

Australian Model Workplace Health and Safety

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1 Introduction

This briefing paper aims to provide International SOS members (**Members**) with a brief update on the new work health and safety (**WHS**) laws (the **Model WHS Laws**) which have commenced operation in all Australian jurisdictions except Western Australia (who have delayed introduction of the laws until at least 2014) and Victoria (who have opted out of the scheme).

This briefing paper will focus on the Model WHS Laws as they apply to employers operating under the laws of the Australian States and Territories (that is, the majority of Australian businesses). A separate briefing paper outlines the application of the Model WHS Laws to employers operating in the Commonwealth jurisdiction (eg. Commonwealth Government agencies or departments).

The duties owed to workers under the Model WHS Laws are criminal in nature. This means that businesses and individuals that fail to discharge the duties imposed on them are exposed to criminal prosecution and, if found guilty, subject to conviction for a criminal offence.

The Model WHS Laws place onerous obligations on employers and others to take reasonably practicable steps to minimise the risk of injury or other harm to the people who work for them.

While most Members will already be familiar with how the new Model WHS laws apply in respect of workers performing work for them in Australia, this briefing paper considers the application of those laws (as they apply in the States and Territories) to:

- Australian businesses that have workers living or travelling overseas for work; and

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- international businesses that have workers travelling to, or who are based in, Australia for work.

We have also provided some guidance on the steps that may be taken by Members to ensure that they are well placed to assert compliance with any WHS duties they may owe to workers whilst travelling or based overseas for work.

¹ While the laws in Victoria and Western Australia are similar to the model WHS Laws, there are important differences and so we recommend specific advice should sought by those businesses have relevant operations with connections to those States.

Overview of the Model WHS Laws

Historically, each Australian jurisdiction (that is, the Commonwealth and each Australian State and Territory) had in place different laws that regulated work health and safety.

However, in recent years, steps have been taken to 'harmonise' health and safety laws to create a nationally consistent regulatory framework across all Australian jurisdictions. The result of this harmonisation process was the drafting of a set of Model WHS Laws which comprise:

- **The Work Health and Safety Act (Model WHS Act):** which sets out health and safety responsibilities relevant to work.
- **The Work Health and Safety Regulations (Model WHS Regulations):** which expand on the obligations imposed by the Model WHS Act and detail how certain sections of the Model WHS Act are to be complied with.
- **National Codes of Practice (Model WHS Codes):** The Codes provide practical guidance about how compliance with the obligations in the Model WHS Act and Regulations can be achieved.

Key Terminology

Australian work health and safety laws have always imposed onerous obligations to take all *reasonably practicable* steps to identify, assess and control risks to the people who work for them. This 'primary duty' remains under the Model WHS Laws however, due to changes to key terminology, this duty will more clearly extend beyond the usual employer/employee relationship.

PCBU – the primary duty-holder under the Commonwealth WHS Laws is '*a person conducting a business or undertaking*' (PCBU). The definition of PCBU is intentionally broad to extend the obligation beyond employer businesses.

worker – has replaced the term 'employee'. The term is defined broadly to include any person who works, in any capacity, in or as part of a business or undertaking. This broad definition more clearly extends the 'primary' duty owed beyond 'employees' to include contractors, labour hire employees, volunteers and apprentices, among others.

workplace – includes a place where work is carried out for a business or undertaking and includes any place where a worker goes or is likely to be while at work.

Adoption of the Model WHS Laws in the States and Territories

The Model WHS Laws have now been adopted by the Commonwealth and most² Australian States and Territories (the **Model Law Jurisdictions**).

In jurisdictions where the Model WHS laws do not yet operate, pre-existing local health and safety laws continue to apply.

While there remain some (mostly minor) differences between the Model WHS Laws as adopted in each of the Model Law Jurisdictions, the primary duty owed to workers is consistent.

² Adoption of the Model WHS Laws has been delayed in Victoria (indefinitely) and in Western Australia until at least the end of 2014.

2 Application of the Model WHS Laws overseas

Each of the Model Law Jurisdictions have been left to determine the extent to which the Model WHS Laws as enacted in their respective jurisdictions will operate outside the relevant territories geographical limits. The result is that the particular circumstances in which the Model WHS Laws will operate to workers travelling or based overseas varies from jurisdiction to jurisdiction, and so, detailed consideration should be given to the particular circumstances of each case.

Most businesses will need to review existing safety management systems, and compare that system with the duties owed under the Model WHS Laws.

However in general, the Model WHS Laws operating in most Australian jurisdictions can apply extraterritorially so that in prescribed circumstances liability extends even where elements of an offence are 'partly' or 'wholly' committed overseas.

Although the extraterritorial application of the Model WHS Laws is complex, differs between States and has not been judicially considered - it is at least arguable that;

- Australian PCBU's will owe a duty to workers, wherever they happen to be, including overseas; and
- Foreign entities with workers travelling or based in Australia will likely be governed by the State or Territory laws in which their workers travel or are based (i.e. a foreign company, with a worker performing work in New South Wales, will likely be subject to Model WHS Laws applicable to New South Wales)

Although, the Courts may ultimately adopt a narrower application, Members would be assuming a reasonable level of risk to not take steps to manage the health and safety of their workers overseas (or based in Australia in the case of foreign entities) in the absence of legal advice relevant to their specific circumstances. This is particularly so where Members have a high degree of control over the management of safety risks applicable to those workers.

What duties will be owed to workers travelling or based overseas?

Where a duty is owed to workers travelling or based abroad for work, Members will owe the same primary duty to those workers as to their Australian based workers. That is, they will be required to take all reasonably practicable steps to provide a safe working environment. However, as we explain further below, what is considered to be reasonably practicable to discharge the duty to workers while they are overseas will be impacted by (among other things) the ability of the PCBU to control or influence safety outcomes in the relevant circumstances.

As noted above, the primary duty owed to workers under the Model WHS Laws is to take steps to ensure that all workers are not exposed to risks to their health or safety. This includes:

- providing and maintaining safe work environments, plant, and systems of work;
- ensuring that workplace conditions and the health of workers are monitored to prevent illness or injury;
- ensuring that all necessary information, instruction, training and supervision is provided to workers; and
- ensuring that adequate welfare facilities are provided to workers (in this context, this may include access to clean water facilities, etc.).

In addition to these general requirements, the Model WHS Regulations impose detailed requirements for complying with the primary duty under the Model WHS Act. Of particular relevance to overseas workers are the obligations to ensure provision of each of the following:

- **general workplace facilities** that take into account the space and layout of a workplace, lighting, ventilation, any extreme temperature conditions, access to adequate toilets, as well as washing and eating facilities;
- **adequate first aid equipment** and access to trained first aiders;
- **emergency** plans containing appropriate emergency procedures including in relation to emergency response, evacuation, and the provision of medical treatment and assistance. Again these procedures must have regard to the nature of the work, the nature of the hazards connected to the work, and the size and location of any relevant workplace;
- **isolated worker arrangements** - which includes developing an effective method of communication with workers who are isolated from access to medical assistance; and
- **proper information, instruction and training** which is suitable having regard to the nature of the work carried out by the worker, the nature of the risks associated with that work and any control measures that have been implemented. This training is required to be provided in a way that is readily understandable to the relevant worker.

The duties owed to workers under the Model WHS Laws are criminal in nature. This means that businesses and individuals that fail to discharge the duties imposed on them are exposed to criminal prosecution and, if found guilty, subject to conviction for a criminal offence.

What is required to assert compliance?

Most duties owed under Model WHS Laws are qualified by the legal standard of what is 'reasonably practicable'.

The term 'reasonably practicable' requires duty holders to only take those steps which are reasonably able to be done, having regard to and weighing up:

- the likelihood of the relevant hazards or risk occurring;
- the degree of harm that might result from the hazard or risk;
- what the person knows about the hazard or risk and the ways of eliminating or minimising the risk; and
- the availability and suitability of ways to eliminate or minimise the risk.

After assessing the extent of the risk and the ways the risk could be eliminated or minimised, the associated costs must be considered, including whether the cost is grossly disproportionate to the risk (which is a very high threshold).

This means that where Members do owe a duty to overseas workers, the measures required to be taken to discharge the duty will be impacted on what can reasonably be done in the circumstances.

What happens when more than one PCBU owes a duty?

Given the broad definitions of 'PCBU', 'worker' and 'workplace', there is likely to be overlap between the duties owed by one PCBU, and those owed by others. In these circumstances, the Model WHS Laws provide that each duty holder must discharge their obligation to manage risks so far as reasonably practicable. However, what is required to discharge the duty will be impacted by the extent to which each party is able to 'control' or 'influence' the relevant safety matter.

In these circumstances both duty holders are required to consult and cooperate with each other in order to achieve coordinated safety outcomes.

3 Action plan for assessing and meeting compliance

For those Members that owe duties to workers who travel to or who are based in overseas jurisdictions, preparing the business to comply with the new Model WHS Laws is likely to include the following:

1 Identifying duties applicable to workers travelling or based in Australia and overseas

Since different laws operate within Australia, Members should identify which Model WHS laws are likely to be applicable to their business activities and identify the workers to whom a duty is owed (including employees, volunteers and contractors).

2 Identifying relevant stakeholders and review consultation, co-operation and co-ordination arrangements

It will be important to consider whether current consultation arrangements are adequate to allow for consultation with all 'workers' to whom a duty is owed about the risks associated with their work overseas. Systems should also be in place to identify other PCBU's with whom a duty may be shared and ensure consultation occurs with those other duty-holders (such as host employers overseas) to achieve a co-ordinated approach to managing safety risks applicable to workers based or travelling overseas.

3 Undertaking a gap analysis

Most businesses will need to review existing safety management systems, and compare that system with the duties owed under the Model WHS Laws. This will identify any 'gaps' in the system that require improvement in order to achieve compliance.

4 Updating policies and procedures

Policies and procedures should be updated where gaps are identified. In the context of overseas workers, particular attention may need to be paid to:

- *Hazard identification* and control procedures: among other things, these should contemplate risks to workers that are likely to arise when they are travelling or based in overseas jurisdictions (e.g. security, immunisation etc).
- *Training Procedures*: these should be targeted at ensuring the provision of necessary information, instruction and training for workers to understand the particular risks associated with their work overseas and the control measures in place to enable them to perform their work safely and in safe conditions.
- *Welfare facilities*: arrangements should be in place to ensure that workers abroad have access to adequate facilities (including access to drinking water, washing and eating facilities).

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- *Emergency plans*: should be reviewed to ensure that the business can respond to emergencies involving overseas workers. This will include evacuation procedures and processes for ensuring access to appropriate medical assistance as required.
- *Procedure for isolated workers*: arrangements should be in place to ensure that workers in locations remote from access to medical assistance are provided with effective means of communication.

5 Identify 'officers' of the business and assist them to meet due diligence requirements

It will be important to identify which individuals in the business are 'officers' under the legislation and ensure that appropriate governance arrangements are in place to assist those officers to exercise 'due diligence'. This will likely require training officers about their personal duty and the safety duties owed by the business, as well as the establishment of regular reporting to officers on the measures in place to manage health and safety requirements.



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