

Welcome to the Changing Face of Occupational Health & Safety [OHS] in Australia

OHS in Australia is currently a complex business, as each State and Territory has its own governing legislation. In April 2008, the then Hon Julia Gillard MP (Minister for Employment and Workplace Relations), appointed an independent advisory panel to undertake a national review to guide the development of a Model OHS Act to simplify and harmonise OHS nationally. The final report following the review was released on 13 February 2009. This article outlines the changing face of OHS that is to come, should recommendations be implemented, and how you should be preparing for these changes.

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OHS is an area of business that many Companies struggle with. The complexity of the current system and associated requirements is often overwhelming for these businesses, and the penalties for not complying are significant.

Beyond avoiding penalties for not performing satisfactorily in OHS, it is important to recognise that managing safety effectively makes good business sense. Especially from financial and reputational risk management perspectives.

Being recognised as a leader in the management of OHS delivers many benefits, and can assist Companies to attract and retain talent, minimise indirect costs such as sick leave and absenteeism, improve productivity and support positioning as an Employer of Choice.

Fundamentally, managing safety is about looking after your Employees and ensuring they go home safely to their loved ones, friends and families at the end of their work day. It is about businesses treading carefully in the areas that they operate in, and minimising their negative social impact.

For those businesses that openly say they care about their Employees, being serious about safety is about demonstrating that they say what they do, and they do what they say.

Effectively managing safety relies upon a business being both proactive and reactive in safety management. For this to occur, Companies must be active in continually addressing various safety issues. However, they must be provided with appropriate guidance and motivation, provided by applicable laws.

This article outlines the proposed changes to OHS laws nationally, how it will impact your business, and how you can effectively prepare for these changes.

The proposed OHS changes

The Federal Government has been reviewing the Occupational Health and Safety [OHS] framework in Australia

with a view to implementing 'OHS Harmonisation'.

Currently every State and Territory throughout Australia adopts separate OHS legislation. With the adoption of Harmonisation a single nationally-applicable OHS Act is to be put in place, supported by Regulations and Codes of Practice.

The proposed form of the OHS Act has been determined following review of current laws. Codes of Practice will be determined by Subject Matter Experts and are currently under review. The form of the Regulations, however, is yet to be determined.

The Review Panel ['the Panel'] responsible for determining the form of the proposed OHS Act have made a number of recommendations following review of submissions on OHS Harmonisation. This review has considered submissions made by interested parties; review of the current legislative framework; and extensive consultation with interested parties including Industry Groups.

Two extensive reports in excess of 400 pages were submitted to Government by the Review Panel, outlining key recommendations.

This article outlines the key recommendations made, however it is important to note that it is not possible to outline all recommendations within the confines of this paper.

1. Duty of Care

1.1 'Reasonably practicable' duty of care

The proposed Model OHS Act (the proposed 'Act') will impose a 'Reasonably Practicable' duty of care. This is a very significant positive step as this replaces significant variations in the level of care owed around the country.

It is expected that in determining whether a reasonably practicable duty of care has been satisfied, Codes of Practice will be important reference points for minimum standards. Documentation such as position descriptions outlining roles, responsibilities and accountabilities will also be very important.

In practicality the burden of proof will rest with the Prosecution, that is, it is up to the Prosecution to determine that an offence has been committed.

1.2 Persons and entities owing a duty of care

The proposed Act specifies those persons who owe a positive Duty of Care. The Panel recommended that duties of care be specifically identified and placed on all persons and entities who are involved in the undertaking of work or the provision of things that facilitate the undertaking of work (such as tools and equipment suppliers) including:

- Persons conducting a business or undertaking a business (as defined)
- Specific classes of person providing things for work to be done
 - persons with management or control of the workplace (as defined)
 - designers, manufacturers, suppliers, installers etc of plant, substances and structures
 - OHS service providers (as defined)
- Officers of a corporation, partnership or unincorporated association, and
- Workers (as defined) and others at the workplace.

For definitions of Officers of a corporation, partnership or unincorporated association, this will align with the Corporations Act, which is expected to simplify matters and improve fairness.

2. OHS Consultation

The Review Panel is of the opinion that OHS Consultation is absolutely essential to protect the health and safety of people at a workplace, conducting work or business, and affected by the conducting of a business.

2.1 OHS committees & consultation

The proposed OHS laws will require businesses with more than 20 Employees to have an active OHS Committee through which they consult with Employees. It is expected that Management Representatives and Employees will need to be in equal measure.

Businesses will need to consider who is represented on this Committee and it is expected that the Committee should not only include Employees but Contractors and other relevant people. Logistically this may prove challenging for businesses.

For example a business who engages the services of a Contractor will need to facilitate consultation between OHS Managers as appropriate, on important issues such as the operation and requirements of both OHS management systems to ensure they are satisfied and adhered to.



2.2 Health & Safety Representatives [HSRs]

Committee Members will be known as Health & Safety Representatives [HSRs]. HSRs will need to complete a five day training course, with a one day refresher course undertaken annually. Businesses will be required to provide funding for their staff to undertake this training, with additional leave being allocated (separate to annual and sick leave) to account for time away from the workplace to undertake required training.

2.3 HSR nomination

It is proposed that HSRs will be nominated in a manner that is agreed between the business and its Employees. It is important to note that once a HSR occupies a position they may only be removed by resigning / standing down or by the business applying to the designated body to have them stood down.

Therefore, very careful consideration must be given to how HSRs should be nominated and criteria they should satisfy (for example meeting specified job requirements indicated in a position description).

2.4 Powers of HSRs

One important proposal made by the Panel is that HSRs will have the power to issue provisional improvement notices [PINs].

It is proposed that HSRs will have the power to identify corrective actions that must be made by a business to address an OHS issue. If the business does not comply with this requirement, it is proposed that a WorkCover Inspector will be able to be called to review the issue, the notice and the decision of the HSR. If the Inspector determines that the PIN is appropriate and valid action may be taken against the business such as WorkCover launching a prosecution and the business may be subject to any penalties determined as appropriate. Therefore it is important that the business carefully consider requests by the HSR as consequences of failing to do so may be significant.

3. Union Powers

The Panel has recommended that Unions be able to provide guidance and provide or obtain information on OHS matters. Unions will not, however, be able to launch prosecutions for OHS breaches.

While Unions will not be able to launch prosecutions they will, however, be able to request that proceedings be launched by WorkCover (or its equivalent regulatory body).

4. WorkCover Inspector Role

The Panel acknowledged the dual role of WorkCover Inspectors in their recommendations. The two roles are acknowledged as occupying the facilitating improvement and enforcement of legislative requirements agendas.

Wherever a WorkCover Inspector attends a workplace communication must occur with them. It is proposed that whenever a person communicates with a WorkCover Inspector when the Inspector is acting in a proactive capacity, information gained may not be used against the person in a prosecution directly related to communications if they have self-incriminated themselves. However that information may be used against the person if it becomes apparent that a subsequent breach for another issue has occurred.

In respect of communication between businesses and WorkCover Inspectors in relation to the enforcement role of

Inspectors, the Panel is of the view that many people often have a hand in managing OHS across a business and therefore the Inspector should be able to make a written submission to a business stating questions that must be addressed.

5. Enforcement

A number of enforcement measures have been recommended by the Panel.

These include:

- Information and guidance by an Inspector, HSR or Union Representative
- Issue resolution processes, which may involve an Inspector, Court or Tribunal
- The issuing of provisional improvement notices [PINs] by a HSR
- The exercise by an inspector of various prohibiting or coercive powers, including the issuing of directions and notices (including improvement, prohibition, infringement and non-disturbance notices), and prosecution of offences.

6. Penalties

One of the most significant changes that will occur should the proposed Act be implemented is the increase in the scope of penalties.

Workers will be subject to fines in the amount of half those imposed on Officers.

It is therefore recommended that indemnity insurance provisions be examined. It is noted also that the Panel

has recommended that Civil action should be able to be brought in relation to the pursuit of OHS breaches and their impacts). Therefore a significant financial risk sits with individuals and businesses who do not meet their OHS requirements.

The proposed Act increases the maximum penalty to \$3,000,000 for Companies (or their equivalent) and \$600,000 for Directors.

Although the maximum financial penalty imposed under the proposed Act is very significant, a categorisation of offence classes is proposed to be introduced, linked to the severity of the offence. The size of the penalty will be proportional to the significance of the breach.

Penalties will be imposed as either:

- Category 1
- Category 2 or
- Category 3 offence.

A positive aspect of the recommendations made is the proposed opportunity to pursue varying remedies such as providing (and implementing) a safety improvement initiative. The ability to pursue such initiatives is however not available for Category 1 offences (being the most significant).

How well are you positioned to handle the proposed OHS changes?

All businesses must meet OHS requirements set in law. This is a requirement that cannot be avoided, and OHS obligations cannot be contracted out by Companies. The consequences of not doing this are serious. As indicated in this article, there are a number of significant changes to OHS law that have been proposed by the Panel. It is noted that the majority of recommendations made have been accepted.

Whilst the Panel has recommended a very significant increase in the size of OHS penalties, this has been tempered by:

- The recommendation to impose three categories of offences
- Availability of alternate penalties for the two lesser categories
- A greater emphasis on the proactive role that WorkCover Inspectors will take.
- The shift to a 'reasonably practicable' duty of care

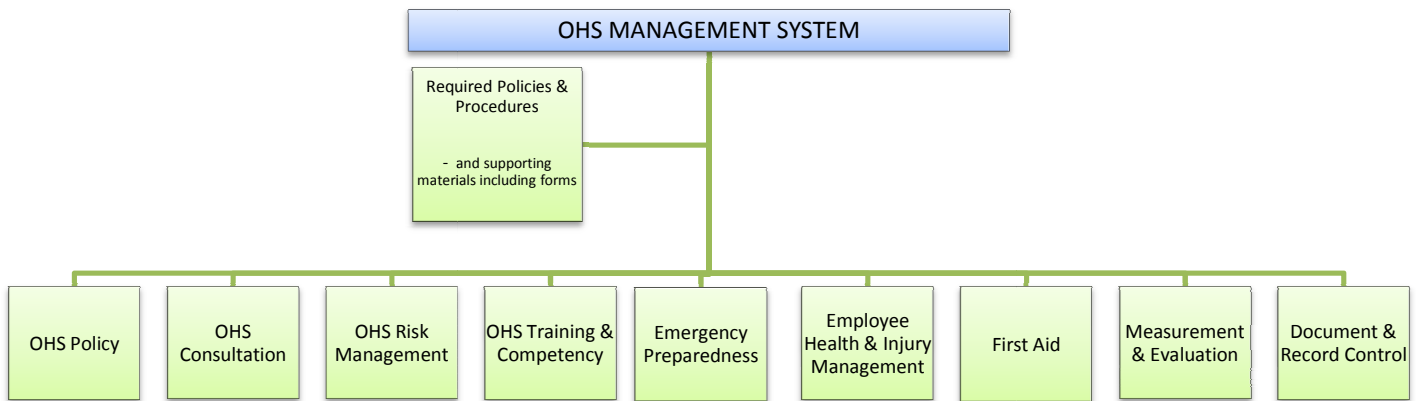
Clearly there are many significant amendments to OHS obligations and consequences that will impact on business when the changes are introduced. This is currently poised to occur in 2011.

Although proposed changes are significant, they do not herald a massive step away from how OHS should currently be managed by business, particularly when a business adopts a best practice and systematic approach to managing its OHS risks and obligations.

What is an OHS Management System and what does it look like?

In meeting OHS requirements, business is required to adopt a structured and systematic approach. The importance of this approach is increasingly being recognised by the Courts, as is the business' commitment to and track record in OHS, when handing down decisions on OHS penalties. The proposed OHS law also supports and requires the adoption of this approach.

Putting in place systematic approaches requires the implementation of an OHS management system that is periodically reviewed. This is more than hazard reporting, workplace inspections / audits and injury management conducted by businesses. The Australian Standards AS4801 outlines the Standard for OHS Management Systems. Note that the stated framework (below) is the minimum requirement for OHS and is not an exhaustive list of all required policies and procedures. Additional policies such as a Manual Handling Policy and a Fatigue Management Policy should be developed by business in response to identified risk.



Current requirements

Currently businesses are required to ensure a safe workplace and safe systems of work, free from risk of harm to safety, health and wellbeing. This applies to both physical and psychological safety, health and wellbeing.

In order to meet these requirements businesses are required to:

- Develop and implement an OHS policy
- Communicate and consult with Staff on matters relating to their safety, health and wellbeing
- Adopt risk management in their business
- Ensure Staff are appropriately trained for their roles, including their OHS requirements and responsibilities
- Have arrangements in place to handle emergencies (including first aid issues)
- Have in place an appropriate injury management program
- Monitor progress on OHS
- Ensure the effective operation of OHS programs and initiatives

Are you meeting your OHS requirements?

Ask yourself these questions:

- Is a signed OHS Policy Statement posted?
- Is there an OHS Management System?
- Is there a risk management program?
- Are applicable OHS policies and procedures in place?
- Do Employees have access to relevant Acts and Regulations?
- Do Employees and Visitors know what to do if they are injured?
- Do all people know what to do in the event of an Emergency? Is there a documented plan?
- Has a Fire Drill occurred recently (at least within last 12 months)?
- Is there an up to date 'Register of Injuries' file?
- Is a Return to Work Program posted?
- Are Return to Work Plans developed for injured workers?
- Is there a Return To Work Coordinator?
- Are all injuries reported to the Insurer within 48 hours?
- Is the first aid kit signposted?
- Is the first aid kit fully stocked?
- Is there a certified first aid attendant?
- Is there a first aid log for minor injury?
- Is there a health and safety committee?
- Are the OHS Committee meeting minutes posted?
- Has there been a workplace inspection / audit?
- Does follow-up occur to ensure hazards have been rectified?
- Have Employees been trained in OHS?
- Have training records been updated to reflect completed training?

Do you need help understanding what you could manage more effectively; systems to help you improve performance and meet legal requirements; or risk management services?

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