



Australian Model Workplace Health and Safety Laws Commonwealth



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 which have commenced operation in the Commonwealth (and now in most Australian States and Territories) (the **Model WHS Laws**).

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

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 Commonwealth) to entities which have workers living or travelling overseas for work.

We also provide 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 traveling or based overseas for work.

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.

1.1 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 Model WHS Codes provide practical guidance about how compliance with the obligations in the Model WHS Act and Model WHS Regulations may be achieved.

The Model WHS Laws have now been adopted by the Commonwealth and, for reference, most Australian States and Territories (the **model law jurisdictions**).¹ In jurisdictions where the Model WHS Laws do not yet operate, pre-existing local health and safety laws continue to apply.

1.2 Key Terminology

Australian work health and safety laws have always imposed onerous obligations on employers to take all *reasonably practicable* steps to identify, assess and control risks to those 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 Model 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.²

¹ Adoption of the Model WHS Laws has been delayed in Victoria (indefinitely) and in Western Australia until at least the end of 2014.

² Section 5, Work Health and Safety Act, 2011 (Cth).

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.

1.3 The Commonwealth jurisdiction

On 1 January 2012, the *Work Health and Safety Act 2011 (Cth)* (**Commonwealth WHS Act**) and the *Work Health and Safety Regulations 2011 (Cth)* (**Commonwealth WHS Regulations**) commenced operation and gave effect to the Model WHS Laws in the Commonwealth (**Commonwealth WHS Laws**). The Commonwealth WHS Laws have replaced:

- the *Occupational Health and Safety Act 1991(Cth)*;
- the *Occupational Health and Safety (Safety Standards) Regulations 1994 (Cth)*; and
- the *Occupational Health and Safety (Safety Arrangements) Regulations 1991 (Cth)*.

In addition, the *Occupational Health and Safety Code of Practice 2011* (which adopts the Model WHS Codes currently released) will replace the *Occupational Health and Safety Code of Practice 2008*.

1.4 Who do the Commonwealth WHS Laws apply to?

The Commonwealth WHS Laws only apply to those businesses or undertakings conducted by either:

- the Commonwealth;
- Commonwealth Public Authorities; and
- for a transitional period, a small number of companies referred to as ‘non-Commonwealth licensees’.³

³ ‘Non-Commonwealth licensees’ refers to a very limited number of Australian national employers who have been granted a self-insurance licence for workers’ compensation by the Safety, Rehabilitation and Compensation Commission (SRCC). A list of this limited number of employers can be found on the Comcare website. The intention of the Federal Government was that self-insured licensees would be moved out of the Commonwealth jurisdiction when harmonisation across all jurisdictions was achieved. However, since harmonisation has been delayed it is not clear when (or if) this may occur. If it does, those employers will become subject to State and Territory based WHS legislation depending on where they operate. There are currently 30 licensees under the SRC Act. For a full list see: http://www.srcc.gov.au/self_insurance/current_licensees.

For all other businesses, State and Territory WHS laws are likely to apply. As noted above, application of those State and Territory laws are discussed in a separate briefing paper.

1.5 Key changes

The adoption of the Model WHS Laws by the Commonwealth has resulted in a number of significant changes to the law in that jurisdiction, including:

- the Crown can be held ‘criminally’ liable for offences;
- a new requirement has been introduced for duty holders who share safety obligations with others, to consult and cooperate with each other to achieve a coordinated approach to managing safety matters;
- a new ‘positive’ duty has been imposed on officers of a PCBU to exercise ‘due diligence’ to ensure that the PCBU does not breach its duties under the Model WHS Act.⁴ A maximum penalty of \$600,000 and/or 5 years imprisonment can be imposed on officers proven to be in breach of this duty; and
- there is a significant increase in penalties. The maximum penalty for the most serious offences committed by a PCBU will increase to \$3 million per offence.

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

⁴ ‘Officer’ means an ‘officer’ as that term is defined under section 9 of the Corporations Act 2001 as well as an officer of the Commonwealth or a Commonwealth Public Authority.

2 Application of Commonwealth WHS Laws overseas

Whether the duties owed to workers under the Commonwealth WHS Laws will extend to workers travelling abroad is a complex issue, and detailed consideration should be given to the particular circumstances of each case.

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

The Commonwealth WHS Laws expressly state that:

- It will apply to Australia's external territories;⁵ and
- the extraterritorial provisions under *Criminal Code Act 1995 (Cth)* (**Criminal Code**) will apply to criminal offences under the Commonwealth WHS Laws.⁶

Consequently, Members who owe duties under the Commonwealth WHS Laws may be liable for breaches of criminal offences if they have failed to meet their legal duties, even where that offence is committed:⁷

- partly in Australia, or on an Australian aircraft/ship; or
- wholly outside Australia and the result of the conduct occurs wholly or partly in Australia or on an Australian aircraft/ship; or
- wholly outside Australia but the offender is an Australian citizen or a body incorporated under a law of the Commonwealth or the States or Territories.

⁵ Section 11, Work Health and Safety Act 2011 (Cth).

⁶ Section 12F, Work Health and Safety Act, 2011 (Cth).

⁷ Section 15.1, Criminal Code Act 1995 (Cth).

2.1 Do the Commonwealth WHS Laws apply in relation to workers travelling to or based overseas for work?

Although the answer to this question is complex and has not been judicially considered, it is at least arguable that those businesses or undertakings conducted by the Commonwealth, Commonwealth Public Authorities and non-Commonwealth licensees will owe a duty to workers, wherever they happen to be, including overseas. This appears to be consistent with the view taken by the regulator, Comcare.⁸

Comcare, the relevant health and safety regulator for the Commonwealth, has recently published the following guidance material:

The Work Health and Safety Act 2011 (Cth) (WHS Act) and the Work Health and Safety Regulations 2011(Cth) (WHS Regulations) have extraterritorial application overseas under s12F(3) of the WHS Act, which is supported by s15.1 of the Criminal Code Act 1995 (Criminal Code).

Therefore, offences against the WHS Act and/or the WHS Regulations committed by Australian citizen workers or a Commonwealth/Commonwealth Authorities/Non Commonwealth Licensees outside Australia would be covered by the WHS Act and WHS Regulations, provided the relevant factors in s15.1 of the Criminal Code are met.

While Courts may ultimately adopt a narrower application of the law in particular circumstances – given the position of the regulator, Members would be assuming a reasonable level of risk to not take steps to manage the health and safety of their workers overseas 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.

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 limitations on the Members to control or influence safety outcomes in the relevant circumstances.

⁸ See Comcare publication “*Extraterritorial Application of the Work Health and Safety Act, 2011*” which is available on the Comcare website <https://www.comcare.gov.au>

2.2 Do the Commonwealth WHS Laws apply to international companies with workers travelling to or based in Australia?

As we discuss above at 1.4, the Commonwealth WHS Laws only apply in relation to a very limited category of duty-holders.

This will not include any foreign entities, and so the duties owed under the Commonwealth WHS Laws will not apply to them.

However, foreign entities with workers travelling or based in Australia may nevertheless be governed by the State or Territory laws in which their workers travel or are based. The application of State and Territory WHS laws are considered in a separate briefing paper.

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

As noted above, the primary duty owed to workers under the Commonwealth 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 Commonwealth WHS Regulations impose detailed requirements for complying with the primary duty under the Commonwealth 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, the size and location of any relevant workplace;
- **isolated worker arrangements** - this 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 Commonwealth 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.

2.4 What is required to assert compliance?

Most duties owed under Commonwealth 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.

Comcare, the Commonwealth Safety Regulator notes that:

When considering sending workers overseas organisations need to:

- *identify any threats relating to the travel*
- *evaluate these threats in consideration of the traveller's profile*
- *set an acceptable level of risk relating to the intended travel*
- *implement strategies to reduce the level of risk while monitoring for any changes in threats or a breakdown in the mitigation strategy.*

No travel event is without risk.

However, the level of risk planning may be scaled to the assessed risk of the mode, purpose and destination of travel. If travelling to a destination assessed as low risk, a less comprehensive assessment may substitute provided due consideration is given to emergency management. If something does happen to workers while overseas organisations must be prepared to respond.⁹

⁹ http://www.comcare.gov.au/safety_and_prevention/health_and_safety_topics/international_deployment

2.5 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 Commonwealth 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 achieved 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).
- *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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