

Safety Matters

December 2004

Editorial

2004 has been a very busy time for legislative drafters across Australia in the OHS area, as our final edition of *Safety Matters* reveals. Significant changes to the Commonwealth OHS Act have already been implemented and major changes in OHS laws are being planned for Victoria, Western Australia and Queensland. In New South Wales, a number of Bills have been introduced which, if passed, have the effect of doubling penalties for OHS breaches in cases involving workplace fatalities, and which may extend the time limit for the commencement of OHS prosecutions by the WorkCover Authority. The push for legislative reform in OHS will certainly continue into 2005.

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Reforms to Victorian Health and Safety Laws

The Victorian Parliament is on the verge of introducing a virtual rewrite of the existing *Occupational Health and Safety Act 1985 (Vic)* (OHS Act). The proposed legislation (the Bill) will repeal the existing OHS Act. The Bill will, however, retain existing employer and duty holder obligations with minor amendments. The Bill will also extend the breadth of the legislation to new duty holders such as designers of workplaces.

In almost every respect the Bill will create more onerous obligations on duty holders. Moreover, those guilty of contravention will face the prospect of higher penalties. It is intended that most of the Bill will become operational on 1 July 2005.

New duties

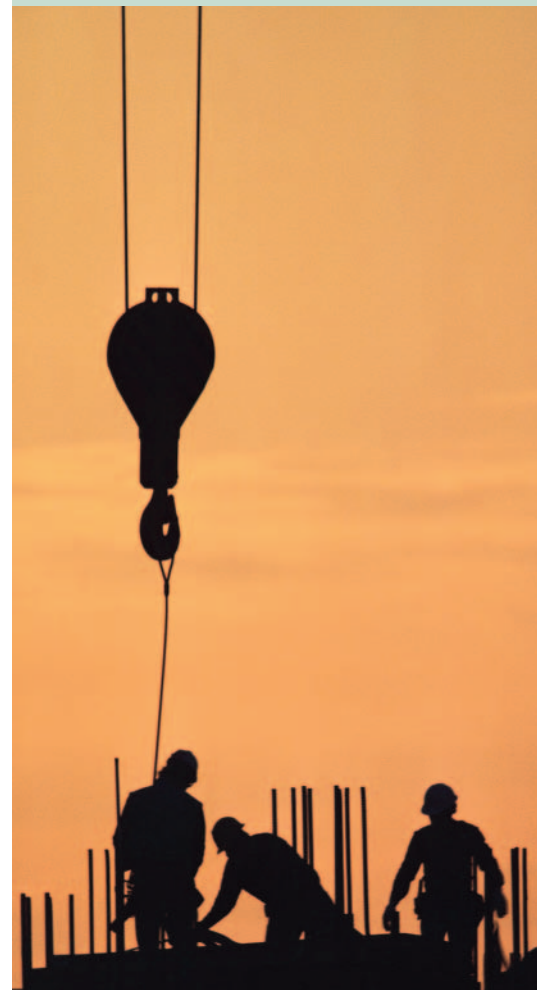
The Bill creates a new offence upon any person who, without lawful excuse, recklessly engages in conduct that places or may place another person at a workplace in danger of serious injury. In the case of an individual this offence can result in a penalty of up to 1,800 penalty units, which is currently \$184,050 and up to

5 years imprisonment. In the case of a corporation the penalty can be up to 9000 penalty units, which is currently \$920,250. The new duty will require a high degree of culpability upon the person or corporation. The obligation extends to any person and is not limited to officers of a corporation.

The Bill also creates a new duty on designers of workplaces. The new duty is intended to ensure that hazards and risks that may be inherent in a design of a workplace are eliminated or reduced at the design stage. The new duty will only apply at the design stage, not to the construction or demolition of a building or structure.

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The Bill also expands the obligation of an employer to provide information to employees concerning health and safety, including the names of persons to whom an employee may make an enquiry or complaint about health and safety.

An additional duty under the Bill is the requirement of employers to notify WorkSafe in writing each time a person becomes or ceases to be a health and safety representative. It is estimated that there are 10,000 health and safety representatives in Victoria. It is expected that the database of health and safety representatives will be used by WorkSafe to provide additional support and assistance to representatives.

Penalties

New and significantly higher penalties will be introduced. The maximum penalty for a breach of general duties will be increased from \$255,625 to \$920,250 for corporations and from \$51,125 to \$184,050 for individuals.

The maximum penalty will increase each year as the dollar value for penalty units is now indexed.

The maximum custodial sentence will be 5 years but will only apply to the new offence relating to conduct endangering persons at a workplace.

The Bill also includes innovative sentencing options such as adverse publicity orders and orders to undertake improvement projects. There is also capacity for WorkSafe to issue infringement notices and to accept enforceable undertakings.

Increased participation obligations

The obligation upon an employer to consult with employees on health and safety issues is greatly extended under the Bill. This includes consulting before making decisions about identifying hazards, making decisions to control risk and any proposed change that may affect the health and safety of employees. The duty to consult requires employees being

given a reasonable opportunity to express their views about the matter and the employer taking into account those views.

The duty to consult also extends to an independent contractor engaged by the employer and any employees of the independent contractor.

Offences for officers of body corporates

Under the existing OHS Act, prosecutions against individual officers are complex and relatively rare. The Bill will reduce the complexity of such prosecutions. Under the Bill, if the conduct of a body corporate is attributable to an "officer" of the body corporate failing to take reasonable care, the officer is also guilty of an offence and liable to a fine not exceeding the maximum fine that applies to a natural person for the offence (usually a maximum penalty of \$184,050).

An "officer" will include a person who makes or participates in the making of decisions that affect the whole or a substantial part of the body corporate's business and a person who has the capacity to affect significantly the body corporate's financial standing. It will not include volunteer officers.

In determining whether an officer of the body corporate is guilty of an offence, regard will be had to:

- what the officer knew about the matter concerned;
- the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned;
- whether the commission of the offence is also attributable to an act or omission of any other person; and
- any other relevant matter.

The Bill will also extend duties under the Act to persons who are officers of partnerships and unincorporated bodies or associations.



Union's right of entry to workplaces

The Bill will allow an authorised representative of a union to enter a workplace if he or she reasonably suspects a contravention of the legislation. The suspected contravention must relate to:

- a member of the union; or
- a person whose employment is subject to a certified agreement and the union is bound by that agreement; or
- a person eligible to be a member of the union whose employment is not subject to a certified agreement by which any union is bound.

An employer must not refuse an authorised representative entry to a workplace.

Changes to WorkSafe

The Bill will introduce a formal mechanism for internal review of decisions made by WorkSafe. This includes decisions to issue prohibition or improvement notices. Applications for internal review will be considered by a new review unit within WorkSafe.

The Bill will expressly allow inspectors to give advice to employers about how to comply with their obligations. The giving of such advice cannot give rise to any liability or claim against WorkSafe if that advice proves to be deficient. The Bill also addresses in greater detail the powers of inspectors.

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Lessons for employers

- **The Bill has wide reaching implications and requires all duty holders to be vigilant. A review of existing OHS systems, including consultation mechanisms with employees, is strongly recommended.**
- **Designers of workplaces should consider the scope of the new duty.**
- **The Bill introduces substantial increases in penalties for non-compliance.**

Proposal to Change Time Limits for the Commencement of OHS Prosecutions in NSW

The New South Wales Government is proposing amendments to the *Occupational Health and Safety Act 2000 (NSW)* (the OHS Act) which have the effect of extending the time limit within which the WorkCover Authority may commence an OHS prosecution where an employer has failed to notify WorkCover of an incident as required under the OHS Act.

Section 107 of the OHS Act currently provides that a prosecution must be commenced within the period of 2 years after the date of the incident alleged to constitute the offence. This time period is extended if a coronial inquest is held. In that case, a prosecution may be commenced within 2 years after the date the coroner's report was made or the inquest or inquiry was concluded.

The *Workers Compensation and Other Legislation Amendment Bill 2004 (NSW)* (the Bill) proposes the introduction of a new section 107A into the OHS Act. This section provides that an OHS prosecution may be commenced within 2 years after

the occurrence of the work incident, or within 6 months after the WorkCover Authority first becomes aware of the work incident, whichever provides the greater period to institute proceedings.

The proposed amendment provides that WorkCover does not become "aware" of the incident until either notification of the incident is given by the employer in compliance with section 86 of the OHS Act, or WorkCover gives the employer notice in writing that is expressed to be notice for the purposes of the section and indicates that WorkCover has become aware of the incident, whichever of these events occurs first.

Other important aspects of the proposed amendments are as follows:

- The CEO of WorkCover may issue a written certificate which certifies the time at which WorkCover first became aware of the incident.
- An OHS prosecution cannot be instituted more than 2 years after the occurrence of the work incident unless the CEO of WorkCover has certified in writing that the prosecution is within the public interest.
- A certificate by the CEO of WorkCover under the proposed section is conclusive evidence as to the matters certified and cannot be challenged, reviewed or called into question before any court or tribunal.

These provisions will also apply to prosecutions commenced by the Department of Primary Industries (formerly the Department of Mineral Resources) against mining industry employers.

The proposed amendments aim to prevent employers deliberately or inadvertently avoiding prosecution by

failure to notify WorkCover of a serious incident as required. The amendments arise from Recommendation 19 of the New South Wales Legislative Council's report into *Serious Injury and Death in the Workplace* which identified instances of employers avoiding prosecution by not notifying serious incidents within 2 years of the date of a work incident.

In the second reading speech for the Bill, the New South Wales Parliamentary Secretary stated that the discretion to prosecute outside the 2 year time limit would not be exercised lightly. He stated that WorkCover would develop guidelines to ensure that the discretion was only exercised where there was a clear need to ensure an employer be brought to account for breaching the OHS Act.

Other amendments

The Bill also proposes:

- To empower WorkCover inspectors to issue stop-work orders to an employer an inspector suspects does not hold a policy of workers compensation insurance. Employers who do not comply with notices face fines of up to \$55,000 and/or imprisonment for 6 months.
- To increase funeral expenses for workers killed at work from \$4,000 to \$9,000 which are to be paid regardless of whether the worker has dependants.

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Lessons for employers

If the Bill is passed by Parliament, it is important for employers to:

- understand the notification obligations under the OHS Act and keep records of notifications made; and
- ensure compliance with the notification obligations under the OHS Act.



The NSW Workplace Fatalities Bill

The New South Wales Government has responded to recent calls for legislative change to make corporations and individuals more accountable for workplace deaths by releasing for consultation the *Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004 (the Bill)*.

The Bill proposes to alter the way in which breaches of the *Occupational Health and Safety Act 2000* (NSW) (the OHS Act) are dealt with by the courts, particularly where there has been a death at the workplace. Whilst the Bill does not create new obligations or alter existing obligations that are imposed on corporations to ensure the health, safety and welfare of employees, the Bill, if passed, will introduce a number of important amendments to the OHS Act in the area of sentencing and penalties.

Many employers and employer associations have made submissions to the Government concerning the Bill and its implications.

Penalties

The Bill proposes the doubling of penalties for breaches of the OHS Act by a corporation or an individual where the breach has caused the death of another person. The Bill also proposes the introduction of a term of imprisonment for first time offenders under the OHS Act. Currently, imprisonment is only a sentencing option for those individuals who have a prior conviction under the OHS Act.

The proposed new penalties are as follows:

- for a corporation being a previous offender under the OHS Act – a fine of up to \$1.65 million;
- for a corporation not being a previous offender under the OHS Act – a fine of up to \$1.1 million;
- for an individual being a previous offender under the OHS Act – a fine of up to \$165,000 and/or 5 years imprisonment or both; and

- for an individual not being a previous offender – a fine of up to \$110,000 and/or 2 years imprisonment or both.

The Bill provides that an act or omission will “cause the death” of another person if it “substantially contributes to the death”.

The current level of penalties in the OHS Act still apply to contraventions which do not result in the death of another person.

Aggravating factors

The Bill also proposes the introduction of a number of “aggravating factors” which the court must take into account when determining the appropriate penalty for any offence under the OHS Act, whether the offence has resulted in the death of another person or not.

In summary, the aggravating factors are:

- the risk to health or safety was known or obvious or could have been reasonably foreseen;
- there were feasible measures reasonably available to prevent or mitigate the risk;
- the risk was of serious injury or death;
- the offender was reckless or negligent in committing an offence that caused the death or serious injury of a person;
- the offender gained a financial advantage by failing to implement safe systems of work that resulted in the commission of the offence; and
- any other aggravating factors the court considers relevant.

Lessons for employers

If the Bill is enacted, employers will need to:

- continue to develop and effectively implement OHS policies, procedures and systems of work which demonstrate compliance with the strict obligations contained in the OHS Act;
- ensure corporations and individuals can demonstrate due diligence in their approach to OHS issues;
- ensure all workers at a workplace are effectively trained and competent to perform their work and that appropriate audit and review processes are in place; and
- ensure that any financial decisions which impact upon OHS considerations are carefully assessed and reviewed.

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Occupational Health and Safety in the Commonwealth Arena

On 13 September 2004 significant amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)* (Commonwealth OHS Act) commenced, establishing a new dual civil and criminal penalty regime. The Commonwealth, Commonwealth authorities and their employees are now exposed to financial penalties for breach of the Commonwealth OHS Act.

The Commonwealth OHS Act aims to secure the health, safety and welfare at work of employees of Commonwealth departments, statutory authorities and Government business enterprises (GBEs). In addition, obligations under the Commonwealth OHS Act are imposed on private businesses which are manufacturers, suppliers or installers of plant, equipment and substances used by Commonwealth employees. Prior to the amendments, only GBEs were exposed to financial penalties under the Act.

Civil proceedings

With the introduction of the amendments, the Commonwealth, Commonwealth authorities and their employees are now exposed to the commencement of civil penalty proceedings for a contravention of clause 2(1) of schedule 2 of the Commonwealth OHS Act. Under this

clause, if a court considers that a person has breached certain provisions of the Commonwealth OHS Act, or was involved in such a breach, a court must make a declaration of that breach which may result in the imposition of a financial penalty. The provisions which, if breached, may result in financial penalty include the general duties of employers in relation to employees, the duties of manufacturers, suppliers and persons erecting or installing plant, and the general duties of employees.

A declaration of a contravention can result in the imposition of a penalty order of up to \$242,000 depending on the nature of the contravention.

Proceedings for a declaration or pecuniary penalty order must be commenced by Comcare, or an investigator appointed by Comcare, within 6 years after the alleged breach and must be proven on the balance of probabilities. However, the amendments introduce a discretion in the nature of a defence to relieve a person wholly or partly from liability if the court determines the person acted honestly and, having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention.

Criminal proceedings

In line with the current push for tougher penalties for fatalities at the workplace, the amendments also introduce criminal prosecutions where a breach of certain provisions of the Act cause death, serious injury, or where there is a substantial risk of such events occurring. The court must find that the person was either

Lessons for employers

- The Commonwealth and Commonwealth authorities are now subject to civil penalty proceedings for breaches of certain general duties under the Commonwealth OHS Act exposing them to penalties up to \$242,000.
- The maximum penalty under the Commonwealth OHS Act has increased from \$100,000 to \$242,000 for a civil breach and \$495,000 for a criminal breach.
- A new offence is created where an employer breaches its duty of care and negligently or recklessly exposes an employee to substantial risk of death or serious harm.

negligent or reckless as to whether the breach would cause death, serious bodily harm or a substantial risk of it occurring. Criminal penalties range from \$9,000 for individuals to \$495,000 for a body corporate. The Commonwealth and Commonwealth authorities cannot be criminally prosecuted under these provisions.

The amendments also introduce a wider range of remedies available to Comcare, namely injunctions, remedial orders and enforceable undertakings to ensure more effective protection of the health, safety and welfare of Commonwealth employees at work.

The explanatory memorandum to the amendments states that there have only been 8 successful prosecutions under the Commonwealth OHS Act since its commencement in 1991. It will be interesting to note whether the amendments result in an increase in the number of prosecutions commenced.

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Recent Changes to Queensland Safety Laws

Recently the Queensland Parliament passed the *Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2004 (Qld)*. This Act made amendments to various Acts including the *Workplace Health and Safety Act 1995 (Qld)* (WHS Act). This follows on from the significant changes made to the WHS Act 18 months ago.

Previous changes

In summary, the changes to the WHS Act 18 months ago included:

- increased penalties for breach of the WHS Act;
- the creation of new obligations for new categories of persons;
- new definitions;
- the creation of "enforceable undertakings"; and
- clarification of inspector's powers.

The recent amendments clarify some of these changes. Some of the recent amendments are discussed below.

Obligations

The obligations for an employer, a self-employed person or a person conducting a business or undertaking have changed. For example, where the WHS Act previously required employers to "ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking", an employer is now required to "ensure each of the employer's workers is not exposed to risks to their health and safety arising out of the conduct of the employer's business or undertaking."

The obligation now in place is much broader than the earlier obligation and will require employers to satisfy a higher test.

Advisory standards and codes of practice

The Workplace Health and Safety (Advisory Standards) Notice 1998 has been repealed. "Advisory standards" have been removed from the WHS Act and replaced with the all encompassing

term "code of practice". Transitional arrangements are in place, which allow existing advisory standards to continue in force as codes of practice, expiring 10 years from the date of their commencement.

The life of a code of practice will now be 10 years, where previously advisory standards and codes of practice only had a life of 5 years.

Enforceable undertakings

The changes to the WHS Act 18 months ago allowed a person who was alleged to have breached the WHS Act to provide an "enforceable undertaking" to the chief executive. Enforceable undertakings include an assurance from the person who is alleged to have breached the WHS Act about their future behaviour.

The amendments to the WHS Act clarify that an enforceable undertaking is to be provided to the chief executive within a time limit prescribed in a regulation (not yet stipulated). In addition, an application by the chief executive for orders as a result of a suspected contravention of the enforceable undertaking is to be made to the Industrial Magistrate's Court not to the Industrial Court of Queensland.

Inspector's powers

The recent amendments to the WHS Act clarify that an inspector may give advice to a person who has a workplace health and safety obligation in relation to the person's compliance with the WHS Act. This amendment raises a number of interesting issues, such as the legal position of an employer who may rely on advice from an inspector which is later found to be incomplete,

Lessons for employers

- Employers should review their compliance and broader legal risk management initiatives to ensure compliance with the WHS Act.
- Employers should ensure they are familiar with recent legislative changes and consider, where appropriate, gaining the benefit of advice from inspectors about compliance.

misleading or wrong and a person suffers an injury as a result.

Improvement notices

An inspector may now direct, rather than require, a person to remedy a contravention or likely contravention of the WHS Act. That direction may be given orally but then must be confirmed in writing in an improvement notice as soon as practicable. The person is then required to comply with the direction and the improvement notice.

It will be important for an employer who receives an oral direction to make a written record of it immediately and, if possible, get the inspector to confirm its accuracy.

Prohibition notices

Previously a prohibition notice could only be issued where an inspector reasonably believed that there was an immediate risk to workplace health and safety. The circumstances in which a prohibition notice may be issued have been broadened. An inspector may now issue a prohibition notice where they reasonably believe that there is a risk of serious bodily injury, work caused illness or a dangerous event.

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Recent Changes to WA Safety and Mining Laws

In November 2004 the Western Australian parliament passed significant amendments to the *Occupational Safety and Health Act 1984 (WA) (OSH Act)* and the *Mines Safety and Inspection Act 1984 (WA) (MSI Act)*. The amendments will come into effect after they are proclaimed.

The changes to the OSH Act were outlined in the May 2004 edition of *Safety Matters*, (available on www.bdw.com under "publications"). Similar amendments have been made to the MSI Act. In summary, the changes:

- significantly expand the duty of care in relation to contract workers, labour hire employees and other people who are not employees;
- create a new offence of "gross negligence" that applies to individuals and corporations. "Gross negligence" may apply in cases where serious harm or death has occurred, and the offender knew that the breach would be likely to cause serious harm or death and disregarded that likelihood;
- establish 4 penalty levels. Maximum penalties increase to \$500,000 for a corporation, with \$625,000 for a second offence for an offence involving gross negligence;
- directors, managers, secretaries or other officers can personally be fined up to \$250,000 and imprisoned for 2 years for a first offence involving gross negligence. They can be personally fined up to \$312,500 and imprisoned for 2 years for any subsequent offence involving gross negligence;

- enable safety and health representatives to issue provisional improvement notices;
- replace the Mining Occupational Safety and Health Advisory Board with a Mining Industry Advisory Committee reporting to the Minister administering the OSH Act and the Minister administering the MSI Act; and
- establish a new Safety and Health Tribunal to hear appeals from decisions of the WorkSafe Commissioner or the State mining engineer.

Petroleum industry

In October 2004 the Western Australian government introduced legislation to achieve a consistent

regulatory regime in State offshore waters.

The proposed amendments to the *Petroleum (Submerged Lands) Act 1982 (WA)* mirror the Commonwealth *Petroleum and Submerged Lands Act 1967 (Cth)*. The amendments apply to various people with responsibilities on an offshore facility, including the operator of a facility and the employer of workers. The amendments will enable the National Offshore Petroleum Safety Authority to carry out its role in Western Australian waters. Similar mirror legislation has been enacted in Victoria.

The amendments also propose that the new Safety and Health Tribunal established under the OSH Act amendments will be the reviewing authority (for example, in relation to inspectors' decisions).

The Bill makes similar amendments to the *Petroleum Act 1967 (WA)* and the *Petroleum Pipelines Act 1969 (WA)*. These changes will apply a similar legislative regime to the upstream Western Australian petroleum industry.

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