ORGANISATION

Work health and safety

Directors have a legal duty to implement and monitor systems to ensure safe working conditions in their workplaces as far as reasonably practical. In nearly all Australian jurisdictions, there is a positive obligation on directors to exercise due diligence in relation to work health and safety (WHS). Directors can be personally liable for breaches of this duty and the penalties extend to possible imprisonment and very substantial fines. Good governance practice ensures that every board meeting has WHS as a topic on the agenda.

What laws regulate work health and safety?

Each state and territory has its own work health and safety laws. Directors ought to check the rules in their organisation's jurisdiction. In an attempt to harmonise work health and safety Australia-wide the Workplace Relations Ministers' Council endorsed the introduction of national harmonised work health and safety laws based on a model Work Health and Safety Act (the Model Act) in 2009.

A review of the model WHS laws occurred in 2018 and changes are expected to be considered later in 2019 or 2020. Marie Boland found that the model WHS laws are largely operating as intended but identified a number of areas for improvement.

The review made 34 recommendations in total, including, notably, that the Model Act be amended to prohibit access to insurance for payment of WHS fines and to create a new offence of industrial manslaughter.

In its submission, the Australian Institute of Company Directors supports robust laws that ensure the health and safety of employees in workplace. However, the AICD submitted that the introduction of an industrial manslaughter offence is not necessary as the model WHS laws are rightly focused on prevention and deterrence rather than punishment. Further, it is critical that directors and officers continue to be able to rely upon D&O insurance for legal costs.[1]

1. L Petschler, 2019, *Consultation RIS: 2018 Review of the WHS Laws*, [letter], AICD, 5 August, **https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/policy/pdf/2019/aicd-submission-consultation-ris-2018-review-of-whs-laws.ashx**, (accessed 5 December 2019).

One clear message from the review is related to the difficulty of having consistency across state jurisdictions for a matter that really ought to be treated nationally by cooperation between jurisdictions. Currently, laws based upon the Model Act operate in the Commonwealth (*Work Health and Safety Act 2011*), the ACT (*Work Health and Safety Act 2011*), New South Wales (*Work Health and Safety Act 2011*), South Australia (*Work Health and Safety Act 2012*), Tasmania (*Work Health and Safety Act 2012*), the Northern Territory (*Work Health and Safety (National Uniform Legislation) Act 2011*) and Queensland (*Work Health and Safety Act 2011*). Western Australia (*Occupational Safety and Health Act 1984*) is in the process of introducing the vast majority of the Model Act.

The exception is Victoria, where the government has stated that it will not be joining the harmonised model so the Victorian *Occupational Health and Safety Act 2004* will continue to apply in that State.

There are Work Health and Safety Approved Codes of Practice that provide practical guidance to support the Model Act. These Codes are not mandatory and an equivalent means of providing the same level of health and safety is acceptable. However, the Codes of Practice have evidentiary value in court and therefore they are useful to observe and incorporate as a minimum standard of good governance.

What must a company do?

Under the Model Act, 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.

More specifically, a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable:

- the provision and maintenance of a work environment without risks to health and safety;
- the provision and maintenance of safe plant and structures;
- the provision and maintenance of safe systems of work;
- the safe use, handling and storage of plant, structures and substances;
- the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;
- the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

What does reasonably practicable mean?

The duty to ensure health and safety under the Model Law requires an organisation to eliminate risks to health and safety so far as reasonably practicable. If it is not reasonably practicable to eliminate risks, then the duty is to minimise those risks as far as reasonably practicable.

In determining what is reasonably practicable, it is necessary to take into account and weigh up all the relevant matters, including:

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

Which workers are covered?

The Model Act has a wider definition of 'workers' to be covered than that previously required pursuant to the former State and Territory legislation. There is now a duty to ensure the safety of the following workers:

- an employee;
- a contractor or subcontractor;
- an employee of a contractor or subcontractor;
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking;
- an outworker;
- an apprentice or trainee;
- a student gaining work experience; or
- a volunteer.

How does a director exercise due diligence?

If a person conducting a business or undertaking has a duty or obligation under the Act, an officer (including a director) of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation. Due diligence includes taking reasonable steps:

- to acquire and keep up-to-date knowledge of work health and safety matters;
- to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations;
- to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking;
- to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and
- to verify the provision and use of the resources and processes referred to above.

This is a positive duty requiring directors to be proactive. It means that directors owe a continuous duty to ensure compliance with duties and obligations under the Model Act. There is no need to tie a director's failure to any particular failure or breach of the relevant person conducting a business or undertaking for the director to be prosecuted.

Traditionally, the courts have held that an employer's duties are very high and, accordingly, the due diligence defences are difficult to establish. The point has been made in a number of cases that 'all due diligence' contemplates a 'mind concentrated on the likely risks'.

Not only do directors need a safety management system, they also need to receive enough information to ensure it is being complied with. Businesses possess a lot of data that could inform the board about WHS – such as bullying and harassment complaints, near-misses data and culture surveys, information from exit interviews, the number of resignations and what happens when someone complains about their boss – but it's often not presented in a WHS context. Nonetheless, directors are beginning to understand what they require and are asking for this information.[2]

Can a director be liable even though remote from day-to-day operations?

The short answer is yes. By definition, directors become further removed from day-to-day operations when a company becomes larger as it is their duty to focus on wider strategy and compliance, not to manage the day to day activities of the company. Nevertheless, liability may follow where directors play a limited direct role in the operation of the business. This will happen where directors leave the decision making to management but without at the same time making consistent and on-going enquiries aimed at ensuring that management was both capable and competent of discharging the company's statutory obligations as to safety (see, for example, *James v Paul* (No 2) (2011) NSWIRComm 117).

2. C Niesche, 2018, "Is your organisation's WHS policy up to scratch?", *Company Director*, 27 September, **https://aicd.companydirectors.com.au/membership/company-director-magazine/2018-back-editions/october/whs**, (accessed 7 May 2019).

What are the sanctions for breach of duty?

Under the Model Act, where a director commits a breach involving recklessness that exposes an individual to death or serious injury or illness, the penalty can be up to a fine of $600,000 and/or five years' imprisonment. For these serious offences, the prosecution must prove that the conduct was engaged in without reasonable excuse. 'Reasonable excuse' encompasses a concept similar to reasonable practicability. This means that the prosecution needs to prove beyond reasonable doubt that the defendant exposed a person to risk where it was reasonably practicable for the person not to have done so.

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In recent years, Queensland and the Northern Territory have introduced industrial manslaughter laws. The new laws add another avenue for prosecution in the event of a workplace death, with lengthy prison sentences (up to 20 years in Queensland, and life in the Northern Territory) and fines of up to $10 million for companies. The ACT also has an industrial manslaughter offence that sits outside its WHS legal framework.

Additionally, it should be noted that the Victorian and Western Australian governments have introduced bills that include an industrial manslaughter offence.

About us

The Australian Institute of Company Directors (AICD) is committed to strengthening society through world-class governance. We aim to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. Our membership includes directors and senior leaders from business, government and the not-for-profit (NFP) sectors.

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