

NATIONAL REVIEW INTO MODEL OHS LAWS

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

INTRODUCTORY COMMENTS

The submission by this Association does not offer comment on those matters raised in the Discussion Paper which we believe are adequately and satisfactorily dealt with in the *Western Australian Occupational Safety and Health Act* and/or the *Mines Safety and Inspection Act*.

The mining industry in Western Australia operating under the *Mines Safety and Inspection Act*, which is faithful to the principles of the Robens Committee recommendations, provides a classic example of what can be achieved with commitment and enthusiasm. It is the only industry sector in Western Australia to do so.

The mining industry since the late 1980's has achieved a level of occupational health and safety performance that is unequalled by an industry sector anywhere in the world.

Full details of the industry's achievements are documented in this submission and provide clear evidence for retention of the legislative model under which it operates.

Comments on issues raised in the discussion document which, if implemented, would endanger the existing demonstrably successful occupational safety and health environment are provided under the respective chapter references.

The Association would welcome the opportunity to further respond to any of these matters.

Chapter 2: Scope, Application & Definitions:

2.1 Industry Sectors

The model OHS Act should enable industry specific safety legislation where it has been clearly warranted and is in the best safety and health interests of the workforce.

At the time OHS legislation was proposed in Western Australia this issue was debated at great length and it was ultimately agreed that due to the nature and location of its operations and the need for a well resourced, adequately qualified regulatory authority, separate legislation was warranted.

Time has shown that this decision was the correct one.

More recently the coroner investigating deaths in the Tasmanian mining sector has highlighted the major deficiency in that State of the inclusion of mining in the generalised OHS legislation.

The outstanding safety and health performance of mining vis-a-vis other major industry sectors fully justifies the retention of industry specific legislation for the mining sector.

Chapter 5: Consultation, Participation and Representation:

5.2 Participation and Representation

The Association recognises the key role of consultation and cooperation between employers and workers and provides evidence (see Chapter 8) of the commitment of the industry to the appointment and training of safety and health representatives.

The Association considers that the industry commitment to the appointment and training of safety and health representatives has been largely responsible for its outstanding safety and health performance. The failure of the non-mining sectors, including Government, to commit to worker representation and involvement is reflected in workers' compensation premiums for 2007/08. (See Chapter 8). Mining industry premiums have been reduced by 80% over the past 20 years.

MARCSTA is of the view that any model OHS legislation must provide increased emphasis on the duty of employers to consult and involve the participation of the workforce.

The recently released *ACT Work Safety Bill 2008 Exposure Draft – Consultation Arrangements and Guide* provides new concepts of choice and flexibility on how consultation can occur to enable the employer and their workers to adopt the consultative arrangement which they believe will best ensure effective and meaningful consultation.

The model OHS Act should contain similar flexible options to ensure that all employers comply with their statutory duty to consult and cooperate with all members of the workforce.

Right of Entry

The Robens Committee, which took two years to complete its informal discussions with inspectors, administrators, industrialists, trade unionists, professional institutions and others in the UK and other industrialised countries including Canada, Germany, Sweden and the USA, made it eminently clear that the primary responsibility for improving occupational safety and health rested with **those who create the risks and those who work with them.**

Introducing outside union representatives (noting the low number of workers represented by unions) into what should be a self-regulatory working environment can only be interpreted as a failure of the consultative, cooperative process to function.

Any model legislation should focus on getting the positive process to function rather than assuming it cannot and introducing an outside third party to investigate "suspected contraventions". Transferring the primary responsibility to persons outside the workplace is contrary to the Robens model and destructive to the workplace consultative process which the mining industry in Western Australia has demonstrated to be so effective.

Chapter 7: Compliance & Enforcement:

7.1 Enforcement Measures

The Association considers that there is little evidence to warrant the enforcement approach proposed in the Discussion Paper and which has been advocated repeatedly by various personnel on the staff of the National Research Centre for Occupational Health and Safety Legislation at the Australian National University for the last decade. (see Minesafe International 2000, pp49 – 62, R Johnstone)

The comprehensive examination of this issue by the Robens Committee led them to conclude that recourse to legal sanctions was only one means of achieving the objectives of safety legislation and that it was rarely the most apt or the most effective.

With regard to the inspectorate the Robens Committee believed that, as a matter of explicit policy, the provision of skilled and impartial advice and assistance should be the leading edge of the activity of the inspectorate.

Applying this philosophy in the mining industry in Western Australia over the past 20 years has resulted in the best OHS performance of any industry in Australia. It has never been necessary to apply a graduated enforcement measures hierarchy and it is inconceivable that an employer would be allowed to continue to operate through the list of enforcement options while the workforce continued to work in unsafe working conditions.

Adoption of the proposed hierarchy of enforcement option would allow poor performers to determine at what level they needed to take remedial action.

Appropriate statutory consultation/participation requirements directing employee involvement is a more meaningful and workable alternative.

7.2 Measures Exercised at the Workplace

Infringement Notices

The Association does not support the introduction of 'on-the-spot' fines as a measure that will improve OHS performance.

It is contrary to the Robens principles and no evidence is offered to warrant their introduction.

At the National Conference on Major Hazard Facilities held in Adelaide in March 2008 the Queensland Department of Emergency Services advised that the implementation of fines had worked against improvements while mentoring by inspectors worked much better though it was more time consuming.

This recent finding supports the Robens approach and should be taken account of particularly in the absence of any evidence to justify the introduction of 'on-the-spot' fines.

Chapter 8: Prosecutions:

The Robens Committee Report was clear and concise on the role of prosecutions in improving occupational safety and health:

- any idea that occupational safety and health standards should be rigorously enforced through the extensive use of legal sanctions is one that runs counter to our general philosophy.
- we do not believe that the traditional sanction commands any very widespread degree of respect or confidence in the occupational safety and health field
- the sanctions of criminal law have only a very limited role to play in improving standards of health and safety at work. Criminal courts are inevitably concerned more with events that have happened.

The Western Australian approach has mirrored the Robens philosophy and, in the case of the mining sector, has done so with marked success. Prosecutions have been rare yet justifiable.

Seeking constructive solutions and maximising the consultation/participation process (see comments Chapter 5) has been the preferred option.

There is no evidence available that a prosecutorial approach has resulted in an improvement in the occupational safety and health process. Recent evidence in Australia has in fact demonstrated just the opposite.

Recent developments in Victoria

In Victoria, which is considered progressive in terms of occupational safety and health, a new OHS Act has been operating since 2004.

This Act demanded that consultation be the key ingredient in workplace safety. It provided for increased participation and involvement of employers, workers and their representatives in workplace health and safety issues and paved the way for increased compliance by making it easier for employers and workers to understand their safety obligations while at the same time cutting red tape and compliance costs.

These innovations followed Maxwell's review of the 1985 Act which had found that although the original Act was sound, some reforms were needed to make it work better in order to meet the needs of workplaces in the future.

A recent independent review of the 2004 Act¹ to assess whether it was promoting improved safety outcomes, including protection of workers who raise OHS issues, found as follows:

- Employers were positive about the changes which they saw as promoting safety outcomes particularly the duty of employers to consult with employees and the power of inspectors to give advice on compliance;

¹ A report on the Occupational Health and Safety Act 2004 Administrative Review. Bob Stensholt, Dec 2007

Key indicators of performance recorded in the Review:

- Workers' compensation claims have dropped significantly since the 2004 Act was introduced;
- The lowest number of workers being injured on record was recorded in 2005/06;
- Victoria has the lowest number of reported injuries across Australia by a significant margin.

The failure of the Review to give due recognition to the effect - as reflected in the key performance indicators – of the increased participation and involvement of all parties in the workplace and the more conciliatory and advisory role of the safety inspectorate is inexplicable.

Key recommendations of the review were to increase the level of resources of its prosecutions and enforcement branch of WorkSafe and to review WorkSafe's prosecution policy in the public interest.

Wisely, the Victorian Government has not considered these recommendations as "key" recommendations and has simply agreed to increase the level of resources as part of its business planning for the period 2008/09 to 2010/11.

Recent Developments in New South Wales

In New South Wales an aggressive approach to prosecution, particularly following fatalities, has provoked an ongoing dispute between employer organisations on one hand and safety regulators and trade unions on the other.

In the mining sector prosecutions have been initiated not only against mine managers but also against other statutory duty holders. Gunningham² concludes:

"...vengeful prosecution against those who neither intended harm nor were reckless in their behavior is widely perceived to be unjust and this has caused the law to lose its legitimacy in the eyes of the duty holders. It has also generated a defensiveness on the part of duty holders that results in an unwillingness to examine the root causes of accidents and incidents for fear of being prosecuted."

The Robens conclusions should be recalled:

- the typical infringement or combination of infringement arises rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency. The real need is a constructive means of ensuring that practical improvements are made and preventive measure adopted.

Increasing and facilitating employer/employee consultation and cooperation is demonstrably the only effective mechanism for improving workplace safety and health performance.

² Prosecution for OHS Offences: Deterrent or Disincentive? Neil Gunningham, Sydney Law Review, Vol 29; 359.

Enforcement Activity in Australia by Jurisdiction 2005/06

The ninth edition of the Workplace Relations Ministers' Council Comparative Performance Monitoring Report, issued in February 2008, compares occupational health and safety and workers' compensation schemes in Australia including enforcement activities by jurisdiction.

	NSW (2.86m)	VIC (2.24m)	QLD (1.61m)	WA (.92m)	SA (.66m)
Inspectors/10,000 employees	1.1	1.1	1.3	1.2	1.4
Legal processes commenced	459	136	174	37	71
Prosecutions resulting in conviction	340	70	143	41	51
Incidence rate of injuries/disease	16.9	12.9	18.0	13.3	18.0
Standardised average premium rate	2.35	1.76	1.36	1.67	3.06
% premium reduction 03/04–05/06	4.5	21.78	.74	13.03	.32

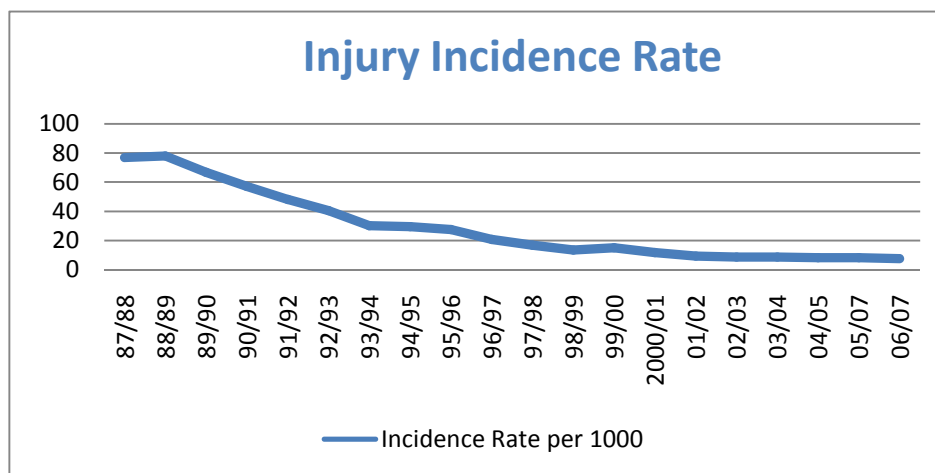
This data shows that Victoria and Western Australia, who have the lowest rate of prosecutions resulting in conviction, also have the lowest incidence rates of injury and disease and importantly enjoy the greatest reduction in average workers' compensation premium rates over the three years to June 2006 by a wide margin.

Do Prosecutions Improve OHS Performance? The WA Mining Industry – A Case Study

The mining industry in Western Australia provides an ideal opportunity to assess the Robens philosophy on the role of prosecutions in improving occupational safety and health performance.

The Mines Safety and Inspection Act, although not proclaimed until 1995, was effectively implemented on site by the industry in the late 1980's following the passage of the Occupational Safety and Health Act in 1984 and corresponding changes to the then current Mines Regulation Act 1946 embodied in a 1990 Amendment Act.

Industry safety performance since that time has been remarkable over a period in which the workforce has increased from 30,000 to over 60,000.



(Reduction in incidence = 80.17)

Source: DOCEP – Resources Safety, *Safety Performance in the WA Mineral Industry Accident and Injury Statistics*

Workers' compensation premiums have been reduced accordingly.

Industry Sector	1986/87 % Payroll	2007/08 % Payroll	% Reduction
Underground	15.0	3.04	80
Surface - Gold	5.0	1.45	80
Surface - Mineral Sands	5.0	1.17	77
Surface - Iron Ore	2.2	.47	79

Source: Workcover Western Australia Premium Rates 2007/08

Comparative Major Industry Sectors Average Premiums 2007/08

	% Payroll
Mining	1.80
Manufacturing	2.37
Construction	3.68
Agriculture	5.04

The reduction in injury incidence and the consequent lowering of workers' compensation premiums can be largely attributed to the holistic adoption of the Robens philosophy by the mining sector.

The mining industry in Western Australia provides an outstanding example of what can be achieved by the adoption of, and commitment to, the key Robens principles referred to earlier:

- An effective self-regulatory system in which employers, employees and their representatives accept primary responsibility for reducing occupational accidents and disease;
- Workers participate in establishing and monitoring the arrangements for safety and health in workplaces; and
- The basic function of safety inspectorates is the provision of expert and impartial advice and assistance to industry.

Empowerment of the workforce has been a major factor in the improvement of safety and health and the commitment of employers to this process is best exemplified in the record of training of safety and health representatives.

Industry Sector	Number of Safety & Health Reps trained per 1000 employees	Average Workers' Compensation Premiums 2007/08	Total Number Trained 2000/01 to 2006/07
Agriculture, Forestry, Fishing	2.33	5.04	434
Construction	5.15	3.68	1245
Manufacturing	3.23	3.36	1522
Transport and Storage	4.09	2.37	1012
Mining	27.88	1.80	5354
Electricity, Gas, Water	10.42	1.27	624

Source: WorkSafe Commission for Occupational Safety and Health Accredited Training Courses for Safety and Health Representatives Annual Report 2006/07

Why is the importance of electing and educating safety and health representatives not recognised by major industry sectors?

The Victorian Government is now demonstrating that consultation, participation and the collective involvement of employers, workers and their representatives can have significant workplace safety and health benefits, something that has been evident in the mining industry here in Western Australia for 20 years.

Proposing to increase prosecutorial resources as a means of improving occupational safety and health is misguided and foolhardy.

The following comments from the Robens Report are as valid today as they were some 36 years ago:

“The character of criminal proceedings against employers is inappropriate to the majority of situations which arise and the processes involved make little positive contribution towards the real objective of improving future standards and performance.

The sanctions available should provide scope for distinguishing between situations where the accent should be on punishment, and the most frequent situations where the accent should be on constructive remedial action.”