

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

SPECIFIC COMMENTS

Scope, Application & Definitions:

Q9. *Should the model OSH Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?*

The Public Transport Authority of Western Australia (PTA) is presently governed by two pieces of primary safety legislation: the *Occupational Safety and Health Act (1984)* and the *Rail Safety Act (1998)*. We are thus regulated by both WorkSafe WA and the Office of Rail Safety and often encounter cross-sector issues.

To date, PTA has managed this conflict by taking initiative in our relationship with our regulators and establishing agreements for which regulator will be involved in various types of incidents and issues. The regulators also have a memorandum of understanding in place. However, these arrangements hold no legal force and, should either regulator so desire, we can be required to deal with two regulatory bodies regarding a single issue. This most commonly occurs in the case of high profile incidents, leading to confusion and inefficient use of time and resources amongst all three agencies.

As such, the PTA submits that the model OSH Act should contain provisions for coordination between different safety regulators. Provisions should include:

- Requirement for regulators to establish clear agreements regarding cross-sector arrangements, including identifying which regulator will act as the 'lead agency' in given situations (for example, rail issues/incidents);
- Requirement for organisations to deal with a single regulator on safety issues/incidents and for that lead agency to be responsible for communicating with other relevant regulatory bodies; and
- General aim to reduce bureaucracy and duplication of communication between all parties.

The advantages of this being included in the Act will be:

- Clarity of roles and responsibilities for both the regulators and organisations;
- Less miscommunication and confusion; and
- Reduced layers of bureaucracy and duplication of effort, resulting in more efficient processes and thus more time spent by the organisation and regulators dealing with the real safety issue.

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

Q16. *Should the model OSH Act include a 'control' test or definition? If so, why and what should it be?*

Some clarity around the 'control' issue would be useful – either in the form of a test or definition.

Q18. *Should control be able to be delegated or relinquished? If so, in what circumstances and what should be the legal effect of doing so?*

Q19. *Should the model OSH Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?*

Where there is a close relationship with a small contractor, 'control' should be clear. However, where a contractor is a major entity in their own right there is often a lesser ability to exert 'control' on the part of the principal. In these cases the contractor should not be able to relinquish part or all of their responsibilities by referring back to the principal.

'Reasonably Practicable' & Risk Management:

Q37. *Should a test of "reasonably practicable" be included in the model OSH Act?*

A test for reasonable practicability should be included in the model Act, in line with current definitions in the Western Australian and Victorian Acts. This test allows for consistency of interpretation by the courts, as well as making the Act and its requirements more accessible for line managers.

As a practical example, at the PTA we find it to be a very useful test when conducting consultative risk workshops where there are safety/employee representatives and line managers present who otherwise have difficulty trying to comprehend such terminology.

A definition such as the one in the current WA legislation is readily understandable by most people who are otherwise not regularly exposed to such terms (and in many cases would not believe "practicable" was even a word). It also provides a common point of reference for everyone involved, so that time is spent dealing with the safety issue at hand, rather than debating the meaning of "reasonably practicable".

Consultation, Participation and Representation:

Q59. *Should the model OSH Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?*

Right of entry provisions should **not** be included in the model OSH Act. The model Act should provide for tiered resolution of issues processes, including consultation processes with elected safety & health representatives, safety & health committees, provisions for issuing of provisional improvement notices, regulatory inspectors, etc. With these processes in place there is no need for unions to have specific rights of entry, as they will be involved in relevant consultation mechanisms and there will already be multiple avenues for resolution of safety issues and breaches.

Providing right of entry to union officials, who have interests other than just safety, provides potential for abuse and use of the right of entry to gain access to the organisation under the pretense of safety. More importantly, it undermines the development of effective consultative mechanisms between the employer and elected safety & health representatives by providing a 'short circuit' around these mechanisms, which is not in the long term interests of organisations attempting to develop a positive, consultative safety culture. Regulators should be appropriately resourced so that they can investigate suspected safety breaches, rather than attempting to divulge this responsibility to special interest groups such as unions.

Were the right of entry provision included in the model Act (although unnecessary), there must be strict requirements for consulting with the employer upon arrival so that appropriate induction processes can be followed to ensure the safety of the visitor/s. It undermines, rather than promotes, safety for anyone to have carte blanche right of entry to a potentially hazardous workplace.

Regulator Functions, Powers & Accountability:

Q83. Should the advisory and enforcement functions of an OSH regulator be separated? If so, how and why?

There is currently a reluctance among regulators to provide advice to organisations regarding whether the implementation of certain control measures is likely to satisfy their legal requirements. For example, if a prohibition or improvement notice is issued, the regulator will not provide comment on whether proposed solutions are suitable, they will simply issue the notice and remove it (or not) after a solution has been implemented. This is presumably because the regulators themselves are concerned about their potential liability should they provide comment on the suitability of a control measure which is later found to be inadequate.

Regulators should be able to engage in meaningful discussion with organisations about identified issues, including providing advice on the likely suitability of proposed solutions and industry practice, without fear of being held responsible for this advice. This may mean having separate advisory and enforcement functions, or other provisions in the Act enabling regulators to engage in such collaborative discussion without absolving the organisation of ultimate responsibility for the outcome.

However, if there is any sort of advisory function to exist, it is also the responsibility of the regulator to ensure they have appropriately skilled and trained staff so that advice can be given and supported in the same way organisations are responsible for ensuring quality decisions.

Prosecutions:

Q110. Who should be entitled to commence criminal proceedings?

Authority to commence criminal proceedings should be limited to inspectors, the regulator, the Minister and/or the DPP. Unions or “authorised persons” should not be able to commence proceedings as, unlike the other groups, safety is not their only (or even necessarily their primary) interest or function, which provides potential for abuse of power and conflict of interest (both real and perceived).

Other Issues:

Due to the potential for prosecution, there has been a trend in recent years for organisations not to complete transparent incident investigations into significant incidents and, in many cases, to find ways to prevent these from being discoverable. This works against the basic goal of improving safety standards, both within the organisation involved and in the broader industry, by preventing the sharing of investigation findings.

The Queensland *Transport Infrastructure Act (1994)* includes a provision to avoid this negative outcome and work in the interests of improving safety for the future. It provides that:

- where an investigation was conducted for the sole purpose of enhancing rail safety; and
- the report is confined to matters of safety significance

it is to not be used for any other purpose.

Reports released under The Act are inadmissible as evidence in any civil or criminal proceedings. This enables organisations to conduct thorough, transparent investigations which will ultimately benefit the organisation and wider industry, through knowledge-sharing, without concerns that their responsible approach to identifying all causal and contributing factors will be used against them in a prosecution. Without this protection, the advice given to employees will be to keep silent during any investigation and organisations will endeavour to bury investigations under legal professional privilege, rather than openly sharing important safety outcomes.

In the interests of demonstrating a genuine commitment to continuous improvement, rather than pushing a punitive agenda, it is recommended that a similar provision also be made in the model OSH Act. This would facilitate the development of positive safety cultures in responsible organisations without limiting the potential for prosecution of less scrupulous operators.