

CLAYTON UTZ

National Harmonisation of Occupational Health & Safety Laws

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Overview

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Harmonisation - The Story so far...

- Separate state systems
- COAG and the IGA (signed by all states except WA)
- Panel reviews OHS laws and makes recommendations
- WRMC decides upon recommendations
- Safe Work Australia prepare model OHS legislation for adoption by all jurisdictions

Harmonisation - The Story so far....

- Model Act has been produced by Safe Work Australia ('Safe Work Act') and is to be mirrored by the states
- Once Model Act is adopted in WA, current OSH Act will cease to exist
- On track for commencement on 1 January 2012 in all States except for WA and Victoria

When will the Act commence in WA?

- State Government has written to Federal Minister Chris Evans seeking extension of commencement date
- Has also confirmed that 1 January 2012 implementation date will NOT be attainable in WA
- There will be some transitional period, but no timeframes yet

The general structure of the Model Act is:

1. Scope, objects and definition provisions
2. Duties of care and other obligations
3. Workplace consultation, participation and representation
4. Functions and powers of the regulators and inspections
5. Legal proceedings
6. Other matters



What's happening in WA?

- WA will be adopting the majority of the Model Act, with 4 exceptions:
 - Penalties
 - Union right of entry
 - Power of HSRs to cease work
 - Reverse onus of proof for discrimination matters

The Model Act - Penalties

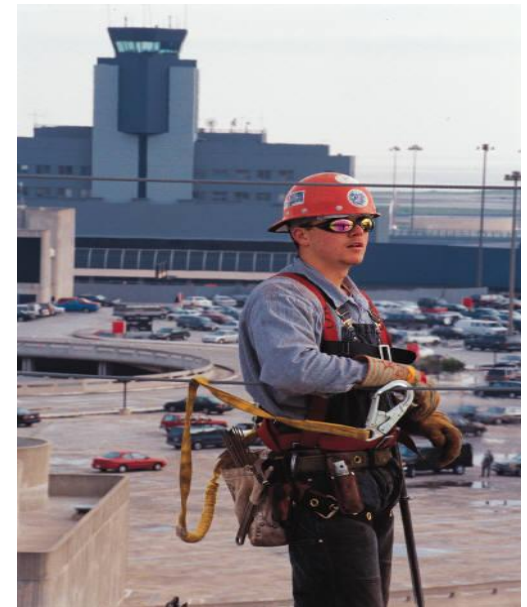
- Increased penalties for offences
- 3 categories of penalties under the Model Act
- Penalties imposed dependent on seriousness or culpability
- Seen as too punitive in WA and won't be adopted

The Model Act - Increased Penalties

Category	Description	Maximum Penalty
Category 1	Most serious cases - breach of the primary (general) duty <u>involving recklessness</u> and serious harm (fatality or serious injury) to a person or a risk of such harm.	Corporation = \$3 million Individual = \$600,000 Imprisonment - up to five years Workers and other persons = \$300,000 Imprisonment - up to five years
Category 2	Breach of the primary (general) duty where serious harm or the risk of it <u>without the element of recklessness</u> .	Corporation = \$500,000 Individual officers = \$300,000 Workers and other persons = \$150,000
Category 3	Breach of the duty that does not involve high risk of serious harm.	Corporation = \$500,000 Individual officer = \$100,000 Workers and other persons = \$50,000

The Model Act - Union Right of Entry

- Will not be adopted in WA - seen as more appropriate for workplace legislation
- Union right of entry under Model Act may be exercised to:
 - inquire into suspected contraventions; or
 - consult and advise workers.



The Model Act - Union Right of Entry

- A permit holder may enter a workplace to inquire into suspected contraventions affecting 'relevant workers'
 - No notice required prior to entry unless inspecting records (min 24 hours notice if inspecting records)
 - Notice must be given as soon as reasonably practicable after entering workplace
- A permit holder may enter a workplace to consult and advise workers if 24 hours notice given

Model Act - Employees ceasing work for safety reasons

- Right of H&S Rep to direct worker/s to cease work if believes there is imminent risk of serious injury or harm to health
- Person conducting business can then direct workers to undertake alternative work
- Not in WA!



Model Act - Reverse onus for "discriminatory conduct"

- Model Act does not impose the reverse onus of proof associated with prosecutions, which currently exists in Queensland and New South Wales
- Under the Model Act, it is an offence to engage in "discriminatory conduct" for a "prohibited reason"
- If prosecution proves that discriminatory conduct was engaged in, onus is on the accused to prove that it was not engaged in for a prohibited reason
- Won't be adopted in WA

Model Act - New or Expanded duties - Primary Duty of Care

- *'A person conducting a business or undertaking must ensure, so far as is reasonably practicable the health and safety of:*
 - *workers engaged, or caused to be engaged by the person; and*
 - *workers whose activities in carrying out work are influenced or directed by the person*

while the workers are at work in the business or undertaking.'

- Primary duty of care extends to not putting other persons at risk
- Pretty much the same as primary duty under current OSH Act

The Model Act - Primary duty of care (cont)

- The primary duty will also include but not be limited to:
 - providing and maintaining a safe and healthy work environment;
 - providing and maintaining safe plant and structures;
 - providing and maintaining safe systems of work;
 - ensuring safe use, handling, storage and transport of plant, structures and substance;
 - providing adequate facilities for the welfare of workers carrying out work for the business or undertaking;
 - providing any information, training, instructions or supervision necessary; and
 - ensuring health of workers and conditions are monitored to prevent illness or injury.

The Model Act - Primary duty of care (cont)

- Person "conducting a business or undertaking" rather than employer owes general duty
- No longer based on employer relationship
- Duty owed to "workers" rather than employees
- "Workers" includes employees, contractors, subcontractors and their employees
- "Reasonably Practicable" requirement retained but defined

Model Act - "Reasonably Practicable"

- Reasonably practicable is an element of practically almost every duty in the Model
- Means that which is, or was, at a particular time reasonably able to be done in relation to ensuring health or safety, taking into account and weighing up all relevant matters

"Reasonably practicable"

- "Relevant matters":
 - Likelihood of risk occurring
 - Degree of harm that might result
 - What the duty holder knows or ought reasonably to know
 - Availability and suitability of ways to eliminate the risk
 - Cost of eliminating the risk (Disproportionate?)



Model Act - Key changes - Positive duty of 'Officers' to exercise due diligence

- "Officers" must be pro-active in ensuring compliance
- Corporations law definition of "officer"
- Officers now have positive duty to exercise "due diligence" to ensure body complies with its obligations
- Previously officers generally only had secondary liability if their corporation was in breach and they were negligent

Model Act - Officer's duty - "Due Diligence"

To exercise "due diligence" - Officers must take reasonable steps to:

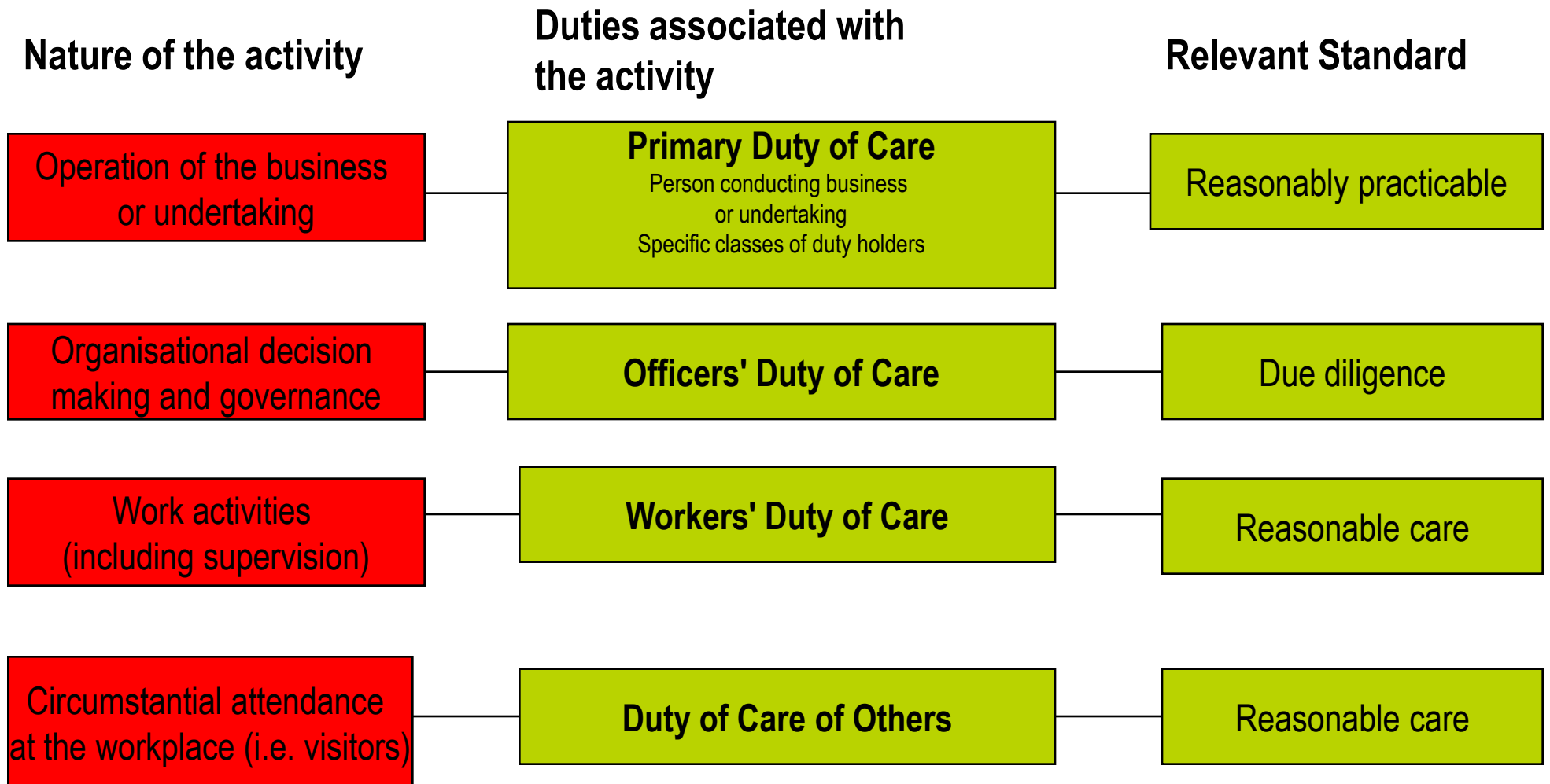
- (a) acquire up to date knowledge of health and safety
- (b) gain an understanding of the nature of the operations and its hazards/risks
- (c) ensure a body has appropriate resources/processes for hazards/risks to be identified and risks minimised

Model Act - Officer's duty of due diligence (cont)

- (d) ensure body has appropriate processes for considering information regarding incidents/hazards and responding in a timely manner
- (e) ensure body has, and implements processes for complying with any duty/obligations under the Act
- (f) verify provision and use of resources and processes in a) and c) above.

Model Act - Duties of Care

The different duties and corresponding standards of care



Consultation obligations



- Broader under Model Act
- Failure to consult is an offence
- New - Specific obligation on duty holders to consult, cooperate and coordinate activities with all other concurrent duty holders

Consultation with workers

- Share relevant information
- Provide workers with reasonable opportunity to
 - express views
 - raise issues
 - contribute to decision-making process
- Take workers' views into account
- Advise of outcomes in a timely manner
- Involve any relevant HSRs

Implications for business

- Jurisdictional carve-outs may mean incomplete harmonisation
- Implementation costs and greater risk of liability for businesses.
- Reduction in cross border regulatory red-tape for multi-state businesses
- Greater regulatory burden

Preparation for Harmonisation

- Review contracts and consider whether clauses dealing with OHS take account of harmonisation
- Review policies and procedures
- Test implementation of policies and procedures to ensure 'on the ground compliance' before the Act comes into effect



Questions?



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