



AUSTRALIAN CONSTRUCTORS ASSOCIATION

ABN 63 065 806 948

11 July 2008

Mr Robin Stewart-Crompton
Chair
National OHS Review Secretariat
Department of Education, Employment and Workplace Relations
64N1 GPO Box 9880
CANBERRA ACT 2600

Dear Mr Stewart-Crompton,

Thank you for the opportunity to make a submission to the *National Review into Model Occupational Health & Safety Laws*.

The Australian Constructors Association (ACA) is a national organisation representing major construction contractors.

The ACA's Mission is "*to make the construction industry safer, more efficient, more competitive and better able to contribute to the development of Australia*".

ACA member companies have a combined annual revenue in excess of \$AUD 40 billion and collectively employ over 86,000 people in their Australian and international operations.

A list of the ACA Board and member companies is annexed.

Overview

A number of general principles underpin this submission:

- Employers accept that they hold very high standards of responsibility in relation to workplace safety, for good reasons of driving continuous improvement in OHS. Legal and enforcement processes should encourage parties to take responsibility by recognising what they have done in a positive way to meet those high standards rather than concentrating on where they have fallen short.
- Enforcement should be a regime based on learning, support and fair sanction upon breach, not on reaction and blame.

- A safe workplace requires all parties to understand and accept their responsibilities.
- Empowering employees with responsibility, through consultation, representation and limited enforcement rights, contributes to a safer workplace.
- Rights should be accompanied by responsibilities and fair sanction for breach of those responsibilities
- A jurisdiction with criminal consequences, high levels of fines and possible imprisonment terms should be subject to the highest standards of process and appeal.

Structure of Legislation

Ideally there should be one OHS Act applying to all industries.

The Act should follow the same basic structure of duties and specific provisions, consistent with the Robens model, as the current regime of general OHS legislation.

Duties of Employers to Employees

The general duty of employers should be that prescribed by the Victorian Occupational Health and Safety Act:

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

The onus should be on the prosecution to prove all elements of the offence.

ACSA believes the Victorian duty is the fairest and most effective structure.

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

The specific duties of employers should include an explicit duty to provide:

- A safe working environment
- Safe systems of work
- Consultation with people on matters directly affecting their safety

- Information, instruction, training and supervision, for employees to enable them to work safely
- Information, instruction and training, for managers and supervisors to enable them to contribute to the provision of a safe workplace
- Appropriate facilities for welfare
- Monitoring of conditions

We support the provisions of the Victorian Act (s.21(3)) extending the general duty of employers to cover independent contractors engaged by the employer, but suggest it be made explicit that this includes on-hire (labour hire) employees. This would be subject to the extent of the control of the employer over the work of contractors

Duty of Employees

There should be three explicit employee duties, taken from the Victorian Act:

While at work an employee must:

- (a) take reasonable care for his or her own health and safety; and*
- (b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace; and*
- (c) co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations.*

The current sanctions for breach of these duties should remain.

Multiple Duty Holders

The principal determinant of responsibility in cases of multiple duty holders should be control

The principal contractor provisions of the NSW regulations should apply to provide greater certainty in the construction industry.

Consultation

There should be a duty to consult with employees. Consultation should be through various options so that the different needs of different sizes and structures of workplaces can be catered for. These include safety committees, safety representatives and other arrangements agreed by the workplace parties.

Health and safety representatives should have the power to issue Provisional Improvement Notices in terms set out in the current Victorian and Western Australian Acts

An employer should have the right to initiate a process for revocation of the power to issue PINs at a workplace for a prescribed period where abuse of the power can be shown.

Workplace Health and Safety Officers

Employers employing more than 50 employees should be required to appoint a Workplace Health and Safety Officer (WHSO) in terms similar to that in the Queensland Act.

An employer should be able to adopt another method if it can demonstrate it effectively duplicates the underlying function of a WHSO.

Offences and Prosecutions

Managers and directors of corporations should only be held individually responsible for breaches of the law by the corporation if the breach is attributable to the manager or director failing to take reasonable care. The onus should be on the prosecution to prove all elements of the offence against the individual.

There should be an offence of reckless endangerment applying to any person in the workplace in cases of workplace death or risk of serious injury.

Imprisonment terms should be prescribed only as an option for the worst cases of reckless endangerment.

A right of appeal for a defendant against a conviction for a breach of OHS law should always lie to the relevant state Supreme Court and beyond.

Prosecutions should be commenced within twelve months of the incident giving rise to the action and be heard in the normal criminal court system.

Rights of Unions

Union officials should have the right to enter a workplace, with notice to the employer to investigate suspected safety breaches.

Union officials should not have the right to issue PINs or cause work to cease.

Unions should not have the right to initiate prosecutions for breaches of OHS legislation.

National Enforcement Protocols

A model law should be accompanied by a mechanism to ensure that regulators enforcing the model law at state level act consistently with respect to:

- Interpretation of duties, regulations and guidance material by individual officers within each regulator and between regulators

- The conduct of workplace inspections and investigations
- The balance of resources, effort and focus between education, training and knowledge transfer on one hand and penalty and prosecution activity on the other.
- An enforcement philosophy that encourages and rewards those who have taken positive action and responsibility.

Right of Entry

The issue of union right of entry in the building and construction industry was the subject of review in the Royal Commission into the Building and Construction Industry. In his Final Report, Commissioner Cole described the issue of abuse of right of entry provisions in the Australian construction industry:

“Statutory provisions which entitle officers and employees of unions to enter premises authorise conduct which would otherwise constitute a trespass. Because they are a statutory intrusion into the premises and business affairs of another and because of their potential to cause disruption to workplaces, the circumstances in which entry is permitted need to be precisely defined and limited to what is necessary to achieve the purpose for which entry is permitted.

The evidence presented at the public hearings of the Commission disclosed widespread disregard in the building and construction industry of obligations concerning entry to premises and inspection of employment records in New South Wales, Victoria, Queensland, Western Australia, Tasmania and the Australian Capital Territory. Most of the evidence of lawlessness related to misconduct by officers and employees of the Construction, Forestry, Mining and Energy Union.

Ensuring that provisions regulating entry and inspection by unions operate properly in the building and construction industry is a matter of considerable importance. Overwhelmingly, the evidence presented to the Commission was that industrial disputation on building and construction sites followed upon union officers and employees entering sites pursuant to the exercise or purported exercise of a statutory power. Industrial disputation was almost always the result of intervention in workplace relations by union officers. That intervention was often uninvited and sometimes unwanted by the affected employees.”

Various provisions of the *Building and Construction Industry Improvement Act* and the *Workplace Relations Act* and the activism of the Australian Building and Construction Commissioner have done much to ensure that OHS union right of entry powers have been properly exercised.

The Commonwealth Government has also used the provisions of the Implementation Guidelines for the National Code of Practice for the Construction Industry (the Implementation Guidelines), to place restrictions upon right of entry provisions in industrial agreements.

The Guidelines specify that:

- No employer or employee is to grant admission to a site by an employee or official of an industrial association other than in strict compliance with the procedures governing entry and inspection under the *Workplace Relations Act* or under relevant state legislation (including OHS legislation). These procedures govern access to employer and employee records and the holding of discussions with employees.
- Attempts to avoid right of entry requirements for union officials by allowing delegates or shop stewards to perform a similar function are deemed to be inconsistent with the Guidelines.
- An industrial instrument must not provide for a person or entity that is not a party to the industrial instrument to monitor the operation of the industrial instrument (this excludes activity provided for under Commonwealth or state laws or monitoring by a Government agency to ensure code compliance, such as the Australian Building and Construction Commissioner (ABCC)).

We support the inclusion of model OHS Act right of entry provisions. However with the demise of the ABCC in January 2010 and a cloud over the future of the Implementation Guidelines, we are concerned that the compliance elements that have ensured that these powers are not abused may soon be removed. The risk is a return to the pre-Royal Commission behaviour.

The Workplace Relations Act requires union officials to hold a current Federal permit, before seeking entry to a workplace. Permits are issued by the Industrial Registrar, on written application by a trade union and remain in force until expiration or revocation. Permits expire three years after they are issued, or when the person ceases to be an employee or officer of the union, whichever is earlier.

Under WorkChoices, a permit will not be issued, unless the applicant is deemed a “fit and proper” person. The Industrial Registrar is required to take into account a number of factors in assessing this, including:

- Whether the official has received appropriate training about the rights and responsibilities of a permit holder;
- Whether the official has ever been convicted of an offence against an industrial law;
- Whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:
 - (i) Entry onto premises; or
 - (ii) Fraud or dishonesty; or
 - (iii) Intentional use of violence against another person or intentional damage or destruction of property;
- Whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in respect of conduct of the official;

- Whether any permit issued to the official under this Part, or under the repealed Part IX, has been revoked or suspended or made subject to conditions;
- Whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law;
- Whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law; and
- Any other matters that the Registrar considers relevant.

Permits cannot be issued during suspension or disqualification period for right of entry offences under State industrial and OHS laws.

We think this is rigorous framework and would like to see a similar structure specified in a model OHS Act.

Thank you for the opportunity to contribute to the Review. Please let me know if the Association can provide the Review with any additional information.

Yours faithfully,



Jim Barrett
EXECUTIVE DIRECTOR

AUSTRALIAN CONSTRUCTORS ASSOCIATION

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ANNEXURE A

ACA BOARD MEMBERS

Mr Wal King AO, (President ACA)
Chief Executive Officer
Leighton Holdings Limited

Mr Nick Bowen
Chief Executive Officer
Macmahon Holdings Limited

Mr Peter Brecht
Managing Director
Abigroup Limited

Mr Brian Cargill
Director Risk
Multiplex Constructions Pty Ltd

Mr Tony Costantino
Managing Director Australia
Bovis Lend Lease Pty Ltd

Mr John Smith
Chief Executive Officer
Clough Limited

Mr John Dunkley
Chief Executive Officer
BGC Contracting Pty Ltd

Mr Matthew Furrer
Managing Director
Laing O'Rourke Australia Construction Pty Limited

Mr Geoff Knox
Chief Executive Officer
Downer EDI

Mr Richard Leupen
Managing Director & Chief Executive Officer
United Group Limited

Mr Peter McMorrow
Managing Director
Leighton Contractors Pty Limited

Mr Nick Miller
Chief Executive Officer
Fulton Hogan Pty Ltd

Mr David Robinson
Chief Executive Officer
McConnell Dowell Corporation Limited

Mr David Saxelby
Managing Director
Thiess Pty Limited

Mr Ken Scott-Mackenzie (ACA Vice-President)
Chief Executive Officer
Bilfinger Berger Australia Pty Ltd

Mr David Stewart
Group Managing Director
John Holland Group Pty Ltd

Mr Rick Turchini
Managing Director
Boulderstone Hornibrook Group