

10 July 2008

Mr R Stewart-Crompton  
Chair  
OHS Review Secretariat  
64N11 GPO Box 9880  
CANBERRA ACT 2601

Business  
Council of  
Australia



Dear Mr Stewart-Crompton

**NATIONAL REVIEW INTO MODEL OHS LAWS**

I refer to your request for submissions in relation to the national OHS laws and the discussion paper released by the panel on 31 May 2008. I am pleased to make a submission on behalf of the Business Council of Australia (BCA). The BCA is an association of Chief Executives of 100 of Australia's leading companies. These companies are major contributors to Australia's economy, employing nearly one million Australians and accounting for over 30 per cent of Australia's exports. Accordingly, the BCA has a substantial interest in the health of Australia's economy and policies that promote sustained growth and prosperity. As part of this, it has long promoted the need for a national framework for OHS regulation.

The BCA believes that the key objective of OHS regulation is to establish an equitable and efficient system that focuses on the prevention of workplace injury and disease, builds business consciousness of the importance of OHS in the workplace and encourages parties to work together to achieve safe and healthy workplaces. The proposed harmonisation of OHS laws being considered by the Review is fundamental to achieving these objectives. One of the major difficulties facing employers who operate nationally is the myriad of different legislative and regulatory requirements existing in the different jurisdictions. Having one set of requirements will not only improve efficiency for both businesses and regulators, but also promote a better understanding of the requirements of the system. The following attachment addresses key issues arising from the discussion paper released by the review panel.

Yours sincerely

A handwritten signature in black ink, which appears to read 'Katie Lahey', written in a cursive style.

**Katie Lahey**

## National Review into Model OHS Laws

### Response of the Business Council of Australia to the Discussion Paper (31 May 2008)

The Business Council of Australia (BCA) is an association of Chief Executives of leading Australian corporations. It was established in 1983 to provide a forum for Australian business leaders to contribute directly to public policy debates to build a better and more prosperous Australian society. These companies are major contributors to Australia's economy, employing nearly one million Australians and accounting for over 30 per cent of Australia's exports. Accordingly, the BCA has a substantial interest in the health of Australia's economy and policies that promote sustained growth and prosperity. As part of this, it has long promoted the need for a national framework for OHS regulation.

We believe that the current complexity across Australian jurisdictions and the often adversarial approach adopted in some jurisdictions compromises the efficiency, equity and potential effectiveness of these laws. We also believe that the proposed harmonisation of OHS laws being considered by the Review is fundamental to achieving a seamless national economy and optimising Australia's capacity for international competitiveness.

#### **Responses to specific questions:**

**Introductory comment:** As a general proposition we consider that the current Victorian legislation provides an appropriate basis for harmonised national legislation. We are confirmed in this view by the fact that recent reviews in other jurisdictions, including NSW, have recommended adoption of key provisions of the Victorian legislation.

We believe that the legislation should be as simple as possible, be based on general duties of care and administered through the normal court system consistent with principles of due process. We also believe that the capacity to initiate prosecutions for OHS offences should be limited to the public authorities.

**Q1-Q4:** The BCA believes that a national legislative approach characterised by simplicity, due process and flexibility is that which will serve Australia best in achieving and maintaining competitiveness. Consistent with this approach, we favour *principles-based standards* with greater detail spelled out in subsidiary legislation, codes of practice and guidance notes.

We also believe it good legislative practice to enunciate within the legislation title and objectives the nature of the legislative intent. In this case we believe it should be *occupational safety and health*.

The key objective of OHS legislation should be to establish an equitable and efficient system that focuses on the prevention of workplace injury and disease, builds business consciousness of the importance of OHS in the workplace and encourages parties to work together to achieve safe and healthy workplaces.

**Q10/12/13/16:** We believe the legislation should establish a series of general duties of care tied to the conduct of work. These duties should be qualified by the fact that the duty-holders should be required to do that which is reasonably practicable to discharge their obligations.

If the general duty of care is appropriately drafted the need to deal with emerging risks or hazards or changing patterns or places of work should be minimised. It follows too that if the general duty of care is established and appropriately qualified, then it is not necessary to make explicit reference to the control factor. Indeed, we have some concern that making specific reference to control may lead to greater complexity and thus be more difficult to administer or adapt to changing circumstances.

**Q20:** Duty-holders should be all persons whose acts or omissions in a work environment have the capacity to affect the health and safety of other persons, including members of the public, subject to the 'qualifier of reasonably practicable'.

**Q27-30:** We do not have any in principle objection to there being a person with specific OHS responsibilities within organisations. However, we understand that in practice in those jurisdictions in which this requirement has applied, it has had little positive benefit. Thus as an additional cost or required input, we see little point in requiring it. Our focus should be on outcomes, rather than specification of inputs. Best practice guidelines provide the capacity to spread beneficial innovations.

**Q37, 39-41:** We support the inclusion of a 'reasonably practicable' qualifier in the model OHS act. In terms of how this should be established, we refer back to our earlier points about control and the general duty.

**Q42-44:** We do not believe that the legislation should incorporate these details. Rather we support the promulgation of best practice guidelines, including risk management practices, as part of the subsidiary or accompanying information packages. This view is based on the desire to keep the core legislation simple and the general duties as clear as possible, recognising that the means of complying with these will change over time.

**Q49-68:** Again we do not believe that the legislation should provide for the specifics of OHS roles and organisations within the legislation, favouring instead a best practice guide and seeking resolution of potential issues at the local level. This is consistent with our objective of trying to ensure a spirit of cooperation and partnership, rather than an adversarial approach to workplace safety and health. However, we also note that the current provisions have worked reasonably effectively in most sectors of the economy and have been exercised with responsibility. The right of workers to cease or refuse work that is unsafe is accepted, consistent with the principle of those who can prevent injury should do so (subject to the reasonable practicability qualifier).

**Q90/91:** We also support the concept of a hierarchy of enforcement measures. These could be contained within the OHS Act to add to their visibility.

**Q106/107/108/109:** The BCA believes strongly that the appropriate jurisdiction for pursuit of breaches of the Act should be the ordinary courts. While a special OHS court might be an attractive proposition in the abstract, we do not believe that there is likely to be sufficient workload to justify establishment of such a body. Similarly, we believe strongly that there should be a right of appeal through the court system. Access to trial by jury should be available where matters are prosecuted by indictment. We also consider that the capacity to initiate prosecutions for OHS offences should be limited to the public authorities.

**Q118:** We believe that much debate about the reverse onus of proof has misrepresented the nature of the issues. In practice, it may be more efficient for the employer to supply the facts and description of the prevailing work situation and processes in question. What is more important is that principles of due process, appropriate jurisdictional settings and rights of appeal apply.

**Q122-124:** It follows from our general principles above that we believe that where an injury or fatality is directly attributable to an act or omission of the officers of the corporation, they should be held accountable for that event, subject to the 'reasonably practicable' qualifier. We support therefore the wording of S144 of the Victorian Act, rather than that of S26 of the NSW Act.