



OHS Harmonisation – ACCI's Perspective

As a consequence of Australia's federal system of government, established in 1901, we currently have nine separate occupational health and safety (OHS) jurisdictions comprising around 60 OHS legislative instruments, over 80 OHS related pieces of regulation and 260 approved codes of practice.

Employers operating in more than one state or territory are required to comply with this maze of disparate OHS legislation, with the inconsistencies across jurisdictions adding substantially to the cost of doing business and serving as an impediment to creating and maintaining safe workplaces.

This problem was acknowledged by the Council of Australian Governments (COAG) in 2006 when it agreed to address six priority cross-jurisdictional 'hot spot' areas where overlapping and inconsistent regulatory regimes are impeding economic activity, one of which is OHS. In the context of a global economic downturn, such reforms that can boost productivity are imperative.

The Commonwealth, State and Territory Governments subsequently signed an Inter-Governmental Agreement (IGA) for Regulatory and Operational Reform in OHS and then in 2008 commissioned a National Review into Model OHS Laws. The report's 233 recommendations were considered by the council comprising each of Australia's Workplace Relations Ministers, which accepted the majority, but not all, of the Review Panel's recommendations.

The harmonisation of OHS legislation will be achieved via the adoption by all OHS jurisdictions of a 'model' OHS Act and regulations, thereby providing for consistent OHS legislation across the country. Notionally at least, this should reduce the overlap and inconsistency of OHS regulation across jurisdictions, and therefore could potentially significantly cut the total OHS compliance burden for employers operating in more than one jurisdiction.

However, harmonisation of legislation is not of itself the solution to the compliance burden problem, but rather it will be the final content and quality of the model legislation and the approach to its implementation and enforcement that will be the critical determinants as to whether or not productivity gains are in fact realised in practice. The ultimate objective should be to put in place a national framework of regulation that reflects OHS best practice, rather than just a negotiated compromise.

From an employer perspective there are both a number of positives and areas of concern arising from the Workplace Relations Ministers' Council's (WRMC) recommendations for a model OHS Act, and naturally perspectives about such positives and concerns will vary from business to business dependant upon in which state or territory they are based and whether or not their business operates in more than one jurisdiction.

Businesses around the country were relieved when WRMC decided that the two aspects of the New South Wales OHS system that undermine fundamental legal principles and processes, the union right to prosecute OHS offences and a reverse onus of proof for breaches of OHS duties, would not be part of the national model OHS Act. Appropriately, under the model Act, only an official who is acting in the course of a public office or duty will be able to bring about a prosecution and the prosecution will bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.

However, there are also a number of concerns held by the Australian Chamber of Commerce and Industry (ACCI) with respect to the proposed model legislation, most of which, it should be noted, are peripheral to the achievement of better safety outcomes but rather are linked to other agendas.

A chief concern is the potential for OHS issues to be used inappropriately as an industrial relations tool under the model Act, in aspects such as issue resolution, union right of entry, and the power of health and safety representatives to direct employees to cease work.

These concerns are also held by the Western Australian Government which was unable to have the issues addressed to their satisfaction under the WRMC voting rules that provide for a decision to be carried if supported by a two-thirds majority of its members, rather than by unanimous agreement. The Western Australian Government continues to seek further dialogue with its jurisdictional counterparts in order to have these issues resolved. At a time when job creation and economic growth are so critical, the community as a whole can ill afford unwarranted delays to major projects or business operations in general. OHS laws should never be used as a vehicle to drive other agendas.

In a further concern for employers, under the model OHS Act the maximum fine for corporations for a breach of the primary duty of care will be \$3 million, a massive increase for each jurisdiction with current maximum fines ranging from \$150,000 in Tasmania to \$1.65 million in New South Wales. There has been no justification provided by WRMC for such a large increase in penalties and this issue needs to be revisited and resolved in a transparent manner.

Other aspects of concern to ACCI which are yet to be resolved include the use in the model Act of the term 'business or undertaking' which has the potential to extend OHS to aspects beyond the scope of the workplace and the performance of work, and the introduction of a reverse onus of proof for a person alleged to have engaged in proscribed discriminatory conduct.

The ACTU has launched a campaign Don't Risk Second Rate Safety to promote their view that "the recommendations for model OHS laws put forward by the National Review will undermine existing laws and safety standards and put lives at risk". They are calling for the union right to prosecute and a reverse onus of proof for OHS breaches to be part of the model OHS Act, both of which were rejected outright by the independent National OHS Review Panel and WRMC. The OHS Review Panel found no evidence that either of these aspects of the New South Wales legislation has resulted in improved OHS outcomes when compared with those jurisdictions which do not have such provisions in their OHS Act.

At the Australian Labor Party conference in late July 2009 the Deputy Prime Minister is reported to have told conference delegates that the Federal Government would meet with unions as a matter of urgency to discuss their concerns with the draft model OHS Act. ACCI will also be reaffirming its position on these issues with the Deputy Prime Minister.

The new national tripartite OHS body, Safe Work Australia, is currently coordinating the drafting of the model OHS Act and will also lead the development of model regulations. The model OHS Act and a Regulation Impact Statement examining the costs and benefits of harmonisation will be put out for public comment for a six week period across September and October 2009. This provides a forum to further voice ACCI's concerns outlined above and to have those issues considered and resolved.

However, ACCI is concerned that this timetable is too rushed and is not providing for adequate time for stakeholders to comprehensively consider all of the implications of the model OHS Act and to have their feedback addressed. It would be preferable to push out the December 2009 deadline for WRMC sign-off of the model OHS Act to mid 2010 if it provides for proper consultation and a workable final Act.

Under the terms of the IGA, in late 2011 each OHS jurisdiction is required to repeal their current OHS legislation and adopt the model OHS Act and regulations, which will result in changes to OHS legislation in each jurisdiction. This will be a major change management exercise and therefore employers will need to be provided with information, education and practical assistance to identify the changes that they will need to make to their business operations to ensure compliance under the new OHS Act.

Throughout the harmonisation process it must be remembered that regulation is but one of many levers that can facilitate improved safety in Australian workplaces. Safe workplaces are primarily achieved through the cooperative development of a safety culture, safe work attitudes and safe work practices at all levels of an organisation, leading to a commitment by employers, employees and regulators to incident prevention, risk assessment and risk management.

Such an approach should be underpinned by practical, reasonable regulation that can be understood and complied with by employers and therefore facilitate safer workplaces. This is particularly important for the majority of employers who operate only in one jurisdiction and who will not receive a direct productivity benefit under harmonisation but who will bear the cost of understanding and complying with a new OHS Act and regulations.

In the current economic climate this opportunity to improve productivity while maintaining the focus on workplace safety is too important to get wrong. In order to ensure the benefits are realised there needs to be continued engagement with employers and other stakeholders by WRMC to ensure that the legislation is practical, reasonable and effective. Then employers can focus on the real objective of OHS which is to provide a safe place of work while maintaining a productive and sustainable business.

Australian Chamber of Commerce and Industry
Occupational Health and Safety Unit
Ph: 03 9668 9950