

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

SPECIFIC COMMENTS

Background:

NatRoad is the national road transporters' association. Its members range from owner drivers through to multi national logistics providers.

A core value of NatRoad is national uniformity of regulation. Another core value is the promotion of safety and compliance.

Therefore, NatRoad strongly supports this national review into model occupational health and safety laws. It has many members who operate regularly between different Australian jurisdictions.

However, NatRoad believes it would be preferable for there to be a single regulatory national authority, with administration and enforcement carried out through the jurisdictions. This would avoid the difficulty in road freight transport laws, where reforms agreed through the National Transport Commission are not implemented consistently by the jurisdictions.

Inconsistent OH&S laws only serve to hinder business and safety, as with other lack of uniformity in transport and business regulation.

Legislative Approach:

NatRoad supports the current three tier model in Australian OH&S law ie principal OH&S Acts with general duties, underpinned by regulations with detailed provisions, and methods to achieve compliance in codes of practice and other guidance materials.

We are a strong supporter of legislation that assists both small and large business to improve their management of OH&S.

For Q1 and Q2, we believe that the breakup is not critical, so long as all provisions are consistent.

Scope, Application & Definitions:

We believe that the general system of OH&S outlined above is preferable to industry specific legislation, with any requirements for particular industries included in regulations. This method would avoid confusion about responsibilities under different legislation (Q 7-9).

General OH&S duties of care should be tied to the conduct of work rather than the workplace as the latter definition has created legal difficulties (Q10). However, because of the difficulties evident in current divergence between jurisdictions, the scope of OH&S should be restricted to workers and specified 3rd parties such as visitors, rather than the general public (Q11).

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

NatRoad endorses chain of responsibility legislation in road transport law, but care must be taken with other commercial relationships such as sub-contracting, which is prevalent in the trucking industry. If OH&S coverage was provided for all subcontracting arrangements, insurance premiums would rise dramatically, and this would flow onto the price of goods which are carried by road.

NatRoad believes that self employed persons should be responsible for their OH&S. They are in the best position to determine their compliance with OH&S.

OH&S laws should be based on a general duty limited by what is reasonable, foreseeable, controllable and realistic.

A workplace injury or illness should not in and of itself constitute a breach of the legal duty - a key element of the duty (and the establishment of a breach) should be that a person did not act reasonably in all of the circumstances. Extreme, absolute or impossible duties should not be imposed under OH&S laws.

Employers should be responsible for their duties under OH&S laws, to the extent that is reasonably practical. These duties should be owed to employees, and visitors where applicable (Q23 & 24) .

The duties of employees should be specified, as for employers (Q25). NatRoad supports a duty on employees and others at a place of work to not only co-operate, but to obey all reasonable health and safety instruction provided by an employer. Furthermore employees and others at a place of work must have an obligation to adhere to safe working procedures. Employers should be able to discipline, including dismiss for serious breaches, an employee who fails to fulfil such obligation.

‘Reasonably Practicable’ & Risk Management:

NatRoad believes that it would be beneficial to include a test of “reasonably practicable” in the model OH&S act. Otherwise it can be subject to differing judicial interpretation (Q37).

NatRoad has argued previously that it is an undeniable fact that every working environment must pose, even if remote or slight, risk.

It is essential that employers have realistic obligations imposed ie that are fully capable of compliance.

Consultation, Participation and Representation:

NatRoad’s members have workforces which are scattered because of the nature of their work. Consultation, committees and other requirements must take account of this restriction.

Members report that they deal with this challenge by various methods such as emails, mobile phone calls and notes in work rooms. In this framework, consultation, participation and representation can and does take place.

Regulator Functions, Powers & Accountability:

The underpinning of the OH&S regime involves the appointment of OH&S regulators who administer their duties impartially.(Q79) Accountability is important, as is the ability to fairly challenge their decisions.

These regulators should provide enforcement and prosecution policies (Q80).

Compliance & Enforcement:

NatRoad's view is that the focus of OH&S should be to encourage compliance, rather than a punitive regime of prosecutions.

We believe that there should be a focus on risk management and collaboration with key stakeholders such as employees.

Therefore, NatRoad supports the implementation of non-mandatory advisory notices to assist business in complying with the objectives of OH&S laws. If there is no satisfactory response to these notices, improvement notices, prohibition notices or infringement notices could be used as appropriate.

Prosecutions:

Q110 &111: We believe that the only party entitled to launch an OH&S prosecution should be OH& S authorities who are trained professionals.

NatRoad has previously objected to the NSW Government about awarding a third party, such as a union, a moiety of the proceeds of a penalty applied by a court. Such a party should not receive financial incentive for launching a "safety" based prosecution.

In practice in one jurisdiction in particular, it often does not matter what systems a business had in place to prevent the incident, prima facie evidence is established for a prosecution based on the occurrence of the incident.

A defendant who is now essentially guilty of an offence (on the basis that an incident occurred), must mount a defence to "prove" that they discharged their obligations. Furthermore it is undeniable that under these circumstances it is impossible for a small to medium sized businesses to fund a defence. In these circumstances, the only successful defence that a small to medium sized business might have against an OH&S prosecution is a lack of resources to investigate every incident.

Other Issues:

NatRoad supports the endorsement of Codes of Practice as evidence to demonstrate that general duties and risk management duties have been discharged. The ability, in particular for small and medium sized business, to access reliable guidance on how to comply is highly desirable (Q144).