Socio-Political Context: OHS Law and Regulation in Australia

Core Body of Knowledge for the Generalist OHS Professional

Safety Institute of Australia Ltd

Australian OHS Education Accreditation Board

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The Technical Panel established by the Health and Safety Professionals Alliance (HaSPA) was responsible for developing the conceptual framework of the OHS Body of Knowledge and for selecting contributing authors and peer-reviewers. The Technical Panel comprised representatives from:

The Safety Institute of Australia supported the development of the OHS Body of Knowledge and will be providing ongoing support for the dissemination of the OHS Body of Knowledge and for the maintenance and further development of the Body of Knowledge through the Australian OHS Education Accreditation Board which is auspiced by the Safety Institute of Australia.

Synopsis of the OHS Body Of Knowledge

Background

A defined body of knowledge is required as a basis for professional certification and for accreditation of education programs giving entry to a profession. The lack of such a body of knowledge for OHS professionals was identified in reviews of OHS legislation and OHS education in Australia. After a 2009 scoping study, WorkSafe Victoria provided funding to support a national project to develop and implement a core body of knowledge for generalist OHS professionals in Australia.

Development

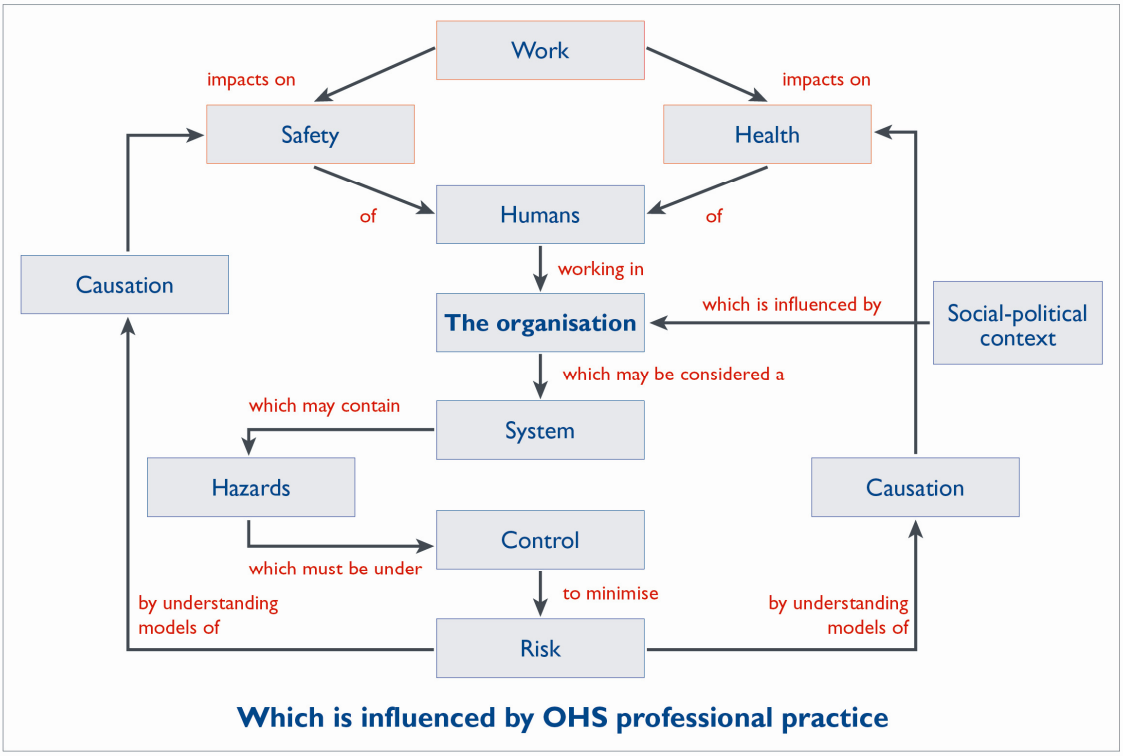
The process of developing and structuring the main content of this document was managed by a Technical Panel with representation from Victorian universities that teach OHS and from the Safety Institute of Australia, which is the main professional body for generalist OHS professionals in Australia. The Panel developed an initial conceptual framework which was then amended in accord with feedback received from OHS tertiary-level educators throughout Australia and the wider OHS profession. Specialist authors were invited to contribute chapters, which were then subjected to peer review and editing. It is anticipated that the resultant OHS Body of Knowledge will in future be regularly amended and updated as people use it and as the evidence base expands.

Conceptual structure

The OHS Body of Knowledge takes a 'conceptual' approach. As concepts are abstract, the OHS professional needs to organise the concepts into a framework in order to solve a problem. The overall framework used to structure the OHS Body of Knowledge is that:

> **Work** impacts on the **safety** and **health** of humans who work in **organisations**. Organisations are influenced by the **socio-political context**. Organisations may be considered a **system** which may contain **hazards** which must be under control to minimise **risk**. This can be achieved by understanding **models causation** for safety and for health which will result in improvement in the safety and health of people at work. The OHS professional applies **professional practice** to influence the organisation to being about this improvement.

This can be represented as:



Audience

The OHS Body of Knowledge provides a basis for accreditation of OHS professional education programs and certification of individual OHS professionals. It provides guidance for OHS educators in course development, and for OHS professionals and professional bodies in developing continuing professional development activities. Also, OHS regulators, employers and recruiters may find it useful for benchmarking OHS professional practice.

Application

Importantly, the OHS Body of Knowledge is neither a textbook nor a curriculum; rather it describes the key concepts, core theories and related evidence that should be shared by Australian generalist OHS professionals. This knowledge will be gained through a combination of education and experience.

Accessing and using the OHS Body of Knowledge for generalist OHS professionals

The OHS Body of Knowledge is published electronically. Each chapter can be downloaded separately. However users are advised to read the Introduction, which provides background to the information in individual chapters. They should also note the copyright requirements and the disclaimer before using or acting on the information.

Socio-Political Context:
OHS Law and Regulation in Australia

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Socio-Political Context: OHS Law and Regulation in Australia

Abstract

This chapter focuses on the socio-political context of occupational health and safety (OHS). It is about the different legal and advisory instruments; state and non-state institutions or actors; political, economic and social forces; technologies; and other factors that constitute the setting for OHS practice. Collectively, these socio-political-context elements frame, shape and regulate OHS practice. They impact on OHS risks and how they are dealt with in the workplace. The chapter begins by providing a broad overview of the socio-political context of OHS, and then examines some of its key elements in more detail. These elements are OHS regulation, industry associations and unions, Australian and international technical standards, other international instruments, and economic and social trends. The chapter concludes with an outline of the national model OHS legislation, a development in OHS regulation that is both central to and has links with many other elements of the socio-political context.

Key words

act, law, legislation, standard, inspection, enforcement, regulation, industry association, union, social and economic trends

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1. Overview of the socio-political context

The legal, political, social, economic and technological context of occupational health and safety (the socio-political context) is dynamic, complex and diverse. This chapter examines this socio-political context with reference to a variety of state and non-state institutions and actors, legal and quasi-legal instruments, and other mechanisms of social control and influence. Collectively, these elements impact on OHS and the work of OHS professionals. They variously frame, structure, monitor, interpret or enforce the 'rules of the OHS game,' and the decision-making and action of organisations and individuals at work. They may also contribute to OHS risks.

Central to the socio-political context is OHS regulation. The term 'regulation' is defined here in a 'command and control' sense as the promulgation of laws by government accompanied by mechanisms for inspecting and enforcing compliance with these laws (Baldwin & Cave, 1999; Black, 2001). The OHS regulators[1] are principal actors in setting OHS standards – the OHS Acts, regulations and approved codes of practice. They are also involved in providing compliance support (awareness raising and guidance), and in inspecting and enforcing compliance. However, these activities are not confined to OHS regulators. Parliaments play a role in setting OHS standards, and the courts are involved in interpreting the law and determining non-compliance in legal proceedings. In addition, the activities of political parties, industry associations, unions, OHS professional associations and interest groups influence OHS policy, regulation and practice.

Casting the net more widely, other elements of the socio-political context of OHS are the laws that incorporate provisions relevant to specific types of work and risks, and the agencies that administer them. These include laws relating to road and rail transport, industrial chemical notification, building safety, petroleum extraction, ionising radiation, agricultural and veterinary chemicals, amusement equipment, electrical and gas safety (Johnstone, 2004a, pp. 85-86; Quinlan, Bohle & Lamm, 2010, p. 314). Also, there are laws and agencies dealing with workers' compensation, industrial relations, human rights and equal opportunity, privacy and other matters that may impact on OHS practice (Quinlan, Bohle & Lamm, 2010, p. 314). Scanning the socio-political horizon still further, there are Australian and international bodies that issue technical standards (for example, Australian or ISO standards), and the International Labour Organisation (ILO), the United Nations (UN) and the World Health Organization (WHO) that prepare treaties, conventions and protocols, which countries that ratify them are expected to uphold (see, for example, Johnstone, 2004a, pp. 92-97).

[1] As at March 2011, the principal OHS regulators are Workplace Health and Safety Queensland, the WorkCover Authority of New South Wales, SafeWork South Australia, Workplace Standards Tasmania, Comcare and the WorkSafe agencies in Victoria, Western Australia, the Australian Capital Territory and the Northern Territory.

In addition to particular state and non-state institutions or actors, laws and other instruments operating in the socio-political context of OHS, there are economic and social trends impacting on OHS in Australian workplaces. These include changes in the labour market, work and organisational arrangements, as well as developments in technology and changes in workforce characteristics. These factors variously shape the organisational, physical and human environments at work. They contribute to OHS risks and impact on the capacity of OHS regulation to influence organisational and individual decision-making on OHS.

This brief overview introduces the complexity and diversity of the OHS socio-political context. Beyond the elements discussed, we could include the media (in all its forms), which contributes to shaping and framing public perceptions of OHS. While OHS regulation is the centrepiece of the OHS socio-political context, other institutions and actors, mechanisms and trends are part of the wider context. The OHS professional will encounter, and need to understand and deal with, all of these elements to the extent that they are relevant to his or her role in OHS. With regard to those elements that are not explicitly part of OHS regulation, a key challenge for the OHS professional will be to assess whether they support or are consistent with the goals of OHS regulation, or whether they are incompatible or undermine OHS regulatory goals.

This chapter examines some elements of the socio-political context of OHS in more detail. These elements are OHS regulation, industry associations and unions, Australian and international technical standards, other international instruments, and economic and social trends.

2. OHS regulation in Australia

2.1 The federal system

The Australian Constitution sets the legislative powers of the Commonwealth, state and territory governments. As the Constitution does not expressly empower the Commonwealth government to legislate generally for OHS, it falls to the state and territory governments to enact such legislation (except in specific areas). The Commonwealth has several heads of power it can use to legislate for OHS (Johnstone, 2004a, pp. 88-89) and has used these powers to enact OHS legislation covering Commonwealth employees and employees of certain licensed corporations, as well as OHS legislation for the maritime industry. As a result of the federal system there are nine sets of general OHS legislation – six state, two territory and one Commonwealth. Also, there is specific Commonwealth OHS legislation for the maritime industry and OHS legislation for the mining industry in some states.

2.2 History of Australian OHS legislation

The general OHS Acts were progressively developed and enacted by the Commonwealth, state and territory governments from the 1970s (the date varies according to the jurisdiction). They were based on recommendations made in the 1972 British report on *Safety and Health at Work*, the Robens Report (Robens, 1972). Consequently, Australian OHS legislation is often referred to as 'Robens style' legislation.

The most recent of the general OHS Acts that were developed *separately* by the Commonwealth, state and territory governments (the jurisdictions) were those enacted in Western Australia (1984), South Australia (1986), the Commonwealth (1991), Queensland and Tasmania (1995), New South Wales (2000), Victoria (2004), the Northern Territory (2007), and the Australian Capital Territory (2008). As a consequence of their development at different times in different political, industry and union-interest contexts, the Acts differ considerably in detail, as do the regulations and codes of practice made under them. However, the general OHS Acts feature some common themes, as outlined in section 2.3.

A notable development in Australia during the 1990s was the preparation of national standards (or model regulations) and codes of practice overseen by the then national OHS authority, the National Occupational Health and Safety Commission. This agency declared national standards and/or codes for plant, certification of users and operators of industrial equipment, hazardous substances, noise, manual handling, major hazards facilities and some other matters (Emmett, 1997; Johnstone, 2004a, pp. 342-346). These model standards and codes were progressively adopted by the Commonwealth, state and territory governments although the jurisdictions' regulations and codes often departed from the national models due to local stakeholder interests and political pressures, as well as differences in standards development processes and drafting styles. The jurisdictions also developed their own regulations and codes on a variety of other topics.

From 2008 there were concerted efforts by all Commonwealth, state and territory governments to secure uniform OHS legislation across all jurisdictions. All governments committed to adopt national model legislation by January 2012 (COAG, 2008), and cooperated in preparing a national model *Work Health and Safety Act* (the WHS Act) and regulations, and a series of national model codes of practice. As the agency responsible for national OHS policy, Safe Work Australia took the lead role in developing these instruments, in accordance with the recommendations of a wide-ranging *National Review into Model Occupational Health and Safety Laws* (Stewart-Crompton, Mayman & Sherriff, 2008, 2009). Safe Work Australia and the jurisdictions also developed uniform and cooperative approaches for OHS policy and practice, including the provision of compliance support, inspection and enforcement of the model OHS legislation (see section 7).

2.3 Common themes in OHS regulation

The generalist OHS professional will need to have a thorough knowledge of the particular provisions of OHS legislation in the Commonwealth, state or territory jurisdiction in which he or she operates (for details[2] see CCH Australia, n.d.), and how to interpret and apply these provisions in the workplace. That said, there are some common themes in Australian OHS legislation that have been in place for many years and are reflected in the national model WHS Act. These themes are:

- There are *three types of instruments*. Each jurisdiction has a general OHS Act that is underpinned by regulations. The Acts and regulations have the force of law – they are *mandatory*. There are approved codes of practice; these are advisory, but *evidentiary* instruments. While failure to comply with an approved code of practice does not in itself render a person liable to criminal or civil proceedings, an approved code can be used as evidence in a prosecution for an alleged contravention of a provision of the OHS Act or a regulation (Johnstone, 2004a, p. 323). The evidentiary status of codes overcomes restrictions in rules of evidence applied by the courts, which would otherwise require that the authority and relevance of the code to a case must be independently proven (Bluff & Gunningham, 2007; CCH Australia, n.d.).
- The OHS Acts incorporate *general duties for a range of persons* whose actions, as individuals or corporate entities, have the potential to impact upon OHS. The statutory general duties were built on legal principles established under the common law[3] (Creighton & Rozen, 2007; Robens, 1972, p. 42). The duty holders have varied over time and across jurisdictions, but typically encompass at least employers and self-employed persons; designers, manufacturers, suppliers, importers, installers and erectors of plant; manufacturers, suppliers and importers of substances; and employees.
- Duty holders have *continuing obligations*. They must act responsibly and comply with their obligations as an ongoing state of affairs; compliance is not a one-off event or something that can be done from time to time (Johnstone & Jones, 2006, pp. 483-502). The general duties require duty holders to take positive, proactive and systematic steps to comply with their continuing obligations (Bluff & Johnstone, 2005, pp. 212-213).
- *Consultation with workers* is a cornerstone of Australian OHS legislation. All of the OHS Acts make provision for employers to consult with workers and for workers to be represented on OHS matters, principally through worker OHS representatives and joint worker and management OHS committees. Arrangements for worker involvement are further detailed in regulations or codes of practice (Quinlan, Bohle & Lamm, 2010).

[2] The OHS Acts, regulations and approved codes of practice also can be found on the websites of each Commonwealth, state and territory OHS regulator.

[3] The common law is the non-codified body of law developed by the courts in countries with legal systems originating in Britain.

As in OHS legislation, there are some common themes in OHS regulators' approaches to securing compliance, inspection and enforcement of OHS legislation (Johnstone, 2004b). These are:

- The OHS regulators have *multi-skilled generalist OHS inspectors* who may work in industry-based teams. Regulators also may have staff members who are specialists in ergonomics, occupational hygiene, engineering or investigation of matters for prosecution. (For discussion of the roles and training of OHS inspectors see Quinlan, Bohle & Lamm, 2010, pp. 360-371.)
- How OHS regulators and field inspectors perform their work is guided by *policies, strategies and procedural guidelines*. Regulators' work typically combines proactive targeted programs and reactive inspections in response to injuries or complaints. Increasingly, regulators are conducting and implementing nationally coordinated campaigns targeting particular risks and industry sectors under the auspices of the Heads of Workplace Safety Authorities (HWSA, 2011).
- The OHS Acts give inspectors *broad powers to inspect and investigate* OHS matters. Inspectors are empowered to issue improvement and prohibition notices, and to prosecute duty holders found to be in breach of the legislation. Also, inspectors may have the power to issue infringement notices and negotiate enforceable undertakings with duty holders. Although the principal penalty for OHS offences is the fine, the courts may impose various types of orders and gaol sentences.

Beyond these central themes, in the past there has been considerable variation in the specific provisions of the OHS Acts, regulations and codes, with differences in types of enforcement mechanisms, sanctions and levels of fines. A further layer of inconsistency arises from differences in OHS inspection and enforcement policy and practice. The adoption of uniform national model OHS legislation and the efforts to harmonise OHS inspection and enforcement promise greater consistency. Close monitoring will be needed to ensure this promise is fulfilled.

3. Industry associations and unions

The Australian OHS Acts give industry associations and unions, as the organisations representing the interests of business and workers, a formal role to play in setting and monitoring the implementation of OHS policy and standards through statutory tripartite bodies established under the Acts (Johnstone, 2004a, pp. 127-132). In these forums, industry and union representatives join government representatives in making recommendations regarding OHS Acts, regulations and codes of practice, and approaches to supporting, inspecting and enforcing compliance in workplaces. This means that OHS law and policy is not simply a rational response to accumulated scientific and other research evidence, but the

outcome of negotiation between different stakeholder interests (see, for example, Quinlan, Bohle & Lamm, 2010, p. 490).

As well as joining tripartite forums, industry associations and unions provide OHS support to their members. This may include advice and training, workplace negotiations on OHS, and campaigns in relation to OHS legislation and other OHS matters (see, for example, ACTU, 2011; AIG, 2011). The role of industry associations and unions in assisting their members to achieve a healthier and safer working environment is recognised in the object of the national model WHS Act (Safe Work Australia, 2011a), which encourages these institutions to take a constructive role in promoting improvements in health and safety at work. The national model Act underpins the unions' role by empowering union officials with permits to enter workplaces where they have members (or eligible members) to inquire into suspected contraventions of OHS legislation. The provisions reflect research evidence that suggests a link between worker participation and stronger OHS performance, particularly when workers and their representatives are supported by unions (Walters, 2004). (For further discussion of the model Act see section 7.)

4. Australian and international technical standards

Along with the compliance support provided by OHS regulators, industry associations and unions, other valuable resources for OHS professionals are technical standards. These published documents provide specifications and procedures relating to the safety and reliability of products, structures, services and systems (Productivity Commission, 2006).

Standards Australia is the peak non-government body responsible for developing technical standards in Australia. To eliminate trade barriers, this institution adopts international standards wherever possible (Standards Australia, 2011). In particular, Standards Australia draws on standards developed by the International Organization for Standardization (ISO standards) and the International Electrotechnical Commission (IEC standards) with approximately one-third of current Australian Standards are fully or substantially aligned with international standards. Standards Australia has a formal agreement for preparing and publishing joint standards with Standards New Zealand, and cooperates with the Australian Government in the standards and conformance activities of APEC[4] and ASEAN.[5]

For OHS professionals, technical standards can provide information about what is reasonable for an organisation to do to ensure health and safety, ways to eliminate or minimise risks, and the availability and suitability of particular risk control measures. As they are based on accumulated industrial, scientific and consumer experience, technical standards reflect established knowledge. Despite periodic review, due to the time required for their preparation

[4] Asia-Pacific Economic Cooperation
[5] Association of Southeast Asian Nations

and the representation of different interests, standards may not reflect the latest technologies and developments.

A particular technical standard does not have legal force unless government has mandated the use of that standard (Johnstone, 2004a, p 332). That is, technical standards are not legal requirements unless they are called up in mandatory instruments such as regulations. Technical standards may have evidentiary status if incorporated in an approved code of practice. They also may have legal standing if incorporated in legal contracts; for example, between a client and a builder or machinery manufacturer.

5. Other international instruments

Standards and strategies that help to frame OHS regulation are set by several international bodies other than the International Organization for Standardization and the International Electrotechnical Commission. For example, the WHO International Agency for Research on Cancer (IARC) develops influential strategies for cancer prevention and control (IARC, 2011). The International Labour Organization's (ILO) conventions can be legally recognised through a process of ratification by the government of a country and measures to implement them into law in that country (Quinlan, Bohle & Lamm, 2010, p. 316). In 2004, the Australian Government ratified the ILO *Convention (No. 155) Concerning Occupational Safety and Health and the Working Environment*, *1981*. The principles of this convention have been broadly reflected in Commonwealth, state and territory OHS legislation for many years. In making their recommendations for the national model OHS Act, the review panel noted that the legislative framework must reflect Australia's commitment to Convention 155 as well as the ILO's 2003 *Global Strategy on Occupational Safety and Health* (Stewart-Crompton, Mayman & Sherriff, 2008, p. xi).

Perhaps the most notable OHS examples of Australian adoption of international standards relate to chemical substances. Just as global trade and commerce advanced the adoption of ISO and IEC standards in Australia, they also spurred the adoption of uniform classification and labelling standards for chemical substances. The criteria for classifying hazardous substances adopted by the then National Occupational Health and Safety Commission were closely aligned with the European Community's criteria for classifying such substances, while those for dangerous goods were closely aligned with UN criteria (NOHSC, 2004; UNECE, 2001).

The regulatory framework for the control of workplace hazardous substances and dangerous goods is under further review. Policy makers intend that the new framework will apply the UN's *Globally Harmonized System of Classification and Labelling of Chemicals* (Safe Work Australia, 2011b). Through adoption of this UN system, the classification, labels and material

safety data sheets (MSDS) for chemical substances used in Australian workplaces will be harmonised with major trading nations.

6. Economic and social trends

As well as institutions and instruments that regulate or frame OHS practice, OHS in Australian workplaces is impacted by economic and social trends. These are the fundamental changes in the nature of work, OHS risks and characteristics of the workforce that have occurred during the last 25 years or so (and are set to continue), and that pose major challenges for those managing OHS in Australian workplaces.

The labour market, work and its organisation have substantially changed with marked growth in casual, part-time and temporary work; outsourcing; the use of labour hire, franchising and complex supply chains; and home-based work (Frazer, Weaven & Wright, 2008; Quinlan, 2004; Quinlan, Bohle & Lamm, 2010, pp. 374-378)[6]. Research shows that OHS is constrained and adversely affected in these types of arrangements due to economic pressures, fragmentation of responsibility, uncertainty about where responsibility lies, and limited training for workers in such circumstances (Haines, 1997; House of Representatives Standing Committee, 2005; Quinlan, 2004; Quinlan & Bohle, 2008).

As a corollary of trends such as outsourcing and franchising, numbers of small businesses (with less than 20 employees) have increased (ABS, 2007). More than 95% of private-sector businesses are small; about 4% are medium (20-199 employees); and only 0.3% are large (200+ employees). Small businesses now employ about 46% of workers in private-sector employment (ABS, 2006a). The characteristics of small businesses mean that they often deal with OHS poorly due to lack of resources and capacity to manage OHS, shorter life cycles and infrequent inspection by OHS regulators, among other factors (Lamm & Walters, 2004; MacEachern et al., 2010).

Changes have occurred not only in the nature of work and organisations, but also in the types of hazards and risks arising from work. Employment in the manufacturing industry has declined and services and construction sectors have grown, which has shifted the pattern of occupational injury and illness towards musculoskeletal and psychosocial disorders (Bluff, Gunningham & Johnstone, 2004, pp. 1-3). The risks of new and emerging technologies such as nanotechnology, and the expanding use of electronic devices for communication and information processing are not well understood.

Furthermore, the make-up of the Australian workforce is subject to change. There has been a steady increase in female participation, typically in casual, temporary and part-time work, and the associated problems of such contingent work (ABS, 2006b, 2008a; Quinlan, Bohle &

[6] See *OHS BoK* Global Concept: Work

Lamm, 2010, p. 376)[7]. In addition, the workforce is aging with more than one-third now aged 45-64 (ABS, 2008b). The OHS problem of an aging workforce lies both in the greater risk of work-related injury and illness for this group of workers (ASCC, 2005), and in the large proportion of the workforce due to retire during the next 20 years. The latter may result in additional pressures on remaining workers and/or greater engagement of migrant and guest[8] workers, who may be less able and more reluctant to raise or respond to OHS issues due to language barriers, low levels of skill and training, and visa limits (Department of Immigration and Citizenship, 2008).

These economic and social trends were recognised in the *National Review into Model Occupational Health and Safety Law*s (Stewart-Crompton, Mayman & Sherriff, 2008) and, to some extent, the national model OHS legislation takes them into account. A central feature of the model OHS Act is the primary duty of care that is owed by persons conducting a business or undertaking (PCBUs) to all workers engaged, influenced or directed by the PCBU (Safe Work Australia, 2011a). The PCBU duty is to eliminate or minimise risks to health and safety so far as is reasonably practicable. Thus the primary duty of care embraces new and evolving work arrangements, as well as new and emerging risks, and those relating to an aging or migrant workforce.

It is unclear, however, how the large proportion of small businesses and undertakings will deal with these responsibilities. Officers of businesses or undertakings will be required to exercise due diligence, which includes taking reasonable steps to acquire and keep up to date knowledge of OHS matters, understand the nature of hazards and risks associated with the undertaking's operations, and ensure appropriate resources and processes are available and used to eliminate or minimise these risks (Safe Work Australia, 2011a). As these are things that small businesses have struggled with in the past, greater involvement by OHS professionals may be necessary if this group is to fare better in managing OHS in the future.

7. Directions in OHS regulation – the model WHS Act

The concerted efforts of the Commonwealth, state and territory governments to secure uniform OHS legislation culminated in the Workplace Relations Ministers' Council endorsing the model *Work Health and Safety Act* (WHSA) (Safe Work Australia, 2011a), for adoption in each jurisdiction by 1 January 2012. The model Act is underpinned by model *Work Health and Safety Regulations* (WHSR) and model codes of practice. This landmark development should simplify the work of OHS professionals who operate across jurisdictions; however, this outcome will depend on the adoption and maintenance of uniform OHS legislation in all jurisdictions. This section sketches some of the key provisions of the model WHS Act with which OHS professionals can expect to engage.

[7] See *BoK*: Global Concept: Work

[8] Such as section 457 visa workers in Australia.

Like its predecessors, the model Act establishes a series of general health and safety duties (WHSA, Part 2). Unlike its predecessors there is a 'primary' general duty covering all work situations, supplemented by 'further' duties imposing more particular obligations on specific classes of duty holder. A duty holder cannot transfer the duty to another person, and the duties are concurrent in that a person can have more than one duty, and more than one person can have the same duty. If more than one person has a duty for the same matter, each person must discharge the duty to the extent that the person has the capacity to influence and control the matter.[9] The duties that require the person to ensure health or safety require that person to *eliminate* risks to health and safety, so far as is reasonably practicable and, if elimination is not reasonably practicable, to *minimise* risks so far as is reasonably practicable (WHSA, s 17).

The model Act defines the expression *reasonably practicable* (WHSA, s 18) as:

> …that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:
> (a) the likelihood of the hazard or the risk concerned occurring; and
> (b) the degree of harm that might result from the hazard or the risk; and
> (c) what the person concerned knows, or ought reasonably to know, about:
> (i) the hazard or the risk; and
> (ii) ways of eliminating or minimising the risk; and
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk (Model Work Health and Safety Bill: Revised draft, 2011, s.18).

The OHS professional's understanding of hazard[10], risk[11] and control[12] concepts will be important in determining what action is reasonably practicable.

The principal duty holder is the *person who conducts a business or undertaking* (PCBU) (WHSA, ss 5, 19). The PCBU's duty is to ensure, so far as is reasonably practicable, the health and safety of workers engaged, influenced or directed by the PCBU, while they are at work in the business or undertaking. Workers are broadly defined to include the PCBU's own employees, contractors or subcontractors (or employees of these), employees of a labour hire company, outworkers, apprentices, trainees, students gaining work experience and volunteers (s 7). A PCBU "must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking" (s 19). The duty incorporates responsibilities in relation to the work environment, plant and structures, systems of work, facilities for the welfare of workers,

[9] Or would have the capacity to influence or control, but for an agreement or arrangement purporting to limit or remove that capacity.

[10] See *OHS BoK* Hazard as a Concept.

[11] See *OHS BoK* Risk.

[12] See *OHS BoK* Control: Prevention and Intervention.

information, training, instruction and supervision, and monitoring of workers' health and conditions at the workplace. There are further obligations for PCBUs who manage or control workplaces, fixtures, fittings or plant at workplaces; design, manufacture, import or supply plant, substances or structures; or install, construct or commission plant or structures (WHSA ss 20-26).

Officers of businesses or undertakings must exercise *due diligence* to ensure that the PCBU complies with the PCBU's obligations. Due diligence is defined as taking reasonable steps:

> (a) to acquire and keep up to date knowledge of work health and safety matters; and
> (b) to gain an understanding of the nature of the operations of the business or undertaking of the [PCBU] and
> generally of the hazards and risks associated with those operations; and
> (c) to ensure that the [PCBU] has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety…; and
> (d) to ensure that the [PCBU] has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
> (e) to ensure that the [PCBU] has, and implements, processes for complying with any duty or obligation of the [PCBU] under this Act…(WHSA, s.27).

These elements of due diligence constitute a basic framework for the governance and management of OHS[13].

The model Act places a new emphasis on *consultation, cooperation and coordination between duty holders*:

> If more than one person has a duty in respect of the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter (WHSA s 46).

For example, the designer of a workplace structure and the various contractors involved in building that structure must consult, cooperate and coordinate their activities to eliminate risks to health and safety so far as is reasonably practicable and, if elimination is not reasonably practicable, to minimise risks so far as is reasonably practicable.

There are requirements relating to *notification of certain types of incidents* by the PCBU, and for persons with management or control of a workplace to ensure that the site is not disturbed after a notifiable incident, until an inspector arrives or otherwise directed by an inspector (WHSA, ss 35-39). The model Act defines notifiable incidents as those involving the death of a person, serious injury or illness, or a dangerous incident (also defined).

The *duties of* a *worker* under the model Act are to:

> (a) take reasonable care for his or her own health and safety; and
> (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of

[13] See *OHS BoK* Systems and The Organisation

other persons; and
(c) comply, so far as the worker is reasonably able, with any reasonable instruction given by [the PCBU] to allow the [PCBU] to comply with this Act, and
(d) cooperate with any reasonable policy or procedure of [the PCBU] relating to health or safety at the workplace that has been notified to workers (WHSA, s 28).

As in preceding Acts, *consultation with workers* is a cornerstone of the model WHS Act: "The [PCBU] must, so far as is reasonably practicable, consult…with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety" (WHSA, s 47). Consultation is defined as requiring:

(a) that relevant information about the matter is shared with workers; and
(b) that workers be given a reasonable opportunity (i) to express their views and raise issues and (ii) to contribute to the decision-making process relating to the matter; and
(c) that the views of workers are taken into account by the [PCBU]; and
(d) that the workers consulted are advised of the outcome of the consultation in a timely manner.
If workers are represented by a health and safety representative, the consultation must involve that representative (WHSA, s 48).

The model Act stipulates that consultation is required when identifying hazards and assessing risks; when proposing changes that may affect OHS; and when making decisions about risk elimination or minimisation, the adequacy of facilities for workers' welfare, procedures for consultation, resolving OHS issues, monitoring workers' health or workplace conditions, and provision of information and training (WHSA, s 49).

As the definition of a *worker* in the model WHS Act (s.7) is very broad, a PCBU's arrangements for consulting workers need to extend beyond the PCBU's own employees. Consultation must include all workers engaged, influenced or directed by a PCBU, whether as contractors or subcontractors (or employees of these), labour hire workers, outworkers, apprentices, trainees or students gaining work experience, or volunteers. This broad range of workers may participate as worker health and safety representatives (HSRs) or committee members for a PCBU, and in the processes for establishing these consultative arrangements. In addition, a work group for electing an HSR may cover the workers of more than one business or undertaking (WHSA, s 55).

The model Act prescribes arrangements for the appointment, powers, functions and training of HSRs and committees (WHSA, ss 50-79) and procedures for resolving health and safety issues (WHSA, ss 80-103). These include the right of individual workers to cease unsafe work, and the power for HSRs to direct that unsafe work ceases – both of which are confined to circumstances where there is a serious risk emanating from an immediate or imminent exposure to a hazard. Also, HSRs are empowered to issue provisional improvement notices, subject to certain conditions relating to consultation and training.

There is protection for persons exercising powers or functions under the model Act; for example, as an HSR. It is an offence to engage in *discriminatory conduct* for prohibited

reasons that relate to exercising, or the intention to exercise, statutory powers or performing functions under the Act. A series of provisions in the Act deal with proceedings, orders for damages or reinstatement and other matters relating to discriminatory conduct (WHSA, ss 104-115).

Union officials may apply to the relevant authority for a *WHS entry permit*, which allows them to "enter a workplace for the purpose of inquiring into a suspected contravention" of the Act (WHSA, s 117). Permit holders are entitled to "inspect any work system, plant, substance, structure or other thing relevant to the suspected contravention," consult with relevant workers and the PCBU, inspect and make copies of relevant documents, and warn persons they reasonably believe to be exposed to a serious risk emanating from an immediate or imminent exposure to a hazard (WHSA, s 118).

Inspectors have prescribed functions and powers under the model Act (WHSA, ss.156-215). They can provide information and advice about compliance, and assist in the resolution of WHS issues, issue *improvement notices* for contraventions of the Act, *prohibition notices* for serious and immediate/imminent risks, and *infringement notices* (on-the-spot fines). Inspectors can investigate contraventions of the Act, assist in the prosecution of offences, and attend coronial inquests. In addition to these enforcement powers of inspectors, a regulator may accept a *WHS undertaking* "given by a person in connection with a matter relating to a contravention or alleged contravention by the person of this Act" (except for a contravention or alleged contravention that is a Category 1 – reckless conduct – offence) (ss.216-222). In carrying out these activities, inspectors have powers relating to entry to workplaces, use of assistants, search warrants, production of documents, answers to questions, obtaining and retaining records or documents, and seizing evidence of an offence and items for examination, analysis or testing. They can apply to a court for an injunction compelling a person to comply with a notice or restraining a person from contravening a notice. It is an offence under the model Act to hinder or obstruct, impersonate, assault, threaten or intimidate an inspector (WHSA, ss 163-190).

There are *three categories of offences* described in the model WHS Act: Category 1, reckless conduct; Category 2, failure to comply with a health and safety duty resulting in exposure of an individual to a risk of death or serious injury or illness; and Category 3, failure to comply with a health and safety duty (WHSA, ss 30-33). The different categories of offence attract different maximum penalties. Fines apply to all three categories with an additional maximum penalty of 5 years imprisonment for Category 1 offences if the duty holder is an individual (not a body corporate). The highest maximum fine of $3,000,000 applies to reckless conduct by a body corporate.

A regulator, or an inspector with a regulator's written authorisation, can bring *legal proceedings*:

(a) within two years after an offence first comes to the notice of the regulator;
(b) within one year after a finding in a coronial inquiry or other official inquiry that the offence has occurred;
(c) if a WHS undertaking has been given in relation to the offence, within six months after: (i) the WHS undertaking is contravened, or (ii) it comes to the notice of the regulator that the WHS undertaking has been contravened, or (iii) the regulator has agreed to the withdrawal of the WHS undertaking (WHSA, s 232).

If a court convicts a person, or finds a person guilty of an offence against the Act, the court may impose a *fine* and may make one or more *orders* against the offender, including adverse publicity orders, orders for restoration, work health and safety project (community service) orders, training orders, as well as court-ordered WHS undertakings and injunctions (WHSA, ss 234-244).

The model Act empowers the government to make *regulations* on a wide range of matters relating to OHS and the administration of the Act (WHSA, s 276). These regulations are *mandatory* requirements – they must be complied with. Also, the Act provides for *codes of practice* approved by the relevant Minister (WHSA, ss 274-275). In a proceeding for an offence against the Act, "an approved code of practice is admissible in the proceeding as evidence of whether or not a duty or obligation under this Act has been complied with" (WHSA, s 275) – that is, approved codes of practice are *evidentiary*.

The court may:
(a) have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and
(b) rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.
Nothing...prevents a person from introducing evidence of compliance with this Act in a manner that is different from the code but provides a standard of work health and safety that is equivalent to or higher than the standard required in the code (WHSA, s 275).

In summary, the national model Act builds on the preceding Commonwealth, state and territory OHS Acts in establishing continuing obligations for a series of duty holders. These duty holders will need to discharge their obligations to the extent that they have the capacity to influence and control a particular matter. While regulations and approved codes of practice provide more detail about how to comply, the model Act itself points to a series of *core processes and activities* for OHS practice. These include consultation with workers, acquiring and keeping up to date OHS knowledge, understanding the hazards and risks associated with a business or undertaking's operations, and ensuring appropriate resources and processes are in place to eliminate or minimise OHS risks. They also include processes for receiving and responding to information about incidents, hazards and risks; for complying with duties and obligations; and for consulting and coordinating with other duty holders. These processes and activities provide the mechanisms to eliminate or minimise risks, so far as is reasonably practicable, and to secure the health and safety of workers and workplaces – the principal OHS regulatory goal.

8. Summary

This chapter has introduced the socio-political context that impacts on OHS and the work of OHS professionals through a complex and diverse, but interconnected, set of elements – state and non-state institutions and actors, legal and quasi-legal instruments, and other mechanisms of social control and influence. It has shown how different elements variously frame, structure, monitor, interpret and/or enforce the 'rules of the OHS game,' influence the decision-making and actions of organisations and individuals at work, and contribute to the condition of health and safety in the working environment. The chapter has highlighted the central place of OHS regulation (legislation and enforcement) in the socio-political context, including developments in harmonising OHS regulation. It has explained the links between OHS regulation and other actors and instruments, such as industry associations and unions, technical standards and conventions, and trends in work, organisations, technology and the workforce. These elements are illustrative rather than exhaustive.

For OHS professionals, the key implication is that many different actors, instruments and mechanisms frame, shape and regulate OHS practice. Identifying, interpreting, analysing and evaluating the relevant elements, and their influence in particular contexts, are fundamental aspects of the role of the OHS professional. The socio-political context poses many challenges for OHS practice. A critical consideration for the OHS professional is whether particular elements support or are consistent with the goals of OHS regulation, or whether they are incompatible or undermine OHS regulatory goals.

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