

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

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## SPECIFIC COMMENTS

### **Legislative Approach:**

A hierarchical regulatory structure should be applied where objectives are established in the enabling legislation which form the basis for either a national performance based or principles based technical standard to be developed. A national board should be established consisting of representatives of each of the relevant agencies, industry and the community tasked with the development of a nationally consistent technical standard for OHS in Australia.

A successful example of this structure exists for building regulations. Building regulations in each state and territory have enabling legislation that adopts a national technical standard, the Building Code of Australia, which is developed by the Australian Building Codes Board (ABCB). The ABCB receives funding from each represented government. Variations between states and territories are accommodated via appendixes though the intention is to remove variations with time.

The importance of express objectives should not be understated in a system of performance based or principles based regulation. In the absence of prescriptive requirements it is essential that the broad parameters that apply to the legislation are clearly stated. This assists all stakeholders in understanding their obligations and duties. In addition it is advantageous from a perspective of policy development where there are clear boundaries for regulation and therefore a reduced potential for regulation creep.

### **Scope, Application & Definitions:**

It would be too difficult to distinguish, and would create an indefensible anomaly, where some occupants are afforded a higher level of health and safety than others. Members of the public should be included. There is an increasing trend for workplaces to provide tours for the public to observe industrial / commercial processes (wineries, chocolate factories etc.). A consistent standard of care should apply to all persons at the workplace.

With respect to property protection there would seem to be no obvious public policy objective to be gained by requiring an employer to protect their own property within their curtilage of responsibility where there is no adverse effect on health or safety. The protection of their

property is a commercial risk that is (or should be) understood by the employer. There is no apparent reason for government regulatory intervention to require a person to protect their own property. A satisfactory outcome may be achieved by the transfer of the risk to an insurer.

On the issue of protection of the environment, it is considered that there is substantial duplication with local government and specific environmental protection legislation. A better arrangement may be to provide a mandatory notification requirement to the relevant local government authority where an increase in the handling of dangerous goods (for example) is proposed. This would ensure a higher degree of integration and line of authority with respect to environmental protection.

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

The concept of a chain of command is commendable. To achieve enhanced transparency and accountability it is recommended that an employer be required to register the chain of command with the government where responsibility is delegated to a person other than the owner of the business. To delegate authority, the delegate should have predetermined competencies to be able to perform the function. This would also be the case where there are multiple duty holders.

### **‘Reasonably Practicable’ & Risk Management:**

If the concept of ‘reasonably practicable’ is to be retained we would make the following comments;

- The concept suggests that a ‘capacity to pay’ is a consideration in that it may be considered practicable for a particular measure to be implemented because a particular national employer (for example) has a capacity to pay for the measure. Conversely a new small business may not have the same capacity to pay for the same measure. This would seem to set up a system for differing standards of health and safety at different workplaces. Whatever the outcome it is imperative that an understanding of whether cost is a consideration is expressly stated.
- Examples should be provided which illustrate acceptable and unacceptable outcomes.

While difficult to reduce to a prescriptive requirement the level of detail to be provided in the risk assessment should be proportional to the level of risk presented. For example a qualitative discussion of low level risks may be adequate though quantification should be provided for higher levels of risk.

An express principle should be provided in the model legislation that a uniform level of risk is required for all workers unless special categories exist. A special category may need to be established for emergency service personnel (fire fighters, police, SES etc) if a higher level of risk is accepted because it is in the communities interest to permit these workers to enter

a dangerous environment. If this is the case a clear statement to that effect should be provided.

In addition it should be clearly established that the level of risk is for each individual and that an average level of health and safety at the workplace cannot be employed which may allow for the exposure of individuals to an unacceptable level of risk.

## **Other Issues:**

The Australian Institute of Building Surveyors (AIBS) is a national organisation representing the interests of building surveyors. Building surveyors are responsible for giving effect to building regulations in each of the states and territories which govern the design and construction of buildings including the installation of systems for the health and safety of occupants. These regulations (to varying degrees) also establish mandatory maintenance requirements for health and safety systems in buildings which apply for the life of the premises. The majority of people are employed within buildings.

The specific tasks undertaken by the building surveyor include;

- Fire safety generally (ranging from minor commercial outlets through to special fire hazards associated with process and storage complexes)
- Safe and equitable access to and within the building including fall prevention
- Systems of ventilation and lighting
- Suitable amenities and facilities for employees
- Services and equipment for emergency services response

In our opinion there appears to be some resistance by governments to provide a whole of government approach to OHS which integrates building regulations. OHS legislation seems to be dependent on the delivery of adequate health and safety systems in the built environment though there is limited interaction on policy development. This is to the detriment of the community where a significant level of duplication exists and the threat of regulatory failure arises where gaps in authority and control arise. This has become a more pronounced issue since performance / principled based regulations have emerged.

Reforms that we are seeking to include in the model OHS legislation include;

1. A deeming mechanism where it is not necessary for an employer to identify hazards and undertake a risk assessment of built environment issues where a building and occupancy permit have been issued in the relevant jurisdiction. The level of health and safety provided in an approved building is deemed to be an acceptable risk mitigation mechanism. This reform would remove the duplication of process and the potential for inconsistent outcomes between authorities,

2. Introducing a requirement in model OHS legislation whereby a change in the built environment requires a building permit (and subsequent occupancy permit). This statutory obligation already exists in building regulations (therefore no new regulatory burden) though this reform would improve the nexus between the overlapping regulatory requirements. Unfortunately approval from one authority (such as a dangerous goods inspectorate) may produce a result which contradicts the legislative requirement established under the building regulations. Not only is this inconvenient, it may also result in an unsafe work environment. The presence of an express requirement in OHS legislation would result in a more cohesive and predictable process for the public and relevant authorities.

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