagement or direction of the workers.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 101 apply here.</p>
<p>Recommendation 103</p> <ol style="list-style-type: none"> a) The model Act should provide that workers be grouped in work groups for the purposes of representation by one or more HSRs and that work groups may include workers engaged at more than one workplace and the workers engaged by more than one person conducting a business or undertaking. b) Within a reasonable period of time following a request from worker(s) for work groups to be determined, the workers (and any person authorised to represent them) and the person conducting the business or undertaking (or each of them if more than one) most directly involved in the engagement or direction of the workers are to conduct discussions to agree the number of work groups. c) The purpose of the discussions is to determine: 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 101 apply here.</p>

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<ul style="list-style-type: none"> i) the number and composition of work groups to be represented by HSRs; ii) whether a deputy HSR may also be elected by a work group; and iii) the workplace or workplaces at which the work group(s) will apply; and iv) if more than one business or undertaking to which work groups will apply – the grouping, into one or more work groups at one or more workplaces <p>d) The diversity of workers and their work must be taken into account when determining the workgroups to be represented by HSRs ensuring any worker within a work group has ready and timely access to an HSR familiar with the work and the hazards and risks to which the workers may be exposed.</p> <p>e) The range of matters to be considered in determining work groups may be specified in regulations under the model Act.</p>	
<p>Recommendation 104</p> <p>The model Act should provide that</p> <ul style="list-style-type: none"> a) an HSR for a work group is to be elected by the members of that work group; and b) the members of the work group are to determine how an election is to be conducted; c) the majority of members of a work group may request a union or other person or organisation to assist them in the conduct of the election; d) where the number of candidates for election as a health and safety representative equals the number of vacancies, an election need not be conducted and each candidate is to be taken to have been elected as a health and safety representative for the work group; and e) as soon as practicable after being informed of the election of a HSR the members of the affected work group are to be informed by the person conducting the business or undertaking most directly involved in engaging the affected workers of the election outcome. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 101 apply here.</p>
<p>Recommendation 105</p> <ul style="list-style-type: none"> a) The term of an elected health and safety representative is 3 years unless: <ul style="list-style-type: none"> i) the HSR resigns; or ii) the HSR is disqualified; and b) An HSR may be re-elected. 	<p>Response: Agreed</p>
<p>Recommendation 106</p> <p>The functions, rights and powers of HSRs should be specified in the model Act.</p>	<p>Response: Agreed</p> <p>Drafting of these provisions should reflect the principle that the actual</p>

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<p>For the purposes of representing the members of their work group, an HSR should have rights and powers to:</p> <ul style="list-style-type: none"> a) inspect the workplace or any part of the work area where a member of the work group works— <ul style="list-style-type: none"> i) after giving reasonable notice to person conducting the business or undertaking or their representative; or ii) immediately, in the event of an incident or any situation involving an immediate risk to the health or safety of any person. b) accompany an inspector during an inspection of the work area they represent; c) to be present with a member or a work group (with the member(s) consent) at an interview concerning OHS between the member(s) and an inspector or the person conducting the business or undertaking (or their representative); d) request the establishment of an HSC for the business or undertaking; e) receive information affecting the OHS of workers; f) request the assistance of an inspector at the workplace; g) monitor measures taken by the person conducting the undertaking or their representative in compliance with the model Act, or regulations; h) represent the members of the work group in matters relating to OHS; i) investigate OHS complaints; j) enquire into anything that appears to be a risk to the health or safety of members of the work group, arising from the conduct of the undertaking; k) issue a provisional improvement notice ; and l) where an issue involves an immediate threat to the health and safety of any person to direct that work cease. <p>An HSRs rights, powers and functions are limited to the work group whom they were elected to represent, unless:</p> <ul style="list-style-type: none"> a) subject to the conditions set out in paragraph 25.82, a member of another work group requests the HSR ‘s assistance; or b) there is an immediate risk to health or safety that affects or may affect a member of another work group and the HSR (and any deputy HSR) for that other work group is determined after reasonable enquiry to not be available. 	<p>functions, rights and powers of HSRs should be in the Act, but associated detail should be in the regulations.</p>
<p>Recommendation 107</p> <p>The model Act should provide that a person conducting a business or undertaking most directly involved in the engagement of the HSRs is required to:</p> <ul style="list-style-type: none"> a) consult with HSRs on OHS matters; b) allow HSRs access to information relating to OHS hazards at the workplace, and the health and safety of workers; c) allow HSRs to accompany a worker during an OHS interview between the worker and an inspector or the 	<p>Response: Agreed</p>

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<p>person conducting the business or undertaking (with the consent of the worker);</p> <p>d) allow HSRs to take paid time off normal work as is reasonably necessary to perform their functions and to attend approved training;</p> <p>e) provide resources, facilities and assistance as are necessary or prescribed by the regulations to enable HSRs to perform their functions;</p> <p>f) allow a person assisting HSRs to have access to the workplace where that is necessary to enable the assistance to be provided;</p> <p>g) permit an HSR to accompany an inspector during an inspection of any work area in which a member of the work group works; and</p> <p>h) provide any other assistance that may be required by regulations under the model Act.</p>	
<p>Recommendation 108</p> <p>The model Act should provide that an HSR have the power to issue a Provisional Improvement Notice (PIN) to a person where the HSR has reasonable grounds to believe the person:</p> <p>a) is contravening the model Act or regulations; or</p> <p>b) has contravened in circumstances that make it likely such contravention will continue or be repeated.</p>	<p>Response: Agreed</p>
<p>Recommendation 109</p> <p>The provisions relating to PINs may usefully be modelled on the provisions contained in ss.60-66 of the Occupational Health and Safety Act 2004 (Vic) or the amendments recently made to the Workplace Health and Safety Act 1995 (Qld) with the following modifications:</p> <p>a) the PIN should clearly state the person required to comply with it; and</p> <p>b) a PIN that has been affirmed by an inspector (with or without modifications) shall be deemed to be an improvement notice of the inspector.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>While there should be an explicit head of power in the Act, the details should be in the regulations.</p>
<p>Recommendation 110</p> <p>The model Act should provide that an HSR, as soon following their election as is reasonable in the circumstances of the business or undertaking in which they are engaged, must attend training which is subject to the following requirements:</p> <p>a) The training must consist of an initial five (5) day competency based training course, approved by the regulator (an ‘approved course’);</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The model Act should provide that:</p> <ul style="list-style-type: none"> • HSRs are entitled to attend training; • The training should be approved by the regulator, but the Act should not

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<p>b) The approved course may be either of the HSRs choice or as directed by an inspector;</p> <p>c) The HSR is entitled to paid leave to attend training; and</p> <p>d) The training is to be at a time agreed with the person conducting the business or undertaking, having regard for the duties and functions of the HSR in meeting their obligations under the model Act, or otherwise as directed by an inspector.</p>	<p>specify the length of the training or whether or not it is competency based;</p> <ul style="list-style-type: none"> • While attendance at such training is not mandatory, HSRs are not able to exercise their power to issue PINs or stop work directions unless they have completed the training; • The cost of the training is to be borne by the person conducting the business or undertaking; • The HSR is entitled to paid leave whilst attending training at the rate of pay as they would otherwise have been entitled to receive from the employer for working during that period as well as reimbursement of any costs associated with attending the training.
<p>Recommendation 111</p> <p>The model Act provide that an HSR may attend and receive paid leave for:</p> <p>a) one (1) day’s refresher training per year after the first year, being a course approved by the regulator; and</p> <p>b) such further attendance (as considered reasonable having regard for the circumstances of the business) at an approved training course as:</p> <p>i) may be agreed with the person conducting the business or undertaking in which the HSR is engaged; or</p> <p>ii) directed by an inspector.</p> <p>The HSR must first consult with, and attempt to reach agreement with, the person conducting the business or undertaking in which they are engaged, as to the timing and costs of the training. Any issue in relation to the details of the training, or payment, must be resolved in accordance with the issue resolution procedures required by the model Act, or referred to an inspector for decision.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>See comments at recommendation 110. These details should be in the regulations.</p>
<p>Recommendation 112</p> <p>The model Act include a provision protecting HSRs from incurring civil liability when in good faith performing or omitting to perform, or properly exercising or omitting to exercise a right or power of an HSR.</p>	<p>Response: Agreed</p>

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<p>Recommendation 113</p> <p>A relevant court or tribunal may, on application, disqualify or suspend an HSR or suspend the right of the HSR to exercise a power for a specified period, for:</p> <ul style="list-style-type: none"> a) repeatedly neglecting their HSR functions; or b) exercising their powers or performing their functions for an improper purpose, including the inappropriate disclosing of information; or c) acting unreasonably in the performance of their functions and exercise of their powers as a HSR. <p>Persons able to make such applications include:</p> <ul style="list-style-type: none"> a) a person detrimentally affected by the performance or failure to perform the functions or the exercise of powers by the HSR (e.g. a person conducting the business or undertaking); or b) the regulator; or c) a member of the HSRs work group. <p>The onus in such proceedings is on the applicant to prove, on the balance of probabilities that the grounds exist for disqualification or suspension.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>A court or tribunal should be able to disqualify or suspend an HSR for improper use of their powers, but court or tribunal involvement is not appropriate in cases of poor performance as an HSR as per the first paragraphs (a) and (c) of this recommendation. These should not be included during drafting ie. ‘repeatedly neglecting the HSR function’ and ‘acting unreasonably in the performance of the HSR functions and exercise of HSR powers.</p>
<p>Recommendation 114</p> <p>The Model Act should provide that a workplace HSC:</p> <ul style="list-style-type: none"> a) <u>must</u> be established: <ul style="list-style-type: none"> i) where requested by an HSR; or ii) where requested by 5 or more workers; or iii) if initiated by one or more persons conducting businesses or undertakings; or iv) if specified by regulation; or v) in workplaces with 20 or more workers; or b) <u>may</u> be established in any business or undertaking; and c) <u>must include</u> equal membership of workers (excluding managers or supervisors) and managers. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Mandatory establishment of HSCs where there are 20 or more workers is not supported, and paragraph (a)(v) should be deleted. There should also be provision for “other agreed arrangements”. Paragraph (c) should be amended to provide only that at least half the members of an HSC should be workers, noting the practical difficulties which would be faced in many workplaces if there had to be equal numbers of management and worker representatives.</p>
<p>Recommendation 115</p> <p>The details of the structure and functions, minimum frequency of meetings and other operational matters relating to an HSC be provided for in regulations to the model Act.</p>	<p>Response: Agreed</p>
<p>Recommendation 116</p> <p>The model Act should define an “issue” for the purposes of</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The need for a definition needs to</p>

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<p>issue resolution at a workplace, as being a dispute or concern about OHS that remains unresolved after consultation between the affected worker(s) and the representative of the person conducting the relevant business or undertaking most directly involved in the engagement or direction of the affected worker(s).</p>	<p>be further examined during drafting. If there is to be a definition, consideration should be given to removing any restriction on the involvement of an HSR in the resolution of an OHS issue.</p>
<p>Recommendation 117</p> <p>The following persons should be entitled to be involved in the resolution of an OHS issue at a workplace:</p> <ul style="list-style-type: none"> a) any HSR elected to represent the affected worker(s), in consultation with the affected worker(s); b) where there is no relevant HSR, the affected worker(s); c) a representative of the person conducting a business or undertaking at the workplace that is involved in the engagement or direction of the affected worker(s) and if more than one relevant business or undertaking, a representative or representatives appointed by them for the purpose. <p>Any party should be entitled to obtain assistance from or be represented by a person nominated or authorised on their behalf, who should thereby be entitled to enter the workplace for that purpose.</p>	<p>Response: Agreed</p>
<p>Recommendation 118</p> <p>The model Act should require all parties to, or authorised to be involved in consideration of, an OHS issue (including inspectors, courts and tribunals) to make all reasonable endeavours to achieve a timely, final and effective resolution of the issue.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>It would not be possible to direct third parties such as courts or tribunals as to how they exercised their powers. The words in brackets should be removed.</p>
<p>Recommendation 119</p> <p>The model Act should encourage workers and those conducting businesses or undertakings at a workplace to agree procedures by which OHS issues are to be resolved, should they arise, where they are able to do so.</p> <p>The model Act should provide for default issue resolution procedures, as specified in regulations, to be adopted where the parties have not agreed issue resolution procedures.</p> <p>The model Act, or regulations, should provide for the matters that must, as a minimum, be provided for in an agreed issue resolution procedure (referred to in paragraph 27.85).</p>	<p>Response: Agreed</p>
<p>Recommendation 120</p> <p>The following process should apply to the resolution of issues at a workplace:</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>It was agreed there should be a process for the resolution of issues</p>

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<ol style="list-style-type: none"> 1. The parties should meet to determine the nature and scope of the issue. 2. The parties should seek to resolve the issue as soon as possible in accordance with: <ol style="list-style-type: none"> a) an agreed procedure; or b) where there is more than one relevant business or undertaking at the workplace, a procedure agreed between all parties; or c) where a procedure has not been agreed or cannot be agreed, a default procedure prescribed by the regulations. 3. If the issue remains undetermined or unresolved after reasonable attempts have been made, any party can: <ol style="list-style-type: none"> a) seek the attendance at the workplace of an inspector, as soon as possible, to assist in resolution of the issue; or b) bring proceedings in a court or tribunal with powers to hear and determine such matters and exercising powers of conciliation and arbitration, such proceedings to be brought and determined in accordance with a process to be determined by regulations. 4. The referral of an issue to an inspector or court or tribunal should not prevent the exercise of the right of a worker to cease unsafe work, or prevent the exercise of power by a HSR to direct a work cessation or issue a provisional improvement notice (PIN). 5. A court or tribunal may not hear a matter relating to an OHS issue with respect to which a PIN has been issued: <ol style="list-style-type: none"> a) where processes have been commenced under the model Act for the review of the PIN; or b) until the time has elapsed for taking steps under the model Act for the review of the PIN other than to the extent that the issue is broader than the matters dealt with by the PIN, or by the consent of the parties. <p>Formal processes under the model Act for the review of a PIN should not prevent a court or tribunal, or the parties, from taking steps to resolve the issue by conciliation.</p>	<p>but the detail should be dealt with in regulations or codes of practice. It was further agreed that issue resolution should be an escalating process and not one in which, for example, an inspector and a court/tribunal could potentially be asked to resolve the same issue at the same time, under this recommendation.</p>
<p>Recommendation 121</p> <p>The model Act should provide that:</p> <ol style="list-style-type: none"> a) a worker(s) may cease work where they have reasonable grounds to believe that to continue to work would expose them or any other person to a serious risk to their health or safety or that of another person, emanating from immediate or imminent exposure to a hazard; b) a worker(s) who exercises their right to cease unsafe work in accordance with (a) is required as soon as possible to inform the person conducting a business or undertaking most directly involved in the engagement of the affected worker(s); c) the person conducting the business or undertaking most 	<p>Response: Agreed</p> <p>Paragraph (a) should be drafted to be consistent with the <i>Fair Work Act 2009</i>.</p>

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<p>directly involved in the engagement or direction of the affected worker(s) may require suitable alternative work to be undertaken by the worker(s) until they resume their usual work;</p> <p>d) a worker who refuses to work as mentioned in section (a) is entitled to the same pay and other benefits, if any, to which they would have been entitled if they had continued to do their usual work;</p> <p>e) the procedures for the determination of any disputes relating to the provision of payment and/or entitlements may be referred to a relevant court or tribunal for consideration; and</p> <p>f) any issue arising under this section of the model Act may be referred to the issue resolution process for the business or undertaking, required by the model Act.</p>	
<p>Recommendation 122</p> <p>The model Act should provide that:</p> <p>a) where an HSR has reasonable grounds to believe there exists a serious risk to the health or safety of a worker(s) represented by the HSR, emanating from immediate or imminent exposure to a hazard worker, the HSR may direct the worker(s) to cease work, subject to the following:</p> <p>i) the HSR must first consult with the person conducting the business or undertaking most directly involved in the engagement or direction of the affected worker(s), unless the risk is so serious and imminent that it is not reasonable to do so, in which case that consultation should occur as soon as possible after the direction of the HSR for the work to cease;</p> <p>ii) the HSR must attempt to resolve the issue of concern with the person conducting the business or undertaking, in accordance with the issue resolution procedures required by the model Act; and</p> <p>iii) the person conducting the business or undertaking will be entitled to direct the worker(s) to undertake suitable alternative work, if available; and</p> <p>iv) the worker(s) would be entitled to the payments and/or benefits they would have received had they continued to carry out their normal work.</p> <p>b) the HSR or the person conducting the business or undertaking most directly involved in the engagement of the worker(s) may request an inspector attend the workplace to resolve any issue arising in relation to the cessation of work.</p>	<p>Response: Agreed</p>
<p>Recommendation 123</p> <p>The model Act should protect the exercise or intended exercise of rights, functions or powers, and the taking of action, under the model Act by prohibiting discrimination, victimisation and coercion relating to those activities.</p>	<p>Response: Agreed</p>

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<p>Recommendation 124</p> <p>Provisions relating to discrimination, victimisation and coercion should provide protection of and remedies for all persons who have been, are, or intend to be, involved in any of the following activities (“relevant activities”):</p> <ul style="list-style-type: none"> a) exercising a right, role or power, or performing a function under the model Act; b) taking action to seek compliance with any duty or obligation under the model Act; c) being involved in raising or resolving, or both, an OHS concern or issue; and d) communicating with or assisting any person exercising a power or performing a function under the model Act and specifically including: <ul style="list-style-type: none"> a) workers and witnesses; b) health and safety representatives and members of health and safety committees; c) inspectors; and d) authorised persons. 	<p>Response: Agreed</p>
<p>Recommendation 125</p> <p>The following conduct by any person (“proscribed conduct”) should be prohibited by the model Act:</p> <ul style="list-style-type: none"> a) Discrimination and victimisation <p>Directly or indirectly putting a person, or intentionally causing another person to put a person, to their detriment in employment, prospective employment or commercial arrangements, or threatening to do so, because the person has been, is, or proposes to be, involved in any of the relevant activities</p> <p>Note: We discuss later whether the reason should be the dominant or a substantial reason or whether another requirement should apply.</p> b) Coercion <p>Without reasonable excuse, coercing, requiring, authorising, intentionally causing or inducing a person to</p> <ul style="list-style-type: none"> i) take action detrimental to the health or safety of any person; ii) refrain from exercising a right or power or performing a function under the model Act or not exercise or perform it in a particular way; iii) refrain from seeking , or continuing to, undertake a role under the model Act; iv) engage in any unlawful discriminatory conduct, as defined. c) Aiding and abetting discrimination, victimisation or coercion. 	<p>Response: Agreed</p>

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<p>Note: Drafting conventions relating to the use of ‘reasonable excuse’ will need to be observed, while meeting the intention of this recommendation.</p>	
<p>Recommendation 126</p> <p>The model Act should provide for criminal offences and liability to civil interventions and remedies, for engaging in, authorising, aiding or abetting proscribed conduct.</p>	<p>Response: Agreed</p>
<p>Recommendation 127</p> <p>The model Act should provide that an offence related to proscribed discriminatory conduct is committed where involvement or intended involvement in the relevant activity is the dominant reason for the proscribed discriminatory conduct.</p>	<p>Response: Agreed</p> <p>It was agreed that ‘dominant reason’ should be considered during drafting to ensure that the provision is workable.</p>
<p>Recommendation 128</p> <p>A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in a criminal prosecution of proving on the balance of probabilities that the reason alleged was not the dominant reason for which that person engaged in that conduct.</p> <p>A person alleged to have engaged in coercion should bear the onus of proving on the balance of probabilities that the person had a reasonable excuse for doing so.</p> <p>The prosecution should bear the onus of proof in relation to all other elements of an offence of engaging in proscribed conduct, beyond a reasonable doubt.</p>	<p>Response: Agreed</p>
<p>Recommendation 129</p> <p>An offence of engaging in proscribed conduct should be a Category 3 offence (see Recommendation 55 in our first report).</p>	<p>Response: Agreed</p>
<p>Recommendation 130</p> <p>The model Act should provide for civil action against a person who has engaged in, authorised, aided or abetted proscribed conduct.</p>	<p>Response: Agreed</p>
<p>Recommendation 131</p> <p>A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in civil proceedings of proving, on the balance of probabilities, that the reason alleged was not one of the operative reasons for the conduct.</p> <p>A person alleged to have engaged in coercion should bear the onus of proving the person had a reasonable excuse for doing so.</p> <p>The person bringing a civil claim should bear the onus of proof</p>	<p>Response: Agreed</p> <p>The drafting of this provision needs to ensure that it is not overly complex.</p>

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<p>in relation to all other elements of the action, on the balance of probabilities.</p>	
<p>Recommendation 132</p> <p>The model Act should permit a person authorised by a claimant to have standing before a court or tribunal to represent that person and to bring a civil claim on the person’s behalf in relation to proscribed conduct.</p>	<p>Response: Agreed</p>
<p>Recommendation 133</p> <p>A relevant court or tribunal should be able to make the following orders in relation to a person who has suffered loss or damage as a result of proscribed conduct:</p> <ul style="list-style-type: none"> a) an injunction to restrain the continuation of the proscribed conduct; and/or b) compensation; and/or c) reinstatement of employment or, in relation to a prospective employee, employment in a similar position; and/or d) other relief as considered necessary <p>save that a person should not be able to recover compensation or other relief under the model Act <u>and</u> under any other applicable Commonwealth, State or Territory legislation.</p>	<p>Response: Agreed</p>
<p>Recommendation 134</p> <p>The model Act should provide that a person may not:</p> <ul style="list-style-type: none"> a) commence or proceed with a civil claim under the model Act if they have commenced proceedings for the same subject matter under another law and those proceedings have not been determined or withdrawn; or b) recover any compensation under the model Act if they have received compensation for the same subject matter under another law; or c) commence or proceed with a civil claim under the model Act if they have previously commenced and failed in a claim relating to the same subject matter under another law. 	<p>Response: Agreed</p>
<p>Recommendation 135</p> <p>The model Act should provide that it would be a defence to a prosecution or civil action against a person (body corporate, partnership or individual) relating to proscribed conduct engaged in by another person, to prove on the balance of probabilities that they had taken reasonable precautions to prevent that other person from engaging in the proscribed conduct.</p>	<p>Response: Agreed</p> <p>It was agreed that in light of the Maxwell Report’s recommendations on this issue in regards to the Victorian Act, ‘reasonably practicable’ was a sufficient qualifier and the defence of ‘reasonable precautions’ should be omitted.</p>

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<p>Recommendation 136</p> <p>The model Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.</p>	<p>Response: Agreed</p>
<p>Recommendation 137</p> <p>The model Act should include an obligation for persons conducting a business or undertaking to ensure, as far as is reasonably practicable, the health of workers engaged by them or under their direction, is monitored for the purpose of preventing fatalities, illnesses or injury arising from the conduct of the business or undertaking.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>This was supported provided it was limited to monitoring health issues arising out of work activity. The necessity of this recommendation is also questionable as it should be adequately covered by the general duty of care.</p>
<p>Recommendation 138</p> <p>The model Act should include an obligation for persons with management and control of a workplace to ensure, as far as is reasonably practicable, that conditions at that workplace are monitored for the purposes of preventing fatalities, illness or injury.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The comments at recommendation 137 also apply here.</p>
<p>Recommendation 139</p> <p>The model Act should provide that persons conducting a business or undertaking must, where reasonably practicable, employ or engage a suitably qualified person to provide advice on health and safety matters.</p> <p>The qualifications of persons providing such advice should be addressed in the regulations.</p> <p>Provision should be made along the lines of the Queensland Act for the appointment by persons conducting a business or undertaking of WHSOs and further consideration should be given to how that requirement can be extended to non-traditional work arrangements that normally involve thirty or more workers.</p>	<p>Response: Not agreed</p> <p>In relation to the first and second paragraphs, such provisions should not be included in the model Act, as an unintended consequence could be that persons conducting a business or undertaking would be encouraged to delegate their responsibilities. The creation of WHSOs, as per the third paragraph, is also opposed.</p>
<p>Recommendation 140</p> <p>The model Act should place an obligation on the person conducting the business or undertaking to ensure that the regulator is notified immediately and by the quickest means, of</p>	<p>Response: Agreed</p> <p>This is supported subject to matters of detail being in the regulations.</p>

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<p>a: a) fatality of any person, b) 'serious injury' to any person, c) 'serious illness' of any person; or d) a 'dangerous incident' arising out of the conduct of the business or undertaking.</p>	
<p>Recommendation 141</p> <p>A written record of the incident must be provided to the regulator within 48 hours of the obligation holder reporting the incident.</p>	<p>Response: Not agreed</p> <p>There are concerns with duplication in reporting given the coverage of recommendation 140. The forms of evidence of notification should be examined as part of recommendation 140 with the detail contained in the regulations.</p>
<p>Recommendation 142</p> <p>Definitions of 'Serious Illness', 'Serious Injury' and 'Dangerous Incident' for incident notification should reflect the principle that only the most serious events are to be captured as outlined in paragraph 33.21.</p>	<p>Response: Agreed</p>
<p>Recommendation 143</p> <p>The model Act should contain all provisions governing incident notification, including associated provisions such as site preservation. Related definitions should be placed in a schedule to the model Act.</p>	<p>Response: Not agreed</p> <p>Definitions should not be placed in a schedule to the Act. Key provisions should be in the Act and other provisions in the regulations.</p>
<p>Recommendation 144</p> <p>Persons with management and control of the workplace should have an obligation to ensure an incident site, including any plant, substance or other item associated with the incident, is not disturbed until an inspector attends the incident site, or the regulator directs otherwise, whichever occurs first.</p>	<p>Response: Agreed</p>
<p>Recommendation 145</p> <p>The obligation to preserve an incident site does not preclude any activity:</p> <p>a) To assist an injured person; b) To remove a deceased person; c) Considered essential to make the site safe or to prevent a further incident; d) Associated with a police investigation; or e) For which an inspector has given permission.</p>	<p>Response: Agreed</p>

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<p>Recommendation 146</p> <p>The model Act should place an obligation on workers to report any illness, injury, accident, risk or hazard arising from the conduct of the work, of which they are aware, to the person conducting the business or undertaking or (where this is a different person) the person with management or control of the workplace. The obligation should also make clear that it in no way impinges on a worker's ability to report an OHS issue to the regulator at any time.</p>	<p>Response: Not agreed</p> <p>Serious omissions would be captured by the general duty in recommendation 46 and this is an unnecessary provision.</p>
<p>Recommendation 147</p> <p>The model Act should include provisions that make it an offence:</p> <ul style="list-style-type: none"> a) to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation; b) to contravene any conditions placed on an authorisation; or c) for a person conducting a business or undertaking to direct or allow a worker to conduct an activity or use a specific type of plant, substance or workplace without a licence, permit or registration where the regulations require such authorisation. 	<p>Response: Agreed</p>
<p>Recommendation 148</p> <p>The regulation-making power in the model Act should allow for:</p> <ul style="list-style-type: none"> a) the automatic recognition of equivalent licences, permits and registrations issued under a corresponding OHS law, and include safeguards to ensure jurisdictions can make case by case exceptions where there are concerns about fraud. b) the sharing of information with other government agencies in relation to the issue, renewal, variation, revocation, suspension and cancellation of authorisations. 	<p>Response: Agreed</p>
<p>Recommendation 149</p> <p>The regulation making powers in the model Act should allow for the processes of application, issue, renewal, variation, suspension, cancellation, review of decisions and placing conditions on such authorisations to be established via regulation.</p>	<p>Response: Agreed</p>
<p>Recommendation 150</p> <p>Decisions for the types of activities that may need authorisations should be justified at the national level based on the level of risk and a cost-benefit analysis.</p>	<p>Response: Agreed</p>

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<p>Recommendation 151</p> <p>The model Act should:</p> <ul style="list-style-type: none"> a) subject to the final decisions about its objects and principles, make clear in the objects or principles that education, training and information for duty holders, workers and the community are important elements of facilitating good occupational health and safety; b) include in the enumerated powers and functions of the regulator sufficient authority for the regulator to promote and support education, training and information for duty holders, workers and the community; c) as recommended in our discussion of the role of inspectors, make clear that an inspector may provide advice about compliance with the model Act; d) authorise the regulator to make guidelines on the way in which: <ul style="list-style-type: none"> i) a provision of the model Act or regulations would, in the regulator’s opinion, apply to a class of persons or to a set of circumstances; or ii) a discretion of the regulator under the model Act or regulations would be exercised. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Not all of the detail proposed will be capable of inclusion in the NSW model OHS Act as the NSW enabling legislation for the regulator is the workers’ compensation legislation. There should be a provision for power for the regulator to make recommendations to the Minister for the making of a code of practice.</p>
<p>Recommendation 152</p> <p>The model Act should authorise a regulator to be able to accept, at the regulator’s discretion, a written enforceable undertaking as an alternative to prosecution, other than in relation to a Category 1 breach of a duty of care.</p> <p>The provisions relating to enforceable undertakings should provide for the safeguards relating to process, transparency of decision making, reviewability of decisions and enforcement that are outlined in paragraph 36.54.</p> <p>If the power to do so does not already exist, a court should be given the discretion under the model Act to release an offender, after conviction, who gives a health and safety undertaking to the court.</p> <p>This judicial discretion should not be available in respect of a Category 1 offence.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Enforceable undertakings are supported but the panel’s proposal for a tripartite advisory panel in relation to enforceable undertakings is not supported. There is also concern with the panel’s proposal for judicial review of the regulator’s decisions in relation to enforceable undertakings as this would undermine prosecutorial discretion and independence.</p>
<p>Recommendation 153</p> <p>We recommend that Ministers note the range of measures designed to reinforce and enhance cross-jurisdictional co-operation which we have identified in this report.</p>	<p>Response: Agreed</p> <p>Information sharing provisions should be as broad as possible.</p>
<p>Recommendation 154</p> <p>The model Act should make specific provision for the process of appointment of inspectors.</p>	<p>Response: Agreed</p>

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<p>Recommendation 155</p> <p>Inspectors should ordinarily be public servants appointed on an ongoing basis.</p>	<p>Response: Agreed</p> <p>Drafting needs to take account that the provision needs to be broad enough to include officers/employees of a public authority.</p>
<p>Recommendation 156</p> <p>The model Act should provide for the temporary appointment of inspectors, subject to strict conditions.</p>	<p>Response: Agreed</p>
<p>Recommendation 157</p> <p>The model Act should, subject to written agreement between ministers or regulators, specifically permit:</p> <ul style="list-style-type: none"> a) inspectors to be appointed in more than one geographical or industry/activity-based jurisdiction; or b) inspectors appointed in one jurisdiction to be authorised to perform functions and exercise powers in, or for the purposes of, another jurisdiction. 	<p>Response: Agreed</p>
<p>Recommendation 158</p> <p>The model Act should clearly set out the scope and limits (if any) of the cross-jurisdictional appointment or authorisation.</p>	<p>Response: Agreed</p> <p>The necessity of this provision should be examined further during drafting.</p>
<p>Recommendation 159</p> <p>The model Act should provide for the valid use and admissibility of evidence gathered by an inspector exercising cross-jurisdictional authority.</p>	<p>Response: Agreed</p>
<p>Recommendation 160</p> <p>The model Act should make specific provision for ID cards for inspectors, containing at least the information specified at s.48 of the NSW Act.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The words after the comma should be removed so the recommendation becomes: ‘The model Act should make specific provision for ID cards for inspectors.’ The detail of what has to be on the ID card should be in the regulations or in a form approved by the Minister.</p>

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<p>Recommendation 161</p> <p>The model Act should provide that it is an offence to forge an inspector ID card, or to alter or deface it without authorisation.</p>	<p>Response: Agreed</p>
<p>Recommendation 162</p> <p>The model Act should:</p> <ul style="list-style-type: none"> a) specify the roles and functions of an inspector, including: <ul style="list-style-type: none"> i) providing information and advice to duty holders; ii) undertaking specific industry, occupational or hazard and risk based interventions (e.g. advice, risk management and enforcement in relation to the industry, occupation or hazard and risk concerned); iii) assisting in the resolution of issues at workplaces; iv) reviewing PINs and the appropriateness of work stoppage on safety grounds; v) securing compliance with the model Act and regulations through the exercise of various powers, including the issuing of notices and giving directions; and vi) investigating suspected breaches and assisting in the prosecution of offences; and b) allow the appointment of an inspector for all, or only specified roles and functions. 	<p>Response: Agreed</p> <p>Consideration should be given in drafting as to whether this level of detail is necessary.</p>
<p>Recommendation 163</p> <p>The model Act should make clear that an inspector may provide advice about compliance with the model Act and that an inspector's power of entry and the powers that an inspector can exercise upon entry are available for the provision of advice.</p>	<p>Response: Agreed</p>
<p>Recommendation 164</p> <p>The model Act should provide powers necessary to enable an inspector to effectively carry out the roles and functions of issue resolution and review of provisional improvement notices.</p>	<p>Response: Agreed</p>
<p>Recommendation 165</p> <p>A provisional improvement notice should be taken to be a notice issued by an inspector, upon affirmation of the notice, with or without modification.</p>	<p>Response: Agreed</p>
<p>Recommendation 166</p> <p>The model Act should provide for inspectors to have such nationally consistent qualifications and training (including ongoing training) as mandated by or under the legislation.</p>	<p>Response: Not agreed</p> <p>Nationally consistent qualifications and training are supported but the requirement should not be mandated in the Act. It can be addressed through administrative means, such as under the auspices of the Heads of</p>

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	Workplace Safety Authorities (HWSA).
<p>Recommendation 167</p> <p>The model Act should provide for the right of an inspector to enter a workplace during such times as the business conducted thereat is operating or the workplace is accessible to members of the public, and at other times if the inspector reasonably believes that an immediate risk to the health or safety of any person exists from activities or circumstances at the workplace.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Inspectors' powers of entry should not be limited. The recommendation should be amended to read 'The model Act should provide for the right of an inspector to enter a workplace'.</p>
<p>Recommendation 168</p> <p>The model Act should provide inspectors with the authority to obtain and execute search warrants.</p>	<p>Response: Agreed</p>
<p>Recommendation 169</p> <p>The model Act provide requirements on an inspector to:</p> <ol style="list-style-type: none"> a) at all times during entry to a workplace, display or have available for examination, such identification and authorisation card or documentation as required by the model Act; b) notify as soon as practicable after entry: <ol style="list-style-type: none"> i) the person with apparent management or control of the workplace; and ii) any person conducting a business or undertaking at the workplace in respect of whom the inspector proposes to exercise functions or powers; and iii) a health and safety representative (if any) representing workers undertaking work as part of the relevant business or undertaking at the workplace of the entry and the purpose of the entry. c) provide a written notice to each of those mentioned in (b), upon or as soon as practicable after leaving the workplace, specifying: <ol style="list-style-type: none"> i) the purpose of the entry; ii) relevant observations; iii) any action taken by the inspector; and iv) the procedure for seeking a review of any decision made by the inspector during the entry. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Parts (a) and (b) of this recommendation are supported. In relation to part (c) of this recommendation, while transparency is important, there are immediate implementation issues. The jurisdictions will pursue administrative solutions through HWSA for the consistent delivery of inspector services.</p>
<p>Recommendation 170</p> <p>The model Act should provide for (a consolidation of) all of the</p>	<p>Response: Agreed</p> <p>See comments at recommendation</p>

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<p>powers currently provided in OHS Acts in Australia, that may be exercised by an inspector upon entry to a workplace, in relation to the following:</p> <ul style="list-style-type: none"> a) inspection, examination and recording, including <ul style="list-style-type: none"> i) taking samples of substances and things (including biological samples); ii) taking measurements and conduct tests (e.g. noise, temperature, atmospheric pollution and radiation); iii) taking photographs and make audio and video recordings; iv) requesting assistance from owners, employers and others at a workplace in exercising their powers and functions; and b) access to documents; (subject to each of the matters recommended by Maxwell, the request being in writing unless circumstances of urgency otherwise require, and allowing reasonable time for the person to consider and respond to the request); c) testing, analysis, seizure and forfeiture of plant (but not operation of it) and substances; d) the taking of affidavits; and e) the taking of persons who are providing assistance to an inspector in the proper exercise of a power or function, to a workplace for the purpose of providing such assistance (e.g. interpreters and technical experts). <p>Note: The exercise of some of these powers may be subject to the availability of legal professional privilege or the privilege against self-incrimination</p> <p>Note: Powers to ask questions, and associated rights and privileges, are the subject of Recommendations 179 to 199.</p>	<p>181. A broad statement of principles should be established for inspector powers using the best practice operating in the various jurisdictions.</p>
<p>Recommendation 171</p> <p>The model Act should provide power to an inspector to issue the following notices and directions upon entry to a workplace:</p> <ul style="list-style-type: none"> a) safety directions; b) infringement notices; c) improvement notices; d) prohibition notices; and e) direction to leave a site undisturbed. 	<p>Response: Agreed</p>
<p>Recommendation 172</p> <p>The model Act should clearly state:</p> <ul style="list-style-type: none"> a) the circumstances in which notices or directions may be issued; b) on whom they may be issued; c) requirements for confirmation in writing of any direction given orally; d) procedures for service and display of written notices or directions; and e) the availability of processes for review of a decision by an 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Parts (a), (b), (d) and (e) of this recommendation are supported. Part (c) is considered unnecessary as oral directions would generally only be used where the inspector is present until the issue is corrected.</p>

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<p>inspector to issue any notice or direction.</p>	
<p>Recommendation 173</p> <p>The model Act should provide that an inspector may, at their discretion, make recommendations and provide advice and assistance in improvement and prohibition notices, and that the actioning of such recommendations and advice is not compulsory.</p>	<p>Response: Agreed</p>
<p>Recommendation 174</p> <p>For improvement notices, the model Act should provide that:</p> <ul style="list-style-type: none"> a) the minimum timeframe for compliance with an improvement notice should not be less than the timeframe provided to seek a review of the notice; and b) an application for review of an improvement notice should automatically stay the notice. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Part (b) should be amended to refer to an external review.</p>
<p>Recommendation 175</p> <p>For prohibition notices, the model Act should provide that:</p> <ul style="list-style-type: none"> a) the issuing of prohibition notices should be dependent on the ‘severity of the risk’, not the immediacy; b) an application for review of a prohibition notice does not stay the operation of the notice. 	<p>Response: Agreed</p>
<p>Recommendation 176</p> <p>Inspectors should be provided powers to make minor amendments or modifications to notices, including:</p> <ul style="list-style-type: none"> a) to extend the timeframe for compliance with the notice; b) for improving clarity; c) for changes of address or other circumstances; and d) to correct errors (e.g. date) or references (e.g. to a section of an Act or Regulation). <p>Such decisions should not substantially change the effect of the notice and should be open to review.</p>	<p>Response: Agreed</p>
<p>Recommendation 177</p> <p>The model Act should make provision for the regulator to seek an injunction to:</p> <ul style="list-style-type: none"> a) restrain ongoing breach of a prohibition notice; or b) compel compliance with an improvement notice after the time for compliance has expired. 	<p>Response: Agreed</p> <p>During drafting, consideration is to be given as to whether injunctions are applicable to paragraph (b) of this recommendation, given that injunctions are generally available to deal with issues that require immediate redress. An improvement notice, by its nature, relates to issues that do not require immediate action.</p>

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<p>Recommendation 178</p> <p>The model Act should allow a regulator to take remedial action where:</p> <ol style="list-style-type: none"> a) there is an immediate and serious risk to the health or safety of any person; and b) the person conducting the relevant business or undertaking in which that risk arises is unavailable, or they or another person fails or refuses to comply with proper and reasonable directions of an inspector in respect of that risk and the action taken by the regulator; and c) the person is first informed of the intention of the regulator to take such action and recover the costs of the regulator from that person. <p>The costs of the regulator should be recoverable from the person conducting the relevant business or undertaking, or such other person to whom an inspector has properly issued a notice or direction in respect of the risk, but:</p> <ol style="list-style-type: none"> a) the person from whom recovery is sought shall be entitled to challenge in a court or tribunal the necessity for and reasonableness of the action and/or cost; and b) that person shall have the onus of proving the action and/or cost was not necessary or was not reasonable. 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The recommendation is supported with the following amendments:</p> <ul style="list-style-type: none"> • part b) – replace ‘proper and reasonable directions of an inspector’ with ‘a prohibition notice issued by an inspector’ • second paragraph – replace ‘a notice or direction’ with ‘a <i>prohibition</i> notice’.
<p>Recommendation 179</p> <p>The model Act should include a requirement that a person must answer questions and provide information requested by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The model OHS Act should include provisions relating to inspector powers of inquiry and questioning, however, the two-stream approach proposed by the review panel is not supported. The detailed recommendations set out in Chapter 42 of the review panel’s second report (recommendations 179-198) should be set aside and instead, the following principles should be applied to the drafting of such provisions in the model OHS Act:</p> <ul style="list-style-type: none"> • Robust powers of inquiry and questioning should be included in the model OHS Act. • There should be a consolidation of existing provisions for inquiries and questioning (akin to recommendation 170). • There should be a requirement

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	<p>for natural persons to answer an inspector’s questions and provide information requested by an inspector.</p> <ul style="list-style-type: none"> • Inspectors should be required to issue a warning about incrimination. Failing the provision of such warning, any information provided or answers given cannot be used as evidence in any proceedings against the individual providing the information or answering the question. • Once provided with a warning, natural persons must still answer the question or provide the information but the answer or information may not be used as evidence in any proceedings against the person. • There should be a power for the regulator to require production of documents with no right of refusal. • Corporations must be compelled to respond to requests for documents or information by the regulator or requests for documents by an inspector, subject to the availability of legal professional privilege. • The model Act should provide that corporations have no protections in relation to self-incrimination.
<p>Recommendation 180</p> <p>A person should not be entitled to rely on a privilege against self-incrimination in response to a request for information by an inspector for the purpose of enforcing ongoing compliance and securing health and safety.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 181</p> <p>The requirement that a person answer questions, and the unavailability of a privilege against self-incrimination, for the purpose of enforcing ongoing compliance and securing health and safety, should be subject to:</p> <p>a) a specific prohibition against the use of the information in</p>	<p>Response: See comments at recommendation 179</p>

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<p>any proceedings against the person providing the information for a breach of the model Act or Regulations;</p> <p>b) the inspector being required to inform the person from whom the information is sought that:</p> <ul style="list-style-type: none"> i) the information is required for the purpose of ensuring compliance and ongoing health and safety protection; ii) the person must answer the questions and provide the information; iii) the privilege against self incrimination is not an excuse for failing to answer the questions or provide the information; iv) the information may not be used in any proceedings against the person for a breach of the model Act or Regulations; and v) legal professional privilege may apply to the information that it is being sought; <p>c) in the absence of the inspector providing the information referred to in b. above, it should be assumed that the information has been requested for the purposes of the investigation of a breach of the model Act or Regulations; and</p> <p>d) if the inspector does not provide the information noted in b. above, any information obtained or discovered by reason of the provision of the information by the person shall not be able to be used in proceedings against that person for a breach of the model Act or Regulations.</p>	
<p>Recommendation 182</p> <p>A request for documents, for whatever purpose it is made under the model Act, would not be subject to a privilege against self-incrimination.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 183</p> <p>An inspector may ask questions about the circumstances in which a document came into existence and the means by which the document may be verified, and such questions would not be subject to a privilege against self-incrimination.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 184</p> <p>Questions relating to matters referred to within a document would be subject to the provisions relating to the asking of questions, as are applicable to the purpose for which the questions are asked.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 185</p> <p>The model Act should explicitly provide that nothing in the model Act shall in any way affect the availability of legal professional privilege.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 186</p>	<p>Response: See comments at recommendation 179</p>

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<p>Legal professional privilege should be confirmed to apply:</p> <ul style="list-style-type: none"> a) to companies and to natural persons; and b) to documents as well as statements. 	
<p>Recommendation 187</p> <p>If legal professional privilege is not explicitly confirmed in the model Act, then any provision that allows for a ‘reasonable excuse’ for not complying should explicitly include the availability of legal professional privilege as a reasonable excuse.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 188</p> <p>The model Act should require that a person answer questions asked by an inspector investigating a breach of the model Act or regulations.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 189</p> <p>The privilege against self incrimination should be available to a natural person in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations.</p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 190</p> <p>The requirement that a person answer questions for this purpose should be subject to the requirement in Recommendation 197 that the inspector provide a warning to the person from whom the information is sought.</p> <p><i>Note: This recommendation was previously recommendation 191. The original recommendation 190 was a duplicate of recommendation 196 and was deleted. All recommendations from this point are renumbered.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 191</p> <p>The model Act should make clear that a corporation does not enjoy any right to silence or privilege against self incrimination and must respond, through its authorised officers, to requests for documents or information by the regulator or requests for documents by an inspector, subject to the availability of legal professional privilege.</p> <p><i>Note: This recommendation was previously 192.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 192</p> <p>The model Act should make clear that the members and officers of a partnership or unincorporated association do not enjoy any right to silence and must respond, directly or through their authorised officers, to requests for information from the regulator or an inspector. Such requests may be subject to the privilege against self-incrimination and legal professional</p>	<p>Response: See comments at recommendation 179</p>

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<p>privilege. <i>Note: This recommendation was previously 193.</i></p>	
<p>Recommendation 193</p> <p>An inspector should have the power to require, by written notice, the production of documents from a corporation, partnership or unincorporated association. Such a request may be subject to legal professional privilege. <i>Note: This recommendation was previously 194.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 194</p> <p>The regulator should have the power to ask questions as to facts (but not law), in writing, of a corporation, partnership or unincorporated association and answers in writing must be provided, subject to the availability of legal professional privilege or (in the case of members or officers of a partnership or unincorporated association) the privilege against self-incrimination. <i>Note: This recommendation was previously 195.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 195</p> <p>Legal professional privilege should be available to a natural person or corporation in response to a request for information or questions asked for the purpose of investigating a breach of the model Act or regulations. <i>Note: This recommendation was previously 196.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 196</p> <p>The requirement in the model Act that a person answer questions relating to the investigation of breaches should be subject to a requirement that the inspector warn the person from whom the information is sought:</p> <ol style="list-style-type: none"> a) that the information is being sought or the questions are being asked for the purpose of an investigation of a breach of the model Act or Regulations by that person, or may (depending upon the information or answers) give rise to an investigation of a breach by that person; b) the person must provide the information or answer the questions unless a relevant privilege is available to that person; c) the person shall not be required to provide the information or answer a question if to do so may tend to incriminate them; d) legal professional privilege may apply in respect of the information sought; and e) the person is entitled to seek and obtain legal advice with respect to the request for information. <p><i>Note: This recommendation was previously 197.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 197</p>	<p>Response: See comments at recommendation 179</p>

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<p>The model Act should provide that in the event of a failure by an inspector to give a required warning before requesting information from a person in the course of investigating a breach, a use immunity and derivative use immunity will apply to all information obtained by reason of the request. <i>Note: This recommendation was previously 198.</i></p>	
<p>Recommendation 198</p> <p>The model Act should make clear that a person shall not be taken to fail or refuse to comply with a requirement, request or direction, or to hinder or obstruct an inspector in the exercise of powers under the Act, merely by seeking and taking a reasonable time to obtain legal advice. Note: This recommendation is supported by Recommendation 181 and Recommendation 197 in relation to the provision of information and warning to a person of whom a request is made, and Recommendation 198 providing for a use immunity and derivative use immunity for a failure to provide that information and warning. <i>Note: This recommendation was previously 199.</i></p>	<p>Response: See comments at recommendation 179</p>
<p>Recommendation 199</p> <p>The model Act should provide for immunity of an inspector from personal liability in relation to the bona fide exercise by the inspector of his or her role, functions and powers. <i>Note: This recommendation was previously 200.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 200</p> <p>The model Act should provide a consolidation of the offences for assault and intimidation etc of an inspector in current OHS Acts. The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered:</p> <ul style="list-style-type: none"> a) for a corporation – \$250,000; and b) for an individual – \$50,000 and/or 2 years imprisonment. <p><i>Note: This recommendation was previously 201.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>This recommendation is supported provided it is clear in drafting that it is not intended to preclude the police from taking action for assault. Further examination of the level of penalties is also required during drafting.</p>
<p>Recommendation 201</p> <p>The model Act should provide for the following additional offences:</p> <ul style="list-style-type: none"> a) hindering or obstructing an inspector in the exercise of functions and powers; b) impersonating an inspector; 	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The penalties should be examined further during drafting as they may be too low for previous offenders. The offence should also be broadened to include an offence of</p>

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<p>c) concealing from an inspector the existence or whereabouts of a person, document or thing; and d) making false or misleading statements or providing false or misleading documents.</p> <p>The model Act should provide for maximum penalties for these offences that are commensurate with their seriousness, with the following penalties suggesting the level that should be considered:</p> <p>a) for a corporation – \$50,000; and b) for an individual - \$10,000.</p> <p><i>Note: This recommendation was previously 202.</i></p>	<p>preventing or attempting to prevent any person from assisting an inspector.</p>
<p>Recommendation 202</p> <p>The model Act should specifically provide for circumstances in which the authorisation of an inspector may be suspended or cancelled.</p> <p><i>Note: This recommendation was previously 203.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 203</p> <p>The model Act should include a consolidation of provisions presently included in OHS Acts relating to accountability of inspectors, confidentiality of information, and their liability for improper conduct.</p> <p><i>Note: This recommendation was previously 204.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>This issue requires further examination during drafting to ensure that confidentiality provisions do not replicate provisions in public sector acts or contracts of employment.</p>
<p>Recommendation 204</p> <p>The model Act should provide right of entry for OHS purposes to union officials and/or union employees formally authorised for that purpose under the model Act.</p> <p><i>Note: This recommendation was previously 205.</i></p>	<p>Response: Agreed</p> <p>Any provisions around right of entry should be consistent with the <i>Fair Work Act 2009</i>.</p>
<p>Recommendation 205</p> <p>Authorised persons for right of entry purposes are those persons who are elected officers and/or employees of unions registered under relevant State or Federal labour law and:</p> <p>a) hold current authorisation under the OHS Act; and b) hold current authorisation required under any other relevant law.</p> <p>Note: union is defined in the chapter containing the definitions. <i>Note: This recommendation was previously 206.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 206</p> <p>The authorising authority must be satisfied that the union official and/or union employee who is the subject of an application to be an authorised person (applicant) is competent in:</p>	<p>Response: Not agreed</p> <p>An alternative approach was agreed in that authorised persons for right of entry purposes must satisfactorily complete a course of</p>

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<p>a) the right of entry requirements of the model Act, regulations and guidance notes;</p> <p>b) issue resolution under the model Act;</p> <p>c) an understanding of the duties and framework of the model Act;</p> <p>d) how to apply risk management principles at a business or undertaking; and</p> <p>e) the relationship between the model Act and any relevant labour laws.</p> <p><i>Note: This recommendation was previously 207.</i></p>	<p>training, the components of which should include parts a) to e).</p>
<p>Recommendation 207</p> <p>At the first periodic review of the model Act, the issue of whether mutual right of entry authorisations (able to be exercised across jurisdictions but subject to the same limitations) should be introduced.</p> <p><i>Note: This recommendation was previously 208.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 208</p> <p>A union (as defined) may apply for authorisation on behalf of persons who are elected officers and/or employees of the union to the specified court or tribunal within the jurisdiction. The application must include a statutory declaration confirming that the applicant:</p> <p>a) has satisfactorily achieved the training required under the model Act;</p> <p>b) meets the fit and proper person test specified in the model Act;</p> <p>c) holds or will hold a current permit under any other relevant law; and</p> <p>d) has not within the previous three years, had their OHS authorisation revoked or suspended; or</p> <p>e) has not within the previous three years, had a permit to enter workplaces under state or Federal labour law revoked.</p> <p>Objections should be permitted as outlined in paragraphs 45.63 to 45.65.</p> <p><i>Note: This recommendation was previously 209.</i></p>	<p>Response: Agreed</p> <p>As ‘fit and proper person’ is not defined, it was agreed the ‘fit and proper person’ test in the <i>Fair Work Act 2009</i> should apply. The provision as drafted should be consistent with the <i>Fair Work Act 2009</i>.</p>
<p>Recommendation 209</p> <p>The process of authorisation (including term, approved forms, training, refresher training, procedure for application and any issue relevant to the process) should be contained in regulations under the model Act.</p> <p><i>Note: This recommendation was previously 210.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 210</p> <p>The model Act should provide that:</p> <p>a) authorisation for right of entry for OHS may be issued for up to three years;</p>	<p>Response: Agreed</p> <p>The reference to ‘regulator’ in part e) is to be amended to ‘authorising authority’ as the regulator would</p>

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<p>b) application for a further authorisation may be made prior to the conclusion of the three year period;</p> <p>c) in circumstances where the elected official or employee leaves the union the authorisation automatically lapses;</p> <p>d) the union in such circumstances is to advise the regulator of officials/employees' changed circumstances as envisaged by (c); and</p> <p>e) the regulator is to keep an up-to-date, publically available, register of authorised persons.</p> <p><i>Note: This recommendation was previously 211.</i></p>	<p>not necessarily be the authorising authority.</p>
<p>Recommendation 211</p> <p>The model Act should provide authorised persons with the capacity to:</p> <p>a) investigate a suspected contravention of the model Act or regulations;</p> <p>b) consult workers on OHS issues; and</p> <p>c) provide advice to workers, and consult with the person in management or control of a business or undertaking or relevant workplace area, on OHS issues.</p> <p><i>Note: This recommendation was previously 212.</i></p>	<p>Response: Agreed</p> <p>The term 'investigate' in paragraph a) should be replaced with 'inquire into'.</p>
<p>Recommendation 212</p> <p>The model Act should limit right of entry by authorised persons to:</p> <p>a) areas of the workplace where work is being carried out as part of a business or undertaking by workers who are members or eligible to be members of the relevant union;</p> <p>b) consultation with, and/or provide advice to, any worker within the eligible group referred to in (a) (subject to that person's consent); and</p> <p>c) where necessary, advice and/or consultation with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on the resolution of OHS issues and/or the suspected breach of the model Act</p> <p>and, be subject to:</p> <p>a) the right being exercised during working hours; and</p> <p>b) ensuring there is no undue disruption to any business or undertaking at the workplace; and</p> <p>c) reasonable OHS requirements that may apply to the workplace being followed by the authorised persons.</p> <p><i>Note: This recommendation was previously 213.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>It was agreed that entry should also be allowed to other work areas that directly affect the health and safety of members or eligible members. It was further agreed that authorised persons should also be required, as envisaged for inspectors at recommendation 169, at all times during entry, to display or have available for examination, the relevant authorisation (eg. permit).</p>
<p>Recommendation 213</p> <p>The authorised person is prohibited from the exercise of powers under the model Act at domestic premises unless:</p> <p>a) such entry is provided for under a regulation under the</p>	<p>Response: Agreed</p> <p>The drafting of this provision should be consistent with comments at recommendations 28</p>

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<p>model Act, or the premises are otherwise declared by regulation to be a business or undertaking; or</p> <p>b) such entry is permitted by the owner or other person with the management or control of the premises.</p> <p><i>Note: This recommendation was previously 214.</i></p>	<p>and 94 regarding domestic premises.</p>
<p>Recommendation 214</p> <p>The exercise of a right of entry for OHS purposes under the model Act by an authorised person will be subject to:</p> <p>a) current authorisation of the authorised person under the relevant OHS Act; and</p> <p>b) any other permit required under relevant Federal, or state labour law for the authorised person to enter the workplace; and</p> <p>c) written notice of at least 24 hours by the authorised person to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to consult or advise workers; or</p> <p>d) notice as soon as reasonably practicable after entry to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is investigating a suspected breach, unless to do so would defeat the purpose for which the premises were entered; or unreasonably delay the authorised person in a case of urgency; or</p> <p>e) written notice of at least 24 hours to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union where the authorised person is entering to inspect documents relevant to the suspected breach of the model Act or regulations.</p> <p><i>Note: This recommendation was previously 215.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>These provisions, especially in relation to whether or not 24 hours notice of entry is required, and in relation to giving notice after entry to the person conducting the business or undertaking, should be consistent with the <i>Fair Work Act 2009</i>.</p>
<p>Recommendation 215</p> <p>An authorised person exercising a right of entry under the model Act may do any of the following:</p> <p>a) consult with or advise those workers who are members of or eligible to be members of the union, subject to written notice of 24 hours;</p> <p>b) consult with the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union on an OHS</p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>The recommendation is supported with the following amendments:</p> <ul style="list-style-type: none"> • part (a) – ensure that provisions as to 24 hours written notice are consistent with the <i>Fair Work Act 2009</i> (refer recommendation 214) • part c) - broaden to include <i>‘or other work areas that directly</i>

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<p>issue;</p> <p>c) inspect work systems, plant or processes contained within the area where relevant workers work;</p> <p>d) investigate a suspected breach of the model Act or associated subordinate instrument(s), subject to the provision of proof of authorisation to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union unless to provide such proof of authorisation would defeat the purpose of the investigation or, it is considered by the authorised person to be an urgent case;</p> <p>e) inspection of documents of the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union relevant to a suspected breach of the model Act or regulations, subject to:</p> <p>i) provision of 24 hours written notice with a reasonable time given for the person from whom the documents are requested to produce them; and</p> <p>ii) written notification to the person conducting a business or undertaking who is most directly involved in the engagement or direction of workers who are members or eligible to be members of the relevant union of details of the particular contravention suspected; and</p> <p>iii) a list of the documents sought being provided with the request.</p> <p>f) warn any person that the authorised person reasonably believes to be exposed to a significant and immediate risk of injury;</p> <p>g) request an inspector visit the workplace to determine whether a notice should be issued; and</p> <p>h) have the right to seek a review of the action taken by the inspector (including a decision of the inspector to not take any action).</p> <p>Any right exercised by an authorised person is limited to matters affecting the health or safety of those workers who are members of or eligible to be members of the authorised representative's union.</p> <p><i>Note: This recommendation was previously 216.</i></p>	<p><i>affect the health and safety of members or eligible members'</i> (refer recommendation 212)</p> <ul style="list-style-type: none"> • part d) - amend to 'enquire into a suspected breach of the model Act or associated subordinate instrument(s)' and delete the words from 'subject to..' to '...urgent case', and ensure consistency with the <i>Fair Work Act 2009</i> • part e) - include provisions for dealing with confidentiality of records accessed and/or kept • parts g) and h) - delete as they are unnecessary.
<p>Recommendation 216</p> <p>A relevant court or tribunal may deal with a dispute relating to the exercise or purported exercise by an authorised person of a right of entry under the model Act. The process may involve conciliation, mediation and, where necessary, arbitration.</p> <p><i>Note: This recommendation was previously 217.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 217</p> <p>Authorisation of an authorised person under the model Act may be suspended or revoked, in whole or in part, or limitations</p>	<p>Response: Agreed</p>

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<p>imposed where, after providing the authorised person a reasonable opportunity to be heard it is determined by a court or tribunal (civil process) that such action should be taken. <i>Note: This recommendation was previously 218.</i></p>	
<p>Recommendation 218</p> <p>Grounds for suspension, revocation or the taking of alternative action (including imposing limitations) should include where:</p> <ul style="list-style-type: none"> a) the authorised person has ceased to satisfy the requirement under relevant Federal labour law, in which case the action to be taken is subject to the operation of the decision of the relevant Federal labour tribunal; or b) a relevant court or tribunal determines it is satisfied the authorised person has: <ul style="list-style-type: none"> i) acted or purported to act in an improper manner in the exercise of the rights conferred under the model Act; or ii) unduly and/or intentionally hindered a person conducting a business or undertaking or the workers during working hours; or iii) no longer meets the fit and proper person test required for authorisation under the model Act. <p>Where action has been taken under (a) by the Federal labour tribunal, the OHS court or tribunal is to convene to enable the authorised person to show cause why complementary action ought not be taken under the model Act. In proceedings brought under (b) the onus is on the applicant. <i>Note: This recommendation was previously 219.</i></p>	<p>Response: Agreed</p> <p>Consideration should be given during drafting as to whether this level of detail is required and to ensure consistency with the criteria for obtaining a permit.</p>
<p>Recommendation 219</p> <p>In determining whether to revoke or suspend or impose limitations on the authorisation of an authorised person the court or tribunal shall have regard for:</p> <ul style="list-style-type: none"> a) the seriousness of any findings of the court or tribunal having regard to the objects of the model Act; and b) the requirement for an authorised person to continue to meet the fit and proper person test; and c) any other matter considered relevant. <p>In proceedings initiated under this provision the onus is on the authorised person to show cause why complementary action should not be taken. <i>Note: This recommendation was previously 220.</i></p>	<p>Response: Agreed</p> <p>As per recommendation 208, the ‘fit and proper person’ test in part (b) should be the same as that provided for in the <i>Fair Work Act 2009</i>.</p>
<p>Recommendation 220</p> <p>A provision be inserted in the model Act prohibiting a person from:</p> <ul style="list-style-type: none"> a) refusing an authorised person gaining entry to the workplace in accordance with the provisions of the model Act; or b) delaying, obstructing, intimidating or threatening an authorised person acting in accordance with the provisions of the model Act, or inducing or attempting to induce 	<p>Response: Agreed</p>

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<p>another person to do so. <i>Note: This recommendation was previously 221.</i></p>	
<p>Recommendation 221</p> <p>An authorised person must not contravene any limitation imposed by the issuing authority on their right of entry authorisation; and It is an offence for any person to impersonate an authorised person under the model Act. <i>Note: This recommendation was previously 222.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Consideration should be given during drafting as to whether the offence should be broadened to include ‘misrepresent’ instead of just ‘impersonate’. The drafting process should ensure consistency with the <i>Fair Work Act 2009</i>.</p>
<p>Recommendation 222</p> <p>Any specific requirements on union right of entry, additional to those contained in the model Act, are to be specified in regulations. Guidance material on right of entry is to:</p> <ol style="list-style-type: none"> a) be drawn up by the regulator in consultation with the relevant tripartite body; and b) issued and distributed in that jurisdiction. <p><i>Note: This recommendation was previously 223.</i></p>	<p>Response: Agreed</p> <p>Consideration should be given during drafting as to whether this level of detail is required.</p>
<p>Recommendation 223</p> <p>We recommend that the model Act provide that:</p> <ol style="list-style-type: none"> a) only an official who is acting in the course of a public office or duty may bring a prosecution for a breach of the Act; b) in accordance with the process and time frame described in our discussion of Option 4, in the case of an alleged category 1 or 2 breach of a duty of care, a person may request in writing that the regulator bring a prosecution for the breach and, if no prosecution is to be brought, have the decision of the regulator reviewed by the DPP; c) where a person requests prosecution of an alleged Category 3 breach the regulator should be required to explain in writing what action the regulator proposes to undertake; and d) the model Act should provide that the DPP is able to bring proceedings for an indictable offence under the model Act notwithstanding any other provisions in the model Act. <p><i>Note: This recommendation was previously 224.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>Further consideration should be given to paragraphs b) and d) in relation to the proposed role for the DPP in reviewing regulators’ decisions in respect of prosecutions, and in bringing prosecutions under the model Act. In relation to paragraph c), while the principle of regulator accountability was supported, it was considered that this represented an unnecessary level of prescription.</p>
<p>Recommendation 224</p> <p>The model Act should contain broad regulation making powers, which allow for the development of regulations necessary or convenient to carry out or give effect to the provisions of the</p>	<p>Response: Agreed</p>

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<p>model Act. <i>Note: This recommendation was previously 225.</i></p>	
<p>Recommendation 225</p> <p>There should also be more specific regulation making powers (that expressly do not limit the broad general regulation making power) prescribing those matters that are not expressly identified within the scope or objects of the model Act for which regulations may be required. <i>Note: This recommendation was previously 226.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 226</p> <p>To assist in identifying the specific matters mentioned in Recommendation 226, the range of existing regulation making powers in each jurisdiction’s OHS Acts should be consolidated into a workable list of more broadly worded, specific regulation making powers. This should be used to settle the specific matters to be included in the model Act’s regulation making power. Note: The range of such matters will only able to be finalised once the extent of matters that will be dealt with by the model Act are finalised. <i>Note: This recommendation was previously 227.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 227</p> <p>The model Act should allow the regulations to provide for summary offences with lower penalties. <i>Note: This recommendation was previously 228.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 228</p> <p>The model Act should provide for codes to be developed through a tripartite process, with expert involvement, and approved by the relevant Minister. <i>Note: This recommendation was previously 229.</i></p>	<p>Response: Agreed</p> <p>The model Act should be consistent with provisions in the <i>Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety</i> relating to the development and adoption of model codes of practice, in particular, clauses 5.4.1 to 5.4.4.</p>
<p>Recommendation 229</p> <p>The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances. <i>Note: This recommendation was previously 230.</i></p>	<p>Response: Agreed</p>

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<p>Recommendation 230</p> <p>The model Act should make it clear that a duty holder may achieve and demonstrate compliance with relevant provisions of the Act and regulations by ways other than the ways set out by an approved code of practice.</p> <p><i>Note: This recommendation was previously 231.</i></p>	<p>Response: Agreed</p>
<p>Recommendation 231</p> <p>The model Act should provide for:</p> <ol style="list-style-type: none"> 1. the imputation to a corporation of the conduct and the state of mind of officers, employees and agents of the corporation acting within the scope of their actual or apparent authority; and 2. a defence for a corporation if it is proved that the corporation took ‘all reasonable and practicable measures to prevent the offence occurring. <p><i>Note: This recommendation was previously 232.</i></p>	<p>Response: Part 1 Agreed; Part 2 Not agreed</p> <p>In relation to the first part of this recommendation, the Criminal Code sets out rules for attributing criminal responsibility to a body corporate in these circumstances and regard should be had to the Criminal Code in drafting the provisions.</p> <p>The second part of this recommendation is unnecessary due to the reasonably practicable qualifier in the general duty.</p>
<p>Recommendation 232</p> <p>The model Act should provide for the review of its content and operation and that of the subordinate regulation at least once in each period of five years after the model Act’s commencement.</p> <p>The review must be part of or take account of any national review of the content and operation of the principal OHS Acts.</p> <p>Any persons who are affected by the operation of the model Act and regulations must be given a reasonable opportunity to provide their views for the purposes of the review.</p> <p>The report of the review must be presented to the responsible Minister and presented to the Parliament within a reasonable time after the Minister has had an opportunity to consider it.</p> <p><i>Note: This recommendation was previously 233.</i></p>	<p>Response: Agreed in principle, subject to qualifications outlined below</p> <p>In relation to paragraph 1 of this recommendation, the principle of review is supported but the practicality needs further consideration during drafting given the significant differences between jurisdictions.</p> <p>Paragraph 2 of this recommendation should be removed as it is redundant.</p> <p>In relation to paragraph 4 of this recommendation, the report of the review is to be submitted to the Workplace Relations Ministers’ Council.</p>