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# THIESS Submission

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## **National Review into Model Occupational Health and Safety Laws**

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Group Safety Manager

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## Preamble

In response to the Australian Government National Review into Model Occupational Health and Safety Issues Paper May 2008, I submit the following comment on behalf of Thiess Pty Ltd.

Michael Boyle

Group Safety Manager

**Thiess Pty Ltd**

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# 1 Introduction

- 1.1 Thiess is a large and diversified construction and contract mining company. Our operations directly and indirectly employ some 24,000 people across all Australian states, Indonesia, India and New Zealand.
- 1.2 This year Thiess celebrates 75 years in business and we currently operate over 200 distinct projects (workplaces). These include mining operations, civil projects, utilities management, waste management, remediation building and process construction. Our employee numbers range from several thousand in our largest mining and civil projects to less than ten at some of our smaller waste transfer operations. Our clients include many major Australian companies along with federal and state government agencies.
- 1.3 This submission draws from our broad experience and history, and we are willing to participate in this review beyond the public comment period.

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## 2 Structure of Thiess Comment

Our submission is presented in several sections:

- General Comments about the Review and Australian OHS Legislation
- General Comments on Risk
- General Comments on Practicality

2.1 In our submission, we have chosen not to respond directly to each of the 152 questions raised in the issues paper, however we reference the appropriate chapter where relevant. We have done this because we expect the details of our company's position to be well represented through submissions by industry associations in which we hold membership. We particularly endorse the submission of the Minerals Council of Australia, who through the National Mine Safety Framework process has been working on OHS harmonisation for over five years. As such, we believe they represent a considered and mature position.

2.2 Thiess is also represented on other industry association submissions, however the tight submission deadline does not allow us to fully review and endorse these submissions as being completely compatible with our own company position.

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### 3 General Comments about the Review and Australian OHS Legislation (Reference Chapter 1 and Terms of Reference)

- 3.1 **Thiess Operates in all States and Territories and across many Industry Sectors:** As a company operating in all Australian States and Territories and in many industry sectors (e.g. roads, building, mining, rail, etc), Thiess is particularly interested in how the model legislation will avoid unnecessary duplication and prevent an unnecessary regulatory burden on businesses without compromising health and safety. In our experience, the complexity introduced from safety legislation that covers multiple jurisdictions and industry sectors, unless well managed, has the potential to detract from and dilute the activities that actually deliver superior health and safety performance in our workplaces.
- 3.2 **Beyond Harmonisation to Uniformity:** We also believe that the review should look beyond harmonisation to national consistency. We particularly endorse item 1.2 of the Intergovernmental Agreement to formalise cooperation between the Commonwealth, State and Territory governments on the harmonisation of OHS legislation. The Parties agree that OHS harmonisation requires national uniformity of the OHS legislative framework (comprised of a model OHS Act, supported by model OHS Regulations and model Codes of Practice) complemented by a nationally consistent approach to compliance and enforcement policy. The health and safety legislation and regulatory approaches used in the United Kingdom can be considered as an example of this approach.
- 3.3 **Cornerstone Processes:** Toward this endpoint, we believe that there is a significant opportunity to set a legislative model that recognises the validity of common cornerstone OHS processes (such as risk management and employee participation and representation) across all jurisdictions.
- 3.4 **On Strict Liability:** We believe that the absolute duties (strict liability) presently imposed in NSW and Queensland have no place in a national legislative model, and that any prosecution under national model OHS laws must bear the burden of proof. We also note that in NSW the situation is further exacerbated by judicial interpretation of legislation, the appeal processes and the costs of challenging a prosecution.
- 3.5 **Previous Industry Commission Inquiry:** We believe that the review will benefit from further study of the recommendations arising from the Industry Commission's *Inquiry into Work: Health & Safety, Report 47, 1995*, and in particular recommendations 2,3,4,5,6 8, 9,10,11, 27 and 28.
- 3.6 **On Occupational Health and Safety Complexity (Terms of Reference Item 11a):** Thiess looks forward to viewing and cross-referencing information that the expert panel will prepare covering areas of best practice, common practice and inconsistency in OHS laws across Australian Jurisdictions. The work required to achieve this outcome will be considerable and will

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provide an understanding of the complexities of working across multiple jurisdictions. However, while the panel review specifically excludes considering specific OHS regulations, codes of practice and guidelines, this is precisely the level of legislation that our organisation has to consider while conducting our operations. As outlined in the Industry Commission review referenced above (paragraph 3.5), there are over 100 pages of health and safety legislation references that must be considered in providing an Australia-wide health and safety management process. Each reference leads to many other pages of detail and includes related acts (e.g. rail and electrical safety), regulations, codes of practice, guidelines and Australian Standards. We manage this complexity by planning effectively, applying process-based standards and constantly reviewing. This is fortunate to employ a number of ex-inspectors and other regulator professionals. Their frank input is that no person or organisation can possibly be across all of this detail all of the time, and that the only way to manage this complexity is to apply a set of health and safety principles to guide duty holders and regulators. These principles should cover the concepts of prevention, equity, participation, co-operation and acceptance of responsibility. It is also our belief that risk management as a process-based standard must be a key part of model OHS laws. We further suggest that addressing unnecessary complexity be a principle for the entire review process.

3.7 **Clear Understanding:** We are interested in further discussion of Chapter 3, particularly the process of ensuring that rights, responsibilities and duties are clearly understood. In our experience, the more clearly we state our expectations for people working in our organisation, the fewer people are injured in our workplaces. Achieving high performance requires 'organisational discipline' for the employer, all stakeholders, line managers, employees and visitors.

3.8 **Health and Safety Legislation Provides Minimum Standards:** In our organisation, we have achieved sustained periods of high health and safety performance independent of the underlying health and safety legislation. We believe that excellence in workplace health and safety is not delivered by legislation, but rather that legislation establishes minimum standards and principles. While we accept that legislation is a key input that must be considered, our company's excellence is a product of our own expectations, systems, leadership, risk management strategies and continuous improvement philosophy. Beyond this, client requirements and other drivers, such as accreditation from the Office of the Federal Safety Commissioner, systems certification and Workers Compensation costs, are also significant contributors. An existing and ongoing concern for an organisation as diverse as Thiess is legislation that fails to recognise these multiple drivers for achieving health and safety excellence and that adds unnecessary complexity. This results from an imbalance in the legislative structure between general duties, prescription, performance and process-based standards (chapter 1). We believe that, apart from size, the relative performance and sophistication of a company's OHS management processes will most strongly determine the impact of legislative change on that company. Committed organisations use legislative

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requirements as a minimum standard and, where practicable, work at higher levels. Prescription through amended legislation will not help the better-performing organisations and may, in fact, lead to a misdirection of resources if flexibility decreases and the evolution of new solutions is stifled.

3.9 **Well Designed Processes can meet Multiple Requirements:** At Thiess, we have demonstrated that multiple requirements of any Australian act (e.g. consultation, hazard identification and risk management) can be achieved through relatively few well-designed processes: one activity can meet multiple legislative requirements (specific and general duty). Pre-start meetings are an example of this, meeting both employee consultation requirements and risk management requirements. This concept could be usefully explored in any amendments aimed at small to medium enterprises so that they are not overwhelmed with a long list of legislative ‘must do’ activities. If the model legislation becomes more prescriptive about required OHS activities, then it may make OHS requirements clearly distinct from general operational requirements, discouraging their integration into normal operations. We believe that a hallmark of best-practice organisations is that there is a ‘right’ way of working that is safe for people, safe for the environment, doesn’t damage equipment and doesn’t cause process or other loss.

We manage multiple legislative requirements by:

- Providing and maintaining safe plant and equipment
- Providing a workplace where risks are identified and well managed
- Providing and maintaining planning processes to provide safe systems of work
- Ensuring that employees are consulted, instructed, supervised and fit for duty

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## 4 General Comments on Risk (Chapter 4)

Thiess believes that:

4.1 Risk is unavoidable but can be managed:

- Risks are present with all human activities (consider activities ranging from driving a car to walking on any surface to operating an industrial tower crane)
- It is impossible to totally eliminate risk—employers can only reduce risks to as low a level as reasonably possible (the well-known and widely accepted ALARP principle)
- The joint Australian/New Zealand Standard *AS/NZS 4360:2004 Risk Management* provides some excellent direction when it comes to the management of risk:
  - *“It involves establishing an appropriate infrastructure and culture and applying a logical and systematic method of establishing the context, identifying, analysing, evaluating, treating, monitoring and communicating risks associated with any activity, function or process in a way that will enable organizations to minimize losses and maximize gains”*
  - *“Decisions concerning whether risk treatment is required may be based on operational, technical, financial, legal, social, environmental, humanitarian or other criteria. The criteria should reflect the context defined above. These often depend on an organization's internal policies, goals and objectives and the interests of stakeholders”*
  - *“Selecting the most appropriate option involves balancing the costs of implementing each option against the benefits derived from it. In general, the cost of managing risks needs to be commensurate with the benefits obtained. When making such cost versus benefit judgements the context should be taken into account. It is important to consider all direct and indirect costs and benefits whether tangible or intangible, and measured in financial or other terms”*
  - *AS/NZS 4360 continues: “Decisions should take account of the need to consider carefully rare but severe risks that may warrant risk treatment actions that are not justifiable on strictly economic grounds. Legal and social responsibility requirements may override simple financial cost benefit analysis”*

4.2 Thiess has, over the years, spent considerable time, effort and resources in developing an industry leading-practice approach to managing risk within our business. The approach adopted is tightly based on the concepts articulated in *AS4804 OH&S Management Systems (2001)*, *AS4801 OH&S Management Systems- Specifications with guidance for use (2001)* and *AS/NZS 4360 Risk Management 2004*

4.3 Under the ‘mixed economy’ economic environment existing in contemporary Australia, it is an economic and political reality that businesses and enterprises flourish by applying the principle of ‘Risk-Benefit Analysis’.

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4.4 Employers, controllers of premises, designers, suppliers and manufacturers must, however, be provided with clear, concise and unambiguous prescriptions of responsibilities and accountabilities for them to methodically fulfil their duties as legislated.

4.5 The NSW Legislative experience also demonstrates that it is not practicable to set down definitive prescriptions for eliminating risk. The situation is further qualified in the *NSW OH&S Regulations 2001*:

*Meaning of “control” of risks*

*(1) For the purposes of this Regulation, an obligation to control a risk to health or safety (in any case in which the elimination of the risk is not reasonably practicable) is a obligation to take the following measures (in the order specified) to minimise the risk to the lowest level reasonably practicable:*

*(a) firstly, substituting the hazard giving rise to the risk with a hazard that gives rise to a lesser risk,*

*(b) secondly, isolating the hazard from the person put at risk,*

*(c) thirdly, minimising the risk by engineering means,*

*(d) fourthly, minimising the risk by administrative means (for example, by adopting safe working practices or providing appropriate training, instruction or information),*

*(e) fifthly, using personal protective equipment.*

*(2) A combination of the above measures is required to be taken to minimise the risk to the lowest level reasonably practicable if no single measure is sufficient for that purpose.*

*(3) Any obligation in this Regulation to control a risk by taking specific risk control measures, or by taking specific risk control measures in a particular order, is in addition to the obligations referred to in subclauses (1) and (2).*

4.6 Thiess has a comprehensive Risk Management approach that embraces a Risk Control Hierarchy based upon principles articulated in *AS/NZS 4360, AS 4801, AS 4804* and the *NSW OH&S Regulation*, among others.

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## 5 General Comment on Reasonably Practicable (Chapter 4)

Thiess believes that:

- 5.1 **On Legislative Requirements to Eliminate Risk:** Where legislation uses absolute terms such as ‘to eliminate... risk’ or ‘to secure the health, safety and welfare’, the intent is definitive. Nor does such and Act’s statement of objects contain the qualification “so far as is practicable”. Parliament’s intention, plainly enough, was that the imperative to establish safe workplaces was absolute, not qualified.

The absolute meaning of the word ‘practicable’ is appropriate when considering the intention of any model act:

- Practicable: ‘capable of being put into practice, done or effected, especially with the available means or with reason or prudence’. (*The Macquarie Dictionary* 1995)
- Practicable: ‘that [which] may be done or effected; feasible; passable’ (*The Standard English Dictionary* 1981)

Under the definitions presented, the term ‘practicable’ is suited for application with the systems of Risk Management as articulated within *AS/NZS 4360*, *AS 4801*, *AS 4804*, the *NSW OH&S Regulation 2001*, the *ILO Convention 155* and the *Thiess system of Risk Management: identification, assessment and control*.

- 5.2 **Risk can not be Completely Eliminated:** As no risk can ever be completely eliminated, ‘all risks shall be assessed and have control priorities assigned, based on the established level of risk... all risks identified through the assessment process as requiring control, shall be controlled through a preferred order of control methods (commonly referred to as a hierarchy), based on reasonable practicability... elimination shall be the first control method to be considered’ - *AS 4801 (2001)*.

- 5.3 **The Relationship between Risk Management and Reasonably Practicable:** We believe that an organisation can demonstrate that it has met ‘reasonably practicable’ provision of OHS legislation through the rigorous and practical application of consultative risk management techniques for all OHS decision making. We believe that model OHS legislation should support a risk management-based approach and suggest that this same process be identified as a mechanism to define ‘reasonable practical’.

- 5.4 **Issue Resolution:** If a worker believes the duties that he/she is to perform represent a threat to health and safety, he/she should consult firstly the supervisor, secondly the Consultative Committee or the H&S Representative, then finally, if still not satisfied, request an inspection by a WorkSafe Inspector. Thiess currently conducts Job Safety Analyses (incorporating Risk Assessment) as part of its Risk Management System. This approach has given employees confidence in the inherent safety of work procedures and job functions. Where a real risk from

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malfunctioning plant and equipment, uncontrolled substances or inappropriate work practices compromises health and safety of any person, Thiess expects that such plant and equipment, substances or work practices will not be used until they can be reviewed and all risks addressed to an acceptable level.

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## 6 Conclusion

- Within our organisation, continuous improvement of our health and safety management approach is a value. While existing and new legislative requirements are minimum standards that will always be met, they are not our drivers for improvement. Our major driver is ensuring that our workplaces are incident and injury free, and we have found that this approach also makes good business sense. Simply, if we can run our operations with this intent, the discipline required to do so results in better project performance.
- Our particular concern is that the national harmonisation of OHS laws delivers practical outcomes and does not impede our opportunities to further improve our approach.
- We believe that the current multiple jurisdictions in Australia adds unnecessary complexity and that addressing unnecessary complexity be a principle for the entire review process.
- We believe that any amendments should continue to recognise the usefulness of risk management approaches and accept that when they are rigorously applied in a consultative way, they become a mechanism to manage the concept of what is 'reasonably practical.'
- If Australian model OHS laws are to achieve required multiple outcomes, then the issues of practicability and foreseeability must be adequately addressed. This requires more than the assignation of definitions and prescriptive clauses; it needs to clearly communicate the responsibilities and concepts associated with Due Diligence and Duty of Care to designers, manufacturers, suppliers, employers, controllers of workplaces, employees, contractors and others at workplaces.
- Sustainable excellence in occupational health and safety is achieved through the efforts of all these parties. While the employer does have a significant role in establishing and maintaining an OH&S system, the responsibility associated with its operation, long-term effectiveness and the scope to which it is embraced is shared by every stakeholder, as indicated above.
- Ultimately, OHS laws are about delivering healthier and safer workplaces for Australian men and woman. We believe that the review must adhere to this paramount principle and the review should not involve regulator and other stakeholder horse-trading in reaching its recommendations.
- As an organisation with well developed Safety, Health and Environmental processes working across many industry sectors, we believe that we are in a good position to provide further constructive input to model laws.