
Work health and safety in Australia — the current state of play

Cherie Holland and Dr Donald Charrett AMOG

Since 2011, work health and safety (WHS) legislation in Australia has undergone significant change through harmonisation across most Australian jurisdictions. The new legislation places a significantly higher burden of responsibility and compliance on organisations working in the construction industry than previously.

The impact of the new legislation on an organisation needs to be carefully reviewed to ensure that personnel at all levels understand their duties and obligations, and that processes and procedures are updated and implemented to reflect the new regime.

One of the significant developments is the formalisation of higher WHS obligations on organisations that design, manufacture, import or supply products. In the following, the impact of the new WHS legislation is considered from the perspective of a design organisation operating in Australia (“company”). The focus is on the changed requirements arising from the new legislation. It should be noted however, that the following comments are not applicable in Victoria or Western Australia at present, as they have not yet implemented the harmonised WHS legislation.

Overview of work, health & safety harmonisation

Harmonisation of WHS legislation

The harmonisation of WHS legislation is part of the Council of Australian Governments (COAG) National Reform Agenda. The intent of these reforms is to deliver a more consistent approach to jurisdictional regulation and thereby reduce compliance costs on business. In 2008 COAG agreed through an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA) that WHS harmonisation would be achieved through national uniformity of the WHS legislative framework complemented by a nationally consistent approach to compliance policy and enforcement policy. The IGA included a commitment to implement the new harmonised framework by the end of 2011. The WHS harmonisation included development of the following components:

- model Work Health and Safety Act through harmonisation of existing legislation;
- model Work Health and Safety Regulations through harmonisation of existing legislation;
- codes of practice; and
- nationally consistent compliance and enforcement policies.

The model Work Health and Safety Act and Regulations are the basis for the harmonised laws across Australia. All states and territories have responsibility for making and enforcing their own WHS legislation within their jurisdictions. As part of the IGA, jurisdictional-specific acts and regulations are being changed to mirror the Work Health and Safety Act 2010 (Cth) (the Act)¹ and Work Health and Safety Regulations 2011 (Cth) (the regulations),² with minor variations as necessary. For model work health and safety legislation to become legally binding, it needs to be enacted by parliament in each jurisdiction.

As at May 2013, harmonised WHS legislation has been implemented in the following jurisdictions:

- Commonwealth (commenced on 1 January 2012);
- Australian Capital Territory (commenced on 1 January 2012);
- New South Wales (commenced on 1 January 2012);
- Northern Territory (commenced on 1 January 2012);
- Queensland (commenced on 1 January 2012);
- South Australia (commenced on 1 January 2013); and
- Tasmania (commenced on 1 January 2013).

The Victorian government has not yet introduced harmonised WHS legislation, and Western Australia is currently seeking public comment on harmonised WHS legislation.

Victorian WHS legislation

The harmonised WHS legislation currently holds no legal status in Victoria, as reflected in the following information published on the WorkSafe Victoria website:³

The Victorian Government has confirmed that Victoria will not adopt the national model workplace health and safety laws in their current form.

The Government supports the principle of national harmonisation and continues to work towards best practice legislation.

WorkSafe continues to enforce Victoria's existing occupational health and safety laws and regulations.

This means that Victoria's workplaces need to refer to Victoria's codes and guidance materials for information about how to comply with Victoria's occupational health and safety laws.

Victorian codes and guidance materials are specifically designed to inform duty holders as to how they can comply with Victorian occupational health and safety legislation. National Workplace Health and Safety codes and guidance materials have no legal status in Victoria. They are designed to support the national model laws and are not designed to support Victorian occupational health and safety laws.

Work health and safety legislation in Victoria is enshrined in:

- The Occupational Health and Safety Act 2004 (Vic).
- The Occupational Health and Safety Regulations 2007 (Vic).

This legislation is supported by compliance codes, WorkSafe positions and non-statutory guidance detailed in the Victorian Occupational Health and Safety Compliance Framework Handbook.

Western Australian WHS legislation

Western Australia is moving towards harmonisation, but is assessing the potential impact to stakeholders. Pursuant to this, the following statements are provided on the WorkSafe Western Australia website:⁴

While it is not intending to adopt the whole of the model WHS Bill, WA will likely adopt the vast majority of the proposed model laws.

In relation to the model WHS Regulations a WA specific public consultation was completed during late 2012 with a WA specific Regulation Impact Statement ("RIS") being prepared by Marsden Jacob Associates and provided to WorkSafe on 31 December 2012. That RIS has been provided to the Government for its consideration as part of the process of proceeding toward the adoption of the model laws.

The timing of the adoption of the model laws is dependent on the availability of the complete package of harmonised laws including the model mining WHS regulations (core and non-core) being available so that any implementation of the WHS laws can be for all industry sectors in WA simultaneously.⁵

Work health and safety legislation in Western Australia is enshrined in:

- The Occupational Health and Safety Act 1984 (WA).
- The Occupational Health and Safety Regulations 1996 (WA).

This legislation is supported by non-statutory codes of practice and guidance notes.

Harmonised WHS impacts

Areas of key change driven by the Act and Regulations that have a significant potential impact for a company are considered to be:

- duty holders and definitions;
- duties of care;
- consultation; and
- codes of practice.

Duty holders and definitions

In the Act, employer and employee no longer define the employment relationship. In s 5, the primary duty of care is placed on a Person Conducting a Business or Undertaking (PCBU). The PCBU replaces the term "employer" and warrants its own interpretative guideline⁶ by SafeWork Australia to provide clarity for individuals and partnerships conducting business.

Section 7 of the Act defines the term "worker" as a person who carries out work in any capacity for a PCBU. The term "worker" casts a wider net than the term "employee", including employees, volunteers, contractors, sub-contractors, apprentices, work experience students and outworkers.

The term "workplace" in s 8 of the Act broadens the definition to include any place where the worker is likely to go while at work.

Section 18 of the Act provides meaning in relation to what is reasonably practicable for duty holders in ensuring health and safety under the Act, the Regulations and Codes of Practice. The terminology that is used is "So Far As Is Reasonably Practicable" (SFAIRP). This replaces terminology such as "As Low As Reasonably Practicable".

To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including:

- likelihood of the relevant hazard or risk occurring;
- degree of harm that may result;
- what is known or what ought reasonably be known about the hazard/risk and the ways to eliminate or minimise the risk;

- availability and suitability of ways to eliminate/minimise the risk; and
- after assessing the above considerations, whether the cost is grossly disproportionate to the risk.

The Safe Work Australia Explanatory Memorandum of the Act⁷ notes that only after taking into account the first four points above, can the cost associated with available ways of eliminating or minimising the risk be considered, including whether the cost is disproportionate to the risk. The consideration of “cost” could be in terms of finance or time and the associated impact.

Duties of care

The significant changes in the duties of care come under four general categories:

1. primary duty of care;
2. PCBUs that design, manufacture, import or supply plant or structures;
3. PCBUs that install, construct or commission plant or structures; and
4. duties of officers.

Primary duty of care

Section 19 of the Act sets out the primary WHS duty that applies to a PCBU. The PCBU must not only ensure, so far as is reasonably practicable, the health and safety of workers, but ensure that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking.

The Explanatory Memorandum of the Act explains that unlike the duty owed to workers in s 19(1), the duty owed to others is not expressed as a positive duty, as it only requires that persons other than workers “not [be] put at risk”. The general aim of both ss 19(1) and S19(2) is preventative and both require the primary duty of care to be discharged by managing risks as specified in s 17 of the Act.

The Explanatory Memorandum of the Act explains that compliance activities can be undertaken by someone else, but the PCBU must actively verify that the necessary steps have been taken to meet the duty.

PCBUs that design, manufacture, import or supply plant

The designer, manufacturer, importer and supplier of plant, substances and structures have specific duties of care detailed in ss 22–25 of the Act. The focus of these additional duties is on the categories of persons who are at risk, the analysis of that risk and the communication of the resultant information:

Categories of persons

The categories of people to be considered by the PCBU are detailed in ss 22(2), 23(2), 24(3) and 25(2). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as in carrying out other reasonably foreseeable activities related to the intended purpose such as storage, decommissioning, dismantling, demolition or disposal.

Analysis of Risk and Provision of Information

The remaining subsections (3)–(5) of ss 22–25 of the Act outline further matters that a designer/manufacturer/importer/supplier must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information.

Subsection (4) states that the designer/manufacturer/importer/supplier must give adequate information to each person who is provided with the design for the purpose of giving effect to it, or to each person to whom the manufacturer/importer/supplier provides the plant, substance or structure concerning:

- (a) each purpose for which the plant, substance or structure was designed or manufactured; and
- (b) the results of any calculations, analysis, testing or examination referred to in subs (3), including, in relation to a substance, any hazardous properties of the substance identified by testing; and
- (c) any conditions necessary to ensure that the plant, substance or structure is without risks to health and safety when used for a purpose for which it was designed or manufactured or when carrying out any activity referred to in subs (2)(a) to (e).

PCBUs that install, construct or commission plant or structures

Section 26 states that the PCBU that installs, constructs or commissions plant or a structure that is to be used, or could reasonably be expected to be used, as, or at, a workplace must ensure, so far as is reasonably practicable, that the way in which the plant or structure is installed, constructed or commissioned ensures that the plant or structure is without risks to the health and safety of specific persons.

These persons are those who install, construct or use the plant/structure, or carry out a reasonably foreseeable activity in relation to the use decommissioning or dismantling of the plant or demolition or disposal of the structure. This also includes persons who are at or in the vicinity of a workplace.

Duty of officers

A significant change under the Act is the introduction of a specific duty of care for officers — due diligence. Officers are senior management with decision-making responsibilities. Officers’ duties cannot be delegated.

An officer of a PCBU is defined in s 4 of the Act within the meaning of s 9 of the Corporations Act 2001.

Section 27 of the Act creates a positive duty on officers of a PCBU to exercise “due diligence” to ensure that the PCBU complies with any duty or obligation

under the Act. This section states that if a PCBU has a duty or obligation under this Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.

The Explanatory Memorandum of the Act explains that these provisions reflect a deliberate policy shift away from applying “accessorial” or “attributed” liability to officers, which is an approach previously adopted by several jurisdictions. The positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations under the Act. **There is no need to tie an officer’s failure to any failure or breach of the relevant PCBU for the officer to be prosecuted under this clause.**

Section 27(5) contains a non-exhaustive list of steps an officer must take to discharge their duties under this provision, including acquiring and keeping up to date knowledge of WHS matters and ensuring the PCBU has, and implements, processes for complying with any duty or obligation the PCBU has under the Act.

Consultation

Consultation with other duty holders

Section 46 of the *Act* sets out the requirements for consultation between duty holders. It states that if more than one person has a duty in relation to the same matter under the Act, **each person with the duty must, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other persons who have a duty in relation to the same matter.**

This is a key difference in the legislation. The impact of this on a company is considered to be significant due to the fact that there will often be concurrent duty holders in a company’s undertakings (for example, company personnel operating within client facilities). The duty holders have overlapping duties, and each duty holder will need to meet the requirement for consultation with all duty holders.

Consultation with workers

Section 47 of the Act sets out the requirements for a PCBU to consult with workers. It requires PCBUs to, so far as is reasonably practicable, consult with their workers who may be directly affected by matters relating to work health or safety. Section 48 establishes the requirements for the nature of the PCBU consultation with workers. Section 49 sets out the kinds of work health and safety matters that must be consulted on, including at each stage of the risk management process. Additional matters requiring consultation may be pre-

scribed by the Regulations, for example specific consultation requirements exist for major hazard facilities.

Codes of practice

Section 275 of the Act states that in proceedings for an offence against the WHS Act:

1. an approved code of practice is admissible in the proceeding as evidence of whether or not a duty or obligation under the Act has been complied with;
2. the code of practice may be regarded as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and
3. the code of practice may be relied on in determining what is reasonably practicable in the circumstances to which the code relates.

However, evidence of compliance with the Act in a manner that is different from the code of practice, but provides a standard of work health and safety that is equivalent to or higher than the standard required in the code may be provided by a person.

While the codes of practice are intended as guidance, the consequence of s 275 of the Act implies that the codes of practice represent minimum requirements. The impact of this for a company is that where there are codes of practice that are relevant to a company’s business or undertaking, these should be regarded as a minimum requirement. However, it is considered that compliance to a code of practice, in and of itself, does not ensure a SFAIRP argument for reduction of risk.

There are 24 model codes of practice that have been finalised for implementation, 12 waiting approval, and three released for public comment.

Working across jurisdictional boundaries

The model WHS legislation introduces some changes that have a significant potential impact for a company’s operations. These changes would drive down into a company’s policies, procedures and processes to meet legislative requirements.

The onus is on a company to:

1. document its processes and activities to provide evidence of compliance to the legislative requirements;
2. implement an assurance program to monitor compliance with the legislative requirements; and
3. be aware of any jurisdictional interface that may expose the company to non-harmonised OH&S legislation.

A company may experience a jurisdictional interface if it operates in a state or territory with harmonised WHS legislation and does business with a company in a state that has not implemented harmonised WHS legislation (ie Victoria or Western Australia). Additionally, a jurisdictional interface may occur if a company operates in a state that has not implemented harmonised WHS legislation (Victoria or Western Australia) and does business with a Commonwealth entity residing in the same state. In these scenarios, the company may have conflicting, slightly divergent or additional obligations under the WHS legislation and will need to determine what these are and how best to comply. The inconsistent harmonisation of the WHS legislation across Australia has introduced some potentially complex issues that may need to be addressed by a company, possibly in coordination with the associated regulators.

Conclusion

The harmonised legislation has resulted in new responsibilities and obligations for a company that is subject to them. These will undoubtedly add additional administrative burdens and costs on a company, and should focus the mind of the “officers” of a company that have new and onerous responsibilities.

For a company that is subject to both the harmonised legislation, and the “legacy” WHS Acts in the stand-out states of Victoria and Western Australia there will be added burdens of ensuring compliance with two different regimes (if that is achievable in practice).

What is clear from the above brief survey is that a company will have to commit resources to understand its responsibilities under the new harmonised legislation, and develop strategies that will ensure its compliance with the new regime. In addition, there are new issues

that need to be addressed by organisations that carry out design. These will be considered in a subsequent paper to be published in Australian Construction Law Bulletin.



Cherie Holland
Associate Director
AMOG



Dr Donald Charrett
Barrister, Arbitrator, Mediator
Chairman
AMOG

Footnotes

1. Model Work Health and Safety Bill, Model Bill 23/6/2011.
2. Model Work Health and Safety Regulations. Model Regulations — 4 November 2011.
3. WorkSafe Victoria Laws & Regulations 2012 “National Work Health and Safety Reform” <www.worksafe.vic.gov.au> last accessed 8 May 2013.
4. Statement from the WorkSafe Western Australia Commissioner www.commerce.wa.gov.au last accessed 8 May 2013.
5. Note that the model WHS Regulations were finalised in November 2011.
6. Safe Work Australian Interpretative Guideline (2011). Interpretative Guideline — Model Work Health and Safety Act, The Meaning of “Person Conducting a Business or Undertaking”, Safe Work Australia, www.safeworkaustralia.gov.au last accessed 4 November 2011.
7. Safe Work Australian Interpretative Guideline (2011). Explanatory Memorandum — Model Work Health and Safety Bill, Safe Work Australia, www.safeworkaustralia.gov.au Last accessed 4 November 2011.