

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

SPECIFIC COMMENTS

Legislative Approach:

Regulatory Structure

A tiered model is appropriate (Act, Regulations, Codes of Practice, Guidelines).

The Act should be limited to principles-based standards (general duties) and performance-based standards (outcomes). Prescriptive standards should not be used in legislation but could be useful in guidance material or “deemed to comply” standards

We contend that duty holders are best placed to manage safety risk and that this is best delivered by duty holders establishing systems appropriate to their operation and the risks inherent in that operation rather than just following a process defined by others who won't have knowledge of the operation and its risks. Thus care is needed in the use of process based and prescriptive standards, which can (and do) limit safety innovation and through this can run counter to continuous improvement / leads to a reduction in or stagnation of safety.

Title

We support naming the Model Act the *Occupational Health and Safety Act* (Q3).

A Victorian approach to principles of OHS is supported in preference to limited objectives. In particular, the NSW Act objective of “securing the health, safety and welfare of persons at work” is not supported because legislation is not able to deliver such an outcome, i.e. legislation cannot secure an outcome.

Scope, Application & Definitions:

Industry Sectors

We support the approach promoted by Lord Robens of all industries being covered under a single law. We also support the principles of special provision (subordinate), special enforcement and advisory arrangements for particular industries.

Having said that, it is important that legislative obligations for particular industries are not expanded (through special subordinate provision) beyond those concerning OHS. In particular we are concerned about extension into public safety

- where work places are accessible to the public e.g. railway stations,
- where safety risk extends beyond a workplace e.g. noise from a construction site,
- where the users of a product/service are not “visitors to a workplace” e.g. train passengers or road-rail level crossing users or
- for broader community/public safety e.g. residential property subsidence caused by mining

It is critical for industry that regulatory overload is limited. Such overload includes having multiple regulators with overlapping powers and responsibilities. While Memoranda of Understanding go some way to deal with this issue, they are often not accessible or communicated effectively to industry, are not generally binding on regulators and add to the complexity and burden of the regulatory environment that is unhelpful and a distraction to delivering safe outcomes.

It is suggested that a better approach is

- clarity of precedence i.e. legislation for dangerous goods, railway safety, mining safety should be subordinate regulations under the OHS Act, and
- legislatively specified regulatory reach for all safety regulators. This could include general and industry specific competencies for inspectors.

There is value in enabling regulators with industry-specific knowledge and competence to enforce general OHS requirement in addition to the industry specific requirements thus giving that particular industry a single safety regulator. This would require the OHS Act to make such provisions explicit.

As way of example – Currently the OHS regulator and rail safety regulator in each jurisdiction have overlapping reach into the rail industry. A rail safety regulator carrying out an inspection of systems to prevent maintenance staff being struck or crushed by moving trains could (and in practice does) consider issues of confined spaces, hazardous materials etc associated with the work environment. It is obviously more efficient for that rail safety regulator to enforce the OHS provisions than to pass findings on to the OHS regulator who then needs to carry out further investigations. It is unreasonable to expect a general OHS regulator to enforce industry specific risk controls without appropriate industry knowledge and competence.

This approach models the UK in the 1990s where HM Railways Inspectorate, reporting to HSE, regulated all aspects of rail specific and OHS safety within the rail industry.

Workplaces and Non-workplaces

In our view it is wholly appropriate that OHS legislation focuses on workers. To that end duties of care should be person-focused rather than geographically-focused. They should extend to activities and places that have an effect on the health and safety of a worker. This would include traditional and non-traditional workplaces. It would extend to temporary workplaces but only while work is carried out and limited to issues relevant to worker health and safety.

Such a people-focused approach would limit the creep into public safety. Currently the overlap with public safety is detracting from delivery of better practice worker safety because of the focus on a geographically based *place of work* which remains so defined whether or not there is work being carried out. For example, resource/time is being spent investigating and reporting a rail passenger drug overdose resulting in the passenger's fatality in a station toilet because that person is deemed to be a "visitor to a place of work". It cannot be argued that a station toilet is not a place of work but the concept of public access to public places being treated as visiting a place of work is inappropriate.

Responding to Change

Focussing on the worker provides a better model for emerging work practice such as labour hire with specific duties falling to those who affect the safety of that individual, i.e. employer – for fitness and competence, workplace controller – for systems of work, individual – for self protection and protection of others.

Definitions

While greater clarity of legislative meaning is always helpful, a move to defining terms like reasonably practicable and consultation often leads to prescription. This in turn can limit such concepts to their current use and stifle innovative more efficient / effective alternatives.

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

Control

While control is a useful concept in OHS law, it cannot be seen as a binary principle, i.e., you either have control or you have no control. It is, of course, a continuum from no control through to full and direct control.

Should control be defined then this continuum must be acknowledged. For example, it should not be implied that having a contract in place through which responsibilities can be enacted is the same as full and direct control.

The concept of chain of responsibility is helpful.

In the case of shared responsibility, it should be incumbent of all duty holders to clearly and proactively define their level of control.

Duties of Employers

All duties - whether of employers, employees or others - must be achievable. Thus, an absolute duty to ensure safety or one not bound by the concept of reasonable practicability places the duty holder in immediate breach if there is any residual risk of injury. An outcome, performance based approach is preferred. The wording of duties drives (or not) compliance – absolute duties do not prompt managers to take proactive, safety improving actions

We are concerned that local variation could be allowed on the framing of general duties allowing jurisdictions to continue current divergent approaches. In our view this issue must be resolved as part of the national review and all jurisdictions should be bound to a consistent approach. In the event that the various jurisdictions reserved the right to retain their approaches in this regard, then the object of the OHS reform and harmonisation process will not be achieved

Appointed Persons and Officers

It is wholly appropriate that duty holders define responsibility and accountability for delivery of safety. In addition, expert advice should be sought as appropriate.

While building such requirement into legislation at a principles level is fine a prescriptive standard is inappropriate as it can lead to responsibility being vested to an individual who cannot control the delivery of safety e.g. to a safety practitioner rather than line manager.

A definition of suitably qualified OHS advisor would be helpful.

‘Reasonably Practicable’ & Risk Management:

The concept of reasonable practicability in OHS legislation is helpful. The provisions within Victoria and WA that assist an evaluation of what is reasonably practicable are useful but better placed in Regulations or Guidelines than in an OHS Act.

Any legislation must be clear in its use of risk terminology. A frequent trap is to use the terms “hazard” and “risk” interchangeably. This results in risk being seen wholly as a negative impact whereas sound risk management assigns risk and risk appetite as having positive and negative impact.

Hazard management and the control of hazards through a hierarchy of control is only part of contemporary risk management practice and, used in place of holistic risk management, can lead to safety improvement opportunities being lost. For example it is unusual to find a business change that has no safety risk disbenefits (even changes that bring a total, macro-level safety benefit usually also carry some micro-level safety disbenefits) – regulating for the management and control of safety risk at the micro level and losing an ability to take safety risk disbenefit for a larger benefit is not supported.

Consideration of the application of “gross disproportion” is also needed. Variability of application of this concept is often a driver for inconsistency of court decisions and regulator behaviour. Legislation must make it clear whether reasonable practicability is predicated on cost-benefit party or gross disproportion.

The legislation should provide that an effective risk management process adopted by an organisation is sufficient to meet the requirements of doing all that is reasonably practicable. This would provide duty holders with guidance as to the relationship between the general duties in the OHS legislation and the risk assessment processes provided in regulation and further, would provide incentives for organisations to adopt rigorous risk management practices. The existence of an effective risk management process should be a defence to a breach of the legislation.

Consultation, Participation and Representation:

It appears obvious that involving workers in considerations that affect their health and safety is valuable.

The most effective systems will facilitate discussion and input prior to management decision, ensure consultation following management decision and be based on open and reciprocal behaviour.

The OHS Act should promote effective systems of worker involvement without being prescriptive. It should also include a reciprocal duty along the lines of that in Northern Territory.

Arrangements for participation, representation and consultation should be flexible enough to apply to traditional union dominated heavy industry and new industry, labour hire, home-working etc. This flexibility cannot be provided through prescription.

Health and safety representatives for groups of co-located workers and health and safety committees can be useful tools in many workplaces and should be available and encouraged where appropriate but not mandated in legislation.

Right of Entry

Employee representatives are not regulators or inspectors and will not have an equivalent level of competence to inspect, audit or determine contravention of the Act.

Employees and their representatives should have access to the regulator and the regulator should have a duty to consider all matters put to them by an employee or representative but the latter should not have a right of entry.

Should this position not be accepted then the authorised representative should have training and a level of competence equivalent to an entry level regulator inspector.

Issues Resolution

The OHS Act cannot legislate for agreement between employer and employees. Guidelines can provide suitable assistance.

Right to Cease Unsafe Work

The OHS Act should provide for workers to refuse or cease to undertake work if there is an immediate and serious danger. It must be linked with a duty to report the issue and to contribute to the resolution of the matter.

The provision should not be extended to representatives directing work to cease. As stated above HRS's are not regulator inspectors.

There should be no penalties to workers who legitimately use the cease work arrangement, however, protection should not be provided in the case of vexatious use or for use when no immediate and serious danger exists.

Regulator Functions, Powers & Accountability:

Education, Advice and Assistance

Regulators should be able to provide advice etc to duty holders within the regulators level of competence. Following such advice should not be mandated and it should be remembered that duty holders and their employees are best placed to manage health and safety, will have a better understanding of work practices and risks at their workplace and will often have a more contemporary understanding of risk management practice than will a regulator.

Compliance and Enforcement Policies

Such policies must be clear and communicated widely. Such policies should make clear the process for duty holders to obtain information on inspectors' investigations and review of regulator decisions.

Compliance & Enforcement:

The graduated approach to enforcement is supported.

The principles are better placed in guidance material on compliance and enforcement policy formation than a model Act.

Provisional Improvement Notices are not supported. The ability to enter into a voluntary “compliance agreement”, issue a verbal warning or caution should be the measures available for more minor safety concerns and formal, written improvement and prohibition notices for the more serious problems. There is no justification for more enforcement measures than are absolutely necessary; they add complexity without benefit.

Improvement Notices – these should specify the nature of the breach and a timeframe for remedial action without being prescriptive in the method of resolution. There should be a statutory right of appeal and the notice should be suspended pending the outcome of the appeal.

The principle of infringement notices is not supported. The court should be involved with any penalty.

Injunctions should be provided for in the Act but should be issued by a court and available to the regulator only.

Enforceable undertakings are not supported. Should action be needed to remedy an offence then an Improvement Notice should be used.

Prosecutions:

Criminal or Civil Liability

It would seem reasonable for the model Act to provide for criminal offences related to general duties and for civil proceedings for procedural breaches such as breaching an improvement notice.

OHS prosecutions should be heard in magistrates, county, supreme, federal courts and not industrial courts or commissions.

A prosecuting authority (DPP) should be involved in decisions of whether a prosecution should take place. Prosecutions should be brought by inspectors or regulators and not by unions or victims.

3 years appears a reasonable time limit for commencement of criminal prosecution, i.e for breach of general duty and 1 year for civil proceedings.

Burden of Proof and Defenses

Reasonably practicable is an appropriate standard of duty.

The standard is appropriately made in the duty and not as a defense.

An absolute duty, even with a reasonably practicable defense results in all duty holders being immediately in breach. Such automatic breaches run counter to good practice safety management by weakening the impact / significance of breach e.g. duty holders with an altitude of “we are in breach anyway so why try harder to comply” and “being in breach in these duties is OK so it must be OK with other duties”.

We contend that absolute duties reduce the use of sound, risk-based decision making and, as a direct result, deliver a less safe outcome.

Liability of Officers

The model Act should provide for a breach by an officer where the offence by the corporation was attributable to an act or omission by that officer and should not be automatic. The reverse onus of proof is not supported.

Legislation should encourage behaviours of officers that have a positive affect on safety including those that promote involvement in safety decisions.

Fines

Fines are an appropriate penalty and it is reasonable for higher maximums to apply for repeat offenders.

Maximum fines should be provided in the model Act and should be different for convictions for general duties and procedural obligations. No statutory minimum should be set.

Penalties should depend on culpability rather than outcome.

A national register of decided cases would be of use.

Other sentencing options

Imprisonment of officers is not supported especially for an individual's first offence.

Industrial / Corporate Manslaughter

Separate legislation dealing with death or serious injury is not justified as the model OHS Act provides for such incidents. The model Act would be weakened by providing such separate legislation.

Other Issues:

Regulation making powers

Broad regulation making powers should be provided.

Codes of Practice

Compliance codes run the risk of becoming prescriptive legislation and thus reducing the opportunity for innovative safety improvement.

Incident notification

Consistent national model Regulations should be used to provide for data parity between jurisdictions.

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GENERAL COMMENTS

General Comments:

Our experience of national model rail safety legislation leads us to contend that a national Model OHS Act is unlikely to deliver the harmonisation and efficiency desired. This is particularly the case where extensive *local variation* is embedded in the Act or where significant use is made of jurisdictional conditional support.

We recognise that this review has been set a framework requiring the use of model legislation. In our view the worst shortcomings of the national model rail safety legislation could be avoided by limiting *local variations* and ensuring, prior to the commencement of drafting, alignment of jurisdictions on key issues such as the standard of general duties (absolute vs. *sfaip*), roles of regulators and roles of employee representatives.