

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

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## SPECIFIC COMMENTS

The Civil Contractors Federation (CCF), with Branches in all states and territories, represents the interests of civil contractors and the civil infrastructure industry.

CCF strongly supports harmonisation of occupational health and safety legislation across Australia, with the view to removing State-by-State inconsistencies within the OHS framework, which includes training, licensing and powers of inspectors. This would greatly assist business coordinate and administer compliance of occupational health and safety from a National perspective.

### **Legislative Approach:**

#### **Regulatory Structure**

CCF supports a legislative framework that achieves an appropriate balance between: Principles-based standards, Performance-based standards, Process-based standards and Prescriptive standards which must meet the needs of all construction contractors to ultimately lead to compliance of OHS legislation and best OHS practice.

The model OHS Act should also be based upon the physical hazards of each workplace to be identified via hazard assessment, chemical hazards, hazardous industries (where applicable), administration (including licensing, registration, approval, exemption).

OHS principles should be clearly set out in legislation to guide regulators in administering and policing the laws. Also it should provide expectations on how individuals and businesses should conduct themselves to comply with OHS legislation and various supporting best practice documents. This could be set out within the model OHS Act with supporting guidance materials such as Codes of Practice which set down nationally consistent definitions including prescription, hazard identification, communication, training to assist compliance with the model OHS Act. This has been successful with the current asbestos<sup>1</sup> and noise regulations, within the construction industry.

Whilst it is acknowledged that, over time, courts will establish the meaning of laws through precedence, there needs to be nationally uniform OHS guidance material applying to all workplaces to improve and assist occupational health and safety for businesses who undertake work across borders.

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<sup>1</sup> National Code of Practice for the safe removal of Asbestos 2<sup>nd</sup> Edition for Construction Work [NOHSC:2002 (2005)]

## **Title, Objects and Principles**

We believe that an appropriate title for the model OHS Act would need to also include 'welfare'. National Codes of Practice and other guidance materials should also take into account welfare issues such as;

- Amenities and facilities;
- Bullying and harassment;
- Fatigue including in relation to emergency activities, e.g. fire-fighting
- Psychosocial influences.

CCF suggests the following regarding objectives in the model OHS Act;

- The objects should be clearly stated in the model laws;
- The law should include a set of principles to guide users, both regulators and duty holders;
- The model OHS Act should cover relevant and related environmental matters;
- Standards should be simple to read and apply in all workplaces within all States and Territories.

Other issues to be included within the legislative approach of a model OHS Act are;

- The OHS model laws should apply to all workplaces;
- The laws should not present onerous implication to small to medium businesses to implement;
- Licensing should be a National initiative with uniform assessment tools. This should also include acceptance of National Training Package qualifications within the licensing assessment and issuance;
- The law should apply to all duty holders, e.g. the public (others), designers (in relation to works in progress as well as for completed works), manufacturers, suppliers, safety consultants, relevant persons, employers, employees, developers, principal contractors and the environment before, during and after work;
- There should be greater emphasis on the asset owner's (client's) responsibility for OHS.

## **Scope, Application & Definitions:**

### **Industry Sectors**

Many operators within the civil construction industry work across the construction industry, the mining industry and the rail industry. Having the one regulator and one OHS Act to cover these industries would give uniformity across these industries and OHS compliance easier to understand and practically achieve.

Additional training is usually required by each industry regulator with no credit or recognition given for holding each industry regulator's OHS training course.

The model OHS Act should incorporate all industry specific safety legislation within regulations, codes of practice, guidance notes etc. The model OHS Act would call up the regulations as required within the OHS Act for certain industry specific obligations.

Definitions including related scope statements should be universal across all States and Territories for legislative requirements. Examples of terms to be universally defined are:

- Safety Construction Plans, OHS Management Plan;
- Safe Work Method Statements, Work Method Statements, Job Safety Analysis.

All OHS legislation should contain provisions for improving co ordination between safety regulators within each jurisdiction. For example, OHS training could be accepted by each jurisdiction with a bridging course to be completed which highlights the hazards and risks of that particular industry.

Currently there is no recognition given by either the mining or rail industry to map units of competency completed in the construction industry's OHS induction training to their own training course. If the model OHS Act outlined co ordination between the parties, duplication problems would be resolved.

Similar confusion currently exists in NSW with the Workcover Construction Industry OHS Induction Training (white card)<sup>2</sup> and the Transport Industry Induction Training (blue card)<sup>3</sup>. Both training courses covering the same OHS induction information and both courses required for truck drivers to;

- enter a construction site and;
- drive a truck on roads.

### **Workplaces and Non Workplaces**

General duties should be tied to all risks associated with any work. The model OHS Act should incorporate all industry specific safety legislation including, for example, dangerous goods, explosives and environmental legislative requirements.

In summary, the wording used in any legislation should be consistent across all States and Territories. Inconsistencies in definitions have caused major frustrations for many years, even amongst the most experienced OHS practitioners.

Another confusing definition that currently exists within States and Territories are each others' different interpretation of 'risk'.

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<sup>2</sup> Workcover NSW Construction Induction Training Code of Practice

<sup>3</sup> Transport Industry National Competency Standard TDT F1 2002

## **Public Safety**

Having the model OHS Act include non workplaces within the definition of working in private residences could have a great impact on other State Licensing Regulators. Policing of this compliance could only be met at the Development Application state through Local Government. However, within the construction industry, OHS obligations for a contractor or employee are no different to that of a home renovator doing the same job for themselves.

Should a project encroach on public safety, it would certainly be deemed as an OHS breach if a member of the public were injured from poor OHS practice. Currently some States do have legal obligations for amusement equipment and operators. How the model OHS Act will be extended to members of the public will need to be examined closely to ensure the boundary between OHS legislation and public safety regulations are not confused.

## **Work Organisation**

All legislation should be able to accommodate new and evolving types of work arrangements. This includes Workers Compensation as well as OHS.

Currently, Workers Compensation is not available to non Incorporated Companies with no employees (i.e. sole traders and partnerships). The definition of deemed worker v a sole trader/partnership for Workers Compensation purposes, causes great confusion and concern to the construction industry. The boundary between a contractors' workers compensation claim and a principal contractors' public liability insurance claim has been tested on many occasions throughout the construction industry.

Labour hire and group apprenticeship schemes rely heavily on the onsite supervision of the host employer to ensure OHS obligations are met. Should the model OHS Act incorporate this type of employment, criteria to assist employers and host employers must be prescribed.

## **Emerging Hazards and Risks**

New hazards and risks are emerging from the ongoing changes to the economy, technology, work organisation and population demographics. From these changes, issues other than direct unsafe working conditions - occupational health & safety - are becoming more common. These physiological and psychological needs should be addressed within the model OHS Act.

The NSW OHS Act 2000 has provision for dealing with psychological health issues and *promotes a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs.*

The model OHS Act would refer to these health issues clarifying that all persons at a place of work have an active role in contributing to a healthy and safe workplace. A Code of Practice could be developed which gives best practice advice on how to avoid psychological health issues.

## **Definitions**

Within the construction industry, various definitions for the industry vary from State and Territories. For example, the National Standard for Construction Work [NOHSC:1016 (2005)], is operational in some States and Territories (Qld, Vic, WA, NT, ACT) however not others (SA, NSW, Tas). Within each State and Territory the definition of construction work differs within each State OHS legislation.

***'Construction work'*** means any work on or in the vicinity of a construction site carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, de-commissioning, demolition or dismantling of any structure, and includes:

*(a) the demolition or dismantling of a structure, or part of a structure, and the removal from the construction site of any product or waste resulting from the demolition or dismantling;*

*(b) the assembly of prefabricated elements to form a structure or the disassembly of prefabricated elements, which, immediately before such disassembly, formed a structure;*

*(c) any work in connection with any excavation, landscaping, preparatory work, or site preparation carried out for the purpose of any work referred to in this definition; and*

*(d) any work referred to in this definition carried out under water, including work on buoys, obstructions to navigation, rafts, ships, and wrecks; but does not include the exploration for or extraction of mineral resources or preparatory work relating to the extraction carried out at a place where such exploration or extraction is carried out.<sup>4</sup>*

Due to the various States and Territories who have adopted this Standard having their own definition for construction work and structures within their own OHS legislation, the above definition is confusing for industry - which ultimately leads to non compliance.

National consistency must be achieved in the model OHS Act to ensure OHS compliance. Definitions within model legislation, regulations, and codes of practice must be uniform and reflect current industry terminology across the range of activities.

## **Duties of Care – Who owes them and to whom?:**

### **The Treatment of workers in OHS laws.**

The definition of employee should be that which defines an employee as a person employed under a contract of service. This would include trainees and apprentices. The contractor status has been outlined within Work Organisation (page 5) of this document.

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<sup>4</sup> 4.1 National Standard for Construction Work [NOHSC:1016 (2005)]

## **Duties of Employers**

Everyone should owe a duty of care to everyone in the workplace. If a hazard is identified in the workplace all those likely to be affected should work together to eliminate or control it. If a hazard has been reported or is observed during inspections then the employee/employer should immediately report or respond to it.

CCF believes the State also owes a duty of care to the community to ensure that adequate educational material is made available to enable persons to meet their obligations.

## **Duties of Workers and Others**

Where Legislation refers to responsibilities there should be information included for employee responsibility. The role that employees have in achieving healthy and safe workplaces should be recognized. For example, when using hazardous substances the employee is responsible for;

- wearing appropriate PPE at all times;
- not using any chemicals they have not received training to use;
- will be required to undertake training;
- may be required to assess the work environment to identify a confined space;
- follow all safe work methods while undertaking their task.

When operating plant, the employee is responsible for;

- not attempting to operate the plant without holding the appropriate certificate or having adequate training;
- not operating plant in a dangerous manner;
- ensuring the working area is isolated;
- using plant that is fit for purpose, appropriately guarded, quiet and safe to use and maintain. Such plant should incorporate where applicable, seat belts, horn, reverse/travel alarm, rear vision mirror, ROPS, FOPS, SWL and safety signage, headlights, indicators, amber strobe beacon, emergency stop devices and reflectors.

Employers can have safety systems in place, issue PPE, train employees to ensure competency, review safety management plans on a continuous basis etc ultimately, the employee is responsible and has a duty of care to carry out all safety management plans issued by the employer and report all OHS issues to the employer.

Penalties issued to employees for non compliance could be a consideration to include within the model OHS Act, which could ensure that employees are also undertaking best OHS practice.

## **Appointed Persons and Officers**

A mechanism for persons to be appointed to a position which has specific OHS responsibilities generally does not promote consultation and the 'shared' duty of care between all parties at the workplace.

A safety committee with defined consultation processes on OHS matters is more effective than having one particular person appointed to deal with all OHS responsibility.

### **Duties of Persons in Control**

All States and Territories generally have consistent legislation for duties of persons in control currently. Uniformity needs to be applied to the concept of 'persons in control' across all jurisdictions within the model OHS Act.

### **'Reasonably Practicable' & Risk Management:**

#### **Concept of Reasonably Practicable**

The CCF believes that the "Reasonably Practicable" test should apply in every state and territory referring to the hierarchy of controls where there are no specific control measures available.

An employer should have access to a defence if they can demonstrate they referred to the hierarchy when assessing a risk (where there were no prescriptive controls in the legislation) especially if the incident was not foreseeable and they can demonstrate how it was not "Reasonably Practicable" to comply with the highest control in the hierarchy.

The term "foreseeable" should be used in all states and territories for obligation holders. For example the model OH&S Act should include words to the effect that an obligation holder has an obligation to implement and maintain control measures for all foreseeable hazards. This should also include employees as they have a duty to help maintain control measures (comply with the employers safety requirements).

#### **Risk Management**

A consistent definition and interpretation of 'risk' is required.

Hazard reporting obligations should be the same in all states and territories.

The requirements should include employee's responsibilities in relation to reporting hazards and what to do if they observe a hazard.

The risk management approach should be maintained where there are no prescriptive controls available in the legislation. Identifying, controlling or eliminating risks will ensure protection and OHS compliance.

OH&S law should set out the factors to be considered when deciding what is reasonably practicable. The current list in the Victorian 2004 Act should be the standard test.

Control should not be added as a factor in this context.

Standards relating to general duties should be objective and the care required of the duty holder should be that of a reasonable person.

## **Consultation, Participation and Representation:**

### **Duty to Consult**

Consultation requirements should be same across all states and territories.

All employers should have to consult with employees (and others) likely to be affected when conducting a risk assessment or where changes are to be made.

Employers and employees should work together to share information and identify improvement strategies about OH&S risks.

There should be a strong emphasis on education in best practice OHS

OH&S reporting should be mandated at the highest level of reporting within an organisation that performs work, e.g. Board of Directors

Legislation should enable the establishment of Health and Safety Representatives and Health and Safety Committees and not mandate it.

OHS committees or Safety Representative requirements should also have National consistency. They should include;

- facilitation of consultation,
- co operation,
- identify improvements,
- make recommendations,
- training and education,
- maintain and monitor safety programs and manufacturers safety specifications

The principle that OH&S is everyone's responsibility should be enshrined whilst retaining flexibility in the establishment of committees, e.g. there should not be prescribed elections. Where employees have elected a representative that representative should be consulted.

There should be no 'right of entry' provisions within the model OHS Act. Any external person reasonably suspecting a contravention of the OHS Act or regulations should be encouraged to refer the issue to the employer in the first instance. In any case, they should have a duty to notify their suspicion to the Regulator. The Regulator should be the only authorized officer who has right of entry with powers. Training and qualifications are mandatory for any OHS regulator's authorized officers currently – this should remain.

Uniform definition of 'issue' is required and the resolution of issues should be linked to a consultation process.

The model OHS Act should provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe.

## **Protection from discrimination and victimization.**

All persons in the workplace should be protected from discrimination, harassment and victimisation including for raising health and safety issues

## **Regulator Functions, Powers & Accountability:**

### **Accountability**

There should be clearly documented records kept and made available to the public through Freedom of Information on why a worksite visit by an Inspector resulted or didn't result in legal action being taken against a business.

This allows for a transparent system to be maintained, reduces the risk of fraudulent activities occurring in the industry and instils confidence in the administration of the legislation.

There should be an organisation independent of the safety authorities set up that investigates reports of internal maladministration, misconduct and corruption within the authority.

All states should introduce mandatory legislation that requires employees to declare any previous work related injury(s) sustained as a result of work or any injury that may place them at risk of further injury at work. This would allow employers the fair advantage of effectively managing their risks and reduce the risk of them having to pay a claim that belongs to someone else.

The model Act should include provisions that allow the making of interpretive documents.

### **Role and Function of Regulators**

The Regulator should have the power to:

- Enter the premises where a suspected OHS issue has been reported;
- Assist businesses comply with OHS legislation by giving advice and support;
- Assist industry by recognizing industries OHS issues and providing support with either implementation of Codes of Practice or Educational Seminars.

The above would keep advisory and enforcement duties connected. Together they provide education, advice and assistance which leads to compliance.

### **Inspectors.**

The role and capacity of inspectors to provide advice and assistance should be clear in the model OHS Act. This will mean strengthening what is currently in place in some jurisdictions. This role is vital as part of the continuum of interventions to manage risk and ensure compliance.

Consideration should be given to guidance for small business to access advice and assistance. Inspectors should also be updated on National Training Packages and

qualifications for each industry sector. Competency of employees is not just licensed through Regulators. VET qualifications are a component of competency and ensuring OHS compliance.

### **Internal Review of Inspectors' Decisions.**

All notices issued by an inspector should be open to review.

Specifics on how this review is undertaken and the timeframe by which the appeal is made must be clear and simple to follow.

### **Compliance & Enforcement:**

#### **Enforcement Measures**

A hierarchy of enforcement measures as per the Issues Paper should be included omitting Infringement Notices.

The 2004 Victorian Act provides a reasonable model for PINs, Improvement Notices and Prohibition Notices.

When PINs are issued they should include recommendations for compliance.

The system should provide for a defined stay when an internal review is being undertaken or an appeal is lodged.

Injunctions should not be provided as they are unnecessary.

Enforceable undertakings should be included for all but the most serious offences.

#### **Prosecutions:**

There should be a common policy regarding compliance and enforcement across all jurisdictions.

The model laws should require regulators to publish prosecution guidelines.

The regulator, an authorised officer or the local Office of Public Prosecutions should be the only authorities to prosecute under OHS laws.

First offences should result in an option being provided to obligation holders of implementing a safety management system in accordance with AS4801 and being audited by a third party for say 5 years or paying the prosecution amount. This should only apply where the company does not have a certified system.

The model OHS Act should deal with;

- the rules of evidence;
- liability of officers based on the severity and negligence as proven by the Regulator;

- sentencing options;
- OHS prosecutions resulting in death or serious injury;

In NSW, the Regulator may wait two years before initiating a prosecution. CCF believes that the period of time for the collection of evidence should be reduced and uniform under the model OHS Act.

## **Other Issues:**

### **Regulations and Codes**

In certain circumstances regulation is the only effective way to ensure health and safety. Regulation should only be proposed if it is the most effective way to deal with issues and it must be evidence based.

Consideration must be given to COAG principles including reducing regulatory burden.

National codes should;

- Describe a range of measures to guide compliance and to control risk
- Relate to a specific provision in the Act for which the code deems compliance
- Identify duty holders which may rely on compliance with the code to deem compliance
- Identify the extent to which reliance on the code will discharge the duties under the Act or regulations.

### **Permits and Licensing**

Permits and licences should have mutual recognition in all states and territories.

A model OHS legislative system should define the standards acceptable in all jurisdictions.

A major high-risk area – demolition – has various degrees of licensing requirements, training and standards for all States and Territories. However, the Australian Standard AS2601: 2001 The Demolition of Structures governs all demolition works. The model OHS Act should also address the licensing of this high-risk area to ensure that national consistency.

### **Plant Licences**

At present there are different requirements from state to state causing administrative and cost burdens to employers and employees who work across borders.

There exists confusion in the industry about OHS regulator defined competency and Australian Qualifications Training Framework competency particularly when employees move across state borders. There should be one uniform OHS licence system applying in all jurisdictions and all industries covering uniformly defined classes of plant.

National Training Package qualifications should become an active requirement in the model OHS Act.

### **Traffic Controllers**

At present, there are different requirements in each State and Territory for traffic controllers. These requirements are regulated currently by the State Roads Departments. There is no National consistency. Again, this becomes a burden for employers and employees who are working cross borders.

Graded courses should be introduced across all States and Territories for traffic controllers to ensure industry related competency.

### **Data Collection**

Following the principle that improvement is enhanced by measuring performance, separating civil construction activity data from the broad construction data is necessary.

ANZIC codes should be examined to include civil construction activity and the used across all jurisdictions.

### **Drugs in the Workplace**

The model OHS Act should lead to a sensible approach to dealing with drugs in all workplaces. This is a clear example of an issue which must be addressed for all workplaces. Small to medium sized businesses need clear guidance to support the development of simple processes.

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

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## GENERAL COMMENTS

### Client Responsibility

Civil construction activities involve;

- A contract between a client and the contractor
- Work undertaken on the client's site

Given the above there needs to be greater emphasis on client's responsibilities for OHS. This should include:

- Incorporating OHS requirements into methods of procurement
- Using tender evaluation methods which focus on the achievement of best practice OHS outcomes

### WORKERS COMPENSATION

The harmonisation should also include the Workers Compensation Acts.

### National Data Set

The ANSZIC coding that is available for Civil Construction should be used across all states when breaking down the Codes for accidents in the Civil Construction Industry.

The hazards associated with building construction (commercial or residential) are very different to those found in civil infrastructure construction.

### Provisional Liability

Provisional Liability used in NSW should be introduced across all states. Early intervention really does reduce unnecessary pain and suffering and costs, everyone benefits.

Employers premiums should not be affected where an employee contributes to his/her own injury/death.


### Table Of Maims

The amount of benefits should be the same across all states.

### Reporting Injuries & Responsibilities

Legislation should be introduced Nationally that requires injured persons to report injuries immediately (where injuries permit) or when they arrive at work following non-workplace injury.

Employees should be responsible for advising employers of injuries sustained outside the workplace. This would assist the employer manage potential workers compensation claims by reviewing OHS procedures and assisting the employee undertake their task in a suitable manner, until medical clearance is given.



This allows the employer to implement OHS systems, to ensure there is no aggravated injury or further injury to the employee.

Currently, there is no protection for employers, which places the employer at an unfair disadvantage.