EMPLOYMENT MATTERS

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THE WORK CHOICES ACT—WHAT DOES IT MEAN FOR OCCUPATIONAL HEALTH AND SAFETY?

While the Work Choices Act 2005 makes significant changes to existing industrial relations laws, the effect on State and Territory occupational health and safety laws is far less dramatic. However, there are some matters which employers need to be aware of to ensure that they comply with both the new changes and existing legislation.

Existing State and Territory occupational health and safety laws, including union rights of entry pursuant to the occupational health and safety laws, are specifically preserved by the Work Choices Act.

While union representatives will also have rights of entry pursuant to the Workplace Relations Act, the Australian Industrial Relations Commission may refuse to issue an entry permit where the rights of entry have already been cancelled or suspended by a Court or Tribunal pursuant to a State or Territory OH&S law. Once issued, a permit may be revoked or suspended if the holder has, in exercising a right of entry under an OH&S law, engaged in conduct that was not authorised by that law.

Further, any union right of entry is subject to the employer's reasonable occupational health and safety requirements that apply to the premises.

The Commission will still be required to take account of State and Territory occupational health and safety and/or workers compensation laws in exercising its powers.

Any action by an employee (such as a refusal to work) that is based on a reasonable concern about an imminent risk to health and safety is not 'industrial action' for the purposes of the Work Choices Act.

However, any employee who is party to a dispute resolution process with his or her employer must continue to work unless he or she has a reasonable concern about an imminent risk to their health or safety.

The employee's right to refuse to perform work is subject to:

• proving that he or she had a reasonable concern about health and safety; and

• complying with a reasonable direction from the employer to perform other available work.

In directing an employee to perform other available work, the employer must have regard to applicable OHS laws that apply to that other work, and to whether it is appropriate for the employee to perform.

NEW SOUTH WALES WORKPLACE DEATHS LAWS

Pursuant to recent changes to the New South Wales OH&S legislation, an offence is committed by an employer whose recklessness causes a workplace death. It is punishable by a fine of up to $1.65 million or five years' imprisonment.

The offence was introduced by amendments to the Occupational Health and Safety Act 2000 (the Act) enacted by the Occupational Health and Safety Amendment (Workplace Deaths) Act 2005, and came into effect on 15 June 2005. The offence is committed where any person who owes a duty under the existing provisions of the Act with respect to the health and safety of another person (the deceased):

• is guilty of conduct that causes (or substantially contributes to) the death of the deceased; and

• is reckless as to the danger of death or serious injury to any person to whom the duty is owed that arises from that conduct.

Where the employer is a corporation, 'any director or other person concerned in the management of the corporation' is also taken to owe the duty. Furthermore, as the offence applies to all those who have existing duties under the Act, it affects not only employers, but also those who have control of work premises, and those who design, manufacture or supply any plant or substance for use by people at work.

Prosecutions for the offence may only be commenced by a WorkCover inspector, or by a party with the written consent of the Minister. The initial draft of the Amending Act allowed the unions to prosecute as well. However, this was removed following strong opposition from employer groups. Still, WorkCover is required, upon request, to provide its reasons in writing to a union where it elects not to prosecute.

An employer will be able to successfully defend a prosecution, which will be heard before the Industrial Relations Commission in Court Session, if they can prove that there was a reasonable excuse for the conduct. The employer will also be able to defend the proceedings on the basis that it was not reasonably practicable for them to comply, or that the commission of the offence was due to causes over which the employer had no

control and against the happening of which it was impracticable for the employer to make provision.

The maximum penalty for a corporation for committing the offence is $1.65 million, and for an individual it is $165,000 and/or five years' imprisonment. Where an individual is found guilty of the offence and a term of imprisonment is imposed, the individual is entitled to appeal by right to the Court of Criminal Appeal.

VICTORIAN OCCUPATIONAL HEALTH AND SAFETY ACT 2004—EMPLOYERS BEWARE

The Occupational Health and Safety Act 2004 came into effect in Victoria on1 July 2005. It includes far–reaching amendments to the individual and corporate liability of employers and corporate officers.

In recent times, WorkSafe Victoria has significantly increased its numbers of field inspectors and they have expanded powers under the new Act. Fortunately, inspectors will also assume the roles of 'educators' in respect of the amendments and are expected to assist employers to ensure compliance.

The amendments to the Act principally fall into five categories:

Personal Liability for Company Directors and Officers

From 1 July 2005, directors, company secretaries and senior managers may be liable to prosecution for a breach of the Act if that breach can be attributed to that person 'failing to take reasonable care'. This could occur whether or not the employer is prosecuted and penalties for convictions include fines and gaol terms.

Higher Penalties

The maximum fines for breaches of the Act have increased by over 250% to $920,250 for companies and $184,050 for individuals. There are also a number of other sentencing options available to the court in addition to or instead of fines.

Increased Powers for Inspectors, Employees and Unions

WorkSafe inspectors will have the power to:

• apply to the Magistrates Court for search warrants in relation to an employer's premises. (Although we have been assured by WorkSafe this will only occur in a very limited number of cases and with the approval of its CEO);

• arrest any person apparently having possession, custody or control of any article or thing that is the subject of a search warrant; and

• issue infringement notices and fines to employers and occupiers for breach of the Act.

Union representatives who have obtained the required certification from the Magistrates Court will have the power to enter a workplace to investigate a suspected contravention of the Act. While it will be an offence for an 'authorised representative' of the Union to use the investigative powers for an improper purpose, they need only establish a 'reasonable suspicion' of a contravention of the Act as a defence.

WorkSafe has established a response protocol to deal with any issues arising between union representatives and employers on the spot. A 'hotline' (ph: (03) 9641 1967) has been set up for that purpose.

Increased Obligations for Employers

These include:

• imposing a specific duty on employers to consult with their employees and contractors (including any employees of the contractors) in relation to health and safety issues that affect them directly;

• making it an offence to discriminate against an employee who is involved in or assists with or raises health and safety issues in the workplace; and

• imposing a duty on employers to do everything that is 'reasonably practicable' to ensure their employees' health and safety at work and setting out the factors to be taken into account.

Designers of Buildings and Structures

From 1 July 2006, all designers of buildings and structures to be used as workplaces must ensure that they are designed to be safe and failure to do so may result in prosecution and a hefty fine.

Conclusion

The amendments encompassed by the new Act are yet to be tested in Victorian Courts and it remains to be seen as to how they will be enforced by WorkSafe. However, the experience interstate suggests that WorkSafe will operate on a 'zero tolerance' policy for serious breaches of the Act and offenders can expect severe penalties.

Accordingly, it is now more important than ever for employers to:

• make sure their company's OH&S policies and practices are audited and up to date;

• develop a company–wide strategy for dealing with WorkSafe; and

• seek assistance and advice if they are unsure.

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