

Introduction

The Hotel Motel and Accommodation Association (HMAA) is the peak national body for the Australian accommodation industry.

HMAA represents a range of accommodation establishments including 5, 4 and 3 star hotels, resorts, motels, motor inns, serviced and holiday apartments, bed and breakfasts, guesthouses, backpackers and time share establishments, combining a membership base of over 2,000 properties and 60,000 guest rooms.

HMAA is the only organisation representing this full range of accommodation types and interests nationally, and in rural, regional and metropolitan Australia as well as the major cities. HMAA offers a range of services and opportunities which assist accommodation properties and corporate businesses in their day-to-day activities.

HMAA's Understanding of the Context of This Review

HMAA understands that this review is an integral part of the process for the development of national model Occupational Health and Safety (OHS) Laws. HMAA further understands that this review is being conducted by an expert advisory panel which will report to the Workplace Relations Ministers' Council on the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions.

The Review Issues Paper of May 2008, outlining the key areas to be considered by the review, has been considered by HMAA in formulating this response. This submission does not, however, attempt a point-by-point response to the Issues Paper. Our responses are focused on those areas of most direct impact upon and interest to HMAA's membership.

Moreover, this response by HMAA does not attempt to answer the "how" question inherent in many of the issues, as this requires a degree of legal expertise on OHS legislation and regulation which is not readily accessible to our organisation (nor indeed, to the overwhelming majority of Australian businesses).

HMAA's sectoral interests reside in the broad tourism sector and this submission therefore focuses on those challenges of OHS legislation, regulation and policy of most direct impact upon tourism, with a key focus on accommodation. It should be noted that all references to "accommodation" in this document should be taken as referring to tourist accommodation.

The Tourism Sector and the Accommodation Industry

Tourism is worth \$85 billion annually to Australia; it earns Australia more than \$22 billion in exports (adding over \$9 billion to GDP). Importantly, over 75% of the tourism industry is accounted for by domestic tourism. Clearly, a healthy domestic tourism sector is the key underpinning for a sustainable export tourism product.

Tourism is different to most industries: it is highly labour intensive; it requires the input of many service providers into a single "product" to the end consumer; it is dominated by a significant number of small businesses; tourism competes against all other discretionary expenditures for the "hearts and minds" and expenditure of the consumer; it operates in a highly complex environment requiring significant compliance skills and costs.

Accommodation accounts for over 10% of the tourism industry, making it an \$10 billion industry in its own right. Accommodation is clearly a vital and integral part of the tourism market. Tourism is more labour intensive than most industries, providing over 550,000 direct

jobs including 14,000 new jobs in the last financial year. Tourism is the point of entry for many entrants to the job market and provides significant numbers of jobs in regional communities as well as capitals cities and tourist centres. Accommodation accounts for well over 120,000 direct jobs in the sector.

In recent years, local consumers have reduced discretionary spending due to high fuel prices and rising interest rates. Additionally, research from Tourism Research Australia suggests that tourism is losing its share of this spend to other expenditures: travel's "share of wallet" has declined from over 16% to 13% in the last decade.

The Accommodation Industry and its Exposure to Legislation and Regulation

The accommodation industry, due to its national coverage, diverse nature and high proportion of SMEs, is exposed to the full gamut of business and other legislation, regulation and policy of all three tiers of government. The capacity of this industry dominated by small businesses to deal with the cost and skill requirements of compliance is low and the consequences of failing to comply costly and severe. This is especially so in an area with the high profile, national inconsistency, and significant stakes of OHS.

The significant additional compliance costs and risks resulting from inconsistent legislation, regulation, and application thereof between different state and local jurisdictions are unacceptable. They add an unfair cost burden to business, making it less competitive in a global context, whilst also making compliance less likely. In other words, the inconsistency of state based approaches to OHS sees every stakeholder lose.

HMAA Position on National Model OHS Laws

In this context, HMAA offers its strong support for the national regulatory and policy approach underlying this review. HMAA and its members believe that a national approach to OHS would be of significant benefit not only to employers in the accommodation industry, but also to employees through greater clarity and consistency.

In the following pages we provide comment following the preferred template approach, but would firstly seek to make the following key points which should be prioritised over the detail in the following pages:

- As a general principle, HMAA supports the creation of a fully national OHS system, operating alongside a fully national workplace relations system;
- If such a fully national system is not immediately achievable, then an integrated federal OHS system with great consistency between jurisdictions should be the goal;
- Such a system requires the least possible opportunity for regulatory and operational "leakage" from a national approach;
- Thus, an integrated federal system should have key requirements encapsulated within the model legislation itself, rather than left to regulation and policy at the behest of individual states and territories;
- Any reasonable federal system of OHS must place obligations upon all workplace participants to ensure safety in the workplace;
- This requires shared responsibility for negative outcomes also, mitigating against any system enforcing absolute liability upon employers.

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

SPECIFIC COMMENTS

Legislative Approach:

HMAA believes that the model OHS Act should be as detailed as required to ensure a significant and ongoing operational uniformity between each state and territory's OHS regime, once enacted. Put simply, the model Act should encompass sufficient detail regarding process based standards (and if necessary prescriptive standards) as necessary to minimise any "wriggle room" which could lead to significant inconsistency in application.

HMAA also believes that the model Act must specify its objectives, the agreement of which should form the basis for a nationally consistent approach.

Scope, Application & Definitions:

The model OHS Act cannot maintain the status quo of industry specificity in each jurisdiction, whilst also setting a national standard. Therefore, HMAA would support the model Act providing a broad industry overview, and also setting the context for national agreements on industry specific safety legislation to be formulated in the future (rather than leaving it to individual jurisdictions to take differing approaches).

HMAA accepts that general duties of care under the model Act should be tied to the conduct of work, rather than a defined workplace. However, HMAA and its membership (whose businesses exist to provide a public service) have significant concerns about the ongoing extension of OHS coverage to the general public in many jurisdictions.

HMAA believes that the model Act should seek to limit this trend, and return the focus of OHS to those involved directly in doing work. The safety of the public must, in the main, remain the preserve of public liability rather than OHS.

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

HMAA believes that OHS legislation should have a primary reliance on employment relationships as the basis for framing safety obligations. Safety obligations to others should primarily rest in other legislation. To do otherwise risks so broadening the OHS process that it loses its key focus, the safety of workers.

To this end, HMAA would support a model Act which provides for a duty of care to non employees directly involved in the workplace (such as contractors, labour hire personnel, apprentices etc) but this should not be extended to the general public.

The model Act should also ensure that shared responsibility for safety (and mutual duties of care) is enshrined as an underlying principle of any national OHS approach. Any approach which provides for absolute liability by an employer works against the best safety outcomes and must be rejected.

HMAA also supports the requirement for the appointment of a Workplace Health and Safety Officer, commencing after a business surpasses a reasonable employee number threshold (such as the 30 provided for in Queensland).

‘Reasonably Practicable’ & Risk Management:

HMAA strongly supports the adoption, through the model Act, of a national definition of what is “reasonably practicable” as part of the duty of care. The inconsistent and legalistic definition of this standard in different jurisdictions (and indeed, even by different courts and tribunals within the same state/territory) adds significant complexity, cost and risk for Australian employers in dealing with OHS, with no commensurate benefit for employees.

Any risk management principles relied upon to define “reasonably practicable” should also be defined in the model Act.

Consultation, Participation and Representation:

HMAA believes that the requirements for consultation within the model Act should differentiate based upon both the nature and scope of the business, and the nature of the work relationship.

Specifically, and with reference to the nature of HMAA’s industry, significant flexibility must be allowed for employers which are:

- Multi worksite structured; and/or
- Seasonal; and/or
- Small businesses; and/or
- Remote workplaces; and/or
- Service rather than production based.

HMAA supports the value of Health and Safety Committees within an OHS structure, provided that the requirement for HSCs clearly recognises their more limited applicability in some of the above circumstances.

HMAA does not support unlimited right of entry for unions as part of a national OHS regime. Rather, a national extension of the Victorian approach (requiring both the reasonable suspicion of a breach of the Act, and written notice of entry with details of the suspected breach) is preferable.

Regulator Functions, Powers & Accountability:

HMAA believes that a significant part of the inconsistency between different OHS jurisdictions (and for that matter, within jurisdictions) comes from differing approaches to compliance and enforcement.

Therefore, the model Act must provide very clear and unequivocal provisions regarding the functions, powers and accountability of regulators and inspectors. Enforcement and prosecution policies and statistics must be publicly available and consistently reported in each state/territory, and ideally the functions of regulator and enforcer should be structurally separated within each jurisdiction to ensure role clarity and consistency of application.

Vitaly, the review and appeal mechanisms in each jurisdiction must be harmonised and structured to minimise cost, reduce complexity and “de-legalise” the process as far as is possible. There must be a reliability and certainty of outcomes across jurisdictions, or this national OHS harmonisation process will have failed.

Compliance & Enforcement:

HMAA would support the inclusion in the draft Act of a hierarchy of enforcement measures, in order to drive the national consistency described above. These should have the full force of the law behind them, and must therefore be included in the model Act rather than left to regulation or policy. Again, there should be no “wriggle room” for individual states/territories to adopt differing approaches detracting from national consistency.

HMAA also supports the enshrining of a nationally consistent Provisional Improvement Notice (PIN) approach in the model Act, subject to the automatic suspension of the notice upon lodgement of an appeal also being enshrined nationally. In the case of Prohibition Notices, HMAA believes that the model Act must ensure that a nationally consistent appeal period is put in place.

The use of Infringement Notices (on the spot fines) is one of the most contentious and inconsistent aspects of OHS in some jurisdictions. The personal feelings and preferences of inspectors, rather than objective standards, are too often at the heart of this process. The appeal process is also inconsistent, and the size of penalties varies significantly.

HMAA believes that the national model OHS Act should remove the option for on the spot fines from the OHS landscape, and focus rather on options designed around objective standards and with greater consistency of application such as improved PINs and Prohibition Notice processes.

HMAA would also support the inclusion of enforceable undertakings, with no admission of fault or liability, as a viable alternative to prosecution for an offence under the Act.

Prosecutions:

HMAA generally supports the continuation of the treatment of most OHS offences as criminal matters, requiring the higher standard of proof this entails. The model Act should provide clarity regarding the courts and other bodies which may hear OHS matters with the intent of reducing cost and complexity, and removing any option for “jurisdiction shopping”.

The inconsistency between jurisdictions as to who may commence a prosecution for an alleged OHS breach is costly, confusing and counterproductive. It should be cleared up in the model Act. HMAA would prefer that this nationally consistent standard allow for commencement of prosecution only by inspectors, the regulator or relevant Minister, thereby removing the authority in some jurisdictions for commencement by unions and victims.

In order to provide further certainty and consistency for business planning and budgeting, the time period for commencement of a prosecution must be made nationally consistent, and be within a reasonable threshold (say six to twelve months after the offence occurs). The evidentiary requirements for OHS prosecutions should also conform to a national standard.

Other Issues:

HMAA believes that there is an inherent risk of this national OHS harmonisation project being derailed by the development and implementation of inconsistent regulations and policy by each jurisdiction. Whilst HMAA broadly supports the need for flexibility and responsiveness which can be achieved via regulating rather than legislating aspects of the system, this should not come at the cost of a reversion to eight widely varying approaches.

HMAA generally supports the development of codes of practice to provide guidance to stakeholders. However, the model Act should provide consistency in the development and application of these codes; indeed, an argument exists that key codes should be developed and implemented nationally, rather than in individual jurisdictions.

HMAA strongly supports the inclusion of alternative dispute resolution mechanisms in the model Act to allow for resolution of issues.

HMAA strongly urges the inclusion of very broad mutual recognition requirements in the model Act. The lack of consistency in this area comes at a direct operational and financial cost to Australian businesses, and indeed should be seen as a risk factor to the implementation of safer workplaces. This mutual recognition requirement should encompass training, educational and skills competencies; authorisations, licenses and permits; notification and reporting requirements; plant and equipment; and business legislation, regulation and policy impacting on safety.

HMAA believes that the issue of jurisdictional overlap must be strongly addressed in the model Act. Short of a fully national OHS system, HMAA believes that there are broadly two approaches available to dealing with such overlap. The first of these would default coverage to the jurisdiction in which the work has physically occurred or the business is physically located; another approach would default the matter to the Commonwealth OHS system in the case of overlap. Either approach is preferable to the current complexity, uncertainty and “jurisdiction shopping”.