



# Towards a national OH&S system

By **Martin Dunne**, Special Counsel, Hunt & Hunt

- *National laws proposed to align occupational health and safety legislation throughout Australia*
- *Exposure draft bill to be released later this year, and all jurisdictions are to have implemented new legislation by the end of 2011*
- *Proposed national laws will modify existing provisions in NSW and may face union opposition*

There is widespread recognition of the necessity to nationally harmonise occupational health and safety (OH&S) laws.

However, the road towards their proposed December 2011 enactment involves compromise in the area of health and safety, where compromise is not normally accepted.

As with the introduction of a national industrial relations system, the Federal Government has no constitutional power in relation to occupational health and safety matters.

Unlike the WorkChoices industrial relations reforms, which were imposed without real consultation between federal, state and territory governments, these OH&S reforms have been pursued in a cooperative process through the Workplace Relations Ministers Councils (WRMC).

On 4 April 2008, Julia Gillard, the Minister for Employment and Workplace Relations, announced a national review into OH&S laws and appointed a three-person advisory panel to report in accordance with terms of reference on the structure and content of model OH&S legislation capable of being adopted in all jurisdictions.

In July 2008 the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health & Safety* (IGA) formalised all governments' commitment to the harmonisation of OH&S laws and provided the protocol and timetable.

On 31 October 2008 the advisory panel submitted its first report, *National Review into Model Occupational Health and Safety Laws*, providing recommendations involving duties of care and the nature and structure of offences including defences.

The second report, completed on 30 January 2009, deals with remaining matters including consultation and representation, enforcement and compliance, regulation making powers, administrative processes, permits, licensing arrangements, education, advice and assistance.

## Timetable

In a communiqué dated 3 April 2009, the WRMC reported that Ministers had agreed that the Safe Work Australia Council (the Council) would commence developing the model national OH&S Act. An exposure draft is expected in August 2009, with the expectation that all jurisdictions will implement the agreed model OH&S Act and regulations by December 2011.

Despite the climate of cooperation and agreement which is apparent within the WRMC, union concerns with the proposed model remain a significant potential obstacle, particularly as recent history in NSW demonstrates.

Constitutional corporation employers who have been granted federal workers compensation self-insurance licences are currently subject to federal OH&S laws in respect of their employees. However, these employers remain subject to state OH&S laws regarding their other duties as occupiers, manufacturers and suppliers, complicating their position.

NSW unions have indicated they are not convinced that federal OH&S laws provide adequate protection. A recent dispute required such employers and other parties to respond and

attend before the NSW Industrial Relations Commission to 'determine measures needed to mitigate and eliminate risk to the health and safety of employee at work' even though there was reason to believe that jurisdiction had been moved from the state arena.<sup>1</sup>

This example indicates that unions, at least in NSW, may not be prepared to meekly accept what appears a fait accompli regarding national OH&S harmonisation on the basis proposed by the advisory panel, particularly with the ALP holding government at the federal level and in the majority of states and territories.

### Primary duty of care

The advisory panel recommends that any business or undertaking (whether employer, self-employed, principal contractor or otherwise), continues to have a primary duty of care for the health and safety of workers (within an expanded definition) and others who may be put at risk.

This primary duty of care will cover new and evolving working arrangements extending beyond the traditional employer and employee relationship.

To allow broad coverage of the primary duty of care, the advisory panel recommends that the definition of worker should extend beyond the traditional employment relationship to include any person who works, in any capacity, in or as a part of business or undertaking.

The primary duty of care should apply to any work activity or work consequences, wherever they occur resulting from the conduct of the business or undertaking and not limited to the workplace.

### Reasonably practicable

The recommended definition of reasonably practicable (except for consultation) will qualify the primary duty of care and consider what was reasonably able to be done, at a particular time, to ensure health and safety, taking into account and weighing up all relevant matters, including:

- the likelihood of the hazard or risk eventuating
- the degree of harm that may result
- the duty holder's knowledge or what they ought reasonably to know in their position about, and ways of eliminating or reducing

the hazard, potential harm and risk

- the availability and suitability of ways to eliminate or reduce the hazard, harm or risk
- the costs associated with eliminating or reducing the hazard, harm or risk, including whether the cost is grossly disproportionate.

### Other duties of care

The following classes of duty holders will be qualified by a reasonably practicable concept:

- those with management or control of workplace areas
- designers, manufacturers and suppliers of plant, substances and structures
- builders, erectors and installers of structures
- OH&S service providers (including lawyers as well as consultants and training providers).

Workers and other persons at the workplace will have a duty to exercise 'reasonable care'.

Corporate officers will have a positive duty to apply due diligence to ensure compliance with the duties of care of the entity of which they are an officer.<sup>2</sup>

Specific duties of care will be placed on designers, manufacturers, importers, builders, erectors or installers in relation to any reasonable foreseeable activity undertaken for the purpose for which the plant structure or substance was intended to be used and will incorporate:

- hazard identification, risk assessment and risk control
- appropriate testing and identification to identify any hazards and risks
- information about hazards, risks and risk control measures is to be provided initially and ongoing as additional information becomes available.

### Proposed offence categories and penalties

There are three proposed categories of offences for each type of duty of care.

- Category 1 is proposed to apply to the most serious breaches, where there is a high level of risk of serious harm and a duty holder who was reckless or grossly negligent.
- Category 2 is proposed for circumstances where there is a high level of risk of serious harm but without recklessness or gross negligence.
- Category 3 is proposed for a breach of duty without aggravating factors.

The primary duty of care will cover new and evolving working arrangements extending beyond the traditional employer and employee relationship.

**Table 1: Proposed fines for breaches of model OH&S laws**

Category	Corporations	Individuals	Corporate officers	Workers
1	\$3,000,000	\$600,000	\$600,000	\$300,000
2	\$1,500,000	\$300,000	\$300,000	\$150,000
3	\$500,000	\$100,000	\$100,000	\$50,000

In addition to recommending imprisonment for up to five years in cases of high culpability involving recklessness or gross negligence where there was non-compliance with a duty of care resulting in serious harm (fatality or serious injury) fines are recommended as shown in Table 1.

The advisory panel believes that the maximum penalties should:

- relate to the seriousness of the breach in terms of risk and the offender's culpability
- strengthen the deterrent effect of the offences
- allow the courts to impose more meaningful penalties that are appropriate.

These recommended penalties represent a significant increase to those currently applicable.

**Other notable features of the review**

- Enforceable undertakings will be available as an alternative to prosecution.
- Unions will continue to have right of entry, with formal authorisation, to workplaces containing union members or persons eligible to be members.
- Appeals against a guilty finding will commence with an application for leave to the Supreme Court and ultimately to the High Court, with no appeal from acquittals.
- There will be no formal definition of control.
- The prosecution will bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.

**Potential opposition to reforms**

The advisory panel's recommendations, particularly regarding duty of care and qualifying concepts, conflict with OH&S law currently applicable in NSW.

New South Wales law imposes a primary duty

that 'must ensure the health, safety and welfare' and the two available defences have extremely limited application.<sup>3</sup>

Former NSW Chief Industrial Magistrate, George Miller, has observed that:

- the proposed definition of 'reasonably practicable' does not reflect (NSW) judicial interpretation
- the recommendations reverse the NSW requirement that the onus of proving reasonable practicability is borne by the defendant
- prosecutions for offences in Category 1 will be rare due to difficulties resulting from their indictable nature.<sup>4</sup>

The prosecution will bear the onus of proving beyond reasonable doubt all elements of an offence, including reasonable practicability, effectively reversing the NSW provisions.

Miller expresses a view that the recommended changes will weaken enforcement provisions currently applicable in New South Wales, which will not be offset by higher penalties.

However, the major opposition to the advisory panel's recommendations can be expected from unions in NSW, who have regarded previous attempts to pass similar amendments as diluting or reducing OH&S standards and who have mounted successful resistance to their implementation.

In 2006, the NSW Government released a draft bill proposing OH&S amendments including a 'reasonably practicable' qualification to the primary duty.

When Unions NSW responded with non-negotiable opposition, no action was taken to implement the proposals. Instead the amendments were referred to Paul Stein, a former

judge of the NSW Court of Appeal, for an independent review.

Although Stein's report was completed in April 2007, again no action was taken to implement his recommendations. In fact Stein's report, which supported the inclusion of a 'reasonably practicable' qualification, was only released after it was submitted to the Advisory Panel in 2008.

The NSW Government has therefore declined two opportunities in recent years to adopt similar recommendations to those made by the advisory

panel, following union opposition.

The advisory panel also recommends that only an official who is acting in the course of public office or duty may bring a prosecution for a breach of the OH&S law. The recommendation provides for a review by the Director of Public Prosecutions (DPP) for inaction or a decision not to prosecute and that the DPP can bring prosecutions for an indictable offence.

This recommendation will remove the right regularly exercised by NSW unions to prosecute for breaches of OH&S laws and recover not only their costs in bringing proceedings but also receive a moiety from any fine imposed.

It is reasonable to expect that union opposition will continue in response to the advisory panel's recommendations. It remains to be seen whether such opposition will carry weight with the federal Federal Government and the WRMC.

## The future

There will probably be considerable comment and opposition to the perceived weakening of existing laws and standards, predominantly in NSW, by the union movement and possibly members of the NSW Government.

However, the proposed national model OH&S legislation based on the recommendations made by the advisory panel will provide uniform requirements throughout Australia, with the resultant cost benefits to national business, together with a balanced approach to the issue of occupational health and safety.

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## Notes

- 1 Notification to Industrial Registrar of Industrial Dispute Pursuant to Section 130 — Transport Workers' Union of New South Wales and Linfox Armaguard, Chubb Security Service and Others; IRC Matter No 1180 of 2007
- 2 The topic of directors' and other officers' duties under the proposed regime will be covered in an article in a forthcoming edition of *Keeping good companies*
- 3 That compliance was not reasonably practicable or the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision: s 28 Occupational Health & Safety Act 2000 (NSW)
- 4 Occupational Health & Safety New South Wales Bulletin 28, March 2009, LexisNexis ●

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- 7 Kirkpatrick G, op cit, p 24
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- 12 Kirkpatrick G, op cit, p 23
- 13 Kirkpatrick G, op cit, p 19
- 14 Trowbridge J, 2009, *Executive Remuneration: The Regulatory Debate*, <<http://www.apra.gov.au/Speeches/upload/Executive-remuneration-in-the-financial-sector-Apr-09.pdf>> [13 May 2009]
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- 16 <<http://www.fsa.gov.uk/pubs/other/remuneration.pdf>> [13 May 2009]
- 17 Mayne S, 'Season of revolt', *Business Day*, 30 March 2009, <<http://www.businessday.com.au/business/season-of-revolt-20090330-9fwo.html?page=-1>> [18 May 2009]
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- 22 Financial Stability Forum, *Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience: Follow-up on Implementation*, 10 October 2008, <[http://www.fsforum.org/press/pr\\_081009f.pdf](http://www.fsforum.org/press/pr_081009f.pdf)> [13 May 2009]
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- 26 Wehinger G, op cit, p 31 ●