

4 April 2011

Safe Work Australia
220 Northbourne Avenue
Braddon ACT 2601

SUBMISSIONS IN RELATION TO THE DRAFT MODEL WORK HEALTH AND SAFETY (WHS) REGULATIONS AND MODEL CODES OF PRACTICE

Introduction

1. NatRoad is the National Road Transporter Operators' Association. Our members range from owner drivers through to multinational fleet logistics providers.
2. The amalgamation of NatRoad with the Australian Road Train Association brought into existence the entity known as NatRoad Ltd incorporating the Australian Road Train Association. This amalgamation cemented NatRoad's position as the largest trucking association representing all long distance and regionally based operators.
3. NatRoad is a not for profit association established for the benefit of its members overseen by a board of directors who are principals of their own trucking businesses.
4. NatRoad was established to represent and assist the businesses that form its membership base and to act as the member's advocate to Government in relation to regulation and safety in the heavy vehicle industry.
5. The establishment of nationally consistent occupational health and safety laws across Australia is in line with NatRoad's core values of promoting and advocating national uniformity of regulation in the heavy vehicle industry and the promotion of safety and compliance for, and by its members.
6. As a consequence NatRoad strongly supports this current initiative of the Federal Government to develop and implement nationally consistent occupational health and safety laws and in turn recognises the value of the current process of public consultation in the development of these nationally consistent model laws.
7. NatRoad as the premier member association representing businesses in the heavy vehicle industry is familiar with the use of model laws in attempting to achieve national uniformity of regulation in the heavy vehicle industry.
8. NatRoad was a major participant in the process involving the development and implementation of the National Transport Commission's model Chain of Responsibility legislation in relation to compliance and enforcement, fatigue management and speeding regulation in the heavy vehicle industry.
9. Having been involved in the consultation process and the subsequent implementation of the model Chain of Responsibility laws, NatRoad is concerned to ensure that the issues that have prevented the Chain of Responsibility model laws from being implemented consistently across all jurisdictions do not similarly effect the implementation of model occupational health and safety laws.
10. It has been the heavy vehicle industry's experience that individual State interests have stood in the way of true national harmonisation of the Chain of Responsibility laws, that has led to confusion and

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instances of non compliance with the laws by businesses, exposing those businesses to significant penalties, particularly those businesses that operate nationally across multiple jurisdictions.

11. NatRoad's primary concern is that should a similar inconsistent approach to the Model OHS laws be adopted allowing States and Territories to amend the laws to reflect individual interests, true harmonisation of occupational health and safety laws will be unachievable resulting in trucking businesses having to comply with different obligations across jurisdictions. This is at odds with the Federal Government's intention to develop harmonised laws.
12. Given the nature of the heavy vehicle industry and the number of members of NatRoad (ranging from owner drivers through to multinational logistics companies) required to operate across multiple jurisdictions, NatRoad fully supports nationally consistent and harmonised occupational health and safety laws.
13. Nationally consistent occupational health and safety laws will assist the heavy vehicle industry in operating safely across all jurisdictions, eliminating duplication of processes and easing the cost burden associated with complying with multiple occupational health and safety obligations in each State and Territory.
14. NatRoad has long been a supporter of the current three tier occupational health and safety model of a principal OH&S Act including general duties, underpinned by regulations containing detailed machinery provisions and practical guidance on how to achieve compliance by reference to national standards, codes of practice and other relevant guidance material.
15. NatRoad previously commented upon the Model WHS Act during its public comment period and as part of its commitment to its membership in advocating for nationally consistent regulation of WHS laws has provided comment regarding the draft Model WHS Regulations below. NatRoad is concerned that the current differences in existing regulations across the multiple State, Territory and Commonwealth jurisdictions has a major effect on the safety and productivity of many of NatRoad's members that operate businesses nationally or across multiple State borders.

Key issues

16. NatRoad supports the WHS harmonisation process and the majority of the provisions that make up the draft Model WHS Regulations, however the following commentary relates to NatRoad's concerns regarding some matters included in the WHS Regulations and some that have been omitted.

Training requirements for HSRs

17. The WHS Regulations include provisions relating to Health and Safety Representatives (**HSR**). The consultation provisions under the Model Work Health and Safety Act (**Model Act**) give prominence to the establishment of workgroups and the election of HSRs as the mechanism for consultation in the workplace.
18. HSRs have certain powers (e.g. to issue Provisional Improvement Notices and stop work notices) under the Model Act provided the HSR has undertaken the required training. Regulation 2.1.7 of the WHS Regulations provides that HSRs are entitled to attend an initial five day training course and annual one day refresher training.

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19. NatRoad can envisage that employees of its members who already sit on health and safety committees or have been elected as representatives will likely be available for election as an HSR. Those employees would have previously undertaken a consultation training course upon election to the committee or as a representative and NatRoad is concerned that there should be a recognition of prior learning with respect to some aspects of the proposed training agenda.
20. The requirement for employees to attend a further five day course on the implementation of these regulations, where employees have already attended similar training courses of up to four days duration has the potential to be a cost and productivity burden on members particularly with respect to those operating small to medium size businesses.
21. NatRoad submits that WHS Regulations should include a note to the effect that on the provision of suitable evidence a person's prior consultation training is to be recognised for the purposes of the training requirement under the WHS Regulations.

Training requirements for WHS entry permits

22. The Model Act includes provisions relating to the right of a union official to enter a workplace to investigate a suspected contravention of the Model Act, to inspect records or to meet with workers.
23. Regulation 2.4.1 of the WHS Regulations includes provisions setting out the training requirements for WHS entry permits.
24. NatRoad notes that the WHS Regulations include a broad outline of the matters that are to be covered in the proposed WHS entry permit training and that the training is to be approved by the regulator.
25. NatRoad is concerned to ensure that the powers available to a union official are exercised consistently in each jurisdiction. On this point the WHS Regulations appear to leave the door open for regulators to approve differing standards of training. The Jurisdictional Note in the Appendix to the Model Act confirms that regulators will remain those regulators currently in each State and Territory enforcing individual State and Territory WHS laws.
26. Given the wide powers available to union officials NatRoad is concerned that regulators in each State and Territory may apply a different standard of training for WHS entry permits, thereby meaning that national businesses may be faced with differing interpretations of how the powers available to WHS entry permit holders are used dependant upon the State or Territory of origin of the permit holder.
27. NatRoad submits that the detail of the training to be provided to union officials seeking to become WHS entry permit holders should be consistently formulated and guidance material setting out a minimum standard for the training material be provided to regulators in each State or Territory.

Fall Hazards

28. NatRoad's members operate in an environment where it is at times necessary to access areas at a height above 2 metres so that the requirements of the WHS Regulations will apply.
29. The proposed regulation in this regard mandates certain controls including a preference towards the use of fall arrest or fall prevention equipment over administrative controls.

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30. In most circumstances it is impractical for NatRoad members to use a fall arrest system and would by necessity prefer administrative controls as the most appropriate control in most circumstances.
31. The WHS Regulations do not provide any guidance as to the nature of administrative controls other than to highlight as an example a safe work method statement (**SWMS**). Simply relying upon a SWMS as an administrative control does not take into consideration the process required to inform and train a worker in relation to the implementation of the SWMS and the review and monitoring process required to ensure its ongoing effectiveness.
32. NatRoad submits that this regulation does not provide any clear guidance for duty holders and should be re-drafted to take into account NatRoad's concerns listed above.

Risk management and the hierarchy of controls

33. NatRoad is concerned at the omission in the WHS Regulations of a provision relating to a duty holders risk management obligations.
34. The WHS Regulations as drafted include a reference to risk management obligations as part of individual and specific hazards, for example noise. The basis of the majority of NatRoad members' safety management systems is the requirement to implement risk management principles.
35. We note that risk management principles and the hierarchy of control are set out in the proposed Code of Practice *How to manage health and safety risks*. Given the status of a Code of Practice NatRoad is concerned that the risk management obligation and the requirement to apply the hierarchy of controls has not been given appropriate statutory standing by virtue of its omission from the Model Act and WHS Regulations.
36. It is NatRoad's view that an express risk management obligation and accompanying requirement to apply the hierarchy of controls should be included in the WHS Regulations to ensure that all duty holders are aware of this fundamental requirement.

Duty to exercise due diligence

37. NatRoad's membership base includes large corporations down to family owned regional businesses. The duty for an officer of a business or undertaking to exercise due diligence under the Model Act has a potential major impact on most of NatRoad's members.
38. Currently there is no guidance material or information regarding this new duty in the WHS Regulations, the priority codes of practice or the proposed codes of practice. Given that this is an individual liability NatRoad is concerned that potential duty holders should be given as much practical guidance so as to be able to best comply with this new duty.
39. In a report to the WorkCover Authority of NSW¹, a panel headed by Professor Ron McCallum considered a range of matters including the operation of the "Directors' and managers" provisions at section 26 of the *Occupational Health and Safety Act 2000* (NSW) (**NSW Act**).

¹ Advice in relation to workplace death, occupational health and safety legislation and other matters June 2004 Professor Ron McCallum, Mr Peter Hall QC, Mr Adam Hatcher and Mr Adam Searle

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40. Section 26 includes a defence for directors or managers that they used all due diligence in preventing a contravention of the OHS Act by the corporation. The panel recommended that a Code of Practice with statutory force be developed that addressed the following matters:
- (a) The definition of directors' and managers' functions and responsibilities;
 - (b) Particularisation of steps required by directors and managers to discharge safety obligations attaching to their roles;
 - (c) The formulation of obligations of members of senior management to integrate themselves into safety systems effecting operations (e.g. the receipt of quarterly reports on the integrity of safety management systems).
41. NatRoad agrees that a similar approach should be adopted and a code of practice developed to provide practical guidance to individuals who may have obligation imposed by the operation of this new duty.

Requirement for multiple duty holders to consult

42. The Model Act obliges duty holders to consult with each other on work health and safety matters for which the duty holders have a concurrent duty.
43. NatRoad concludes that such a requirement is to ensure a uniform approach to safety by each of the duty holders.
44. NatRoad is concerned about the lack of detail in the WHS Regulations with respect to this multiple consultation requirement as opposed to the detailed provisions relating to worker consultation obligations.
45. NatRoad members regularly access client premises such as retailer distribution centres and other related premises. It is likely that members will be exposed to the duty holder consultation requirements on a daily basis and would benefit from having greater detail regarding how to comply with this duty in the WHS Regulations.
46. The WHS Regulations should include similar detail about the mechanisms for consultation between duty holders as the worker consultation provisions. This will provide guidance to duty holders as to when consultation is required and the nature of the consultation.

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Effect on other Heavy Vehicle Industry Specific Regulations

47. NatRoad agrees with the fact that the WHS Regulations do not contain provisions relating to fatigue in the heavy vehicle industry and consider that this matter is best regulated by the current Chain of Responsibility legislation operating across Australia thereby eliminating the current duplication of regulation in this area.

Yours faithfully



Bernie Belacic

CEO NatRoad

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