

Submission by Graeme Peel

National Review into Model OHS Laws

Introduction

Corporations operating across Australia are required to comply with the differing OHS legislative requirements of eight States and Territories, along with a variety of additional Australian and international Standards and codes of practice. This complex multi-jurisdictional approach imposes serious cost and productivity burdens, including the requirements to, *inter alia*, employ State-based in-house or external specialist personnel, subscribe to multiple legislative update services, continually tailor/update safety management systems and a range of other OHS programs, and retrain personnel accordingly. Furthermore, the effort expended on dealing with such a range of requirements distracts from progressing OHS performance.

The opportunity to change this undesirable situation is thus welcomed. The comments listed below are intended to address the key issues of contention with existing legislation, and are not all-inclusive.

Legislative Approach

The optimal approach is considered to be a national OHS Act for all industries and modes of work, with a corresponding single set of regulations, standards and codes of practice. Modifications may be made to ensure relevance to specific industries where required.

Harmonization of OHS legislation has not succeeded in Australia, as evidenced by the non-adoption or extensive modification of NOHSC codes of practice – intended to be common documents – by States and Territories over recent years. A ‘model’ act which remains subject to the discretion of States and Territories is not appropriate if productivity gains are to be achieved.

This approach is the same as that which currently applies to the operational safety elements in the aviation industry, in the form of Civil Aviation Act and Regulations. Such legislation is not impacted by any of the negative factors associated with current OHS legislation.

Intent/Content

The intent of a national OHS Act should be to provide a framework for government and industry to facilitate health and safety outcomes for people performing work and, in relation to public safety, for members of the public directly impacted by such work within the workplace. The Act should clearly define the responsibilities of stakeholders, be administered by government, and should not have application beyond the workplace. The content, which must be in plain English and simple to understand, with clear definitions of all key terms used, should reflect this intent.

The Act should be brief, stating the key principles listed below. Further detailed direction and guidance should be provided in subordinate regulations, standards and codes of practice, which should be coordinated with similar such non-OHS documents in other legislative regimens to remove duplication.

Principles

Risk Management should be the core principle, i.e. hazards are to be identified, risks assessed and controls implemented and maintained. Work should not be undertaken if risks cannot be controlled to an acceptable level.

Duty of care should be an obligation shared by all in the workplace, allocated according to the level of practical OHS control in the chain of responsibility. In general, employers should be responsible for providing OHS systems and programs, procedures/processes and associated implementation and monitoring/maintenance resources. Managers should implement, manage and supervise the programs/processes at the workplace. Employees, including contractors and self-employed, should work in accordance with program/process requirements.

Fundamental to the Act should be the concept of 'reasonably practicable'. Human systems are by their nature subject to failure, as recognized in the extensive human factors research and programs applicable to flight safety. The imposition of absolute obligations is thus inappropriate and counterproductive. The effective implementation of risk management systems and programs which provide defences to failure should be the basis for reasonableness.

Consultation should be the final principle. Ownership of programs and processes requires appropriate consultation between the key stakeholders. OHS committees provide a mechanism for such consultation, including issue resolution in concert with management. Additional authorized representatives are not required as they add complexity without value. Flexibility is required to accommodate different workplace arrangements, e.g. those with a mix of employees and contractors, where principals may be required to effect consultation.

Regulator Roles

Regulator roles and functions should include developing regulations and related instruments through a tripartite consultative process, conducting inspections, audits and investigations, enforcement within defined parameters which include appeal mechanisms, and facilitating performance improvement. Separation of investigative and regulatory functions should be undertaken to limit the potential for conflict.

Compliance/Enforcement

Compliance requirements should be clearly stated. Enforcement measures and processes should also be clearly defined and allied to guidance for corrective action. These should range from actions such as warnings and remedial orders to prosecutions as a last resort, with the focus being on requiring performance improvement rather than punishment.

Proportional to other areas of law, prosecutions should be civil actions unless reckless endangerment is alleged, in which case criminal charges may be appropriate. Only public prosecutors should initiate actions, not third parties, again consistent with other legal frameworks. Cases should be tried in courts of general jurisdiction, not industrial commissions or courts which are established to deal with matters of workplace relations. General rules of evidence should apply, with the removal of the current reverse onus of proof, which is unique to OHS. The performance of reasonably practicable actions should be key to the available defences, in light of the above comments on human systems.

Liability should be based on control as per above and penalties proportional to the nature of the failure or culpability. The imposition of penalties based on entirely on outcome is unreasonable as serious injuries may result from minor systems failures.

Other Issues

Codes of practice should be based on the available scientific evidence rather than opinion, as is the norm in Australian Standards.

A single set of licences and permits should be directed by the Act, consistent with a national approach.