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Harmonisation

A summary by Chris Jones
Director
Chris Jones Risk Management

Introduction

Currently in Australia Occupational Health and Safety and Workers Compensation are matters regulated by the states. The Commonwealth government regulates OHS and WC in Federal employment and federal territories (the ACT and NT now have their own legislation). In an attempt to “harmonise” this legislation throughout Australia, the federal government put together a panel to prepare model OHS legislation. For their part, the states undertook to amend their legislation in accordance with this model. The first report on model legislation was delivered in October 2008, and the second report in January 2009.

Differences Amongst the States

There are significant differences in OHS legislation amongst the various jurisdictions including:

- The quantum of fines and penalties (including imprisonment);
- The requirements for consultation, including the powers of employee OHS representatives, and the training required;
- The defences available to organisations and individuals;
- The responsibilities and liabilities of directors and management;
- The regulatory detail, such as regulations, codes of practice and the role of Australian Standards.

There are also a number of jurisdictional oddities. For example, Queensland is alone in requiring that organisations with more than 20 employees appoint a “workplace health and safety officer” (WHSO), with a legislated role and detailed training requirements. New South Wales is alone in requiring that persons undertaking the accredited construction induction training and consultation training must produce 100 points of identification before they can even attend the course.

The way in which the regulatory authorities, the inspectorates, operate appears to be different. Practitioners across Australia often discuss which state has the most “aggressive” inspectors, and it is not uncommon to find that documentation, procedures, or controls, acceptable in one state, are unacceptable in another.



Does This Matter?

It is easy to understand that when the Australian Constitution was being formulated prior to federation, the need to have common legislation in workplace health and safety would not have been foreseen. Indeed, the states did not generally enact OHS legislation, (the “factory shops and industry” act), until after federation.

Of course, now that Australian industry routinely operates across Australia, and indeed, around the globe, a fractured, state by state approach is totally inappropriate.

Trying to comply with up to eight sets of legislation is administratively costly. These costs have to be borne by the consumer.

Having nine sets of legislative authorities (6 states plus 2 territories and the federal body), nine different inspectorates, nine authorities publishing



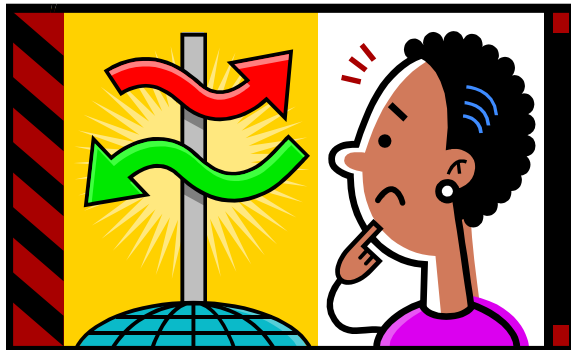
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regulations and codes of practice, has to be wasteful of resources. This cost is borne by the tax payer.

There is a huge opportunity cost here. These resources could be much better applied to solving specialised OHS problems and research, rather than on the administration of these nine separate bodies.

When competing globally or against imported products and services, these costs lead to loss of business, jobs, and a loss to the nation's wealth. We are competing with industrialised countries like the USA and Japan and the EEC, with much larger populations, but a single set of legislative requirements. We are also competing with emerging and third world economies where there is little concern for OHS and frequently limited or no provision for workers compensation.

When it is difficult to comply with legislation, it is less likely that organisations or individuals will comply with that legislation. A wide range of different and sometimes conflicting legislative requirements makes compliance more difficult, and diverts and dilutes limited resources. In this way, this situation directly contributes to the workplace accident and injury toll.



The Model Legislation

The first and second reports into the model OHS legislation together run to 656 pages. The following summary is therefore only a very brief overview of the recommended model legislation, focusing on some of the more interesting issues.

Fines and Penalties

The model legislation recommends the following maximum penalties:

- Corporations - \$1,500,000; \$3,000,000 for a fatality.
- Directors and Officers - \$300,000; \$600,000 + 5 years imprisonment for a fatality.
- Persons - \$150,000; \$300,000 + 5 years imprisonment for a fatality.

There is also provision for the court to make other orders, e.g. improvements, research, community services.

These fines represent a significant increase for some states.

Consultation

The legislation recommends that employee OHS representatives be able to issue provisional improvement notices, in a similar fashion to the existing powers in Victoria and South Australia.

There is also a recommendation to increase the training of OHS representatives to five days, with an additional day of refresher training annually.

Defences

It is proposed that the term "reasonably practicable" is to be defined and included in the general OHS responsibilities of employers.

The prosecution will be required to establish their case "beyond all reasonable doubt".

Directors and Officers

It has been recommended that "Directors" and "Offices" be defined in accordance with the definitions used by the federal Corporations Act 2001.

Due Diligence

It has been recommended that the term "due diligence" be defined as what a "reasonable person" would do. This would include the need for directors and officers to take reasonable steps to proactively and regularly ensure that they:

- Have up to date knowledge;
- Understand the nature of the organisation's operations and hazards;
- Provide appropriate resources;
- Verify implementation of controls;
- Receive and consider information on hazards and incidents.



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Regulations and Codes of Practice

While the report recommends that the model legislation be able to make regulations, the detail is for the future. There is a recommendation that codes of practice should be able to be used as evidence in a proceeding.

Where to From Here?

The states have agreed to amend their legislation in accordance with model, by the end of 2011. However, Western Australia has said it will not implement the increased penalties or the recommendations on employee OHS representatives issuing provisional improvement notices. The Workplace Relations Ministers Council (WRMC) has accepted ninety percent of the recommendations. They have requested that the Federal body – Safe Work Australia prepare model legislation. This is expected to be released in August 2009.

We have to wait and see just how far the model will be implemented in each state and federally.

There have, in the past, been a number of national standards on OHS, intended to form the basis of common approaches to specific concerns (e.g. manual handling and plant). Each state has implemented these codes differently, and in some cases, their inspectors have even refused to accept documentation based upon national standards in favour of a local format.

There is considerable local resistance to specific changes. Unions have raised concerns about “watering down” the requirements in some states. At the same time, employers have raised concerns regarding the increased requirements in some jurisdictions.

Many of the problems created by differing legislation state to state are caused by the detail. There is no reason to suppose that the states will not continue to insist on their own specific requirements. Will Queensland abandon WHSOs? Will New South Wales relax its onerous identification requirements on trainees? Will the courts, in a given jurisdiction, start imposing significantly higher fines? Will the various states enact identical regulations and accept common codes of practice?

None of these proposals mentions Workers Compensation. No discussion of OHS is complete without looking at how injured employees are rehabilitated and compensated, and how this is funded.

The author remains sceptical but hopeful.

However, if there was a genuine political will to solve this problem, then the Federal Government could, under its corporate powers, enact Federal Legislation for both OHS and Workers Compensation, which would supersede state legislation. They have already done this in the area of industrial relations. With the genuine support of the states, employers and unions, this would be the most effective way to establish one set of laws across Australia.

The fact that there is currently no genuine discussion of this option by any of the governments involved suggest that the “harmonisation” solution is an each way bet by the parties involved. It will allow the states and the commonwealth governments to make only as much change as they wish, while retaining the differences they wish to retain.

Chris Jones Risk Management provides a wide range of Occupational Health and Safety services and training, including:

- ✓ OHS Audits – SafetyPlan; SafetyPlan Gold; AS 4801
- ✓ OHS programme implementation
- ✓ Risk Assessments
- ✓ OHS culture surveys
- ✓ Accredited training for consultation (NSW)
- ✓ OHS training for management and supervisors

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