

↙ feature cover story

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THE MISSING 'PEACES'

It is often said that reform moves slowly and laws reflect community values and consensus. While this is true, the draft Model Work Health and Safety Regulations largely reflect the community values of the early to mid-1970s, not those of the 21st century. So what current thinking is missing from the retro model WHS Regulations?

The release of the draft Model Work Health and Safety Regulations on December 7 last year by Safe Work Australia (SWA) represents a monumental effort in consolidating the varying work health and safety regulations throughout Australia into one regulation.

With a few notable exceptions, most topics covered by current regulations are included in the consolidated regulations. Consistent with the Model Work Health and Safety Act, obligations previously imposed on employers are now imposed on persons conducting businesses or undertakings.

Although the model regulations usher in some improvements, there have also been some alarming developments.

On the plus side is the inclusion of provisions not widely adopted in most jurisdictions, such as the Queensland provisions for diving work and remote or isolated work.

Unnecessarily prescriptive provisions, such as the content of first-aid kits, which were previously included in some regulations, have been excluded – no doubt to be incorporated in codes of practice or guidance material.

A number of 'Priority' Codes of Practice have also been released, for example: How to Manage Work Health and Safety Risks; How to Consult on Work Health and Safety; Managing the Work Environment; and Facilities.

On the minus side, one of the most alarming developments has been the approach to the hierarchies of duty-holders and of hazard controls. Indeed, the regulations appear to abandon the internationally accepted commitment to the hierarchy of controls.

Unmoved by reform

In both form and substance, the regulations appear unmoved by the critical reforms introduced by the model Act itself.

Rather than consistently emphasising the obligations of upstream persons conducting businesses or undertakings (PCBUs), the term 'PCBU' appears to have been used synonymously with the existing label, 'employer', while other labels – such as supplier, designer, manufacturer and person with the management or control of the workplace – are retained.

Importantly, the regulations missed the opportunity – provided ▶

by the inclusion of a proactive due-diligence obligation on officers in the model Act – to reinforce the prominent OHS role that leaders have within organisations.

More broadly, while the definition of due diligence in the model Act captures current judicial thought on the subject, it would be useful if it also helped officers to understand how these duties apply to their spheres of influence.

An officer who has financial responsibility, for example, may be required to consider the adequacy of resources allocated by his or her company to meet its health and safety obligations. Officers with managerial responsibility might be required to undertake adequate site visits as part of their obligation to familiarise themselves with the nature of their companies' businesses or undertakings.

The regulation also fails to outline how a duty-holder might go about consulting with other duty-holders. As this is an important aspect of the package of reforms delivered in the model Act, one would expect the regulations to impose obligations on duty-holders in relation to those dealings.

One would expect there to be an obligation to provide relevant information, consult in good faith, record the outcomes of consultations and have triggers reminding officers to review or revisit the consultation wherever there is a material change in the circumstances. Without such guidance, horizontal consultation is likely to descend rapidly into provisions re disclosure in contracts or warranties that are unlikely to be conducive to positive safety outcomes.

Inconsistent controls

What is most alarming, however, is the exclusion of general risk management obligations in favour of hazard-specific provisions, with an inconsistent 'hierarchy' of prescribed controls adopted.

Currently, an express risk-management obligation exists in all Australian jurisdictions with the exception of Queensland and Victoria. In Queensland, the obligation is part of a code of practice which, under that state's regime, has a quasi-legal effect because of the treatment of codes of practice in that jurisdiction.

Indeed, the National Review Panel expressly anticipated the inclusion of general risk management provisions in regulations – including a prescribed hierarchy of controls: a recommendation agreed on by the

WRMC. The exclusion of express risk management obligations, including a prescribed hierarchy of controls, is a very significant omission from the Regulations.

The hierarchy of controls, however, *has* been included with respect to the control of risk for the construction industry. The Regulations require PCBUs to eliminate risks to health and safety associated with construction work and, where it is not reasonably practicable to eliminate these risks, to minimise them by implementing any of the following risk-control measures:

- to substitute, for a hazard giving rise to a risk to health and safety, a new activity, procedure, plant, process or substance that lessens the risk to health and safety; or
- to isolate persons from the hazard; or
- to implement engineering controls; or
- to combine any of the risk-control measures outlined.

If those control measures do not minimise the risks so far as is reasonably practicable, the provision requires the PCBU to minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls.

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While providing for the combining of substitution, isolation and engineering controls in the construction provisions, the drafting of the Regulations does not expressly state that the requirement is to adopt such minimisation controls in that order.

That is, a PCBU would be able to comply with the risk control requirements set out in the provision by introducing a combination of isolation and engineering controls without ever considering a substitution control (ie, substituting the hazard for a lesser hazard giving rise to lesser risk), which was available and which is a higher-order control than isolating people from the risk or engineering out the risk.

This is possible because while the controls in the hierarchy of controls for risk minimisation are listed in the order of the hierarchy of hazard controls, nowhere in the provision does it specify that the construction work PCBU must adopt the measures in the order as written.

This sends a dangerous message to duty-holders: that all controls are considered equal. As safety practitioners, we know that this is not the case, and that such a suggestion can have deleterious effects on safety performance.

Stunning denial

But the inclusion of the hierarchy of controls in this way (albeit in a modified form, failing the mandating of its



descending preferential or cascading order) begs a broader question:

Why did Safe Work Australia take the view that it was necessary to adopt a hierarchy of controls for construction work and no other type of work?

Incident rates in the construction industry are high; recent statistics demonstrate, however, that incidence rates in transport and storage; agriculture; forestry and fishing; and manufacturing industries are higher. Yet nowhere in the Regulations have these hazardous industries been similarly singled out for special attention with regard to risk management.

Indeed, a thorough examination of the Regulations reveals a stunning denial of the place of the 'hierarchy of hazard controls' principle. Certain hazards and risks, dealt with in the Regulations, prescribe particular control measures. Specific controls have been prescribed for workplace hazards and risks that include noise, confined spaces, environments involving work at heights, falling objects, electrical equipment and powered mobile plants, as well as the risk of musculoskeletal disorders. One would expect that these provisions would at least adopt the hierarchy of controls in their approach to risk-control measures to be implemented for workplaces containing specific types of hazard. The hierarchy is not always adopted, however, and in some cases, certain types of controls are missing completely. Examples in this regard include the following:

- Control of noise: while substitution of plant and implementation of engineering controls and administrative controls are listed, isolating people from potentially damaging noise – under the hierarchy, a higher-order control than either engineering or administrative controls – is not included.
- Plant: here, the hierarchy of controls is largely replicated; however, as with the construction provision discussed above, adopting the control measures in descending order of preference is not mandated.
- Hazardous chemicals: substitution of chemicals, reduction in the amount of chemicals used, isolation of chemicals and engineering controls are all treated as if they are equally important; applying a cascading order of preference – as would be expected if one was adopting a true hierarchy of controls for the minimisation of risk – is not required.

Bizarre relationship

SWA's own draft Code of Practice, How to Manage Work Health and Safety Risks, acknowledges that "the most important step in managing risks involves eliminating them so far as is reasonably practicable, or if that is not possible, minimising the risks so far as is reasonably practicable." The Code also advocates the use of the hierarchy of hazard controls. In this context, the failure to include the hierarchy of controls as a mandated process within the Regulations



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borders on the bizarre.

It must be stressed that including the hierarchy of controls in the Code of Practice doesn't make up for its absence in the Regulations. As the code states only that the Courts "may" take it into consideration, the Act and Regulations "may" be complied with by following a method other than the code, and inspectors "may" refer to it when issuing improvement or prohibition notices, the place of the hierarchy of risk controls in the model OHS reform package is far from certain.

Missing in action

The Regulations are also lacking in other ways. Stress, bullying and fatigue management have received virtually no attention – yet all are active

areas of regulatory enforcement. The thorny issue of fitness for work has largely been ignored except in the context of diving work, despite the fact that fitness has been identified as a risk factor in numerous major accident inquiries.

Don't wait – act now

The Regulations are open for public comment until April 4, 2011. We encourage every reader to take the time to make a submission.

Let's generate debate on these important issues rather than being passive observers. While people do not usually like change, safety is too important to allow for such inertia, as recent disasters around the world have shown.

The laws we enact today are intended to operate for the next 30 years, in much the same way that their predecessors have done.

If you have suggestions for improvements, the time to make them is here and now – not once the laws have been embedded and duty-holders have gone to the expense of putting compliance measures in place.

If we fail to speak up now, it will be too late, and we may well be stuck for decades with what we do not want. /

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