



# Work Health & Safety Act Broader! Bolder! Better?

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# What we will cover today

Outline the key changes

Describe the new regulatory landscape

Examine some case studies

Charles C. Ebbets 1932



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# Harmonisation of OHS laws

Historically each jurisdiction has its own OHS legislation

- A model national OHS Act has now been drafted to harmonise OHS obligations across Australia
- All jurisdictions were expected to enact the legislation by January 2012
- But only ACT, NSW , the Commonwealth and Qld have passed legislation
- WA, Vic, SA & TAS will delay until further notice

# Broader Harmonisation of OHS laws

- The new notion of a PCBU
- Workers not employees
- Duty to consult
- Positive duties for officers





# PCBU

- Principal duty holder under the WHS Act replaces term employer
- WHS Act now extends beyond traditional employer/employee relationships to include new and evolving work arrangements and risks



# Meaning of Worker



- A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
  - an employee; or
  - a contractor or subcontractor; or
  - an employee of a contractor or subcontractor; or
  - an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
  - an outworker; or
  - an apprentice or trainee; or
  - A student gaining work experience; or
  - A volunteer



# Volunteers

- Volunteer associations are carved out if they meet the two part definition
- If a not for profit group employees any person it will be a PCBU and owe safety duties to all volunteers that are part of the workforce
- Volunteers will have the same duties as other workers and can be prosecuted for a breach of those duties
- Volunteer officers will have the same duties as other officers however they will not be criminally liable for a breach of those duties





# Consultation

Between PCBU and workers must occur:

- When identifying hazards presenting risks
- When making decisions about ways to eliminate or minimise risks
- When making decisions about the adequacy of facilities to the welfare of workers





# Consultation

When making decisions about:

- proposed changes that may affect the health or safety of workers
- the procedures for resolving health and safety issues
- Monitoring the health of workers or workplace conditions, information and training



# Officer Liability

Who is an officer

Corporations Act, section 9.

- A senior executive who makes, or participates in making, decisions that affect the whole or a substantial part of a business or undertaking.



# Officer Liability

- Intention behind the duty is to ensure engagement and leadership in WHS management.
- Officers must be proactive and continuously ensure that business or undertaking complies with relevant duties and obligations



# Due Diligence

What is the duty?

- “Officers” now have duty to exercise due diligence to ensure that PCBU complies with any legal duty.
- Standards of due diligence must be high yet attainable and should relate to the position and influence of the officer within PCBU.





# Due Diligence

How to comply

Officers must:

- Take reasonable steps to acquire and keep up to date knowledge of work health and safety matters
- Gain an understanding of the hazards and risks associated with the nature of operations of PCBU



# Due Diligence

## How to Comply

- Ensure that PCBU has appropriate processes for receiving information about incidents, hazards and risks and responding 'in a timely way'.
- Ensure that PCBU has appropriate processes and resources to enable hazards to be identified and risks eliminated or minimised
- Ensure PCBU has processes for complying with duties and obligations.



# Harmonisation of OHS Laws Bolder

- Abrogating the right to silence
- Categorisation of offences from category 1-3 depending on severity
- Increase in penalties for breaches
- Alternative enforcement tools



# Penalties

## Category 1

A person commits a Category 1 offence if:

- the person has a health and safety duty; and
- the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- the person is reckless as to the risk to an individual of death or serious injury or illness.





# Penalties

## Category 2

A person commits a Category 2 offence if:

- the person has a health and safety duty; and
- the person fails to comply with that duty; and
- the failure exposes an individual to a risk of death or serious injury or illness.



# Penalties

## Category 3

A person commits a Category 3 offence if:

- the person has a health and safety duty; and
- the person fails to comply with that duty.



# Transitional Principles

Transitional principles have been developed that deal with:

- Currently elected HSRs, HS committee members, entry permit holders and work groups – specified term to commence as at pre-harmonisation date
- Existing investigations
- Licences and registrations
- Alleged offences against pre-harmonisation laws must be prosecuted under those laws, even if investigation first started after commencement of the Model Act



# Harmonisation of OHS laws

## Better?

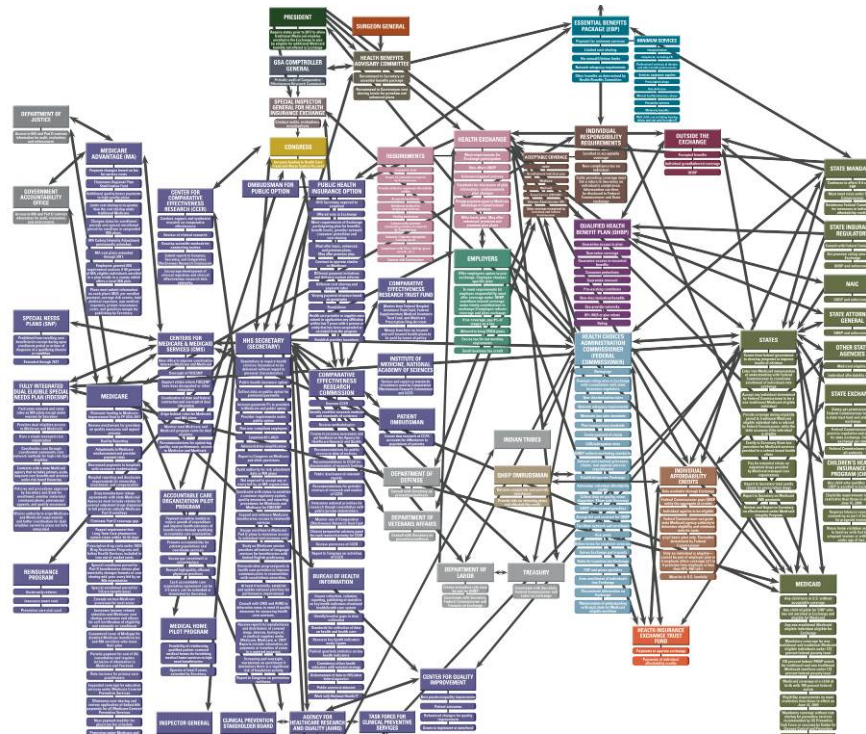
- The laws are set to be implemented on 1 January next year
- There remain some differences of opinion amongst stakeholders





# Harmonisation of OHS laws Better?

- The main stakeholder issue is red tape
- The draft regulations as they stand total 580 pages
- For many implementation is likely to be costly and complex



# Harmonisation of OHS laws

## Better?

- Across Australia, courts of divergent status will interpret and apply OHS laws with inevitable differences.
- Business and workers will therefore face jurisdictional uncertainty about the application of the laws, including penalties.



# Case Study 1- Officers

The Board of a national fitness business is given a submission from an Operations Manager seeking to replace handrails around the occupational pool facilities throughout the country.

A report given to the board three months earlier revealed an issue with the integrity of the handrails. The Board resolved to delay the expenditure until the next financial year. A month later a member of the public falls through a handrail, sustaining serious head injuries.



## Case Study 2 - The Independent Contractor

Bill is an independent contractor who has been tree lopping on a contract basis with a local Council on and off for the last 15 years.

He has two employees and one work experience student.

Recently the Council received a recall notice for the chainsaws but neglected to advise Bill of the notice.





## Case Study 2 - The Independent Contractor

Bill arrived at work and gave the work experience student some tree lopping work at ground level, using the same model chainsaw.

The chainsaw malfunctioned seriously injuring the work experience student.



## Case Study 3 –Ensuring Adequate Resources

The Board of an Aged Care Facility passes a resolution to reduce staff numbers and bring in agency workers if required.

The Facility has strict manual handling policies which were developed in response to the poor claims history regarding manual handling.

The Board commissioned an expert report which recommended that no residents be moved without two staff.

Frances is on duty alone on night shift. She moves a resident and suffers a back injury.



# How can we help?

Wholesale changes are coming

- Review & consider
  - Policies – how changes to extension of duties, consultation, right of entry, elections of health and safety representatives and training will affect contractor procurement strategy, etc
  - Who in the organisation is an 'officer' and what is required of them to fulfil their obligations of 'due diligence'
- Gap analyses/audit
- Revise - contractor procedures
- Reinvigorate - culture



# Questions?



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