

Changes to Occupational Safety and Health Regime in WA

By Scott Wade

Replacing the OSH Act in WA

The *Occupational Safety and Health Act 1984* (WA) (**OSH Act**) is soon to be replaced by a new Work Health and Safety Act, with the Western Australian Model Work Health and Safety Bill (**WHS Bill**) on schedule for introduction to Parliament in mid-2019.^[1] The WHS Bill is based on the model *Work Health and Safety Act 2011*, developed by SafeWork Australia.

How will local governments be affected?

The four key terms and concepts are as follows: When enacted the WHS Bill will bring many changes to safety management in Western Australian workplaces. This article will focus on four key concepts contained within the WHS Bill, that are likely to have the greatest impact on local government management and operations.

- a. Persons Conducting a Business or Undertaking;
- b. Creation of a category of individuals known as 'officers';
- c. Duty of due diligence; and
- d. Increased penalties.

Person conducting a business or undertaking

As a part of the transition to the new WHS Act the term 'employer' has been replaced with 'a person conducting a business or undertaking' (**PCBU**), as defined in s5 of the WHS Bill. This change recognises the changing nature of business structures and activities in Australia. A PCBU goes beyond the traditional employer/employee relationship and now encompasses structures such as franchisor, labour hire company, host employer, sole trader or a government department and local authorities.

Section 19 of the WHS Bill imposes a primary duty of care on a PCBU which is similar to that imposed on employers within s19 of the current OSH Act, however these duties are now applicable to a much broader group.

Officers

Section 4 of the WHS Bill introduces a new category of individuals who are duty holders, known as officers. The term 'officers' is defined by way of direct reference to s9 of the *Corporations Act 2001* and are not 'officers' as traditionally referenced in local government structures. The Corporations Act definition of 'officer' includes:

'(a) a director or secretary of the corporation; or

(b) a person:

- i. who makes, or participates in making decisions that affect the whole or a substantial part, of the business of the corporation; or
- ii. who has the capacity to affect significantly the corporation's financial standing;
- iii. in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)...

As with the definition of a PCBU, elected members of a local government are specifically excluded from the category of individuals identified as officers by s. 4 of the WHS Bill.

When determining who is an officer in a local government setting, the most significant consideration should be who '*...makes, or participates in making decisions that affect the whole or a substantial part, of the business...*'. Within local governments, this may include but not be limited to CEOs, Directors, Managers, Coordinators and Supervisors depending on the applicable circumstances.

Who is considered an officer is not always fixed and may be subject to change depending on the nature of activities being undertaken at any particular time. For example, if there is a large project being undertaken by the local government and a coordinator is afforded significant responsibilities or decision-making authority for a specified period of time, that coordinator may be considered an officer at that point in time. Another relatively common local government scenario is when an individual becomes an officer as a result of acting in a higher role that is an officer's position.

Local governments need to take note that the definition of an officer extends well beyond those who were previously expected to primarily take responsibility for OSH within an organisation. It now encapsulates individuals in any part of an organisation who make, or participate in making decisions that affect the whole or a substantial part, of the business potentially including finance, human resources and asset management to name just a few.

Due Diligence Obligation for Officers

Officers will be subject to significant new duties and obligations known as 'due diligence' obligations under section 27 of the WHS Bill. The new due diligence obligation is arguably the most significant conceptual change arising from the safety legislation.

The due diligence obligations are personal and non-delegable in nature and carry substantial criminal penalties in the event of a breach. The new penalties include the possibility of a \$600,000 fine and 5yrs imprisonment in the most serious of circumstances.

The obligation is positive in nature and therefore requires officers to undertake certain activities. In simple terms, the due diligence obligation requires officers to do certain things on a proactive basis, rather than passively observing the fact that safety procedures exist. While the duty itself is non-delegable, for practical reasons the officer may task individuals to undertake certain actions which may fulfil the officer's obligation.

Section 27 of the WHS Bill sets out the 6 core elements of the due diligence obligation, which in summary requires officers to:

- a. acquire and keep up-to-date knowledge of work health and safety matters – beyond the workplace;

- b. understand the nature of the operations of the organisation, and the hazards and risks associated with those operations;
- c. ensure appropriate resources and processes are available for use, and are actually used, to eliminate or minimise risks;
- d. provide appropriate processes to obtain information regarding incidents, hazards and risks and ensure response in a timely way to that information;
- e. implement a process for ensuring ongoing legal compliance with all duties; and
- f. verify the provision and use of these resources and processes.

A breach of an officer's obligations may result from simply failing to prove compliance with one of the above elements and does not require any actual incident or accident to occur. In that situation, the mere inaction itself forms the breach and therefore grounds for prosecution of the officer.

The methodology for the practical application of the duties will naturally vary between local governments based on the size, structure and nature of activities undertaken. As an assurance step, it will be vital that PCBU's and officers have a process for ensuring ongoing legal compliance with all duties contained within the WHS Bill and related regulations.

Penalties

Penalties for breaches of officer obligations cannot be insured against in accordance with s272 of the WHS Bill, which declares any contract or term of a contract that purports to do so as void.

Under WHS legislation in other jurisdictions maximum penalties for officers range from \$100,000 for the most minor offence, to \$600,000 and 5yrs imprisonment for the most serious offence. Western Australia has already indicated that the new Western Australian WHS Act will carry even higher penalties.

Conclusion

The new safety regime proposed under the WHS Bill sends a clear message to individuals with influence and decision-making authority in any organisation that the existence of a safety system alone is no longer enough to satisfy their obligations. Responsible officers will need to prove they are taking an active role in work health and safety within their organisation and satisfying applicable due diligence obligations to avoid potential liability under the proposed new safety regime.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information, presentations or education regarding the forthcoming changes under the WHS Bill, please contact swade@mcleods.com.au.

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