

## Employment & Safety Alert

### Delay in harmonisation of work health and safety laws

December 2011

Despite an agreement between state, territory and Commonwealth governments, Australia has yet to achieve the promised harmonisation of work health and safety laws.

Whilst the new work health and safety laws (**WHS laws**) will commence operation in Queensland, New South Wales, the Australian Capital Territory and the Northern Territory in January 2012, the implementation of these laws in Victoria, Western Australia and Tasmania has been delayed for at least 12 months.

In South Australia, the *Work Health and Safety Bill 2011* (SA) will be the subject of further debate when the South Australian Parliament resumes in February next year. Safe Work SA's acting executive director has expressed

confidence that the Parliament will pass the Bill when it resumes debate in February 2011. With a purported \$33 million incentive fee riding on the implementation of the new model WHS laws, the South Australian Government will be pushing independent members of the State's upper house to support the Bill.

The table below provides a snapshot of the current state of the harmonisation project.

#### Queensland, New South Wales, ACT and NT – recommended actions

Businesses should review their safety systems to ensure compliance with the new WHS laws. This should include:

- developing a WHS Corporate Governance Statement for the board and senior management to ensure compliance with their due diligence duty. This should include obtaining training / advice on the practical impact the new laws will have on daily business operations.

State / Territory	Current status of legislation
Australian Capital Territory	The WHS laws will commence on 1 January 2012.
New South Wales	The WHS laws will commence on 1 January 2012.
Northern Territory	The WHS laws will commence on a date to be proclaimed in January 2012.
Queensland	The WHS laws will commence on 1 January 2012.
South Australia	The WHS Bill has passed the House of Assembly, but remains with Legislative Council. The date on which the WHS laws will commence is currently unknown.
Tasmania	Bill introduced to Parliament in October 2011, however, the Parliament has voted to delay its commencement by 12 months. The Bill will be sent back to the Lower House for further debate in March 2012.
Victoria	No legislation has been introduced, however the government has indicated that it intends delaying the commencement of the WHS laws until January 2013.
Western Australia	No legislation has been introduced. The WHS laws will not commence on 1 January 2012. The government has not indicated when the WHS laws will be implemented.
Commonwealth Public Entities & Non-Commonwealth Licensees	The WHS laws will commence on 1 January 2012.

- a 'gap' analysis - the new primary duty of care is broader in scope and covers all 'workers', including contractors, subcontractors and agents. Businesses must determine the extent of their duties and ensure changes are made to safety management systems to cover the broader duties.
- reviewing contracts - duty holder consultation arrangements and enabling provisions should be included in all new contracts (and, where possible, variations should be made to existing ones) to ensure businesses properly discharge their duties. This is critical for long-term contracts entered into over the next few months that are likely to remain in place long after the commencement of the legislation.
- implementing coordinated planning to ensure compliance with the new duty to consult other duty holders.
- developing consultation processes to cover workers, including contractors and subcontractors.
- developing dispute resolution processes to minimise the need for regulatory involvement in your workplace
- developing processes for dealing with union right of entry and regulatory rights and obligations to ensure compliance with the new obligations.
- reviewing the new Regulations and Codes of Practice to see how they might impact on your business.

## **South Australia, Tasmania, Victoria and Western Australia – recommended actions**

The delay provides business with further time to consider the changes that will take place under new WHS laws and take action to ensure compliance in areas such as corporate governance, the broader primary duty of care and the greater level of consultation needed with other duty holders (contractors and workers).

Pre-emptive action can, and should, be taken by business to ensure operations are ready and compliant when the remaining laws commence.

## Transitional issues

For those jurisdictions in which the new WHS laws will commence, Safe Work Australia has published Transitional Principles. The Principles will guide each jurisdiction in the development of necessary transitional provisions to cover changes from existing safety laws to the new WHS laws. The Principles are intended to ensure that (so far as possible) all jurisdictions adopt harmonised transitional arrangements.

## **Principal Contractors**

There is no Principal Contractor obligation in the WHS laws or any provision that provides for the appointment of a Principal Contractor. Instead, Principal Contractor obligations and duties are located in the new model WHS regulations. Existing Principal Contractor appointments will only continue if they meet the criteria for appointment in the new model WHS regulations.

## **Mutual recognition: HSRs, HSCs, WHS entry permit holders**

Comparable appointments and elected positions will continue following the commencement of the WHS laws. This includes the election and appointment of persons such as Health and Safety Representatives (**HSRs**) (including deputies), and Health and Safety Committee members.

The principle of mutual recognition will also apply to the regulator in relation to the election and appointment of inspectors, and also to WHS entry permit holders.

If an election or appointment process is not completed at the time of commencement, the process may continue under the pre-harmonisation legislation, but must be completed within 3 months.

Exceptions to these rules will arise if:

1. training requirements differ substantially to the existing requirements. This may affect the powers of HSRs until further training is completed. This issue will be determined by each individual jurisdiction.
2. there is no comparable position under the model WHS laws. In this case, the particular pre-harmonisation appointment will lapse on commencement of the new WHS laws.
3. there is disqualification under pre-harmonisation laws. In this case, disqualification from the comparable position under the model WHS laws will be held to have taken place.

## **Mutual recognition: Work groups**

Work groups will be given mutual recognition. An existing work group that does not comply with the requirements of the model WHS laws will be allowed to continue for up to one year after commencement of the model WHS laws.

## **Authorisations and licences**

Authorisations, licenses, and registrations issued under pre-harmonisation laws will also receive mutual recognition until the term of the authorisation expires.

## Powers of inspectors

The model WHS transitional regime will permit inspectors to exercise powers under the new WHS Act from commencement (including in relation to matters which occurred before the commencement of that Act).

The model WHS regime will recognise policies and procedures agreed under pre-harmonisation legislation where those policies and procedures comply with the requirements of the WHS laws. If existing policies and procedures do not comply with the requirements of the WHS laws, the transitional laws will allow the continuation of those agreed policies and procedures for up to one year.

## Penalties and enforcement

Pre-harmonisation laws will still apply to any conduct that occurred before the commencement of the new laws. In other words, contraventions of pre-harmonisation laws will be prosecuted under the pre-harmonisation laws, even if proceedings are not issued until after the model laws commence.

Similarly, any improvement or prohibition notice issued under the pre-harmonisation laws will continue to operate until its nominated expiry or until the notice is addressed. However, each jurisdiction will determine what approach will be taken to enforceable undertakings already in place at the time the model laws commence.

## Codes of practice

Pre-harmonisation Codes of Practice may continue to be used where a replacement Code of Practice has not been issued at the time the WHS laws commence. This includes the use of Codes of Practice within legal proceedings.

## Conclusion

Businesses should be reviewing the application of the WHS laws and regulations to their operations. In particular, company officers with due diligence obligations should be implementing corporate governance arrangements and, more generally, companies should be reviewing WHS management systems to ensure compliance.

Please contact our Employment and Safety Team if you would like assistance.

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