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

SPECIFIC COMMENTS

Please complete this template to provide specific comments with supporting reasons against each chapter of the Issues Paper. If you are responding to a specific question in the Issues Paper, please include a reference to the relevant question number.

Legislative Approach:

This submission accepts that the designers of buildings and structures do owe a duty of care to those who work in or on those buildings or structures. The Building Designers Association (BDAA) does not purport to have the answers to all the questions and will only address those of which the association has knowledge and interest.

The BDAA position on the issue of regulatory structure will depend on the review outcomes for other parts of the Model OHS Act.

For example, should the Queensland and South Australian approach of including “during construction” into the duty of care of designers be adopted, a “prescriptive standards” approach would be preferred. This would also be the approach where the “burden of proof” is shifted from the prosecutor onto the duty holder.

In such cases, it will not be sufficient for the designer to rely on the “reasonably practicable” argument as defence because he or she has no “control” over what happens on site. The reality is that builders rarely carry out the construction as envisaged by the designer and this must be recognised within the model legislation.

Q1.
BDAA does recognise that a prescriptive model may not be the best approach for the broad range of people who will be affected by this legislation. A better approach for all may be a somewhat more performance based model which calls up prescriptive Codes of Practice for some groups as “deemed to satisfy” methodology. BDAA submits that a code for the designers of buildings or structures would be of the highest priority.

Q2.
This would allow for a less detailed objective based model OHS Act which can easily cater for the broad range of activities which are covered by the Act.

BDAA reiterates that the Act without a Code of Practice for the Design of Buildings or Structures would not be in anyone’s interest and would not be acceptable.

Scope, Application & Definitions:

Business in Australia is burdened by far too many different pieces of legislation. The development of a model Act is an important opportunity to consolidate OHS legislation into one Act.

Q8.
A model OHS Act should incorporate all industry specific workplace safety legislation with industry specific codes of practice and guidance material to deal with industry specific issues.

Q11.

BDAA submits that public safety is a separate matter to the safety of workers. Although it would be advantageous to have a code of practice in this regard, it would over-complicate the Model Act to attempt to incorporate the duty owed to the public with that owed to workers.

Q12.

Changing work arrangements and changing workplaces are a fact of modern life. The model OHS Act must find ways of dealing with change. This adds to the argument for a performance structure with detailed codes of practice. For designers, however, the act must provide that the designer owes a duty of care for workers in or on the building, structure or plant only to the extent that the building, structure or plant is being used for the purpose for which it is designed and in the manner in which the designer reasonably believed it would be used.

For example, the designer of a private dwelling must be able to design that dwelling in accordance with the brief provided by the client. Such a designer cannot be held responsible if the client or subsequent occupant uses the building or part of the building as a workplace. It would be wrong for a court to ascertain that the designer should have allowed for the modern "work from home" trend where that is not part of the design brief.

Q14.

Definitions will be a key part of the model legislation. This review must identify and clearly remove any room for varying interpretation of the most important principles. Current legislation falls well short of clear definition of such terms as "control", "reasonably practicable" and even "designer of buildings and structures". The very fact that different jurisdictions currently have different interpretations of "worker" and "workplace" is sufficient evidence of this issue.

The building process can be an extremely complicated one. The concept of who is in "control" at a particular time and place and for a particular occurrence is often difficult to define. Does a designer automatically hand over "control" to the builder with the drawings, the builder to the sub-contractor after a safety induction or to the owner or occupier on completion or is the control taken by the downstream party only when they depart from the intended method or use?

If "control" is to be incorporated, and it should be, there needs to be clear identification of when an activity, process or part passes out of the control of the designer.

Designers also need a clear understanding of what incorporates a "workplace". Is a home office used irregularly a workplace? Is a back garden where a gardener is employed once a month, a workplace?

If "reasonable" is to be an important term in the way in which a designer must discharge his or her duty, particularly when cited as a specific defence, this must be carefully defined. By their very nature, "reasonably practicable", "reasonable precautions", etc will mean different things to different people. Designers will come across clients who will want "reasonable" stretched far wider than what may be intention. These designers will want some surety in how they deal with such clients.

In current legislation where designers of buildings and structures are specifically included as duty holders, there is little understanding of who or what they are. Any building will be designed by a whole team of largely independent professionals. While there is generally a principal designer with coordination and management responsibilities, he or she, will engage others who has particular qualifications and knowledge not possessed by the principal designer. BDAA submits that a clear definition of "designer" should be included along with acknowledgement that the use of consultants with specialist knowledge is a "reasonable" way of discharging the designer's duty of care.

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

Q16.
The model OHS legislation should include a "control" test and definition for the reasons given above.

Q17.
Control should have a role at all levels also for the reasons given above in relation to the complexity of the construction process.

Q18.
Loss of control should be taken on by downstream entities where, in the case of a building for example, where construction or use of the building is not in accordance with drawings and specifications, where construction process is one which is not reasonably expected by the designer or the building is not used in the way it was described in the design brief. Control cannot be disposed of by the duty holder but it should be argued that a duty holder has acted reasonably by engaging an outside consultant where specialist knowledge or different skills are required.

Q19.
The model OHS Act should clarify responsibilities where multiple duty holders and multiple duties are involved. Given the complexity of processes involved, such clarification should be included in relevant codes of practice.

Q25.
Workers should not be exempt from exercising due care and diligence in the workplace. The OHS principles should not make designers, employers or any other entities responsible for unreasonable behaviour by workers.

Q26.
All persons undertaking any activity already have a duty of care to the general public and this presumably will cover visitors to workplaces. BDAA submits that it is not necessary to broaden the persons captured under OHS legislation past "workers".

Q33.
Where jurisdictions have introduced the "whole of life" concept, it has been argued that a teamwork approach will lower the incidence of injury and death at work. BDAA supports the principle of all those who can have a role in reducing the unacceptable number of workplace incidents becoming involved in the process.

This principle can impact on building designers by making them consider the safety of workers during construction. BDAA would support this only if there are sufficient safeguards through the adequate definition of "control", recognition of the role played by specialist consultants in the design process and that designers are able to allow for a high degree of OHS knowledge and skills in those involved downstream.

The definition of "control" should also place some responsibility upstream of designers. The clients of the designer can have significant input into the design, can place undue pressure on the designer and can ignore the advice of the designer. There must be clear identification of when "control" is taken out of the hands of the designer.

It must also be recognised that the designer has little or no control of and is not trained to specify work practices on site, either during construction or during demolition. The designer's responsibility is to supply a design which <u>can</u> be constructed, used and demolished in a safe

manner. The designer is not responsible for defining what the work practices are that will insure that the workplace is safe.

This creates an environment where legislation cannot operate without a Code of Practice for the designers of buildings and structures and the model act must recognise that compliance with the code in a professional manner indicates compliance with the act.

Q34.
The issue of upstream activity should be used to develop a "everybody who can" help make a workplace safer, does so. Such a teamwork approach would place the onus squarely on the remainder of the team where design or manufacturing work is done outside of Australia. This would not abrogate those responsible for the overseas work from responsibility for their work but it may place an additional burden of responsibility on the local team members.

Responsibility across Australian state and territory borders should not even be considered as outside of the jurisdiction. If a designer is responsible for the design of a building in another state he or she must still design in accordance with the Building Code of Australia, the local town planning laws and state codes, the OHS responsibility should be no different.

'Reasonably Practicable' & Risk Management:

Q37.
"Reasonably practicable" is the logical test to be applied. There can become an issue on how the courts apply the test. BDAA submits that the application of "reasonably practicable" should be clearly defined in terms of accepted risk management processes.

Q42.
Hazard and risk should be defined either completely within the act or by reference to the Australian Standard. More detailed industry specific information should be included within the relevant code of practice.

Q44.
Risk management principles and processes should be one method of demonstrating compliance. As such they may be better included in the codes of practice.

Consultation, Participation and Representation:

Q45.
Consultation is an important part of compliance in many areas. In regard to building designers, it is usually not possible to go further than providing detailed information on plans and in specifications and this should be recognised within the model act.

There should be a requirement that plans, specifications and other material are retained at the workplace for the life of the building. In more complex projects, safety plans, fire equipment maintenance schedules and other specific material are already supplied to the building owner. This material will be sufficient for those maintaining the building and those engaged to decommission or demolish the building to identify any safety issues to be addressed.

For persons using the building or structure as a workplace may also need to be aware safety installations and risks. A risk management assessment should be applied to the workplace as part of the business process of those in charge of the workplace. In many cases the fit-out of the building will not be designed by the original designer of the building. The plans and specifications for all the separate parts of the structure should be used as part of the risk assessment.

It would be impractical to require designers of buildings and structures to carry out consultation beyond the provision of professionally prepared fully detailed plans and specifications. Any specific risk known to the designer and any required maintenance should be identified on the documentation provided.

Regulator Functions, Powers & Accountability:

BDAA is not commenting on these questions.

Compliance & Enforcement:

BDAA is not commenting on these questions.

Prosecutions:

Q118.
The aim of the model act should be to reduce the number and severity of workplace incidents. Therefore the emphasis should be on what happens before an incident occurs rather than after there has a workplace injury or fatality. Unfortunately, there will always be occasions where incidents occur so the act does need to address the issue.

Because some harsh penalties are involved the burden of proof should be borne by the prosecutor. BDAA believes that maintaining this position will, in fact, ensure that the jurisdictions involved will be more pro-active in ensuring that duty holders are fulfilling their responsibilities before an incident happens rather than reacting after the event.

Other Issues:

Q144.
The model act will lead to very important legislation and legislation which is designed to cover a broad range of activities. In terms of the building design industry, there is significant complexity, an unusually high number of entities involved in both design and construction of any particular project and an equally broad range of knowledge and skill levels.

For these reasons, a Code (or Codes) of Practice for the design of buildings or structures is crucial to the successful implementation of the legislation. This model act should include provisions that the code of practice must be developed and released at the same time or prior to the commencement of the act.

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GENERAL COMMENTS

Please list any general comments you would like to make on any other matters not already highlighted in the Issues Paper. Ensure your general comments fall within the Terms of Reference of the National Review into Model OHS Laws (refer to Appendix A of the Issues Paper).

General Comments:

Thank you for the opportunity to contribute to the review of OHS Act.