

MODEL OHS LAWS REVIEW

SUBMISSION OF THE
VICTORIAN TRADES HALL
COUNCIL

11 JULY 2008



The voice of Victorian workers since 1856

Victorian Trades Hall Council

Introduction

1. The Victorian Trades Hall Council (VTHC) makes this submission to the Review of the OHS Act (OSHA). The VTHC represents over 50 affiliated union organisations (including some divisions of unions which have maintained separate affiliation), representing approximately 400,000 Victorian union members.

2. Occupational Health and Safety (OHS) and the protection of workers rights is a core function of unions. The benefit of the efforts of unions is not limited to those who are members of unions but has led to improvements in the work environment which are enjoyed by all workers. The VTHC and affiliates have significant knowledge and experience in assessing the effectiveness of the operation of OHS legislation in Victoria and in the improvements which need to be made to provide Victorian workers with the highest standards of OHS rights and protections.

3. The VTHC supports wholeheartedly the submission of the ACTU to the Model Law Review and this submission is supplementary to it. Consequently, this submission will not deal substantively with the issues covered in the ACTU submission. The VTHC also commends the Victorian Government for their commitment to adopt the new laws. However the VTHC would like to supplement the ACTU submission with our views on the operation of the Victorian legislation most recently reviewed by Bob Stensholt and some issues from 'The principles underpinning a good OHS legislative scheme'¹ (Worksafe Issues paper) produced by Worksafe Victoria which we believe will underpin the response of the Victorian government to the Model Laws Review.

Tripartism or tokenism?

4. The Worksafe issues paper suggests the principles for model OHS laws:
- 'promote the establishment of tripartite advisory bodies to consult on OHS policy in compliance with Article 4 of ILO Convention 155 on Occupational health and Safety
 - the laws should be flexible to allow jurisdictions to administer their tripartite arrangements to reflect their organisational structures
 - such bodies should be advisory in nature, as distinct from possessing formal decision-making powers to ensure they do not usurp the principal role of local regulators'
5. According to the Worksafe paper Victoria has similar structures to NSW with a governing Board of Management, tripartite and expert committee structures that advise the Board and tripartite industry groups. During meetings of the Model Laws working group unions have continually argued

¹ Worksafe Victoria Preliminary Issues Paper

that the information on Advisory Bodies at para 1 of the Issues under 6.4 of Worksafe's Issues Paper is incorrect.

6. The paper claims that Victoria and NSW have similar structures. In our view this is a misrepresentation of the NSW position and an overstatement of "tripartism" in Victoria. Our issues relate to the legislative basis for the body ie whether unions and employers are represented, the legislative functions of those bodies particularly who the body reports to and the nature and operation of those bodies.

7. The *NSW Workplace Injury Management and Workers Compensation Act 1998* establishes the Workers Compensation and Workplace OHS Council of NSW. The Council includes representatives from employees and employers and establishes the membership for Industry bodies. The functions of the Council are to advise the Minister.

8. This is not what happens in Victoria. The Workcover Board has no representatives from either employees or employers. Industry Groups are not established legislatively. The Occupational Health and Safety Advisory Committee (OHSAC) is established by s 19 of the Occupational Health and Safety Act 2004 (OHSA 2004). However, this body has limited functions and no reporting line to the Minister. Other than a specific role for OHSAC in the development of ARREO training, the OHSAC is limited to reporting to the Board on matters referred by the Board. It has no capacity to 'set the agenda'.

9. In his review of the Occupational Health and Safety Act, Maxwell² recommended that a statutory advisory committee be established for OHS.

10. In his consideration of the consultative model Maxwell indicated that

- The committee must be accountable to the Board in relation to the advice it provides, and the recommendations it makes (para 243) and
- the Board must be accountable to the committee in relation to the action it takes, or does not take, in response to the advice or recommendations it receives from the committee. (para 244).

11. In our experience the OHSAC has a limited role and does not operate as Maxwell envisaged nor as government had previously agreed through the terms of reference for the OHS Working Group. To date the Board has not developed any meaningful terms of reference merely re-stating the functions set out in OHSA 2004. The Committee has met only 9 times since March 2005 and other than resolving the training issues relating to ARREOs, which is a specific requirement of OHSA 2004, the Committee has not been given the opportunity to deal with any strategic issue in any meaningful way.

12. The role of the OHSAC in advising the Board which is principally established to manage the Workers Compensation functions has always been a major concern for affiliates. Decisions of the Board on OHS are not transparent. The Board operates without the involvement of key stakeholders and relies on the "good will" of the Chair and CEO to relay information to the Board and back to the OHSAC. It is unacceptable for decisions relating to the

² Occupational Health and safety Act Review Chris Maxwell March 2004

VWA as a regulator of OHS to be inaccessible to scrutiny. For example, the recent development of the Strategy 2012 included no role for the OHSAC. Given the significance that the VWA places on the new Strategy this is a serious shortcoming. Affiliates do not support a number of the initiatives but have had no opportunity to have their views considered as the Strategy is a fait accompli. Maxwell also proposed that the Board give greater emphasis to OHS and develop performance criteria. To date this has not occurred.

13. The Stensholt review acknowledges concerns about the operation of OHSAC

Although I note WorkSafe's comments that OHSAC has not been frequently required to consider key strategic issues because they have not arisen, I am of the view that the Committee is not operating as well as it could be. There is a lack of conviction regarding the potential effectiveness of OHSAC from all stakeholders. This impedes the Committee's ability to work effectively as a representative stakeholder group

It seems OHSAC has primarily been treated as an 'information sharing' committee by WorkSafe. I do not believe this is what was intended by Parliament when the Bill became law. Rather than merely providing OHSAC with its business plan for any particular financial year after it has been settled (for example),

WorkSafe should also be prepared to engage OHSAC on key strategic issues as they arise in the rolling out of Strategy 2012, rather than just providing the Committee with updates as to how Strategy 2012 is tracking. A primary consideration for WorkSafe in making OHSAC more effective should be to ensure it adopts flexible processes, designed to promote and not impede.³

14. The Victorian government has recently agreed to his recommendations on the operation of the OHSAC. Regardless of expected improvements from the Stensholt review, Victoria's tripartite structures are at odds with all other jurisdictions and are not similar to those in NSW.

15. The VTHC believes that the model laws must include provision for a tripartite body to be the principal source of advice to the Minister on the Authority's functions regarding occupational health safety and welfare. The functions of such a body must be included in the model laws and must include the functions detailed by the ACTU.

Are Victorian workplaces safer?

³ A report on the Occupational Health and Safety Act 2004 Administrative Review Bob Stensholt MP for Burwood Chair Public Accounts and Estimates Committee December 2007

16. There seems to be a view, promoted by Worksafe and supported by employer associations and others, that Victorian workplaces are the safest in Australia. This claim is taken to support the proposition that the Victorian legislation is therefore the best. There are certainly parts of our legislation which contribute to the achievement of health and safety improvements in workplaces. The role of OHS Representatives and unions in achieving safer workplaces is well established. However claims our workplaces are safer on the basis of statistical analysis must be challenged.

17. The main indicator of performance for Worksafe's activities are claims data. Apart from the concerns regularly expressed by unions, experts and others regarding the narrowness of statistics based on successful compensation claims, the VTHC points out that Worksafe does not report according to the standard reporting requirements in its report to the Workplace Relations Ministers Council (WRMC) for Comparative Performance Monitoring (CPM)⁴:

In Victoria, following changes to the Workers Compensation Act employers must pay for the first ten days absence (as opposed to the first five days). Victorian figures are calculated on a statistical formula.

18. Despite concerns with the validity of using claims data, we point out that the latest CPM report indicates that Victoria has the highest percentage of claims over 6 weeks (used as one indicator of injury severity - Victoria is at 47% compared to the Australian average of 39% and NSW at 36%).

19. Illustrating why reliance on claims data is inadequate, the ACTU in its Submission to the Productivity Commission Inquiry 2003 stated:

'Through their reliance on compensation data, the working group has provided a misleading picture to ministers and the community about the state of OHS in Australia' -.... 43% of work-related deaths were not covered by compensation agencies,published compensation information significantly underestimates the magnitude of work related traumatic death of workers,the extent of compensation data coverage of traumatic fatalities depends on factors such as growth of self-employment in hazardous work and changing eligibility'

20. The limitation of claims data in relation to occupational disease is well recognised.

Coverage by workers' compensation is low for psychological (especially anxiety/stress), respiratory, digestive, and dermatitis problems. Most diseases are not well covered by workers' compensation. (*Work-related aspects of patient presentations to general practitioners in Australia*, pp.46-47)

21. Despite the inclusion of disease as a priority action under the National OHS Strategy the politisation of OHS under the Howard government and the

⁴ Comparative Performance Monitoring Report 9th edition February 2008

lack of progress on the National Strategy has meant that efforts to address the work relatedness of occupational disease have faltered.

22. After significant lobbying by unions through various stakeholder forums Worksafe will include a Disease Strategy in its Business Plan for 08/09. This is welcome however Worksafe ignores evidence other than claims data. Worksafe already collects Hazard Exposure data through its Omnibus Survey but makes no use of this evidence source in any meaningful way.

23. The Omnibus Survey and the recently released draft National Hazard Exposure Worker Surveillance (NHEWS) Survey have similar conclusions - that for the majority of hazards surveyed the top 3 preventative measures are an over-reliance on administrative controls, particularly PPE or 'did nothing'. This quite clearly needs addressing urgently. Most the hazards surveyed are well known and covered by Regulation.

24. Only when action is taken on workplace hazards including occupational disease can Worksafe be regarded as having the safest workplaces in Australia.

Worksafe - regulator or client manager?

25 One of the disturbing outcomes of the lack of stakeholder engagement in the strategic directions of OHS in Victoria has been the ability of Worksafe to re-write the language of OHS without any scrutiny or accountability. Most recently in the information provided on the 08/09 Business Plan and previous information on the Strategy 2012 has been Worksafe's view that a 'modern regulator' is one 'which has a client focus which reflects and evolves with the community's needs and expectations'.

26. In addition, and of concern, is that WorkSafe's interpretation of 'client' is very broad and includes numbers of interest groups. This has had the effect of further weakening engagement by the regulator with the major stakeholder, that is, employer organisations and unions. It has also led to our view that WorkSafe is too often non-responsive to its major stakeholders. The Act specifies main stakeholders to be employers and their organisations and workers and their organisations. Examples:

1. The recent re-branding of the Victorian Workcover Authority as Worksafe Victoria is of significant concern to affiliates. OHS activity is driven by claims data with a focus on a 'whole of agency' approach. This has undermined the role of Worksafe as the OHS regulator.
2. WorkHealth initiative imposed despite concerns from both employer and unions on Worksafe's involvement in health promotion with the focus on lifestyle factors when Worksafe has done little to address the work-relatedness of occupational disease
3. WorkSafe Advisory Line: Since the establishment of this 'service', unions, HSRs, etc have had on-going problems. After much discussion and many months, a protocol was eventually agreed upon that would ensure that the rights of HSRs would not be undermined. Also, for several years, due to dissatisfaction at times with the advice provided,

the unions have requested that all calls be logged, a seemingly straightforward request, supported by the employers on Stakeholder Reference Group (SRG). To date, the response we have had is that 'it is being looked at'. Recommendation 4 in the Stensholt review recommends a logging system for all incidents notified.. part way to what we requested.

Is WorkSafe Victoria a 'model regulator'?

27. The VTHC and our affiliates have been disappointed on countless occasions by the ineffectiveness of WorkSafe Victoria as a regulator.

28. WorkSafe's prosecution record is unsatisfactory, not only to unions, community and interest groups, but also to the Government, as seen by a number of Stensholt recommendations. Yet Victoria claims that the State's prosecution record is very good. We make the following points:

- The successful prosecution rates in its paper are somewhat misleading. When we, and HSRs who have asked why certain employers are not prosecuted, we have been told on countless occasions that judgements must be made on the likelihood of prosecutions taken being successful. If there are doubts about likely success, prosecutions are not brought.
- Most of the prosecutions are based on outcomes of breaches, where workers or others have been killed or seriously injured rather than on breaches of the Act or Regulations.
- Unions have been critical of WorkSafe's record in pursuing bullying claims – with only one successful prosecution to date.
- WorkSafe has not made adequate use of the full range of prosecutions options available to it. Two additional provisions were included in the Victorian OHS Act 2004 to provide for custodial breaches involving high-level culpability (s32 - reckless endangerment) and to allow prosecution to be brought against decision-makers in large organisations. This was put as an alternative to 'industrial manslaughter' legislation. These provisions have not been successful in bringing culpable parties to justice. It appears that the difficulty relates to successful prosecution being dependent on intentional recklessness in s32 and a conscious decision or non-decision in s144.
- WorkSafe's enforcement activity has been decreasing (for example the number of notices issued by inspectors has decreased, in some sectors alarmingly so); numbers of active inspectors has decreased; there has been a rise in claims in certain areas.
- The protection of workers and HSRs. WorkSafe has provided inadequate substantive support to and protection of workers generally, and HSRs in particular. There has been a serious lack of prosecutions

against employers, but of even more concern, WorkSafe has been slow or even non-responsive to problems in workplaces.

29. Evidence and examples:

Results of the VTHC OHS Representative Surveys⁵ undertaken in 2003 and 2005 surveys show

- a significant proportion of HSRs (approx one third) reported pressure from their employers NOT to raise health and safety issues. over 65% of employers do not automatically consult HSRs and workers about health and safety, YET there have been no prosecutions of employers for failure to consult
- the 2005 survey also found that only 36% of HSRs reported that the action taken by the inspector was to issue a notice, compared with 57% in the last survey.
- there was an increase in HSRs who experienced inspectors providing advice and assistance to them (from 29% in 2003 to 35% in 2005). However, HSRs who reported that inspectors took no action or the action was unknown to the HSR rose from 9% to 28%.
- only 47% of HSRs believed that the action taken by inspectors was effective in fixing the health and safety problems.
- HSRs who reported that the inspector had failed to make reasonable efforts to contact them fell from 64% to 37%.

30. Yet very poor support from WorkSafe (See some specific examples, below)

- Melbourne university – a number of elected HSRs have had issues including employer interference with elections, long and unacceptable delays in resolving issues and complying with PINs and inspector notices, singling out of HSRs for reprimands, etc. The unacceptable situation has gone on for years now, and the HSRs have found WorkSafe inspectors to be less than helpful in assisting to resolve matters. On at least one occasion, WorkSafe involvement exacerbated the situation.
- MUA Geelong – issue of discrimination/threat to a HSR, including meetings (minuted), letters, etc. The HSR and the union took this to WorkSafe before the end of 2007. As of July 11, they are still waiting for a 'report' on what WorkSafe intends to do about it. In the meantime, the HSR has continued to be put under pressure in his role as HSR.
- Labour hire worker who got no more work after finding asbestos in the green waste. Outcome: inspectors went out and issued a number of improvement notices on site (no procedures for toxic material found in 'green waste', inadequate facilities, inadequate training, inadequate PPE). Worker got no more work, despite having been promised it would be a long-term potentially permanent position, other worker from labour company sent there. Because of Worksafe internal procedures with inadequate support for the worker, the worker no longer is

⁵ VTHC View from the front line A report on experiences of OHS Representatives Oct 2004 and Oct 2006

employed and was forced to ask for termination letter in order to qualify for benefits.

31. Part of the problem is that WorkSafe seems to take the position that if not enough 'evidence' to prosecute, then no other action can be taken. Stensholt also noted that the Act and WorkSafe have not provided adequate protection and made a number of recommendations in this area (Recommendations 13 – 19)

32. WorkSafe has recently acknowledged that there is 'a perception' that its compliance activities had decreased. In fact, it is not simply a 'perception' but a fact which has been acknowledged in the Stensholt Review:

.....in light of the comparatively low level of prosecutions, it seems to me that WorkSafe is at the crossroads. Does it continue on the 'hands off' path of increased guidance and relatively few prosecutions or does it ramp up its prosecutions ? In my view, WorkSafe needs to seriously reconsider whether its policy of guidance and incentives, coupled with an arguably conservative deterrence approach, is sufficient to achieve its health and safety goals. I believe there is a strong case for WorkSafe to increase the level of resourcing for its prosecutions branch. Greater resourcing would enable it to engage in more strategically targeted prosecutions in the public interest, including of 'upstream' duty holders (that is, suppliers, manufacturers and designers).⁶

33. The VTHC believes that the model laws must be capable of enforcement and that enforcement and compliance activities must remain the primary focus of regulators.

Compliance Codes or Codes of Practice?

34. Following the Maxwell Review, the OHSA 2004 renamed Codes of Practice as Compliance Codes and removed their evidentiary status. Initially as part of the recent consolidation of Regulations all current Codes of Practice were expected to be translated into Compliance Codes to take effect on the same date as the Regulations.

35. The OHSA 2004 provisions which deal with the provision of compliance codes have created confusion with the result that the original timeframe for Compliance Codes has not been achieved. No Compliance Codes have yet been approved although a number have been through the public comment phase.

36. Debates on the nature and status of Compliance Codes have occupied significant time and resources of stakeholders in the various forums established to progress each chapter of the Consolidated Regulation. Conversely, the status of Codes of Practice (COPs) under the 1985 Act was

⁶ Ibid page 87

clear ie COPs could prescribe a way that a hazard could be controlled or a process followed. The duty holder could depart from the COP by proving that they had followed/adopted an approach that was as good as or better than the Code of Practice. Maxwell did not propose that the legal status of codes be removed but suggested it be expressed similar to provisions in the Queensland Workplace Health and Safety Act 1995 -

Under s.26(3) of that Act –

"(3) If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by

–

(a) adopting and following a stated way that manages exposure to the risk; or

(b) adopting and following another way that gives the same level of protection against the risk."

37. Maxwell's recommendation was not adopted in the OHS Act 2004. In our view Victoria's Compliance Code approach has unnecessarily confused what had previously been established by the OHS Act 1985 and is at odds with the regulatory framework of all other jurisdictions. The nature of Compliance Codes makes adoption of National Codes problematic and is at odds with COAG and WRMC decisions to remove impediments to the adoption of National Standards and Codes.

38. The model laws should refer to Codes of Practice and define their evidentiary status.