



National Harmonisation of OHS Laws – How best to Prepare for the New Safety Laws

Paul Hardman, Partner

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Key Changes

- New positive duty of care for officers (due diligence defined)
- Consultation obligations widened as between PCBU and workers and other duty holders
- Role of safety regulator (increased role/greater presence)
- Power and functions of HSR
- New procedural requirements for negotiation and notification related to HSRs and Committees
- New protections from discrimination, coercion and misrepresentation
- No 'reverse onus of proof' – prosecution will have to prove all elements of the offence, including failure to meet a standard
- Introduction of adverse publicity orders

Primary Duty

The duty of a person conducting a business or undertaking must 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 in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking

Duty extends to the health and safety of other persons.

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Primary duty encompasses:

- Provision and maintenance of a work environment without risks to health or safety
- The safe use, handling, storage and transport of plant, structures and substances, the provision of and access to adequate facilities for the welfare of workers, the provision of information, training, instruction or supervision
- Monitoring of the health of workers and the conditions at the workplace

Officer Duties

- Must exercise 'due diligence' to ensure PCBU complies with duty or obligation.
- Due diligence includes taking reasonable steps in relation to:
 - Acquiring and keeping up to date knowledge of work health and safety matters;
 - Gaining an understanding of the nature of the operations and associated hazards and risks;
 - Ensuring that the PCBU has available and uses appropriate resources and processes to enable hazards associated with the operations to be identified and risks eliminated or minimised;

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- Ensuring that PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding to these in a timely way; and
- Ensuring that the PCBU has and implements processes for complying with the body's duties and obligations.

Consultation

- PCBU must consult with workers . Must include HSR (if one)
- Workers include employees, contractors, subcontractors, outworkers, apprentices, students gaining work experience, volunteer work, who could be affected by the matter.
- Act stipulates the nature of the consultation.
- Consultation to include information on why decisions are made (does not require workers to agree with them).

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- Duty qualified by reasonably practicable (proportionate to the circumstances).
- PCBU and workers may agree on consultation procedures, if so, these procedures must be complied with.
- Duty holders with overlapping duties must, as far as reasonably practicable, consult, co-operate and co-ordinate with each other

HSRs

- HSRs represent “workgroups”. Workgroups are determined prior to election of HSR.
- Scope and number of workgroups are determined by negotiation with workers. PCBU must allow union involvement in negotiations.
- If negotiations fail, inspector may be called to determine issue.
- Requirements for notification of workers about election of HSR and workgroup negotiations.

HSR – powers and functions

- **Broad powers and functions**
 - Represent workers, monitor workplace health and safety measures of PCBU, investigate complaints of workers, inquire into anything that appears to be a risk to WH&S
 - May, inspect the workplace , accompany an inspector, be present at interviews, receive information concerning work health and safety;

HSR – power to direct work to cease

- Direct workers to cease work if has a reasonable concern that...work would expose the worker to a serious risk... emanating from an immediate or imminent exposure to a hazard.
- Right of individual worker to cease work
- Not unlawful under Fair Work Act
- Subject to direction to perform alternative work.

HSR – obligations of PCBU

- **PCBU must (among other things):**
 - Consult (so far as is reasonably practicable) on work health and safety matters;
 - Confer with HSR whenever reasonably requested;
 - Allow HSR access to information relating to hazards and the work health and safety of workers;
 - Allow training for HSR.

Committees

- At request of the HSR, 5 or more workers or on its own initiative PCBU establish a HSC.
- 50% must be workers not nominated by PCBU.
- Membership (other than HSR who may choose to be a member) will be agreed by negotiation.
- If negotiation cannot be reached an inspector may be called to determine.

Role of Safety Regulator

- Safety regulators will be exposed to greater accountability.
 - Review of decisions including those relating to work groups, notices, health and safety committees.
 - Review of failure to initiate prosecutions by the Director of Public Prosecutions or similar.
 - Publication of reasons for failure to prosecute.

Role of Safety Regulator

- There will be greater scope for the regulator to be asked to visit your business.

Activity	Section
Failure to negotiate work groups	54, 56
Issue resolution	80-82
Direction to cease unsafe work	89
Review of Provisional Improvement Notice	100
Dispute about WHS right of entry	141
Creation of Health & Safety Committees	76
Regulations	In draft

Union Involvement

- There will be a greater scope for a union to become involved in your business.

Activity	Section
Entry to inquire into suspected contraventions	117
Entry to consult and advise workers	121
Right for workers to be represented by union in negotiating work groups	52(4)
Right for a HSR to request the assistance of any person (including a union official)	68(2)(g)
Right of entry for resolution of Health and Safety issues	81(3)

Discriminatory, coercive and misleading conduct

- Protection for all workers and those in commercial arrangements from discrimination based on WHS role or action
- You cannot engage in “discriminatory conduct” for a “prohibited reason”.
 - Broad test for “discriminatory conduct”.
 - Broad test for a “prohibited reason”.
 - Introduces criminal sanctions (if WHS role or action was ‘dominant reason’) in addition to civil sanctions (if WHS role or action was “substantial reason”).

Investigation and questioning powers

- Cannot refuse based on privilege against self-incrimination
- Use immunity if assert the privilege
- Requirement for warning
- Legal professional privilege enshrined

Enforcement and prosecution

- Various options
 - Adverse publicity orders, Restoration orders, Community service orders, WHS undertaking, Injunctions, Training Orders
- 2 year limitation period for prosecution – can be extended
- Significantly increased maximum penalties

Adverse Publicity Orders

- “Name and shame”
- Order to publicise an offence and related matters.
- The court can make this order on its own initiative.
- The Regulator can fulfil the order if the business fails to do so.

Penalties

Category of Offence	Description	Penalty for Corporation	Penalty for Officers	Penalty for Workers
Category 1 Section 31 Model OHS Act	There was a high risk of serious harm to any person and the duty holder has been reckless	\$3 million	\$600,000 or 5 year imprisonment	\$300,000 or 5 years imprisonment
Category 2 Section 32 Model OHS Act	There was a high risk of serious harm to any person	\$1.5 million	\$300,000	\$150,000
Category 3 Section 33 Model OHS Act	Other breaches of OHS duties	\$500,000	\$100,000	\$50,000

Recommendations

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| <ul style="list-style-type: none">• Undertake legal risk and gap analysis |
| <ul style="list-style-type: none">• Review, revise and supplement policies and procedures (with regard to consultation obligations), including:<ul style="list-style-type: none">• Representation and consultation processes;• Robust issue resolution processes• Union right of entry processes |
| <ul style="list-style-type: none">• Update contractual arrangements – to reflect consultation changes |
| <ul style="list-style-type: none">• Informing officers of new obligations, update governance in WHS to ensure effective management and ‘due diligence’ compliance. |
| <ul style="list-style-type: none">• Training of contract administrators, managers and staff on new obligations, systems and policies |

Questions?



Paul Hardman

Partner

Tel: (07) 3135 0675

Email: paul.hardman@holdingredlich.com.au

Melbourne

350 William Street
Melbourne VIC 3000

GPO Box 2154
Melbourne Vic 3001

DX: 422 Melbourne

Tel: +61 (0)3 9321 9999
Fax: +61 (0)3 9321 9900

Sydney

Level 65, MLC Centre, 19 Martin Place
Sydney NSW 2000

GPO Box 4118
Sydney NSW 2001

DX: 529 Sydney

Tel: +61 (0)2 8083 0388
Fax: +61 (0)2 8083 0399

Brisbane

Level 1, 300 Queen Street
Brisbane Qld 4000

GPO Box 490
Brisbane Qld 4001

Tel: +61 (0)7 3135 0500
Fax: +61 (0)7 3135 0599