

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

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## SPECIFIC COMMENTS

### **Legislative Approach:**

The Association of Tourist and Heritage Rail Australia (ATHRA) submits that the development of a National Act for OH&S be undertaken, rather than a Model OH&S Act. The Model Act approach was used for a National Rail Safety system and this has failed. This is due to conflicts within the State's OH&S legislative frameworks, thus resulting in inefficiencies once again. As well, individual rail safety regulators want to do their own thing.

A National OH&S Act should allow for the provision of Codes of Practices. The needs of industrial heritage; rail, machinery, marine where prescriptive processes were often implemented in the past, should be accommodated for to enable appropriate understanding and application by volunteers / operators.

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

A National OH&S Act should include provision for specialist knowledge areas, eg railways, mining etc with co-ordination between any specialist regulator that works with the National OH&S Act rather than have an OH&S style Act within their own legislation.

The application of an OH&S Act should include the extension of the general duties of care to the public attending any heritage or like rail operation.

Legacy practices involved in the operation of steam locomotives, boilers, old rail rollingstock etc are often overlooked or inappropriately included with new equipment practices. As a result they do not cover the specialities required to operate this type of equipment. This problem can be addressed by the development of Codes of Practices which contain the necessary vital past information for future operators.

The submitter Association of Tourist and Heritage Rail Australia (ATHRA) has been in liaison with the Office of the ASCC and the National Historical Machinery Association in the development of Codes of Practice for the development of an appropriate code of practice for operation of boilers. ATHRA is working closely with the Rail Industry Safety and Standards Board in the development of a Boiler code for the inspection and maintenance of steam locomotive boilers.

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

Many small community based not-for-profit groups managed and operated by volunteers do not see themselves as in an Employer/Employee relationship due to the way the OH&S Acts are expressed. This needs to be considered in any National Act. However, if any Act is made too onerous and punitive for volunteer managers, they will not participate in community volunteer groups, something that is becoming apparent to ATHRA through its membership.

A National OH&S Act should provide for visitors themselves to have to a duty of care when visiting a workplace -rail heritage operator premises and vehicles. That is, to be responsible for their own behaviour, follow instructions and be responsible for the behaviour of people under their control – children.

The concept of having an appointed person responsible for OH&S at the workplace results in other managers and workers considering that they don't have to worry about OH&S themselves, the appointed person is doing it. It should be a shared responsibility of all people involved within the organisation and with positive duties on any Committee of Management or its officers. For volunteer based organisations, it can be difficult to find a person willing to take on individual responsibility for OH&S within that organisation.

### **'Reasonably Practicable' & Risk Management:**

The National Model Rail Safety Bill was prepared around the concept of "So Far as is Reasonably Practicable" and this is supported by ATHRA. The Rail Safety Bill requires the preparation of very detailed Risk Assessments and Risk Registers to meet a complex set of regulations. This has frustrated many volunteer bodies due to the level of detail and documentation required. It has been made harder by the lack of skill and knowledge in undertaking such extensive exercises, in particular by rural based community groups.

ATHRA submits that the nature of the regulatory framework be changed to a style that is easier for the smaller community groups to comply with. Drawing on the proven concepts that are the basis of the Australian building industry and the Building Code of Australia, ATHRA proposes a "deemed to satisfy" or a Code of Practice model is adopted for use by non-main line tourist and heritage railway and tramway operators. The Code of Practice would embody the Risks that need to be considered by the rail operator.

### **Consultation, Participation and Representation:**

Any consultation, participation and representation system in a National OH&S Act should allow for the informal procedures that occur within small workplaces and volunteer managed and operated community bodies. A one-size-fits-all prescriptive approach would be cumbersome and in-efficient.

### **Regulator Functions, Powers & Accountability:**

As legacy workplace equipment, eg boilers, heritage machinery, steam locomotives has become redundant there has been a loss of knowledge and specialist skill amongst regulator staff. The allowance for the development of national Codes of Practice within any National OH&S Act is important. Such Codes need to be developed on a consultative basis with the industry concerned.

In the Rail Safety arena, there have been significant problems with the rail knowledge of some the auditors involved in the statutory audit process. They have been unable to appreciate the limited resources of voluntary community based rail organisations. These auditors tend to apply the same principles as they would to a commercial operation operating a suburban or freight railway. The methods of having any decisions reviewed have been cumbersome. A National OH&S Act should allow for simple review processes where a decision or recommendation is disputed. Again the development of Codes Practices for heritage operators will assist in this process.

## Compliance & Enforcement:

The current hierarchy of enforcement methods, with advice and persuasion being the most important step for community based voluntary organisations.

## Prosecutions:

### Volunteer Exemption

The Model Rail Safety Bill prepared by the National Transport Commission contains the following clause regarding volunteer exemption from prosecution.

- (10) An officer –
  - (a) of a body corporate (including a body corporate representing the Crown); or
  - (b) of a partnership or unincorporated body or association-who is a volunteer is not liable to be prosecuted under this section for anything done or not done by him or her as a volunteer.
  
- (11) In this section-  
“**volunteer**” means a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses).”

ATHRA was instrumental in the inclusion of this clause in the Model Bill, which follows Clause 44(5) of the Victorian OH&S Act. Without this clause, ATHRA believes that many potential Volunteer Officers with good professional qualifications and experience to lead and positively promote safety will not make themselves available to serve on Boards or undertake supervisory roles. This is likely to result in the Board’s or Safety Committees positions being filled with less qualified volunteers who may not concern themselves as much about the possibility of being prosecuted. There is the possibility, that no one will make themselves available for volunteer Board or supervisory positions and closure of a community based rail heritage facility may result.

ATHRA is very concerned about the safety of our Member’s operations. We are of the view that the inclusion of this style of clause in a National Act will benefit safety within the rail heritage sector. The loss of important community functions could result and the importance of volunteering be diminished.

## Other Issues:

### General

At present most Australian rail heritage operators are regulated by State Rail Safety Regulators. The same legislation is applied to them as it is for a suburban or freight operations. For many smaller operators, who operate on independent or isolated rail lines, this is an oppressive approach and is impeding their development – too much paperwork for little gain. This one-size-fits-all approach is resulting in frustration and resentment for these small not-for-profit community based volunteer managed groups, who have operated safely in the past with few incidents. This approach is neither practicable or feasible, a more tailored or scale approach would make it more appropriate.

## **Codes of Practice**

ATHRA sees the development of Codes of Practices through a consultative process with industry as the most appropriate way to ensure the survival of Australian industrial and rail heritage. A National Model OH&S Act would enable this and overcome the difficulties of different “rules” in different states. The approval of these codes should however have in-built review systems and not require Parliamentary approval, but be done so by regulation.

## **Notification of Incidents and Reporting**

Currently regulated railways have a requirement to report specified incidents and general data. However there has been little, if any, feedback to the heritage rail operators in particular about the results of this reporting in their sector.

## **Mutual Recognition – Competency Assessment**

One of the areas included within the National Model Rail Safety Bill was one of competency training and assessment, requiring the use of Registered Training Organisations. While this system may be applicable for general industry it is a expensive and awkward way to ensure competency for community volunteer based organisations who are often in remote rural areas. Investigations have shown that only a very few RTO's have the necessary skills and expertise to undertake training and competency assessment in heritage rail operations, the skill residing in the operators themselves. The cost of using these RTO's can be prohibitive. ATHRA has recommended that competency assessment be done by relevant “in-house” or experienced industry people who have been trained in this task. Codes of Practice can incorporate the necessary operator training and assessment processes that are required to be undertaken.

## **About the Submitter**

ATHRA was formed in 2004 by the tourist and heritage rail state bodies from around Australia with the aim of providing a national voice for the tourist and heritage rail sector. In many respects the relationship between ATHRA, the state bodies and the rail operators parallels the three-tier governance structure of Australia. At the base level are the tourist and heritage rail groups. These are independent entities, mostly staffed and managed by volunteers, which operate the many tourist and heritage railways and tramways located throughout Australia.

The mid level is the representative bodies that have been established in each state. Throughout Australia these voluntary bodies have the same general objectives of promoting the sector and representing their members' interests to their particular state government and, in more recent times, rail regulator. As the landscape of Australia's rail industry took an increasingly national focus, it became important for the sector to have a national voice of its own and hence the formation of ATHRA, itself also a voluntary organisation, as an overarching national body.

Website: [www.athra.asn.au](http://www.athra.asn.au)