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Dear Sirs

Attached is a submission from RMIT University OHS Education Unit on the National Review into Model OHS Laws.

We would be happy to elaborate on any of the issues covered herein.

Yours truly,

Leo Ruschena CFSIA

# Submission to the Review of the National Harmonisation of the Occupational Health & Safety Acts

Comments on Issues Paper – National Review into Model OHS Laws – May 2008  
RMIT University, OHS Education Unit, 10 July 2008

## Introduction

While the review of the harmonisation of the Occupational Health & Safety (OHS) laws asks a series of questions in isolation, the question of OHS regulation needs to be placed in context, and this relates to the reason for having OHS laws in the first place. While this may seem self evident, it is nevertheless useful to start the discussion this way.

The National OHS Strategy 2002-2012 has objectives, *inter alia*, of significantly reducing fatalities, injuries and disease arising out of work related activities. OHS regulation is an instrument in achieving this objective. The authors are in the process of undertaking the second Triennial Review of the National Strategy, and most stakeholders interviewed (OHS regulators and their social partners) identified that the national harmonisation of OHS laws would be an important issue in achieving future national (2012 and beyond) objectives. Further, many stakeholders indicated that it was not just the legislation that should be harmonised, but also its application by the various jurisdictions.

## Scope of the submission

The Issues Paper asks some 152 questions, but in reality, the substance of many of these questions is reiterated in various formats to deal with differing parts of the current structures of the Acts.

This submission will seek to address the underlying principles implied in the questions since it is suggested that if agreement can be reached on these principles, then theoretically it should be simpler to arrive at agreement in relation to process or implementation issues.

Questions 1-58 in the Issues Paper will be covered in this submission.

## 1. Nature of the Regulatory Structure

It needs to be recognised that OHS Acts generally serve two purposes – (a) identifying the various duties and processes required of those who, in Lord Robens' words, "*create the risks and those who work with them*"<sup>1</sup>; and (b) the enforcement structure that is applied to ensure that the legislation is applied in an appropriate ways. The Issues Paper neglects this differentiation in **Questions 1-2**. In terms of the work duties, the laws

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<sup>1</sup>Robens, Lord, *Safety and Health at Work, Report of the Committee 1970-1972*, Her Majesty's Stationery Office, London, p4

should provide a comprehensive series of principles that can be applied in the workplace, with a minimum of prescription, which can be fleshed out more appropriately in subordinate Regulations, Codes, etc. Conversely, the enforcement structure (Regulator, powers of inspectors, etc), clearly needs to be highly prescriptive.

## 2. Scope of the Regulatory Structure

As noted in the Issues Paper, apart from the multiplicity of jurisdictions in a country of 21 million inhabitants, there is also a multiplicity of regulators within each jurisdiction, catering to specialist activities. Radiation safety was not mentioned alongside the plethora of specialist functions in the Issues Paper.

Model national OHS laws should encapsulate an underlying principle that goes to answering the question of whether the fragmentation is maintained or eliminated. The principle is that **each worker, regardless of the industry, geography, or hazard involved, is entitled to the same level of, and approach to, OHS regulatory oversight.** Similarly, a complementary principle should be that **each employer should be governed by unambiguous and non-complex legislation.** While various regulators within jurisdictions may have memoranda of understanding between themselves, nevertheless, an employer having to comply with multiple laws and regulators (eg OHS, electricity, mining and radiation, would be a common combination), faces unnecessary complexity in complying to provide a safe workplace. Clearly a single regulator as in the UK, perhaps having common legislation but with separate divisions for implementation will be the most efficient regulatory regimen (**Questions 7-9**). Robens pointed out in 1972 that *“The first and perhaps most fundamental defect of the statutory system is simply that there is too much law..... The sheer mass of law, far from advancing the cause of safety and health may well have reached the point where it becomes counterproductive.”*<sup>2</sup> This situation applies in Australia today. It would clearly help industry if there were fewer laws and regulators. Thus all specialty regulators predominantly dealing with workplace safety should be drawn under the same umbrella.

It is recognised that, for example, some mining regulation deals with both safety and other aspects of mining such as leases, etc. The non-safety issues could be covered in separate legislation with a separate (non-safety) regulator.

If the above is accepted, then the model laws should be seen to deal comprehensively with hazards and risks in work and workplaces, and this should be seen to be reflected in their title. Holistically, the preferred title is *Occupational Safety, Health and Welfare Act* (**Question 3**). This also recognises that psychosocial issues are emerging as the dominant issue as chemical, physical and similar hazards are slowly brought under control. It also leads to determining the scope of the legislation, which should be about the safety (using its broadest definition) at work, whatever or wherever or under what industrial contract work is carried out (**Questions 10 & 12**).

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<sup>2</sup> Robens, Lord, *Safety and Health at Work, Report of the Committee 1970-1972*, Her Majesty's Stationery Office, London, p1

### 3. Object and Principles

The objectives of the National OHS strategy should be reflected within the model OHS legislation, similar to the Vision Zero in Swedish road safety laws. These aspire to have zero fatalities and serious injuries on the road, and in doing so, have then to deal with the separate responsibilities of users, designers and maintainers of the road-vehicle system in Sweden. Such an approach in Australia would go a long way to clarify duties of the various stakeholders in the workplace system (**Questions 4-5**).

Duty of care as a principle has a long history in common law, well before the modern Robens style legislation codified it. The difficulty that has arisen in modern times is the modification of the work arrangements that has, perhaps, confused who owes a duty to whom, although there is a large body of case law that can be used to clarify the current understanding. The underlying principle that should be written into the model legislation is that **“a person/organisation owes a duty of care, to the degree that they have control”**. It can be rightly noted that there are some contradictions between courts in different jurisdictions on what level of control each participant in a contract for services has. It is suggested that the meaning of control as enunciated in *R v ACR Roofing Pty Ltd* [2004] VSCA 215 should be utilised. This case was determined in the Supreme Court of Victoria, sitting as Court of Appeal. Ormiston JA discusses the requirements for control by various parties within the occupier – contractor – subcontractor relationship and makes suggestions on how the definition of control in the (Victorian) legislation could be made clearer.

Legislation should exclude attempts to shift the duty by artificial means (eg through contract clauses) as is the case in the Victorian legislation. Application of the above principle clarifies issues about shared responsibilities. There should not be detailed ‘control tests’ since industrial law has grappled with who is or is not a contractor for many years, and has not evolved a single, simple control test. The courts have a variety of precedent tests that are used in various circumstances. However a statement of “chain of responsibility” would be a useful principle to link with duty of care. This deals with multiple relationships, including contractors, franchises, outworkers, and if framed broadly, should cover any novel work arrangement. It also ties in designers and manufacturers, in that they have a duty of care in designing and manufacturing their products where these can be utilised within an occupational setting.

The concept of duty of care relating to the degree of control they possess also deals with the responsibilities of workers/employees in the workplace. Workers generally have extremely limited degrees of control, which is constrained by the structure of work, work organisation, training and supervision, amongst other factors, all of which are controlled, or should be controlled by management or the employer.

Another principle which can be provided so that employers and others understand how to achieve their duty of care is an understanding of ergonomics, which states that the demands of work and workplaces be matched to the needs and capabilities of the workers. This encompasses work organisation and psychosocial needs, as well as the

normal physical needs and demands. Such a principle could be included in the list of specific duties normally described under the duty of care such as provision of safe plant, systems of work, instruction, supervision, etc. (**Questions 16-26**)

#### **4. Competent People**

A limitation that has plagued existing OHS legislation has been the lack of requirement that employers, designers and others access competent OHS professionals to advise how to achieve a safe workplace. While Queensland has gone some way in requiring the appointments of workplace health & safety officers (WHSOs) in workplaces having more than 30 employees, it is totally inappropriate to suggest that such people provide “expert” advice, as noted in the Issues Paper. They receive some 10 days training, and at best will be able to provide some basic technical advice on application of Regulations, Codes of Practices, or similar. However, this is better than in other jurisdictions where elected health & safety representatives (HSRs), with some 5 days training, can become the *de facto* local expert on all things OHS as far as their employer is concerned. The above is not to denigrate the work of WHSOs or HSRs, but only to highlight the general limitation of their knowledge and skills base. Anyone who suggested that one or two weeks training would make a person able to provide expert advice on the tax laws would be rightly howled down with derision. Yet that is the current situation with OHS laws, which as exemplified by the questions in the Issues Paper, contain complexity in terms of application.

Large organisations generally have the ability to hire or have access to university qualified OHS professionals. This ability is generally not available to small – medium enterprises of <100 employees, so that utilising technicians such as WHSOs does make sense. However, their limitations need to be recognised, together with the understanding about when to call in true expert advice. One problem in this has been that any individual can call themselves OHS consultants, as the profession is unregulated. Jurisdictions need to define what “competent advice” is in relation to OHS practitioners and consultant. Victoria has commenced this activity and this should prove a useful model for other jurisdictions.

However, more fundamentally, the lack of knowledge about OHS amongst managers and supervisors will fundamentally hold back the achievement of the National OHS Strategy. How can they contribute appropriately if they have no understanding of their own duties and how to apply the duty in the workplace? It seems anomalous that in many workplaces outside Queensland, the person with the most knowledge on OHS is the elected HSR with some five days training, but the legislation explicitly notes that HSRs have no responsibility to making workplace safe. It would seem that if the National OHS Strategy is to be met, managers should, as a minimum, have the same degree of OHS training as HSRs. It should be reasonably practicable that all management representatives on OHS Committees be required to have OHS training (**Questions 27 – 30**). Persons who design, manufacture, supply, import, etc items that have OHS implications, should be required in the model legislation to involve competent OHS professional advice in the development of their product, to reduce the “upstream” hazards as far as reasonably practicable

(Questions 33 – 36). Again, it seems anomalous that all TAFE qualifications have to contain OHS components, but university graduates from engineering, science, business or other disciplines who generally become the managers and supervisors in industry, and who consequently have the control in the workplace, have no such requirements.

#### 4. Reasonably Practicable & Risk Management

The concept of ‘reasonably practicable’ must be included within the model laws, and be clearly defined. The definition provided in the Issues Paper is perfectly acceptable since it contains the principles of risk management that is consistent within current OHS laws. It may also be further developed in subsidiary guidance material. However, ‘reasonably practicable’ also needs to be coupled with the duty of care – that is employers, etc, should have a duty of care, **so far as is reasonably practicable** to provide a safe workplace without danger to health, etc.. The current NSW approach where there is an absolute duty of care that has a defence – in a separate clause – of practicable is not a good model if clarity by the employer / manager is a legislative objective. (Questions 37-41)

When discussing risk management, it is essential that the terms ‘hazard’ and ‘risk’ be clearly defined. There is much confusion between these terms, including in some current OHS legislation. AS/NZS 4360:2004 *Risk Management* provides the following definitions:

- Hazard – a source of potential harm
- Risk – the chance of something happening that will have an impact on objectives

However, even these definitions need to be explained further in Codes of guides. Hazard can be thought of as an inherent property of a material or situation. For example, petrol has inherent **hazards** of flammability and neurotoxicity. It is not possible to mitigate the hazard of petrol. What can be done is eliminate it, or change the hazard by substituting something other than petrol. Exposure to the petrol involves **risk** of health damage or fire, and the extent of the risk depends on the likelihood and consequences of the hazard becoming uncontrolled. Risk, unlike hazard, can be reduced by appropriate mitigation strategies such as containment controls or protective equipment. Risk will never be eliminated unless the hazard is eliminated (ie likelihood is reduced to zero). The model laws should contain definitions, which would then be expanded in subordinate guidance material.

Risk management models should be included within the model laws. Over and above that, what also needs to be provided, probably in guidance material, is the concept of ‘tolerable risk’. Organisations working under major hazard facilities regulations have to define tolerable risk within the Safety Case, showing how they are going to control all risks in their facilities. There are some situations where tolerable risk is implicitly defined, eg occupational exposure limits for chemicals or noise. However, what should be developed is a generic approach that employers can utilise in developing strategies to meet duties of care in situations where there are no explicit standards. ‘Tolerability’ refers to a willingness to live with a risk so as to secure certain benefits and in the confidence

that it is being properly controlled. To tolerate a risk means that we do not regard it as negligible or something we might ignore, but rather as something we need to keep under review and reduce still further if and as we can<sup>3</sup> (**Questions 42– 44**). There will need to be extensive consultation on developing guidelines covering tolerability of risk.

## 5. Consultation and Participation

Consultation is an inherent component in the Robens' approach and the principle of consultation needs to be included in the model laws. However, there are many methods of consultation and the legislation should not be prescriptive about the methodology that should be employed. Where consultation is detailed in the enabling Act and then again in Regulations as is the Victorian situation, is confusing.

What constitutes acceptable consultation should be provided in guidance material. This should also link to who should be consulted and in what circumstances. An employer discharges part of their duty of care by consulting to ensure that they have all available information from all relevant parties before making decisions on control. Contractors or subcontractors may have relevant information so that they should be included in such consultation. Workers in contingent work relationships are frequently excluded from formal workplace consultation processes<sup>4</sup> (**Questions 45-48**).

The concept of effective participation of workers and their representatives improve health and safety in the workplace is an article of faith in all jurisdictions, but the evidence is actually ambiguous. It is often more associated with union activity, rather than consultation, *per se*. When referring to consultation or participation, the legislation often uses the terms “employees and/or their representatives”, suggesting that the Regulators expect direct consultation with employees, at least in some situations. However, evidence for the effectiveness of such direct participation is difficult to both gather and assess<sup>5</sup>. Gunningham<sup>6</sup> summarises the situation by saying that worker participation provisions have been more effective where there is a strong, well organised and safety conscious union, than where these conditions are lacking.

The above is not to suggest that participation should not be part of the regulatory framework. However, with union density in the general workforce at around 20%, formal participation is not likely to be effective as the Issues Paper suggests, except in those industries still maintaining high union density. It is suggested that there is a higher probability of improving safety outcomes by requiring managers and supervisors to

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<sup>3</sup> Adapted from HSE, 1992, “The tolerability of risk from nuclear power stations”, <http://www.hse.gov.uk/nuclear/tolerability.pdf>, accessed 2 July 2008.

<sup>4</sup> Eg, Consultative Arrangements Working Party (2001) Working Together: A Review of the Effectiveness of the Health and Safety Representative and Workplace Health and Safety Committee System in South Australia-Final Report and Recommendations, WorkCover Corporation of South Australia, Adelaide

<sup>5</sup> Walters, D., (2003) *Workplace Arrangements for OHS in the 21<sup>st</sup> Century*, Working Paper 10, National Research Centre for OHS Regulation, Australian National University

<sup>6</sup> Gunningham, N., (1993) Thinking about regulatory mix: Regulating Occupational Health & Safety, Futures Markets and Environmental Law, in Grabosky, P., and Braithwaite J., (eds) *Business Regulation and Australia's Future*, Australian Institute of Criminology, Canberra

clearly understand their responsibilities and duty of care through formal education. Every manager should be required have a “red card” (eg as in the construction industry) indicating that they have completed a recognised course of OHS training (**Questions 49-58**).