

Business
Council of
Australia



Business Council of Australia

Submission to Safe Work Australia

on the

**Exposure Draft Model Act for Occupational Health and
Safety Discussion Paper**

November 2009

Introduction

The Business Council of Australia (BCA) welcomes the opportunity to present its views to Safe Work Australia on the discussion paper dealing with the Exposure Draft Model Act for Occupational Health and Safety dated September 2009.

The BCA is an association of chief executives of leading Australian corporations with a combined national work force of almost one million people. It was established in 1983 to provide a forum for Australian business leadership to contribute directly to public policy debates in order to build a better and more prosperous Australian society.

The BCA strongly endorses efforts to enhance the effectiveness of occupational health and safety (OHS) legislation and policy and its operation around Australia. The BCA considers that the key objective must be to establish an equitable and efficient system that focuses on the prevention of workplace injury or fatality and encourages businesses and employees to be proactive in that respect.

The BCA supports the efforts of the Council of Australian Governments (COAG) to develop a harmonised national framework based on model legislation which would address the inconsistency of OHS laws across jurisdictions in Australia, whilst ensuring that the more concerning aspects of some of the laws are not duplicated across the country.

A key concern for business is the complexity and inconsistent operation of occupational health and safety legislation across the Australian 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.

Additionally, the BCA has been concerned with some of the prescriptive provisions that have developed in OHS regulation and legislation, and in the direction of legislative changes being adopted by some states. With this in mind, the BCA endorses model legislation where it ensures that:

- General duties of care are administered through the normal court system, consistent with the principles of due process (including an appropriate system of appeals).

- Appropriate and flexible qualifying concepts are included, such as the concepts of 'reasonably practicable' and 'reasonable care', to ensure that the system applies fairly.
- Prosecutorial due process is incorporated, including that prosecutions for alleged breaches under OHS laws can only be brought by the public authorities.

In this regard, the BCA's views made to the National Review into Model OHS Laws in July 2008 continue to apply (this submission is attached for your information).

At a broader level, in the face of the increasing re-regulation of business activity in Australia, the BCA is concerned to ensure that the framing and operation of legislation does not unduly and unnecessarily burden business, create disincentives for businesses to grow and invest, or discourage individuals from taking on senior responsibilities within companies.

This submission does not address the detail of all of the questions raised in the discussion paper on the model Act. In general however, the BCA wishes to support a more principles based approach to the laws, which allows for proportionate responses to alleged misconduct and treats individuals equally under the law. Against this background, the BCA considers it important to raise several high level comments on certain issues raised in the discussion paper.

Legislation should set the framework – not cover the ground

Regulation should be simple, clear, well explained and sensibly enforced.

Too often regulation seeks to prescribe rules for all eventualities, leading to complex and confusing regulation, with higher compliance costs and greater incidence of organisations or businesses unknowingly or unwittingly breaching the law.

Regulations should establish the framework for the performance or conduct that is required.

Many of the questions raised in the discussion paper go to a level of prescription beyond that which the BCA considers is appropriate. The BCA considers that high levels of

prescription create a 'compliance' rather than prevention or outcomes culture. In addition, the higher the degree of prescription, the greater the scope for OHS issues and processes to be abused and for positive proactive actions to be undermined.

For example, the BCA supports the concept that persons conducting a business or undertaking must ensure 'so far as is reasonably practicable' the health and safety of workers. Question 10 asks whether the definition of 'reasonably practicable' should be exhaustive, so that only matters listed can be considered in determining compliance with the duty. A prescriptive approach to the definition of 'reasonably practicable', risks undermining the development of proactive and innovative systems and procedures.

Clause 18(4)(f) requires in general the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons. Question 12 asks whether this requirement should expressly require that information to be provided in an appropriate language or languages, or provided at a level that can be understood by workers. An approach should be avoided where it risks increasing the complexity and prescription of the legislation.

It is however important that the principles for performance and conduct are included in the model laws, including in respect of the duty to undertake 'due diligence'. Panel recommendation 88 in its second discussion paper in January 2009¹ highlighted a set of policy objectives to guide the 'due diligence' requirement which could be included into the model Act.

The BCA would therefore strongly advise that the model Act should avoid unnecessary prescription and should focus on clearly establishing:

- the principles for performance and conduct; and
- the outcomes sought – namely the effective prevention of workplace injury and the rehabilitation of injured workers.

¹ Second Discussion Paper, page 61-62

Legislation should allow for flexibility and choice

The BCA considers that employers and employees at the enterprise level are best placed to develop the most suitable strategies and processes to effectively prevent workplace injury and those positive outcomes for all concerned are best achieved in a cooperative enterprise environment.

Organisations and businesses should have the flexibility to achieve the objectives of the regulation in the manner most suitable to their circumstances and regulators should have the discretion to accept a range of valid approaches to compliance.

Conclusion

The BCA welcomes the opportunity to provide input into ongoing policy discussion and development of a harmonised system of OHS laws across Australia. Our key priority remains the establishment of a truly national system of OHS legislation and policy.

While the current arrangements have shown efforts to ensure that there is no future divergence in the laws, the BCA emphasises the need to focus on the continuing harmonisation of these laws (especially in relation to sections 10 and 11 of the model provisions and the administrative arrangements). In this respect, the BCA considers that one of the key goals in developing these laws should be to ensure that the harmonised laws can be maintained into the future.