

# Local government decision makers under the new Work Health and Safety Act

By Scott Wade

The Western Australian Work Health and Safety Bill 2019 received assent on 10 November 2020, with the Work Health and Safety Act 2019 (**WHS Act**) due to come into operation in early 2021. Accordingly, organisations must now begin their transition to compliance with the provisions of the WHS Act.

Critical to this transition is the need for a shift from the mindset that the OSH officer / coordinator / manager or other similarly titled employee, is solely responsible for all matters pertaining to workplace health and safety in an organisation.

The WHS Act introduces a range of new concepts, including positive due diligence obligations for 'Officers' of organisations.

## Who is an Officer?

'Officers' are a category of duty holders recognised by the WHS Act and are defined by way of reference to section 9 of the *Corporations Act 2001* (Cth), that is:

'(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; or
- (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 can be seen from the definition above, everyone with a significant level of organisational influence, from CEOs to directors, managers and sometimes even coordinators, of all portfolios, can fall into the category of Officers under the WHS Act.

The critical message for local governments is that Officers as duty holders under the WHS Act, may span all portfolios and areas of the organisation. This includes portfolios which are not typically thought of as being associated with workplace safety, such as human resources, finance, governance, infrastructure and corporate services.

### **What are the Due Diligence Obligations?**

The new WHS Act imposes personal due diligence obligations upon those individuals falling within the definition of an Officer.

The obligations are positive in nature, meaning that compliance requires proactive actions to be undertaken (and evidence of this must be able to be provided), with failure to do so resulting in an offence. A breach of their obligations can arise regardless of whether an injury / incident has occurred.

The obligations contained in clause 27 of the WHS Act require an officer to:

1. Acquire and maintain up-to-date knowledge of WHS matters.
2. Obtain and maintain an understanding of the organisation's operations and the associated hazards and risks.
3. Ensure appropriate resources and processes are available for use, and being used, to eliminate risks or to mitigate so far as is reasonably practicable.
4. Ensure that the organisation has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding promptly to that information.
5. Ensure that the organisation has, and implements a process for confirming ongoing legal compliance with the WHS duties and obligations of the organisation.
6. Verify of the provision and use of resources and processes for elements 3-5 above.

Officers may delegate tasks to assist with discharging their obligations, however the duty, along with the liability, remains with the officer.

### **Officers cannot insure against a breach of their obligations**

Significantly, clause 272A creates an express prohibition against insurance policies purporting to indemnify individuals for penalties arising from their breach of a duty under the WHS Act. Furthermore, the Act establishes an offence for offering or obtaining such insurance, which attracts a penalty of up to \$55,000.

### **Where to from here?**

Local governments must identify persons who may fall within the definition of an Officer. The following questions may assist:

- Does the person make or participate in making significant decisions that affect the organisation as a whole – such as budget decisions?
- Regardless of their job title, do they have significant influence that could affect the whole or a large part of the organisation?

If a person is, or is likely to be considered an Officer:

- Do they know and understand the operations of the organisation – beyond the work that their own direct reports undertake?
- Do they know about and understand WHS risks and issues?

- Are they aware of the organisational resources needed, supplied and used in order to ensure the safety of workers and compliance with WHS obligations?
- Do they know if there is a reporting system and if so, do they have assurance that reports are followed up? Is the system understood and used by everyone?
- Could they provide evidence of the organisation's legal compliance with WHS obligations?

With maximum personal penalties for breaches of officers' duties ranging from \$120,000.00, up to \$5,000,000.00 and imprisonment for up to 20 years, local governments can't afford to wait until the regulator comes knocking to find out the answers to the above.

For further advice or information regarding this or any other WHS topics, or to discuss the provision of an information session, contact Safety Specialist and McLeods Solicitor Scott Wade on 9424 6247 or [swade@mcleods.com.au](mailto:swade@mcleods.com.au).