



## **Introduction**

The health and safety of Australian workers is a key concern of Australian governments at all levels. All workers have the right to a safe and healthy workplace and employers have the right to expect that workers and visitors to their workplaces will cooperate with occupational health and safety (OHS) rules.

This submission has been developed by the Department of Education, Employment and Workplace Relations in consultation with Comcare. The views expressed in this submission are not necessarily the views of the Commonwealth Government, nor do they simply reflect the current provisions of the Commonwealth's *Occupational Health and Safety Act 1991* (OHS Act).

## **Purpose of the Submission**

The Council of Australian Governments (COAG) at its meeting on 3<sup>rd</sup> July 2008 reached agreement on an Inter-Governmental Agreement (IGA) to harmonise OHS laws and brought forward implementation of the model OHS laws to 2011.

OHS regulation affects every workplace in Australia. All States, Territories and the Commonwealth have OHS laws that aim to prevent workplace death, injury and disease.

Harmonising OHS laws will cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties.

The 2004 Productivity Commission Inquiry Report<sup>1</sup> referred to National Occupational Health and Safety Commission estimates that the total economic cost of workplace accidents to workers, employers and the community is in excess \$31 billion annually or some 4.3% of the Gross Domestic Product. It set out in chapter two examples of the considerable cost to employers in complying with jurisdictional differences in OHS and workers' compensation and referred to previous recommendations of other inquiries and reports all recommending a national system. The Productivity Commission considered it "essential that the existing broad agreement on OHS regulation be taken further to develop, adopt and enforce uniform national legislation and regulations".<sup>2</sup> The Department strongly supports this recommendation.

This submission is provided to assist in the debate towards a harmonised model OHS Act and to achieve the national targets set out in the National OHS Strategy 2002-2012.

The submission addresses a range of issues that the Review Panel may wish to take into account when developing a model OHS Act. Key issues identified in the Review panel's Issues Paper have been addressed where appropriate.

Avoiding undue prescription will enable jurisdictions to adopt the model OHS legislation without amendment. Consistent and sensible enforcement of the safety laws will also be paramount to ensure the objectives of COAG are achieved.

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<sup>1</sup> National Workers' Compensation and Occupational Health and Safety Frameworks, Productivity Commission Inquiry Report, No. 27, 6 March 2004

<sup>2</sup> P. XXVIII



## Legislative Approach

The Department recommends that the Model OHS Act incorporate principle-based standards (general duties of care) and performance-based standards (specifying the outcome to be achieved). Principle-based standards establish the framework in which the obligations must be understood, namely, that duty-holders must take a broad approach to their obligations to ensure safe workplaces. Performance-based standards are important as they provide flexibility for duty holders to develop measures which are the most appropriate and effective for a particular industry, enterprise, workplace or work practice. Regulations, codes of practice and guidance material assist duty holders to comply with performance-based standards.

Process-based standards (specifying a process or series of steps to be followed, e.g. risk management) and prescriptive standards (describing precisely what measures should be taken and requiring little interpretation) should be kept to a minimum and used only when necessary.

## Scope, Application & Definitions

The Department considers it preferable for the model OHS Act to accommodate all industries as far as possible. Certain high risk industries are, however, better suited to specific industry legislation. An option may be to have one OHS Act (a parent Act) which provides for the inclusion of specific industry provisions and/or the development of related Acts to be developed and read with the parent Act. This would allow development of a more consistent approach to general OHS duties, enforcement and penalties. Where a particular jurisdiction has identified a need and established industry specific safety legislation, it is recommended that this legislation be reviewed and, either through a national or a jurisdictional approach, redrafted to form a specific addition to the parent Act or redrafted to be consistent with and read in conjunction with the model OHS Act. Within the Commonwealth sphere such a review process would include consideration of those provisions associated with the *Occupational Health and Safety (Maritime Industry) Act 1993*.

The Department notes that the Commonwealth OHS Act provides at sections 6, 7 and 8 that the operation of the Act is not to prejudice national security, national defence or certain police operations. Under sections 6 and 7 certain provisions of the Act may, after consultation with the Minister, be exempted from applying, or in modified form from applying, to specified people.

## Workplaces and Non-workplaces

New and evolving types of work arrangements need to be accommodated in the scope and application of the model OHS Act. In developing a Model OHS Act, the duties of care should, as far as possible, relate to the conduct of work, wherever work is being carried out. This will not necessarily be at the employer's workplace. While the States are able to provide comprehensive OHS coverage for a workplace as all the parties are within the same jurisdiction, the Commonwealth jurisdiction is restricted by the Commonwealth

Parliament's capacity to legislate in respect of OHS. The duty under the Commonwealth OHS Act would need to be primarily limited to Commonwealth jurisdiction employers and there are limits on what the duty could encompass. For example, it would not be possible for the Commonwealth to place a duty of care on a partnership in respect of its own employees nor legislate for the OHS responsibilities of officers of unincorporated associations.

If the duties of care were tied to the workplace, there would also be confusion about responsibilities and coverage if parties were to move in and out of jurisdictions depending on whether they are undertaking work at a Commonwealth or State workplace.

### Definitions

It is essential that the Australian OHS legislation contain uniform definitions of key terms which are adopted by all the jurisdictions without change. The model OHS Act should therefore provide definitions of "worker", "workplace", "control", "reasonably practicable" and "consultation". Depending on the final form of the model OHS Act, other terms which would need to be uniform across jurisdictions include "employer", "contractor", "employee representative" "investigator/inspector" and "plant".

Given the increasing trend to non-traditional working relationships, it is recommended that the model OHS Act be forward-looking and examine the concept of "worker" rather than "employee". In this case, the definition of "worker" should be wide enough to encompass all natural persons who undertake work for a duty-holder. This includes employees, contractors, sub-contractors, employees of contractors and sub-contractors, labour-hire employees and other persons prescribed in regulations.

The Department recommends that a definition of "workplace" be defined as any place in which or at which workers work. It could be more specifically defined as premises, motor vehicle or ship. In recognition of the growing numbers of home-based workers, private premises should not be automatically excluded. However, those parts of private premises which are primarily used as a private dwelling should be excluded.

Inserting a definition of "reasonably practicable" in the model OHS Act would assist in ensuring consistent approaches by courts across Australia when dealing with prosecutions for breach of OHS obligations. The phrase has been the subject of judicial interpretation<sup>3</sup> and is used in describing an employer's duty in Article 16 of ILO Convention 155<sup>4</sup> which Australia has ratified. A statutory definition would also provide clear guidance for employers and others on what is required to meet their obligations. Section 20(2) of the Victorian *Occupational Health and Safety Act 2004* provides a model for a definition of "reasonably practicable".

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<sup>3</sup> E.g. *Edwards v National Coal Board* [1949] 1 KB 704; *Austin Rover Ltd v Inspector of Factories* [1989] 1 WLR 520; *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304

<sup>4</sup> International Labour Organisation, C155 Occupational Safety and Health Convention, 1981

A definition of “consultation” in the model OHS Act would be useful. Such consultation should be genuine, with participants contributing to all aspects the OHS decision making process. The Review Panel is asked to consider the Australian Industrial Relations Commission case *Australian Workers’ Union v Campbell Mushrooms Pty Ltd 1183/96 Print N4825 (1996)*. Consultation, on the findings of this case, can be summarised as:

“Consultation means to appropriately inform employees, inviting and considering their response. Sufficient action must be taken to secure employees’ responses and give the employees’ views proper attention. Consultation requires more than a mere exchange of information. Employees must be contributing to the decision-making process, not only in appearance, but in fact.”

### Duties of care

The Department recommends that duties of care clearly set out responsibilities without undue prescription. Duty holders should not be able to delegate their OHS responsibilities. If they are held not to be responsible in particular circumstances, it will be because they do not have the relevant control in those circumstances, not that they have delegated their control. It is recommended that the model OHS Act provide that the employer has an overarching general duty of care to take all reasonably practicable steps to protect the health and safety at work of the employer’s workers. The employer should also owe a duty of care to third parties whose health and safety are affected by the activities connected with the employer’s undertaking.

The model OHS Act should clarify responsibilities where multiple duty holders and multiple duties are involved. This would ensure duty holders understand that OHS is a shared responsibility and that in any particular situation there is likely to be more than one party with OHS responsibilities. Importantly, it would make it clear that duty holders cannot avoid their OHS responsibilities by claiming that another party should necessarily bear all responsibility in a particular situation.

The term “control” is not currently defined in Australian OHS legislation. It is however a term that is increasingly causing concern to employers and other duty holders in identifying the boundaries of their OHS responsibilities. There are a number of ways ‘control’ could be defined, but, if used in the Act, the Department recommends it be defined with more specific circumstances set out in the regulations. The discussion of *Reilly v Tobiassen* [2008] WASC 6<sup>5</sup> illustrates the difficulty of defining control.

### Consultation, Participation and Representation

Consultation is a key factor in ensuring employers, employees and their representatives achieve an effective partnership in improving workplace safety. The Department recommends that a requirement for employers to consult their workers be included in the model OHS Act. This is consistent with the principles of Australian OHS legislation and ILO Convention 155<sup>6</sup> that OHS is a shared responsibility and that workers have a right to participate in addressing safety issues at their workplaces.

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<sup>5</sup> Also see *Reilly v Devcon Australia Pty Ltd* [2008] WASC 84 which involved the prosecution of a company over the same matter and approved the reasoning in *Reilly v Tobiassen*.

<sup>6</sup> Articles 19 and 20

The Department recommends that consultation requirements apply to all work relationships. Section 35 of the Victorian OHS Act provides one model setting out matters where consultation is necessary.

As far as possible employers and their workers should be able to establish consultation arrangements which are outcomes focussed and suit their particular requirements. The model OHS Act should establish the duty to consult and provide a framework in which such consultation should occur.

The model Act should not seek to impose different levels of consultation. The Department recommends that discussion on different types and ways, rather than 'levels' of consultation, be explored in interpretative documents and guidance, especially in relation to the composition of the workforce.

The power to issue Provisional Improvement Notices (PINs) is an important tool for encouraging employees to become actively involved in resolving safety issues in their workplace. The Department's view is that PINs empower them to resolve issues with their employer without escalating an issue to the regulator. The Department recommends that consultation with the employer be specifically required before Health and Safety Representatives (HSRs) can exercise the right to issue PINs.

## Regulator Functions, Powers and Accountability

### Regulator role and functions

The role of the regulator is critical to ensuring safe workplaces and the Department recommends that the model OHS Act provide for its establishment, set out its functions and powers and provide measures to ensure it is accountable.

Functions of the regulator should be to:

- ensure compliance with the obligations imposed under the Act and regulations;
- advise employers, employees and others on OHS matters;
- collect, interpret and report information relating to OHS;
- formulate policies and strategies relating to OHS;
- provide advice to the Minister responsible for the legislation on OHS matters;
- liaise and co-operate with other bodies concerned with OHS.

Regulators should publish enforcement and prosecution policies but the Department recommends these requirements are not in the model OHS Act. The 'separation' of the advisory and enforcement functions of an OHS regulator should be detailed and managed within the internal governance arrangements and procedures of the OHS regulator.

The development of agreed interpretative documents would assist regulators in adopting consistent approaches and having consistent understandings on the implementation of aspects of the model OHS Act. This would also provide a degree of certainty and guidance to employers and workers.

The model OHS Act should include a provision to allow for the exchange of information between OHS regulators and between OHS regulators and other enforcement agencies. This would include information obtained in the course of an investigation. This type of provision will assist in consistent enforcement by all jurisdictions.

### Inspectors

The model OHS Act should provide for the appointment of inspectors but the Department recommends that prescriptive processes such as the qualifications of inspectors, issuing of identity cards etc be dealt with in regulations.

The Department recommends that the model OHS Act establish when and in what circumstances inspections or investigations should be conducted to ascertain whether the requirements of the Act and regulations are being complied with.

The model OHS Act should give inspectors the power to provide advice and assistance to duty holders to help them meet their obligations under the legislation. The Department recommends that discretion be given to inspectors as to the circumstances in which and how such advice and assistance should be given. Inspectors should also have the power to refer duty holders to persons with relevant expertise for advice on OHS matters. Inspectors should be given indemnity from civil liability in respect of any advice and information given in good faith in the performance of their functions or the exercise of their powers.

The Department recommends that inspectors should be given a wide discretion in relation to making decisions under the legislation, such as the issuing of notices. However, they should be required to comply with directions and instructions of a general nature issued by the regulator. Inspectors' decisions should always be subject to internal review by the regulator.

The Department recommends that an inspector should always have the discretion to modify, amend or cancel any notice or instrument they have issued. Inspectors have the responsibility of ensuring compliance with the legislation and are best placed to know if changes in circumstances warrant modification, amendment or cancellation of notices. This can assist in resolving issues at the workplace. Decisions by inspectors to modify, amend or cancel notices should, however, be subject to both internal and external review.

### Compliance and Enforcement

To maximise the benefit of having model OHS legislation in place, it is imperative that the laws are consistently enforced by all jurisdictions.

The Department recommends that the Model OHS Act include a full array of enforcement measures, including pecuniary penalties, infringement notices, prohibition notices, improvement notices, enforceable undertakings, remedial orders and injunctions. However, it should not set out a hierarchy of such measures in order of escalation as this is best left to the regulator and the courts.

There should not be statutory principles or requirements for the appropriate use of enforcement measures in the Act. The appropriate measure should be a matter for the inspector and/or regulator to determine in the particular circumstances and subject to review. Policy or guidance documents, such as the enforcement policy of the regulator, can set out principles to guide inspectors in decision-making and provide information to duty holders on how the legislation will be enforced.

#### Infringement Notices

The Department recommends that the model OHS Act provide for infringement notices. These should however only be available for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. An infringement notice scheme should only apply to strict or absolute liability offences.

The amounts specified as fines for infringements should be in the lower range of penalties under OHS legislation. The specific amount needs to be determined at the time of implementation of the model OHS Act. In the Commonwealth jurisdiction, infringement notice penalties must specify the penalty that may be imposed under an infringement notice for each offence to which the scheme applies.

#### Prosecutions

The Department recommends that the model OHS Act provide a mixture of civil and criminal remedies.

The Crown, in the Commonwealth sphere, is generally immune from criminal prosecution; therefore appropriate civil penalties need to be provided. Immunity stems from a strong common law presumption that the Crown is not criminally liable (*Cain v. Doyle* (1946) 72 CLR 49, *Bropho v. WA* (1990) 171 CLR 1 at 23). Whether an authority of the Commonwealth falls within the shield of the Crown must be resolved on the particular circumstances of each such body<sup>7</sup>.

The availability of civil proceedings for duty holders enables the regulator to exercise discretion in the means of enforcing compliance with obligations. For instance, some breaches of OHS legislation may be more appropriately dealt with under a particular type of proceeding rather than another type. The availability of civil proceedings also enables some breaches to be subject to proceedings which require a lower standard of proof, while other, more serious breaches should be subject to criminal proceedings.

The Department notes that setting a civil penalty higher than a penalty for a corresponding criminal offence is consistent with Commonwealth practice. (See recommendation 26-3 in the Australian Law Reform Commission's Report on *Principled Regulation: Federal Civil and Administrative Penalties in Australia*<sup>8</sup>)

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<sup>7</sup> Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers p33

<sup>8</sup> <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/index.html>.

The Department also notes that Commonwealth OHS legislation does not include any indictable offences. Section 4G of the *Crimes Act 1914* (Cth) provides that an offence is indictable if it is punishable by imprisonment for a period exceeding 12 months. Under section 80 of the Constitution indictable offences must be tried by jury.

As a general principle, the Department recommends that prosecutions be commenced as soon as possible and the model OHS Act should, therefore, specify a time limit for the commencement of a prosecution. In specifying a time limit, the model OHS Act should allow a reasonable period for commencement to ensure that all available evidence can be collected whilst at the same time giving duty holders some degree of certainty. The Commonwealth Act sets a time limit for civil prosecutions of 6 years<sup>9</sup>. This would overcome some difficulties jurisdictions have experienced concerning breaches of the manufacturer or supplier duties because the time limit commences from the date of manufacture or supply which may be years before the fault or breach is identified.

#### Other issues

The Department recommends that the level of penalties be determined within the maximum penalty amount for the particular offence. Courts have the relevant expertise to make such determinations. The Commonwealth OHS Act does not specify different penalties for repeat offences. This is because the Commonwealth generally does not set multiple penalties for a single offence.

#### Regulation making powers

Regulations will play a significant role in supporting the general duties established under the Model OHS Act. The Department recommends that the Model OHS Act set out specific matters on which regulations can be made as well as a broader and more general regulation-making power.

The Department notes that the development of model OHS regulations will be progressed by the ASCC replacement body, following adoption of the model OHS Act. The scope, framework and timing for this work is still to be settled.

#### Codes of Practice

The Department recommends that the model OHS Act provide for the responsible Minister to approve codes of practice as developed by the regulatory or other applicable body. In the interest of harmonisation and reducing business regulatory red tape, codes of practice, as far as possible, should be national model codes. The Commonwealth OHS Act currently includes a provision at section 70(2).

The Department notes that the development of model OHS Codes of Practice will be progressed by the ASCC replacement body. The scope, framework and timing for this work is still to be settled.

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<sup>9</sup> Schedule 2, Part 1, Clause 6