

### **NATIONAL MODEL OHS LAWS—WHAT IS PROPOSED?**

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### **IN BRIEF**

The recommendations of the National Review into Model OHS Laws, if adopted, will substantially rewrite OHS legislation in Australia and synthesise existing State and Territory regimes into a more cohesive uniform system.

A first report on the National Review into Model OHS Laws has been released with 75 recommendations on reframing duties of care, the nature and structure of offences, personal liability and penalties. If adopted, the recommendations will substantially rewrite OHS legislation in Australia and synthesise existing State and Territory regimes into a more cohesive uniform system. We will provide updates to our clients as developments occur.

### **TWO STAGE REPORTING**

An advisory panel was appointed by the Australian Government to review current OHS legislation across Australia and recommend to the Workplace Relations Ministers' Council (WRMC) the optimal structure and content of a model OHS Act. The advisory panel's first report was delivered to the WRMC on 31 October 2008. A second report containing further recommendations on other aspects is due by 30 January 2009. We summarise below the key recommendations of the first report.

### **DUTIES OF CARE—KEY PROPOSALS**

#### **Guiding principles**

The report recommends that guiding principles should be included to assist duty holders, regulators and the courts interpret and apply the duties of care. The duties should focus on the obligation to eliminate or reduce hazards or risk so far as is reasonably practicable, and should be cast broadly to ensure that the model Act remains

relevant to protecting health and safety in light of changing modes of work and emerging workplace risks.

Duties should be non-delegable, and more than one person may concurrently have the same duty. The model Act should emphasise the importance of duty holders consulting, cooperating and coordinating activities to ensure safety at a common workplace.

#### **Primary duty of care**

The primary duty of care should be imposed on the person conducting a business or undertaking, whether as an employer, self-employed person, principal contractor or otherwise. This primary duty should apply to all persons conducting a business or undertaking, even where doing so in conjunction with or as part of another business or undertaking. It should be owed to 'workers' and others who may be exposed to risk to their health or safety by the conduct of the business or undertaking.

The duty should not be limited to a workplace but be focused on protection of all persons involved in, or affected by, the work activity. This proposal seeks to address changes in the modern labour market and move away from emphasis on the employment relationship. As a result, the report recommends that the concept of a 'worker' should be defined so that it extends beyond the employment relationship to include a person who works in any capacity in or as part of a business or undertaking.

#### **Other duties**

The concept of having 'management and control', which has created confusion in existing legislation, should only be used in the model Act in relation to a single duty in respect of a workplace area, fixtures, fittings or plant, and the term should be defined.

The model Act should retain duties of care for designers, manufacturers, builders, erectors, installers, importers and suppliers. Financiers who play no active role in supply will be excluded.

Providers of OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act should also have a statutory duty of care to ensure so far as is reasonably practicable that no person at work is exposed to a risk to their health or safety from the provision of their services.

### **Duties of officers, workers and others**

The panel proposes that a positive duty should be placed on an officer of a corporation to exercise due diligence to ensure compliance by the corporation with its duties. Officers of unincorporated entities will have similar duties. The concept of due diligence will require the officer to take proactive steps.

The definition of 'officer' will be contained in the panel's second report. However this first report notes that the duty should be focused on persons in a position to direct or influence the key decisions of the organisation relating to compliance with relevant OHS duties of care.

It is proposed that all persons who carry out work activities in a business or undertaking should have a duty to themselves and other persons whose health and safety may be affected by the workers' conduct at work. To comply with the duty, the worker will have to take 'reasonable care'. A similar duty is proposed for other persons present at a workplace.

### **OH&S OFFENCES**

The panel recommends that breaches of OHS laws should remain criminal offences and that the prosecution should bear the criminal standard of proof for all elements of the alleged offence.

Offences for a breach of a duty of care should be absolute liability offences subject to the qualifiers of reasonable practicability, due diligence (officers) or reasonable care (workers and other persons) as specified above.

The panel proposes three categories of offence set out below. For breach of the primary duty or a specific duty, the proposed categories are:

- Category 1—involving a high level of risk of serious harm or a fatality and the duty holder was reckless or grossly negligent. This attracts a maximum fine of \$3 million for a corporation and \$600,000 for an individual.
- Category 2—involving a high level of risk of serious harm but without recklessness or gross negligence. This attracts a maximum fine of \$1.5 million for a corporation and \$300,000 for an individual.
- Category 3—involving breach of a duty without the aggravating factors present in the first two categories. This attracts a maximum fine of \$500,000 for a corporation and \$100,000 for an individual.

In the case of a category 1 offence (involving recklessness or gross negligence) by an individual, it is proposed that the highest penalties and imprisonment for up to 5 years should apply. Lower penalties are proposed in each category for breach of a duty of care by a worker or other person. Prosecutions for category 1 offences should be brought on indictment (trial by judge and jury) and other offences dealt with summarily. Where the court

considers it appropriate and the defendant agrees, there should be provision for an indictable offence to be dealt with summarily.

The model Act should not provide for a further penalty for a repeat offender. The full range of sentencing options in addition to fines and custodial sentences should be available.

### **SUMMARY OF KEY RECOMMENDATIONS**

- Introduction of a duty of care for persons conducting a business or undertaking to ensure the health and safety of 'workers' and others affected. This is a move away from a focus on the traditional employment relationship in defining the primary duty of care.
- The term 'reasonably practicable' should qualify most duties of care, and be defined.
- Introduction of a positive duty on 'officers' of entities to exercise due diligence to ensure the entity complies with its duties.
- Increased penalties for breach of duties of care based on three distinct categories of offence.
- Introduction of a standard limitation period of two years on the commencement of prosecutions.
- A prohibition on delegating duties of care. Concurrent duty holders will be required to cooperate and coordinate to ensure that where arrangements are made for another person to undertake activities, the duty holder must still ensure that the required standards are met and maintained.

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