



OCCUPATIONAL HEALTH & SAFETY HARMONISATION

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INTRODUCTION

NEW UNIFORM SAFETY LAWS WILL BE ENACTED IN ALL JURISDICTIONS IN AUSTRALIA BY 1 JANUARY 2012.

- **WHAT WILL THIS REALLY MEAN FOR YOUR BUSINESS?**
- **HOW WILL IT AFFECT YOU PERSONALLY?**
- **WILL IT CHANGE THE WAY THE SAFETY REGULATORS DEAL WITH YOUR BUSINESS OR INDUSTRY?**
- **IS YOUR ORGANISATION READY FOR THE CHANGES?**

We consider these questions in light of some of the key changes to the law. We provide practical steps your business can take now to prepare for the new changes.

We also include insights from industry stakeholders on their view of the new laws and the anticipated impact they will have on businesses.

Lastly, we provide a summary of some of the key laws that impact on your business' day-to-day operations.





HARMONISED LAWS - WHERE DID IT ALL START?

A National Review Panel was established in the beginning of 2008 to deal with a challenge that has been in existence for over 30 years – uniform safety laws. One of the terms of reference provided to the Panel was:

“Make recommendations on the optimal structure and content of a model OH&S Act that promotes safe workplaces, increases certainty for duty holders, reduces compliance costs for business and provides greater clarity for regulators without compromising the safety outcomes.”

Two years later, we have a model Work Health & Safety Bill (WHS Bill) that will commence operation in almost identical terms across all jurisdictions in just over 12 months. The question remains whether the proposed model WHS Bill, and the corresponding regulations, will meet the objectives given to the Panel.

As with most legislative changes, it will require a number of years to assess the full impact of the new laws and whether these goals have been achieved.

One reason for this delay is, unlike other significant workplace legislative changes such as the abolition of Work Choices, the harmonisation of OH&S laws may also be coupled with profound changes to the way safety regulators approach their role.

These changes come about as a result of moves by the regulators to adopt a uniform approach to investigation and enforcement. Similarly, the approach taken by the Courts to the promotion of the uniform safety laws will also be critical.

Timeline

Activity	Date
Council for Australian Governments commits to harmonised safety laws	July 2008
Independent Review Panel first report	October 2008
Independent Review Panel second report	January 2009
Safe Work Australia created	April 2009
Draft Work Health & Safety Bill endorsed	December 2009
Work Health and Safety regulations, priority Codes of Practice to be publicly released	December 2010
Public comment	January to April 2011
Regulations to be approved	June 2011
Commencement of Work Health and Safety Act and Regulation	1 January 2012



WILL THE NEW LAWS PROMOTE BETTER SAFETY?

The safety culture that exists in your organisation, to a large extent, is impacted by three key matters being:

- Knowledge within the business about safety
- Leadership on safety
- Effective communication, accountability and ownership by managers and staff about safety issues

The historical role of safety laws has been to superimpose legal obligations on individuals and businesses to encourage them to take proactive steps to continually develop and enhance these important aspects of safety within the workplace.

Under the new safety laws, there are some key changes that will affect the safety culture in your business. These include the:

- expanded duty of care
- expanded consultation obligations
- positive duties on “officers”
- greater ability for your business’ reputation to be tarnished
- greater ability for intervention by unions and the regulators

We examine each of these in detail below.



YOU WILL HAVE A GREATER DUTY OF CARE

For most businesses, there will be a broader duty of care owed under the new laws. This is due to the introduction of a new duty of care on any "person conducting a business or undertaking" (PCBU). This is a general duty to take all reasonably practicable steps to ensure the health and safety of workers engaged in the business or undertaking. The duty extends to those workers whose activities in carrying out work are influenced or directed by the PCBU.

The language used in describing the primary duty of care is very broad and has the potential of expanding the number of people to whom your organisation may owe a duty of care. The challenge for your business is to now assess what is the extent of its "undertaking" and what workers are carrying out work at the direction or influence of the organisation. For example, if your business repeatedly engages the same contractor to remove waste products from your site for sale or disposal, will the work they perform be part of your undertaking? The question of how much control your organisation can exercise over safety in those arrangements will be critical to this assessment.

Similarly, an equally broad new duty is imposed on a person with the management and control of a workplace to ensure that there are no risks "arising from the workplace". This will require you to consider what areas may constitute your workplace. Generally a business' place of work is obvious. However, a business operation will change in scope and size from time to time.

This change could include geographic extension of your operations either from new remote working arrangements or the growth of the business itself. It could also come about from indirect control by your business, for example, the ordering of supply materials for your business from one source in circumstances where particular requirements are imposed by your business on the manufacture or production of those supplied goods.

Once an assessment has been made as to the nature of your business' undertaking, there is then a requirement to determine what risks can arise from work carried out as part of the undertaking. A business will then need to consider the extent to which it can, or wants to, exercise control so as to eliminate or reduce those risks. As a result, your business will need to consider whether its current contracts and systems of work are able to deal with these issues.

"One of the more significant challenges under the uniform laws from the point of view of Westfield will be to revisit the traditional employer/employee relationship model in the context of a person conducting a business or undertaking. Although the most important factor regarding compliance will remain having robust safety systems that operate in practice, the question of identifying the extent of Westfield's undertaking is an important challenge".
 Phil Tanner, General Manager, Life Safety Risk Management, **Westfield Group**



BROADER REQUIREMENT TO CONSULT AND CO-ORDINATE

A significant change under the new laws is the broad duty to consult. This duty is not limited to the more traditional consultation within your business, that is, between management and workers. The requirement is now to consult, cooperate and coordinate activities with all other businesses and people that are impacted by your undertaking who also have a duty of care. The challenge for businesses will be to assess who are the categories of people that must be consulted with, and what contracts and processes need to be put in place to comply with the consultation requirements.

The starting point will be to consider the current consultation arrangements that are in place to see whether they can be adapted to deal with the new requirements. For example, in the case of existing construction projects or stand alone businesses with processes such as safety and project committees already in place, consideration will need to be given to whether these comply. In the case of new projects or developments, then different consultation structures may need to be implemented from those contained in any existing Safety Management system.

The other important element is the extent and level of consultation and coordination required. The law provides that it must be done as far as "reasonably practicable". This suggests that each organisation involved in any undertaking must assess the extent of its resources to be able to be involved in ongoing consultation.

For example, clear guidelines will need to be established at the commencement of any new development or construction project to deal with contractors who may have only limited interaction with your business. It will be critical to determine where responsibility for consulting on safety issues will lie and ensuring an ongoing process of review is undertaken.

"Clearly one matter that we will need to grapple with is how the new consultation obligations will operate in practice. For a business that deals with many contractors this may pose a real challenge". Andrew Smith, National Business Systems (QHSE) Manager, **St Hilliers Construction**



LEADERSHIP - A NEW POSITIVE DUTY ON “OFFICERS”

One of the most important aspects of any safety culture is leadership. The WHS Bill deals with this issue by introducing a new concept that an “Officer” of the PCBU must exercise “due diligence” to ensure that the PCBU complies with its safety obligations. The purpose of separately imposing the duty on an officer in this manner is designed to influence the culture of your organisation to establish strong safety leadership. Part of that duty is the requirement for the officer to take reasonable steps to acquire, and keep up to date with, knowledge of work health and safety concerns in the business.

In practical terms, the WHS Bill is designed to impose a duty on an officer to be a safety leader. The laws require officers to be aware of the risks associated with the operations of the PCBU and to ensure there are appropriate resources and processes to eliminate or minimise risks. Further, officers must respond in a timely way to information regarding incidents, hazards and risks and ensure that processes are implemented for complying with the PCBU’s obligations.

The term “Officer” is a broad one which will include directors, senior managers and operational or commercial managers who make, or participate in making, decisions that affect the whole, or a substantial part of the business or affect significantly the business’ financial standing.

Businesses will need to assess who are “Officers” in order to ensure that they are fully aware of their obligations under the new laws and the steps that they must take to avoid personal liability. Shadow and de-facto directors will also owe positive duties under the new laws and some businesses that exercise control over a related entity will need to consider the impact of this relationship.

“At the end of the day, accountability is the most important part of developing a good safety culture. It has to be more than people just understanding they are responsible for their own and other people’s safety, but also understanding that they are held accountable for it”.
Ray Miranda, Safety Manager, **Thiess Pty Ltd**



REPUTATION - A NEW APPROACH TO ENFORCEMENT

The reputation of your organisation is often critical to its continued success. There have been numerous examples of businesses that have been adversely affected by allegations of unsafe conduct attributed to their business, whether the allegations were unfounded or not.

One of the tools in the new enforcement armoury of the safety regulators will be the potential for increased adverse publicity orders. Across the jurisdictions there has already been an increase in the use of these orders that currently exist in limited form. Depending on the approach to be taken by the regulators and the courts themselves, this is likely to be one of the most effective tools for regulators going forward.

Historically, publicity orders have been limited to the print media but there is nothing in principle to limit these orders. Potentially, orders could be made requiring a business or individual to publish their unlawful conduct and conviction as part of an ASIC or ASX announcement.

Further, orders could be made for these adverse statements to be published on the internet. Unfavourable press on the internet, and in particular social media networks, has proved in recent times to be a significant commercial risk for a business. As a result, your organisation may need to consider how it will look to deal with the prospect of this developing enforcement tool under the new laws.



INTERVENTION AT YOUR WORKPLACE

Another key impact on your safety culture will be the increased opportunity for the safety regulators and unions to access your workplace. The new laws provide a number of different avenues for the regulator to be invited to your organisation. These include disputes over safety committees, work groups and right of entry.

Similarly, although the right to commence a prosecution will no longer be available to a union, there will be greater scope for a union to become involved in your organisation under the new laws. In particular, there will be a general union right of entry to consult and advise workers on safety issues as well as a right of entry for the purpose of resolving health and safety issues.

The appointment of a health and safety representative (HSR) with rights to issue Provisional Improvement Notices and direct that work cease, will be new to some jurisdictions. An HSR will have the right to request the assistance of any person, including a union official, in the conduct of their duties.

The issue for businesses is how they will deal with the prospect of greater intervention. An assessment will also be needed of the industrial impact that HSRs will present, particularly in those jurisdictions where HSRs do not currently hold these powers.

Further, the interaction of these new positions and the conduct of any incident investigation will also need to be considered, particularly in light of the new criminal offences protecting HSRs from coercion, duress and discrimination.

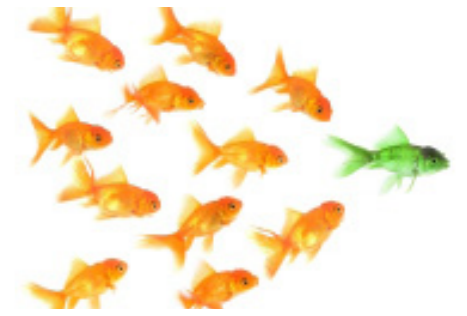
A summary of the most significant areas for intervention is set out in the tables as follows:

Regulator Intervention

Activity	Section
Failure to negotiate work groups	54, 56
Issue resolution	80-82
Direction to cease unsafe work	89
Review of Provisional Improvement Notice	100
Dispute about WHS right of entry	141
Creation of Health & Safety Committees	76
Regulations	Coming soon

Union Involvement

Activity	Section
Entry to inquire into suspected contraventions	117
Entry to consult and advise workers	121
Right of workers to be represented by union in negotiating work groups	52 (4)
Right for a HSR to request the assistance of any person (including a union official)	68 (2) (g)
Right of entry for resolution of Health and Safety issues	81 (3)



APPROACH OF THE SAFETY REGULATOR

One of the unknown issues for businesses operating in a harmonised regulatory environment is the approach that the regulator will now take towards their organisation. There are many factors that currently determine how the regulator approaches your business including the legislation in your jurisdiction, historical policy approaches, the attitude of particular inspectors and the Courts and the level of accountability of the regulator.

All this may change significantly under the new laws as a result of the following:

- each regulator will obtain new or varied powers of investigation. Importantly, in some jurisdictions the right to claim the protection against self-incrimination will be removed
- regulators will be operating together in a more efficient manner, adopting uniform approaches to enforcement and prosecution with increased cooperation across borders
- there will be a greater focus on the regulator as the advisor rather than the enforcer which may affect the regulator's approach to your business
- there will be greater opportunity for the regulator to be called to visit your organisation as set out in the table on page 10
- there will be greater accountability for the decisions made by the regulator including the decision not to prosecute your organisation for some offences, which can be the subject of review by the Director of Public Prosecutions

The sum of all these changes is likely to result in a shift, albeit not immediately, from the current approach taken by the regulator in your jurisdiction. The issue for your business is to determine how this approach may change and what, if any, strategic and structural changes it should make to its operations to manage this development.

Strategic options may include forming alliances with the regulator or other key industry or government bodies that are connected with safety regulation. At the very least, your business should closely examine the information disseminated by the regulators regarding their investigation and enforcement approaches, as well as their schemes for promoting co-operation between business and the regulator.



APPROACH BY THE COURTS

One of the concerns of many stakeholders regarding the OH&S harmonisation process is whether, despite the uniform laws, there will be a consistent approach taken by the Courts across all jurisdictions.

Currently, safety prosecutions are dealt with in different Courts of varying judicial superiority and with significantly different emphases. One of the key practical issues that your organisation will face is to understand the shift, if any, in the attitudes of the Courts in your jurisdiction to the conduct of OH&S prosecutions.

Any change by the Courts will be influenced by the approach adopted by the safety regulators, and whether the regulators in fact adopt a uniform approach. Further, there is the prospect that Court decisions in jurisdictions such as New South Wales and Victoria may dominate the approach taken in other jurisdictions given the sheer number of prosecutions that will be conducted in those two States.

In practical terms, this means following the introduction of the new laws your business will need to remain up to date with developments in the Courts and, most notably, any key decisions made by the Courts as to the interpretation of the new laws.

It also means that your business should take the opportunity now to assess its capability to deal with the regulator if an investigation is commenced or prosecution initiated. These issues are particularly important now as the levels of fines will significantly increase under the new laws up to \$3,000,000. Similarly, dramatic increases apply for individuals.

“Without a doubt, the single most important factor in how the new safety laws will operate in practice depends on the approach that will be taken by the Courts. Certainly, the most serious offences will need to be conducted before the Supreme Court. Whether there will be uniformity is not clear in a situation where some jurisdictions will retain the right for jury trials and others may not” **Bruce Hodgkinson, SC.**

CONTACT US

What steps can you take now?

The introduction of uniform safety laws across Australia presents many challenges for businesses both in assessing the scope of the changes and the practical impact on their business. Steps that your business can now take include the matters set out below. It is important to commence these processes as early as possible in order to be in the best position to operate under the new laws on 1 January 2012.

Steps	Timeframe
Review draft regulations and proposed Act	November to March 2011
Assess key areas that impact your business undertaking	November to March 2011
Gap analysis of your OHS Management System	March to June 2011
Gap analysis of contractual arrangements	March to June 2011
Amend or update contracts, policies and procedures	June to September 2011
Training of contract administrators, managers and staff on new obligations, systems and policies	September to December 2011

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