



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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National OH&S Review Secretariat
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**NATIONAL REVIEW INTO MODEL
OCCUPATIONAL HEALTH AND SAFETY LAWS**

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the issues paper *National Review into Model Occupational Health and Safety Laws*.

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We represent over 8,000 governance professionals working in public and private companies. We are an independent, widely-respected influencer of governance thinking and behaviour in Australia.

Members of CSA have a thorough working knowledge of directors' and officers' duties and the *Corporations Act 2001*, and many are themselves officers as defined in the Corporations Act. Our members are all involved in corporate administration and governance, with substantial knowledge of a great variety of legislative frameworks, and we have drawn on their experience in the formulation of this submission.

General comments

CSA welcomes the proposal to introduce uniform OH&S laws. CSA notes that the existing variety of standards and tests contained in OH&S legislation at both the Commonwealth and State levels makes compliance much more difficult to manage than it would be under a uniform approach. Current legislation across Australia requires corporations and officers to respond to differing standards and tests, and this necessarily involves a greater allocation of resources and the attendant costs than would be the case if uniform legislation was in place.

CSA strongly supports a uniform approach as it would:

- promote compliance by reducing confusion as to obligations, which in turn would bring greater certainty to both employers and employees
- facilitate the introduction of appropriate risk management systems and processes to ensure the safety of workers, which in turn would facilitate implementation, management and evaluation of such systems
- reduce compliance time and costs by removing the need for organisations to respond to differing standards and tests
- provide greater certainty to insurers in assessing organisations' risk management systems and processes as part of their analysis in relation to providing insurance and deciding if a claim falls within the scope of the policy.

As overarching principles to take into account, **CSA recommends** that:

- the uniform OH&S model laws should be applicable to all workplaces, irrespective of size
- the law should apply equally to all duty holders, whether they are in the public or private sector
- the model OH&S laws should take a principles-based approach, as such an approach
 - provides real guidance on how the OH&S regulator will administer the laws and the expectations of the regulator as to how duty holders should conduct themselves to ensure compliance with the OH&S Act
 - assists users to understand the legislation, and
 - enshrines the aspirations of the community concerning workplace health and safety.

On this latter point, CSA notes that while large organisations may have compliance departments with specialists in place to closely read many pages of legislation, small to medium-sized enterprises (SMEs) do not have such resources. CSA believes that any uniform OH&S legislation should be developed on the basis of ensuring the greatest number of businesses can understand and engage with their obligations under OH&S laws, and suggests that a principles-based approach is more likely to achieve this policy objective than thousands of pages of prescriptive black-letter law requiring specialist skills to comprehend.

In this submission, CSA members focus on issues closely aligned to their areas of responsibility, rather than commenting on all matters raised in the issues paper. In brief, our submission canvasses issues relating to the:

1. liability of officers and duties of care — who owes them and to whom?
2. concept of ‘reasonably practicable’ and risk management
3. burden of proof and defences.

The liability of officers and duties of care — who owes them and to whom?

Derivative liability

CSA has reservations about the concept of derivative liability, especially where people have no power to influence the offence committed by the body corporate, but are held liable by reason of their formal position in the corporation, rather than for any actual acts or omissions. CSA prefers the concept of accessory liability, as a form of direct liability for intentional and knowing participation in a corporate breach.

Notwithstanding this, CSA acknowledges that derivative liability is already recognised in all OH&S statutes and that the social goal of a responsible corporate compliance culture is desirable.

CSA would like to point to some of the practical implications of the application of derivative liability. Under most state occupational health and safety (OH&S) legislation, if an individual is injured at work, the company will almost certainly be guilty of an offence. Under most state legislation, once a company has committed an offence, the directors and officers will be deemed also to have committed an offence, unless they can prove that they were not in a position to influence the relevant conduct or that they exercised all due diligence to prevent the relevant conduct.

Consider the example of a company with thousands of people employed at multiple sites using heavy mobile equipment, or a labour hire company with thousands of employees working on thousands of client sites in a variety of occupations. Directors could potentially be liable to prosecution if an unfortunate safety or environmental incident were to take place, despite having no knowledge of, or ability to ameliorate, the circumstances giving rise to the incident, no matter how seriously the directors take their responsibilities and no matter how much time they spend focusing on safety and environmental issues.

It is important to differentiate between foreseeable and/or preventable accidents, such as that which occurred at the Esso gas plant explosion at Longford in Victoria in 1998, and those accidents that cannot be prevented and where people are injured without any person being responsible for the injury, such as when a hydraulic line ruptures, despite the fact that it is well-maintained.

Arguments for and against extending derivative liability

CSA recognises that to the extent that derivative liability creates potential liabilities on the part of directors and officers, it provides significant incentives for directors and officers to put in place effective risk-management arrangements to ensure that the corporation complies with its obligations. It has been suggested that 'accessorial liability alone may not create sufficient incentive, given that the general principles of this type of liability require a person to have actual knowledge, or be wilfully blind, about certain corporate conduct'.¹

a) Argument for restricting derivative liability to officers as defined in the Corporations Act

One argument is that derivative liability should be limited to directors and officers with the power to influence corporate conduct, that is, the persons attracting personal liability for a corporate breach should be those who have both the authority to make decisions about the organisation as a whole and the power to enforce them. In practice, there are few individuals in a corporation with the power to make these decisions.

For example, an OH&S Manager may have a broad scope of responsibility for OH&S, and may make recommendations concerning OH&S issues to the executive committee of a corporation, but may not have the power to make critical decisions concerning OH&S and enforce them. In this example, if the executive committee did not approve recommendations made by the OH&S Manager, the OH&S Manager should not be exposed to derivative liability for any breach of statutory safety requirements which resulted.

Another example concerns risk managers and compliance managers in financial services corporations. They are likely to report to more senior managers and, ultimately, to a member of the executive committee, which has the power to make and enforce decisions concerning these areas of responsibility. The risk and compliance managers should not be held liable for any breach of legislation as a result of actions or inactions by the executive committee, when they have not had the power to make and enforce the relevant decisions.

b) Argument for extending derivative liability beyond officers as defined in the Corporations Act

Directors and officers could potentially be held liable by reason of their formal position in the corporation, rather than for any actual involvement in acts or omissions, and despite having made every effort to ensure OH&S compliance frameworks have been developed and effectively implemented and observed.

¹ Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault: Discussion Paper*, 2005, p 19

There is, therefore, an argument for personal liability for any breach of OH&S legislation attaching to the person whose acts or omissions caused the breach, rather than to directors and officers by virtue of their position in the corporation. Limiting the scope of derivative liability to directors and executive officers may thwart safety efforts in corporations, as those responsible for particular worksites or groups of employees do not necessarily take 'ownership' of the safety obligations.

CSA's recommendations

CSA does not support persons being subjected to derivative liability merely because of their position in a corporation, where the breach was caused by conduct outside of their control and they made reasonable efforts to ensure that appropriate compliance systems and processes are in place. At the senior executive level, individuals generally monitor the performance of others; they cannot be involved in the day-to-day implementation of processes and systems.

CSA recommends that the guiding principle for the 'chain of responsibility' should be that all those who exercise control over conduct affecting compliance have responsibility and are made accountable for failing to discharge their responsibility, subject to those persons having:

- accepted their responsibilities and been given the necessary delegated authority, and
- adequate budgetary and other resources.

CSA notes that officers as defined in the Corporations Act does not capture all those with delegated authority and adequate resources who may hold responsibility.

CSA recommends, therefore, that the definition of officer in the Corporations Act not be used as the definition of who has control in any model OH&S legislation.

On this basis, **CSA recommends** that any control test or definition introduced in the model OH&S legislation should clarify that the board of directors has ultimate responsibility and that any delegation of authority must be informed, to ensure that directors understand their ultimate responsibility. However, this responsibility is for oversight and not operational implementation, except where directors are also responsible for operations, and directors should be able to rely on the processes they have directed to be established and for which they have provided adequate resourcing. Directors should not be held personally liable if they have ensured that risk management systems are in place which others are responsible to implement, and they can prove that they were adequately resourced and regularly monitored and evaluated.

CSA also recommends that accessorial liability rather than derivative liability apply to shared duties, that is, responsibilities where multiple duty holders and multiple duties are involved.

Finally, **CSA recommends** that any move to harmonisation take account of implementation issues, as well as legislative enactment. CSA notes that harmonisation of the means by which OH&S legislation is implemented is the key to success of any harmonisation process.

CSA recommends that one national regulator be responsible for overseeing compliance with and enforcement of OH&S legislation. Such a national regulator will ensure consistency in interpretation and enforcement. Without such consistency, any harmonisation process will fail.

The concept of 'reasonably practicable' and risk management

CSA believes that OH&S protection is an essential component of a risk management system. Organisations should develop and implement a risk management system that is:

- fit for purpose (as the requirements of particular organisations and particular industries will differ)
- documented
- regularly reviewed.

Organisations need to ensure that they diligently assess and monitor OH&S risks. The concept of 'reasonably practicable' is important in giving regard to the type and appropriateness of a risk management system that any particular organisation has put in place, that is, its fitness for purpose.

CSA notes that 'reasonably practicable' is a well understood concept in common law countries and has been the subject of considerable guidance and case law. It embodies an objective standard which has broad community acceptance. Therefore, **CSA recommends** that reference to the term be included in the model OH&S legislation, but opposes the inclusion of absolute duties without qualification. General duties that are limited by what is 'reasonably practicable' make it clear to duty holders about the extent of their duties and what is expected of them. This approach offers greater transparency about the intent of the law than absolute duties which then include defences.

CSA does not believe that it is feasible to define in black-letter law a risk management system that is applicable to all organisations and strongly opposes the inclusion of any definition of risk management in the model OH&S legislation.

However, **CSA recommends** that the model OH&S legislation provide clarity on the determinants that can be taken into account when assessing what is reasonable and practicable in terms of mitigating OH&S risks in any particular organisation. CSA supports the model OH&S legislation having regard to, in determining what is 'reasonably practicable' for any particular organisation (as set out on page 19 of the issues paper):

- the likelihood of the hazard or risk occurring
- the degree of harm that would result if the hazard or risk occurred
- the state of knowledge that exists about the hazard or risk and any ways of eliminating or reducing the hazard or risk
- the availability and suitability of ways to eliminate or reduce the hazard or risk, and
- the cost of eliminating or reducing the hazard or risk.

CSA strongly opposes defining hazard or risk, as what is reasonable and practicable will vary from organisation to organisation and industry to industry. For example, the hazards and risks a company such as BHP Billiton faces will be substantially different from those faced by a solicitor's office.

Organisations need to be able to show that they have undertaken a risk assessment process that has regard to these determinants, and also undertaken reasonable precautions and due diligence. A smaller organisation may not have implemented a full risk management framework but could still have risk management processes in place and regard needs to be had to such processes and their applicability to the circumstances of the organisation.

CSA also notes that having in place a fit-for-purpose risk management system that is documented and regularly reviewed should be able to be used as a defence if an accident or injury occurs. CSA also notes that, in such circumstances, being able to set out the risk management system in place will also assist insurers in deciding if an OH&S policy applies.

The burden of proof and defences

CSA supports any model OH&S legislation providing additional guidance in relation to liability and duties of care rather than introducing larger penalties.

The burden of proof

CSA believes that it is appropriate that the prosecutor bears the onus of proof in OH&S legislation. This is consistent both with the criminal law principle that the prosecution should bear the onus of proving every element of the offence, and with human rights principles. That is, a person who is charged with a crime has the right to be presumed innocent until proven guilty according to the law.

CSA strongly opposes the reverse onus of proof applying, as it currently does in the OH&S legislation of some jurisdictions, which means that the defendant has the burden of proving that on the balance of probability he or she did everything that was reasonably practicable in the circumstances.

CSA cannot cite any evidence that justifies a reverse onus of proof applying, given that the objects of the Act and the principles of health and safety are not being defeated in the courts where the onus of proof rests with the prosecutor.

CSA recommends that the principles of criminal law should guide the onus of proof requirements. The burden of proof should rest on the prosecution, not the defence, notwithstanding that it recognises that the defence must show that all reasonable steps were taken to prevent a breach of the statute and proof should be required that an individual was in a position to influence the outcome.

CSA recommends the Victorian OH&S Act as a good model for the approach to the burden of proof.

CSA also strongly recommends that any model OH&S law take account of the issues raised in the CAMAC report released in September 2006, *Personal Liability for Corporate Fault*.

Criminal sanctions

CSA strongly believes that criminal consequences should only flow from egregious behaviour, that is, behaviour which meets the elements of intentionality, recklessness or fraudulence.

On this basis, **CSA recommends** that criminal liability should only apply where recklessness or intentionality as to the likelihood of the company's contravening conduct occurring can be proved, and where the officer failed to take reasonable steps to prevent the conduct.

Our recommendations relate to the fact that, while still placing a significant burden on directors and officers to do the right thing, a framework as recommended by CSA would provide more certainty for those individuals subject to derivative liability than the tenuous link between 'crime' and punishment that exists currently.

Given that any uniform OH&S law is likely to contain a range of OH&S indictable and summary offences, with a variety of penalty options which may be imposed by inspectors or a court of

law, CSA supports a model that provides effective deterrence relying on imprisonment only for the most serious offences and a diversity of penalties, including fines, enforceable undertakings, publicity orders and community-based orders, utilised for lesser offences.

CSA recommends the Victorian OH&S Act as a good model for the approach to criminal sanctions.

CSA also strongly recommends that any model OH&S law take account of the issues raised in the CAMAC report released in September 2006, *Personal Liability for Corporate Fault*.

Further information

In preparing this submission, CSA has drawn on the expertise of the members of its two internal national policy committees. We would welcome the opportunity to meet with you to discuss any of our views in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Sheehy', written in a cursive style.

Tim Sheehy
CHIEF EXECUTIVE