

*The Model Work Health
and Safety Act and
Regulations – Successfully
Defending prosecutions
under the New Act*

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Introduction

- Discussion on a few points
 - Shift in current law to “reasonably practicable”
 - Look at current law
 - Look at what “reasonably practicable” means
 - Change in onus of proof
 - How will this effect how prosecutions are conducted?
 - Risk based
 - Evidentiary matters
 - Penalties and other Enforcement Options

Reasonably Practicable

- What is the current state of the law?
 - S28 of the Act – requirement to “ensure” WHS
 - Act is structured in such a way that as soon as an injury occurs, there is a breach
 - Strict liability
 - Number of defences then available under s37
 - *Lutheran Church*
 - *Abigroup*

Reasonably Practicable

- New offence will be failure by obligation holder to do everything that is reasonably practicable to prevent an injury from occurring
- What does this mean?
 - *Queensland Workplace Health and Safety Act 1989* – “practicable”
 - the severity of any potential injury or harm to health or safety that may be involved, and the degree of risk that exists in relation thereto
 - the state of knowledge about the injury or harm to health or safety that may be involved, about the risk of that injury or harm to health or safety occurring and about any ways of preventing, removing or mitigation that injury, harm or risk
 - the availability and suitability of ways to prevent, remove or mitigate that injury or harm to health or safety or risk, and
 - whether the cost of preventing, removing or mitigating that injury or harm to health or safety or that risk is prohibitive in the circumstances.

What does this mean?

- Change of onus of proof
 - Chugg –v- Pacific Dunlop
 - High Court held that prosecutor is required to negative the requirement of reasonably practicable in order to succeed in a prosecution
 - Is an onus of beyond reasonable doubt
 - Must prove that something more could have been done
 - However, obligation holder must be able to show that they looked at what more could have been done and had a valid reason to go no further
 - Risk management?
- No Defence – S37 gone
 - Codes of Practice evidence of what is reasonably practicable??

How will this effect Prosecutions?

- At the moment:-
 - A workplace injury (or risk or workplace injury) constitutes a breach of the Act regardless of control measures in place
 - It is up to obligation holder to show strict compliance with Regulation or Code of Practice
 - Makes it very difficult to defend

How will this effect Prosecutions?

- Next Year:-
 - Workplace Health and Safety will be required to prove (beyond reasonable doubt) that the control measures in place were not reasonably practicable
 - Prove that there was something more which could have been done and was reasonably practicable in the circumstances
 - Will require much more invasive investigation to be successful – financial resources, decision making processes and the like
 - Will be significant dispute over alternative control measures

How do Obligation Holders Prepare for this?

- Have a robust risk management system to start off with
 - So that it can show a decision making process at ground level
- Have a clear and auditable decision making process throughout the organisation
- Have clear delineation of financial authority, and be able to justify refusal of capital expenditure

Penalties

Category 1

Corporations: \$3m
Officers: \$600k / 5 years jail
Workers: \$300k / 5 years jail

Category 2

Corporations: \$1.5m
Officers: \$300k
Workers: \$150k

Category 3

Corporations: \$500k
Officers: \$100k
Workers: \$50k

Change in Penalty Regime

- Categories of Offences
 - Movement to risk based penalties rather than results based (not focused so much on bodily harm, GBH or death)
 - More focused on conduct of party involved
 - Recklessness, high risk of harm to be considered

Categorisation of Offences

- Category 1 Offence
 - Recklessly endangering a person to risk of death or serious injury at a workplace
 - Doesn't matter whether they suffer the injury or not
 - “Reckless” - Recklessness transcends ordinary negligence. To be reckless, conduct must demonstrate indifference to consequences under circumstances involving peril to the life or safety of others, although no harm is intended.

Categorisation of Offences

- Category 2 Offence
 - Circumstances where there was a high level of risk of serious harm but without recklessness.
 - Once again, doesn't matter whether an injury occurred or not
- Category 3 Offence
 - Breach of duty without recklessness or high risk of serious harm

New Penalty Options

- In addition to penalties or as an alternative
 - Adverse publicity orders
 - Remedial orders
 - Corporate probation
 - Community service orders
 - Injunctions
 - Training orders
 - Enforceable Undertakings
 - Sentencing option as well as an alternative to prosecution

Summary

- The new Act will to some extent “restore the balance” regarding prosecutions
- However, a successful prosecution will have a significant financial impact on your business
- Need to ensure your internal systems are robust enough to withstand a WHS investigation