

No consensus on national OHS Act

While the aim of the new national OHS Act is to simplify compliance, it seems to date that its main impact has been to generate division

SYDNEY: Experts are divided on whether new occupational health and safety laws based on a national model Act will bring “a race to the bottom” or much needed clarity for employers. Either way, there is at least agreement that the changes are going to have a big impact on employers and unions in New South Wales.

On October 27 at the annual Safety Conference a line-up of eight experts, including lawyers, Professor Ron McCallum, chair of Safe Work Australia, WorkCover NSW’s general manager and Comcare general manager of prevention and rehabilitation will discuss the biggest reform of OHS laws in 30 years. However, even before the panel of heavy hitters representing unions, employers, academics and the regulator speaks, the battle lines will have been well and truly drawn.

Three key issues are set to dominate discussion: the burden of proof; personal liability of company officers; and the impact of prosecutions. Neil Foster, senior law lecturer at the University of Newcastle, maintains personal liability is at the heart of the changes. “The harmonisation process seems to have been driven by directors’ fears of personal liability and the hope that there would be some watering down of the laws,” he claimed. “In my view, the model Act inappropriately waters down the personal responsibility of company officers, although I do support some of the proposed changes in this area, including the acknowledgement that the officer has obligations to exercise due diligence to protect the workers. But with the change to the current onus of proof provisions, it is quite possible that guilty people will now escape justice.”

Michael Tooma of law firm Deacons, who will moderate The Safety Conference’s harmonisation panel discussion, said that while current state laws differ in their approach to personal liability of officers, all will be reshaped by the proposed model Act. “Despite the range of liabilities, all have one thing in common – the officer will be personally liable only if their company commits an offence. The new regime does not require this,” he explained “Under the approval recommendations for the new OHS laws, officers will be liable if they fail to exercise due diligence. That is, the duty has been recast as a positive obligation on officers to proactively ensure compliance with OHS laws, rather than an attributed liability in the event of a breach by the company. This is a landmark shift in approach which will have a significant impact on OHS enforcement and compliance.”

The definition of “due diligence” may also be contentious. “The Workplace Relations Minister’s Council (WRMC) did not approve the recommendation for a definition of due diligence,” Tooma said. “The Committee had recommended that due diligence be defined in line with existing case law on its meaning, drawn largely from NSW where the term has been in use for almost 30 years. “Instead, WRMC preferred to rely on the courts to interpret due diligence. Practically, that means that the true harmonisation of the scope of the personal liability of officers may have some way to go as each State Court and Territory Court attempts to interpret due diligence in the context of the case before it, until a case is brought to the High Court so that an authoritative determination of that term is made which is binding on all State and Territory Courts.”

Meanwhile, Michael Selinger of Holding Redlich Lawyers has pointed out that company officers found guilty will face increased penalties, rising from the current maximum in NSW of two years in prison or fines of \$55,000 to fines of up to \$600,000 for an individual and five years in prison.

New South Wales employers, however, may enjoy some relief as the burden of proof shifts to prosecutors. “The new model Act will have a more significant impact on NSW employers than those in any other states because it is largely based on the Victorian and Queensland Acts,” Selinger said. “For NSW, the onus of proof will move away from the employer as a result of the inclusion of the qualifier ‘reasonably practicable’ in the general duty to ensure safety under the Act. When it comes to proving liability, the prosecutor will now need to show the employer has not taken all reasonable steps to prevent injury. “In 95 per cent of cases, shifting the burden of proof to the prosecutor will not affect the outcome. This is because when an injury occurs, employers examine the workplace to see what actions need to be taken to prevent a recurrence. By doing that, they show there were reasonable steps that could have been taken, which makes it easier for the prosecution to prove liability. To some extent, there has always been this tension between trying to improve the safety system and protecting your legal position.” According to Selinger, the legislation in NSW has historically been enforced more vigorously than in other jurisdictions, but most regulators only initiate a prosecution if it is in the public interest and they have a good prospect of success.

“Under the new Act, there is likely to be more of an emphasis on education and co-operation between the regulator and business,” he said. “We will not really know the answer to whether there’s likely to be fewer prosecutions until the new Act is implemented – at the end of the day, how it is enforced will be the key factor.

The regulator will still have plenty of enforcement tools and there is likely to be a uniform enforcement policy applied across the country.” On the other hand, Neil Foster believes the onus of proof belongs with employers. “The model Act has been legitimately described as a ‘race to the bottom’,” he said. “The onus of proof should be placed on employers because they have the greatest control over safety: how hard people work; safety procedures; how money is spent; and safety policies.

There is still a lot of carelessness in workplaces and WorkCover sensibly doesn’t launch prosecutions unless there is a good chance the employer is guilty and hasn’t taken reasonable precautions. I think the NSW safety system has been working well.” Henry Davis York special counsel, Scarlet Reid, said the impact of reversing the onus of proof is uncertain. “From a practical perspective, this could make convictions more difficult to obtain in New South Wales. In the absence of any changes that stipulate which courts hear prosecutions at first instance, it remains to be seen if this is in fact the case. It is questionable as to whether real uniformity can be achieved without examining this important issue.”

According to Reid, employers were likely to benefit from other changes under the proposed model Act. “Defendants in NSW and Queensland should benefit from the proposed expanded appeal rights,” she said. “Defendants in NSW may also find comfort in the proposal to abolish the prosecutor’s right to appeal against an acquittal.” If, indeed, employers are the winners under the changes, unions, which will lose the right to launch prosecutions, are protesting vigorously against the proposed model Act, claiming it would be detrimental to safety. Foster agrees. “The changes to be brought in under the harmonisation process send a message from government to employers – safety has been too tough and we’re not so worried about it anymore,” he said. “It’s very sad.