

Client Alert

Model OHS Act released for public comment

Safe Work Australia has publicly released the draft model Occupational Health and Safety (OHS) Act, along with a discussion paper, draft of the administrative regulations and a consultation regulation impact statement.

The exposure draft and supporting documentation were endorsed for release by the Workplace Relations Ministers' Council (WRMC) at its meeting on 25 September 2009. The public comment period for the exposure draft of the model Act and model regulations closes on Monday 9 November 2009, 5PM (EDST).

The purpose of this client alert is to provide an overview of the background to the changes and the main characteristics of the proposed Safe Work Act 2009 and outlines some of the implications for businesses.

Copies of the documents referred to in this alert can be accessed at www.safeworkaustralia.gov.au

Background to the changes

The harmonisation of Australia's OHS laws has been on the agenda of both state and federal governments for over two decades. A more detailed strategy for change was launched in 2002 by the then National Occupational Health and Safety Commission (NOHSC) in the form of a paper titled *The National Occupational Health and Safety Strategy: 2002-2012*, which established national targets and priorities. The development of a consistent regulatory framework was a key objective.

This need for change was also recognised in 2006 by the Council of Australian Governments (COAG). Of the 27 priority areas of regulation being assessed under the National Reform Agenda, OHS was identified as causing the most concern for businesses in Australia. Indeed, Safe Work Australia, which is charged with the responsibility of developing the model legislation, estimates the annual economic cost of occupational injury, illness and death to be \$57.6 billion. This represents 5.9% of gross domestic product.

According to the WRMC there are more than 400 pieces of OHS legislation in Australia. While the general laws within each jurisdiction are based on the same model, there are considerable differences in the definition and functions of key activities, namely:

- Duty of care
- Consultation arrangements
- Offences and penalties

The consequence of these discrepancies imposes a substantial cost on businesses, which has been well documented in the consultation regulation impact statement.

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Key aspects of the draft OHS Act

The model Act does not significantly depart from the structure and content of existing OHS Acts, which is why the term 'harmonisation' has been used rather than 'development' or 'replacement'.

The key characteristics of the proposed model have been summarised below, with the main emphasis being placed on the revision of the duty of care requirements. The standard definition of duty of care, which is included in legislation in most states, will be expanded to allow a person to have multiple duty of care obligations, and for a specific duty of care to be applicable to more than one individual.

Depending on a business's state(s) of operation, some or all of the changes may have implications.

1. Proposed changes to the scope of 'Duty of Care'

- Definition of a workplace to be expanded to include ships, boats, aircraft, any installation on land, on the bed of any waters or floating on any waters (any 'business or undertaking')
- Employer/employee relationship to be amended to promote greater interconnectivity and interdependent duty of care
- Definition of a worker to include persons who work in any capacity, in or as part of the business or undertaking - employees, sub-contractors, employees of sub-contractors, labour hire employees, apprentices, work experience students and volunteers
- Duty of care to be placed on an officer of a body corporate to exercise due diligence to ensure the body complies
- Wholly volunteer associations to be excluded (individual volunteers are still protected as workers where it applies to a business or undertaking)
- Exclusions to apply to persons who engage workers solely for their own private or domestic purposes
- Principle of risk management to be included within the Act
- Burden of proof for OHS offences to rest with the prosecutor
- Removal of Crown immunity from prosecution

2. Proposed changes to consultation arrangements

- The obligation will be imposed on the person (which includes a body corporate) conducting the business or undertaking
- The duty will extend beyond the duty of employers to consult with employees i.e. consultation will apply to the expanded definition of a worker
- Removal of timeframes for response to requests for nominations and elections of Health and Safety Representatives (HSRs)
- Work groups will be established prior to nominations and elections of HSRs
- HSRs will be empowered to issue Provisional Improvement Notices (PINs)
- The HSR will be given the ability to direct that unsafe work cease
- Workers will have the right to cease unsafe work

- Unions will have right of entry into workplaces for the purpose of inquiring into suspected contravention and in the resolution of issues
- There will be no specific requirement to employ an OHS person, although it is implied that OHS advice would be sought as part of the general duty of care

3. Offences and penalties

The table below outlines the proposed penalties for breaches of duty of care and other offences:

	Nature of offences	Maximum penalty – Corporation	Maximum penalty – Individual
Category 1	The most serious offences – causing death, or serious injury or high risk of death or serious injury involving recklessness	\$3 million	\$600,000 and/or 5 yrs imprisonment for officers \$300,00 and/or 5 yrs imprisonment for workers or other persons
Category 2	Offences involving a high risk of death or serious injury without recklessness	\$1.5 million	\$300,00 for officers \$150,000 for workers or other persons
Category 3	Less serious offences placing persons at risk of injury or illness, including discrimination, victimisation and coercion	\$500,000	\$100,00 for officers \$50,000 for workers or other persons
Category 4	Offences related to non-compliance with notices, PINs remedial and enforceable undertakings	\$250,000	\$50,000 and/or 2 yrs imprisonment
Category 5	Offences related to specific unsafe work, unauthorised persons and absence of consultation arrangements	\$100,000	\$20,000 for workers or other persons
Category 6	Offences relating to contravention of established notification and consultation arrangements	\$50,000	\$10,000 for workers or other persons
Category 7	Offences related to provision and/or display of required information	\$25,000	\$5,000 for workers or other persons

Additionally, the penalty regime under the Act will encompass the following:

- All contraventions of the Act will be treated as criminal offences
- Provision will exist for applying enforceable OHS undertakings, adverse publicity orders, community service orders, training orders and compensation orders in place of and in conjunction with fines and penalties
- Preservation of legal professional privilege
- Clearer definitions for duty-holders around the availability of and capacity to implement controls

The functions and powers of inspectors remain largely consistent with the existing arrangements within the jurisdictions. A person may be appointed as an inspector if they are a public servant, a statutory office holder or an OHS inspector in a jurisdiction.

Time line

The proposed OHS model, including any amendments, will be presented in a final version to WRMC for agreement in December 2009. Further model regulations and codes of practice, to replace the 400 existing pieces of legislation, are scheduled to be developed by September 2010.

It is expected that the model OHS Act will be adopted into legislation by all states, territories and the Commonwealth, and ready for implementation, by 1 January 2012.

Implications for businesses

The implication of the model OHS Act, if agreed upon by the WRMC and adopted by states and territories, may vary between businesses and will require a thorough review to assess the impact it will have on individual businesses.

However, in a broad assessment, Marsh anticipates that there may be some initial short-term costs to businesses, associated with reviewing and aligning existing systems and training with the model Act. The extent of the additional cost to business in the short term will need to be weighted against the impact of:

- Any improvements in incidence and absence rates both at the micro and macro level
- The alignment of systems, such as sub-contractors complying with internal requirements of those persons conducting a business or undertaking
- Easing compliance burdens for those organisations thinking of expanding their operations into different jurisdictions
- Any reductions in ongoing costs for system reviews and associated training when each jurisdiction reviews and/or changes their legislation
- Increased attention and diligence placed on OHS by virtue of tougher fines and penalties coupled with specific requirements for officers of a body corporate.

Please contact your Marsh advisor if you have any further questions about the model OHS Act exposure draft.

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