



DUE DILIGENCE QUARTERLY

SEPTEMBER 2017

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WHY SHOULD YOU READ THE DUE DILIGENCE QUARTERLY FOR DIRECTORS AND OTHER OFFICERS?

The directors and other officers of a 'person conducting a business or undertaking' (**PCBU**) have a personal duty to exercise due diligence to ensure that the PCBU complies with its safety duties, by taking 'reasonable steps' to:

1. acquire and keep up-to-date knowledge of work health and safety matters;
2. gain an understanding of the nature of the operations of the PCBU's business and generally of the hazards and risks associated with the PCBU's operations;
3. ensure that the PCBU 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 PCBU's business;
4. ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
5. ensure that the PCBU has, and implements, processes for complying with any duty or obligation it has under the Work Health and Safety Act; and
6. verify the provision and use of the resources and processes referred to in items 3-5.

Reading the Due Diligence Quarterly helps you to comply with item 1 and understand the issues associated with items 2-6.

NATIONAL SAFE WORK MONTH

Next month (October) is National Safe Work Month.

In a media release, the Chair of Safe Work Australia said that “*work-related injury and disease cost our community \$61.8 billion a year. In other words, poor work health and safety costs \$5,000 per worker each year and equates to 4.1 per cent of Australia’s gross domestic product. This doesn’t even touch on the immeasurable cost of grief and trauma to workers and their families. The whole community bears the cost of poor work health and safety*”.¹

The Chair has outlined five ways for building work health and safety capability:²

- **good work design** – “*which is the most effective way to eliminate hazards in the workplace, incorporate effective risk control measures and design-in efficiencies*”;
- **sound investment in quality equipment that is designed safely**;
- **maintenance** – “*damaged or poorly maintained equipment like broken ladders, split electrical cables and frayed ropes can cause serious injuries or fatalities... inefficient and outdated systems and equipment can become a hazard to physical or mental health*”. Workers must be able to report malfunctions and breakdowns easily;
- **training and risk assessments** – work health and safety should be “*part of...daily conversations and involve everyone, especially those actually doing the work*”. It is vital that people feel as though they can stop work for safety reasons; and
- **reviews and continuous improvement** – ensuring a healthy and safe workplace is ongoing and approaches to safety must be responsive to ever-changing environments.

Safe Work Australia has released a campaign kit (click [here](#)) which includes resources for organisations to carry out their own initiatives during National Safe Work Month. The resources include infographics for certain industries, such as construction, road transport, healthcare and social assistance, agriculture and manufacturing.

Regulators will host events in their respective state or territory.

For more information about National Safe Work Month, click [here](#).

SENATE INQUIRY INTO NON-CONFORMING BUILDING PRODUCTS

This inquiry commenced in mid-2015 and its terms of reference have since been expanded to inquire into the illegal importation of asbestos-containing building products and following the Grenfell Tower fire, the implications of using non-compliant external cladding materials.

The *Interim Report – Aluminium Composite Cladding* was released this month.³

Eight recommendations were made in the interim report to the Commonwealth, including:

- implement a total ban on the importation, sale and use of polyethylene core aluminium composite panels as a matter of urgency because there is no place for them in the market given that safe non-flammable and fire retardant alternatives are available;⁴
- in relation to the Federal Safety Commissioner:
 - ensure that the office is adequately resourced to carry out the newly legislated role of auditing compliance against the National Construction Code (**NCC**) in relation to building materials.⁵ The Commissioner himself told the committee that his office does not have the resources (or expertise) for these audits; and
 - consider imposing a penalties regime for non-compliance with the NCC (e.g. a ban from tendering for Commonwealth-funded work and substantial financial penalties) because loss of accreditation is not a “*strong enough*” penalty;
- consider making all Australian Standards and codes freely available because the committee was “*dismayed*” that people are expected to pay unreasonable sums of money to access these documents which are required to comply with the NCC; and
- work with state and territory governments to establish a national licensing scheme for all trades and professionals in the building and construction industry (e.g. surveyors, inspectors, builders and project managers) – which would include a requirement for continued professional development – to ensure that participants have the necessary skills and knowledge to operate in the industry’s complex regulatory environments.

An interim report into the illegal importation of asbestos-containing building products is due at the end of next month (31 October 2017) and an overall final report is due 31 April 2018.

For more information about this inquiry, click [here](#).

1 ‘Media Release – October is National Safe Work Month’. Safe Work Australia (15 September 2017).

2 ‘Five ways to boost WHS capability’. OHS Alert (18 August 2017).

3 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Interim_report_cladding.

4 The Customs Amendment (Safer Cladding) Bill 2017 (Cth) was introduced on 11 September 2017 to implement this ban.

5 *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).

INTERNATIONAL

ISO 45001 PROGRESS

The International Standards Organisation (ISO) is developing ISO 45001 – *OHS Management Systems – Requirements with Guidance for Use* which will align with other generic management system approaches in ISO 9001 – *Quality Management Systems – Requirements* and ISO 14001 – *Environment Management Systems – Requirements with Guidance for Use*. It will be a voluntary standard and adaptable for all organisations.

The first vote on the draft last year was unsuccessful and the standard had to be redrafted to take into account approximately 3,000 comments from various national bodies. One of these national bodies was Standards Australia, which had submitted a negative vote.⁶

On 17 July 2017, the second draft was approved.

The new anticipated publication date for the standard is March next year.⁷

A three year transition period is expected. It is also expected that this standard will replace OHSAS 18001 – the world's most recognised standard for OHS management systems – and AS/NZS 4801, the current standard in Australia.⁸

For the briefing note about the standard, click [here](#).

NON-HARMONISED JURISDICTIONS ON THE MOVE

The state governments for the two jurisdictions yet to adopt the model work health and safety laws have both made announcements recently in a move towards harmonisation.

Victoria

The state government in Victoria has agreed 'in principle' to greater align the *Occupational Health and Safety Act 2004* (Vic) with the model work health and safety laws.⁹ The comment follows an announcement to introduce a labour hire licensing scheme in response the 2016 'Victorian Inquiry into the Labour Hire Industry and Insecure Work'.¹⁰ The inquiry recommended, among other things, that the approach to regulating labour hire relationships under the model work health and safety laws be adopted in Victoria because the definitions of 'person conducting a business or undertaking' and 'worker'¹¹ are appropriately broad.¹²

A further announcement will be made later this year.

6 Standards Australia – Statement (17 May 2016).

7 <https://www.iso.org/iso-45001-occupational-health-and-safety.html>.

8 <https://www.ioshmagazine.com/article/iso-45001-home-stretch>.

9 'Harmonisation-style changes likely for Vic soon'. OHS Alert (14 September 2017).

10 'Media Release - Tough new laws to crack down on labour hire exploitation'. Hon. D Andrews, Premier (10 September 2017).

11 'Worker' includes "an employee of a labour hire company who has been assigned to work" in the business or undertaking.

12 Recommendation 5.

Western Australia

The state government in Western Australia announced that it will develop a single piece of work health and safety legislation which will replace the *Occupational Safety and Health Act 1984* (WA) as well as other industry-specific safety legislation.¹³ The relevant minister recognised that the state's legislation "is 30 years old and is out of date". The bill is expected to be introduced in mid-2019 and will be based on the model work health and safety laws. This announcement follows an amalgamation of two regulators in the state – the new regulator is now known as the Department of Mines, Industry Regulation and Safety.¹⁴

To view the media statement, click [here](#).

To view a more detailed article on the movement in Western Australia, click [here](#).

OFFICER CONVICTED FOR BREACH OF DUTY WITHOUT A PENALTY IMPOSED

An officer and a company were convicted for breaching their duties under the *Work Health and Safety Act 2012* (SA) after an incident at the Royal Adelaide Show on 12 September 2014.¹⁵ The incident involved the fatality of a young girl who suffered fatal injuries when she was thrown from her seat when the Airmaxx 360 amusement device was in operation. Although the officer had been involved in the industry for some time and the company owned and operated the Airmaxx 360, guidance was needed, so experienced experts were engaged.

The Airmaxx 360 was the first of its kind in Australia and it required design and plant registrations. A consulting engineer was engaged to assist with this process and gave the company a design registration number for another device – the incorrect design registration number had not been fixed at the time of the incident. The Airmaxx 360 was subject to an initial set-up inspection by an engineer who had not inspected a 'high risk complex apparatus' on his own before, nor did he have the manufacturer's user guide available. The inspection by this engineer was deficient, including incorrect determinations about the amusement device's classification and appropriate restraint type. A log book was set-up but not much of it was able to be completed without the manufacturer's user guide. The log book was not subsequently used for recording maintenance and repair work (e.g. the replacement of four primary lock cylinders) which meant that these issues could not be checked by other people. Injuries suffered by patrons at the Melbourne Show and Sydney Easter Show were also not recorded.

13 E.g., the *Mines Safety and Inspection Act 1984* (WA) and *Petroleum and Geothermal Energy Safety Levies Act 2011* (WA).

14 The Department of Commerce (which included WorkSafe WA) and the Department of Mines and Petroleum.

15 *Boland v C, J & Sons Amusements Pty Ltd and Sullivan* [2017] SAET 68.

The Airmaxx 360 was audited by SafeWork SA before the Royal Adelaide Show. An engineer (with Safe Is Safe Pty Ltd) carried out an inspection and said that the “*device had been correctly maintained, required testing satisfactorily completed and was free of visible defects that could adversely affect the safety of the device*”¹⁶ – this was two weeks before the incident.

The officer was charged with failing to take reasonable steps to ensure:

- that safe systems of work were provided and maintained by the company;
- that repairs, maintenance and inspection of the amusement device’s primary lock cylinders were only performed by appropriately qualified persons;
- that the company had appropriate systems and processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, e.g. a procedure whereby operational and safety matters are contemporaneously recorded in the amusement device’s logbook; and
- that the design of the amusement device had been registered before use.

The officer and company both entered early guilty pleas.

Deputy President Ardlie found that the defendants had “*relied upon experts to ensure that the engineering and design of [the Airmaxx 360] was safety compliant*” and although there were failings mostly related to the day-to-day operations, these failings were not as significant as the design faults. The defendants had been “*let down*” by some of the experts engaged.¹⁷ The officer was genuinely remorseful and considerable cooperation had been provided during the investigation. The defendants had been “*financially ruined*” as a result of the incident and neither has any prospect of paying a penalty or compensation.¹⁸ Convictions were recorded for the defendants however as there was no ability to pay, the defendants were only required to pay a Victims Crime Levy of \$420 each. If there had been an ability to pay, Deputy President Ardlie said that \$84,000 and \$10,500 penalties would have been imposed on the company and \$59,500 and \$3,500 penalties would have been imposed on the officer, after a 30% discount. \$20,000 in compensation would also have been ordered for the victim’s family.

To view the decision, click [here](#).

In separate ongoing proceedings, the engineer with Safe Is Safe Pty Ltd and the company itself have been prosecuted for category 1 offences in relation to this incident.

¹⁶ Ibid at [33].

¹⁷ Ibid at [75]-[76].

¹⁸ Ibid at [80].

¹⁹ ‘3D printing and additive manufacturing – the implications for OSH’ [6 July 2017].

INTERNATIONAL

EMERGING RISKS ASSOCIATED WITH 3D PRINTING

The European Agency for Safety and Health at Work (**Agency**) has released a discussion paper about the emerging risks associated with 3D printing.¹⁹ 3D printing is the technique used to manufacture products that exist only as a computer file that through the use of a machine adds raw materials in layers until a finished product is shaped. According to the discussion paper, 3D printing is possible with plastics, metal, conductive materials, glass and ceramics. Constructional elements of 50 cm by 50 cm can be printed and ‘hybrid manufacturing’ is also becoming widespread, which is when parts of a product are printed.

The discussion paper recognised that 3D printing is a relatively new industry and not much is known about its impacts on health and safety. In 2012, *The Economist* had predicted 3D printing would be part of a third industrial revolution.²⁰ The discussion paper provides however that this third industrial revolution has not yet eventuated. The key risk identified by the Agency was exposure to dangerous materials but overall, risks to physical safety will be limited as 3D printing involves use of a machine with little manual movement. That said, the Agency considered that the impact on the well-being of workers may be considerable given the impact 3D printing may have on, among other things, job security, working hours and monotony. The Agency recommended a response to the risks at the European (and not national) level because 3D printing is a global economy.

To view the discussion paper, click [here](#).

CONSTRUCTION AND MINING WORKERS AMONGST THOSE WITH HIGH SUICIDE RATES

Data recently sourced by *The Australian* from the National Coronial Information Centre provides that 239 workers in construction and mining died by suicide between 2012-2014.²¹ This results in a 0.15% suicide rate (or 5 in every 1,000) based on the number of workers in both industries. Of the 3,738 suicides reported for the period, 83 per cent concerned men. The article reported that people working in blue-collar occupations experienced suicide more than any other workers.

Dr Alison Milner from the Centre for Health Equity at the University of Melbourne’s School of Population, and Global Health was quoted in *The Australian*. Dr Milner believes “*a ‘toxic cocktail’ of work stressors and personal issues, such as relationship problems and substance abuse, is putting at*

²⁰ <http://www.economist.com/node/21552901> and <http://www.economist.com/node/21552903>.

²¹ ‘Miners, builders have the nation’s highest suicide rates’. Parnell, S, *The Australian* (4 August 2017).

risk men who by their nature are less likely to ask for help". Dr Milner referred to the existing stigma surrounding mental health and added that *"poor work is itself a risk factor, things like low job control, high job insecurity and high demands"*.

A recent publication by Dr Milner on suicidality and psychosocial job stressors can be found [here](#).

AMENDMENTS PROPOSED IN QUEENSLAND

Last month, the state government in Queensland introduced the Work Health and Safety and Other Legislation Amendment Bill 2017 (Qld) which, among other things, will create a new offence of industrial manslaughter. The bill follows the release of the 'Best Practice Review of Workplace Health and Safety Queensland' in July which identified 58 recommendations after considering the effectiveness of the model work health and safety laws in Queensland in light of contemporary regulatory practice – the proposed amendments largely reflect the 58 recommendations.

To view the media statement, click [here](#).

A more detailed article on these proposed amendments will be in the next edition of this publication.

REGULATOR'S DECISION TO REJECT ENFORCEABLE UNDERTAKING UPHOLD

A company's application to the Supreme Court of Queensland for statutory review of a regulator's decision to reject an enforceable undertaking was unsuccessful.²³

This matter involved a fatality.

The company had recently acquired a sugar mill and the fatality occurred within the first year. The worker was walking down a corridor next to tracks which carried empty cane bins; he then walked across the tracks and was struck in the back by an empty cane bin. The worker suffered fatal crushing injuries. Justice Douglas said *"it was probably momentary inadvertence"* as to why they crossed and *"there had been no previous incidents which might have alerted the [company] to the likely risk of such an event"*.²⁴ A prosecution had been commenced against the company and the hearing was adjourned pending the outcome of this application. Despite a panel (appointed by the regulator) unanimously recommending that the enforceable undertaking be accepted, it was ultimately rejected by the regulator.

23 *Wilmar Sugar Pty Ltd v Blackwood [as regulator under the Work Health and Safety Act 2011 (Qld)]* [2017] QSC 180.

24 *Ibid* at [7].

25 A third argument concerned the regulator's use of the word *"unacceptable"*. The company argued that an incorrect test of 'acceptability' or 'unacceptability' had been applied to the facts and there was an error of law. Justice Douglas disagreed and said the regulator's use of the word *"unacceptable"* was describing conclusions about the evidence which then informed the decision – the regulator was not *"fettering the free exercise of his discretion"*: *ibid* at [22].

26 *Ibid* at [13].

The company argued that the regulator:²⁵

- Failed to take into account the company's positive history of safety performance, including no prior safety convictions and no concerning compliance history; and
- Failed to give proper reasons for the decision because the regulator did not express a reason why the unanimous recommendation of the panel was not followed.

Justice Douglas disagreed with the arguments and found the regulator:

- Clearly considered the company's positive history of safety performance and had emphasised that the company *"seriously and diligently"* applied itself post incident;²⁶ and
- Comprehensively addressed the reasons for the decision made. The regulator expressed concern that the risk of death from serious crushing injuries was foreseeable and it was a degree of potential resultant harm that the company ought to have reasonably known about. The company had received an engineering report post incident which identified deficiencies and isolation and lockout procedures were subsequently implemented which demonstrated to the regulator that it would have been reasonably practicable to prevent access to the tracks before the incident. In balancing the objectives of the legislation, and because the incident involved a fatality, the regulator decided the objectives were best served by continuing the prosecution. Justice Douglas said that the regulator took the panel's unanimous recommendation into account, and yet made the decision it did in spite of it.

The application was dismissed.

The regulator's guidelines for accepting an enforceable undertaking provide that when there has been a fatality or very serious injury, an enforceable undertaking *"will usually not be appropriate"*.²⁷ In those circumstances, and consistent with the positions of other regulators (e.g. SafeWork SA²⁸ and SafeWork NSW²⁹), exceptional circumstances need to be demonstrated. Under the model work health and safety laws, regulators are prohibited from being able to accept an enforceable undertaking for a contravention or alleged contravention that is a category 1 offence.³¹

To view the decision, click [here](#).

27 https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0003/95313/guidelines-acceptance-EU.pdf.

28 https://www.safework.sa.gov.au/uploaded_files/enforceable_undertakings-general_overview.pdf.

29 Enforceable undertakings - an overview.

31 Section 216, WHS Act.

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