

Update: NSW moving closer to harmonisation - 'Duty of Care', 'Due Dilligence' and You



Written by Lucinda Smith, Director of Esteem People Management

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Currently, the Federal Government is moving towards introducing harmonised workplace health and safety laws to be administered by Safe Work Australia. This legislation is the culmination of a significant amount of work including extensive consultation with interested parties such as industry bodies and experts in the area, has incorporated the support and involvement of the Council of Australian Governments, and is set to introduce many (and significant) changes to current arrangements such as an increase in maximum penalties for OHS breaches to \$3 million for corporations.

New South Wales has recently moved towards adopting the harmonised workplace health and safety laws with the introduction of the *Occupational Health and Safety Amendment Bill 2011 (NSW)* and the associated *OHS Amendment Act 2011 (NSW)* and the *OHS Amendment Regulation 2011 (NSW)* on 7 June 2011. This is an important event as it means that elements of the harmonised Workplace Health and Safety Act - presently scheduled to be introduced on 1 January 2012 - are now in force in New South Wales as of 7 June 2011. If you presently conduct a business or undertaking in NSW, take heed. These changes affect you.

What does this mean for me? you ask. Hopefully this information will help. Essentially, the key changes brought about with the introduction of the recently introduced legislation relate to 'Due Diligence' and 'Duty of Care'.

DUTY OF CARE

Prior to the introduction of the *OHS Amendment Bill 2011 (NSW)*, an absolute duty of care was placed on employers in NSW.

The *OHS Amendment Act 2011 (NSW)* introduces the 'reasonably practicable' duty of care to the NSW landscape, and is in line with the proposed changes to be enacted with the introduction of harmonised legislation.

S. 7A of the *OHS Amendment Act 2011 (NSW)* applies to duty of care (i.e. 'the concept of ensuring health and safety') and states that:

"(1) A duty imposed on a person by this Division (or by any other provision of or made under this Act) to ensure, so far as is reasonably practicable, health and safety requires the person:

(a) to eliminate risks to health and safety so far as is reasonably practicable, and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

(2) For the purposes of this Division (or of any such other provision), in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety, all relevant matters are to be taken into account and weighed up, including:

- (a) the likelihood of the hazard or the risk concerned occurring, and
- (b) the degree of harm that might result from the hazard or the risk, and
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk, and
 - (ii) ways of eliminating or minimising the risk, and
- (d) the availability and suitability of ways to eliminate or minimise the risk, and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

In simple terms, 'duty of care' described essentially relates to risk management; which is the practice of identifying hazards, rating their level of risk, and determining (and implementing) an appropriate course of action to ideally eliminate or otherwise control (or minimise) risks in workplaces. Monitoring and evaluation is also required to ensure that no new hazards have been introduced by implemented risk control measures, and that these measures are otherwise achieving their intended outcomes.

If no structured risk management program and associated processes are in place that are monitored and continually improved, there is a fair chance that risk management is not being satisfactorily addressed. For those organisations that do have risk management programs in place, in many instances these address physical hazards in the workplace however do not adequately address psychological hazards.

The recent introduction of 'Brodie's Law' in Victoria which provides opportunity for 10 year prison terms in response to bullying; and decisions linking OHS liability to issues such as bullying (for example the May 2004 decision of the NSW Chief Industrial Magistrate in *Inspector Maddaford –v- Coleman Joinery (NSW) Pty Ltd & Or.*) highlight the importance of effective management of psychological hazards in the workplace. Potential workers' compensation costs associated with psychological injury, in addition to the potential for civil claims (and associated costs orders against both organisations and individuals such as directors) in response to issues such as harassment, bullying and discrimination also provide a solid business case for doing so.

DUE DILIGENCE

S.26 of the *OHS Amendment Act 2011 (NSW)* applies to 'Due Diligence' and specifies that officers of corporations, not simply directors, are required to exercise due diligence. In regards to who is considered to be an 'officer' it is stated that this is specified in s.9 of the *Corporations Act 2001 (Cwlth)*. S.26(1) of the *OHS Amendment Act 2011 (NSW)* states that: "If a corporation has a duty or obligation under a relevant provision, an officer of the corporation must exercise due diligence to ensure that the corporation complies with that duty or obligation".

Simply put, all officers must now ensure that they are active in supporting and facilitating the organisation in meeting its reasonably practicable OHS obligations, and must demonstrate that they have done so.

According to s.26 (2) of the *OHS Amendment Act 2011 (NSW)*, provisions apply to duties including: general duties; health safety and welfare at work related duties; consultation duties; incident and investigation duties; and any duties deemed relevant for the purposes of 'Due Diligence'.

Clearly, there are a wide range of duties which must be satisfied, highlighting the importance of adopting a structured approach the management of health and safety.

Many people are unclear about what 'Due Diligence' means, both for them and the corporations and organisations for whom they work. This is clarified by s.26(3) of the *OHS Amendment Act 2011 (NSW)* which defines 'Due Diligence' and states that this includes taking reasonable steps to:

- Acquire and maintain knowledge of workplace health and safety matters
- Gain an understanding of the nature of the trade, business operations or other corporation undertakings and general hazards and risks associated with operations
- Ensure appropriate resources and processes are made available to eliminate or minimise risks to health and safety related to work carried out as part of the conduct of the trade, business or other undertaking of the corporation
- Ensure the corporation has appropriate processes for receiving and considering information relating to incidents, hazards and risks; and responding in a timely way to that information, and
- Ensuring that the corporation has, and implements, processes for complying with any duty or obligation of the corporation relating to: notifiable incidents, consultation, compliance with notices issued under this Act, provision of health and safety training and information, and the provision of training to OHS representatives
- Verifying the provision and use of these resources and processes

'DUE DILIGENCE' PROCEEDINGS

Safety is a serious issue and this theme seems to be picked up in the *OHS Amendment Act 2011 (NSW)*, particularly in S.26(4) where it is indicated that proceedings may be commenced against a person (and the person may be subsequently convicted of an offence) even if no action has been commenced against the corporation. However, protection is afforded to volunteers (as defined by s.60 of the *Civil Liability Act 2002 (NSW)*) from prosecution in relation to any acts or omissions which are deemed to have occurred when they acted in the capacity of a volunteer, as per s.26(5) of the *OHS Amendment Act 2011 (NSW)*.

Aside from action being taken against individuals separately to corporations, the situation is also reversed for corporations. That is, s.26(6) of the *OHS Amendment Act 2011 (NSW)* specifies that liability of a corporation imposed for a failure to satisfy the relevant duty or obligation is not affected by proceedings against individuals.

The take away message here is that individuals (including officers) and corporations should not be complacent in how they deal with the issue of workplace health and safety as action may be taken against each entity, irrespective of that taken against the other.

WHAT THE CHANGES MEAN FOR YOU

The introduction of the OHS Amendment Bill 2011 (NSW) highlights the importance of workplace safety both for individuals and for organisations. Clearly, there are many duties and obligations that must be satisfied and which require the adoption of a hands-on, systematic approach in order to both meet requirements and demonstrate that efforts have been made to do so.

Seven key points to remember are:

1. Managing health and safety is complex and requires specialist expertise. Engage competent expertise to ensure you satisfy legislative requirements. This is important. The harmonised legislation specifies what constitutes a competent professional and you need to meet this requirement
2. Be proactive in managing health and safety - have a documented plan and measure performance
3. 'Duty of Care' requirements highlight the importance of adopting a structured approach to risk management
4. Although it is important to establish a budget to address risk management, items not being budgeted should not be a barrier to implementing risk management programs
5. Hazard identification, control and risk management must include both physical and psychological health, safety and wellbeing
6. Documents and records are important for organisations and individuals (i.e. officers and people with OHS responsibilities) to demonstrate they have been working towards meeting requirements in a 'reasonably practicable' manner
7. Have your systems audited by an competent independent person such as an Independent Auditor

By following these pointers you should be well on the way to satisfying the new requirements; mitigating both personal and organisational risks; and more importantly, preventing workplace injury which is the ultimate aim of all health and safety legislation.

ABOUT THE AUTHOR: Lucinda Smith is the Director and Principal of Esteem People Management. She originally qualified as an Occupational Therapist and since that time has worked for approximately ten years in and consulting to Private and Public Sector organisations. Lucinda has worked in strategic and operational capacities across a range of industries providing health, safety and rehabilitation consultant expertise. Services provided included OHS management system development and review; health and wellness strategy and program development; performance of assessments including risk, worksite and ergonomic assessments (and development and implementation of related programs); training; rehabilitation consulting; workers compensation premium management; and Expert Witness services.

REFERENCES:

Civil Liability Act 2002 (NSW) s.60 (Austl.)
Inspector Maddaford v Coleman (NSW) Pty Ltd & Or 2004 NSWIRComm 317 (Austl.)
Occupational Health & Safety Amendment Bill 2011 (NSW) (Austl.)
OHS Amendment Act 2011 (NSW) s.7A (Austl.)
OHS Amendment Act 2011 (NSW) s.26 (Austl.)