

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

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## SPECIFIC COMMENTS

### **Legislative Approach:**

TFCA supports the existing framework to the extent that there should be national legislation espousing general duties of care followed by detailed provisions in regulations and codes. The latter must be consistent on a national level to facilitate cross border working arrangements.

TFCA's preference is for the Act to be entitled Workplace Safety, Health and Welfare Act. This ensures that the Act applies evenly across all workplace related issues and should not be limited to those participating in an occupation. In simple terms there are many factors impacting on health and safety and often these are not limited to people in occupations.

As for principles and objects, TFCA supports the inclusion of principles and/or objects with those set down in WA and NSW legislation being a useful guide.

## **Scope, Application & Definitions:**

TFCA's preference is for a model act to encompass all industry sectors. Regulations and Codes of Practice can then address specific sectoral requirements. The option of containing provisions for improving coordination between regulators would also be useful, especially when effective safety management systems have been established in one jurisdiction but regulators in another jurisdiction are not that familiar with what has been achieved.

With respect to question 10, TFCA is supportive of the duties of care being tied to the workplace rather than just the conduct of work. This should ensure that all activities at a workplace are covered by the legislation, not just those directly related to the conduct of work. In areas where workplaces are significantly large affairs such as commercial construction sites and forest operations, everyone needs to be cognisant of workplace safety requirements.

General duties of care must extend to public safety with members of the public required to be protected and required to undertake general duties of care. This must include everyone on a work site being required to follow suitable safety precautions and not interfere with working arrangements and equipment.

With respect to work organisation, more investigation is required to determine whether an extension is needed to cover new and evolving types of work arrangements. Existing duty of care provisions pertaining to employers, employees, self employed people and controllers of workplaces may be sufficient; especially if public duties are added in.

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

There has been a significant amount of work been undertaken over the years across various jurisdictions and legislative instruments about the 'control test' and other like minded tests. TFCA supports the development of a simple test that applies universally. If this is the control test, then a simple checklist must be devised to tackle problems associated with interpretation.

With respect to question 18, control should be able to be delegated but not relinquished. Delegation can occur through development and implementation of effective safety management systems.

With respect to question 19, TFCA submits that an investigation into the efficacy of transport 'chain of responsibility' provisions is required before any decision about multiple duty holders is undertaken. The existence of too many duty holders may undermine the safety message and make it difficult to provide for a safe working environment.

With respect to work relationships, note TFCA's comments in the previous section and also note our comments above about the potential pit falls of multiple duty holders.

With respect to question 25, TFCA submits that more detail is required, preferably within the regulations, specifying what duties workers should undertake to ensure their own safety and that of others.

With respect to question 26, TFCA refers the reviewer to our earlier comments about the general public. These people must not only be protected, but must also have specific duties to observe. This extends to those that are invited and not invited. Forestry operations especially fall foul of trespasses that put their own lives at risk as well as those undertaking lawful work. Such people must have a duty of care with a failure to observe leading to penalties. Furthermore, employers and controllers of workplaces should not be penalised if their safety systems are adequate and trespassers/members of the public fail to observe and fail to undertake their own duties of care.

With respect to questions 27 thru 30, TFCA is unsure of what benefits are gained by formally appointed 'responsible persons'. It is TFCA's view that the existing duty requirements are adequate. Whilst some delegation occurs as part of business processes, adding another 'appointment requirement' is almost akin to another layer of red tape.

TFCA submits that the existing duties relating to persons in control of a workplace are adequate. Within the forestry sector in Tasmania, the relevant Code of Practice provides enough guidance for all parties, not just persons in control.

With respect to questions 33 thru 36, TFCA understands the intention of the review paper but fears that the establishment of additional duties may add unnecessary complexity to the system. Codes of Practice can address this under the existing duty of care provisions.



## **‘Reasonably Practicable’ & Risk Management:**

TFCA would be supportive of the development of a test for ‘reasonably practicable and for this test to be incorporated into the model OH&S Act. This test must be developed in consultation with industry and union stakeholders.

## Consultation, Participation and Representation:

TFCA is supportive of the statutory duty to consult and also supports the reciprocal duty for workers that is currently in the Northern Territory legislation. This statutory duty should extend to owners/controllers of work sites and even self employed persons/contractors. The suitable development of effective safety management systems underpinned by adequate Codes of Practice should set the framework for consultation.

With respect to questions 49 thru 58, TFCA cautions against the development of a statutory requirement to implement HSRs and HSCs for all businesses. Arguably larger businesses are more able to establish HSRs and HSCs than smaller businesses. This doesn't mean that smaller businesses should be immune from such arrangements. A statutory duty to consult (and participate) should be enough for smaller businesses.

It is also critical to note that how the changing nature of working relationships may make it difficult for the establishment of HSRs and HSCs in some workplaces, regardless of size.

TFCA submits that it is incumbent upon employers and controllers of workplaces to risk manage their hazards. If their risk management process identifies the need for HSRs and HSCs then so be it. Properly established Codes of Practice can guide the risk management process and provide for the structure, powers and functions of HSRs and HSCs.

With respect to rights of entry, it is TFCA's perspective that rights are often 'abused' or even incorrectly applied. Unfortunately this happens at the expense of suitable safety outcomes and broader based industrial relations arrangements also suffer. Therefore clear rights of entry are required with those invoking the right must do so under the sole ambit of 'safety' and must be suitably trained and qualified. Notice periods must be clear and unambiguous and avoid providing for 'exceptional circumstances' that often fall foul of interpretation.

TFCA is supportive of the development of issue resolution procedures within the regulations with such provisions fully explained in Codes of Practice.

With respect to a right to cease work, whilst supportive of this inherent right, TFCA is reluctant to support such a right being enshrined in legislation. Essentially this right should be exercised as a last resort and safety management systems must provide for this as well as for a clear process leading up to refusal. It is TFCA's view that subrogating this right to HSRs is fraught with danger unless it is a last resort type action with due process suitably followed. It would be difficult to provide for these processes in legislation. TFCA is supportive of dispute resolution procedures being developed and incorporated into regulations/Codes.

## **Regulator Functions, Powers & Accountability:**

TFCA is supportive of the model OH&S Act providing for the establishment, functions, powers and accountability of regulators. Existing legislative instruments provide some information as to content. The requirement to encourage and facilitate compliance through provision of education, advice and assistance is critical and must be expressly specified.

Furthermore, TFCA supports the requirement for regulators to publish enforcement and prosecution policies. Ideally, such policies should operate on a national level in line with the intent of this review.

With respect to question 83, TFCA is supportive of an 'administrative' separation in that an inspector can be invited to provide assistance to a business at a particular time and place. This is administratively separate from an unannounced or even an announced compliance visit. Any further separation of function would be difficult to resource and won't effectively utilise extensive knowledge possessed by inspectors. Furthermore, further separation could result in increased red tape.

TFCA supports the ambit of the model Act being extended to include the powers, functions and accountability arrangements for inspectors. With respect to appointment and qualification, are these issues best dealt with through existing Government employment processes?

TFCA supports the concept of strengthening the role and capacity of inspectors to provide advice and assistance. This could be achieved with the inclusion of a specific object within the Act coupled to suitable training for inspectors and promotion to businesses.

With respect to question 86, if the inspector's role is clearly defined in advance of a particular meeting, then there should be no need for independence from the regulator. Clear concise processes are required and inspectors must be accountable to these processes. Any questions about whether the line of advisor or regulator has been crossed must be addressed through normal dispute resolution procedures including, as stage 1, an appeal to a senior inspector.

With respect to question 87, TFCA is not supportive of a provision enabling an inspector to modify, amend or cancel any instrument issued by him/her. Essentially this is about accountability and each inspector must be accountable for his/her actions. They must also be suitably trained and effectively resourced. In fact it is TFCA's bitter experience that inspectors, whilst well meaning, often lack the necessary, skills and resources to undertake their roles effectively. The system should then provide for a process dealing with a review of notice or instrument.

With respect to questions 88 and 89, TFCA supports the inclusion of internal review mechanisms into the model Act with all decisions made by inspectors being reviewable.

## **Compliance & Enforcement:**

With respect to questions 90 and 91, TFCA questions whether this hierarchy should be in the Act or some other document such as the enforcement and prosecution policy. Whilst supportive of a hierarchy, TFCA notes that it needs to be flexible enough to allow inspectors an opportunity to appropriately respond to a particular issue.

With respect to questions 92 thru 96, the model OH&S Act should contain details pertaining to improvement, PINs and prohibition notices. Recommendations on each instrument regarding compliance, timeframes and review should be mandatory. Initial review of all instruments should be internal followed by a suitable external arrangement such as a low cost Commission. It could be dangerous for a notice to be suspended pending appeal but an incorrectly applied notice could be quite costly for a business. Therefore TFCA supports the status quo, ie the notice remaining in force, but there should be provision costs if notice incorrectly applied. Once again, this relates directly to inspector accountability.

With respect to questions 97 thru 99, TFCA does not support current infringement notice arrangements. TFCA submits that if a regulatory system is serious about providing safety outcomes, then infringement notices are not required. Improvement and prohibition notices coupled to a fair and reasonable prosecution policy should be enough.

With respect to question 100, TFCA suggests that a prohibition notice operates in a similar vein to an injunction. If this is the case then an additional arrangement is not required.

With respect to questions 101 thru 102, TFCA submits that an improvement or prohibition notice should not only address what is wrong, but should also specify recommendations for fixing the problem and an ample time frame for review. The prosecutions policy should then address non compliance. In these circumstances, additional tools such as enforceable undertakings may not be required.

## Prosecutions:

TFCA finds it difficult to support the adoption of criminal offence provisions for breaches of duties and obligations. The vast majority of employers attempt to fulfil their duties of care as much as possible therefore why threaten or punish them with provisions aimed at the minority. TFCA's preference is for breaches to be the subject of civil proceedings although TFCA welcomes any opportunity to discuss the establishment of a system that treats the majority fairly and the minority more harshly.

If breaches remain within the civil proceedings ambit then prosecution should be heard by low cost specialist tribunals, that is, tribunals containing personnel who are suitably skilled in occupational health and safety. It is likely that this arrangement would result in reasonably quick and effective outcomes. Appeals should lie to a suitable court of competent jurisdiction.

If it is determined that breaches are dealt with criminally, then they must be heard by at least a Supreme Court. This raises immediate questions about costs and timeframes and quick outcomes are unlikely.

With respect to question 111, TFCA submits that the regulator, its inspectors or the Minister should be able to commence proceedings. Interested or affected parties can always present a submission to the regulator or the Minister.

With respect to question 112, TFCA submits that the prosecution must be commenced within 12 months of the incident or within 12 months of the regulator being made aware of the matter.


With respect to question 113, proceedings should be left to the rules of the relevant court or tribunal although procedural advice must be developed and made available to affected parties.

TFCA submits that the evidentiary status of codes, regulations and other subordinate documentation should be clearly defined. If an employer observes all relevant aspects particular code then they should be to use this as a defence to prosecution. If circumstances do not necessarily fit within the ambit of the code then a partial defence should be considered. If a relevant code is not followed then the duty holder must demonstrate what risk management procedures they have used.

With respect to question 117 thru 121, TFCA submits that 'reasonably practicable' is an appropriate standard for the model OH&S Act and the burden of proof must lie with the prosecutor as is the case with criminal offences. This should ensure that any decision to prosecute is appropriately considered. Reversal of the burden of proof may unfortunately lead to 'fishing expeditions' and unwelcome red tape for small business.

TFCA questions whether the possible provisions mentioned in questions 122 thru 126 are only aimed at convictions rather than developing and endorsing good safe work practices. Whilst there may be a minority of corporation 'officers' that arguably should fall foul of these type provisions, threatening the majority with the same is 'overkill'. These provisions could also add complexity to court cases by requiring multiple cases and defences to be prepared and presented.

With respect to sentencing options, TFCA prefers fines and even enforceable undertakings (as an outcome to prosecution only – not for regulators to utilise) instead of terms of imprisonment. Whilst there is no doubt that some personnel have been killed or seriously injured as a result of employer/workplace controller negligence, arguably the vast majority of serious incidents do not result from the serious/wilful negligence. Therefore if imprisonment



was a sentencing option then it must be imposed carefully and only in extreme circumstances.

TFCA submits that 'suspected' breaches of OH&S duties that lead to death or serious injury should still be dealt with by OH&S legislation in a civil environment.

## Other Issues:

TFCA is supportive in principle of extensive regulation making power providing that suitable consultation and notification periods are utilised. Furthermore, appropriate review provisions must be provided for. Finally, any new regulation must be applied nationally to ensure consistency.

With respect to question 144, TFCA is extremely supportive of the role of codes of practice. These are normally developed in consultation with industry stakeholders; they take advantage of industry expertise and they often include specific risk management outcomes for duty holders to follow. Suggested requirements for code development should include provisions relating to industry consultation, public comment and Ministerial endorsement.

TFCA is supportive of the same notification requirement applied in each jurisdiction. Such notification should be simplistic and be cognisant of various communication methods and remote area working arrangements.

With respect to questions 146 and 147, the answer to these essentially lies in determining whether the court/tribunal is dealing with a civil or criminal matter. As noted earlier, TFCA is supportive of the civil approach with an external review in the first case being conducted by a specialist tribunal. Such a tribunal should have powers of conciliation and arbitration.

With respect to questions 148 and 149, TFCA is supportive of continued tripartite arrangements because such arrangements assist with focusing regulators on specific industry needs.

TFCA strongly supports mutual recognition arrangements with these extending to training, education, competence requirements, licences, permits, notifications etc. Mutual recognition is at the cornerstone of achieving a nationally uniform approach to OH&S legislation. It will be difficult to achieve though given the variations between jurisdictions. A working group encompassing representatives from industry, Government and unions within each State may be required to develop a suitable approach within a specified timeframe. Such approach could be signed off by the Council of Australian Governments and implemented in a similar manner to what current exists with heavy vehicle transport regulation.

With respect to question 152, TFCA does not have a solution. We are certainly concerned that interaction problems may remain and therefore significantly hamper and undermine any national uniform approach. Agreement from individual jurisdictions to commit to developing a nationally uniform approach within a specific timeframe is required. One possible solution lies in the use of the Federal Government's Corporations Power to develop uniform legislation for companies and the like. An intergovernmental agreement could then be struck to mirror Federal legislation at the State to cover off on non corporate entities. Such agreement could also address matters such as regulation and information sharing.

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## GENERAL COMMENTS

### General Comments:

TFCA submits that regulatory impact statements should be prepared for any preferred provisions