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Legalwise Seminar – 14 June 2012

OH&S Law and Government: Complying With the National Harmonisation of OH&S Laws

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How Will National Harmonisation of OHS Laws Effect Government?

1) Introduction

After a brief update on the process of change this paper will focus on the conceptual shifts in the application of statutory health and safety duties. It will then analyse the content of the duties and apply them in practice to government and the private sector.

2) An Update on Progress

In July 2008 the Council of Australian Governments (COAG) signed the *Intergovernmental Agreement for Regulatory and Operational Reform in OHS* (Agreement) committing to a process of Occupational Health and Safety harmonisation.

The intention of the process was for each jurisdiction to enact its own version of the model provisions subject to the changes necessary to ensure the laws will operate effectively with other legislation in that jurisdiction but so as not to undermine the harmonisation process.

By May 2009 the Workplace Relations Ministers Council (WRMC) had made decisions based on the recommendations coming out of the National Review into Model Occupational Health and Safety Laws.

By late September 2009 Safe Work Australia had released for public comment, an exposure draft of the Model Work, Health and Safety model Bill (model Bill). Following the public comment period, Safe Work Australia adopted a number of the amendments proposed, culminating in a revised version of the model Bill being submitted to the WRMC.

By 11 December 2009 the WRMC had endorsed the revised model Bill after making further technical amendments. By 29 April 2010 the amendments were finalised and a revised version of the model Bill was posted to the Safe Work Australia website. Only minor amendments were then made before the model Bill was finalised on 23 June 2011.

An exposure draft of the model Regulations and a priority model of the Codes of Practice as well as an issues paper and a Consultation Regulation Impact Statement were released for a four month public comment period in December 2010. The model Regulations and first 11 Codes were finalised in August 2011.

According to the timeframe set by COAG, the nine relevant jurisdictions needed to enact the model Bill and Regulations by December 2011 so that the model Act would commence on 1 January 2012. (Further supporting material will continue to be developed past that date, including model Codes of Practice and a national compliance and enforcement policy.)

NSW, Qld, NT, ACT and the Commonwealth all met the deadline with the model Act commencing in each of those jurisdictions on 1 January 2012. Tasmania has passed the legislation but has delayed commencement until 1 January 2013.

South Australia, Victoria and WA have not passed the legislation. South Australia has adjourned parliamentary debate on the Bill indefinitely. Victoria has not introduced a Bill and has expressed serious concerns regarding the costs of implementing the new laws to the Victorian economy, following a government commissioned report by PWC.

WA committed in the May 2012 budget to introducing a Bill by the end of 2012. WA has already stated that it has four points of difference with the Bill, and will amend the model Bill to take account of this. WA will also carve out the mining industry and there will be a parallel statute to regulate Mine Safety. Commencement is not expected until mid-late 2013.

3) Examining the Key Changes Proposed

Key areas of change come into focus best when we examine the new building blocks on which the harmonised safety regime will be based. These are found in the key terms and concepts defined in the model Bill.

Person Conducting a Business or Undertaking (PCBU)

Under the Occupational Safety and Health Act 1984 (WA) (OSH Act), the duty to provide a workplace free of occupational hazards rests on employers and those with capacity to control the workplace, notwithstanding contractual provisions which attempt to divert responsibility. Under the model Bill, the health and safety duties, both primary and ancillary, fall on any PCBU.

For the purpose of section 5 of the model Bill, a person conducts a business or undertaking either alone or with others and either for profit or not for profit. Volunteer organisations are excluded however by section 5(7). This expanded definition is aimed to capture the broad range of work relationships and business structures currently existing in Australia. It is noteworthy that 'person' refers to all forms of corporate vehicles[1] unless they are specifically excluded, and clearly includes individuals,[2] as well as the Crown and public authorities.[3]

These persons must take reasonably practicable steps to ensure the health and safety of workers engaged in the business or undertaking. The PCBU also owes a duty to workers whose activities in carrying out work are influenced or directed by the PCBU, which may extend to contractors. This is an extended duty of care compared with that owed to 'employees' or 'workers' under most state OSH Acts.

Businesses will need to ascertain which workers are carrying out work at the direction, or under the influence, of the organisation. Which contractors will you owe a health and safety duty to?

The Health and Safety Duties

There are primary duties and further duties, all of which rest on PCBU's.

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[1] Section 5 subsections 3-6:
(3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.
(4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.
(5) An elected member of a local authority does not in that capacity conduct a business or undertaking.
(6) The regulations may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.

[2] See definition of "Officer" (section 4) read with the exception to section 5(5).

[3] For "public authority" see also section 23C of the OSH Act.

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The primary duty is found in section 19 and requires the PCBU, subject to what is reasonably practicable,[4] to ensure the health and safety of workers engaged by the PCBU and workers whose activities are influenced or directed by the PCBU while those workers are at work in the business or undertaking. This duty is further unpacked in subsections 19(2) to 19(5)[5] and includes accommodation owned or managed by the PCBU where the worker occupies it because no other accommodation is reasonably available.

The further duties are found in sections 20 to 26 and cover activities such as the management and control of a workplace, the management and control of fixtures or plant at a workplace, the supply of plant or substance for use at a workplace, as well as the design, installation and construction of plant or structures that will be used at workplaces.

Worker

Section 7 of the model Bill states that a person will be a "worker" for the purpose of the Act if that person carries out work in any capacity for a person conducting a business or undertaking, including work as:

- An employee;
- A contractor or subcontractor;
- An employee of a contractor or subcontractor; or
- An employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- An outworker;
- An apprentice, trainee or work experience student or volunteer.

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[4] Refer to page 6-7, see also Section 17:
A duty imposed on a person to ensure health and safety requires the person:
(a) to eliminate risks to health and safety, so far as is reasonably practicable; and
(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

[5] Section 19 subsections 2-5:
(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
(a) the provision and maintenance of a work environment without risks to health and safety; and
(b) the provision and maintenance of safe plant and structures; and
(c) the provision and maintenance of safe systems of work; and
(d) the safe use, handling and storage of plant, structures and substances; and
(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.
(4) If:
(a) a worker occupies accommodation that is owned by or under the management or control of the person conducting the business or undertaking; and
(b) the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available,
the person conducting the business or undertaking must, so far as is reasonably practicable, maintain the premises so that the worker occupying the premises is not exposed to risks to health and safety.
(5) A self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

Workers must take reasonable care for themselves and others and co-operate with the person conducting the business or undertaking regarding work, health and safety (s28).

The definition of worker is expanded when compared with the definition under the OSH Act which, despite the deeming provisions of section 23D of the OSH Act, starts from the narrower definition of "employee" which encompasses only those who perform work under a contract of employment and apprentices.

The effect of the new definition is that persons conducting a business or undertaking will now owe the primary duty to all persons who, in the workplace, conduct work in or for their business or undertaking, including contractors and potentially suppliers. This will increase the need to monitor the OSH practices and standards of contractors and subcontractors whom employers may not have frequent contact with.

The extent of this duty as it will apply to suppliers and other workers engaged by contractors of the person carrying on a business or undertaking remains to be seen, but it is clear the scope of persons to whom employers owe a duty has been expanded.

Workplace

The term "workplace" is not directly mentioned in section 19 which deals with the primary duty on PCBU's. Instead it is embedded in each section covering the further duties, sections 20-26.

The term is, however, defined in section 8(1) – "A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work." Sections 20 through to 26 utilise the term when referring to industry specific workplaces.

Officers

The change that has arguably generated the most commentary, debate and concern amongst organisations is the positive duty applied to officers under the model Bill.

Under the model Bill (section 27(1)), "officers" of companies are required to exercise due diligence to ensure that the company complies with the duty or obligation proscribed by the model Bill. An officer may be convicted or found guilty of an offence *irrespective* of whether the person conducting the business or undertaking was convicted or found guilty of an offence relating to the duty or obligation.

The justification for this change is seen in the Expert Panel Review into Australian OHS Laws (The Panel)[6] commentary on the issue. The Panel held that a positive duty that applies immediately is desirable, compared to the situation under most state OSH Acts where accountability applies only after the corporate body has been convicted of an OHS offence.

It was thought beneficial to give the officer a sense of control over his or her personal liability as they will become liable for their own acts or omissions. The "positive duty" was championed as being more likely than the other options to ensure appropriate, proactive steps are taken by an officer to ensure the company or business complies with its duty of care.

The model Bill employs a wide definition of the term "officer". The model Bill employs the definition used in section 9 of the Corporations Act which is:

(a) a director or secretary of the corporation; or

[6] Expert Panel Review into Australian OHS Laws - Stewart-Crompton, Mayman and Sheriff reports

(b) a person:

(i) who makes or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation;

(ii) who has the capacity to affect significantly the corporation's financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors of the corporation); or

(c) a receiver, or receiver and manager, of the property of the corporation; or

(d) an administrator of the corporation; or

(e) an administrator of a deed of company arrangement executed by the corporation; or

(f) a liquidator of the corporation; or

(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

And further relevantly includes officers of the Crown who make decisions that affect a substantial part of the business of the Crown (section 247[7]) and influential officers of a public authority (section 252[8]).

Officers of persons conducting a business or undertaking that have a duty or obligation must exercise “due diligence” to ensure that the person conducting a business or undertaking complies with that duty or obligation.

Of course to understand the extent of this new positive duty on officers we need to look at how due diligence is defined by the model Bill.

Due Diligence

Under section 27 of the model Bill, due diligence is defined as taking reasonable steps to:

- Acquire and keep up to date knowledge of work health and safety matters,

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[7] Section 247:
(1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the Crown is taken to be an officer of the Crown for the purposes of this Act.
(2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

[8] Section 252:
A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority is taken to be an officer of the public authority for the purposes of this Act.

- To gain an understanding of the nature of operations and the hazards and risks associated with those operations,
- To ensure that the person conducting a business or undertaking has available and uses appropriate resources and processes to enable hazards associated with the operations, resources and processes to be identified and risks eliminated or minimised,
- To ensure that the person conducting a business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding to these in a timely way,
- To ensure that the person conducting a business or undertaking has and implements processes for complying with the body's duties and obligations, and
- To verify all of the above.

In practical terms the model Bill is designed to impose a duty on officers to become safety leaders to ensure that the PCBU is complying with its safety obligations. Imposing a separate duty on officers is aimed to influence the culture of organisations to establish strong leadership in safety. The officers are required to acquire and keep up to date with knowledge of work health and safety concerns within the particular business.

Perhaps the industry in which the positive duty on officers to take steps to exercise due diligence will be the energy and resources industry. As a significant number of these businesses operate through a number of separate legal entities the question will be whether officers of a holding company will owe a duty of care in respect of related entities.

It is imperative that businesses assess who will be considered 'officers' to ensure they are fully aware of their obligations under the model Bill in order to manage potential personal liability. Company executives and directors need to ensure they are aware of and on top of the company's OHS obligations and the particular risk control measures in place to manage these risks.

Officers need to familiarise themselves with the requirements of the due diligence obligation to avoid being in breach of the model Bill.

Reasonably Practicable

As we have discussed, officers must take steps that are “reasonably practicable” to ensure the person conducting a business or undertaking has the resources, knowledge and information to comply with their obligations under the model Bill. Bear in mind that in any prosecution the state bears the onus to specify and prove the measures that could have prevented the risk or incident occurring were practicable.[9]

To what extent must officers take action in order to conform with this duty? Section 18 of the Act requires the following factors to be weighed up in assessing what is reasonably practicable:

(a) the likelihood of the hazard or the risk concerned occurring;

(b) the degree of harm that might result from the hazard or the risk; and

(c) what the person concerned knows, or ought reasonably to know, about:

[9] See *Laing O'Rourke v Kirwin* 2011 WASCA 117 para 72.

(i) the hazard or risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) the costs associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

How does this compare to the definition of 'reasonably practicable' in the current OSH Act? It can be explained as an expanded version that imparts a similar standard. Is assessing what is reasonably practicable under the current Act regard must be had to:

(a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;

(b) the state of knowledge about:

(i) the potential injury or harm to health occurring; and

(ii) the risk of that injury or harm to health occurring; and

(iii) means of removing or mitigating the risk or potential injury or harm to health; and

(c) the availability, suitability and cost of the means of removal or mitigation.

You can see the standard is effectively the same, what is reasonable will depend on the likelihood and potential harm that could occur from the risk and the practicability of measures associated with averting or mitigating the risk.

Under the new definition there is focus on what is, or was reasonably able to be done taking into account and weighing up the relevant matters.

More Than One Person May Concurrently Hold a Duty

Although it was always the case that 2 or more entities and individuals might be prosecuted successfully for the same incident/breach of duty, the model Bill now makes this explicit.[10]

Concurrent duty holders “must discharge the duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity”.

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[10] Section 16:
(1) More than one person can concurrently have the same duty.
(2) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty.
(3) If more than one person has a duty for the same matter, each person:
(a) retains responsibility for the person's duty in relation to the matter; and
(b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

Unfortunately, despite the use of "management or control" in several places in the model Bill, "control" is not defined. The threshold for when a person exercises control will therefore initially depend on the existing judicial interpretation and is likely to include "the capacity to control" and the exclusion of the right of a PCBU to purport to exclude health and safety duties by contractual means. Similarly, "influence" is also undefined and it should be assumed that it will be given its common and ordinary meaning.

The practical effect of the provision for concurrent duty holders is that organisations will be prevented from "offloading" OSH obligations onto single representatives or managers. Anyone who falls into a class of duty holder must discharge their duty to the extent that they have capacity to influence and control the matter.

Increased Penalties and Removal of Causation Requirement

The penalty levels proposed in the model Bill mark a significant increase from the current levels under the current OSH Act.

Category 1 penalties (that involve exposure to risk in circumstances which include recklessness), the maximum penalty is $3 million for a corporation, $600,000 or five years jail for an officer and $300,000 or five years jail for a worker.[11]

Category 2 offences involve a failure to comply with a health and safety duty that exposes an individual to a risk of death or serious injury or illness. Under the model bill the maximum penalty for corporations for category 2 offences is $1.5 million, $300,000 for officers and $150,000 for workers.[12]

Category 3 offences involve a failure to comply with a health and safety duty and attract a maximum fine of $500,000 for corporations, $100,000 for officers and $50,000 for workers.[13]

Under the current West Australian *Occupational Safety and Health Act 1984* the maximum penalty for corporations is $500,000 per offence and $250,000 or two years jail for individuals. For WA, which has one of the lowest levels of penalties across the Australian jurisdictions, adopting the model Bill would see a dramatic jump in penalty levels.

Aside from the dramatic increase in penalty amounts, the wording of the provision has changed so as to alter the causation principle imparted by the current OSH Act. For example, if we look at section 19 of the current OSH Act which proscribes the duties of employers and some of the different "levels" of penalties are characterised based on the harm that the breach "causes".

For example where the employer contravenes section 19(1) of the OSH Act in circumstances of gross negligence the employer commits an offence and is liable to a level 4 penalty. Where an

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[11] Section 31 subsections 1 (a), (b) and (c):
(1) A person commits a Category 1 offence if:
(a) the person has a health and safety duty; and
(b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
(c) the person is reckless as to the risk to an individual of death or serious injury or illness.

[12] Section 32 subsections (a), (b) and (c):
A person commits a Category 2 offence if:
(a) the person has a health and safety duty; and
(b) the person fails to comply with that duty; and
(c) the failure exposes an individual to a risk of death or serious injury or illness.

[13] Section 33 subsections (a) and (b):
A person commits a Category 3 offence if:
(a) the person has a health and safety duty; and
(b) the person fails to comply with that duty.

employer contravenes section 19(1) and by the contravention *causes* the death of, or serious harm to, an employee, the employer is liable to a level 3 penalty. The liability for different penalties is explained in a similar way for breaches of other duties, such as the duty of manufacturers contained in section 23 of the OSH Act.

Under the new penalty provisions, an employer will be deemed to have committed a category 1 offence if that person has a duty under the act and they engage in conduct that *exposes* an individual to whom that duty is owed to a risk of death or serious injury or illness and are reckless to as to the risk of serious illness or injury.

To this end a corporation or individual may be exposed to fines of up to $3 million for a corporation or $600,000 for an individual and five years imprisonment for reckless conduct that exposes an individual to a risk of death or serious illness or injury. There is no requirement that a death or serious injury occurred, only that there was exposure to the risk.

The requirement that the breach of the Act "caused" the harm is dispensed with and the prosecution need only prove that a failure to comply with a health or safety duty exposed an individual to a risk of death or serious injury.

Broader Consultation Requirements

The consultation requirements are found in Part 5 of the model Bill, namely sections 46 through to 49. Section 46 requires duty holders who have overlapping work health and safety duties to consult, co-operate and co-ordinate activities with each other as far as is reasonably practicable.

This is an extension of the duty imposed under current OSH Acts which require employers to consult with their employees, workers, health and safety representatives and other committees about aspects of workplace safety and health. The duty to consult with those with overlapping duties is a much broader requirement.

Sections 47-49 require PCBU's to consult, as far as reasonably practicable, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to health or safety at work. Levels of consultation should be proportionate to the significance of the work health or safety issue and the number of potentially affected workers.

Businesses will need to assess who must be consulted with as the obligation goes beyond the traditional consultation obligation that exists between management and workers.

Another important factor to consider is the extent and level of consultation and coordination that will be required. Consultation must be done as far as "reasonably practicable". Businesses involved in the undertaking must assess the extent its resources permit consultation and take necessary steps to fulfil its consultation obligations as far as reasonably practicable.

Workgroups and Entry Permits

Workgroups are another new concept under the model Bill. Workgroups are formed under section 51 and are groups of workers who are represented by a particular health and safety representative. The aim of work groups is to ensure health and safety representatives have a discernable and reasonable number of workers which they represent and are responsible for.

Workplace Health and Safety representatives granted an entry permit under section 512 of the *Fair Work Act* 2009 (Cth) are given the right to enter a workplace under section 121. They may enter workplaces to consult with and provide advice on work health and safety matters. Workplace Health and Safety representatives are protected from discriminatory conduct under Part 6 of the model Bill.

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4) So What Is WA's Position?

WA does not intend to adopt the whole of the model Bill. WA will adopt the majority of the Act bar four key areas.

Penalty Levels

The first of these relates to penalty levels. WA feels that the significantly increased levels discussed earlier are excessively punitive, especially on small businesses. There is no scope in the model bill to distinguish between small business and large, multinational corporations and small businesses that breach the Act will be subject to the same high penalties.

Union Right of Entry

The second area that WA is unlikely to adopt is the provisions that allow for union right of entry. Under the model Bill union representatives who have been issued a WHS entry permit under section 134 can enter workplaces for the following reasons:

- To inquire into suspected contraventions (section 117) – entry is without notice
- To inspect "employee records" or records relating to a suspected contravention – 24 hour notice to be given (section 120)
- To enter to consult and advise workers (section 121) – 24 hours notice to be given
- The right of workers to be represented by unions in negotiating work groups (section 52(4))
- Right for a HSR (Health and Safety Representatives) to request the assistance of a person (including union official) (section 68(2)(g))
- Right of entry for resolution of Health and Safety Issues (section 81(3))

Union right of entry for occupational health and safety is provided for under the *Industrial Relations Act* 1979 (WA). WA considers that providing for union right of entry in a second act would create unnecessary duplication and confusion.

Direction to Stop Work by WHS Representative

WA feels that the decision to stop work where workers believe they are exposed to an imminent risk of serious injury or harm to health should remain with the individual worker rather than be a power given to the Workplace Health and Safety representative. Under section 84 of the WHS model Bill a worker may cease work where they have a "reasonable concern that to carry out work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard".

Under section 85 a Health and Safety representative may direct a worker to stop work if carrying out work would expose the worker to such a serious risk. The test for when the direction can be made is the same as provided in section 84.

Reverse Onus of Proof – Discriminatory Conduct

The final area that WA is not adopting is the reverse onus of proof in discrimination matters. When it is said that discrimination matters in this context it is not discrimination against a worker for reason of their age, sex, marital status or sexual preference. It is discriminatory, coercive and

misleading conduct directed at someone who has done or refrained from doing something in compliance with the model Bill.

For example it will amount to a breach if a person engaged in discriminatory conduct against a person because that person is a health and safety representative or is on a health and safety committee.

Section 113 provides that where a "prohibited reason" is proved for the discriminatory conduct (i.e., that the person was a health and safety representative) that reason is proved to be a substantial reason for the conduct unless the defendant proves, on the balance of probabilities, that it was not a substantial reason for the conduct.

Therefore once it is established that the discriminatory conduct for a prohibited reason occurred it becomes the defendant's onus to prove that the conduct was not engaged in for that reason. WA believes that the onus of proof should remain on the person alleging that discriminatory conduct was because of a "prohibited reason".

Reversing the onus of proof would mean that employers who sack or refuse to enter contracts with individuals involved in safety committees will have to prove that the reason for dismissing or not entering a contract with the individual was not attributable to their involvement in the safety committee.

Interaction With the Mines Safety Act 1994 (WA)

A topic of particular interest to West Australians is how the model Bill will interact with the *Mines Safety and Inspection Act* 1994 WA (Mines Act). It is expected that WA will implement a new Act to regulate mining safety that will be called the *Mining Work Health and Safety* (WA) Act. This Act will mirror the key provisions contained in the model Bill in both the Act and the regulations made under it. There will also be mining specific Code of Practice similar to those that are being formulated to complement the model Bill.

Core elements of the Mines Safety and Inspection Act will be retained in the new Act with concepts such as registered mine managers remaining unchanged. It should be noted that Queensland had originally outlined a similar plan to WA, but have recently announced that they are reconsidering this approach. On the basis that their existing laws are clearer and more proactive than the new model WHS laws, they may instead retain their two key mining Acts and make amendments in accordance with the National Mine Safety Framework. (The National Mine Safety Framework has been in development for some years, coordinated by the Ministerial Council on Mineral and Petroleum Resources, to achieve a nationally consistent occupational health and safety regime for the Australian mining industry. Safe Work Australia has been working with the Framework to ensure a consistent and collaborative approach to OHS reform for the mining industry).

5) What About the Effect on Government?

We have gone into some detail about the proposed changes under the model Bill. These will affect all three tiers of government in Australia because each of them has the duties which rest upon a PCBU, and those with the capacity to control or influence will have the duties resting upon officers.

Under current State and Territory OHS Acts the Crown is not excluded from liability for breaches. Government departments, agencies and employees are all captured by the various Acts. The position is different under the Commonwealth legislation. Under the *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth) the Crown in right of the Commonwealth is bound by the Act but neither the Commonwealth nor a Commonwealth authority is liable to be

prosecuted for an offence or to pay a fine or penalty for an offence, although civil sanctions may apply.

In considering the issue, the National Review decided that under the model Bill the Crown should be subject to the same laws as the people, and should thus be liable to prosecution under the new legislation.

Another effect on Government will be seen in changes to the Comcare Scheme. In June 2009, the then Deputy Prime Minister, Julia Gillard announced that once the harmonisation process was complete the Comcare self insurance license will be transferred back to the State jurisdictions. The effect of harmonisation on the Comcare scheme is another area of change that “remains to be seen”.

The final effect will be a shift in the attitude of the regulator. Under harmonised legislation the regulator will have more of an advisory role and there will be more national co-ordination between state WorkSafe bodies.

6) So What Can We Do to Prepare for These Changes?

The effect of the new definition of PCBU is that persons conducting a business or undertaking will now owe a duty to all persons who conduct work in or for their business or undertaking, including contractors and potentially suppliers. This will increase the need to monitor the OSH practices and standards of contractors and subcontractors whom employers may not have frequent contact with.

Businesses will need to ascertain which workers are carrying out work at the direction of, or under the influence of the organisation. Which contractors will you owe a duty in OSH to? You need to work out who you owe a duty to and ensure relevant policies and practices are in place to discharge your duty.

As we have discussed, the definition of “Officer” of a PCBU is wide. It is imperative that businesses review their corporate governance system to ascertain who will be considered officers.

These officers need to be fully aware of and trained in their obligations under the model Bill in order to avoid personal liability. Company executives and directors need to ensure they are aware of and on top of the company's OHS obligations and the particular risk control measures in place to manage these risks.

Officers need to familiarise themselves with the requirements of the due diligence obligation to avoid being in breach of the model Bill. We refer to the relevant features:

Under section 27 of the model Bill, due diligence is defined as taking reasonable steps to:

- Acquire and keep up to date knowledge of work health and safety matters;
- To gain an understanding of the nature of operations and the hazards and risks associated with those operations;
- To ensure that the person conducting a business or undertaking has available and uses appropriate resources and processes to enable hazards associated with the operations, resources and processes to be identified and risks eliminated or minimised;

- To ensure that the person conducting a business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding to these in a timely way;
- To ensure that the person conducting a business or undertaking has and implements processes for complying with the body's duties and obligations; and
- To verify all of the above.

So how will officers, directors and managers discharge these obligations practically?

My first piece of advice would be to undertake a legal risk analysis and a gap analysis. You need to establish what your policies and practices for keeping your workplace safe are and where they fall short of the obligations set by the model Bill they need to be supplemented.

Once this has been done you need to implement your new policies. This may involve training staff in new procedures and updating your manuals and handbooks. You also need to review your contracts between suppliers and contractors to ascertain who you owe a duty to and how you are going to discharge that duty.

In doing this you will need to consult with your fellow duty holders bearing in mind the provisions for concurrent duties under the model Bill. The model Bill contains obligations to consult and consultation must be treated as an imperative part of your duty to keep workplaces safe. You must also prepare for and be willing to participate in multi business work groups. Your workplace's health and safety representatives will work with your business to implement and manage these groups.

7) Summary

In summary it is advisable to review, revise, implement and be aware. Review your policies and revise them where necessary. Review your corporate governance to ascertain who holds a duty and to whom a duty is owed, bearing in mind this may extend to contractors. Implement the changes – train staff and officers in what they need to do to comply with their obligations under the model Bill and always be aware of your obligations, both now and in the future. Constant awareness is crucial to ensure ongoing compliance.

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