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## Cutting back the red tape: National OHS Reform

Disparate state and territory regimes regulating Occupational Health and Safety (OHS) cause a high level of complexity in work safety compliance for multi-jurisdictional businesses. Australia's nine separate OHS jurisdictions consist of approximately 60 legislative instruments, more than 80 pieces of related regulation and more than 260 approved codes of practice, making any prospect of national reform an immense policy task.<sup>1</sup> The proposed harmonisation of OHS laws across Australia represents a significant step towards achieving greater consistency, increased efficiency and higher standards of safety. These reforms, while not without their substantive and jurisdictional limitations, will bring considerable advantages to employers in the form of reduced compliance costs and procedural advantages which recast duty of care provisions and remove the right of unions to prosecute for safety breaches.

<sup>1</sup> Australian Chamber of Commerce and Industry (ACCI), *OHS Harmonisation - ACCI's Perspective*, 5 August 2009, Online, Available: <[http://www.acci.asn.au/text\\_files/speeches\\_transcripts/2009\\_OptionPiece/ACCISHarmonisation-ACCIPerspective.pdf](http://www.acci.asn.au/text_files/speeches_transcripts/2009_OptionPiece/ACCISHarmonisation-ACCIPerspective.pdf)>

## Key developments: model OHS Act released

A draft model *OHS Act* and supporting regulations have been developed by Safe Work Australia to harmonise OHS legislation and reduce the incidence of workplace death, injury and disease. An exposure draft of the model *OHS Act*, along with draft regulations, a discussion paper and a regulatory impact statement were released on 28 September 2009. It is anticipated that all jurisdictions will implement any agreed model *OHS Act* and regulations by December 2011.

### Key developments

- Introduction of positive duty on directors/officers to exercise due diligence to ensure compliance with health and safety matters by their company, partnership or association.
- A reversal of the onus of proof, which shifts the burden back to the prosecution to prove that an employer has not provided a safe working environment. This constitutes a significant departure from the current NSW position.
- Expansion of the definition of "officer" and "workplace" and insertion of an Objects clause, expanding the scope and operation of the Act.

## Cutting back the red tape: National OHS Reform (continued)

- Enhanced duty of care requiring that all persons who conduct a "business or undertaking" take reasonably practicable steps to ensure the health and safety of persons performing work for them. This expanded duty has the capacity to apply to principal contractors, subcontractors, superintendents, project managers, or even principals or developers of a project as "conducting a business or undertaking" in construction or commercial development. It may also have the potential to capture project finance lenders or complex corporate structures such as holding or management companies who conduct relevant business or undertakings and occupy certain duties for the purposes of the legislation. This new approach will no longer rely on employment as the determinant of whether a duty of care is owed and other obligations are attracted.
- Unions will enjoy more expansive rights of entry to investigate suspected OHS breaches, but will no longer have the right to commence and conduct prosecutions for safety breaches.
- Increases in maximum penalties and reforms to categorisation of offences. The highest category attracts a maximum penalty of \$3 million for a corporation and \$600,000 and/or up to five years imprisonment for an individual.
- Privilege against self-incrimination has been removed for people who might be prosecuted under the proposed model *OHS Act*.

## Rationale behind reform

- The rationale underlying these reforms is to harmonise OHS legislation across Australia by cutting red tape, boosting efficiency and providing greater certainty and occupational health protections for all workplace participants. It has the potential of reducing the significant compliance costs faced by employers who operate in multiple jurisdictions.

## How will this affect employers?

- National OHS laws will ensure that businesses can comply with one set of consistent laws irrespective of the state or territory in which they operate. It will reduce the costs of compliance, allowing multi-state businesses to focus on developing and implementing effective company wide injury prevention strategies.
- The new laws will provide an enhanced duty of care where all persons involved in, or materially affected by, the performance of work, owe a duty of care to all workers and other persons. This represents a shift away from the traditional adversarial focus on the employment relationship by expanding the duty and requiring all persons who operate businesses to do everything that is 'reasonably practicable' to ensure a safe workplace.
- A broader definition of 'worker' is introduced and the primary duty is not limited to the workplace, but applies to all work activities wherever they may occur.

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### *Cutting back the red tape: National OHS Reform (continued)*

- Importantly, domestic premises will be included in the definition of a 'workplace', which means that 'workers' who worked in private homes will be afforded OHS protections under the proposed laws. Further, inspectors will also have right of entry to domestic premises for OHS purposes.
- Clause 15 of the model *OHS Act* provides that more than one person can be a person conducting a business or undertaking at any given workplace. Each person must discharge their duty to the extent of their capacity to influence or control or consult, cooperate and coordinate their activities with those other persons.
- That general duty will include but is not limited to the following:
  - providing and maintaining a safe and healthy work environment;
  - providing and maintaining safe plant and structures;
  - providing and maintaining safe systems of work;
  - ensuring safe use, handling, storage and transport of plant, structures and substances;
  - providing adequate facilities for the welfare of workers carrying out work for the business or undertaking;
  - providing any information, training, instruction or supervision that is necessary;
  - ensuring the health of workers and conditions at the workplace are monitored for the purpose of preventing illness or injury of workers.
- Under clause 18 of the model *OHS Act*, a person conducting a business or undertaking will be required to ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by the person and workers whose activities are influenced or directed by the person. Further, the person will also have a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

### **Directors/Officers of a Company**

- A positive duty will be placed on officers of corporations to exercise due diligence to ensure compliance with the model *OHS Act*. It is important to note however that the Council held there was no need to define 'due diligence' in the model *OHS Act* because interpretation of that term should be a matter for the courts. Arguably, this represents a missed opportunity to provide officers with guidance about the actual requirements of their duty.
- Under the model *OHS Act*, 'officers' (defined broadly under the *Corporations Act 2001*) are required to take reasonable steps to proactively and regularly ensure that:
  - they have up to date knowledge of OHS laws and compliance requirements;

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## Cutting back the red tape: National OHS Reform (continued)

- they have an understanding of the nature of the operations of the company and the hazards and risks associated with those operations;
  - the company utilises and has available appropriate resources and processes to enable the identification and elimination or control of specific OHS hazards and risks associated with the operations of the entity, and verification of the implementation of those matters;
  - a process of receiving, considering and ensuring a timely response to information regarding incidents, identified hazards and risks.
- Company officers found guilty will face increased penalties, with fines of up to \$600,000 and a maximum of five years in prison.

### Rights of workers

- Every worker will have the right to elect health and safety representatives (HSRs) to represent them in health and safety matters. All trained HSRs in Australia will have the power to issue Provisional Improvement Notices (PINS) and direct others to cease unsafe work.

### Unions

- The model *OHS Act* gives authorised representatives broad rights of entry to investigate suspected contraventions of OHS laws, including a right to enter and consult with, or to advise workers regarding safety matters. These rights do not require actual breach, but are

enlivened by a reasonably held suspicion of breach of an OHS law. These rights of entry include a right of entry immediately for investigating suspected breach.

- Under the reforms, unions are not permitted to prosecute breaches of the OHS legislation. Instead, only the Crown may prosecute, a significant departure from the current NSW position. Under the model *OHS Act*, employers will not have to prove they have provided safe working conditions, as the legal onus shifts to the prosecution to prove the elements of any criminal offence beyond reasonable doubt.

### Drafting shortcomings

- The model *OHS Act* contains a number of jurisdictional qualifications which may jeopardise the achievement of harmonisation. These qualifications provide guidance to individual jurisdictions in drafting their own provisions on a particular subject, meaning that the provisions will not be identical between jurisdictions. For example, there are jurisdictional notes for issues relating to extra-territorial application of the legislation, definitions of dangerous goods, provisions which adjust the description of penalties or maximum penalties, terminology for the use of 'regulator' or 'authorising authority', and the power to make guidelines.

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## *Cutting back the red tape: National OHS Reform (continued)*

- Jurisdictional notes regarding penalty leave quantum of penalty uncertain, with a note allowing each jurisdiction to 'adjust the penalty provisions to fit the manner of creating offences in its jurisdiction. While the intention is clear, this may nevertheless create disparity among jurisdictions who may impose different penalties in relation to offences, thereby jeopardising harmonisation.
- Arguments explaining why some jurisdictions are perceived tougher than others has nothing to do with the law and everything to do with the discretion to prosecute – something that this model of harmonisation will not fix.

### **Political obstacles to national harmonisation**

- Significant opposition to reform has been expressed by Western Australian Liberal Treasurer Troy Buswell, who has expressly reserved Western Australia's right to opt-out of national reform. His primary concerns are twofold:
  - The 2/3 majority power given to COAG's<sup>2</sup> Workplace Relations Ministers Council, which would effectively result in potential out-voting by Labor states on pro-union moves.
  - The increased power of unions to enter workplaces on safety grounds, and concerns over allowing industrial relations tribunals to conciliate on health and safety disputes.
- From a pragmatic perspective, the potential for 'backsliding'<sup>3</sup> by states on reform is reflected in the reality that Canberra, South

Australia, Victoria, Tasmania and New South Wales State Governments face election within the next 20 months, which makes comprehensive reform a contested political issue.

### **How should you prepare for these future changes?**

The proposed national harmonisation of OHS laws represent a significant shift in policy direction reflected in a commitment by Australian states and territories to develop a uniform, national occupational health and safety regime. In order to reduce compliance costs and unnecessary delay if the model Act is introduced, employers should take proactive steps to:

- Become familiar with the impact of the enhanced duty of care and how right of entry provisions and consultation may affect your business.
- Review your corporate governance arrangements and consider the personal responsibility of officers and directors to perform due diligence under a positive duty of care. Consider also the primary duty of care for a person conducting a business or undertaking to take 'reasonably practicable' steps to comply occupational health and safety requirements.
- Seek advice on how you can develop policies to provide for effective and efficient compliance, including procedures for incident response.

2 Coalition of Australian Governments (COAG).

3 Katie Lahey, Chief Executive, Business Council of Australia

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## Case Note:

### Leighton Contractors Pty Ltd v Brian Allan Fox & Ors; Calliden Insurance Ltd v Brian Allan Fox & Ors (2009) HCA 35

A principal contractor does not owe a duty of care to provide training in safe work methods to independent subcontractors who are injured whilst undertaking activities within their area of expertise.

#### Practical significance

This High Court decision is of considerable practical significance. It affects the respective roles and responsibilities of construction industry participants while on site, and provides further clarification for construction and engineering underwriters in assessing the risks of their potential insureds. Principal contractors and their contractors may take comfort from the fact that they are not under any obligation to provide training in safe work methods to independent subcontractors who are injured whilst undertaking specialised tasks on site within their area of expertise. This case recognises the commercial realities of major sites and reinforces the need for independent subcontractors to bear their own responsibility for meeting OH&S obligations under the *Occupational Health and Safety Act 2000 (NSW)*.

#### Facts

- Leighton Contractors Pty Ltd ('Leighton') was the principal contractor carrying out works during the refurbishment of the Hilton Hotel in Sydney. Leighton had contracted with Downview Pty Ltd ('Downview') to carry out concreting and formwork. Unknown to Leighton, Downview then subcontracted the concrete pumping to Mr Still and Mr Cook (the 'subcontractor'), who in turn supplied the pipes and equipment for the work as well as engaging Mr Fox and Mr Stewart as independent contractors, to assist during a concrete pour in March 2003. Following the concrete pour, the concrete delivery pipes were to be cleaned, which involved blowing an object through the pipes with compressed air. As a result of the negligent manner in which this was done<sup>4</sup>, Mr Fox suffered severe injuries when the end pipe swung around and struck him on the head.
- The contract between Leighton and Downview mandated induction training for all persons to be engaged in work at the site, which was to be provided by Leighton. The contract also provided that Downview had to provide Leighton with the details of any secondary subcontractors, and that the provision by Leighton of induction training did not relieve Downview of its obligation to properly induct workers in relation to 'particular procedures and requirements relevant to that work'. Leighton

<sup>4</sup> Arising from inappropriate use of a dacron bag and failure to properly secure the end of the pipe to a waste bin in accordance with the relevant industry code of practice.

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*Case Note: Leighton Contractors Pty Ltd v Brian Allan Fox & Ors; Calliden Insurance Ltd v Brian Allan Fox & Ors (2009) HCA 35 (continued)*

and Downview however did not provide any activity-based safety training on concrete pumping procedures, as they relied on the subcontractor to provide this.

- At first instance, the primary judge found that Mr Fox's injury was caused by the negligent conduct of the subcontractor, who failed to follow the safe working procedures set out in the relevant industry code, and awarded damages of \$472,561.95. However, the judge dismissed Mr Fox's claims against Leighton and Downview on the basis that there was no breach of duty by either of them.
- Mr Fox successfully appealed to the NSW Court of Appeal in relation to his claim against Leighton and Downview. The Court of Appeal found that Leighton as principal contractor had breached its common law duty 'to provide training in matters of safety to subcontractors' and to take 'reasonable steps to ensure that [Mr Fox] had completed OHS induction training'. Although this was a civil claim in negligence, the Court of Appeal took into account the duties imposed on Leighton as 'principal contractor' under the *Occupational Health and Safety Act 2000 (NSW)* ('OHS Act') and the *Occupational Health and Safety Regulation 2001 (NSW)*<sup>6</sup> ('OHS Regulations') when assessing the scope of its general law duty. The Court held that this duty required Leighton to provide induction training

to all subcontractors (including Mr Fox), and that such training should have extended to activity-based safety procedures relating to their specific work activity, which in this case involved line cleaning during concrete works.

- The Court of Appeal decision was overturned by the High Court, which held that a principal contractor's common law duty to use reasonable care to avoid or minimise a risk of injury to an independent contractor does not extend to providing training to independent specialist contractors in the specifics of their work. It is important to note however, that the High Court's decision does not address the question of whether a 'principal contractor' could still be liable under NSW OHS Legislation in similar circumstances, especially since the legislation imposes a statutory obligation on the principal contractor to ensure safety for all persons working or present on a construction site.

### Conclusion

Whilst this decision clarifies the position of the principal contractor in terms of a claim in negligence, prosecution under the OHS law for failing to induct and/or train specialist independent contractors, is still likely to be available in NSW.

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## Cutting edge developments in the High

### Court: Kirk & Anor v Industrial Relations Commission of NSW & Anor

The High Court of Australia is currently considering a claim that certain provisions of the *Occupational Health and Safety Act* (NSW) are being interpreted in such a restrictive and erroneous way that it makes it impossible for an employer to comply with them and practically removes the benefit of statutory defences. The ultimate decision will impact on how courts interpret the Occupational Health and Safety duties of employers and the corresponding scope of statutory defences.

#### Facts

■ The case involves an appeal to the High Court by Mr Kirk, a director of the company Kirk Group Holdings Pty Ltd, in relation to criminal convictions for contraventions of the *Occupational Health and Safety Act* (NSW) ('the NSW OHS Act'). WorkCover NSW prosecuted Mr Kirk and his company over an employee fatality at the company's farm in Razorback Mountain, near Picton. An all-terrain vehicle

(ATV) owned by the company overturned while Mr Graham Palmer, a manager of the farm, was navigating a steep slope on the farm which resulted in his death. The company was charged with offences under Sections 15 and 16 of the *NSW OHS Act* for failing to ensure the safety of Mr Palmer. Mr Kirk, as a director of that company, was personally prosecuted under section 50 of the *OHS Act*, which deems that a director is regarded as having contravened the Act where the corporation is in contravention.

- Mr Kirk and the company pleaded not guilty, relying on the statutory defence of section 53 of the *NSW OHS Act*, on the basis that it was not "reasonably practicable" for Mr Kirk and the company to comply with their duties under the *OHS Act*. It was argued that it was unforeseeable that Mr Palmer would ride the ATV down a steep hill instead of using a purpose-built road. Justice Walton of the Industrial Relations Commission found both defendants guilty and held that the company failed to discharge its responsibilities for workplace safety under the *OHS Act* by neglecting to ensure that Mr Palmer had the necessary skills to manage the safe use of the ATV or to conduct risk assessments. Kirk Group Holdings Pty Ltd was fined \$110,000 and Mr Kirk personally fined \$11,000.

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*Cutting Edge Developments in the High Court: Kirk & Anor v Industrial Relations Commission of NSW & Anor [2009] HCA Trans 239 (1 October 2009) (continued)*

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## Appeal to Full Bench of the Industrial Court

- On appeal, Mr Kirk argued that while he was the "controlling mind", he was in ill health, which meant that Mr Palmer held corporate responsibility for safety procedures as the scope of his work involved the operational day-to-day running of the farm. The Full Bench of the Industrial Court unanimously dismissed this appeal on the basis that liability under sections 15 and 16 of the NSW *OHS Act* was absolute; that an employer holds a non-delegable duty to ensure safety; that in some cases, the employer may be entitled to rely on another person who has expertise in health and safety, although criminal liability can only be avoided if the defence under section 53 is made out, but that this was not established on the present facts.

## High Court proceedings

- In the High Court proceedings, Counsel for Mr Kirk and the Company argued that the construction of sections 15 and 16 of the NSW *OHS Act* afforded by the Industrial Court of New South Wales is so erroneous as to disclose jurisdictional error. The High Court will consider

interesting questions of law: in determining whether a corporation is criminally liable for conduct in breach of the *OHS Act*, whether it is sufficient to determine whether the controlling mind of the company took the steps identified as necessary to obviate the relevant risk, or whether the appropriate test is that the Court be satisfied beyond reasonable doubt that no-one on behalf of the Company took the identified steps.

- This case presents an opportunity for the High Court to determine whether the interpretation of duties under the NSW *OHS Act* is so restrictive that it makes it impossible for an employer to comply with them and practically removes the benefit of the statutory defences. It is interesting because the Attorneys-General for the Commonwealth, New South Wales, Victoria and South Australia intervened in the proceedings. The Court will also consider the provisions of the *Industrial Relations Act 1996* (NSW) which limit the right of appeal of parties from the Industrial Court of NSW.

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