

GROUP TRAINING ASSOCIATION OF VICTORIA (GTA Vic)

National Review into Model OHS Laws

GTA-Vic Background

GTA Vic has been operating since 1985 and is an umbrella organisation representing 23 Victorian member Group Training Companies (GTCs). The companies that form GTA Vic includes industry based group training companies, regionally based metropolitan group training companies, and regionally based rural group training companies.

The core activity of the members of GTA Vic is the employment and vocational training of young people to the levels set out in the Australian Qualification Training Framework. The GTCs forming GTA Vic are especially skilled in working with medium and small businesses which make up the majority of the host employer placements.

In addition to the core activity, Victorian GTCs also deliver services as Registered Training Organisations, Australian Apprenticeship Centres, Job Network Providers, Jobs Pathway Providers to Schools, Community Business Employment Programs, Youth Employment Initiative programs and Structured Workplace Learning programs.

The GTA Vic member companies are autonomous not for profit organisations that look to GTA Vic to provide support and leadership in the areas of advocacy, negotiation and policy setting particularly at the State level.

The combined strengths of the network include the knowledge of:

- host employers (principally small to medium employers),
- the contribution of community, industry and business,
- the processes of government, and
- the operation and delivery of vocational training particularly as it applies in the workplace and in schools.

For the past nine years GTA Vic and its member companies have placed a major emphasis on the development of OHS best practice, and over the past five years have developed guidelines and training programs specific to the Group Training Industry.

Purpose of submission

This submission seeks to promote the contribution being made by Victorian Group Training Companies (GTCs) to the safe placement of apprentices and trainees.

The member companies of GTA Vic are generally the largest employers of apprentices and trainees in Victoria. Approximately 9,000 apprentices and trainees are employed statewide with five companies employing more than 500 apprentices

and trainees and the largest employing more than 1000 apprentices and trainees. It is estimated that GTA Vic members are in contact with some 50,000 employers annually with a significant number of these receiving multiply face to face contacts throughout the year.

As not for profit community based organisations GTCs are accountable for the welfare and pastoral care of individual apprentices and trainees, as well as providing services to host employers, schools and communities. This responsibility enables GTCs to influence communities and employers and to promote and support change.

COMMENTS ON NISSUES PAPER

1. Legislative Approach

Red tape and business compliance are heavy burdens for business. While regulation is necessary in a wide range of areas wherever possibly its application must be of a light touch (as opposed to heavy and complex).

Gta Vic believes that all states and territories should have a commonly labelled Act governing workplace safety. These Acts should also contain an agreed common set of principles and obligations.

The Act should be an enabling instrument with detail kept to a minimum. However issues of substance and matters which may be contentious should be clearly identified and defined in the Act (eg; Duty of Care, Reasonably Practicable) to make misinterpretation or various interpretation impossible.

2. Scope Application and Definitions.

Each state should have only one Act regulating workplace safety for all workplaces based on a nationally agreed model format.

Definition of the workplace should not be complex but must take into account all of the environments in which work may be undertaken and all ways in which workplace activity may affect other parties. This would include responsibility for the general public and go to designers of workplaces, plant and equipment.

Many issues surround the changing nature of work. Technological and structural change, changing demographics, changing social and cultural views are impacting on the nature of work and how it is carried out.

Family friendly workplaces place new requirements on OHS. Women returning to work introduce new requirements for the design of jobs and impact on OHS requirements and attitudes. Retaining older workers in the labour market and enticing retirees to re-enter the workforce pose new issues of OHS. The mobility of the younger workforce and the delaying of career decisions pose new issues in terms of the timing and the amount of OHS training to be invested in employees.

The creating of new technologies and the pace of change is ever increasing and continues to challenge the capacity employers and employees to recognise and act on change in advance of statute and regulation which will always lag behind.

The challenge for a model Act and particularly the supporting regulations and guidance materials is the retention of relevance and currency of language in the face of time and change.

3. Duty of Care

Comparison with other jurisdictions is a key issue for GTA Vic and its members. For some years GTA Vic has been canvassing for an Act which includes include an expanded meaning of “who is the employer” similar to the provisions contained in the Queensland Act.

Section 10 of the Queensland Workplace Health and Safety Act 1995 clearly identifies apprentices and trainees in the employ of GTCs as a distinct class of employee and identifies who the employer is when the apprentice or trainees is with the host employer or with the GTC.

The advantages of this definition are significant for both the GTC and the host employer.

Firstly GTCs are not in a position to implement day to day control of apprentices and trainees placed with host employers. Despite exercising best practice in the placement of an apprentice or trainee, there will always be situations which will be beyond the actual control of the GTC. This will be the case in spite of properly constructed placement agreements and procedures, and the appropriate briefing of apprentices and host employers. The punishment of GTCs for matters over which they have no actual control does not promote best practice and has placed some GTCs in a parlous financial position.

The volunteer Boards of GTCs considered the risk and financial burden associated with this uncertainty as too great to endure. The risk and exposure is often cited as a barrier to attracting the ideal person to be a director of a GTC – why take such a risk when you don’t get paid?

A further consideration is that some host employers mistakenly believe that as long as the GTC is deemed to be the employer that this is some form of a shield. If not a total shield it is perceived as deflecting some of the responsibility and cost away from the host employer when there is an incident or inspection. In this situation the full safety cost message is not reaching the host employer.

In promoting this position GTA Vic is in no way seeking to lessen or change the duty of care required of GTCs and firmly advocates that these responsibilities should be documented at the Group Training Industry level to ensure the application of best practice.

Also the area of overlap in responsibilities between the GTC and the host employer is often grey and ill defined. Clearly this is unsatisfactory for both parties. While this is an issue to be resolved it may best be dealt with in regulation and guidance material.

For these reasons GTA Vic advocates most strongly that the Act be amended to include provisions similar to those contained in the Queensland Act.

All persons at a workplace or affecting a workplace have some duty of care to the other people at the workplace. This principle should be clearly defined in the model Act. It should be defined to a level which makes it clear to any person affecting a workplace what are their rights and responsibilities.

A view often put by employers is that the majority of the Act is about identifying the responsibilities of employers and putting in place requirements which impost on the employer. It is generally recognised that the bulk of employers are good and caring employers and only need to be assisted in the development and maintenance of safe workplaces. However the tenor of OHS legislation is prosecutorial of employers.

Reference to the roles and responsibilities of employees are limited and less pronounced.

It is claimed that this leads to an imbalance in the way that legislation is interpreted and applied.

Clearly employers have the greater capacity to affect and improve workplace safety but employees are critical partners in this process with no less responsibility. Often legislation is seen as empowering employees without making them responsible. The emphasis on the sharing of responsibility needs to be enhanced and given equal prominence with matters of procedure.

4. Reasonably Practicable & Risk Management

In many situations failure is determined on the basis of what is 'practicable'. It is here that difficulty occurs, as frequently this element is not definable or measurable but is determined subjectively or determined post the event. Most employers find the indeterminate nature of "what is practicable" frustrating. Indeed employers sometimes see it as being vexatious and providing the regulator with a forever changing club with which to bash employers.

While a word such as 'practicable' is necessary to make the Act manageable, there is not enough supporting work to enable an '*ordinary everyday persons*' understanding of the application of the word. What is the difference between practicable, possible and permissible?

Leaving the concept up to courts to decide is an "after the event" approach which is inconsistent with the general requirement that employers utilise risk management approaches to foresee dangerous situations.

GTA Vic strongly supports the inclusion of a clear and unambiguous definition of reasonably practicable within the model Act.

Because the terms hazard and risk are likely to be required elements for the defining of reasonably practicable they should also be defined in the model act.

5. Consultation Participation & Representation

The nature of OHS requires high levels of awareness by employers and employees. The best levels of awareness cannot be achieved through legislation alone. While legislation is effective in bringing notice to requirements, overly explicit mandating of process and procedures rarely achieves the outcome being sought.

GTA Vic members regularly encounter small and medium sized employers who are unaware of their responsibilities or obligations in this area. Because this sector of industry has limited resources and undergoes frequent change legislation alone is not an effective approach and it is an area where special strategies need to be applied. Therefore it is important that the model Act is cognisant of what is achievable via legislation alone.

The model Act should be flexible in its requirements on the amount and modes of consultation.

The role of representatives is a vexed one for GTA Vic. Because the apprentice and trainee component of our work force is outplaced it is not possible to have designated workgroups or formal representatives for this group of employees based within the GTC structure.

This difficulty is compounded when the apprentice and trainee component of the workforce is the least experienced in the workplace and often only in a particular workplace for a relatively short period. All too frequently there is insufficient life and/or work experience to appoint an apprentice or trainee as a safety representative.

While GTA Vic acknowledges the purpose and value of designated work group and safety representatives it is a model which is not readily applicable to the core activity of our industry. However the ability of GTC apprentices and trainees to participate in host employer representative and consultative groups should be encouraged.

6. Regulatory Functions Power & Accountability

If the regulatory burden is assessed by the volume of material which needs to be understood because it just MIGHT apply to your situation, the burden is enormous. The number of Acts and regulations applying to this area is too large. There has to be an opportunity to rationalise and amalgamate some of the acts and regulations as well as limit their content. The guidance materials are the critical document for the end user. It is a waste of time and effort if the policy which flows down from the Acts

and regs cannot be summarise in the Codes of Conduct thereby limiting what the users need to have, read and apply.

In addition the use of OHS Acts and their powers as industrial relations instruments detracts from the intended benefits of the Act. This is not only a reference to actions in the workplace but also to the processes which cover consultation and policy development. A significant number of employers feel disadvantaged and disempowered in the area of developing and directing policy and its subsequent application.

A model Act must make its misuse, as well as purpose, clear to all users

7. Compliance & Enforcement

Compliance is a big issue for employers especially when it comes to the cost and the relevance of the compliance. This issue can be especially onerous for micro and small business. Where compliance can be included in the cost of doing business it is reasonably argued that those costs are predictable and should be manageable.

However where the costs are not predictable or perniciously imposed there needs to be a mechanism for identifying such situations and where the imposition causes financial risk there needs to be a source of support.

As indicated earlier the volume of regulations and knowledge is of itself a compliance problem. It is great for the consulting industry which it helps maintain but adds to the cost of doing business.

The effectiveness of enforcement will always be impacted by the resources available and the philosophy driving the enforcement. To some extent these are bound up in the policies of incumbent governments.

GTA Vic has long held the view that enforcement alone will not imprint OHS best practice on the minds of employers. Enforcement must be balanced with at least equal parts of reinforcement and support.

Consistency in enforcement is also an issue for employers, however this may not be an issue for the model Act but one of proper preparation and support of inspectors within jurisdictions.

8. Prosecutions

It is unreasonable to represent all OHS offences as criminal offences. The maintenance of some offences in the civil jurisdiction is entirely appropriate especially where what might be considered reasonably practicable is disputed. Equally it is unreasonable that the burden of proof should be different for OHS offences than for other similarly graded offences.

The prospect of criminal proceedings and jail terms has no support within the Group Training Industry. The work of attracting quality directors to serve on the Boards of not for profit organisations is notoriously difficult. Already the exposure of these volunteers is significant without the burden being increased. The repercussions within the Group Training network when industrial man-slaughter was a hot issue were great. There were serious difficulties in getting directors to continue in their role as well as difficulty in finding new directors.

Penalties should be such that they improve practice not act as a disincentive to business development and/or employment creation. The options for more effective penalties should not be confined to concentrating on financial penalties or to simply increasing the amounts. It should be clear that the current amounts are sufficient to get the attention of small to medium sized enterprises providing that the consultation/promotion activities are successful.

Incurring monetary penalties may have a disproportionate impact on small to medium size employers while they may not have the desired impact on larger employers.

It is notable that the Office of Equal Opportunity for Women while operating under a statutory regime does not utilise monetary penalties. They rely on public relations and the naming of poor or failing performers. The use of similar non monetary penalties might be considered in respect of the model Act.

The GTA Vic position is that penalties should be designed to influence behaviour and practice in a way that benefits employers and employees. They should not put an enterprise at risk of bankruptcy. While repeat offenders may require a different approach to first time or inadvertent breaches it is imperative that ALL of the social, economic and personal implications of penalties are considered.

In the case of GTCs, the existing penalties can jeopardise the ongoing operation of the smaller companies and the penalties are certainly of sufficient magnitude that they gain the attention of all of the GTCs.

9. Other Issues

Need for a National Framework The need for a National Framework is most commonly advocated by the large business sector on the basis that it makes doing business easier. It is difficult to argue with this position. It could be argued that, given the globalisation of markets (increased national focus) and the increasing mobility of the workforce, a national framework of understanding is essential for safety, for effective management and for optimal productivity. However a commonly held framework need not necessarily mean centralised (federal) regulation.

The potential for financial benefit to dominate this argument is a concern. It is clear that the level of benefits for injured workers vary across the systems and if a cheaper national system was predicated on the lowest level of support for injured workers, society may gain very little even if business gains a lot. GTA Vic suggests that more work needs to be done in this area to demonstrate the cost benefits available and if there is cost shifting where do the costs land?

However an even greater fear would be the potential remoteness of a federal system and the difficulty of embracing local difference in the operation of business even though they are in the same industry. For the past eight years GTA Vic has been expanding its dialogue with the VWA to the benefit of both parties. It is difficult to imagine this level of contact and progress for a State Association within a Federal System.

Changing Nature of Employment According to the press Australia leads the world in the fractionalisation and casualisation of employment.

The issue of outsourcing and on hire clearly provide opportunity for employers and employees to become confused as to whom the responsible party at a particular point in time and to who is one accountable and for what?

There are issues of employers not wishing to invest in training transitory employees as well as the problem of employees not participating in the workplace long enough to undergo training. Equally critical is the assessment of the training outcomes for highly mobile workers. Are their requirements the same and do they learn and retain knowledge in the same way as more permanent employees?

GTA Vic has vital interests in this area and considers that a model Act should refer to training needs of employers and employees.

New and Emerging Risks New and emerging risk will be a constant. Regulators are usually aware of new and emerging risks only after they have emerged (and are not so new).

While there are risks that can be identified now as new and emerging how long they remain so varies and not all will require the same level of response.

Employers and employees need to be trained to anticipate risk as well as respond to identified risks. The predominant training to date is in the area of recognised risk and best practice. Encouraging employers and employees to deal with the 'what might be' will be challenging but is essential. However as well as awareness there needs to be accessible and responsive mechanisms available which enable the development of what if solutions and the promotion of those solutions.

The GTA Vic advocates that the model Act considers this aspect as part of its response to training issues.