

11 July 2007

Attention: National OHS Review Secretariat
Department of Education, Employment and Workplace Relations

Dear Sir / Madam

MPMSAA SUBMISSION RESPONDING TO THE “REVIEW OF THE NATIONAL OCCUPATIONAL HEALTH AND SAFETY LAWS”

Thank you for the opportunity to contribute to the review of the National Occupational Health and Safety Laws.

MPMSAA welcomes the commitment of the Government to review the operation of the review.

This submission is made by Master Plumbers' and Mechanical Services Association of Australia. (MPMSAA). The impact on our employer association is heavily based on information from our member base.

Yours faithfully,

C.J. Harnath
National Workplace Relations Advisor

INTRODUCTION

MPMSAA welcomes this opportunity to contribute to the National Review into Model Occupational Health and Safety Laws. This review is an opportunity to achieve significant gains toward the objective of more harmonised and effective occupational health and safety legislation.

The failure to harmonise OHS regulation across Australian jurisdictions means that industry must manage in an environment that :

- is unnecessarily complex, especially for employers that operate across jurisdictions.
- imposes costs on employers, in terms of the resources required to understand and comply with regulation and keep abreast of developments in regulation.
- will restrict the implementation and achievement of safety initiatives and practices within workplaces

DUTIES NEED TO BE CLEAR AND BALANCED

Prosecution of workplace parties for failure to achieve safety outcomes would be a poor outcome compared to continuously improving systems of workplace safety that identify and remove workplace hazards and risks. To be effective, OHS regulation must focus on injury prevention and the practical and achievable management of risks. This requires the application of a statutory, general OHS 'duty of care' based on :

- 1. Reasonable care.**
- 2. Identification of hazards.**
- 3. Implementation of reasonably practicable measures to eliminate or control hazards/risks.**

DUTIES OF CARE

The Victorian *Occupational Health and Safety Act 2004* imposes duties on employers in relation to independent contractors over whom they have control. Control concepts can play a useful role in OHS legislation if they result in a clear and reasonable understanding of what control means.

A workable and practical definition of control, which has the effect of placing responsibility on the party with actual control of a particular hazard or situation, is to be welcomed. Unfortunately, in some jurisdictions understandings of control have evolved which have had the opposite effect of extending obligations where it is fanciful or unreasonable to impose obligations, or to impose overlapping/multiple obligations. This approach is of concern to MPMSAA.

The model OHS Act should be drafted to streamline rather than expand the number of duty holder categories, thus ensuring that the legislative framework captures all contemporary forms of work but does not extend coverage in ways that create confusion for unintended consequences. Applying a control test (if properly drafted) will assist with this.

WORK RELATIONSHIPS

The duty of care in OHS legislation should be primarily a duty that employers owe in respect of their employees in a particular workplace.

It must however be recognised that it is sometimes appropriate to extend these duties to other parties. OHS legislation has developed various mechanisms to ensure that this occurs. For example, **S 21(3) of the Occupational Health and Safety Act 2004 (Vic)** has been cited as one such mechanism that extends duties to independent contractors engaged by an employer to the extent that the employer exercises control over particular matters.

DUTIES OF EMPLOYERS

The employer's duty of care should extend to 'so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is

safe and without risks to health'. This formulation, or something like it, accords with the core duty that is found in most Australian OHS statutes.

It is important that an employer can be deemed to comply with this overarching duty if they implement specific health and safety measures as required in more specific regulations or codes. In those circumstances, it must be taken that they have met their statutory obligations and they are exposed to no additional legal or compliance risk.

TO WHOM SHOULD THESE DUTIES BE OWED?

This duty of care should be owed to all persons engaged in work at the employer's workplace (eg employee, contractor).

DUTIES OF EMPLOYEES AND OTHERS

Mutual responsibility in the workplace is consistent with modern management practice and procedures and has the potential to lead to improved employer/employee relationships, improved productivity and enhanced OHS performance

In the spirit of mutual responsibility, employees should have responsibility and accountability for their acts, or failure to act.

WORKERS' DUTY OF CARE

Section 25 of the *Occupational Health and Safety Act 2004* (Vic) is an adequate starting point for specifying employee's duties of care.

The model Act should ensure that employees must :

- Take reasonable care of their own health and safety.
- Take reasonable care of the health and safety of persons who may be affected by the employee's actions or omissions at a workplace.
- Co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under the Act or the regulations.

- Not intentionally or recklessly interfere or misuse anything provided at the workplace in the interests of health, safety and welfare.
- Attend for work in a state of health ready to perform their duties.
- Where an employee fails to adhere to safety instructions, and particularly where an employee, by their actions or omissions, is responsible for creating a risk to health and safety, an employer requires the discretion to undertake performance management or terminate an employee's employment where that is appropriate.
- Unreasonable double jeopardy, where an employer can act to meet their health and safety obligations, and then be subject to litigation by aggrieved employees when they do so, must be removed from the system of employment regulation.

SHOULD THE MODEL OHS ACT INCLUDE DUTIES OF CARE FOR PERSONS WHO ARE NOT PERFORMING WORK (E.G. VISITORS TO A WORKPLACE, MEMBERS OF THE PUBLIC)?

The model Act should include duties of care for 'other persons'. Such as visitors and members of the public.

DO CURRENT PROVISIONS FOR PERSONS IN CONTROL OF A WORKPLACE (AND PLANT AND SUBSTANCES) CLEARLY EXPRESS WHO OWES A DUTY, TO WHOM, AND UNDER WHAT CIRCUMSTANCES THE DUTY IS OWED?

The current legal responsibility on persons in control is unsatisfactory. A realistic and genuine understanding of persons in control must be imposed by definition in the model Act.

ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

All parties throughout the supply chain should bear reasonable and realistic duty of care, with the aim of preventing and eliminating safety hazards and risks before they arise.

PRACTICABILITY AND RISK MANAGEMENT

The over-riding focus of a workable OHS system at the national, jurisdictional and workplace level must be the prevention of injuries and the control risk in a practical and achievable manner.

Regulation that is practical will emphasise outcomes above process. It will assist duty holders to improve OHS performance and encourage safety initiatives tailored to individual industries or businesses. It will set compliance standards which are practical and realistic.

MPMSAA believes that neither parliaments nor courts should impose extreme, absolute or impossible duties on employers or designers of workplace environments, plant or equipment in meeting performance-based obligations. To do so, undermines confidence in the law, and leads to unfair and unsustainable legal liabilities. It also does nothing to assist in the creation of safer workplaces.

CONCEPT OF REASONABLY PRACTICABLE

Clear legislative guidance should exist on what is meant by reasonable, practicable and foreseeable and capable of being achieved, economically and practically. An overall, common-sense approach and examination of the workplace safety management system should determine what was reasonable in all of the circumstances.

SHOULD A TEST OF REASONABLY PRACTICABLE BE INCLUDED IN THE MODEL OHS ACT?

MPMSAA believes that the inclusion of a definite test of 'reasonably practicable' in the model OHS Act is essential to ensure that an employer has clarity and surety on their duty and how it will be applied.

RISK MANAGEMENT

Effective OHS management should be integrated into business activities. Businesses need, on an ongoing basis, to proactively meet their duties of care –

including by conducting risk assessments, hazard identification and eliminating risks and hazards to workplace safety.

MPMSAA believes that the model Act should support a systematic approach to workplace health and safety, but should not impose an obligation to implement any one particular OHS management system.

Making workplaces safer starts and finishes with workplace culture and by employers and employees initiating practical steps that reduce or eliminate risk; properly designed regulation can assist the workplace parties in this process.

DUTY TO CONSULT

MPMSAA believes that involving employees, and where appropriate their representatives, in health and safety programmes encourages commitment to the achievement of business OHS goals and an awareness of shared responsibilities. Employees can provide some of the most practical and constructive suggestions on OHS risks and the management of those risks.

Whilst MPMSAA supports provisions for consultation in the model OHS Act, the method of consultation should be determined at a workplace level. And should not be mandatory

RIGHT OF ENTRY

If a model OHS Act were to contain right of entry powers, the exercise of those powers should only be possible by persons who contain valid permits issued by OHS authorities.

It is appropriate that the issuing of such permits should only occur when applicants have met:

- a fit and proper person test.
- are appropriately trained in OHS matters to enable them to genuinely consult with employees and others on safety issues.

ISSUE RESOLUTION

The model Act may appropriately provide for the making of regulations specifying model dispute resolution procedures, which would apply as a default provision where the parties have not developed their own dispute resolution mechanism.

PROTECTION FROM VICTIMISATION AND DISCRIMINATION

MPMSAA is of the view that, overall, existing provisions that are present in workplace relations and anti-discrimination cover this area, in most circumstances; provide protections against discriminatory treatment and victimisation.

ROLE AND FUNCTIONS OF REGULATORS

A model Act should provide for the establishment, functions, powers and accountability of regulators. The provisions in the model Act should be supported with subsidiary regulations.

INSPECTORS

In relation to inspectors, the model OHS Act should provide for:

- The capacity of an OHS authority to appoint suitably qualified inspectors to act on behalf of the OHS regulator.
- The general powers of entry and powers exercisable upon entry.
- A comprehensive list of inspector's powers should be provided for to ensure sufficient accountability and transparency. The purposes for which the powers may be used should be set out in the model OHS Act and they should be specified.
- They may include powers such as:
 - The powers to require the production of documents to take samples.
 - The powers to issue notices (eg prohibition, improvement, non-disturbance) to persons and to require the name and address of a person.

- Inspectors decisions should be liable to an internal review to promote transparency in OHS decision making.

HIERARCHY OF ENFORCEMENT MEASURES

It is recommended an appropriate hierarchy of enforcement measures common amongst a range of regulatory areas be adopted as follows starting from the lowest and gradually escalating to the highest forms of enforcement measures):

- Informal discussions and advice on how to resolve safety risks.
- Improvement notices.
- Prohibition notices.
- Enforceable undertakings.
- Enforcing civil penalty offences.
- Enforcing criminal penalty offences.

MUTUAL RECOGNITION

It is not clear what role mutual recognition would play in a system that is genuinely nationally consistent. There may be scope for mutual recognition in relation to permits and licensing arrangements. Whether these need to be addressed in the model Act is not clear. These may be matters more appropriately addressed in subordinate legislation.