



AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Modern Workplace: Safer Workplace – An Industry Blueprint for Improving OHS in Australia

In April 2005, after two years of industry consultation, research and analysis, the Australian Chamber of Commerce and Industry released Australia's first employer-initiated national Blueprint on Occupational Health and Safety (OHS) law and policy. The Blueprint, titled *Modern Workplace: Safer Workplace*, sends a clear message to industry, governments and OHS regulators - that workplaces will only be safer if there is a culture of mutual and shared responsibility throughout the supply chain and by all stakeholders.

A more enlightened approach is needed rather than the current, one-sided 'employer blame-game'. The current system of OHS regulation is seriously deficient and in some cases even hinders good outcomes by removing the incentive to invest in OHS or by making it difficult to comply. In particular, the burden of OHS red tape on small and medium business needs to be reduced.

As we enter the mid years of this decade, a national industry Blueprint on OHS in Australia is timely.

Whilst Australia's OHS record is improving, it can and should be better as should the quality of OHS regulation. The human and economic costs and consequences of fatalities, injury and disease in the workplace, like the costs of road trauma, are profound. Regulatory design can compound, or ameliorate the problem.

At a national level, the Australian Government is establishing a new, national tripartite body on OHS policy - the Australian Safety and Compensation Commission. The Productivity Commission has released a report on national OHS frameworks. The government recently ratified an international treaty developed by the International Labour Organisation on OHS and will soon implement a program of OHS advisors for small and medium businesses.

At a State and Territory level, governments have the principal role for OHS regulation of the private sector. In most jurisdictions new OHS laws are proposed or have recently been introduced. Recent general trends across jurisdictions have been to broaden legal duties, create new offences, increase penalties, extend liability to individuals and adopt a heavier hand to compliance activities. In just the five years to 2003, apart from the nine governments and multiple regulators that make OHS laws affecting employers in Australia, there were

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L E A D I N G A U S T R A L I A N B U S I N E S S

more than a dozen principal OHS Acts, 166 amending OHS legislative instruments and 1,796 changes to rights and obligations of employers and employees on workplace safety.

At an international level, the International Labour Organisation is currently debating the form of a new instrument on OHS that would be capable of adoption by governments and form part of domestic OHS law, as well as global activity by trade unions in dealing with multinational enterprises.

For industry, OHS issues and regulations are mainstream considerations in the day to day operation of businesses. There is a high level of industry awareness of OHS issues and the business case for adopting an OHS culture of ongoing improvement is powerful and increasingly understood. Equally, there is serious disquiet amongst employers (especially small and medium enterprises) with current OHS law and systems and the direction in which they are going.

ACCI's 2004 Pre-Election Survey of Australian business showed that:

- OHS regulations and inspections rated fourth and fifth highest in the level of business concern with government regulation;
- over 60 per cent of employers were concerned at the level of OHS regulation;
- 50.8 per cent of employers regarded workplace health and safety inspections as a major or moderate problem;
- workers' compensation was the dominant workplace issue of concern; and
- union OHS inspections caused greater concern amongst employers than industrial action.

THE NEED FOR A NATIONAL OHS BLUEPRINT

The *Modern Workplace: Safer Workplace* Blueprint has been driven by three imperatives:

- the business community must take leadership on OHS issues;
- the current system of OHS law and policy needs a comprehensive overhaul; and
- most importantly, powerful common interests exist between employers and employees in achieving safer workplaces.

It is wrong to leave important issues of law and policy affecting the welfare of employers and employees up to governments, politicians and regulators alone, or to be captured by them.

Its development coincided with ACCI's support for the tripartite National Occupational Health and Safety Commission's *National OHS Strategy*. That Strategy, also adopted by all Australian governments (Commonwealth, State and Territory) and the ACTU, set out goals and targets for a significant and sustained reduction in the level of fatalities and injuries in Australian workplaces by 2012. Those targets cannot be achieved without the direct participation of industry and all parties in the supply chain. The ACCI OHS Blueprint concludes that this also requires a framework of laws and their administration that is sympathetic to those goals.

MESSAGES TO GOVERNMENTS

As if excessive quantity and frequency of change in OHS regulation is not enough, the quality of OHS regulation is poor.

The Blueprint outlines these deficiencies not because employers want to avoid their proper role and responsibilities for occupational health and safety. Indeed the opposite is the case.

Workplaces will only be safer if there is a culture of mutual and shared responsibility throughout the supply chain and by all stakeholders.

If workplaces are to become safer then a more enlightened approach is needed rather than a one-sided 'employer blame-game'. The current system of OHS regulation is seriously deficient and in some cases even hinders good outcomes by removing the incentive to invest in OHS or by making it difficult to comply. In particular, the burden of OHS red tape on small and medium business needs to be reduced.

If an employer is guilty of an OHS breach no matter what they do, then where is the incentive to do more?

If an employer is liable for a safety breach arising from a manufacturing defect in plant that they did not know about, where then is the incentive for the manufacturer or importer to get it right?

If an employer is liable for a safety breach arising from an employee not working in the way they have been trained then where is the incentive for employees to take OHS training seriously?

OHS laws which make employers liable no matter what they do, undermine a culture of shared responsibility.

MESSAGES TO INDUSTRY

ACCI's OHS Blueprint is much more than a criticism of the shortcomings of OHS law and regulation.

It is as much directed to industry as it is to governments.

Business owners and executives from the top down need to engage in OHS issues.

OHS is a core business activity in the modern management of workplaces. Australian law requires employers and employees, from the smallest to the largest, to take active steps to make workplaces safer.

Good safety records benefit business. They can be undone unless commitment by all parties to safer workplaces is ongoing. There is a powerful business case for industry to develop a strong and ongoing culture of safety and prevention.

The management of risk is needed at all levels – even where the elimination of all risk may be beyond a particular employer. The OHS Blueprint urges industry of all sizes and capacities to develop safety management plans according to their size and capacity.

RESTORING BALANCE TO OHS LAWS

There is a lack of balance in some existing OHS legislation and court decisions.

The trend across jurisdictions has been to broaden legal duties beyond reasonable limits, increase penalties, extend liability to individuals and seek to punish rather than prevent.

Modern OHS legislation is generally understood as based on the ‘Robens model’ of duty of care, named after Lord Robens who authored a landmark report in the United Kingdom in the early 1970s. In his original report Lord Robens said:

“As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control.”

It is disappointing to see that the interpretation of Australian law has moved away from this intended and commonsense principle.

Over the past decade some OHS laws have gradually imposed extreme or excessive obligations on employers. This concept of duties of care based on what is ‘reasonable and practical’ has been distorted which has caused a serious decline in confidence amongst Australian employers with the way that OHS is regulated.

As a result, new and more balanced statements of the standard of duty of care are required.

There are some signs that authorities are becoming aware of this problem. Two decisions by the High Court in March and April 2005, although not specifically in the context of OHS legislation, are encouraging.

They suggest that OHS liability at common law has gone too far and that individual and shared responsibilities must be factored back into the duty of care.

ANALOGIES WITH TORT LAW REFORM

In one sense these are not wholly surprising developments. OHS laws have historically been based on the same legal foundation as public liability laws – the common law concept of negligence in tort law and a duty of care based on what is reasonably foreseeable.

Just as tort (that is, negligence) laws got out of hand and created major public liability problems in recent years, OHS laws are now, for similar reasons, imposing duties on employers that are unreasonable.

Some court decisions and legislative approaches portray OHS laws as strict liability each time a workplace injury occurs, yet (unlike workers' compensation laws) OHS laws are still meant to be fault-based.

The most glaring examples of these deficiencies are in New South Wales.

The November 2004 Comparative Report of OHS Systems in Australia says that:

“Under NSW OHS legislative provisions there is an absolute requirement on duty holders to maintain a working environment that is safe and without risks. The duty is not limited by a ‘as far as is practical’ requirement.”

In applying these laws, in 1999 the Full Bench of NSW IRC said:

“The duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances.... Under s15(1) the obligation of the employer is “to ensure” the health, safety and welfare of employees at work. There is no warrant for limiting the detriments to safety contemplated by that provision, to those which are reasonably foreseeable..... the terms of s15(1) specify that the obligation under that section is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety.”

In an earlier case a single judge in New South Wales said:

“The Act was designed to protect against human errors including inadvertence, inattention, haste and even foolish disregard of personal safety as well as foreseeable technical risks in industry.”

In a recent case in May 2005, the same NSW tribunal imposed a penalty of \$175,000 on a bank for an OHS breach arising from a prosecution not by the government agency but by a trade union. The incident was the act of a bandit driving a vehicle over the footpath into the bank in a robbery. For that, the employer was guilty of an OHS breach. To add insult to injury, the tribunal awarded half of the fine to be paid to the union (over \$90,000), and declared that the union could use the monies for any lawful purpose it wished.

As they have started to do with public liability laws, governments and the courts need to rein in the excesses of OHS laws when they impose unreal liabilities.

Employers accept a reasonable and practical OHS duty of care – but not its expansion into the unknowable, uncontrollable or unforeseeable.

Employers should not be liable for conduct of others that cannot be foreseen, cannot be controlled or cannot be known by them.

Some of Australia's OHS laws and court decisions suggest that employers are being held liable out of convenience or retribution – irrespective of the facts or commonsense.

THE BLUEPRINT'S VISION AND OUTCOMES

The Blueprint outlines a Vision for an improved OHS system.

“Occupational Health and Safety policies and systems that support employers, employees and all those in the supply chain to develop cultures and attitudes, and accept responsibilities, that achieve safer places of work and safer methods of working so that Australian workplaces are free from death, injury and disease.”

It seeks to achieve the following Outcomes:

- Significant and sustained reduction in fatalities and injuries;
- Reduced human and economic costs;
- Increased awareness, communication and co-operation as the driver of cultural change;
- Reasonable, balanced and practical regulation that contributes to a world class OHS system and performance; and
- Safer communities.

TWENTY CONCLUSIONS AND RECOMMENDATIONS

The twenty Conclusions and Recommendations reached in the Blueprint are:

- Workplace culture drives outcomes more effectively than regulation;
- Mutual responsibilities exist but should not be delegated to others;
- Active and ongoing OHS management plans and corporate leadership is required;
- There is a role for governments and regulation but only where intervention drives improved outcomes;
- Australia's OHS performance is improving but can and should be better;
- Commitment throughout the supply chain is needed, including early intervention through workplace design;
- The focus should be on risk management, not risk elimination where that is unachievable;
- The current system of regulation is seriously deficient;
- Complex regulation is self-defeating and removes the incentive to invest in better OHS outcomes;
- The duty of care based on reasonableness and foreseeability has been distorted in some jurisdictions into impossible or unreal duties of care;
- Specific measures, such as a business advisors program, are needed to make OHS regulation workable for small and medium businesses;

- Alternative criteria for assessing the duty of care, such as compliance with a safety management system, should be pursued;
- National consistency of regulation is a desirable goal, whether or not there are national laws;
- State and Territory governments have a crucial role to play if OHS regulation in the private sector is to be improved;
- OHS communication activities by governments should be nationally co-ordinated;
- An imbalance exists in current enforcement and compliance practices. The focus is on prosecution of the few instead of prevention amongst the many;
- Alternative penalty options, such as enforceable undertakings, should be introduced;
- Proposals for new offences of industrial manslaughter breach fundamental principles of criminal responsibility and should not be pursued;
- Safety awareness should be built into community education; and
- Investment in OHS training needs to be increased.

THE BLUEPRINT AND SMALL BUSINESS

The majority of Australian employers are small and medium businesses and almost half of employees are employed in these enterprises. Yet many employers, especially small and medium businesses, who want to make their workplaces safer do not have the resources, expertise or assistance that will help make this happen.

There is an excessive growth of OHS regulation and red-tape. Many employers, especially small and medium businesses, find OHS laws and regulations to be complex, bureaucratic, difficult to understand, and almost impossible to implement effectively. In some cases they are not practically possible to deliver.

In launching the OHS Blueprint, ACCI Director and Victorian small business owner Owen Brown OAM said:

“As a small business person I know that OHS issues must be taken seriously. As important as they are, the reality is that they are just one of many issues that business owners need to manage every day. All parties in the supply chain must play their part. Unless employees, unless contractors, unless manufacturers and unless designers meet their obligations then small business cannot alone manage all OHS issues. And unless governments put in place sensible and balanced laws then small employers are lost in the sea of OHS red tape and compliance costs.”

Whilst businesses with significant OHS skills and resources need to be allowed to apply appropriate common systems across the nation, the OHS system must also be sympathetically crafted to the special needs of businesses with lower level skills or resources.

To achieve improved OHS performance in the SME sector, initiatives must be developed which provide:

- meaningful guidance materials;
- a reduced level of regulation;
- improved quality of regulation where it is needed;
- targeted workplace assistance; and
- face-to-face advice.

In 2004 ACCI published and released nationally a tool box for small business in the ACCI *Small Business Safety Solutions* package. This tool box is being supplemented by training programs conducted through business and employer organisations, much of which is directed to small and medium employers.

In addition, the Blueprint recommends additional measures in the SME sector such as:

- a program of workplace visits, follow-up advice and practical guidance and information on how smaller employers and their staff can understand their rights and responsibilities; and
- legal recognition of a safety management system that deals in a more certain way with issues of both employer and employee liability in small business.

OHS TRAINING AND EDUCATION

The OHS Blueprint highlights the importance of OHS communication and awareness.

Improving awareness and workplace communication requires industry training. In addition, the Blueprint suggests that there be community-based safety education from an early age, preferably in the schooling system. This is a shortcoming that if remedied could have big spin-offs for the community as a whole.

If school-age children are taught basic principles about safety – such as about how to climb a ladder or about the correct way to lift – at an early age, then those habits will be brought into the home and into the workplace. Fewer personal injuries will mean fewer medical costs, less pressure on hospitals, lower legal expenses and less pressure on insurance.

Parents have a role in this. As the High Court said in its April 2005 judgment, just like a workplace – there are no risk free dwelling houses.

CONCLUSION

Whilst ACCI and employer organisations have had well crafted OHS policies for many years, the *Modern Workplace: Safer Workplace* Blueprint puts a contemporary implementation plan to those policies and sits alongside ACCI's two other ten year Blueprints on Workplace Relations and Taxation - a clear indication of the importance that Australia's employer bodies now attach to OHS issues.



It is plain speaking, constructive and forward looking. Its messages are directed at industry and directed at governments. To both parties, the Blueprint acknowledges improvements, identifies failures and makes recommendations for improvement.

Through the Blueprint, Australia's employer bodies are calling for a fundamental re-think by governments about OHS law and policy.

The power and uniqueness of the *Modern Workplace: Safer Workplace* Blueprint is that it is a collective plan by Australia's thirty-six State and Territory chambers of commerce and leading national industry organisations across all industry sectors. Consistent with one of the key messages of the Blueprint – that OHS cultures require leadership from the top of organisations – it was adopted by employer bodies at the highest level - Presidents and Chief Executives.

The task ahead is to communicate the key messages of the Blueprint throughout industry and the broader community, to mobilise industry around its Recommendations and Conclusions and to translate its vision into Australian law and industry practice.

The Blueprint will be supported by further specific initiatives, publications and activities by ACCI and employer bodies over the coming months.

A copy of the OHS Blueprint and its summary pamphlet can be obtained from the ACCI web site www.acci.asn.au or an ACCI-affiliated employer organisation.