

LEGISLATIVE APPROACH

We refer to and repeat the submissions of the ACTU under this heading.

SCOPE, APPLICATION & DEFINITIONS

Scope of Model OH&S Law

APESMA represents a broad range of members in a broad range of occupations including engineers, scientists, pharmacists and the coal mining industry.

The model OH&S Act should maintain the status quo in each jurisdiction regarding industry specific safety legislation. The model OHS Act should be a safety net which sets out the broad objectives and principles of OHS, while industry specific safety legislation can add to and enhance these objectives and principles (in the same way that collective agreements add to and enhance the employment conditions provided for in awards).

Workplaces and Non-workplaces

APESMA, through its Connect division, covers independent contractors who do not always work in traditional workplaces. Likewise, many of our engineers are not engaged in static workplaces, but work in a range of different areas and locations. As such, the general duties of care should not be tied to the workplace. The definition of workplace under Queensland's *Workplace Health & Safety Act 1995* which includes any place where work is, or is to be performed by either a worker or a person conducting a business or undertaking would be an adequate definition.

The scope and application of the model OH&S Act should be sufficiently broad and flexible to accommodate new and evolving types of work arrangements. This would be achieved by adopting the definition of workplace provided above, but leaving the definition of both "work" and "worker" to the common law courts.

In all other respects we repeat the submissions of the ACTU under this heading.

DUTIES OF CARE – WHO OWES THEM AND TO WHOM?

While duties and duty holder obligations must operate concurrently and overlap (and that is they cannot be delegated), the primary duty to ensure worker health and safety is protected must reside with the employer. The employer controls the budget, gives directions and allocates resources, so it is the employer who is best placed to control health and safety at work.

The Model Laws must enshrine the principle that the employer is ultimately responsible for the OHS outcomes irrespective of the management processes that the employer may put in place.

OHS duties should be broad and applicable without decreasing the protection afforded to those workers outside of conventional employment categories. In terms of duties owed to contractors, labour hire personnel, volunteers, outworkers, apprentices and trainees – all should be afforded the same protections as conventional workers.

Duties of the employer must include;

- Ensuring the health, safety and welfare of all workers and others performing work in the workplace and others affected by work in the workplace;
- Providing and maintaining a healthy work environment;
- Providing and maintaining safe plants;
- Ensuring safe use, handling and storage of substances;
- Ensuring safe systems of work; and
- Providing adequate training and supervision to ensure health, safety and welfare.

Control

We do not believe that a definition of control within the Act would be useful. Rather, the Act should operate with the positive presumption that the employer has ultimate control of the workplace with the employer able to rebut this proposition before the courts. It is our fear that any definition of control within the Act would place an onerous burden and increased liability on our members who are managers at workplaces, as employers would fix on making sure that the "control" of OH&S is moved from the employer to the managers. It is the concern of APESMA that in focusing on the issue of control, employers would focus on the avoidance of liability rather than focusing on the safety and welfare of employees.

While APESMA understands that employers may delegate OHS tasks to staff, we submit that employers must ultimately ensure that their directions have been adequately complied with.

Work Relationships

APESMA supports the use of a duty to cover a person conducting a business or undertaking but, as mentioned above, does not support the obviation or mitigation of this clause by employing a statutory definition of "control". It is our submission that not defining "control" would force a positive obligation on those establishing a business or undertaking to ensure the health, safety and welfare of those engaged or involved in the undertaking rather than focusing on ways to delegate control.

In all other respects we repeat the submissions of the ACTU under this heading.

'REASONABLY PRACTICABLE' & RISK MANAGEMENT

Reasonably Practicable

It is APESMA's view that an employer's duties under OH&S should not be limited by the phrase "so far as reasonably practicable" in the model law. This defence is open to employers at common law and does not need to be reduced to statute.

Risk Management

A risk management clause must be included in OH&S laws. It should make it clear that the objective is to eliminate the hazard, or if that is not possible control it, and require the duty holder to be proactive in utilising a systemic process as distinct from an adhoc reactive response. The risk management clause must specify the hierarchy of controls. Consultation must be part of the process at every stage and health and safety representatives and the union must be allowed access to risk management records. Health and safety representatives and workers must have the right to have their objections to the specific use of risk management controls recorded in risk management records.

The risk management process must be legally enforceable.

Risk Management needs to include risk assessment (identify the hazard, assess the hazards, eliminate all those that can be eliminated and put in effective controls for those that can't). There needs to be a follow up evaluation process as well.

CONSULTATION, PARTICIPATION & REPRESENTATION

The model OH&S laws must protect worker consultation, participation and representation rights. This means that employers cannot;

- choose whom they will or will not consult with;
- run health and safety elections or select health and safety representatives;
- determine the worker representatives on OH&S committees.

These issues are to be determined by the health and safety representatives and workers, in conjunction with their relevant union if they choose.

Where there is failure to reach agreement after consultation, the issues resolution procedure should be initiated.

In all other respects, APESMA repeats and supports the submissions of the ACTU under this heading.

REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

We refer to and repeat the submissions of the ACTU under this heading.

COMPLIANCE & ENFORCEMENT

At APESMA we have noticed a marked increase in the number of members claiming that they have suffered a workplace injury or detriment as a result of occupational bullying or harassment. Traditional OHS approaches to this particular workplace hazard have been ineffectual as the primary remedy under OHS law is education. Educating workplace bullies does not, in APESMA's experience, diminish the injury or detriment suffered by the victim.

The unique nature of workplace bullying and harassment as an OHS issue needs to be acknowledged and accommodated under OHS law.

In all other respects we repeat the submissions of the ACTU under this heading.

PROSECUTIONS

We refer to and repeat the submissions of the ACTU under this heading.

OTHER ISSUES

We refer to and repeat the submissions of the ACTU under this heading.

Submission of APESMA 2008