

CLIENT BRIEFING

UPDATE ON WORK HEALTH AND SAFETY IN AUSTRALIA

TRENDS AND INSIGHTS

Serious Incident Investigation and Legal Professional Privilege

A spate of high profile workplace injuries and fatalities in Australia and abroad (Dreamworld / Eagle Farm, Brisbane, Grenfell Tower) have prompted some jurisdictions to review penalties for OHS breaches. This includes increasing of OHS fines (WA) and the introduction of new corporate offences such as Industrial Manslaughter (QLD).

Notably, OHS / WHS fines are on the rise in all Australian jurisdictions, as we begin to see offences committed under the new WHS Laws (Model Act) reach its conclusion in court. Despite harmonised legislation being in place since 2011/2012, the delay between the occurrence of an adverse event and a court finding means we are only now witnessing the application of the new law and resulting fines, some of which have exceeded \$1m, where a non-fatal incident occurred.

Given the likelihood of an increased focus by the regulators in serious incidents, including those where no harm has occurred but significant risk of harm existed, organisations should ensure that appropriate provisions are in place for adequate insurance cover for defending such enquiries by regulators. While fines imposed for OHS / WHS offences are not insurable, cover is available for defending an investigation by the regulator into an OHS / WHS incident, along with associated defence costs.

Where serious incidents occur, it is imperative that legal advice is sought and obtained from external counsel under legal professional privilege (client legal privilege), and that any investigations, internal or external, should be conducted under LPP.

Marsh has witnessed many cases where organisations have benefitted from obtaining LPP and legal advice prior to embarking on a serious incident investigation, particularly where the regulator has also commenced investigations into the circumstances of the incident. It should be noted that LPP cannot be obtained after the event but can be waived, once established, should the client wish to at a future date.

Undertaking an investigation under LPP allows a frank and open discussion between organisations and their legal advisors during an active investigation without needing to disclose these findings either publicly or to a third party including a regulator, as they are deemed not discoverable.

A recent article by Marsh discusses the reality of [dealing with a workplace fatality](#).

Cloud based WHS compliance

In the past year Marsh has seen a swell in the number of businesses moving to cloud based WHS compliance systems, replacing paper based reporting and safety processes. The growing choice of software platforms on the market and the diminishing start-up and operating cost has made the option of moving online attractive for many organisations which, only a few years ago, faced technology systems that were cost prohibitive and only available to large organisations.

Those looking to learn more about moving to a cloud platform can find information about [Marsh and Donesafe's collaborative offering](#).

Auditing

2017 has been a big year for auditing with many clients conducting internal audits for various reasons. The most commonly cited include:

- The safety management system has been in place for a number of years and it is time to test it
- There is interest in self-insurance and a desire to undertake a gap analysis to test performance
- The Board has requested an audit to be undertaken to assist them with their due diligence obligations, under the Harmonised /Model Act Laws
- The audit has been undertaken of a specific hazard or process to help the business improve a specific operational hazard or process.

Whatever the reason, conducting an audit of your safety system is an effective way of understanding the performance of the safety program, how the safety management system meets the standard audited against (AS/NZS 4801, ISO 18001, ISO 45001, NAT, internal audit criteria), the organisation's compliance to system requirements and generally identifying how the organisation can improve its management of safety and risk.

Before engaging an auditor:

- Ensure that they hold certification with Exemplar Global, the internationally recognised auditing body that certifies auditors based on their skill and experience.
- Determine exactly what you want from the audit report:
 - Do you want a conformance/non-conformance and brief comments, or would you prefer more detailed audit commentary to help you understand exactly what is happening within the organisation?
 - Are you also looking for recommendations of corrective actions that will improve your safety program?

While there is a range of providers, price is often a good indicator of the level of service and depth of skill and experience. Marsh has come across a number of audits this year where the results of the audit were sub-par and did not give the organisation a clear picture of what was happening in the organisation and/or the recommendations have been so vague or broad that they were really just a re-write of the standard being audited against. In one audit, the recommendations did not include a single comment about the risks to the organisation and were only focused on the development of a new safety management system.

Resurgence in updating safety management systems

The development and impending release of ISO45001, the new international standard for occupational health and safety management systems, is prompting many organisations to review their current WHSMS to understand what gaps may exist against the new standard. While the date of release has not yet been announced, it is likely to be in early 2018. One of the aims of ISO45001 is to encourage senior management to integrate responsibility for health and safety issues as part of the organisation's overall strategic plan rather than placing sole responsibility on the safety manager.

Participatory ergonomics

Musculoskeletal disorders continue to be the highest burden on workers compensation and injury costs for many organisations in Australia. In recent years, Marsh has helped businesses look beyond manual handling training to a participatory ergonomics approach. A participatory ergonomics program is a worker-led program comprising self-identified ergonomic champions. The process involves building capability in the champions to proactively lead the identification of hazardous manual tasks, and generate controls through their knowledge, with assistance from a subject matter expert.

Participatory ergonomics programs have been shown to:

- Decrease the risk factors of musculoskeletal injury
- Increase workers knowledge on ergonomic controls such as postural variation
- Shift the organisational culture from reactive to proactive around manual handling injuries
- Decrease workers compensation costs associated with muscular sprains/strains

Implementing design and engineering controls along with administrative controls (such as training) removes the reliance on manual handling technique alone and has been shown to decrease the incidence of work-related musculoskeletal disorders.

Psychosocial risk and mental health

Workplace costs associated with mental health and wellbeing of employees is increasing across Australia.

As with all healthcare interventions, prevention is less costly than cure and many organisations that have taken a strategic approach to employee mental health and wellbeing have been able to demonstrate the return on investment.

For businesses looking to take stock on their organisation's psychosocial risk profile, the following factors should be considered:

- Resourcing and training to undertake work demands
- Levels of consultation and decision making in work requirements
- Supportive feedback and recognition and reward structures
- The management of change including role clarity

Building robust processes to strengthen protective factors ensures that employees feel support and are not relying solely on employee assistance programs to deal with psychosocial risk factors.

REGULATORY AND LEGISLATIVE UPDATES

Western Australia

The previous Liberal government's WHS Bill, which had gone through public consultation and a first reading, has now been abandoned by the new Labor government under McGowan.

An announcement in early July 2017 indicated that the government would look to present a new WHS Bill to parliament in mid-2019. Unlike its predecessor Bill, which aimed only to replace the OHS 1984 Act, the new WHS Bill is set to amalgamate three current Acts (OSH Act 1984, Mines Safety & Inspection Act 1994 and Petroleum and Geothermal Energy Safety Levies Act 2011) into one single Act. It is designed to align with the provisions contained in the Model Act (Cth) from 2011 while also accommodating the peculiarities of the state

Among the proposed changes is the increase of fines for offences under the OSH Act 1984, to bring them into alignment with the Model WHS Act (Cth) that operates across the other jurisdictions.

This would see a Level 1 fine (lowest level culpability) increase from \$50k to \$456k and Level 4 fines (highest level culpability) rise from \$500k to \$2.7m, along with an increase in jail term from two to five years. Increases in fines are to be incorporated into the OSH Act prior to the new WHS bill being introduced in 2019. These changes are set to take place ahead of the new WHS Bill being presented to the WA Parliament in 2019.

The Department of Commerce (which had responsibility for WorkSafe WA) and the Department of Mines & Petroleum were merged following the state election, with inspectors from both WorkSafe WA and DMP now operating within the newly created Department of Mines Industry, Resources and Safety (DMIRS).

Victoria

The new *Occupational Health and Safety Regulations 2017 (OHS Regulations)* and *Equipment (Public Safety) Regulations 2017 (EPS Regulations)* commenced on 18 June 2017.

The majority of the new OHS Regulations 2017 remained the same with the following notable exceptions:

- Manual Handling:
 - Changes have redefined the term to include the word "hazardous" to better reflect the issue and provide a more explicit definition. Triggers for the need of risk assessment have also changed as a result
- Plant:
 - Emergency stop devices must be designed so they can only be reset manually
 - Hazard identification and risk control requirements placed on designers and manufacturers have been removed
- High risk work:
 - Increased licencing requirements for reach stackers, crane chasers (doggers), boiler operators, crane operators, forklifts and low-lift pallet trucks drivers
 - Fewer requirements for cranes, lifts and amusement structures.
- Hazardous substances:
 - Recast to the Globally Harmonized System of Classification and Labelling of Chemicals (GHS)

- Asbestos:
 - Increased requirements for the identification, management and notification of all asbestos in the workplace
 - Broadening of Class B and Class A licence holders' ability to remove certain types of asbestos
- Construction:
 - Additional requirements for employers and self-employed to develop emergency procedures
- Major Hazard Facilities (MHF):
 - Additional requirements for emergency management plans, safety cases and threshold notifications for MHFs

Minor changes to definitions, testing and compliance notes have also been made to sections of the Regulations including noise, fall prevention, confined space, and lead. Businesses must take care to ensure they are aware of the changes relevant to their workplace.

With the introduction of OHS Regulations 2017, previously approved compliance codes that aligned with old regulations are undergoing review and will be updated to reflect the requirements of the new regulations. Eight new codes have recently been through public consultation, with WorkSafe Vic now considering responses.

Queensland

The Queensland Government has introduced legislation to make 'industrial manslaughter' a new criminal offence under the *Work Health and Safety and Other Legislation Amendment Bill*, which passed parliament in October 2017. The new offence was created as an outcome of the independent safety review undertaken following the Dreamworld incident. Two new offence categories are proposed for negligent conduct that leads to the death of a worker: a 'senior officer' offence and a 'corporate' offence. Under the proposed new law, the maximum penalty will be 20 years imprisonment for an individual, with a maximum fine of \$10 million for a corporate offender.

The QLD Minister for Natural Resources and Mines has also introduced the *Mines Legislation (Resources Safety) Amendment Bill* to parliament, which aims to tighten up health and safety management systems and enforcement. It proposes the introduction of:

- Penalties of up to \$126,150 if duty holders fail to meet their safety and health obligations to mine workers
- Increased power for the mines inspectorate enabling it to take direct action against duty holders
- New powers for the Chief Executive to suspend or cancel individuals' statutory certificates of competency and site senior executive notices if they fail to meet their safety and health obligations - preventing those officers from occupying statutory positions at Queensland mine sites

National

Amendments to the heavy vehicle chain of responsibility laws will bring nationwide changes to the transport industry. The new laws, being introduced in 2018, are intended to align more closely to workplace health and safety legislation. The National Heavy Vehicle Regulator is assisting organisations in the supply chain to understand their roles.

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