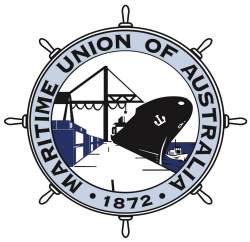

National Stevedoring
Code of Practice

Analysis of “industry” paper to Safe Work Australia - Strategic Issues Group

Analysis of stevedoring industry paper

5 October 2012

Background

On 26 September, Safe Work Australia's Strategic Issues Group (SIG) met to consider the final draft of the stevedoring code of practice.

At that meeting, a paper was tabled by major stevedoring employers, with no notice to other stakeholders, in an attempt to prevent the SIG from signing off the draft code for public comment. The paper was authored by DP World, Patricks, Toll and QUBE together with Shipping Australia, the representative of foreign shipowners. We understand this was done with support and/or assistance by the Australian Chamber of Commerce and Industry. Toll later withdrew from the "industry group" and disassociated itself from the industry paper.

MUA is disappointed that the industry was permitted to make a late submission at the SIG meeting without notice to other stakeholders. All relevant stakeholders have had ample opportunity to canvass the issues and provide input. The draft code of practice is the product of more than two years of discussion through a TAG process. A public comment period was also held, with 11 submissions received from industry and approximately 700 from stevedoring workers, their families, emergency services and other community stakeholders. MUA also facilitated a national consultation workshop of stevedoring HSRS, at considerable expense, and without support from the industry. On this basis, the last-minute paper looks more like an attempt to block the code than a genuine attempt to achieve better regulation.

The timing of this intervention is particularly disappointing, coming the morning after father of two Greg Fitzgibbon, 56, was killed working in Newcastle. Yet another tragic fatality illustrates the severe shortcomings in safety endemic across the stevedoring industry.

This document provides a detailed analysis of the industry paper. It is written for an internal audience and is not for wider distribution at this stage.

Summary of key points

- The industry paper claims that the draft code of practice somehow does not meet what they describe as the 'seven principles of best practice design standards' for government regulation.
- These so called 'seven principles' do not reflect current policy of the Australian Government or the OECD.
- The industry paper has attempted to pass off outdated and selectively chosen source material, from a 2001 report, as current Australian Government and OECD policy.
- At best, the use of outdated source material to support their arguments may be due to sloppiness. At worst the industry paper may be trying to pull the wool over our eyes.

- Once the window dressing is pushed aside, the naked motivations of the paper are revealed – these employers are seeking to cut safety standards and water down the code.
- Major stevedoring companies are seeking to reduce or remove regulation in at least eight areas. These are outlined below.
- If a RIS is required, it should take into account the loss of life and the emotional and psychological toll for families and workmates of those killed on the job. It should include the case for better regulation – not just examine cost as industry suggests.

About the industry paper

The central claim of the industry paper is that the draft code of practice somehow does not meet what they describe as the 'seven principles of best practice design standards' for government regulation.

So, where do these 'principles' come from, and what is their status?

The seven 'principles' quoted in the industry paper are as follows:

- Employ the minimum necessary to achieve objectives
  - Kept simple to avoid unnecessary restrictions
  - Targeted at the problem to achieve the objectives
  - Not imposing an unnecessary burden on those affected
- Not unduly prescriptive
  - Performance and outcomes focused
  - General rather than overly specific
- Accessible, transparent and accountable
  - Readily available to the public
  - Easy to understand
  - Fairly and consistently enforced
  - Some flexibility for dealing with special circumstances
  - Open to appeal and review
- Integrated and consistent with other laws
  - Addresses a problem not addressed by other regulations
  - Recognises existing regulations and international obligations
- Communicated effectively
  - Written in 'plain language'
  - Clear and concise
- Mindful of the compliance burden imposed
  - Proportionate to the problem
  - Set at a level that avoids unnecessary costs
- Enforceable
  - Provides the minimum incentives needed for reasonable compliance
  - Able to be monitored and policed effectively

The industry paper has pasted these principles into their document and used them to support their push for reduced regulation of stevedoring safety.

When you start to examine these principles, it becomes clear they do not have anywhere near the weight that industry suggests in their paper.

The seven principles were briefly mentioned as a 'checklist' in the Productivity Commission's annual report back in 2001-2002[1]. According to that paper they are drawn from a variety of sources, including OECD policy dating from 1995 and 1997. In its 2001 annual report, the Productivity Commission said this about the checklist:

> The ORR has drawn on a range of OECD and other reports to produce a consolidated checklist to illustrate the attributes and characteristics of high quality regulatory systems and regulations (see box 4.1). While this checklist provides a useful method of assessing the quality of individual regulations, it has a number of limitations. It would need to be applied to both the stock of existing regulation and the flow of new and amended regulations to produce information on the overall quality of regulations and changes in quality over time. While some of the criteria used in this checklist are procedural and verifiable, others are subjective and difficult to measure. Furthermore, some of the criteria measure the quality of regulations, while others measure how regulations are interpreted and applied by regulators.

It should be noted that, following the change of government in 2007, the Productivity Commission is no longer responsible for policy in this area. Formerly known as the Office of Regulation Review, the agency was moved to the Department of Finance and Deregulation back in late 2007. This function is now conducted by the Office for Best Practice Regulation.

Firstly, just to be clear, the checklist mentioned in the 2001 paper is not a legislative or mandatory requirement, and never has been. Far from it. It was merely a checklist, mentioned in an annual publication back in 2001, from an agency that is no longer responsible for policy in this area.

Secondly, the principles cited in the industry paper are out of date and do not reflect the current policy of the Australian Government or the OECD. The Australian Government's policy has developed considerably in this area, as outlined in detail below. Likewise, the OECD's policy has moved on substantially from the 1997 recommendations. As described in the 2005 OECD paper *OECD Guiding Principles for regulatory quality and performance*[2], concepts of effective regulation have changed a lot over the past decade, from an emphasis on deregulation to an emphasis on effective whole-of-government regulation.

In other words, the principles the industry are seeking to rely on are out of date. Consequently, these principles should not be given the weight that industry is attaching to them, and they should certainly not be used to support an argument attacking the code of practice because these so called 'requirements' are not being met.

What is the current government's policy on best practice regulation?

The authors of the industry paper appear to have confused the seven principles above, which were mentioned in passing in a 2001 report, with actual government policy.

The Australian Government's approach to best practice regulation is administered by The Office of Best Practice Regulation (OPBR). Current requirements are set out in *The Best Practice Regulation Handbook*, dated June 2010[3].

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[1] http://www.pc.gov.au/annual-reports/regulation-and-its-review/regulationreview0102, page 39
[2] http://www.oecd.org/fr/reformereg/34976533.pdf, page 1
[3] http://www.finance.gov.au/obpr/proposal/gov-requirements.html#handbook

This handbook quotes seven OECD guiding principles, which reflect the OECD's current policy in this area. There are not the same as the principles cited in the industry paper. For some reason, industry have chosen to quote outdated sources that do not reflect Australian Government or OECD policy, either through sloppiness or because the outdated sources better support their push for reduced regulation.

The OECD Guiding Principles for Regulatory Quality and Performance, quoted in the handbook, are set out below. As can be seen, the emphasis is on dynamic, whole-of-government approach to implementing regulatory policy – not on merely cutting regulation as industry suggests.

> 1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
>
> 2. Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.
>
> 3. Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.
>
> 4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
>
> 5. Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.
>
> 6. Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness.
>
> 7. Identify important linkages with other policy objectives and development policies to achieve those objectives in ways that support reform.

Industry paper built on faulty assumptions

As the analysis clearly shows, there is a fatal flaw in the industry paper: it is built on dodgy sources.

The paper has used outdated and selectively chosen sources to mount an attack on the way Safe Work Australia have constructed the code of practice.

In doing so they have made inaccurate representations of Australian Government and OECD policy.

At best, the authors of the industry paper have been sloppy and have failed to properly check their sources. At worst, the paper has knowingly used outdated sources in an attempt pull the wool over the eyes of Safe Work Australia, the SIG, state regulators and all stakeholders involved in the process.

Once the window dressing of the 'seven principles' has been stripped away, the real objectives of the stevedoring companies become clear: to water down or eliminate key provisions in the draft code.

Getting to the bottom of it - what industry is seeking in their paper

A clear indication of what the industry is seeking can be found in the examples and issues they have cited to support their argument for reduced regulation of safety. Here, the real objectives are revealed.

The industry is seeking to water down or eliminate provisions in the code in at least the following eight ways:

1. **Cut the role of safety observers** altogether in section 4.7. One of the more ridiculous arguments contained in the document is the idea that a safety observer or cargo space lookout is somehow an administrative control. This claim does not stand up to scrutiny. In practice, the activity of observing and identifying risks so they can be eliminated is number one on the hierarchy of controls. It is not clear what industry proposes instead of this vital role – presumably they seek to eliminate the role altogether in the interests of cost. We are aware that at least Shipping Australia, the representative of foreign shippers, has argued in their submission that the position should be removed altogether. As the public comment process showed, the overwhelming weight of evidence is in support of retaining this vital function. Almost 700 public submissions addressed this issue in detail, providing countless examples and illustrations of how the cargo space lookout and safety observer helps to save lives on the waterfront. The time for debate on this issue has passed.

2. **Remove content on training/licensing** in section 4.12 on the grounds that it is too prescriptive, and the Act does not include prescriptive training requirements. In fact, the Act in section 19(3)(f) *does* stipulate that a PCBU must provide relevant information, instruction and supervision necessary to protect all persons from risks. Section 39 of the regulations further spells out that a PCBU must take into a range of factors when meeting their obligation under s19. On this basis, it is perfectly reasonable for the code to identify a range of ways that a PCBU can achieve this. In drafting that section of the code, SWA have not included any prescriptive requirements. It is entirely made up of non-mandatory, recommended and optional ways of satisfying s19 of the Act. Once again, perfectly reasonable and consistent with the Act.

3. **Water down or remove traffic management** content in section 4.2 because it covers some of the same risks as the traffic management code.

4. **Remove requirement to consult** workers and their representatives, which is set out as a fundamental principle in s1.2. This astonishing claim cuts across the s47 duty to consult and is absurd in the context of codes of practice, in numerous jurisdictions, that clearly set out what is required to satisfy the duty. The generic text in section 1.2 is absolutely consistent with those other references.

5. **Make the code shorter**, because 'it is 46 pages long and overloaded with prescriptive information', although no specific examples of prescriptive requirements are given. In fact, there are barely any control measures in the entire code that are 'required', i.e. mandatory. In almost every instance the suggested controls use the word 'may', which denotes an optional control, or 'should' which is a recommended by not mandatory way of controlling the risk.

6. **Remove vast sections because they allegedly duplicate material in other codes of practice.** For example, the industry paper argues that pages 26-28, which contains all of the content on **stevedoring crane operations**, should be removed. No information is given as to which codes it duplicates and what those duplications are.

7. **Diminish the scope of the code** to exclude functions associated with the handling of cargo on the waterfront.

8. **Remove the use of the word 'include'**, when introducing non-exhaustive lists of possible controls, presumably because it is somehow more prescriptive than industry would like. No examples are given.

Regulatory Impact Statement (RIS)

In their paper, the industry is calling for a RIS. A RIS is a document prepared by the department, agency, statutory authority or board responsible for a regulatory proposal, following consultation with affected parties[4]. The RIS is done by the OBPR according to a process outlined in the OPBR's Best Practice Regulation Handbook (June 2012)[5].

It formalises and provides evidence of the key steps taken during the development of the proposal, and includes an assessment of both the costs *and benefits* of each option (although RISs are not required to directly compare options).

The RIS must be presented to decision makers so that the decision is informed by a balanced assessment of the best available information. After a decision has been made, the RIS needs to be made public.

In their paper, the industry identifies that costs to be considered include items that can be readily quantified in money, as well as items that cannot be readily quantified in money terms (the OPBR gives the example of 'reduced competition').

What industry overlooks is the fact that the RIS, before even getting to the issue of cost, must first focus on the problem or issue that has prompted government action[6] – in this case, severe deficiencies in safety standards in the stevedoring industry and a swathe of fatalities and devastating injuries. The OPBR handbook itself cites 'unacceptable hazard or risk, such as to human health and safety standards' as an example of legitimate issues that can be regulated in the public interest.

Industry should be reminded that the purpose of a RIS is not all about cost – it is about examining the need for regulation as well as the cost. MUA would expect to be involved in the RIS process and can provided evidence of the devastating impact of fatalities and injuries in the industry.

[4] http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf, page 7
[5] Ibid page 5, paragraph 1.18
[6] Ibid page 28, paragraph 3.7 and box 5.