

Safety Matters Alert

May 2006

Changes to OHS laws: Is it reasonable?

On 4 May 2006, the NSW Government released draft amendments to the *Occupational Health and Safety Act 2000 (NSW)* (OHS Act) which are designed to make practical improvements to occupational health and safety laws in NSW.

The *Occupational Health and Safety Amendment Bill 2006* (Bill), still in draft form and open for public comment until 18 May 2006, followed a 10 month review of the operation of the OHS Act. The purpose of the amendments proposed by the Bill are to clarify and improve the operation of the OHS Act. The effect of the amendments will be to make significant changes to OHS laws in NSW, and more closely align those laws with safety laws in other States, particularly Victoria.

Some of the more significant changes include clarifying that duties under the OHS Act must be fulfilled so far as is reasonably practicable, and altering the controversial laws which deem directors and managers liable for a corporation's offence. The amendments also allow WorkCover to enter into enforceable undertakings, rather than commence or continue prosecutions, and provide WorkCover with legislative mechanisms to assist persons in complying with OHS laws.

It is proposed that some of the changes will commence upon assent of the Bill, while others will commence on 1 October 2006.

The key changes proposed by the draft Bill are highlighted below.

Reasonably practicable

The Bill qualifies the absolute obligations imposed by the OHS Act on employers and others (such as controllers and suppliers) to ensure the health, safety and welfare of persons by introducing the notion of "so far as is reasonably practicable".

The Bill requires a person to eliminate risks so far as is reasonably practicable and, if not reasonably practicable, to reduce the risk to the lowest level reasonably practicable. The factors to be considered in determining what is reasonably practicable are:

- the knowledge of the person (or what the person ought reasonably have known) about the hazards giving rise to the risk and about ways of eliminating and reducing the risk;
- the likelihood of risk eventuating;
- the availability and suitability of ways to eliminate or reduce the risk; and
- the cost of eliminating or reducing the risk.

As a consequence of the proposed introduction of the "so far as is reasonably practicable" concept into the key duties, it is proposed that the current defences under section 28 are removed.

This amendment is likely to have the effect of more closely focusing on the control the officer has over the circumstances leading to the offence ...

Liability of directors and managers

The provision in the OHS Act which deems that a director or person concerned in the management of a corporation commits the same offence as a corporation has caused increasing concern.

The amendments proposed by the Bill qualify the current deeming provision by extending liability for offences to an "officer" of a corporation where the contravention by the corporation is attributable to the officer failing to take "reasonable care". "Officer" is defined in the *Corporations Act 2001* (Cth) and includes directors and persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the business of a corporation. This amendment is likely to have the effect of more closely focusing on the control the officer has over the circumstances leading to the offence, the foreseeability of the offence and the acts and omissions of the officer.

In determining what constitutes "reasonable care", the Bill sets out a number of matters that a court should have regard to. These include the officer's knowledge about the matter concerned, his or her ability to make or participate in the making of decisions that affect the corporation in relation to the matter, and whether an act or omission of another person is relevant to the contravention.

The amendments proposed to these provisions do not affect the operation of the workplace deaths provisions which will continue to apply in circumstances where a person's reckless conduct causes the death of a person at work.

Enforceable undertakings

The proposed amendments provide an additional compliance mechanism for WorkCover in the nature of enforceable undertakings.

WorkCover will have the flexibility to accept enforceable undertakings with potential defendants, rather than commence or continue a prosecution.

Fact Sheets issued by WorkCover state that undertakings may be to the effect that the potential defendant commits to taking preventative or proactive steps to correct or prevent breaches of OHS laws for the benefit of the workplace, industry and/or community.

While an enforceable undertaking is in place, no prosecution for an offence of the OHS laws may be taken about a contravention to which the undertaking relates. However, if there has been non compliance with the enforceable undertaking, WorkCover may withdraw the undertaking and prosecute the original breach of the OHS laws, or take action in the Industrial Court of New South Wales to enforce the undertaking.

An enforceable undertaking is not available in relation to the workplace deaths provisions.

Either WorkCover or a potential defendant may suggest an enforceable undertaking. They are voluntary, and WorkCover will not be able to compel a person to enter into one.

Role of WorkCover

In addition to the flexibility provided by enforceable undertakings, the proposed amendments balance WorkCover's compliance function by expressly providing WorkCover with advisory, assistance and educational powers. These include:

- providing WorkCover with the power to provide compliance advice to persons with duties under the OHS Act, and provide such advice in writing. If compliance advice is given, a copy of the advice must also be provided to the OHS committee or OHS representative representing employees affected by the compliance advice. Compliance advice cannot give rise to a defence to a contravention of the OHS Act, or otherwise be admissible in proceedings;
- providing WorkCover with the power to make and publish guidelines on ways in which OHS laws apply to a class of persons or a set of circumstances; and

- empowering WorkCover to determine any unresolved matters about consultation arrangements.

Right of entry

The OHS Act presently contains the right for union officials to enter premises for the purpose of investigating suspected breaches of OHS legislation. The way in which these provisions have operated have not always been clear.

The Bill proposes changes designed to facilitate union entry. The entitlement to enter premises has been considerably broadened such that a union official may enter premises to discuss matters relating to OHS at that place of work. The discussion must only occur during a work break, and must be preceded by at least 24 hours notice of the entry and reasons for the entry.

Any dispute about the entitlement of a union official to enter premises may be referred to WorkCover. If WorkCover is unable to resolve the dispute, it may then be referred to the Industrial Relations Commission for resolution.

Employee duties

The general duties applying to employees have been extended to clearly identify an employee's responsibility to take reasonable care for his or her own safety. Whether an employee has failed to take reasonable care depends upon the employee's knowledge of the relevant circumstances.

Safety recommendation notices

The Bill broadens the powers of an appropriately trained employee OHS representative (including the chairperson of an OHS committee) by authorising the representative to issue a safety recommendation notice.

A safety recommendation notice sets out recommendations to the employer about remedying an alleged contravention of OHS laws. A safety recommendation notice may only be issued if:

- the alleged contravention directly affects the health and safety of the employees represented by the OHS representative; and



- consultation with the employer has occurred after which the employer has had a reasonable opportunity to remedy the alleged contravention.

If the recommendation in the notice is not remedied, WorkCover may be requested to attend the place of work to confirm or withdraw the notice. If WorkCover confirms the notice, WorkCover must issue an improvement or prohibition notice.

Other amendments

Other changes proposed by the Bill include the following:

- the introduction of a new object into the OHS Act for all persons with OHS duties to take an active role to protect themselves and others;
- the introduction of a right for an employee dismissed because of the employee's OHS activity to apply for reinstatement to the Industrial Court of New South Wales;
- permitting WorkCover to record interviews by video, audio or other recording mechanism, without the consent of the interviewee, if the interviewee is informed beforehand that the evidence will be recorded;
- the removal of WorkCover's right to appeal against a decision to acquit a person of an offence under the OHS Act;
- a right for interlocutory decisions in OHS proceedings to be appealed;
- permitting WorkCover to share information with other OHS agencies throughout the country; and
- the creation of an offence for a person to knowingly and falsely represent that the person is authorised to perform a function under the OHS Act, or obtain a financial advantage by deception in connection with the OHS Act.

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Implications for employers

If passed in its current form, the way in which the OHS Act is interpreted by the courts may change. Employers should consider the implications of the amendments carefully. In particular, employers should:

- continue the approach of identifying, eliminating or reducing risks in the workplace. If risks cannot be eliminated or reduced, clearly document and test the reasons why;
- review position descriptions to clearly specify responsibility (or not) for OHS. The proposed amendments increase responsibility for an individual's own acts or omissions;
- in respect of company officers, consider how the concept of "reasonable care" will apply to OHS issues at a place of work. This requires an assessment of the extent to which risks are foreseeable and also the individual circumstances of the person, such as the person's knowledge of the events leading to the offence, their role, experience and their expertise;
- consider the circumstances where discussions with WorkCover about enforceable undertakings may be appropriate; and
- consider the protocols which may be necessary to deal with trade union right of entry issues.

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