




LEADERS FORUM 2012

National Model Work Health and Safety Act

March 2012

What do the changes
mean for you?



Outline

- The main obligations under the new legislation
- The new obligations on directors and officers to exercise “due diligence”
- Changes to the privilege against self-incrimination
- Some recent examples of prosecutions
- Practical guidance

OHS Harmonisation

- Currently 10 principal OHS statutes across Australia, hundreds of regulations and codes of practice
- States agreed to harmonise OHS laws
- Each state to enact Model Work Health and Safety legislation
- System was to commence nationally on 1 January 2012 – (has commenced in NSW, QLD, ACT, NT) although Victoria has indicated it will defer enactment for 12 months

Primary duty

- Are you a **PCBU**?
- Duty imposed on a **'person conducting a business or undertaking'** to ensure, so far as is reasonably practicable, the health and safety of the workers it engages/causes to be engaged, and others who may be put at risk from work carried out by the conduct of the business or undertaking.

Primary duty

- “**Person conducting a business or undertaking**” includes an employer, corporation, association, partnership and sole trader organisations.
- “Workers” – broadly defined to include **contractors** and **volunteers**.
- Others who may be put at risk” – for example, customers, visitors to the workplace

How does this differ from existing obligations?

- PCBU is potentially broader than “employer” – it remains to be seen how broadly “undertaking” is construed

What does this require?

A PCBU must ensure, so far as is reasonably practicable:

- the provision and maintenance of a work environment without risks to health and safety
- the provision and maintenance of safe plant and structures
- the provision and maintenance of safe systems of work

What does this require?

A PCBU must ensure, so far as is reasonably practicable:

- the safe use, handling and storage of plant, structures and substances
- 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

What does this require?

A PCBU must ensure, so far as is reasonably practicable:

- 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

What does this require?

- 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 undertaking

Consultation

A PCBU must:

- Consult with those who carry out work for the business or undertaking and are, or likely to be, directly affected by a health or safety issue
- Share relevant information with workers
- Allow workers to express their views

Consultation



- Take into account the views of workers
- Advise workers of the outcome of the consultation
- Involve any HSRs in process

When is consultation required?

- When identifying hazards and assessing risks
- When making decisions about ways to eliminate or minimise those risks
- When making decisions about the adequacy of facilities for workers
- When proposing changes that may affect the health or safety of workers
- When making decisions about health and safety procedures

Duties of officers



- The positive duty to exercise “due diligence” is the central aspect of officer liability under the Model Act.
- This duty is and represents a significant expansion in OHS obligations for officers in most states and territories.
- Officers **cannot** delegate the duty to exercise due diligence.

Who is an officer?

- The definition of '**officer**' is from Corporations Act and includes directors and persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the business or undertaking.

What is required of officers?

In exercising due diligence an officer must take “reasonable steps” to, amongst other things:

- acquire and keep up to date knowledge of work health and safety matters;
- gain an understanding of the nature of the operations of the business or undertaking of the body and of the hazards and risks associated with those operations;

What is required of officers?

- ensure that the body has available for use, and uses, appropriate resources and processes to enable hazards associated with the operations of the business to be identified and the risks eliminated or minimised;

What is required of officers?

- ensure that the business has, and implements, appropriate processes for complying with any duty or obligation under the legislation; and
- verify the provision of and use of these resources and processes

Officers - what has changed?

- In Victoria, for example, previously officers were only exposed if the Company had contravened the legislation – ie attributed liability. Officers then had to demonstrate they had exercised “reasonable care”
- In most other States and territories previously exercising due diligence was a “defence” for officers defending OH&S prosecutions.

Officers - what has changed?

- Now it is a **positive duty** and a failure to exercise it gives rise to the offence, **irrespective** of whether the Company has contravened the Act .
- Officers therefore need to be proactive in meeting the duty.

Officers – NSW case study

Inspector Ken Kumar v David Aylmer Ritchie [2006]

- Prosecution of CEO of a large group of companies. Ritchie was director of 10 companies in the group.
- Ritchie was based in NZ and oversaw the Australian company from there.
- An employee was killed as result of explosion after using spray gun. The employee was part of the washing operations.

Officers – NSW case study

- Ritchie argued he had exercised due diligence to prevent conduct taking place
- Ritchie had implemented structured safety management systems, and had ensured site safety officers were appointed. He relied on General Managers to report back to him on safety issues.

Officers – NSW case study

- Court found that Ritchie did not exercise due diligence. His lack of knowledge of the washing operations, the chemical used, the need to ‘earth’ the facility, as well as the lack of personal protective equipment demonstrated that he had not exercised all due diligence.

Officers – NSW case study

- Due diligence did not require having a hands on involvement in the daily operations but Ritchie **did** need to be “**active and diligent**” in requiring information, reports and recommendations on such issues, in acting on recommendations and in understanding the Company’s business operations.
- Ritchie fined \$22,500

Altering privilege against self incrimination

- At common law (and under some current OHS legislation), an individual can refuse or fail to give information if giving the information or doing the other thing would “tend to incriminate the person”
- This does not apply to the production of a document required to be produced or the giving of name and address

Altering privilege against self incrimination

- The Model Act abrogates this normal right against self incrimination
- A person is not excused from answering questions or providing information or documents on the grounds that the answer or information may tend to incriminate them
- Answers are not admissible in other actions against that individual (except proceedings for false information)

Altering privilege against self incrimination



What does this mean?

- This significantly alters the common law position relating to self-incrimination which is entrenched as an absolute right.
- So will have to answer – but then there are limitations on use of the answer.

Altering privilege against self incrimination

- The new Act requires a warning to be given about the effect of this section. Unless the warning is given it is not an offence to refuse to answer the question
- Companies will no longer be able to rely on an employee/officer refusing to give information by invoking the privilege

Penalties

- Three categories of offences, graded to reflect the degree of recklessness of the duty holder and the seriousness of the risk or hazard involved

Penalties

- Category 1 – without reasonable excuse, conduct that exposes person to risk of death or serious injury or illness AND **reckless** as to that risk
 - Penalty – Individual - \$300k or 5 years or both
 - PCBU (individual) - \$600k or 5 years or both
 - PCBU (company) - \$3,000,000

Reckless as to that risk means...

- *“It is not the offender's indifference to the consequences of his act but his knowledge that those consequences will probably occur that is the relevant element” R v Crabbe [1985] HCA 22*
- Prosecution has to prove “recklessness”

Penalties

- Category 2 – failure to comply with duty, failure means risk of death or serious injury or illness
 - Penalty – Individual - \$150k
 - PCBU (individual) - \$300k
 - PCBU (company) - \$1.5M

Penalties

- “Strict liability” provision no need for the prosecution to prove recklessness, merely need to establish a breach
- Consequence of breach – exposure to risk of death or serious injury or illness gives it Category 2 status

- Category 3 – failure to comply with duty
 - Penalty – Individual - \$50k
 - PCBU (individual) - \$100k
 - PCBU (company) - \$500k
- Contrast with category 2 offence. Here, there is no need to prove that an individual has been exposed to a serious risk of injury or illness.
- Prevention is better than cure!

Ascoli Developments (now in liquidation) and Director Mr Gurvich

- Company fined \$96,500 for failure to comply with Improvement and Prohibition Notices and a failure to provide safe plant and systems of work (fall protection, electrical risks, employee amenities). It was pure risk offence, no injury or incident.

Recent cases

- Director also pleaded guilty and got \$17,000 fine and conviction
- Director appealed to County Court but court upheld fine and conviction

Café Vamp

- Prosecution of employer, director and employees following systematic bullying that led the suicide of Brodie Panlock
- Café Vamp (MAP Foundation) was fined \$220,000, its director \$30,000
- The “bullies” were personally fined \$45,000, \$30,000 and \$10,000 depending on culpability

What do you need to do?

- Need to make sure that safety processes are implemented, and reviewed - now is a good time to review policies and procedures
- Need to ensure systems capture the broader notion of ‘**business or undertaking**’ and the obligation to workers and “**others**”.

Some suggestions?

- Management and Board meetings should receive OH&S Reports and Updates.
- Make provision in budgets for OH&S expenditure and resources.
- Have processes for reporting on OH&S issues, including incident notification.
- Engage competent, trained and qualified staff to implement safety systems.

Some suggestions?

- Undertake audit and review of safety systems – including by management risk and compliance committees.
- Do the key decision makers in the organisation understand the changes and the potential impact on resourcing and processes?

Safety – you can't afford to get it wrong



Safety – you can't afford to get it wrong

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