Managing Risk: National work health and safety harmonisation
Introduction

New Work Health and Safety legislation was introduced to seven of Australia’s states and territories in January 2012 that has significant impacts for all businesses. In this paper we explore the current state of legislation across the country, the major changes incorporated within the legislation and what the implications are for building owners and tenants who undertake refurbishment or construction projects.
The Australian Landscape

In 2008 the Commonwealth and each State & Territory agreed to harmonise Work Health and Safety (WHS) laws. A National model was endorsed in 2009 and each jurisdiction was required to develop their own laws to mirror the model proposed by SafeWork Australia.

The New Act and Regulations were due to commence 1 January 2012 but only NSW, the ACT, Queensland and the Northern Territory followed through with the agreement. The proclaimed benefits were:

- Greater clarity & simplicity
- Reduced costs for national businesses
- Nationally consistent safety standards
- Reduced government expenditure in developing & administering WHS laws

Now in 2013 South Australia and Tasmania have joined, leaving Western Australia and Victoria as the only states not currently working under the harmonised laws. However there is consistency across a large part of the country which is an improvement on the past.

By opting out of the new laws Victoria must continue to adhere to the existing Victorian Occupational Health and Safety Act 2004. However they have created the situation where organisations that run offices in multiple states must consider the differences in WHS laws when dealing with Victorian business.

Western Australia, on the other hand, remains committed to the principle of harmonisation, according to Worksafe WA. However, it is not intending to adopt the whole model WHS Bill. In short the government in Western Australia has highlighted four areas that it believes does not deliver direct improvements to safety outcomes in the workplace.

a. Penalty levels
b. Union right of entry
c. Health and safety representatives’ capacity to direct the cessation of work
d. Reverse onus of proof in discrimination matters

Another issue that is holding back progress in WA according to Workcover is that the model Health and Safety Regulations are missing a mining component. Therefore an update of the corresponding Bill for mining industry in 2013 is required. Workcover have reported that the Government has concerns that having a different commencement date for mining laws will create an uncertain regulatory environment which could conceivably have a negative impact on safety standards in this high risk industry. A likely start date in WA according to Workcover is mid-2014.

There is a risk for potential confusion or safety breaches to occur when more than one set of safety laws exist. This can be easily reduced by reviewing a comparison of the Model WHS laws with the Occupational Health and Safety Laws of Victoria that was undertaken by Australian Industry Group. Click here to review the comparison.
What has changed?

New legislation has been introduced that organisations need to be aware of to manage their risk profile. A number of legislative changes have been implemented and each jurisdiction has provided a “Summary of changes” document for their areas that are freely available online.

Of all the changes to occur, arguably the most significant is the introduction of the new term Person Conducting a Business or Undertaking or PCBU to replace the term Employer.

The term applies a new concept of primary duty of care to anyone who conducts a business or an undertaking that influences one or more elements that go to the performance of work and may affect the health and safety of those undertaking the work or those affected by the work.

A PCBU duty of care extends to activities conducted by a corporation, a partnership, a self-employed person, an unincorporated association or a government agency. It does not apply to volunteer organisations. This duty of care applies to activities carried out by, or under the control of a person whether alone or with others, whether or not for profit or gain.

Simply put this term ‘gives more people, more duties to more people’ as the following chart illustrates. Whereas previously the duty of care tended to lie with the principal contractor.

Another key point to note is the principal contractor’s duties. The WHS regulations state that a principal contractor is a PCBU that commissions a construction project. A construction project is defined as any project greater than $250K. The regulation goes on to state these projects require a WHS management plan to be in place and be accessible and that all people working on the project must be made aware of its contents prior to commencing work.
Building owners and tenants commissioning a rebuild or refurbishment are the PCBU unless as the regulation states ‘engages another person conducting a business or undertaking (PCBU) as principal contractor for the construction project and authorises the person to have management or control of the workplace’.

Owners and tenants in this situation can engage a principal contractor, where no principal contractor is appointed, the owner or tenant commissioning the work remains the PCBU and effectively plays the role of the principal contractor.

With the new laws, building owners, tenants, property managers, facility managers, subcontractors, workers, and project and site managers can find themselves with a heightened risk profile as a PCBU.

New penalties for non-compliance by a corporation increased from $800,000 to $3 million in NSW and similar increases were seen in other states under the new harmonised WHS laws. Additionally, officers of an organisation can be convicted of negligence and face up to five year imprisonment should it be found they did not conduct due diligence on their projects.

There are three categories for prosecution in the new harmonised Act. Category one applies to any reckless act that exposes a person to risk of death or serious injury or illness. It is classified as a criminal act and will be trialled in a District court. Category two applies to a non compliance to a duty that results in serious risk of harm without recklessness. The last category is defined as failure to comply with a WHS duty.

All are highlighted in regional summary documents that are provided via the links below.

Link to Safework Australia
Link to NSW Workcover site
Link to Worksafe ACT
Link to Workcover Queensland
Link to NT Worksafe
Link to Workcover SA

Case Study

Introduction

Once the new harmonised WHS laws came into effect, Suncorp wanted to understand what this meant for their risk profile and communicate it to their staff.

Working together with Jones Lang LaSalle, Suncorp developed their ‘Real Estate Project Contractor Health and Safety Management guideline’.

The purpose as stated in the guidelines is to:

• Establish a process for Project Managers (PM) and Principal Contractors (PC) to induct contractors on behalf of Suncorp.
• Establish a process for PMs and PCs to report to Suncorp on contractor management (including induction).
• Provide guidance to any other contractor engaged directly through the Suncorp Real Estate team regarding minimum requirements for health and safety.
• Outline specific rules (Suncorp Site Rules) for contractors working on Suncorp premises so that all that is reasonably practicable may be done to maintain a safe workplace.

Conclusion

Suncorp is now able to manage, quantify and report on key HSE statistics and metrics in line with their responsibilities under the new ACT thus fulfilling their participation as a PCBU.
### Getting on the front foot

To reduce the new risk profile building owners and tenants should undertake the following steps:

1. Clarify your position as PCBU
2. Identify the risks of taking on the role of principal contractor
3. Seek advice on what controls can be put in place to minimise the risks.

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Figure 1: PCBU legislation requirements during rebuilds or refurbishment projects

<table>
<thead>
<tr>
<th>PCBU requirements:</th>
<th>Building owners</th>
<th>Building tenants</th>
<th>Property managers of Commercial property</th>
<th>Facilities Managers</th>
<th>Sub-contractors</th>
<th>Project/Site managers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporting Notifiable Incidents</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Training and instruction</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Emergency procedures</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Risk management &amp; identification</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Incident management</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Communication and consultation</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Review and monitoring</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Provide PPE</td>
<td>Only if directing work</td>
<td>Only if directing work</td>
<td>Only if directing work</td>
<td>Only if directing work</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
About Jones Lang LaSalle

Jones Lang LaSalle Project and Development Services (PDS) provides project and construction management services for real estate owners, occupiers and investors. With over 840 professionals in Asia Pacific, supported by a truly transparent global platform, we provide the most consistent client experience across more than USD 18 billion in capital works annually.

Whether engaged in a Project Management, Construction Management or Head Contractor role, PDS acts on behalf of our clients to manage construction projects under the harmonised legislation (and within the states yet to conform) to provide peace-of-mind and clarity.

We have always believed the safest project is also the most cost effective project and we have developed our systems, training and innovation in safety to deliver projects without serious incident in Australia in the past six years.

Author

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Roy has 10 years experience in the health and safety industry, starting out as an onsite safety advisor in Geothermal drilling and Maritime safety based in New Zealand. In 2010 he relocated with his family to Australia and has progressed to a National Safety role with Jones Lang LaSalle in 2012 after a short stint as NSW/ ACT state Safety Manager for AECOM Australia. Roy has helped clients distil the impacts of the harmonisation laws on their real estate interests through communication and thorough consultation.
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