



ASSOCIATION OF CONSULTING
ENGINEERS AUSTRALIA

REVIEW OF SECOND REPORT RECOMMENDATIONS FOR A MODEL OHS ACT

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ACEA SUBMISSION

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INTRODUCTION

ABOUT THE ACEA

The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services. There are over 260 firms, from large multidisciplinary corporations to small niche practices, across a range of engineering fields represented by the ACEA with a total of some 46,000 employees.

The ACEA presents a unified voice for the industry and supports the profession by upholding a professional code of ethics and enhancing the commercial environment in which firms operate through strong representation and influential lobbying activities.

The ACEA also supports members in all aspects of their business including risk management, contractual issues, professional indemnity insurance, occupational health and safety, procurement practices, workplace/industrial relations, client relations, marketing, education, sustainability and business development.

EXECUTIVE SUMMARY

The ACEA welcomes the National Review Panel's second and last report to the Workplace Relations Ministers' Council and its recommendations for the optimal structure of a model OHS Act.

The ACEA believes that both of the Review Panel's reports will help to increase transparency, focus and certainty for duty holders, all the while helping to improve the health and safety of all people, regardless of whether they are workers, visitors or the general public.

This submission is a review of critical areas recommended in the second report that the ACEA believes will either encourage or burden designers of buildings and structures to be able to efficiently, effectively and competently manage their OHS specific duties of care.

Below is a summary of ACEA's support and concerns relating to the second report into model OHS laws:

- The lack of definition of control will create a lack of clarity, focus and consistency for duty holders, especially those with overlapping duties who need to coordinate and cooperate with other duty holders.
- The support for the adoption of s.15B of the QLD Act in the model OHS Act to define a person with management or control of a relevant workplace. This is because it will mean those persons with effective and sustained control over a construction site will primarily be the owner of the construction site or principal contractor.
- Recommendations for the model OHS Act to include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, however it fails to advance and strengthen the need for better cooperation, coordination and integration between key construction project participants.
- The model OHS Act does not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.

This submission should be read in conjunction with ACEA's December 2008 response to the National Review Panel's first report titled: Proposed Designer Duties of Care in a Model OHS Act.

Please find at the back of this submission a brief summary of ACEA's first report recommendations for your reference and information. The ACEA acknowledges that as both of the National Review Panel's reports have now been released it means that all ACEA concerns and recommendations can be carefully reflected upon and considered by policy makers.

REVIEW OF SECOND REPORT RECOMMENDATIONS FOR A MODEL OHS ACT

CHAPTER 23: DEFINITIONS

1.1 National Review Panel recommendation 84

The model OHS Act should not include a definition of "control".

1.2 Application to designers of buildings and structures

The ACEA believes that the model OHS Act should include a definition of control. This is because a definition of control will provide duty holders with exact guidance as to how to manage their duties of care and to what extent and scope. Without a clear definition it will create a lack of clarity, focus and consistency for duty holders, especially those with overlapping duties who need to coordinate and cooperate with other duty holders. This could lead to uncertainty and confusion.

The lack of guidance and clarity in the concept of control supposedly encourages better health and safety results. However, if a duty holder does not know if they are in control, has the responsibility to control, or to what capacity they should control they ultimately only deem themselves in control so as to not risk any culpability. This is not conducive to OHS performance.

Therefore control is open to interpretation, most notably by the Courts, and the absence of control acts more as a mechanism to gather the maximum number of potential targets for prosecution, rather than as a mechanism for ensuring a reduction in the number of workplace injuries and fatalities.

The ACEA supports Chris Maxwell QC 2004 review and update of the Vic OHS Act. Maxwell deemed that there should be a definition of control in OHS legislation, because:

- *a breach of the general safety duties results in criminal liability. It is unsatisfactory to impose criminal liability by reference to such a "vague, open-ended and inaccessible" concept; and*
- *a lack of adequate guidance to duty holders, as to how they should make decisions about risk control and in particular as to how their respective efforts should be co-ordinated with each other, increases the likelihood of imperfect decisions about these matters, which are vitally important in injury prevention.*¹

While it's noted that Maxwell's recommendations were not adopted in the Vic Act, the ACEA believes that these considerations must be taken into account for the development of the model OHS Act because the inclusion of control in the model OHS Act will provide much-needed certainty for duty holders.

The ACEA recommends that if control is not defined in the model OHS Act then at the very least specific guidance material from the regulator must be developed and issued in regards to the allocation of responsibility amongst overlapping duty holders. For example, guidance on control should be provided for key construction project participants (clients, principal contractors and designers) and the safe design and construction of buildings and structures.

The ACEA recommends:

¹ Maxwell Review of the Vic OHS Act, p.115, paras.481 and 482

The model OHS Act should include a definition of "control".

1.3 National Review Panel recommendation 95

The model OHS Act should adopt s.15B of the QLD Act to define a person with management or control of a workplace.

1.4 Application to designers of buildings and structures

The ACEA supports National Review Panel recommendation 95 in that the model OHS Act should adopt the Qld WHS Act 1995 s.15B to define a person with management or control over a workplace.

s.15-Meaning of person in control of relevant workplace area:

(1) The person in control, of a relevant workplace area, is the person who is the owner of the relevant workplace area.

(2) However, if there is in place a lease, contract or other arrangement that provides, or has the effect of providing, for another person to have effective and sustained control of the relevant workplace area, the other person, and not the owner, is the person in control of the relevant workplace area.

The design of buildings and structures is a complex process that involves a broad range of inputs and influences on design outcomes by key project participants, other than the designer, including equipment suppliers, materials suppliers, project managers, principal contractors and clients.

The ACEA has previously raised concerns that some OHS Acts (e.g. WA Occupational Safety & Health Act 1984) place additional duties on designers to ensure those affected by the construction work of the design project are not exposed unduly to hazards or risks. Designers as part the design process do consider the constructability of the design project but these considerations are always limited to a designer's expertise, knowledge and level of sustained and effective control they have over construction methods and sequences in the construction phase of a design project.

The ACEA deems that designers of buildings and structures should owe a duty to those persons using it as a workplace for the purpose for which it was designed. This workplace should not include the temporary workplace (i.e. construction site) of the design project. The 'construction site' is not designed by the engineer. It is designed by the builder or principle contractor. The designer has no effective or sustained control over the construction site unless a contract is in place which states otherwise.

The ACEA believes that it is the principal contractor who owes a duty of care to those persons constructing the design project because they are either the owner of the workplace (i.e. construction site) or that they have a contract with the owner (i.e. client) to have effective and sustained control of the workplace, instead of the owner. Therefore they are best placed and in control (effective and sustained) to ensure, so far as is reasonably practicable, that persons constructing the design project are not unduly exposed to hazards or risks.

The ACEA believes that in relation to the construction of a design project a principal contractor should:

- supervise and direct the construction work using their appropriate skills and expertise;
- be solely responsible for and have control over construction methods and sequences as well as coordination of construction work (unless a different contract arrangement exists between or

with other construction participants);

- evaluate and determine construction site safety and the methods, sequences and coordination used in the construction of the design project;
- have the expertise and control to determine that any work methods, sequences, or coordination is unsafe and therefore unsafe to proceed; and
- have the responsibility that if construction work methods, techniques and coordination proceeds when deemed unsafe, that they are solely responsible for any resulting injury, loss or damage etc.

In relation to the duties of care to those persons maintaining or disposing of the design project, the client or end-user of the building or structure will be the persons in control (effective and sustained) to ensure those persons maintaining or disposing of the building or structure are not unduly exposed to hazards or risks. The designer will not have control over the workplace in this last lifecycle phase due to their lack of effective and sustained control, especially in relation to demolition methods, techniques and coordination. They will also not ordinarily have a contract to have control over the workplace throughout the operation, maintenance and demolition phase of a building or structure.

In short, the ACEA believes that by including s.15 (Meaning of person in control of relevant workplace area) into the model OHS Act, designers will not have effective or sustained control over a construction site where a design is being built. This is because they have no control over construction methods and sequences as well as coordination of construction work (unless a different contract arrangement exists between or with other construction participants). Therefore, they are unable to control OHS outcomes resulting from construction, operation or demolition of the design project.

The ACEA recommends:

The model OHS Act should adopt s.15B of the QLD Act to define a person with management or control of a workplace. However, s.15B (2) should be amended to:

(2) However, if there is in place a contract that provides for another person to have effective and sustained control of the relevant workplace area, the other person, and not the owner, is the person in control of the relevant workplace area.

S.15B (2) should be amended so as to simplify the duty in that a contract must be in place for a person to have effective and sustained control of the relevant workplace area, instead of including a lease or other arrangement. This will make the duty clear, straightforward and consistent.

CHAPTER 24: CONSULTATION RIGHTS AND OBLIGATIONS

1.5 National Review Panel recommendation 98

The model OHS Act should include an obligation for each primary duty holder to consult with other persons having a duty in relation to the same matter, as far as is reasonably necessary.

1.6 Application to designers of buildings and structures

Most OHS legislation in Australia, apart from Qld, does not promote or fully provide for a coordinated and cooperative approach (i.e. team approach) in helping to ensure health and safety is achieved in the design and construction phase of a building or structure. The ACEA believes it is essential that coordination, cooperation and agreement through consultation between key construction project

participants (client, principal contractor and designer) is promoted, supported and addressed in a model Act.

While the ACEA supports the principle that each primary duty holders must consult with other persons having a duty in relation to the same matter, there are concerns that this primary duty fails to advance and strengthen the need for better cooperation, coordination and integration between key construction project participants. This is because there are complex contractor relationships and multiple duty holders on construction sites and it's essential that all parties coordinate, cooperate and agree in regards to the safe design and construction of buildings and structures.

The ACEA believes the primary duty to consult recommendations for the model OHS Act fail to address this issue appropriately as they don't specifically identify the importance that key construction project participants must consult. If specific duties to consult between key construction project participants in the design and construction of buildings and structures were imposed and adopted in the model OHS Act it will be conducive to better health and safety outcomes.

The ACEA supports the Qld Workplace Health and Safety Act 1995 as it places obligations on clients and principal contractors to consult. For example, the Qld WHS Act 1995-Section 30A Obligation on clients states:

(1) A client has an obligation to consult with—

(a) if a designer designed a structure that is, or is part of, construction work—the designer about how the construction work in connection with the design can be undertaken in a way that prevents or minimises all risks to health and safety; and

(b) if there is a project manager for the construction work—the project manager about how the construction work can be planned and managed in a way that prevents or minimises all risks to health and safety; and

(c) if there is a principal contractor for the construction work—the principal contractor about how the construction work can be undertaken in a way that prevents or minimises all risks to health and safety.

In addition, the QLD WHS Act 1995-Section 31 Obligations of principle contractor states:

(2) Without limiting the principal contractor's obligation under subsection (1), the principal contractor must—

(b) consult with each of the following persons who are involved in the construction work in relation to identifying hazards associated with the construction work and assessing risks that may result because of the hazards—

- *the designer;*
- *the project manager; and*
- *any other relevant person.*

The ACEA believes that while there remains a failure to balance specific duties of care in the design and construction of buildings and structures in most jurisdictions, with the exception to the Qld WHS Act 1995, there will be a lack of cooperation, coordination and agreement that is required for the management and delivery of projects. This failure to balance specific duties of care means that designers have disproportionate obligations to their level of control or influence compared to other

key construction project participants.

The ACEA has previously stated in our first report review (The ACEA Submission on the Proposed Designer Duties of Care in a Model OHS Act) that the specific duties of care placed upon clients, project managers and principal contractors in the Qld WHS Act 1995 identifies that these key stakeholders have a significant ability to control over the design and construction of buildings and structures.

The Qld WHS Act duties aim to recognise clients, project managers and principal contractors influence over the other project participants (i.e. designers) to make sure things are planned, coordinated and supervised for the benefit of improving health and safety outcomes. This promotes a balanced, collaborative and team approach in eliminating and reducing hazards and risks to health and safety in the design and construction of buildings and structures.

The ACEA recommendation:

The model OHS Act should impose specific duties of care on key construction project participants, such as clients, project managers and principal contractors as they have a significant control over health and safety in the construction and design of projects. These duties should include the obligation to consult with each other.

CHAPTER 30: RISK MANAGEMENT

1.7 National Review Panel recommendation 136

The model OHS Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model act should allow for the process to be established via regulation, with further guidance provided in a code of practice.

1.8 Application to designer of buildings and structures

The ACEA is in support of National Review Panel recommendation 136. The ACEA agrees with the Review Panel in that risk management is implied in the definition of 'reasonably practicable', and therefore risk management processes do not need to be specifically applied to duties of care.

The ACEA believes that in the case of the design of buildings and structures which in most cases, but not all, requires a process of hazard identification, risk assessment and a hierarchy of control measures to be adopted guidance on risk management should be provided in a national code of practice.

For example, the WA 2008 Code of Practice for the Safe Design of Buildings and Structures provides duty holders with advice on risk management processes for the safe design of buildings and structures. Risk management guidance is not provided or required in the WA OSH Act 1984 as it is deemed more practical for duty holders to be addressed in a code of practice.

The ACEA recommends:

The model OHS Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but the regulation-making power of the model OHS Act should allow for the process to be established via-regulation, with further guidance provided in a code of practice.

CHAPTER 48: CODES OF PRACTICE

1.9 National Review Panel recommendation 136

The model Act should provide for codes to be developed through a tripartite process, with expert involvement, and approved by the relevant minister.

1.10 Application to designers of buildings and structures

Codes are generally designed and implemented after consultation has taken place with a number of key stakeholders (i.e. government, employer associations, and unions) and this importantly means that the codes has been through a fair, transparent and open tri-partite process.

The ACEA recommends that all codes must be developed, designed and reviewed through a tri-partite process which should include the new national OHS body (Safe Work Australia), employer and union associations. This means any development or review of a code will remain objective and balanced with relevant and expert involvement that provides suitable guidance material for duty holders.

The ACEA recommends:

The model Act should provide for codes to be developed through a tripartite process, with expert involvement, and approved by the relevant minister.

1.11 National Review Panel recommendation 136

The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.

1.12 National Review Panel recommendation 136

The model Act should make it clear that a duty holder may achieve and demonstrate compliance with relevant provisions of the act and regulations by ways other than the ways set out by an approved code of practice.

1.13 Application to designers of buildings and structures

Codes of practices offer valuable guidance material to duty holders with recommended practical advice and procedures regarding what is required to achieve compliance with a duty of care required under a designated piece of legislation. Compliance codes also help set out specific standards and provide voluntary standards of protection to employers, employees, and all other relevant stakeholders.

Currently, in some cases failure to observe or undertake recommendations under a code can be used as evidence in proceedings for any offence under a relevant Act. However, a stakeholder (i.e. duty holder or persons in control of workplace) is not automatically liable if they have failed to adhere or observe the code, especially if they can demonstrate they have achieved a higher standard. Therefore, guidelines within codes are not always mandatory to adopt and they allow for duty holders to be able to either use the code as a benchmark or voluntarily adopt processes that they believe are, as far as is reasonably practicable, to be a similar or higher standard to the code to manage their duties of care.

The ACEA recommends that if a national code of practice is developed for the design of a buildings and structures then it's recommended that a designer either does what the national code suggests;

adopt another process that manages exposure to the hazard or risk to a higher standard; or that the designer, so far as is reasonably practicable, takes precautions and exercises due care.

The ACEA believes that a national code for the design of buildings and structures should be used as evidence by the courts to show what is known about specific hazards, risks and risk control measures as this will help the courts interpret what duty holders knew, understood and what reasonably practicable in the circumstances.

The ACEA also supports the recommendation that the model OHS Act make it unambiguous that a duty holder may attain or show compliance with relevant provisions of the model OHS Act or applicable regulations by means other than the approach recommended in a code of practice.

The ACEA recommends:

The model Act should provide that the code is to be taken by the court to represent what is known about specific hazards, risks and risk controls. That evidence, along with other evidence, may assist the court in determining what was reasonably practicable in the circumstances.

The model Act should make it clear that a duty holder may achieve and demonstrate compliance with relevant provisions of the act and regulations by ways other than the ways set out by an approved code of practice.

FIRST REPORT RECOMMENDATIONS FOR DESIGNER DUTIES OF CARE IN A MODEL OHS ACT

Please find below a summary of ACEA's recommendations following the first report by the National Review Panel into the optimal structure of a model OHS Act in relation to designer's specific duties of care for your information and reference.

- A designer's specific duties should be recognised in the model OHS Act. This must be accompanied by the qualifier of what is reasonably practical, meaning that their duties of care should be proportionate to their level of control, competence, qualification and within the standard of what is reasonably practicable.
- The model OHS Act should impose specific duties of care on key construction project participants, such as clients, project managers and principal contractors as they have a significant control and influence over health and safety in the construction and design of projects. This will promote in the model OHS Act the principle of a collaborative and "team approach" in minimizing and reducing risks to health and safety in the lifecycle of projects.
- The model OHS Act should provide for separate duties of care on the following classes of persons:
 - a) designers of plant, structures or substances;
 - b) manufactures of plant, structures or substances;
 - c) construction project participants including clients, project managers, principal contractors; and
 - d) importers or suppliers of plant, structures or substances.
- A designer's specific duty of care regarding a building or structure should not extend beyond completion of the construction and should be limited by a statute of limitations. The duty should also only extend insofar as the building or structure is being used for the purpose for which it was originally designed.
- The duties of care of are owed to those persons whose health and safety may be affected by the use of the structure for which it was designed, but there be no duty of care for the designer to provide advice regarding construction/maintenance/repair/demolition techniques.