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workplace relations | law alert

Important changes to NSW occupational health and safety law

The NSW Government has announced important changes to the NSW *Occupational Health & Safety Act 2000*, which are intended to bring NSW occupational health and safety law broadly in line with the law operating in the other Australian states. The proposed changes are expected to commence on 1 October 2006.

The key changes include:

- moderating the duty of care imposed on employers to take “reasonably practical” steps to ensure workplace safety;
- requiring workers to take reasonable care for their own safety as well as the safety of others;
- providing that directors and officers will no longer be liable for workplace safety law breaches over which they have no control; and
- introducing the ability for WorkCover to enter into enforceable undertakings and agreements with persons who have breached safety law, to be used in some circumstances instead of prosecution.

The changes modelled on the Victorian provisions mean that an employer’s responsibility to provide a safe workplace will only extend to taking steps which are “reasonable practical” instead of the current position requiring the employer to take all steps to ensure safety of a workplace. The amendments to the OH&S Act also include an explanation that a duty to “ensure health and safety” means to reduce the risk to the lowest level that is reasonably practical and to outline the factors to be considered in determining whether a particular course of action or control measure is “reasonably practical” including:

- what is known or ought reasonably be known about the hazards giving rise to the risk concerned;
- the likelihood of the risk eventuating;
- the degree of harm that would result if the risk eventuated;
- what is known, or ought reasonably be known, about the ways of eliminating or reducing the risk;
- the availability and suitability of ways to eliminate or reduce the risk; and

- the cost of eliminating or reducing the risk.

Consistent with the existing laws of the Commonwealth and other states, a specific duty will be introduced requiring employees to take care for their own safety at work as well as the safety of others.

Directors and officers will now only be liable for workplace safety law for matters under their control, removing the existing anomaly that persons who may not necessarily be in a position of real influence within a corporation may be caught under existing provisions. The new provisions will only apply to an officer in cases where their own failure to “take reasonable care” has led to a contravention occurring.

As an alternative to prosecution for breach of occupational health and safety law, a system of voluntary undertakings and agreements by employers to take preventative or proactive steps to prevent breaches will, in certain circumstances, be used instead of prosecution whilst the undertaking is in force or after it has been satisfactorily fulfilled by the employer.

Whilst employer groups have welcomed the proposed changes to the Act, employer groups warn that a provision which only exists in NSW OH&S law permitting unions to launch OH&S prosecutions and retain half of any fines imposed by the Industrial Court remains a provision which has been described by the NSW Opposition as “bounty hunting”.

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