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Workplace Health and Safety – Harmonisation in Practice

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Speaking Notes

National Model Legislation

1. In July 2008 the Council of Australian Governments formally committed to the harmonisation of work health and safety laws by signing an intergovernmental agreement. What resulted from that was model work health and safety legislation which all States and Territories agreed to implement, other than WA.

2. New work health and safety laws commenced in New South Wales, Queensland, the ACT, the Commonwealth and the Northern Territory on 1 January 2012.

3. Tasmania has passed the legislation and it will take effect from 1 January 2013. In South Australia a Bill was introduced but has not been passed. Victoria and Western Australia have not yet introduced the legislation.

Work Health and Safety Act 2011 (NSW)

4. In May 2011, shortly after being elected, the O'Farrell Government moved to introduce legislation to reflect the national harmonised laws to commence from 1 January 2012. Some changes, however, were considered too important to wait until then, resulting in amendments to the *Occupational Health and Safety Act 2000* (NSW) ('the OHS Act') which took effect on 7 June 2011.

5. The *Occupational Health and Safety Act* continues to have effect even though it is repealed. That is because pursuant to the Regulations to the *Work Health and Safety Act* proceedings for an OHS offence alleged to have been committed before the repeal of the OHS Act are to be dealt with after the repeal of the OHS Act as if that Act had not been repealed.

6. This results in the odd situation where currently there are three different OHS laws that apply depending upon the date that the alleged offence occurred.

Significant Changes

7. Consistent with the model law, the new Act, the *Work Health and Safety Act 2011* (NSW) ('the WHS Act') departs in a number of important respects from the previous legislation.

8. The primary duty of care is now, under s19, that a person conducting a business or undertaking *"must ensure, so far as is reasonably practicable, the health and safety of"* the workers engaged there. Previously the prosecutor only had to prove that the person (ie the employer) had failed to ensure safety and having done so the onus fell to the defendant to show that they had done everything reasonably practicable. The onus of proof has shifted. The prosecutor now has the onus to prove that the employer did not do everything reasonably practicable.

9. A further important change in that respect is that the expression *"reasonably practicable"* is defined in s7A. The test is an objective one, namely whether a reasonable person in the circumstances would have foreseen the possibility of the exposure to the relevant risk in the circumstances. Evidence of what steps other employers may have taken or take in such circumstances may be admissible and relevant in that respect. No longer will the prosecutor be able to rely simply on the fact that the employer took steps after the event which, if taken before, would have prevented the risk. It may well lead to the need for expert evidence to demonstrate knowledge in the industry in a manner which has perhaps been less necessary in the past.

10. A second major change is the removal of the deeming provision pursuant to which directors or persons concerned in the management of a corporation are in effect deemed to be liable for a contravention by the corporation unless they can prove that they took all reasonable steps to prevent the occurrence or were not in a position to influence the corporation relevant to the event. Under the new legislation a director or manager (now known as a *"officer"* - a change in definition which will prevent lower level managers being prosecuted as it only applies to those who participate in the making of decisions that affect the whole or a substantial part of the business of the corporation) are only guilty if the prosecutor can show that they failed to exercise *"due diligence"*. That is that they failed to take reasonable steps – which does not necessarily mean every step.

11. A third change is to divide offences up into categories. The most serious category – Category 1 – is for those offences where the prosecutor seeks to prove that the defendant was reckless as to the risk to the individual of death or serious injury or illness: s31. In essence, something akin to manslaughter. For such offences the maximum penalty for a person conducting a business or who is an officer is $600,000 or five years imprisonment. The maximum penalty for a corporation is $3,000,000. Charges under this category however are expected to be rare. They must be commenced by indictment – which means must be commenced by the DPP.

12. Category 2 is expected to be the most common offence. It is a breach of a duty which exposed an individual to a risk of death or serious injury or illness. A prosecutor can elect to instead charge under the lowest level, Category 3, which does not require proof that the exposure was to a risk of death or serious injury. Maximum penalties for Category 2 are $300,000 for an individual if conducting a business and $1,500,000 for a body corporate, and for Category 3 $100,000 for an individual conducting a business or an officer and $500,000 for a body corporate.

13. A fourth significant change is as to the Court which will hear the prosecutions. This was a matter of some debate in Parliament which resulted in a rather unfortunate result. Category 1 offences on indictment may be taken in either the Supreme Court or the District Court pursuant to s8 of the *Criminal Procedure Act*. Category 2 offences, which will be the most common, can only be commenced in

the District Court – which has not previously been a venue which heard OHS prosecutions. Category 3 offences can be heard either in the Industrial Court or the Local Court but not the District Court – which is unfortunate, as I said, because the Industrial Court is a superior Court of record, a level higher than the District Court, yet is given equivalence with a Local Court, able only to hear the lowest level offences.

14. Under the WHS Act prosecutions by unions will become almost non-existent. They still have power to bring a prosecution but only in the rare circumstance that they have requested WorkCover commence a prosecution, WorkCover seeks the advice of the DPP, the DPP recommends that a prosecution take place and yet WorkCover chooses not to do so. The likelihood of that occurring is small. The net result is that unions are unlikely to commence prosecutions in respect of alleged offences which occur after 1 January 2012.

Three Laws and Three Courts

15. Under both the OHS Act and the WHS Act a prosecution can be commenced up to two years after the incident. Most practitioners would be aware the principle prosecutor, WorkCover, tends to commence a prosecution on a date very close to the two year expiry.

16. Proceedings under the OHS Act which had not been commenced by 1 January 2012 are, under the transitional provisions, required to be dealt with either by the Local Court or the District Court.

17. The new onus on the prosecutor to prove that the person did not take all steps that were reasonably practicable came into effect in advance of the WHS Act on 7 June 2011 when the OHS Act was amended. Also on that date directors and managers were not longer deemed liable but had to be proved to be liable. An offence committed prior to 1 January 2012 is to be taken as if the OHS Act has not been repealed. In respect of conduct on or after 1 January 2012 the WHS Act,

with its quite different primary duties, has effect. The result is that, for a period of time, there are three laws and three courts.

18. Matters commenced prior to 31 December 2011 will be heard by the Industrial Court applying the OHS Act. New proceedings in respect of an offence that arose prior to 7 June 2011 will be prosecuted as if the OHS Act has not been amended – and those offences are still being brought now and will continue to be commenced until about June 2013. They must be brought in the District Court or the Local Court (and not the Industrial Court). Then during 2013 there will be a period where the offences being brought are being brought under the OHS Act in the form it was amended on 7 June 2011. These offences too must be brought in the District Court or the Local Court. Then, from about the end of 2013 and thereafter the offences being brought will be offences under the WHS Act which can be brought in the District Court (Category 1 and 2) or the Industrial Court or Local Court (Category 3). While the prosecutor tends to wait two years, it is open to a prosecutor to bring a prosecution for an offence committed after 1 January 2012 at any time. What that means is that for the next two years or thereabouts, prosecutors and defendants will be working with three different laws – and taking into account the time by which trials take place, including appeals, it will be some years before we are considering only the provisions of the WHS Act.

District Court – New Procedure

19. Pursuant to the transitional arrangements, proceedings that were already commenced prior to 1 January 2012 continue to be dealt with by the Industrial Court. As a result, the District Court did not get a flood of already commenced matters but rather has had a trickle of new matters, being those matters commenced after 1 January 2012.

20. The District Court has established simple and straight forward procedures for commencing matters. A prosecutor files an application along with a statement of facts. The prosecutor then has seven days to file the summons on the defendants. The defendants then have seven days to file a notice of appearance.

The prosecutor then has two weeks to serve the prosecution brief. Six weeks after the matter commenced it comes before the Court for the first directions.

21. It is expected that if the defendant is not in a position to enter a plea at the first directions hearing the usual order will be to permit 4-6 weeks for the defendant to consider its position. It is unlikely that the District Court will permit more than one such adjournment before expecting a plea to be entered and a date for hearing set. The Practice Note does not provide for a matter to be referred to a case conference although parties could no doubt agree to do that if they wished.

22. It is expected that OHS/WHS Act matters will not be put in the general criminal list, but allocated to Judges who will have some specialised knowledge or experience of the area. It is likely that there will in due course be District Court judges who have as their primary responsibility WHS prosecution hearings. Initially, however, the Chief Judge, Blanch CJ, will usually conduct the directions hearings himself to get a proper understanding of the jurisdiction. It may be that one or more Acting District Court Judges will initially hear the matters. Hungerford J (previously of the Industrial Court) may be one of them.

23. There will be a number of changes arising from the fact that new cases will now be heard in the District Court in accordance with its established criminal procedure. Some of lesser importance include that barristers will wear wigs and gowns to hearings. The District Court has a fierce approach to ensuring that matters are dealt with expeditiously. Some 90% of criminal cases are currently heard by the District Court and completed within 12 months and the remaining 10% are completed within two years. I have no doubt that Blanch CJ will be intending that this new jurisdiction will comply with those statistics. This might come as a bit of a shock to practitioners who are used to OHS matters routinely taking more than 12 months and, in respect of the larger more complicated matters, substantially more than two years. They, I suspect, will find a Court uninterested in giving them the sort of adjournments they are used to having.

24. Another change will be as to special fixtures. The Industrial Court always sets matters down on set dates, usually taking into account availability of counsel. It will be interesting to see whether the District Court takes the same approach.

Currently in respect of criminal cases it will often put matters into a running list leaving practitioners unsure whether their matter will start on a particular day. Once started a matter may continue until it is completed. Whether that occurs in respect of OHS/WHS matters is to be seen.

25. A further procedural change will be that appeals from a District Court judge will go to the Court of Criminal Appeal. That contrasts to matters before the Industrial Court – they will continue to go on appeal to a Full Bench of the Industrial Court. Beyond the Industrial Court there is no right of appeal – only the potential to seek prerogative relief in the Court of Appeal. One oddity appears to that under the WHS Act a Category 2 prosecution commenced in the District Court would be appealed the Court of Criminal Appeal, while as the Act currently stands a Category 3 offence commenced in the Industrial Court for a breach of the same duty would end up in the Court of Appeal via a Full Bench of the Industrial Court.

26. The change in venue both at first instance and on appeal may well bring about a new judicial approach to the determination of prosecutions. Many believe it will make it harder for prosecutors. Of interest, however, is the fact that the new courts will be dealing for some time with the old law – and it will be interesting to see to what extent they will simply apply the law as determined by the Industrial Court (along with a limited number of Court of Appeal and High Court decisions).

Issues to Watch

27. The first thing of note is the change in the remedies or orders that can be made. First, there has been a significant increase in penalties. The most common type of charge, a Category 2 offence, sees an increase in the potential penalty of an individual from $55,000 to $300,000 and the maximum penalty for a corporation for a first offence increased from $550,000 to $1,500,000.

28. A second important change is the introduction of enforceable undertakings. In Part 11 of the WHS Act WorkCover can accept an undertaking in lieu of a prosecution. This is a powerful and useful tool for a prosecutor to have. Defendants, faced with a potential prosecution, and willing to be seen to be doing

the right thing, will no doubt approach the prosecutor seeking to provide an undertaking as to the things that they will do in the future in the hope that the prosecutor will accept that in lieu of a prosecution. This is an approach commonly used by other regulators. A prosecutor does not need to first prove a contravention – indeed invariably the undertaking is sought and given prior to a prosecution being commenced. The prosecutor is in effect given a further policy choice – to either seek and obtain an undertaking or instead, because of the seriousness or otherwise of the matter, to seek to prosecute.

29. A very important part of the new Act, and one which does have effect from 1 January, is Part 5 which provides for the appointment of workplace representatives and gives them substantial powers. A health and safety representative is a worker elected from the workers within their work group. That person, once elected holds office for three years. Their powers, pursuant to s68, include to represent the workers in health and safety matters, to investigate complaints from members of the work group and to enquire into anything that appears to be a risk to health and safety. In exercising their powers the representative may inspect the workplace at any time after giving reasonable notice, request the establishment of a health and safety committee and, pursuant to s90, may issue a provisional improvement notice requiring an employer to remedy a contravention of the legislation. A failure to comply with such a notice can give rise to a fine for an individual of $50,000 or for a corporation $250,000. It will be interesting to see whether unions or groups of workers seek to use these new powers and how they do so.

30. I have already identified that in respect of a potential offence committed after 31 December 2011 a prosecutor must elect to prosecute under one of the three identified categories: ss31-33 and 229B. If a prosecutor elects to charge a person under Category 2 they must proceed in the District Court. In such a case if the prosecutor proves the breach, but cannot prove that the breach gave rise to a *"risk of death or serious injury or illness"* then it is doubtful the District Court would have jurisdiction to convict the defendant, even though the defendant had been proved to have committed a Category 3 offence. That is because pursuant to s229B a Category 3 offence is to be dealt with by the Local Court or Industrial Court, the

District Court being given no jurisdiction over such offences. For the same reason it is doubtful a prosecutor can plead a Category 3 offence in the alternative to a Category 2 offence.

31. I have heard it said that the converse is also the case – namely that the legislation would be interpreted as intending to deprive the Industrial Court of jurisdiction to convict a defendant of the breach that gave rise to a *"risk of death or serious injury or disease"*. I do not think that is correct. In my view a prosecutor could elect to bring an offence that would meet the requirements for Category 2 as a Category 3 offence in the Local Court or Industrial Court. Given the still substantial maximum fines provided for a Category 3 offence (almost the same as the current maximum fines) it is to be seen whether the prosecutor will elect in some cases to take the more conservative approach and commence matters under the WHS Act in the Industrial Court. Until WHS Act prosecutions start being brought all new matters will be commenced in the District Court. By the time WHS Act prosecutions start being commenced the prosecutor may be familiar enough with the District Court to have formed a view as to whether it would prefer to continue commencing most matters in that Court.

32. All that assumes no further legislative changes, an issue not without doubt given the recent report of the Legislative Council's Standing Committee on Law and Justice titled 'Opportunities to Consolidate Tribunals in NSW' which contemplates the potential amalgamation of the NSW Industrial Commission into a large administrative law tribunal, with the potential for the demise of its Siamese twin, the Industrial Court.

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