

Employment & Safety Alert

Amendments to the SA Work Health and Safety Bill – “Control is the key”

June 2012

Speculation about the death of the *Work Health and Safety Bill 2011 (SA)* (**Bill**) appears premature.

Recent media reports suggest the South Australian Government is taking a pragmatic approach to its negotiations with the business community in the hope that it can secure the Bill's passage through the Legislative Council.

Proposed amendments to the Bill address concerns raised by various business groups about the issue of 'control' and the primary duty to ensure health and safety. It is also proposed that the Bill be amended to remove the provision abrogating the privilege against self-incrimination (section 172 of the Bill).

Under the Bill (based on the harmonised model Work Health and Safety laws), the existence of the **primary duty** to ensure health and safety does not turn on the question of who 'controls' the work. However, it is generally understood that in discharging the primary duty (to ensure the health and safety of workers so far as is reasonably practicable) the person's capacity to control and influence the work is highly relevant. For example, in the absence of a person having any capacity to control or influence the work, there may be very little that can practically be done by the person to ensure health and safety. Consequently, very little need be done by the person in order to discharge the primary duty.

Having said that, the person, as a primary duty holder, even without direct control must still do all that is reasonably practicable to ensure health and safety. **For example**, in a labour hire situation, a host employer will have a primary duty to ensure the health and safety of its labour hire

employees. The employer whilst not having direct control over its employees or the work still has a primary duty to ensure the health and safety of its employees so far as is reasonably practicable. This may require the employer to undertake its own assessment of the host employer's workplace or demand that the host employer provide information that can satisfy the employer that its employees are working in a safe environment under a robust safety management system. This is a requirement under the current safety laws and nothing changes under the laws proposed in the Bill.

Contrary to concerns expressed in some sections of business, the proposed Bill is not a radical departure from the current safety law in South Australia. The main criticism of the Bill is that it does not expressly state that a person's ability to discharge the primary duty depends on the extent of its capacity to control or influence the worker and/or the work being undertaken. The proposed amendments are an attempt to make clear that the primary duty need only be discharged to the extent of the person's capacity to control and influence the work. In some respects this is just stating the obvious.

Business owners and other entities conducting a business or undertaking should prepare for the implementation of the Work Health and Safety laws by conducting a review of their safety management and governance arrangements to ensure compliance with the new laws.

Thomsons Lawyers will be conducting a series of workshops on the new laws including:

1. Due diligence and safety governance under the *Work Health and Safety Act (SA)*;
2. Contractor management and the issue of "control" under the *Work Health and Safety Act (SA)*;

3. High Risk Construction Work and the new Work Health and Safety Regulations; and
4. Work Health and Safety Act for landlords, agents and tenants.

Written by:

Karl Luke

Partner

+61 8 8236 1280

kluke@thomsonslawyers.com.au

For further information, please contact:

Jacquie Seemann

Partner

+61 2 9020 5757

jseemann@thomsonslawyers.com.au

Mark Branagan

Partner

+61 3 8080 3638

mbranagan@thomsonslawyers.com.au

Paul Ronfeldt

Partner

+61 3 8080 3533

pronfeldt@thomsonslawyers.com.au

Karl Luke

Partner

+61 8 8236 1280

kluke@thomsonslawyers.com.au

www.thomsonslawyers.com.au

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