

Specific Comments

Legislation Approach

Regulatory Structure

As a professional who has worked in four individual jurisdictions a combination of models for the Act, Regulations and codes could be used for different aspects. Generally the Act should contain principle based standards, the regulations required are a combination of processes and prescription depending on the topic of the regulation and the codes should be very basic processes aimed at small business in plain English containing template models to follow.

Structure of the Supporting Regulations

Before discussing the regulatory structure I wished to start with the physical structure of the proposed regulations.

After working as a professional across jurisdictions I can see the validity of both arguments. However, as a point of discussion I will detail both views.

Within the Commonwealth there are several models of regulations. Victoria has combined them all: Comcare has combined most, but have 4 Acts & 6 Regulations to administer.

Queensland has combined them all;

Tasmania has 1 Regulation;

Western Australia has 1 Regulation;

Northern Territory has 1 Regulation.

The move has been towards combining all previous regulations into one regulation. This allows all of the information to be contained in one place, but also contains information that may never be used on most sites.

The most recent move to this model was in Victoria. Due to the fact that the regulations were so hastily combined there are two results that have occurred:

1. The combined common elements are now confusing. For example if you follow through the process for licensing of a major hazardous facility the regulations state the process and the exceptions so that any person trying to apply is required to carefully read the entire section to find all of the "Except for Major Hazardous Substance Facilities they require..."

The second major concern is that during the consolidation process the wording was changed to combine sections. During this consolidation processes a lot of the scientific requirements for lead, asbestos and chemicals are now lost in the legal interpretation of what employers were required to do.

The Authority

This section should be detailed enough so that there are no further details or clarifications required in any other documents.

Duties

The duties of employers, employees and consultation are generally 'High Level' general duties and are appropriately located in the Act. However the detail now found in the Victorian Act on notifiable incidents has narrowed the scope of incidents that are required to be reported. If this section was relocated into the Regulations they could again refer to "Or all Incident that has the potential to cause of the listed incidents". An example is currently there is no requirement for an electrical incident that does not result in an electric shock to be reported. The Act should only specify that incidents should be notified and scene preservation. Maybe timeframes, but the details should be in the regulations.

Licenses, Registration – Results

The level of detail in the Victorian Act is appropriate for this section. However with the recent changes of the regulations where all requirements have been combined it has made the deciphering of actual requirements relatively hard.

One method to address this would be to have an administrative regulation that documents the processes that the authorities use, e.g. licensing applications, renewal, cancellation, suspension, etc that documents the process and time frames that can be applied to all of the processes and the detailed prescriptive attachment to the forms be individually listed in the specific regulation section, e.g. what supporting documentation for hazardous sub facilities should be located in the hazardous substance section for clarification of the requirements.

Title Objectives and Principles

An appropriate title for the Act could be:

Occupational Safety and Health Act.

The reason for the reversal of Safety and health is to help distinguish that health issues caused by industry are just as important as safety. When its Health and Safety the perception is that they are the same thing. Industry needs to begin focusing on the mental and physical health of employees caused from chemicals and substances: e.g. Asbestos, carcinogens and other chemicals.

The OHS Act should specify objectives to assist judges to determine the intent of the Act with these being 4 or 5 separate points of clarity.

Principles of health and safety protection should be included in the Act as an expression of intent aimed at employers as to what is expected of them to achieve the objectives. They should state the principles of

1. Protection of people (regardless of who they are);
2. Control and management of a worksite;
3. Employers should be proactive
4. Inclusion of employees elimination or reduction methods;
5. Employees right for representation on H&S matters.

Scope Application Definitions

Industry Sectors.

The model for OH&S Act should not maintain the status quo in each jurisdiction mainly due to the fact there are three separate models in effect. Model 1 is separate legislation and regulations; Model 2 is combined Acts and industry specific regulations; Model 3 is separate Act, but where there is conflict the OH&S Act takes precedence.

The overarching safety responsibilities should remain in the Act with the regulations having specific sections where required for industry.

Presently while working in the Rail Industry in Victoria, if there is an incident that needs investigation the following authorities can enter for this purpose:

The State Coroner;
WorkSafe Victoria;
Public Transport Safety Victoria;
Australian Transport Safety Bureau;
Chief Investigator – Transport & Marine;
Energy Safe Victoria;
Comcare.

Depending on the complexity of the incident determines how many of these authorities will attend site. This causes confusion both for the site management and the attending authorities as to who has jurisdiction over which aspect.

This can also damage the ability of each authority to prosecute the company as different investigations under different acts can result in an investigation and prosecution that is fragmented and may not achieve the total desired result.

If the model Act is a National Act and Regulations which includes all industries then there will be no need for setting up extra provisions for coordination.

Presently some authorities have memorandums' of understanding, however, in the case of Victoria most of these have expired and new agreements have proven to be difficult to achieve.

Workplaces and Non Workplaces

General duties for both employers and employees should be tied to the conditions provided for “work performed” as it is under the Queensland legislation.

The workforce in Australia has evolved over this past decade to include working from home, mobile offices and moving construction sites. The models where there is a strict definition of workplace the more traditional model of factory sites and building sites that are contained a fence were the most frequent models.

Public Safety

In the general duties under the Act the General Public should be protected where the work being performed may impact them. This should extend to traffic management and pedestrian management for example. In these cases in particular the employer is setting up a system that directly impacts the general public and alters what they expect. In this particular case the bodies (Council & VicRoads) should also be accountable for the Traffic Management Plans that they approve. Currently councils approve the plan regardless of what it looks like and then places a disclaimer that it must be set up as per Australian Standard – it should not be approved in the first instance if it does not comply.

Responding to Change

The responsibilities should be broad enough that the person engaging the company has duties but the company ultimately employing the person should also share responsibility.

Example: Labour Hire Company sends 5 workers to a site. It should be unacceptable to do this without conducting a site inspection with the host employer so that all parties are aware of the working conditions.

Emerging Hazards and Risks

Under some of the Acts by the definition of health it covers the non traditional aspects of safety. However, regulatory bodies may need to more adequately explain on this concept with guidance notes. With the introduction of bullying only the severe physical result has been actively pursued for prosecution. The reason for this may be twofold.

1. Employees are not aware or have enough support for reporting these types of claims; and
2. Regulatory authorities are not given enough guidance and/or training on how to handle the “non physical” injuries

Definitions

Definitions can be critical when striving for National consistency. These set the scene for application of the law and determine what is covered and exempt. The critical definitions to achieve consistency are:

Employee;
Employer;
Health;
Consultation;
Self employed person;
Substance;
Workplace;
Persons in control;
Principle contractor;
Dangerous event; and
Illness.

The scope and application should be broad enough to cover the ever changing work places. Society is no longer confined to an office, factory or construction site. The new legislation should reflect this.

CHAPTER 3: Duties of Care

Control

The model OHS Act should have a test for “Control”. The test would be able to be written broadly enough to capture all of the parties who have control. For example in the rail industry the state declares projects, they engage a principle contractor, but the leasee of this land allows them access. The leasee continues with their work (running trains) and only monitors any potential adverse interface with the train. The state has no control over the interface and the leasee has no contract with the principle contractor and only monitors any interface works. As in the chain of custody laws each one of these bodies should have duties consistent with the type of control over the impact they have on the work.

The role of control should be directly related to the ability to direct or control the work being performed.

Control should be able to be only able to be delegated or relinquished by a client letting the contract to a principle contractor. This should only be if the client can demonstrate that the principle contractor has adequate systems in place to protect the work force and that the systems are monitored for implementation. Clients should not be able to hand over to the principle and walk away from the project. They should be accountable for the contractors they use – then the cheapest may not always be the best.

The Act needs to take into consideration the methods of contracting. It should be a simple to draw. There are basically 5 models of contracting. Alliancing and project manager models should be equal responsibilities between the parties. For Design and then construct, Design and construct and pre-works then design and construct...the model should be the client has responsibility until they discharge their duties to the principle contractor.

In the modern environment more and more companies are outsourcing work to various different forms of working arrangements. There needs to be a distinction between who is ‘writing the pay check’ and who is using the resource.

The person who ultimately employs the person (labour hire, self-employed, contracting companies) should still have a duty under the Act until they can discharge that duty to the person using the resource. Merely farming out ‘bodies’ to companies and collecting revenue should be unacceptable. The legal responsibility should only be able to be discharged if they can prove safe systems at work. Currently some labour hire companies may conduct inspections; however, most only identify the deficiencies, but will still send the ‘bodies’ in for work.

The duties of the employers under the Act should specify some fundamental duties like plant and equipment, substances, systems of work, information, training, instruction and supervision.

The duties should be extended to all people engaged to perform work or invited onto the premises. The legality of maintaining the site safe for all persons who attend might be tempted with an out clause for people who are trespassing and/or wilfully causing damage to the premises.

The ideal model would include workers and others duty of care to extend to not wilfully or recklessly misuse items provided for safety and not wilfully or recklessly endanger any other person (regardless who they are).

The reality of this single section of the Act will generally only ever be invoked if the employee was involved in an incident where it is obviously a bullying issue (e.g. an apprentice). History has shown that the regulator is reluctant to prosecute an individual for their behaviour, i.e. removing a guard against company procedure that caused the loss of a finger. The regulator generally will only prosecute the company, not the individual. This is also the case with self employed people.

Appointed Persons & Officers

It is one thing to ensure that companies have access to “competent safety advice”, but the model of mandatory appointment of a person is fundamentally flawed.

In QLD you must be a WHSO in order to be appointed as a safety officer. This is a five day course that teaches basic information. If you have a degree in safety which includes law from another state this is not recognised. Understand law and the ability to apply it is what is generally taught – not learning the sections of the Act and being able to quote then verbatim.

There should not be a clause as in QLD where the safety officer is exempt from prosecution. This clause only protects those who do nothing or provide incorrect advice. In other states the safety professional who does not have the authority to override the process is protected.

Safety is a validated profession with science degrees available in each state, it is no different to working as an Engineer without an Engineering Degree. Unless the Act mandates “competent persons” industry will continue to appoint people who have an “interest” safety, not a professional person who has the scientific & legal skills to adequately advise companies on compliance. There should be a definition on what is “competent” that reflects the professional person required for the position.

In every workplace management should have access to “competent safety professionals”. This does not necessarily mean they must be a full time employee, but a long term relationship with an appropriately qualified consultant who can provide support and advice.

The model could look at an and/or model. If the company is large enough they have a professional safety person, or if they are not large enough they have access to a safety person and have an appointed person within their company who is responsible for the company's compliance using the competent advice.

Positive duties would be of benefit to define who has responsibility within the boy corporate model. However there should still be a requirement to have professional advice.

The current duties of persons in control under the Victorian Act are adequate for permanent workplaces. There should be provision for the control of temporary workplaces. If a contractor sets up to work at traffic lights, then adequate traffic management should be in place to separate cars from the workers.

Activities which impact on health and safety

Duties of all parties upstream of the work should be clearly established under the OHS model. They should be delineated out to include Designers, Manufacturers, Suppliers, Importers, installers and disposal. These duties should be worded to include all of the control that they have over the process. Designers should be separate from manufacturers as in most cases these are done by separate companies who may be separated by geography and time. Suppliers should be extensive enough to include each time an item is supplied, including loan or hire.

Chapter 4 'Reasonably Practicable' and Risk Management

There should be a test of “reasonable practicable” in the model OHS Act. This would provide consistency when applying the act and give everyone a similar level of enforcement.

The standard should be similar to the Victorian and Western Australian models. These have been used for a number of years and have provided a reference to the court when determining “reasonable practicable”.

The control element should only be used if the person is away from the standard “site” of work and the task is being performed unsupervised. Employers should not be responsible for employees who put themselves at risk by performing work outside the company standards and risk assessments.

Risk Management

Hazards and risks should be defined in the model Act. Victoria used to have this definition in the Regulations, however, it has been replaced with having a hazard register and implementing controls. There is nothing requiring assessing the risk – although when you speak to the WorkSafe inspectors they expect you to have done this. In the model OHS Act the principles and processes of risk management should be specifically required. The previous Working at Heights Regulations had a requirement to show the hierarchy of control when determining controls measures. This was a good thing as employers could not just place workers in harnesses when working at height they had to demonstrate that they had actually used the most appropriate method – not just the easiest.

The reasonable practicable test should not apply to risk assessment as when risks are assessed the control measures that are documented should already be actual things that can be done.

Chapter 5: Consultation, Participation and Representation

Consultation should be provided for in the model OHS Act to include critical areas of work. These would involve company procedures, processes, changes to existing processes, introduction to new equipment, chemicals or processes.

The consultation process should be extended to the contractors working at the site (factory, construction site, warehouse, etc) on issues that effect there working environment. There should be a distinction between the inclusion of contractors and only consulting with them when the issue affects them. For example consulting on changing shifts should not extend to contractors. There should be different levels of consultation depending on the affect the proposal would have on the individual. In practice there would be some issues where this is hard to distinguish.

The differences in the consultation process can easily be addressed by employers under different models:

- multi employer worksites can be achieved by the principle contractor or by the same information being conveyed by each companies management.
- Employers spread across different worksites can convey the same information and process through management.
- Small business will only end up having a very straightforward and simple process.
- Remote workplaces still need to be informed – this can be achieved by email or phone conferences.
- For the culturally and linguistically diverse backgrounds the process may need to be simplified with languages other than English provided to facilitate the process as is currently the case in Victorian worksites now.

Participation and Representation

Under the model OHS Act there should be provision for Health and Safety Committees. HSC's could be either set on a minimum number of employees or at the request of the employees. These should be made up of a representative sample of the workforce. This would also include "permanent" contractors. The HSC should have at least one person from Management who has the authority to enact decisions made at the committee. This would include the ability to spend money, change procedures, etc. Without this person the committee does not have any real effect. In relation to the composition of the committee, there should not necessarily be equal numbers of management and employees. The committee can function effectively with one or two management, a safety professional and a number of employees. There should be a provision that there should not be more management than workers.

On electing HRS they should only be able to be elected from the existing workforce on the site. HRs should only be able to be elected if they are

employed to work on the site – they should not be full time HR's. If they any workplace requires to employ full time HR's then the company has serious safety issues. The HR's should have no different powers than every worker has on site. Under most jurisdictions, any person who sees an unsafe act has the ability to stop the work.

Right of Entry

The model OHS Act should have similar provisions to the Victorian. The authorised person should have reasonable grounds, give written notice and they should have at least basic training in safety principles. The powers that they should be able to have are inspect, observe, consult, take photos and if required stop work where there is an immediate risk to safety and request the presence of an inspector.

Issue Resolution

Issue resolution should be located in the Act. The process should involve the employee and supervisor in the first instance, the HSC where there is a difference of opinion and if there is a deadlock the advice of a WorkSafe Inspector should be sort.

Right to Cease Unsafe work

The model Act should specifically provide the right of individual workers to refuse or cease work they consider to be unsafe. This should be without the fear of prosecution. Under Industrial Law provisions already exist for payment of workers who stop work for safety matters. The OHS Act should be focused on providing a safe work place, not involved with pays.

Protection from Discrimination and Victimisation

Under the model Act persons who raise issues, carry out H&S functions or refuse to work in unsafe situations should be protected from discrimination and victimisation. Any person who has been discriminated against should be able to bring action. The breech should be able to be criminal and civil proceedings. The standard of proof should be as in the civil system and be based on the balance of probabilities. Victims should have similar remedies as under discrimination laws.

The proceedings should have the ability for arbitration and conciliation prior to court proceedings if the victim chooses. There would be cases where this would not be appropriate.

Chapter 6 Regulator Functions, Powers & Accountability

The model Act should provide for the establishment, functions, powers and accountability similar to the Victorian Act. Regulators should be required to publish enforcement and prosecution policies. This allows for transparency in dealings with industry.

The regulator should be able to produce interpretative documents available to the public. These documents help with the interpretation of the legislation and provides small business with guidance on how to read the legislation.

The inspectors should be able to give advice when asked or enforce the legislation. They should not be performing both functions at the same time. If the inspector is performing both functions, then the employer has no option but to implement the advice in order to comply with the enforcement notice. This should be separated as the first answer that is given is not necessarily the most practical solution.

Inspectors

The appointment of inspectors should be part of a standard employment process conducted by the regulators Department. The inspectors should have qualifications and experience in Safety in order to be able to competently inspect, provide advice and enforce the legislation. It would be best if the standard of inspector would be equivalent to a Chartered Professional member of the Safety Institute of Australia.

Inspectors should have a role in providing advice and assistance. This allows for small business to seek advice from an inspector when they visit the site. It also helps with the accountability of the inspectors, it is easy to say that is wrong – it is not always so easy if you ask why.

Chapter 7: Compliance and Enforcement

The model OHS Act should include a hierarchy of enforcement. This should include: Advice, Improvement Notice, Prohibition Notice, Enforceable Undertakings, Fines and other punitive action (Lower Court) and Fines and other punitive action (higher court). The statutory principles should be contained in either policy or guidance documents.

Improvement and prohibition notices should be contained in the model OHS Act. They should not contain recommendations on how to achieve compliance. This is due to the fact that inspectors do not understand all of the workings of every work site and what may work in one industry to achieve compliance, may not work in another. As in the Victorian Act there should be a provision for internal review of Improvement and prohibition notices.

There should be specific timeframes for compliance with the notices. The review process should suspend the notice until the review process has been completed.

Infringement notices should be able to be issued for very specific duties, such as failing to have medicals for lead workers, failing to have adequate PPE for asbestos workers, etc. The administration of the notices should be contained under the OHS law.

The amounts should be in the vicinity of 5000 – 10,000. These will then act as deterrents.

The model Act should include the ability to request injunctions. These should be not only for the compliance with improvement or prohibition notices, for taking or refraining from actions, but there should be the ability to seek orders where there has been a breach of the Act that has resulted in death of a worker.

Enforceable Undertakings

Enforceable undertakings should be used as an alternative to prosecution for an offence against the Act. It should only be available to companies for a first time offence where there were no injuries. This would help to free up the courts for minor infringements and save the public purse during the prosecution. The enforceable undertaking should result in the company admitting that they were at fault. If a company does not own up to the breach they will not learn from the mistake.

Chapter 9: Other Issues

Regulation making Powers

The model Act should have the power to make regulations, however, there should be a specific method for formulating the regulations and who should have input to the process. When the regulations in Victoria occurred the process tried to do too many at once. The combining of sections that occurred, may on the surface not look like there were many changes, however, the combination of the wording has taken the science out of the safety.

The regulations should provide for summary offences and they should also refer to Act section breaches as in the new Victorian Regulations. There is no confusion on sections of the regulations that are important for worker safety.

Codes of Practice

Codes of Practice should be developed as guidance for industry. These should be used as a minimum standard and are helpful for small and medium business.

Notification of Incidents and Reporting

To minimise the compliance burden all incidents, including mining, electrical and rail, should be reported to the local jurisdiction (I will expand more on this in interaction of federal and state laws). This report should be to a central location with a list at the 1800 number of which types of incidents MUST have an inspector contact them within 10 minutes and the others that can just have the written report sent in within 48 hours for follow up by an inspector if required within 5 days.

External Appeals and Issue Resolution

There should be provision for external appeals under the model Act. These should be for improvement and prohibitions notices, licences, and permits and for any decisions that the regulations state that the regulator can make that may impact on a company or persons ability to earn a living.

In order to expedite the process of review there should be an avenue for conciliation and arbitration.

Mutual Recognition

All of the areas listed in the paper would benefit from mutual recognition. It would be prudent to look at the highest standard used across the country and set them as the overall standard. This should be relatively simple to determine.

For High Risk Work there are national competencies already currently being used. There should be a centralised issuing of Licences and Permits that can be accessed by each jurisdiction for the input of information. This centralised location could also record if a jurisdiction has suspended or cancelled a licence. This should be recognised in other jurisdictions.

Interaction of Federal and state laws.

If the model OHS laws are enacted across the country were the same then the inspectors within the jurisdiction should be able to enforce the law. At the moment we have Federal OHS Laws that are substantially different to individual jurisdictions with only investigators, not inspectors employed to enforce them. Unlike the states and territories there are no inspectors to regularly inspect workplaces. I have worked for two of those companies who come under this legislation and not only did I never see an inspector, but in one company they had never seen an inspector – this was even when we had reported serious incidents. In Victoria at the moment there is no current memorandum of understanding, so WorkSafe has no ability to enforce the Commonwealth Law, only contact Canberra and suggest compliance. If Comcare don't do anything – nothing gets done.