

NATIONAL REVIEW INTO MODEL OHS LAWS PUBLIC SUBMISSION

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

SPECIFIC COMMENTS

Legislative Approach:

Q1 Transfield Services supports a system of regulation and enforcement that is designed to promote the development and application of health and safety management systems and to educate and assist employers in with a view to improving occupational health and safety outcomes in Australia.

The model Act should ensure, as required by principle 14 (d) of the Terms of Reference, that there is no reduction or compromise in standards for legitimate safety concerns. Adopting the lowest common denominator is not in the best interests for improving workplace health and safety in Australian workplaces. The objective of the national review must be to achieve a consistent standard in all jurisdictions. In practice, this will require that the overall regulatory structure incorporates a mix of principles-based standards, performance-based standards, process-based standards and prescription.

Q2 The model Act should concentrate on principles-based and performance-based standards. Regulations should concentrate on prescriptive standards, however this should be limited to only those situations where the level of risk and/or knowledge of controls justifies the specification of precise measures to be taken with little or no room for interpretation or uncertainty about compliance. Process-based standards should be dealt with in codes of practice to allow workplaces more flexibility to adapt or develop processes that are suited to their operations.

Scope, Application & Definitions:

Q8 As a contracting organisation providing services to clients across a range of industries in the resources sector, Transfield Services would see great benefit in the model Act incorporating industry specific legislation. Industry-specific requirements could be dealt with in regulations where prescriptive measures are required or codes of practice for process based standards. All industries should be subject to the same principles-based and performance-based standards.

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

Q16 The model Act should include a test or definition of control. This is particularly relevant in contracting arrangements where there may be multiple parties carrying out work in the same workplace. In these circumstances the duty of care

owed by each party should be limited to those aspects of the work processes or work environment that it is reasonably practicable for them to control or exercise an influence over.

Q18 Control should be able to be delegated in specific circumstances where the duty holder does not possess the technical expertise or does not hold a required licence or accreditation to complete a particular task. In these circumstances the duty holder should be able to delegate their control, through a documented process, to a technical expert with demonstrated qualifications, training, licence, accreditation and/or experience to carry out work to manage that risk.

In addition, Transfield Services believes there is an urgent need to achieve consistency in the current Principal Contractor provisions. The model Act should allow for the appointment of principal contractors, setting out the authority which an employer can delegate to such a party for the management of health and safety in specific circumstance. These provisions should be modelled on the arrangements adopted in OHS provisions relating to the construction industry.

Q23 The model Act should specify that an employer must ensure the health and safety of employees and others to the extent that it is reasonably practicable. The duty should make it clear that the duty is owed to any person affected by the business or undertakings including for example contractors, labour hire personnel and volunteers. This specification will assist in providing employers with certainty as to whom they owe a duty of care. The duties should also encompass, again for clarity, responsibilities for plant, substances, systems of work and provision of information, instruction, training and supervision.

‘Reasonably Practicable’ & Risk Management:

Q37 The model Act should include a test of reasonably practicable.

Q39 The test of reasonably practicable should include consideration of:

- (a) the likelihood of the hazard or risk concerned eventuating;
- (b) the degree of harm that would **most likely** result if the hazard or risk eventuated;
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
- (e) the cost of eliminating or reducing the hazard or risk.

Most likely is added to the test of reasonably practicable to emphasise the need for a measured assessment of the degree of harm rather than assuming that the worst case scenario will eventuate every time.

Consultation, Participation and Representation:

Q45 Transfield Services recognises the importance of employee participation in planning and decision making in relation to the management of health and safety risks at work and the benefits to be gained from that involvement. Therefore a duty to consult is an appropriate inclusion for the model Act.

Q46 The duty to consult should extend to the employees of other employers involved in or affected by the undertakings of the employer in control of the workplace.

Q48 The model Act should provide maximum flexibility to employers to determine, through consultation with their workers, the arrangements for consulting on OHS matters. This could be achieved through principles-based standards or performance-based standards included in the model Act.

OHS management systems and general awareness of OHS obligations have developed significantly since the concept of workplace OHS consultation was first included in OHS statutes in the last quarter of the last century. The advent of process based standards has provided many opportunities for employee participation in day to day decision making through risk assessments and the management system processes such as toolbox meetings and review processes.

Formal OHS structures such as OHS Committees are often difficult to maintain in terms of membership, and in light of employee involvement in other OHS decision making, can become redundant.

The model OHS Act could usefully provide for the election of health and safety representatives with specific functions in relation to issue resolution, workplace inspection, participation in OHS reviews and incident investigation.

Training to ensure that employees and managers are equipped with the appropriate skills to participate in health and safety management is recognised as important for meaningful outcomes. Current requirements for training of health and safety representatives and responsible officers are restrictive and create obstacles to getting voluntary participation by employees and managers. If such training is to be mandated it would be more appropriate for the model Act to address the requirements through a principles-based approach, identifying the scope of training and allowing employers to source appropriate training either internally or externally.

Q59 The role of trade unions to raise OHS matters on behalf of their members is recognised as a legitimate and important function however principles and processes governing the nature and extent of union involvement must be included in the model Act. We recognise that pro-active involvement and constructive dialogue with relevant union personnel contribute in achieving improvements to OHS outcomes. For example issues such as “right of entry” are supported, however the model Act should address issues such as the need for appropriate identification of responsible persons, appropriate qualifications, prior appropriate notice and the need for appropriate details of the suspected OHS concerns or reasons for involvement.

Regulator Functions, Powers & Accountability:

The model Act should explicitly provide for the regulator to provide advice and direction to an employer as a measure separate from enforcement functions. This could be provided for through industry forums and partnerships. It could also include empowering inspectors to issue written advisory notices that are not legally binding and cannot be used in subsequent proceedings by either the regulator or the employer.

Q81 The model Act should not allow for the regulator to issue interpretative documents unless there is careful consideration given to a mandated approach to the publication and distribution of such documents. Current experience with such documents is that their existence is not well publicised by regulators.

Q88 The model Act should allow for all the transparent review of decisions and actions by inspectors. Review decisions should provide details on how the decision was reached. Further appeal should be available to a technical expert within the regulator with appropriate qualifications to make an assessment of the subject matter.

Compliance & Enforcement:

Q 92 Transfield Services believes the issuing of infringement notices is rightfully the responsibility of the regulator. Provisional improvement notices issued by employee representatives should not be necessary where effective issue resolution processes are in place. Where these are not effective or in place, the regulator should be called upon to adjudicate.

Q101 The model Act should provide for enforceable undertakings as an alternative to prosecution for all offences under the Act. The Queensland approach of not requiring an admission of fault or liability as a condition of entering into and enforceable undertaking is supported.

Prosecutions:

Q 106 The model Act should provide that OHS Prosecutions be heard in courts where there are uniform rules on entitlements and processes for appeal.

Q110 Given that the model Act provides for criminal prosecutions it should reflect mainstream criminal process. Accordingly the model Act should provide for prosecutions to be commenced by a single independent authority.

Q117 Reasonably practicable is an appropriate standard for the model OHS Act.

Q118 The burden of proof as to whether a standard was met or not should rest with the prosecutor.

Q124 The model Act should maintain provisions for management / executive accountability for safety, however deeming provisions whereby an officer is found to be automatically guilty of an offence, subject only to proving a defence, is unreasonable and unfair. The liability of an officer or any person should be limited to the prosecution proving that an act or omission by the officer / person contributed to the offence.

Q129 The model Act should ensure a consistent penalty regime across all jurisdictions.

GENERAL COMMENTS

General Comments:

Principles 14 b and 14 c of the Terms of Reference provide for consideration of increasing consistency of monitoring and enforcement of OHS standards across jurisdictions and the resource implications of all levels of government enforcing OHS laws.

As an employer operating across state boundaries, Transfield Services would support the establishment of a single regulator with enforcement powers.