



2018 Review of the Model Work Health and Safety Laws

26 April 2018

Introduction

1. The National Road Transport Association (NatRoad) is pleased to make a submission on the 2018 Review of the model Work Health and Safety (WHS) laws in response to the Discussion Paper released in February 2018.
2. NatRoad is Australia's largest national association representing road freight transport operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tipplers, express car carriers, as well as tankers and refrigerated freight operators.
3. Safe Work Australia statistics indicate that 24 per cent of workers who died were employed in the transport, postal and warehousing industry (2007-2016). Despite a national focus on road freight transport as a priority industry under the *Australian Work Health and Safety Strategy 2012-2022*, the sector continues to have high rates of fatality and injury compared to other industries.
4. NatRoad is concerned by these statistics. We have a deep commitment to improving safety in the road freight transport sector, both on-road and off-road. We agree that anyone who can influence health and safety should use that influence to achieve the safest possible outcomes for workers and others affected by work.
5. Our submission is focussed on addressing the key review questions in relation to what elements of the model WHS laws work effectively and what elements could be improved.

What is working well?

Structure

6. NatRoad supports continuation of the three-tiered approach consisting of an outcomes-based Act, supported by:
 - regulations where the level of prescription is proportionate to the risk being addressed, and
 - Codes of Practice that provide authoritative advice on how to comply with the duties.
7. Approved Codes of Practice should never become mandatory. They should retain their current evidentiary status and allow duty holders to achieve compliance by following another method if that method provides an equivalent or higher standard than that set out in the Code.
8. Codes can be supported with a range of guidance materials. Codes and guidance materials must be designed to be user-friendly and easily accessible. Text heavy documents may not always be the best way to present the information and other formats should be considered, depending on the target audience, for example videos, podcasts, infographics, checklists and mobile applications.
9. Approved Codes of Practice should continue to be developed nationally in consultation with Commonwealth, state and territory governments, employer organisations and unions. The decision to develop a code rather than guidance should be based on the criteria agreed by WHS Ministers. This does not prevent industry sectors from continuing to develop their own 'industry codes of practice'.
10. WHS regulators can produce their own guidance material which should be shared with other jurisdictions where relevant to prevent a proliferation of different advice being developed

on the same topic. Having too much information can make it difficult for duty holders to find what they need. The Heads of Workplace Safety Authority have an important role in this regard.

Duties of care

11. The safety of work in the road freight transport sector is influenced by more complex supply chains and new business models, such as digital marketplaces that facilitate transactions resulting in the movement of people or goods. Platform companies use technology solutions to match buyers and sellers, also extending the traditional consumer-to-business model to include peer-to-peer. Other changes impacting on the road freight industry include:
 - an ageing workforce
 - rapidly evolving safety technologies such as fatigue monitoring devices
 - automation, and
 - increasing consumer demand for personalised, door-to-door and immediate delivery of goods.
12. It is essential that the WHS laws are flexible enough to accommodate these changes without compromising safety. In our view the framework of duties and the broad definitions of a 'person conducting a business or undertaking' and a 'worker' are effective in adapting to changes in employment relationships and business models.
13. NatRoad strongly supports the requirement for officers to exercise due diligence. This is helping to drive safety from the top of an organisation and ensure that information about safety performance is reported back up again from the 'factory floor' to the board room.
14. We support retaining the definition of an 'officer' consistent with the *Corporations Act 2001* (Cth). The officer duties should not be pushed down the managerial hierarchy but only apply to those who make or participate in making decisions that affect the whole or a substantial part of the business.
15. However, we note that the majority of section 27 prosecutions have been against officers of small organisations where officers were closely involved in the day-to-day management of work. While it may be harder to prove the failure of officers in large corporations to exercise due diligence, WHS regulators should not shy away from investigating these offences.
16. We believe the qualifications placed on the duties and the way that 'reasonably practicable' and 'due diligence' are defined are appropriate. The guidance developed by Safe Work Australia explaining these concepts is very useful.

Consultation, cooperation and coordination

17. Multiple duty holders with concurrent and overlapping duties are a common feature of many work activities, particularly in the transport industry dominated by supply chains.
18. The requirement to consult, co-operate and co-ordinate activities with other duty holders is, without a doubt, essential in ensuring that each party can meet their duty effectively. The model *Code of Practice on WHS Consultation, Cooperation and Coordination* provides useful guidance on how to comply with this duty.
19. Safe and healthy workplaces cannot be achieved without consulting and involving workers in health and safety decisions. However, modern work environments can make consultation more challenging. The model WHS Act should continue to allow flexible methods for worker

consultation and participation. It should recognise that traditional health and safety representatives and committees may not suit all workplaces.

20. The broad duty to consult workers, qualified by reasonable practicability, should be retained and some of the prescription regarding health and safety representatives and committees moved into regulation. We recommend that further research be undertaken to examine the effectiveness of different consultation methods in a range of contemporary workplaces, so that evidence-based policy and guidance can be developed on this issue.

Enforceable undertakings

21. NatRoad supports the availability of enforceable undertakings as an alternative to prosecution. They can result in lasting safety improvements. The financial contribution of a person entering into an enforceable undertaking is often significant and potentially higher than the fine a court may have imposed following a prosecution.
22. While enforceable undertakings are not available for a category 1 offence, there is some debate about whether they should be available for category 2 offences that involve a fatality. We believe the regulator should continue to have discretion in accepting enforceable undertakings for all category 2 offences.

Public safety

23. The WHS laws must remain limited in scope to risks arising from work. However, as the laws have become broader to capture modern work arrangements, the boundary between public health and safety and WHS has become less distinct. This is inevitable, but not a detrimental issue from our perspective.

What could be improved?

National consistency

24. NatRoad strongly supports national consistency in the regulatory regime, including consistency in enforcement approaches. A key benefit of harmonised laws is that multi-state organisations can operate under consistent safety practices, language, descriptions and interpretations of safety duties. This has a positive impact on safety and productivity.
25. We urge Victoria and Western Australia to adopt the model WHS laws. We are disappointed when new governments in some jurisdictions feel compelled to unilaterally change their WHS laws, based on their own political ideology rather than improving safety outcomes. Queensland has been the worst offender in bypassing the national process. A truck loaded at a farm in NSW and unloaded in a Queensland processing facility should be able to operate under the same WHS laws at both ends of the journey.
26. All jurisdictions should adopt the National Compliance and Enforcement Policy in a consistent manner and continue to work cooperatively through the Heads of Workplace Safety Authorities to improve consistency in the administration, inspection and enforcement of the WHS laws.

The relationship between the model WHS laws and other safety laws

27. In addition to WHS laws, road freight transport operators must comply with duties under the Heavy Vehicle National Law (HVNL) adopted in most jurisdictions except Western Australia and the Northern Territory. The HVNL focusses on the safety of a heavy vehicle on a road

while WHS laws cover all work-related hazards and risks. This means there is a significant overlap.

28. Recent amendments to the HVNL are aligning chain of responsibility provisions more closely with WHS laws to include outcomes-based primary duties and duties for executive officers. The HVNL clarifies that if there is any inconsistency between the WHS laws and the HVNL, the WHS law prevails.
29. We support Recommendation 76 of the *National Review into model Occupational Health and Safety Laws* and believe there is no need to have separate industry specific laws as the principle for managing risk is the same. The WHS Act is broad enough to capture all types of work activities. The general duties can be supported with industry specific regulations and codes of practice.
30. For example, heavy vehicle safety requirements, including rules relating to fatigue and load restraint, could be rationalised by including specific regulations under the WHS laws. This will remove the risk of inconsistency and confusion and should improve compliance where heavy vehicle safety is managed holistically as part of a safe system of work.

Extraterritorial application

31. Given that many organisations operate across borders, it is essential for the effectiveness of the model WHS law that it includes provisions to extend regulatory powers outside a jurisdiction, as recently amended in NSW.¹ WHS Regulators should also be able to share information with other regulators in the interests of safety.

Principles applying to duties

32. NatRoad supports the principles in the model WHS Act clarifying that duties are not transferable, a person can have more than one duty and more than one person can have a duty. In relation to the latter, section 16(3) states that each person must discharge their duty to “the extent to which the person has the capacity to influence and control the matter...”
33. The Explanatory Memorandum states that the capacity to control applies to both ‘actual’ or ‘practical’ control, while the capacity to influence connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances.
34. In our view “influence and control” narrows the duty as both influence and control need to be present. While influence is always a factor of control, influence can be achieved where there is no actual or practical control. We submit that the provision should be amended to “influence or control”.
35. This change would align with the primary duty owed to workers whose activities in carrying out work are influenced or directed by the person (section 19(1)(b)).

Upstream duties

36. The current upstream duties are limited to plant, structures and substances. We recommend a review of these duties to ascertain whether they are broad enough to capture technological developments and the digital economy, such as designers and developers of software and mobile applications used for work.

¹ Work Health and Safety Amendment Bill 2018 <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3496>

Offences and legal proceedings

37. NatRoad does not support the inclusion of industrial manslaughter provisions into WHS laws. The model WHS Act already allows for significant penalties including terms of imprisonment. Industrial manslaughter should remain in criminal law, which does not prevent prosecution under these provision for WHS offences.
38. Instead we recommend that the Category 1 offence include “gross negligence” as originally recommended by the *National Review into model Occupational Health and Safety Laws*.
39. Given that all duty of care offences are criminal offences with significant penalties attached, it is appropriate that the burden of proof for these offences remain with prosecutors.
40. NatRoad supports implementing nationally consistent sentencing guidelines for WHS offenders.
41. We also support including provisions in the model WHS Act to specifically prohibit insurance of penalties and to make it an offence for an insurer to cover the cost of WHS fines and penalties.

Right of entry

42. NatRoad acknowledges that unions have a role in facilitating consultation and participation mechanisms for workers. It is essential that the requirements and processes for workplace entry be aligned with the *Fair Work Act 2009* (Cth).
43. It is NatRoad’s preference that workplace entry provisions be simplified by moving them entirely into the Fair Work Act, similar to the approach used in Western Australia.
44. The provisions should ensure that safety is not used to advance industrial agendas. The permit holder must clearly describe on the entry notice the purpose for entry, whether it be for safety or industrial reasons.

Psychological health

45. The model WHS Act clarifies that ‘health’ includes psychological health. However, the model WHS Regulations are focussed on physical hazards and have no provisions relating to protecting psychological health, for example eliminating or minimising stress, workplace bullying and fatigue. The hierarchy of control is currently designed for physical hazards.
46. Given their prevalence in workplace injury and illness statistics, NatRoad recommends that psychosocial hazards be given more regulatory attention, particularly the importance of work design in controlling these risks. Incident notification provisions should include reporting of work-related psychological illness to the WHS regulator.

Conclusion

47. The model WHS laws have introduced important reforms and have resulted in a higher level of harmonisation. Overall, we believe the model WHS laws are operating as intended, but that a number of changes should be made to enhance them as outlined in this submission.