

# THE ROLE OF CODES OF PRACTICE IN THE OHS FRAMEWORK

OCCUPATIONAL HEALTH AND SAFETY ACT 2000 REVIEW

DECEMBER 2005

ISSUE PAPER 4  
CALL FOR PUBLIC COMMENT  
BY FRIDAY 3 FEBRUARY 2006

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Submissions should be prepared using the format at **Appendix A**.

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# INTRODUCTION

On 16 June 2005 the Hon John Della Bosca MLC, Minister for Commerce, announced the review of the *Occupational Health and Safety Act 2000*, in accordance with the requirements of section 142 of that Act, to determine whether the Act's objectives remain valid and whether the provisions of the Act remain appropriate for securing those objectives.

The *Review of the Occupational Health and Safety Act 2000 Discussion Paper* was released on 28 June 2005 with interested persons and groups invited to submit comments relevant to the terms of reference. The closing date for public submissions was 19 August 05 but submissions were received as recently as 26 October 2005.

There was a substantial amount of comment in relation to the Act's objectives, general duty framework and enforcement approaches. This information is currently being analysed by the review team. Some of the specific issues raised in the Discussion Paper did not elicit a significant response, or the responses indicated that there might have been some misunderstanding about a suggested proposal. The review team is seeking further comment on a range of issues to assist with the analysis of these issues and the consideration of change options. Comment is sought on the following five Issue Papers.

1. Clothing outworkers
2. Recognition between safety inspectorates
3. Offences for fraudulent activities
4. The role of Codes of Practice in the occupational health and safety framework
5. Controllers of work premises

You are welcome to make a submission on any or all of the Issue Papers. The **closing date for submissions is Friday 3 February 06**. Submissions should be prepared using the format provided at **Appendix A** and sent by email, fax or mail to:

Email: [ohsact.review@workcover.nsw.gov.au](mailto:ohsact.review@workcover.nsw.gov.au)

Fax: 02 9287 4920

Mail: OHS Act Review  
WorkCover NSW  
Locked Bag 2906  
Lisarow NSW 2252

Once WorkCover receives your submission an acknowledgement will be sent to confirm receipt of your submission.

## ISSUE

An approved industry code of practice provides practical guidance to employers and others on achieving the standard of health, safety and welfare required by the *Occupational Health and Safety Act 2000* and *Occupational Health and Safety Regulation 2001*. Codes of practice usually address a particular hazard, work activity or health and safety duty.

An approved code of practice should be followed, unless there is an alternative course of action, which achieves the same, or a better standard of health, safety and welfare in the workplace.

The legislative framework has a hierarchy with the Act containing general duties, establishing overarching health and safety obligations. The supporting regulations provide a range of performance-based and prescriptive requirements to inform duty holders more specifically of what they need to do to discharge their general duties. Codes of practice give practical and industry specific guidance on what compliance with the legislation 'looks like'.

Section 43 of the Occupational Health and Safety Act provides for the Minister to approve industry codes of practice:

*The Minister may, having regard to any recommendation of WorkCover, approve an industry code of practice.*

Part 4, specifically sections 41 and 42, of the Act sets out details in relation to the development of a code of practice.

*WorkCover may prepare draft industry codes of practice. An industry code of practice may refer to or incorporate, with or with modification, a document prepared or published by a body specified in the code, as in force at a particular time or from time to time.*

*WorkCover is to consult with such organisations or persons as the Minister may direct about a draft code and may consult with such others as WorkCover thinks appropriate*

*WorkCover is to take in to consideration any submissions it receives that relate to a draft code before it makes any recommendation to the Minister for its approval.*

These sections allow for WorkCover to prepare draft codes and impose a duty for WorkCover to consult with such organisations or persons as the Minister may direct although WorkCover may consult with such others, as it deems appropriate.

A code of practice is designed to be used in conjunction with the legislation but does not have the same legal force. Under section 40 of the Occupational Health and Safety Act, codes are created for the purpose of providing practical guidance to employers and others. There is no mandatory requirement to follow codes, unless directed by an inspector in order to remedy any contravention of the legislation. A person or company cannot be prosecuted only because of a failure to comply with a code of practice.

However, under section 46 of the Act, failing to comply with a relevant code can be used as evidence to demonstrate that there has been a breach of the legislation.

A WorkCover inspector can cite a code of practice in a direction in an improvement or prohibition notice, indicating the measures that should be taken to remedy an alleged contravention or non-compliance. Failure to comply with a requirement in an improvement or prohibition notice is an offence.

In summary, an approved industry code of practice:

- gives practical guidance on how the required standard of health, safety and welfare can be achieved in an area of work
- should be followed, unless there is an alternative course of action which achieves the same or better standard of health and safety in the workplace
- can be used in support of the preventive enforcement provisions of the legislation
- can be used to support prosecutions for failing to comply with or contravening the legislation
- cannot be explicitly used to support a defence.

There are currently over 40 codes of practice (see **Appendix B**) that have been approved by the Minister to assist parties to meet their legislative obligations. Examples of the codes of practice in place include:

- Occupational Health and Safety Consultation;
- Moving Plant on Construction Sites; and
- Risk Assessment.

More recently codes of practice have placed a greater emphasis on practical advice, based on what WorkCover expects in relation to compliance with legislative obligations. This is a move to setting out more clearly what action must be taken, which should provide more certainty while still allowing flexibility on behalf of duty holders to adapt codes of practice to meet their own individual workplace circumstances. Feedback from stakeholders indicates that some existing codes of practice are too general or too repetitive in the way they reflect the legislative provisions. There is stakeholder interest in reviewing the nature of codes to ensure they provide useful guidance that improves the ability of industry to comply with legislative obligations. The subjective nature of risk assessments make the role of codes in providing clear and practical risk control information even more critical to the occupational health and safety framework.

A person's failure to observe the code can be used by WorkCover as evidence in a proceeding for a breach of the legislation. However, a number of stakeholders have pointed out that the legislation does not recognise that following a code of practice is a demonstration of compliance or partial compliance with legislative obligations. Others have gone further suggesting that compliance with codes should be mandatory and that a breach of a code should be an offence.

## **STAKEHOLDER VIEWS**

Several issues have been raised by stakeholders regarding the role of codes in occupational health and safety in New South Wales. The general consensus of stakeholder submissions is supportive of the need for codes in the occupational health and safety framework.

### **THE ROLE OF CODES**

There are several aspects regarding the role of codes that have been brought up by stakeholders as needing examination and potential review.

As noted above, under section 46 of the Act, failing to comply with a relevant code can be used as evidence to demonstrate that there has been a breach of the legislation. Some stakeholders support using compliance with a code as evidence to demonstrate compliance with legislative requirements. They argued that duty holders needed greater certainty about what to do to comply with the general duties and regulatory obligations. This, they suggested, would provide a greater incentive for duty holders to comply with the legislation, as they would receive recognition for the preventive efforts they had put in place. It was considered that this would also address the perception that it was not worth investing in prevention because you would be liable to the same putative enforcement actions whether you had partially complete or substantially complete health and safety systems in place. Some stakeholders only supported the use of codes as evidence of compliance on the proviso that codes would need to be industry specific.

Others recommended mandating compliance with codes and offences for non-compliance. They argued for greater clarity about when codes needed to be complied with. They suggested that the legislation should clearly state that codes should be complied with unless a duty holder can demonstrate a safer or healthier system of work.

### **DEVELOPMENT OF CODES**

Proposals from stakeholders include recommendations that codes be drafted using tripartite (government, union, employer) consultation mechanisms. It has also been suggested that there be a mandatory review period for each code of practice. While there is currently no legislative requirement to review codes, WorkCover does carry out periodic reviews, although some public comment suggested that some codes were out of date and would benefit from a more frequent review period.

A suggestion has also been made for national uniformity with regards to codes of practice. Many of the current codes of practice are based on national standards prepared by the former National Occupational Health and Safety Commission (now the Australian Safety and Compensation Council) as part of the national uniformity framework. Some have raised concerns about the length of time it takes jurisdictions to adopt national codes of practice.

Some stakeholders suggested that codes be developed in a systematic manner with high incidence areas targeted first. The Occupational Health and Safety Act does not currently set out any prescriptive requirement as to which areas should have a code of practice and it is left to the discretion of WorkCover to prepare codes where deemed necessary. It may however, be worth considering an administrative strategy for the identification and prioritisation of code development in consultation with stakeholders.

Stakeholders were generally supportive of clarifying in the legislation the provision of general practical advice and guidance, although some stakeholder raised concerns about inspectors providing non-mandatory advice. The provision of advice and guidance was seen as integral to WorkCover's prevention and compliance approach and is being considered as part of the Act review.



## LEGISLATIVE MODELS

A summary of the role codes of practice play in the different states in Australia is provided in the table below.

OHS Act	Features
Victoria	<p>Under the former <i>Occupational Health and Safety Act 1985</i>, approved codes of practice were made to assist people who have duties or obligations under Victoria's health and safety laws. Their status meant that a general duty under an Act or a specific requirement under a Regulation could be met by complying with the related part of a code of practice.</p> <p>On 1 July 2005, the Act was repealed and replaced by the <i>Occupational Health and Safety Act 2004</i>. This Act provides in section 149 for the making of compliance codes, which have the purpose of providing practical guidance. Failure to comply with a compliance code does not give rise to any civil or criminal liability, however under section 152 a person who complies with a compliance code may be taken to have compliance with the Act.</p> <p>WorkSafe Victoria will progressively review all codes of practice and replace them with other types of guidance material and, in appropriate cases, with compliance codes that will provide greater certainty about what constitutes compliance with the OHS laws. The difference between a Victorian compliance code and a NSW code of practice is the recognition that following the Victorian code may be taken as compliance with the Act. Currently no Victorian compliance codes have been made.</p>
Queensland	<p>Under the Act, there are three types of instruments made to help meet workplace health and safety obligations - regulations, Advisory Standards and industry codes of practice.</p> <p>Codes of practice state ways to manage exposure to risks. These were known as Advisory Standards until November 2004. If there is an advisory standard or an industry code of practice about a risk – duty holders must either:</p> <ul style="list-style-type: none"> <li>do what the standard or code says; or</li> <li>adopt and follow another way that manages exposure to the risk and take reasonable precautions and exercise proper diligence about the risk</li> </ul> <p>The role of codes of practice under the Queensland framework is to essentially provide mandatory prescriptive standards of health and safety that support the general duties and obligations under the legislation. The difference between a Queensland code of practice and a NSW code of practice is the recognition that following the Queensland code may be taken as compliance with the Act.</p> <p>From 18 Novemembr 2004 the <i>Workplace Health and Safety Act 1995</i> was amended so that all Advisory Standards and industry codes of practice were continued as Codes of Practice and expire 10 years after their commencement date.</p>
Western Australia	<p>Codes of practice provide practical advice on prevention strategies; and/or practical means of achieving compliance with general duties or specific regulatory requirements. The</p>

OHS Act	Features
	difference between a Western Australian code of practice and a NSW code of practice is the recognition that following the Western Australian code may be taken as compliance with the Act.
South Australia	Approved Codes of Practice give practical guidance on how to comply with legal requirements of specific regulations and should be used in addition to the Act and Regulations. Duty holders are obliged to follow Approved Codes of Practice unless they can apply another solution that is as good or better. The South Australian model is similar to NSW.

A comparison of jurisdictional frameworks demonstrates some differences in approach to codes of practice. The common thread running through all jurisdictions is that codes provide practical guidance, which should be followed, or duty holder must identify another solution that is as good as, or better than, the approach in the relevant code of practice.

### ISSUES FOR COMMENT

Question 1 – What role should codes of practice play in the New South Wales occupational health and safety framework?

Question 2 – Should codes of practice be used to support a proceeding for an offence under the OHS Act?

Question 3 – Should codes of practice have a mandatory status?

Question 4 - Should codes of practice be used as part of a defence to demonstrate compliance with the OHS Act?

Question 5 – Who should be involved in the preparation and consultation on draft codes of practice and should this be specified in the OHS Act?

## REFERENCES

### LEGISLATION

*Occupational Health and Safety Act 2000* (New South Wales)

*Occupational Health and Safety Act 2004* (Victoria)

*Occupational Health and Safety Act 1984* (Western Australia)

*Occupational Health, Safety and Welfare Act 1986* (South Australia)

*Occupational Health and Safety Regulation 2001* (New South Wales)

*Workplace Health and Safety Act 1995* (Queensland)

# APPENDIX A

## PUBLIC COMMENT FORMAT

Role of Codes of Practice Issue Paper No. 4

Occupational Health and Safety Act 2000

<p><b>To:</b></p> <p>OHS Act Review          WorkCover NSW          Locked Bag 2906          Lisarow NSW 2252 <i>or</i></p> <p>Fax:          02 9287 4920 <i>or</i>          Email:          ohsact.review@workcover.nsw.gov.au</p>	<p><b>From</b> Name (company and position if applicable):          :</p> <p>Postal address:</p> <p>Phone:</p> <p>Email:</p>
<p>Closing date:  <b>Friday 3 February 06</b></p>	<p>Date of comment: ...../...../2005</p>

## GENERAL COMMENT

1.	
2.	
3.	

## SPECIFIC COMMENT

Question number	Issue and supporting reasons

## APPENDIX B

### APPROVED INDUSTRY CODE OF PRACTICE

(Approved by the Minister under Section 43 or 45 of the *Occupational Health and Safety Act 2000*, or Section 12 or 14 *Rural Workers Accommodation Act 1969*, including those now revoked)

**Copies of the Codes of Practice are available on the WorkCover website.**

Code title	Commencement (revocation)
Compactors	15 February 1991
Tunnels under construction#	7 June 1991
Manual Handling	1 September 1991
The safe handling of timber preservatives and treated timber (incl guidance note)	1 November 1991
The safe use of Vinyl Chloride	1 November 1991
Workplace injury and disease recording	1 November 1991
Electrical practices for construction work#	1 February 1992
Facade retention	1 May 1992
Safety aspects in the design, manufacture and installation of on-farm silos and field bins	2 August 1992 (amended 26 Nov 1993)
Safe use of Synthetic Mineral Fibres	1 June 1993
Mono-strand post-tensioning of concrete buildings	1 August 1993
Safe work on roofs Part 1 - Commercial and Industrial Buildings	1 November 1993
Snigging logs - Revoked and replaced by Forest harvesting 2003	1 February 1994 (1 January 2003)
Construction and testing of concrete pumps	1 March 1994
Pumping concrete	1 March 1994
Safe handling and storage of enzymatic detergent powders and liquids	4 April 1994
Loading, unloading and securing of logs to log haulage vehicles. Revoked and replaced by Forest Harvesting 2003	16 January 1995 (1 January 2003)
Overhead Protective Structures	20 March 1995
Safety Line Systems	16 June 1995
The prevention of Occupational Overuse Syndrome (June 1994)	2 March 1996
For health care workers and other people at risk of the transmission of Human Immunodeficiency Virus and other blood-borne pathogens in the workplace 1 <sup>st</sup> ed. Replaced by National code	10 March 1996 Revoked 15/10/04
Control of Hazardous Substances in the Workplace#	12 July 1996
Preparation of Material Safety Data Sheets 1 <sup>st</sup> ed* Revoked and replaced by 3 <sup>rd</sup> edition 2003	12 July 1996 (26 April 2006)
Labelling of Workplace Substances	12 July 1996
Noise Management and protection of hearing at work. Amended 2004	31 May 1997 (amended 17 Dec 04)

<b>Code title</b>	<b>Commencement (revocation)</b>
Cutting and Drilling Concrete and Other Masonry Products	1 March 1997
Amenities for Construction Work	1 March 1997
Safe Work on Roofs Part 2 - Residential Buildings (1 <sup>st</sup> ed) (revoked)	1 March 1997 revoked 10 Dec 04
Sawmilling	1 July 1997
Formwork	22 June 1998
Amenity Tree Industry (1 <sup>st</sup> edition)	1 August 1998
Safe use and storage of chemicals (including pesticides and herbicides) in agriculture#	1 September 1998
Safe use of pesticides including herbicides in non-agricultural workplaces#	1 September 1998
OHS Induction Training for Construction	1 April 1999
Excavation	31 March 2000
OHS Consultation	7 September 2001
Risk assessment	21 September 2001
Workplace amenities (excludes construction, amended to include agriculture 2005)	21 September 2001
Technical guidance	21 September 2001
Working in hot and cold environments	21 September 2001
Low voltage electrical work	1 January 2002
Safety in forest harvesting operations	1 January 2003
Transport and Delivery of Cash-in-Transit Industry	9 March 2003
National Code of practice for the preparation of material safety data sheets, 2 <sup>nd</sup> edition 2003	26 April 2003
Moving plant on construction sites	16 January 2004
National code of practice for the control of work-related exposure to hepatitis and HIV (blood-borne) viruses (NOHSC: 2010 (2003))	15 October 2004
Safe Work on Roofs Part 2 - Residential Buildings (2 <sup>nd</sup> edition).	10 December 2004
Noise management and protection of hearing at work, 2 <sup>nd</sup> amended ed.	17 December 2004
Collection of domestic waste	29 July 2005
Safety aspects in the design of bulk solids containers including silos, field bins and chaser bins	26 August 2005
Storage and handling of dangerous goods	1 September 2005
Work near overhead power lines*	
Rural accommodation and amenities*	

# new version under development

\* new code of practice in development



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