

Employment and Safety Alert

Work Health & Safety Bill in doubt - South Australian update

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The continued harmonisation of occupational health and safety laws hangs in the balance in the Legislative Council of South Australia's Parliament.

Despite a significant and robust consultation process by Safe Work Australia and other state based safety regulators, and the implementation of a special interest group to help coordinate the harmonisation process between the States, the South Australian Government still faces a possible rejection of its *Work Health and Safety Bill* in the upper house.

In opposing the SA Bill, spokesman for Workplace Relations, Rob Lucas MLC, in his second reading speech, asserts that the Labour government has not stated a clear enough case for change so as to warrant the introduction of the harmonised safety laws.

In his second reading speech, Mr Lucas suggested that the new laws would lead to an increase in compliance costs for the housing and construction industry, giving the example of the use of scaffolding, under the proposed Work Health and Safety Regulations. Mr Lucas also suggested that the primary duty of care under the Bill would involve greater obligations on SA business than is currently the case under the current *Occupational Health Safety and Welfare Act 1986 (SA)* (**OHS&W Act**).

Mr Lucas also told Parliament that failure to include the concept of 'control' in the primary duty of care meant that businesses could owe a duty of care over workers with whom they did not directly engage, and over whose work activities they have no actual control.

In considering Mr Lucas' remarks, it is noteworthy that the OHS&W Act already places significant obligations on employers to ensure the safety of contractors and contractor's employees to the extent that an employer has control over the work being performed. Nevertheless, Mr Lucas makes the assertion that if passed, the Bill will substantially increase the scope of duties and obligations on employers in South Australia.

It is worth noting that under the proposed Bill the issue of control is not directly relevant to whether or not the person conducting the business or undertaking (**PCBU**) acquires a primary duty of care. Instead, the existence of the primary duty depends upon whether workers are engaged or caused to be engaged or alternatively whether workers can be influenced or directed by the PCBU. Importantly, the proposed Bill provides a qualification that once the PCBU has acquired the primary duty, it must do all that is "reasonably practicable" to discharge the duty. Here, a consideration of the nature and extent of actual control over the work becomes relevant to the actions needed to comply with the primary duty.

Other areas in which Legislative Councillors expressed concern include union rights of entry and the extent to which volunteer associations may be caught by the Bill. Currently, duties and obligations under the OHS&W Act are confined to employers or deemed employers, whereas under the Bill, volunteers who are not employed and who do not employ workers may acquire a duty of care.

The Liberal party whilst opposing the Bill's passage, has also proposed a raft of amendments to ensure that the duty of care for volunteer associations is confined only to

those workers that are engaged as employees by the association.

The immediate fate of the Bill will be known over the next few sitting days and further updates will be provided. The new Work Health and Safety Laws are now operative in Queensland, New South Wales, ACT, Northern Territory and in respect of the Commonwealth. Key changes under the new WHS laws include a broadening of the scope of the primary duty of care, obligations to consult with duty holders, due diligence for company officers and significant increases in penalties.

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