



University of
South Australia



MONASH University

National OHS Review Secretariat
Department of Education, Employment and Workplace Relations
64N1 GPO Box 9880
CANBERRA ACT

Friday, 11 July 2008

Dear Committee Members,

Re: Submission to the review OHS legislation in the State, Territory and Commonwealth jurisdictions.

We refer to the Committee's invitation to make a written submission to its review of OHS legislation in Australia. The University of South Australia has a long history of engaging with industry and government around issues of OHS regulation, while members of the Monash Centre for Regulatory Studies, Faculty of Law, Monash University have been working on the issue of nanotechnology regulation and policy, including OHS issues, since 2005. The elements of the review of most relevance to our submission are:

- a) Duties of care, including the scope and limits of duties;
- b) The role of OHS regulatory agencies in providing education, advice and assistance to duty holders; and
- c) Other matters the Panel identifies as being important to health and safety that should be addressed in a model OHS Act.

Reasonable Practicability

As the Issues Paper suggests most jurisdictions do not define what 'reasonably practicable' means, and thus it is left up to the courts to determine on a case by case basis. This has the effect of giving rise to ambiguities and inconsistencies across jurisdictions and also results in a reactive regulatory environment to risk. Further, the translation of the interpretation into case law makes it difficult for most businesses to access, interpret and implement.

In order to resolve this issue there are a number of factors that should be addressed. These include:

- | The definition of 'reasonably practicable' has typically been established with respect to an industry, however businesses with different resource levels will have different capacities to reduce the associated risks.
- | In association with this, it is evident that the definition of 'industry' has been open to interpretation and ambiguity. This ambiguity needs to be eliminated or reduced.
- | What is 'reasonably practicable' is dependent on sound scientific knowledge, and in some emerging areas (such as nanotechnology) this data is limited and contested.

The 'reasonable person' test (a test of reasonable foreseeability) has been employed by Australian courts in the area of tort law for a long period of time and is seen as an effective tool in that area. We suggest that rather than remove the concept of reasonable practicability from uniform OHS law, a test should be included in nationally uniform legislation acknowledging the components of the Victorian and Western Australian Acts while addressing the concerns we outline above. We suggest that a more detailed review of the interpretation of this 'test' within case law should be undertaken. This will provide government the ability to determine the key components of this obligation, formulate an appropriate test and provide guidance to industry.

Risk Management

We refer to the note in the issues paper that "most OHS laws in Australia require a process of risk management, whereby duty holders must identify the hazard, assess the risk and, where appropriate, take the necessary steps to eliminate or reduce the risk. Each jurisdiction has, however, addressed the requirement for a duty holder to manage risks via different avenues".

While we support the notion of integrating process-style provisions (such as risk management) into OHS Acts, we also acknowledge that there are some circumstances in which the process as defined in the Risk Management Code of Practice does not adequately address the hazard/risk context. Nanotechnology is an example of such a circumstance. We suggest that in circumstances where scientific data lags behind commercial development (and is therefore limited and contested), the use of the As Low As is Reasonably Practicable (ALARP) concept should be considered.

Nanotechnology

There is little doubt that the development and commercialisation of nanotechnologies is currently, and will continue to challenge Australia's existing OHS regulatory frameworks. Our overall view of the nanotechnology challenge is that there are likely to be many areas of state and federal regulatory regimes which will need amending to take into account the unique characteristics of the platform technology. As the Senate Community Affairs Reference Committee into Workplace exposure to toxic dust (2006) noted, nanotechnology does present new challenges to occupational health and safety and these issues must be addressed to ensure adequate regulations are introduced.

We thank you for the opportunity to participate in the Inquiry.

Yours Sincerely,



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