Update on the national work health and safety harmonisation process

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Readers of this bulletin will be aware of the proposal to introduce nationally “harmonised” workplace health and safety legislation from 1 January 2012. This article aims to provide a brief overview of the Work Health and Safety Act 2011 (Cth) (WHSA) and an outline of the current status of the implementation of model legislation across Australian jurisdictions.

Overview of the WHSA

Like the OHS legislation that has been in force in various Australian jurisdictions since the mid-1980s, the WHSA imposes criminal penalties on various duty-holders in the workplace as a means of “securing the health and safety of workers and workplaces”, to quote the Objects clause, s 3(1).

After defining a number of key terms in Pt 1, Pt 2 of the legislation forms its “heart”, imposing a number of general health and safety duties on a wide range of workplace participants. The range of persons who bear duties is expanded beyond those currently covered in, say, the former Occupational Health and Safety Act 2000 (NSW) (the “OHS Act”). A key concept is that important general duties are cast on “a person conducting a business or undertaking” (PCBU). These duties are framed in terms of “ensuring, so far as is reasonably practicable”, in a conscious departure from the “absolute” terms in which the previous NSW legislation was expressed.

Part 3 requires various incidents to be notified to the regulator (to assist in enforcement), and Pt 4 contains a series of special obligations not to use certain workplaces or equipment unless they have been “authorised”.

Part 5 contains detailed provisions to facilitate consultation between various “stake-holders” under the legislation, especially between workers and other duty holders. These incorporate provisions requiring the appointment of “health and safety representatives” and committees. The representatives may in some cases issue what are called “provisional improvement notices”.

Part 6 prohibits certain types of discriminatory and “coercive” workplace behaviour connected to workplace safety (essentially dealing with cases where a worker may be penalized for a role they play in dealing with safety issues.)

Part 7 deals with situations where there may be entry into workplaces by union officials to deal with safety matters. A system of “WHS entry permits” governs who can take advantage of these rights.

Parts 8 and 9 set out the functions and powers of the relevant State regulator, which for NSW, for example, will continue to be WorkCover (the new “harmonised” system does not propose to set up a central Federal regulatory body.) The provisions empowering the regulator to make investigations, to enter premises, to ask questions and receive answers, are all fairly similar to those governing the regulators currently. Under Pt 10 provision is made for enforcement measures similar to those currently applying.

A new tool in the regulators’ kit is contained in Pt 11, “Enforceable undertakings”. This is a slightly controversial option which has been previously used in some other jurisdictions, but which will be new for others, such as NSW. It will allow a business operator to choose, instead of being prosecuted, to undertake some project or activity that will contribute to workplace safety in the future.

Part 12 deals specifically with provisions for administrative review of certain decisions under the Act. Part 13 generally deals with criminal proceedings (limitation periods, sentencing options, and so on). However, it contains in Div 7 provisions allowing certain obligations under Pt 7 (dealing with entry into workplaces by WHS permit holders) to be dealt with as “civil penalty provisions”, which will mean that someone who is found liable to pay a penalty will not incur a criminal conviction.

Division 8 of Pt 13, however, which currently only contains s 267, expresses an intention that the general provisions of the Act are not to be taken to create civil liability at large, presumably with reference to the tort of breach of statutory duty.

Part 14 contains a miscellaneous group of “general” provisions, and concludes with what is an important
Implementation of the Model Act so far

The aim of the process was to commence the new harmonised system on 1 January 2012. However, of the nine jurisdictions (six States, two self-governing Territories and the Commonwealth) five have implemented the model and four have yet to.

Jurisdictions where the Model Act came into force on 1 January 2012

Queensland
Queensland became the first jurisdiction to enact the legislation with Royal Assent being given to the Work Health and Safety Act 2011 (Qld) on 6 June 2011. It also enacted specific legislation dealing with recreational diving, which had been a part of their previous Act but did not fit the Model — the Safety in Recreational Water Activities Act 2011 (Qld), which also commenced on 1 January 2012.5

New South Wales
New South Wales followed by enacting its version on 7 June 2011, departing slightly from the national model Act by preserving the possibility of union prosecutions in some situations. Under s 230(1)(c), a union can commence a prosecution for a Category 1 or 2 offence if WorkCover has declined to follow advice given by the Director of Public Prosecutions under s 231 of the Act.6 The NSW Act also departs from the Model by allowing prosecution for a Category 3 offence (the least serious) to be commenced in the Industrial Court as well as in the Local Court. (The Model legislation does not specify which courts should be involved, but it does assume that it will be same one, whereas the NSW Act allows for this variation.)

Amendments “fine-tuning” the NSW legislation in the form of the Work Health and Safety Legislation Amendment Act passed the NSW Parliament on 24 November 2011. These amendments allowed deferral of commencement but only by proclamation before 1 January 2012, which in the event did not happen.

Australian Capital Territory
The WHS Act 2011 (ACT) was “notified” (ie came into force) on 29 Sept 2011. It seems to follow the Model legislation.

Commonwealth
The WHSA was assented to on 29 November 2011. There are some minor additions to the Model to take account of the particular situation of the Commonwealth — for example, s 12B adds a duty to consult those who hold duties under similar laws in other jurisdictions, as well as within the one jurisdiction, and ss 12C–12E exempt certain organisations in the interests of national security, defence and federal police operations.

One feature of the WHSA worthy of comment is that it applies (as had the most recent version of the previous specific Commonwealth OHS legislation) to what are called “Non-Commonwealth licensees.” These are large national companies who were able to be self-insurers and who were previously approved to join the Commonwealth OHS and compensation schemes under a system introduced by the Howard government. The current Labour government has left this system in place, but the indications are that it plans to “roll back” these companies into the State systems. The Explanatory Memorandum for the Commonwealth WHSA describes the application of the Commonwealth law to these companies as “for a transitional period.”7

Northern Territory
In the Northern Territory the Work Health and Safety (National Uniform Legislation) Act 2011 (Act No 39, 2011) commenced operation on 1 January 2012.

Jurisdictions where the Model Act did not come into force on 1 January 2012

The Model Act is not yet in force in four jurisdictions.

South Australia
In South Australia the model Bill was initially introduced and then withdrawn. It was later reintroduced and passed the House of Assembly, but in the Legislative Council debate was adjourned on 29 November 2011 and will not be resumed until 14 February 2012.

Tasmania
Tasmania passed the model Bill in the House of Assembly on 15 November 2011; but on 1 December 2011 the Legislative Council, in its deliberations, amended the commencement clause to take operation from 1 January 2013. This amendment still needs to be approved by the House of Assembly, but at the moment the model Act is clearly not in force yet.

Victoria
While the Victorian Government initially indicated support for the model law, more recently it has expressed some reluctance to meet the agreed deadline. A press release of 28 September 2011 called on the Commonwealth to delay commencement of the scheme for 12 months.8 Some commentators have suggested that this may mean that the scheme will commence on 1 January 2013 in Victoria but on 1 January 2012 elsewhere.9 There is a certain degree of irony in the withdrawal of Victoria from the harmonised scheme, given that a cursory examination of the two major
National Inquiry reports that lie behind the Model legislation would reveal that in many areas the Inquiry preferred precisely the legislation already in force in that State.

Western Australia

Western Australia has at least been consistent in its refusal to sign off on the model legislation from an early stage. It remains to be seen whether they will eventually adopt a modified version.

The future

At present, five jurisdictions have enacted the model legislation and four have not. Of the four “hold-outs”, it seems likely that at least two will move to enact the legislation in the course of 2012 — South Australia and Tasmania have already gone a long way towards this goal. Western Australia may eventually enact a modified version of the Model. It has expressed concerns about matters such as penalties, rights of entry and other powers for union representatives, and an issue to do with the reversal of onus in “victimisation” claims, and these might be areas that would depart from the Model. If the legislation can be seen to operating without too many problems during 2012, it may be that Victoria would decide to move from next year. As noted above, much of the legislation fits well with the current Victorian Act, and so the change needed should be least of all in that State.

Footnotes

3. It is not apparent what the impetus for these provisions was. In addition, there seems some ambiguity in s 254 as to which provisions of the legislation may be dealt with in this way. Under s 254(1) the only breaches of the head legislation that are made subject to this regime are found in Pt 7. But s 254(2) more broadly suggests that any “sub-regulation” may provide that it is a “WHS civil penalty provision”. It is not clear whether there is an intention to draft regulations in other areas (outside those dealing with entry permits) that will be classified as “civil penalty” provisions.
4. It should be carefully noted, however, that, while s 267(a) excludes civil liability for breach of the Act, s 267(c) leaves it open for a court to find, on general principles, that a breach of

5. Qld 2011 SL No. 239.

6. However, one of the main complaints about the previous NSW provisions allowing union prosecution, that unions were entitled to a share of the fine that was imposed, has been removed by providing under s 230(6) that the provisions of the Fines Act 1996 (NSW) normally allowing this do not apply to these prosecutions.

7. See subs 12(4)–12(7) of the Commonwealth WHSA for these matters.
