



**Regulation Review Committee
Parliament of New South Wales**

**Report on the Adoption of Codes
of Practice under the
Construction Safety Amendment
(Amenities and Training)
Regulation 1998**

**Report No 8/52
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Regulation Review Committee

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Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987*. A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

- (a) that the regulation trespasses unduly on personal rights and liberties;
- (b) that the regulation may have an adverse impact on the business community;
- (c) that the regulation may not have been within the general objects of the legislation under which it was made;
- (d) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
- (e) that the objective of the regulation could have been achieved by alternative and more effective means;
- (f) that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- (g) that the form or intention of the regulation calls for elucidation; or that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable, including reports setting out its opinion that a regulation ought to be disallowed.

Chairman's Foreword

This report sets out the Committee's consideration of the *Construction Safety Amendment (Amenities and Training) Regulation 1998*. This regulation introduced a number of codes of practice relating to the facilities and accommodation for building and excavation workers.

The Committee was interested to see how these codes had been operating in the industry over the past 18 months since the regulation commenced.

The regulation is part of a major trend away from black letter law to codes and performance-based standards. The Committee previously considered this trend in connection with the *Subordinate Legislation Amendment (Regulatory Flexibility) Bill 1998* when it expressed support for the concept of performance-based regulation provided that safety was not compromised.

The Committee obtained a briefing from officers of WorkCover to find out how these codes were operating and how well they were accepted and applied by employers and employees in the industry.

The Committee was satisfied with the detailed response provided by the officers of WorkCover but noted that a number of related issues such as the co-ordination and consistency of national standards adopted in New South Wales legislation were the subject of ongoing inquiries by WorkCover.



Peter R. Nagle, MP
Chairman

CONSTRUCTION SAFETY AMENDMENT (AMENITIES AND TRAINING) REGULATION 1998

The explanatory note to the regulation states its object is to repeal Part Ten of the regulation which deals with shelter, change accommodation, dining accommodation, sanitary facilities and washing facilities for building and excavation workers. These matters are now covered by a code of practice approved under section 44A of the Occupational Health and Safety Act 1983.

That section states "For the purpose of providing practical guidance to employers, self-employed persons and employees, the WorkCover Authority may formulate and prepare industry codes of practice. The Minister may, having regard to any recommendation of the WorkCover Authority, approve an industry code of practice. An industry code of practice may consist of any code, standard, rule, specification or provision relating to occupational health, safety or welfare approved by the Minister".

The regulation also inserts a new part into the regulations which provides for induction training of construction workers in accordance with a code of practice approved by the Work Cover Authority.

This regulation shows the trend away from black-letter regulation in favour of codes and performance based standards. The Committee previously considered this trend in connection with the Subordinate Legislation Amendment (Regulatory Flexibility) Bill where it expressed support for the concept of performance-based regulation provided that safety was not compromised.

BRIEFING

The Committee wrote to the Minister for Industrial Relations seeking the attendance of the relevant officers to brief the Committee on the adoption of codes and performance-based standards under his administration.

On Friday 7 April 2000 Mr Bryan Russell, Director – Strategic Operations Group, Occupational Health and Safety Division, Mr Daren McDonald, Co-ordinator - Industry Liaison Unit, WorkCover Construction Team, Occupational Health and Safety Division and Mr John Mackay, Assistant Manager, Occupational Health and Safety Liaison Unit attended to brief Committee members on the adoption of codes under the regulations. Mr Russell tabled a paper replying to a number of questions formulated by the Committee. (See Appendix 1)

He said that the unit was responsible for setting policy direction and strategic planning operations of the Division and supported field-based activities of the inspectorate service delivery group of the Division.

He said codes were a useful addition to regulatory requirements. The Code of Practice program should be seen in a holistic sense as part of a separate mechanism for legislative framework.

Mr Russell and the other officers said that WorkCover has over the last five years initiated a program of listening to stakeholders, and working with them to develop codes. The two codes in question, Amenities and Induction Training, were good examples. They said there was a high level of interaction.

The officers indicated that in the case of the Induction Training Code of Practice, there were twenty different industry stakeholders representing large contractors, small builders, government contractors, employees and other stakeholders who had extensive input into the code of practice.

The officers indicated that it is not intended to adopt codes of practice in all areas. There are some industries where codes of practice on their own are not sufficiently prescriptive. These require more restrictive controls, for example for asbestos and demolition contractors it is necessary to have clear language about the need to observe provisions and meet standards.

The officers indicated that it was not easy to assess the cost and benefits of standards. However WorkCover has initiated a study to determine the essentials of a good code of practice as opposed to legislative provisions.

The Committee members suggested that morbidity and mortality rates over time might point to the success or failure of a particular code. The officers agreed but said it would be difficult to isolate the code itself from the means by which it was implemented. For example the code relating to roofing was developed after a number of fatalities in the industry. It altered the safety standards by requiring guard rails around roofs of cottages but there is extensive under-reporting of accidents in the housing industry and it might therefore not be possible to estimate the success of the code by this means. The code nonetheless changed the culture of the industry but this was not directly measurable.

The Committee members asked who initiated the proposals for codes and the officers referred to a further document (see appendix 2) which showed the various arrangements for regulation of occupational health and safety in diagrammatic form.

Arrangement 1 dealt with the situation where both a regulation and code of practice were adopted to regulate an area. This applied to matters such as manual handling risks, hazardous substances and noise.

Arrangement 2 concerned those matters which were dealt with by regulation only and applied to demolition work, certification and first aid.

Arrangement 3 related to those matters dealt with by code of practice only and included the present regulation governing amenities for construction work.

The officers said in some cases the proposals for Arrangement 2 were initiated by the industry who favoured clear prescription as to their rights and liabilities, for example regulations governing demolition work were, the officers advised, initiated by the relevant contractors and unions. The code of practice for amenities for construction workers, by contrast, was initiated by the relevant stakeholders who felt that a code of practice alone was sufficient.

The officers said that the demand for regulation rather than a code arose from contractors themselves because they were alarmed at the number of accidents occurring in their industry. There were some contractors shortcutting safety standards. They needed to create a level playing field with minimum standards for all contractors.

The officers indicated that the amenities and induction training code of practice was widely disseminated to industry. They distributed 20,000 copies to the Housing Industry Association and the Master Builders' Association and organised a range of seminars.

The officers indicated that they do not convert discretionary codes into mandatory codes when they are adopted under New South Wales legislation. They prefer to retain the codes as guidance material for employers as they enable employers to manage risk in a particular industry. The officers said that Parliamentary Counsel is not involved in this exercise except to ensure that the title of the code is accurate when referred to in New South Wales legislation.

The officers indicated that an ongoing inquiry by WorkCover related to the need to ensure consistency between codes, particularly where those incorporated by reference in New South Wales legislation themselves incorporate further codes which may contain provisions which are inconsistent with the principal code.

The officers concluded by indicating that the review of the construction safety regulation was itself tied up with the review of the occupational health and safety regulations. The staged repeal of those regulations had been postponed on several occasions and the latest advice indicated that the Parliamentary Counsel is considering a draft regulation.

The Chairman thanked the officers for their advice and said that the Committee would consider their evidence.

RECOMMENDATION

The Committee recognises that there is a need for codes as an alternative to regulations in certain cases.

It recommends that WorkCover give consideration to means of ensuring that those codes are properly assessed in terms of their costs and benefits before they are adopted in New South Wales and recommends that such an assessment be carried out before the regulations under the *Occupational Health and Safety Act* and the *Construction Safety Act* are repealed and replaced in accordance with the staged repeal program.

The Committee also recommends that the review of Australian Standards being conducted by WorkCover to ensure their consistency be expedited.

APPENDIX 1

PAPER BY WORKCOVER NSW - OHS DIVISION

***Construction Safety Amendment (Amenities and Training)
Regulation 1998***

PAPER FOR THE REGULATION REVIEW COMMITTEE

For

Presentation of briefing for the Committee on 7 April 2000

Subject

of briefing: ***Construction Safety Amendment (Amenities and Training) Regulation 1998***

Date: 7/4/00

Introduction

The Committee has sought a briefing on the *Construction Safety Amendment (Amenities and Training) Regulation 1998*.

This amending Regulation did two things:

- 1 It repealed Part 10 of the *Construction Safety Regulations 1950* in favour of allowing the *Code of Practice: Amenities for Construction Work* to operate unimpeded.
- 2 It created Part 15 of the *Construction Safety Regulations 1950* to establish an OHS induction training system for the construction industry – the system consists of a collection of requirements established by means of Part 15 and an accompanying code of practice, *Code of Practice – Occupational Health and Safety Induction Training for Construction Work 1998*.

Committee's observations

The Committee has observed that a code of practice approved under section 44A of the *Occupational Health and Safety Act 1983* (OHS Act) can be established to replace regulations dealing with shelter, dining, accommodation etc for building and excavation workers.

The Committee has formulated a number of questions for WorkCover's consideration.

About codes of practice

- 1.1 The advent of codes of practice is a natural consequence of how work safety law has been evolving over the past two decades.
- 1.2 More particularly, in the case of NSW, it is a consequence of a number of significant developments including:

- A The demand for the OHS regime to be reformed and modernised.
 - B An imperative for all workers in all industries to be accorded equal treatment under the regime and to enjoy equal protection.
 - C The advent of the *Subordinate Legislation Act 1989*.
 - D An imperative for national standardisation of work safety law.
- 1.3 The need for modernisation is considerable. It has been difficult to ensure that the collection of work safety laws that preceded the advent of the OHS Act kept pace with advancing technology and industrial development and they have ceased to be contemporary.
- 1.4 Additionally, the application of the collection of 'old' laws was confined to certain industrial activities or certain kinds of workplaces - while all classes of workers are afforded protection under the Act, not all enjoy the same protection provided by the available Regulations.
- 1.5 These 2 considerations explain the appeal of the risk-management philosophy on which the reform being pursued by WorkCover is based.
- 1.6 The OHS regime is being transformed into a regime founded largely on the principles of risk management.
- 1.7 Since this entails both a liberalising and a generalising of OHS law, consistent with the general nature of the duty-of-care obligations established by the OHS Act itself, it follows that a reliance on detailed prescriptions must be minimised.
- 1.8 Codes of practice provide a practical means of maintaining or creating whatever detailed specifications need to be maintained in the transformation. They meet the needs of industry and are acceptable to industry.
- 1.9 The substitution of non-mandatory codes of practice for mandatory requirements is quite consistent with the theme and spirit of the *Subordinate Legislation Act*. This is because the justification doctrine imposed by the Act demands that alternatives to a regulatory proposal should be preferred if they would enable the relevant objectives to be met and they are commendable on cost-benefit or other grounds.

The Committee's questions

Question 1

Is it intended to adopt industry codes of practice in all other areas of occupational health, safety and welfare or are there some areas where it is just too risky to have anything other than detailed Regulations and if so, what are they ?

- 2.1 Decisions to develop and establish codes of practice are not always made unilaterally by WorkCover. They are often made in response to demands by industry stakeholders - indeed, many of the codes made under section 44A of the OHS Act are tripartite codes which have originated from industry initiatives.
- 2.2 WorkCover does not accept the proposition that a detailed Regulation is necessarily the best solution to the problem of eliminating risk.
- 2.3 WorkCover's view is that risk prevention can be addressed by a combination of measures with varying degrees of mandatory requirements depending on the nature of the risks.
- 2.4 The attached diagram provides an illustration of three different regulatory arrangements that are feasible under the OHS regime based on the OHS Act. The diagram provides examples of each arrangement.
- 2.5 There are no definite criteria for determining which particular arrangement is commendable for a particular risk-prevention objective - WorkCover would acknowledge that the optimum balance between mandatory requirements and guidance is elusive.
- 2.6 Consultation with stakeholders is critical to the making of decisions to develop and establish codes of practice.
- 2.7 With all of this in mind, the Committee might appreciate that it is not the intention of WorkCover to adopt codes of practice in all areas of occupational health, safety and welfare.
- 2.8 In some instances it is appropriate and important that OHS is dealt with by way of regulation exclusively, as is the case with regulating highly hazardous activities such as demolition and asbestos. In other cases it may be appropriate to develop a code of practice not only to provide detailed guidance to employers but to avoid prescribing particular control measures where other control measures, not dealt with by the regulation, may be the most effective way of controlling risk. In this

sense codes of practice assist in showing industry how the required standard of safety may be achieved without hindering alternative and innovative safety solutions.

- 2.9 The legislative framework is comprised of different instruments – the OHS Act, Regulations, codes of practice and occasionally, other instruments - just as the enforcement and compliancing activities of the WorkCover Authority are comprised of different instruments – notices, prosecution, case management, and so forth. It would be inappropriate to adopt a dogmatic approach of distinguishing Regulations and codes as alternatives when they are often complementary instruments.

Question 2

With regard to the requirements of the *Subordinate Legislation Act*, how is it possible to assess the impact of industry codes of practice relating to occupational health, safety or welfare when they are less prescriptive than regulations and often contain discretionary provisions which may or may not be implemented ?

- 3.1 Assessment of the impact of codes of practice is difficult. This is particularly so because the effectiveness of any legislative instrument is also a function of its implementation. The better the implementation program and consequential enforcement and compliancing activities, the more industry associations do to raise industry awareness about their new industry code(s), the more likely is it that the codes will have an impact. Isolating the impact of the instrument from the impact of its implementation program and industry supporting activities is difficult.
- 3.2 Nevertheless, WorkCover has initiated a study in an endeavour to identify and to assess the characteristics of codes of practice and their development and implementation. WorkCover is anxious to devise a system for reviewing the justification for codes of practice and their real effectiveness.
- 3.3 Whilst it is difficult to attribute success and effect by way of numbers eg reduced incidence of injury, it is possible to gauge industry reaction and to assess effect by other qualitative measures. For example, as a consequence of the Construction Industry Induction Training code, 40,000 employees have received induction training. The Residential Roofs code has had a major observable impact on industry culture although it would be hard to measure that, at this point, by review of the injury statistics.
- 3.4 Codes of practice are best considered as “industry” instruments. WorkCover’s industry consultation process in the code development process is intensive and exhaustive and it has the benefit of helping to

ensure industry ownership of the outcome. Certainly, industry's strong demand for and support of codes of practice is an indicator that they are an effective instrument in the workplace.

Question 3

Can you assure the Committee that it is safer to have industry codes of practice relating to occupational health, safety and welfare than regulations and can you produce any statistics from other states or overseas to support your view ?

- 4.1 It is not WorkCover's view that it is necessarily better to have codes of practice than regulations.
- 4.2 Regulations and codes are often complementary and critical components of the legislative framework.
- 4.3 What WorkCover does contend is that the regulatory framework should be more focused on outcomes and safety management performance.
- 4.4 It is important that the regulatory framework be performance based – not only for consistency the Act – but also to encourage and require industry to apply risk management principles and think about the most appropriate and effective risk controls.

Question 4

When the Committee considered the Dangerous Goods Regulation last year the view was expressed that some in industry favour prescriptive regulations over more flexible codes because they provide clearer guidelines as to what to do and more certainty. Have you heard this view expressed in the area of occupational health, safety and welfare and does it have any validity ?

- 5.1 It is common in WorkCover's experience, for views of this kind to be expressed.
- 5.2 WorkCover will elaborate, but, in summary, such views might be attributable to fear of the challenges presented by modern risk-management concepts.

Question 5

As the Regulation has now been in operation for 18 months, this is the ideal time to assess whether the code is working effectively in practice. Can you give us a summary of its strengths and weaknesses over the past year and a half and indicate generally how it is being accepted by building and excavation workers and their employers ?

The strengths and weaknesses of the 2 codes of practice connected to the 1998 amending Regulation would include the following:

| Amenities CoP | |
|--|---|
| <p>Strengths</p> <ul style="list-style-type: none"> • Complete coverage • Mobile workforce now covered • High compliance based on WorkCover observations • No industry compliant • COP well accepted by industry | <p>Weaknesses</p> <ul style="list-style-type: none"> • WorkCover has been alert to industry feedback and industry has brought no concerns or problems to our attention |
| Induction training CoP | |
| <p>Strengths</p> <ul style="list-style-type: none"> • 40,000 trained when WorkCover predicted 6,000 • more qualified and quality training providers • COP has been a wake up call to industry with respect to OHS training generally and contributed to a real cultural shift • COP has required industry to adopt a risk management approach and in that context has been ahead of its time in terms of the forthcoming OHS regulation • COP has given effect to one of the NSW Government's key OHS reform objectives in the NSW construction industry • COP has established a quality OHS induction training regime in the industry • COP has gone a long way to ensuring that the NSW construction industry doesn't let a young worker's first day be their last day | <p>Weaknesses</p> <ul style="list-style-type: none"> • Some implementation problems with respect to the Work Activity area of the Induction training COP. WorkCover has been seeking to work through this issue with industry. • The implementation problems can be seen as a weakness but also a strength because it is testimony to the fact that the COP has forced to the industry to squarely face up to how they meet their OHS training obligations under Sect 15 2 © of the OHS Act. |

APPENDIX 2

WORKCOVER NSW - OHS DIVISION

OHS Regime in NSW

OHS Regime in NSW

