

Safety Matters Alert

Finally... Western Australia has tabled a tailored WHS Bill

WHAT YOU NEED TO KNOW

- The Western Australian Government (WA Government) tabled the 'green' *Work Health and Safety Bill 2014* (WHS Bill) on 23 October 2014. The WHS Bill is open for public comment until 30 January 2015.
- The key differences between the WHS Bill and the model WHS laws concern union right of entry, the ability of WHS representatives to direct stopping work, the reverse onus of proof in discrimination cases, the option of enforceable undertakings for contraventions and the limitation period for prosecutions.
- Importantly, the WA Government proposes to keep the model WHS penalty provisions. These penalties are significantly higher than current penalties for corporate and individual offenders.
- The WA Government is also drafting a complementary *Work Health and Safety (Resources) Bill* (Resources Bill) to cover the mining sector. The Resources Bill is expected to be introduced in mid-2016.
- The most significant change to the regulatory framework under the Resources Bill concerns specific requirements for hazard identification, risk management, use of hierarchy of control, and review and maintenance of risk control measures.
- One of the most significant changes under the model WHS laws, which is proposed to be adopted by both the WHS Bill and the Resources Bill, concerns directors' and officers' due diligence obligations to personally take reasonable steps in relation to safety matters.

WHAT YOU NEED TO DO

- Consider the WHS Bill and, if you believe it may have adverse effects on your business, make a submission to the Department of Commerce. We are able to assist you draft tailored submissions based on the operations and needs of your business.
- Keep up to date with the progress of the Resources Bill, which we will update you on in the future.

The journey so far

On 3 July 2008, the Commonwealth and all State and Territory jurisdictions entered into the Inter-Governmental Agreement for Regulatory and Operation Reform in Occupational Health and Safety (Agreement).

The Agreement committed State and Territory jurisdictions to harmonise their occupational health and safety laws with a national model, drafted by the Commonwealth. In order for the model work health and safety (WHS) laws to become legally binding they must be enacted by Parliament in each jurisdiction. All jurisdictions except Western Australia and Victoria

have enacted legislation adopting the model WHS laws.

In 2012, the WA Government commissioned a consultation regulation impact statement (RIS) on the national WHS model regulations and codes of practice. The RIS identified 13 areas where adoption of the model WHS laws may result in changes to work practices and associated benefits or costs. The RIS concluded that "between the two extremes of complete rejection or complete acceptance [of the model WHS laws] a finer consideration is required."

Recently, the WA Government tabled a State-specific version of the model WHS laws (see below). Work is

also under way to harmonise Western Australia's resources safety legislation with the model WHS laws, with the proposed Resources Bill expected to be introduced by mid-2016.

The WHS Bill

On 12 August 2014, Western Australia's Attorney-General and Minister for Commerce, Michael Mischin, proposed introducing a State-specific version of the model WHS laws. The WHS Bill was subsequently tabled in Parliament on 23 October 2014. The WHS Bill can be accessed online at: http://www.commerce.wa.gov.au/sites/default/files/atoms/files/work_health_and_safety_bill_2014.pdf

The WHS Bill has been released as a 'green' bill allowing public consultation until 30 January 2015. At the time of proposing the WHS Bill, Mr Mischin stated that this version would reflect the "core provisions" of the model WHS laws but be tailored to Western Australia's environment.

Importantly, the WHS Bill does not adopt some of the key aspects of the model WHS laws, including in relation to:

- union right of entry with WHS entry permits;
- safety and health representatives' capacity to direct the cessation of work;
- the reverse onus of proof in discrimination matters;
- the option of enforceable undertakings for contraventions to the legislation; and
- a shorter limitation period (by one year) in which a prosecution must be brought.

The WA Government's reasons for the first three of these differences are (respectively):

- union right of entry is better provided for under industrial relations legislation;
- the decision to refuse to continue working where there is a serious risk of harm should remain with the individual worker; and
- a reverse onus of proof in discrimination matters is contrary to the purpose of harmonising WHS laws.

Surprisingly, the WHS Bill proposes to maintain the uniform penalties from the model WHS laws (which, historically, was not the WA Government's position). Model WHS laws set a maximum fine of \$3,000,000 for a body corporate, and up to \$600,000 and five years imprisonment for an individual conducting a business or undertaking (PCBU), convicted of reckless conduct. These are significantly higher penalties than under the current regime, which sets a maximum fine of \$500,000 for corporations, and \$250,000 and 2 years imprisonment for individuals (for first offences).

The Department of Commerce has stated that the WHS Bill does not necessarily represent the WA Government's settled position. However, if you are concerned about how the proposed changes may affect your business, you should make a submission to the Department of Commerce.

The Resources Bill

Western Australia is also set to modernise mines safety legislation with the drafting of the Resources Bill under way. The Resources Bill is expected to be introduced by mid-2016.

According to Simon Ridge, executive director of the Department of Mines and Petroleum's (DMP) Resources Safety Division, the new legislation will incorporate the "best elements" of the model WHS laws and the National Mine Safety Framework. A Ministerial Advisory Panel, in consultation with industry and unions, has been providing recommendations to the DMP on the development and implementation of the reforms since January 2014.

According to Mines and Petroleum Minister, Bill Marmion, the intention of the Resources Bill is to place a greater focus on risk management and to be less prescriptive with the onus being "placed on industry to demonstrate they understand hazards and have control measures in place."

According to the DMP, the most significant change to the regulatory framework under the Resources Bill will concern specific requirements for hazard identification, risk management, use of hierarchy of control, and review and maintenance of risk control measures.

Another proposed change will be the transfer of responsibility for occupational safety and health for major hazard facilities from WorkSafe to the DMP.

Directors' and officers' due diligence obligations

One of the most significant changes under the model WHS laws proposed to be adopted by the WHS Bill and the Resources Bill, concerns directors' and officers' due diligence obligations. In this regard, and for other aspects of the model WHS laws, see our **Safety Matters Alert** – 11 October 2012 regarding "Occupational Health and Safety Harmonisation – Progress in Western Australia". In summary, the due diligence obligations impose a positive duty on directors and officers of a PCBU to personally take

reasonable steps in relation to safety matters, including regarding workers. Also of importance is that, under the model WHS laws, a director or officer can be prosecuted for safety breaches irrespective of whether the PCBU is guilty of an offence.

Authors



Marie-Claire Foley
Partner
Perth
T: +61 8 9366 8734
E: marie-claire.foley@ashurst.com



Ashleigh Littlewood
Graduate
Perth
T: +61 8 9366 8762
E: ashleigh.littlewood@ashurst.com



Brad McLean
Lawyer
Perth
T: +61 8 9366 8057
E: brad.mclean@ashurst.com

Employment contacts

Brisbane	James Hall, Ian Humphreys, Vince Rogers	T: +61 7 3259 7000
Canberra	Jon Lovell, Paul Vane-Tempest	T: +61 2 6234 4000
Melbourne	Steven Amendola, Richard Bunting	T: +61 3 9679 3000
Perth	Marie-Claire Foley, Rob Lilburne, David Parker	T: +61 8 9366 8000
Sydney	Lea Constantine, Jennie Mansfield, Helen McKenzie, Adrian Morris, Stephen Nettleton, Stephen Woodbury	T: +61 2 9258 6000

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at aus.marketing@ashurst.com.

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. Further details about Ashurst can be found at www.ashurst.com.

© Ashurst Australia 2014. No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to aus.marketing@ashurst.com. Ref: 231147581.02 2014