Towards a National OHS Law

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Neil Foster

The biggest change in the OHS legal environment in Australia in over 25 years is approaching, with the possible enactment of uniform legislation in the form of the model Work Health and Safety Act produced by Safe Work Australia in response to recommendations of a joint Federal and State ministers’ meeting. This paper will provide an overview of the new legislation, touching on the new definition of duty-holders as “persons conducting a business or undertaking”, obligations imposed on managers, the differential penalty regime, new options for enforcement, and whether or not the recent High Court decision in Kirk will have any impact on the proposed new regime.

Introduction

Occupational health and safety law in Australia has traditionally been a State, rather than Federal, responsibility. This has led to many complaints about the fragmented nature of the obligations, duplication of responsibilities for businesses operating in more than one State, and a call for some form of uniform Australian legislation on the issue.

Those calls seemed to be doomed to be ignored for many years. While in theory governments agreed that a national approach would be preferable, there seemed to be no obvious Commonwealth head of power that would cover the field, and in any case the Commonwealth did not seem to be keen to take on the expense of supporting the employment of inspectors and other infrastructure that would be required by an effective national workplace safety regulator.

But through some combination of economic and political circumstances there now seems to be a will to move towards national, or at least nationally consistent, regulation of the area of workplace safety. This paper will review briefly how we have got to the current stage of that uniformity process, and outline the provisions of the model legislation as it currently stands. (This will be referred to, despite the fact that it has not been enacted by any legislature at the moment, as the Workplace Health and Safety Act, “WHSA”.)

The Road to the current WHSA

Following an election commitment by the then-incoming Labour government in 2007, a National Review into Model Occupational Health and Safety Laws (“NRMOSHLS”) was set up. The Review produced two Reports (in October 2008, and January 2009). On 18 May 2009 the Workplace Relations Ministers’ Council (“WRMC”) announced that the Commonwealth, State and Territory governments

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2 The Reports are available to download at http://www.nationalohsreview.gov.au/.
had reached agreement on a “framework” for reform, in a detailed response to the recommendations of the NRMOHSL. The task of developing model legislation has been given to a new body called Safe Work Australia.

As far as a timeline for future progress is concerned, the SWA website at the moment says that:

Each state and territory and the Commonwealth will be required to enact laws that reflect the model work health and safety laws by the end of 2011. It is expected that all laws will commence on 1 January 2012.

The legislation, then, will not be enacted as Commonwealth legislation to take effect under a constitutional head of power of the Commonwealth, but will be designed as “model” legislation to be enacted by each of the States. The drawbacks of such a system are obvious, and particularly in an area where emotions can run high in response to particular events, it is not hard to foresee that “uniform” legislation may well become not so uniform fairly quickly. Already Western Australia has indicated that it is not very impressed with the proposed model, and has refused to make any commitment to enacting it.

It is important to note that so far there have been no less than three published versions of the draft legislation, and to make sure that you are working with the current version. These three versions are

1. A draft model Bill called the “Safe Work Act” (SWA), which was released for comment in October 2009;
2. The first version of the “Workplace Health and Safety Act”, released for comment after being approved by the Workplace Relations Ministers’ Council in December 2009;
3. The current version of the WHSA, which will be used in this paper, which bears a release date of 11 May 2010. The website says that this draft “incorporates technical and drafting amendments”, which sounds very innocuous. However, I must say that to my mind there are some reasonably important changes, some of which I will comment on today. (To take just one, which I will not spend a lot of time on today, the May 2010 draft adds in a whole new Division to Part 13 of the previous draft, Division 7 “WHS civil penalty provisions”, comprising some 13 substantive provisions dealing with a completely new regime for possible penalties.)

3 The response document can be downloaded from http://www.safeworkaustralia.gov.au/NR/rdonlyres/5EA77432-4A8B-4455-9376-83E6462732C9/0/WRMC81outcomesMay09_pdf.pdf. In fact so far the Western Australian government has not “signed off” on the reforms. Whether any other States might decide to change their views (if, for example, there is a change in a State Government between now and the end of 2011) remains to be seen.
5 For example, the excellent overview of the legislation by Sherriff and Tooma, *Understanding the Model Work Health and Safety Act* (North Ryde; CCH, 2010) relies, as it had to, on version (2).
6 The new draft also, somewhat annoyingly, has added a new provision very early on, new s 9 dealing with the very technical issue of how to interpret the “examples and notes” given in the Act. But the
Overview of the Model Act

Like the current OHS legislation, the WHSA imposes criminal penalties on various duty-holders in the workplace as a means of "securing the health and safety of workers and workplaces", to quote the Objects clause, s 3(1). Broadly speaking, it does so in the following way.

After defining a number of key terms in Part 1, Part 2 of the legislation forms its “heart”, imposing a number of general health and safety duties on a wide range of workplace participants. As will be explained below, the range of persons who bear duties is well expanded beyond those currently covered in the NSW Occupational Health and Safety Act 2000 (the “OHS Act”). Part 3 requires various incidents to be notified to the regulator (to assist in enforcement), and Part 4 contains a series of special obligations not to use certain workplaces or equipment unless they have been “authorized”.

Part 5 contains detailed provisions to facilitate consultation between various “stake-holders” under the legislation, especially between workers and other duty holders. These incorporate provisions requiring the appointment of “health and safety representatives” and committees. The representatives may in some cases issue what are called “provisional improvement notices”.

Part 6 prohibits certain types of discriminatory and “coercive” workplace behaviour connected to workplace safety (essentially dealing with cases where a worker may be penalized for a role they play in dealing with safety issues.) Part 7 deals with situations where there may be entry into workplaces by union officials to deal with safety matters. A system of “WHS entry permits” governs who can take advantage of these rights.

Parts 8 and 9 set out the functions and powers of the relevant State regulator, which for NSW will presumably continue to be WorkCover (the new system does not propose to set up a central regulatory body.) The provisions empowering the regulator to make investigations, to enter premises, to ask questions and receive answers, etc, are all fairly similar to those governing the regulators currently. Under Part 10 provision is made for enforcement measures similar to those currently applying.

A new tool in the regulators’ kit is contained in Part 11, “Enforceable undertakings”. This is a slightly controversial option which has been previously used in some other jurisdictions, but which will be new for NSW. It will allow a business operator to choose, instead of being prosecuted, to undertake some project or activity that will contribute to workplace safety in the future.

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effect is to change the numbering of every other provision after that point, of course! So those who were used to referring to, say, s 18 as dealing with the new “primary duty of care”, will have to now get used to s 19.

Presumably the “health and safety of… workplaces” is shorthand for “the health and safety of people, other than workers, who are present at the workplaces”. The well-being of factories and offices per se is not a traditional interest of the law.

For a helpful review of the current Australian experience, see R Johnstone & C Parker “Enforceable Undertakings in Action – Report of a Roundtable Discussion With Australian Regulators” (National Research Centre for OHS Regulation, WP 71, Feb 2010), available at

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Part 12 deals specifically with provisions for administrative review of certain decisions under the Act. Part 13 generally deals with criminal proceedings (limitation periods, sentencing options, etc). However, it now contains in Division 7 provisions allowing certain obligations under Part 7 (dealing with entry into workplaces by WHS permit holders) to be dealt with as “civil penalty provisions”, which will mean that someone who is found liable to pay a penalty will not incur a criminal conviction. Division 8 of Part 13, however, which currently only contains s 267, expresses an intention that the general provisions of the Act are not to be taken to create civil liability at large, presumably with reference to the tort of breach of statutory duty.

Part 14 contains a miscellaneous group of “general” provisions, and concludes with what is an important topic in safety legislation, the power to make regulations. It is understood that a draft set of model regulations is currently in preparation, and will be released for public comment in October 2010.

Duty-holders and their obligations

Primary Duty-Holder

A major change that is introduced by the WHSA (at least in comparison to the NSW OHS Act 2000) is that the primary duty-holder in the legislation is no longer the “employer” or the “self-employed person”, but is described as a “person


9 It is not apparent what the impetus for these provisions was. In addition, there seems some ambiguity in s 254 as to which provisions of the legislation may be dealt with in this way. Under s 254(1) the only breaches of the head legislation that are made subject to this regime are found in Part 7. But s 254(2) more broadly suggests that any “subregulation” may provide that it is a “WHS civil penalty provision”. It is not clear whether there is an intention to draft regulations in other areas (outside those dealing with entry permits) that will be classified as “civil penalty” provisions.

10 It should be carefully noted, however, that, while s 267(a) excludes civil liability for breach of the Act, s 267(c) leaves it open for a court to find, on general principles, that a breach of the more specific regulations made under the Act may create civil liability. In doing so it follows the model of s 32 of the NSW OHS Act 2000. For general discussion of the tort action in this area see N Foster, ‘Breach of statutory duty and risk management in occupational health and safety law: New wine in old wineskins?’ (2006) 14 Tort Law Review 79-104; and for more recent NSW cases either deciding or assuming that the current regulations allow such civil actions see Macey v Macquarie Generation & HI S Engineering Pty Ltd [2007] NSWDC 242, Irwin v Salvation Army (NSW) Property Trust [2007] NSWDC 266, Estate of the Late M T Mutton by its Executors & R W Mutton trading as Mutton Bros v Howard Haulage Pty Limited [2007] NSWCA 340, Fox v Leighton Contractors Pty Ltd [2008] NSWCA 23 (decision overturned by the High Court in Leighton Contractors Pty Ltd v Fox [2009] HCA 35 though not on this point). There is an ongoing debate about whether provisions of the NSW legislation apply to members of the public- see Wynn Tresidder Management Pty Ltd v Barkho [2009] NSWCA 149, and comment in N Foster, ‘Is public liability created under OH&S legislation?’ (2009) 6/5 Australian Civil Liability 186-189.

11 There is a very minimal draft of some regulations on the SWA website at the moment, but it only deals with a few broad areas (Consultation, Incident Notification and some material to do with Workplace Entry), and refers back to “stage 1” of the drafting where the legislation was called the “Safe Work Act”. See http://www.safeworkaustralia.gov.au/NR/rdonlyres/7CF3298D-547B-45BB-937B-B3E6E36A903A/0/ModelSafeWorkRegulations_PDF2.pdf .

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conducting a business or undertaking” (sometimes referred to here as a PCBU\textsuperscript{12} or “business operator”). Thus the main duty provision, s 19, reads:

### 19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.

It is apparent that this casts the net fairly wide. It is clearly intended to remove much of the debate about whether a worker is an “employee” or “independent contractor”, and sensibly to focus on the fact that an undertaking of some sort is being conducted which will create certain risks, and to impose obligations on those in charge of the undertaking to think ahead and endeavour to remove risks as far as possible.

The meaning of PCBU is clarified in s 5, although there is no “definition” of the term in the traditional sense. That is, it seems that the words are to be given their “ordinary” sense, and s 5 simply clarifies what might be otherwise uncertain. Points that are clarified by s 5 include that

- A person can “conduct” a business alone or in partnership with others (hence all “partners” in a professional firm are individually liable as PCBU’s- see s 5(1)(a), 5(2), 5(3));
- It is not necessary for the “business or undertaking” to be conducted for profit- I will return shortly to the way the Act applies to non-profit organizations;
- Someone does not, however, “conduct” a business “to the extent that” the person is engaged “solely” as a worker or officer of the business (perhaps leaving the way open for interesting debates where a director receives a salary but is still involved in some management decisions);
- Local Councillors who are elected are not to be regarded as PCBU’s simply by virtue of their office;
- Volunteer associations do not conduct a business or undertaking (again, discussed further below).

\textsuperscript{12} As tempting as it is to pronounce this “peekaboo”, I tend to agree with web commentators who have suggested that this is not a wise move, as tending to trivialize what is in the end a very important issue (especially for people who have suffered, or whose family member has suffered, a workplace injury).

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Further Duties

In addition to the “primary” duty of care (which is how s 19 is described), Division 3 of Part 2 contains “further duties” of business operators. These duties attach where a business or undertaking manages or controls a workplace (s 20), or fixtures, fittings or plant at workplaces (s 21); where a business or undertaking designs (s 22), manufactures (s 23), imports (s 24) or supplies (s 25) workplace plant, substances or structures; or where a business or undertaking installs, constructs or commissions workplace plant or structures (s 26).

There are then other duties imposed on persons who are not business operators. In s 27 personal liability is imposed on company officers (discussed below). In s 28 “workers” are given duties of “reasonable care” for the health and safety of themselves, and others at their workplace, and duties to comply with directions about safety. (One difference from the current s 20 of the NSW OHS Act 2000 is that at the moment this slightly paternalistic duty to look out for one’s own safety is not imposed under that Act.) The scope of these provisions is fairly wide, given the extended definition of “worker” which is provided in s 7.

7 Meaning of worker

(1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:

(a) an employee; or
(b) a contractor or subcontractor; or
(c) an employee of a contractor or subcontractor; or
(d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
(e) an outworker; or
(f) an apprentice or trainee; or
(g) a student gaining work experience; or
(h) a volunteer; or
(i) a person of a prescribed class….

(3) The person conducting the business or undertaking is also a worker if the person is an individual who carries out work in that business or undertaking.

Remember that for this legislation, the duty of the business operator is not confined by the definition of “worker” (while the term is used in s 19(1), most duties of business operators, in ss 19(2)-26, apply in relation to “persons” generally.) But

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13 As is the case under current legislation, of course, a person may hold more than one duty under the legislation at the same time, and must discharge them all- see WHSA s 15.
this extended definition of “worker” will impose new duties on a number of individual workplace participants who did not have those duties previously.

And even more far-reaching is s 29, which imposes duties on any “person at a workplace (whether or not the person has another duty under this Part)”, to take reasonable care for the safety of themselves, and others at the workplace. Given the broad definition of “workplace” in s 8, as any “place where work is carried out for a business or undertaking”, the Act will now impose duties on customers shopping at a store, for example.

**General Features of Duties**

Each of these provisions contains far more detail than we can explore today, of course. But a few general comments are possible. One of the great debates that has surrounded OHS law over the last few years has been the question of what standard of care is required of duty holders, and how the legislation should structure the onus of proof.

The “traditional” way of organizing these issues, going back to the UK Robens model in the *Health and Safety at Work etc Act 1974* (the “HSW Act”, the progenitor, of course, of the Australian legislation), is for the duty to be qualified by way of a defence of “reasonable practicability”, but for the onus of proving that nothing more could reasonably practicably have been done to fall on the accused person. In the *HSW Act* that is reflected in sections 2 and 3 requiring that safety be ensured “so far as is reasonably practicable”, but for s 40 of that Act to provide that the onus of proof on the issue falls on the defendant. In the *NSW OHS Act 2000*, the result was achieved with more clarity by s 8 and similar provisions requiring that safety be “ensured”, but s 28 allowing for a defence of reasonable practicability to be made out by the defendant.

However, other legislation around Australia has followed other models, incorporating the “defence” into the statement of the duty. The model that has been adopted by the WHSA, in line with the decision on the issue that was approved by the WRMC, is for the duty itself to be qualified by the relevant phrase. So s 19 requires that the PCBU “ensure, so far as is reasonably practicable”, health and safety of workers. The onus of proving that there was something “reasonably practicable” that could have been done to ensure safety, where there has been an injury or death, will fall on the prosecutor.

While I am on record as arguing that the previous, UK and NSW, model was conceptually and practically preferable, I think it is clear that the new model will not be dramatically different to the current situation. From conversations with regulators, it seems that, even in NSW, their practice has been to gather and present evidence on the question of reasonable practicability already, and not simply to rely

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on the *prima facie* case to win the conviction. In almost all cases that are presented for prosecution, it will be very clear what more could have been done, and the prosecution will simply have to present this to the court at an early stage. No doubt the recent decision of the High Court in *Kirk* will provide even more of an incentive to do so.\(^{16}\)

**Liability of Company Officers**

As it is an area of particular interest of mine, I hope you will forgive me spending a few minutes on the way that the provisions of the WHSA relating to the personal liability of company officers will operate.\(^{17}\)

**(a) General Provisions**

The provision of main interest is s 27 WHSA, which in part reads as follows

<table>
<thead>
<tr>
<th>27 Duty of officers</th>
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<tr>
<td>(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.</td>
</tr>
</tbody>
</table>

Most of you will know that the model currently provided by s 26 of the *OHS Act* 2000 operates differently, deeming an officer to be liable if the company has contravened the legislation, unless defences of due diligence or lack of influence can be made out. This provision, by contrast, imposes a positive duty framed in terms of due diligence. However, in line with the change in onus of proof noted previously, the element of lack of due diligence will need to be established by the prosecution.

I won’t go into too many of the boring details, but I should say that those of you who have been following the evolution of the legislation will notice that this version is slightly different to *both* of its predecessors!


In the original (stage 1) SWA s 26 cast the relevant obligation onto an officer of “a person other than an individual (the body)”. In stage 2 (the Dec 2009 draft) the WHSA s 26 cast the obligation onto an officer of a “body”, but did not define the word “body”. An unresolved question was, did the word include organisations like clubs and voluntary associations that are not actually given “corporate personality” by legislation?

But now we have the duty arising where a “person” conducts a business or undertaking, and while it sounds odd to speak about “an officer of the person”, interpretation legislation invariably includes companies when it uses the word “person”.

This new provision is a reasonably straightforward implementation of recommendation 40 of the First Report of the National Review, which was that a new Model Act should “place a positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care” under the Act. This is a very commendable change, which I fully support. It is backed up by all the research that stresses the need for management to provide clear leadership on safety issues.

(b) Who is an “officer”? The obligation applies to an “officer” of the corporate person. The definition of this term has been a controversial issue.

The drafters of the initial model SWA chose not to follow the Second Report of the National Review, recommendation 86, which had suggested simply incorporating the definition of “officer” from the Corporations Act 2001 (Cth). A complex variation on the Corporation Act provision was included. Perhaps in response to public comment, however, the WHSA has now reverted to at least the broad spirit of the Second Report recommendation. Section 4 now provides the following definition:

<table>
<thead>
<tr>
<th>officer means:</th>
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<tbody>
<tr>
<td>(a) an officer within the meaning of section 9 of the Corporations Act 2001 of the Commonwealth other than a partner in a partnership; or</td>
</tr>
<tr>
<td>(b) an officer of the Crown within the meaning of section 247; or</td>
</tr>
<tr>
<td>(c) an officer of a public authority within the meaning of section 252,</td>
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18 See, eg, s 21(1) of the Interpretation Act 1987 (NSW): “person” includes an individual, a corporation and a body corporate or politic”.

19 For a summary of some of this research see Foster (2005), above n 17, and material noted in Sheriff & Tooma, above n 5, at 29-30. Chapter 3 of this book gives an excellent overview of directors’ liability provisions, including a good review of recent decisions under s 26 of the NSW OHS Act 2000 and suggestions as to how the new WHSA regime may work.

20 The response by the Workplace Relations Ministers’ Council of 18 May 2009 had broadly indicated agreement with Rec 86 but had proposed “qualifications”. The only qualification that seems to have been specifically indicated, however, was the agreement (perhaps not surprising at the Ministers’ Council) that Ministers should not be regarded as possibly liable!
other than an elected member of a local authority acting in that capacity.

Perhaps it is worth noting that, under the *Corporations Act* definition of “officer”, are included not only formal directors, but others such as

(b) a person:
   (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
   (ii) who has the capacity to affect significantly the corporation's financial standing…

Arguably this will include at least some “middle managers”, but perhaps not quite the same range as the current definition in s 26 of the NSW Act, referring broadly to persons “concerned in the management” of the corporation.

It is helpful to see that, since partners in firms are regarded as “persons conducting a business or undertaking”, the WHSA definition clarifies that they are not also regarded as “officers”. This may have been necessary as s 5(2) says that

5(2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.

While this provision does not directly deem a partnership to be a “person”, it might have suggested this unless the exclusion in para (a) of the definition of “officer” had been included.

The Act now provides a specific exception from liability for “volunteers” as follows:

34 Exceptions

(1) A volunteer does not commit an offence under this Division for a failure to comply with a health and safety duty, except a duty under section 28 or 29.

This presumably means that a volunteer cannot be prosecuted for an offence under s 27 as an “officer”, even if the “person” of which he or she is an officer is itself to be classified as a “person conducting a business or undertaking”. Will this lead to commercial companies appointing board members who are not entitled to a fee or honorarium? The definition of “volunteer” in s 4 refers to “someone who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses)”. It is to be hoped that regulators will be alert to any arrangements that might be made for so-called “out-of-pocket” expenses to be artificially inflated so as to amount to a salary, to allow board members to escape legal liability by purporting to be volunteers.

To return to the immunity of volunteers under s 34: what of the situation of a charity or other “voluntary association” (assuming it is incorporated for the

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moment), where the organisation pays a manager? The salaried manager would not be a “volunteer”. The organisation might be one that looks like a “volunteer association”, and hence thought at first to be exempt from the duties imposed on PCBU’s by s 5(7): “A volunteer association does not conduct a business or undertaking for the purposes of this Act.”

But under the definition of the term “volunteer association” in s 5(8), the immunity given by s 5(7) only applies “where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to work for the... association”. Presumably this will apply even where an “unincorporated association” otherwise made up of volunteers employs someone (as in some sense that employment will be “joint” employment by all the members.) So where anyone is engaged as a worker by a club, that club loses its immunity from prosecution under s 5(7). Hence the officer concerned may be prosecuted under s 27.

Other provisions of s 34 (new to this latest draft) provide some further guidance on these issues.

<table>
<thead>
<tr>
<th>34 (2)</th>
<th>An unincorporated association does not commit an offence under this Act, and is not liable for a civil penalty under this Act, for a failure to comply with a duty or obligation imposed on the unincorporated association under this Act.</th>
</tr>
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<tbody>
<tr>
<td>(3)</td>
<td>However, an officer of an unincorporated association may be liable for a failure to comply with a duty under section 27 and a member of an unincorporated association may be liable for failure to comply with a duty under section 28 or 29.</td>
</tr>
</tbody>
</table>

The effect of these provisions is that an unincorporated association cannot be prosecuted under the Act. But an officer of the association, if they have failed in their duty of due diligence, may be personally prosecuted, and any member of the association may also be personally prosecuted for failing to comply with sections 28 or 29. (Carol singers at a shopping centre, for example, might be prosecuted for distracting workers?)

One odd thing about these provisions, at first sight, is that they seem to assume that an unincorporated association might be liable under the Act. But why is this the case? The nature of such an association is that it is not a “person” for legal purposes. The answer seems to be the enigmatic s 5(2), which, as noted previously, provides that: “A business or undertaking conducted by a person includes a business or undertaking conducted by ... an unincorporated association.” While that provision looks like a definition of “business or undertaking”, rather than a definition of “person”, it may be that it would be read as including such associations within the meaning of “PCBU”. Hence the need for the clarifying exclusion of criminal liability under s 34(2).

We have seen that an elected councilor is not a business operator. Under the current NSW 26(4), they are also immune from prosecution as a company officer. This immunity of local councilors is provided for in the WHSA through the definition
of "officer", which appears above, the concluding words of which provide: “other than an elected member of a local authority acting in that capacity.”

Under a later provision of the WHSA, s 247, however, liability is imposed on some officers of the Crown as follows:

247 Officers

(1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the Crown is taken to be an officer of the Crown for the purposes of this Act.

(2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

This would mean, of course, that some suggestions occasionally made that various Ministers responsible for programs that might have put safety of workers at risk, will still not be able to be prosecuted. It is, however, an interesting clarification of possible liability of senior public servants. Section 252 makes a similar provision for those managing “public authorities”, a term which interestingly is to be left up to each State and Territory to define.

(c) Meaning of “due diligence”

The standard adopted in s 27 WHSA is “due diligence”. This is already the standard adopted (albeit as a defence) in the current NSW legislation, and has been considered fairly regularly by NSW courts in recent years. Recommendation 88 of the Second Report was that the standard should be defined by setting out matters to be considered. The initial response of the WRMC was that there should be no formal definition, and instead that the current case law should be relied upon. But perhaps again in response to public comment on the draft SWA (which reflected the WRMC view by not defining the term), the current provision now attempts to provide a detailed definition of “due diligence”.

(5) In this section, due diligence includes taking reasonable steps:

(a) to acquire and keep up-to-date knowledge of work health and safety matters; and

(b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and

(c) to ensure that the person conducting the business or undertaking 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 conduct of the business or undertaking; and
(d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and

(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and

(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

**Examples**

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include

- reporting notifiable incidents;
- consulting with workers;
- ensuring compliance with notices issued under this Act;
- ensuring the provision of training and instruction to workers about work health and safety;
- ensuring that health and safety representatives receive their entitlements to training.

It is difficult to predict whether this detailed list will be helpful or not. No objection can be taken to any of the individual items, but there is always a danger that when an attempt is made to create a list like this, that other matters may be omitted that have not been thought of. It is encouraging, however, that the definition is framed in an “inclusive”, rather than “exclusive”, way. By use of the word “includes”, the definition makes this set of considerations not the sole list of matters that can be taken into account in determining due diligence, and allows consideration of any other issues.\(^{21}\) This will allow the courts to take into account developments in understanding of what it would be appropriate for company officers to consider in making safety decisions, as society and community expectations change.

The statutory list may be compared to some of the key judicial discussions of “due diligence” over the last few years. As I noted in a previous paper,

The “due diligence” defence requires consideration of a range of “proactive” activities whereby safety systems are not only established on paper, but also implemented on the ground, their operation regularly monitored, and specific issues responded to when they are drawn to attention.\(^{22}\)

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\(^{21}\) Interestingly this seems to be a change from the Dec 2009 WHSA draft.

\(^{22}\) Foster (2009), above, n 17 at 31.
Cases that provide a discussion of these matters include Inspector Kumar v David Aylmer Ritchie\textsuperscript{23} and Inspector Aldred v Herbert.\textsuperscript{24} There is a more recent discussion of what “due diligence” requires in Inspector Hayes v Santos and Lorenzo.\textsuperscript{25}

In Ritchie, Haylen J defined due diligence in this way, at para [177]:

the hallmark of this defence is that the defendant would need to show that he had laid down a proper system to provide against contravention of the Act and had provided adequate supervision to ensure that the system was properly carried out.

In that case his Honour approved the following summary of the requirements of due diligence as provided by the prosecution:

153 Having regard to these authorities, the prosecutor submitted that the statutory defence under s 26(1)(b) required the Court to be satisfied that:

(a) there was in place a systematic approach designed to achieve compliance with a regulatory scheme established by the Act and to prevent its contravention;

(b) that the system so established was both proper and appropriate so as to achieve the regulatory requirements of the Act and, in particular, was not merely some paper scheme that paid lip service to the Act or merely exaggerated the reality of the system that was in place; and

(c) that the system was properly enforced and policed to achieve the regulatory outcome of preventing contraventions of the Act.

It was submitted that, for the defendant to make out the defence, each of these elements had to be established.

In Santos and Lorenzo Boland P found that due diligence had not been made out where an employee was allowed to carry out certain work without having the relevant training, and where his qualifications had not been properly checked by the directors.

188 The defendants may not have been aware of the use of open hooks. However, they were unable to show that they had adopted a process of review and auditing that might enable them to ensure supervisors and managers were acting in compliance with S&L’s written policy regarding the prohibition of using steel hooks to lift steel plates in the circumstances that occurred on 26 May 2006. The defendants placed much emphasis on the fact that they had written policies regarding the prohibition on open hooks, that they reiterated this policy regularly at tool box meetings and even advised individual employees not to use open hooks. The defendants obviously considered this to be an important safety issue. That being so, one would expect some form of auditing, even by way of casual inquiry, to ensure supervisors and managers were complying with the policy. But there was none.

The following table provides an overview of the matters referred to by the courts and compares them with the provisions in proposed s 27(5) WHSA.

\textsuperscript{23} [2006] NSWIRComm 323.
\textsuperscript{24} [2007] NSWIRComm 170.
\textsuperscript{25} [2009] NSWIRComm 163 (1 October 2009).
## Comparison of Judicial Discussion of “Due Diligence” with Legislative Definition in s 27(5) WHSA

<table>
<thead>
<tr>
<th>Judicial statements</th>
<th>Section 27(5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) to acquire and keep up to date knowledge of work health and safety matters;</td>
<td>(b) to gain an understanding of the nature of the operations of the business or undertaking of the [PCBU] and generally of the hazards and risks associated with those operations</td>
</tr>
<tr>
<td>(c) to 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 conduct of the business or undertaking</td>
<td></td>
</tr>
<tr>
<td>“specific issues responded to when they are drawn to attention”</td>
<td>(d) to 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</td>
</tr>
<tr>
<td>“there was in place a systematic approach designed to achieve compliance with a regulatory scheme established by the Act and to prevent its contravention”; “laid down a proper system to provide against contravention of the Act”</td>
<td>(e) to ensure that the [PCBU] has, and implements, processes for complying with any duty or obligation of the body under this Act</td>
</tr>
<tr>
<td>“that the system so established was both proper and appropriate so as to achieve the regulatory requirements of the Act and, in particular, was not merely some paper scheme that paid lip service to the Act or merely exaggerated the reality of the system that was in place;” “that the system was properly enforced and policed to achieve the regulatory outcome of preventing contraventions of the Act”; “safety systems are not only established on paper, but also implemented on the ground, their operation regularly monitored”</td>
<td>(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).</td>
</tr>
<tr>
<td>“had provided adequate supervision to ensure that the system was properly carried out”; “adopted a process of review and auditing that might enable them to ensure supervisors and managers were acting in compliance”</td>
<td></td>
</tr>
</tbody>
</table>

This brief and fairly cursory comparison shows that, while the new definition in s 27(5) does commendably direct attention to matters that have not been spelled out explicitly by the courts previously, there is at least one matter to which the courts have directed attention which is not covered by s 27(5). This is the issue of the provision of appropriate supervision to ensure the carrying out of a system. It might be possible for a court to read “resources” in the various paragraphs of s 27(5) as dealing with the matter, but there would be at least some doubt. A detailed study of other cases where “due diligence” has been referred to may reveal other
matters not touched on in s 27(5). Still, the provisions provide a good starting point, and so long they are not viewed as an exhaustive list of matters to be taken into account, a more open-ended approach by the courts will allow important issues to be considered.26

(d) Meaning of “ensure”

An unusual (at least to my mind) feature of s 27 is that the obligation is one to “exercise due diligence to ensure” compliance with the Act (emphasis added). The meaning of the word “ensure” in OHS legislation seems to have been settled for a number of years as imposing an “absolute” obligation on a duty holder. Thus, in an often quoted comment early in the history of the “Robens-style” legislation in Australia, Watson J of the NSW Industrial Commission, in Carrington Slipways Pty Ltd v Inspector Callaghan (1985) 11 IR 467, at 470, drew a sharp distinction between the common law duty (which is always the duty of “reasonable care”), and the statutory duty. He said:

Had the legislature intended to restate the common law obligations devolving on an employer to take reasonable care for the safety of his employees, it would have been open for it to have adopted wording such as... ‘shall take all reasonable precautions to ensure’... In their context and purpose there would seem to be no reason to make any implication that the words 'to ensure' are to be construed in any way other than their ordinary meaning of guaranteeing, securing or making certain.

While using the word “ensure” in the WHSA, though, it seems that the drafters intend something much closer to the common law standard than to absolute liability. This can be seen clearly in s 17, which, while appearing to define “risk management”, in fact seems to be a definition of the word “ensure”:

17 Management of risks

A duty imposed on a person to ensure health and safety requires the person:

(a) to eliminate risks to health and safety, so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

The question is- does this unusual meaning of the word “ensure” apply in s 27? Technically the duty in s 27 is not to “ensure health or safety”, but rather to “ensure that the person conducting the business or undertaking complies with” a safety duty. Since the body’s “duty” will usually be one of the safety duties imposed

26 It may also be doubted why the list of “examples” of a body’s “duties or obligations” under para 27(5)(e) has been included. While all are correct, the list could be expanded greatly and by matters of perhaps more importance, and there may well be a tendency of managers to focus on this list as opposed to the full range of issues that should be attended to.
under Part 2, such as s 19, then this means that the officer is to “exercise due diligence to ensure” that the body “ensures, so far as reasonably practicable” health and safety. But under s 17 this means “eliminate risks so far as reasonably practicable” or “if not reasonably practicable, minimise risks so far as reasonably practicable”. Section 18 then provides a list of factors to be taken into account in determining what is “reasonably practicable”.

The detailed explication of all these steps is a joy awaiting the court required to apply this concatenation of “reasonable practicabilities”. It must be said that at each step in the lengthy chain (all, it should be remembered, required to be proved by the prosecution to the criminal standard of “beyond reasonable doubt”) there will be a number of exculpatory factors which can be relied on by officers. If the company can now argue that it “did its best”, the officer can now argue that all that was required was “due diligence” (which will no doubt be said to mean, “I did my best”) to see that it was “doing its best”. The word “ensure” is, in an Orwellian transformation, now denuded of meaning and comes to mean effectively “we gave it a go so long as it was not too expensive” or “it appeared on the agenda”.

This may slightly overstate the problem. But it is unfortunate to see the strong “ensure” standard so watered-down, and to see the possible problems that may be created in obtaining convictions against officers under the new Act.

**Volunteers and Unincorporated Associations**

Finally, on the issues of liability, it is worth noticing how the legislation deals with “volunteers” and unincorporated associations. (See also the Appendix to this Paper.) We have seen that:

- Under s 5(7) a “volunteer association” (where nobody is paid to do the work) will not itself be a PCBU;
- However, “unincorporated associations” in general may be potentially liable as a PCBU under s 5(2);
- Under s 7(h) a “volunteer” may be a “worker”, so that a risk to the volunteer may create a breach of a provision of the Act such as s 19(1); in addition, this will mean that volunteers have duties under the Act in s 28 (“workers” to take reasonable care of themselves and others), and (as “persons at a workplace”), under s 29;
- But a volunteer under s 34(1) cannot be prosecuted under Divn 5 of Part 2 for a “health and safety” breach, except for their liability under ss 28 and 29.

There are a number of other duties under the Act outside Part 2, which extend to parties other than those who conduct a business or undertaking. But

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27 However, it is encouraging to see that under s 18(e) the court is required to take into account “the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk”. The reference to “grossly disproportionate” seems to capture the balance here reasonably well, not allowing a safety precaution to be ignored due to mere cost alone.

28 For example, Sherriff & Tooma, above n 5, at 54 suggest that volunteer firefighters or lifesavers may now be held criminally liable for failure to exercise due care to rescue others.
whether those other duties could extend to unincorporated associations is a difficult question at the moment. The regular pattern for these provisions is to impose a duty on a “person”, and then to specify penalties that are divided between “individuals” and “bodies corporate”. Take, for example, s 42:

### 42 Requirements for authorisation of plant or substance

(1) A person must not use plant or a substance at a workplace if:

(a) the regulations require the plant or substance or its design to be authorised; and

(b) the plant or substance or its design is not authorised in accordance with the regulations.

Maximum penalty: In the case of an individual—$20 000

In the case of a body corporate—$100 000.

The obligation is imposed on all “persons” (not “persons conducting a business or undertaking”) so the exemption in s 5(7) does not apply. Arguably a voluntary association might “use a plant or substance at a workplace” contrary to the provision. But the difficulty is that a voluntary association is neither an “individual” (the word invariably refers to a human being, a member of the species *homo sapiens*), nor is it a “body corporate”. So the conclusion may either be that Parliament does not intend this provision to apply to clubs, or else that while the club has a duty, it cannot be prosecuted, as Parliament has determined no maximum penalty.

All in all it would seem preferable for some specific decisions to be made about the application of other provisions of the Act outside Part 2 to unincorporated associations, rather than leaving the matter in the current state of uncertainty.

### Penalties and Enforcement Options

Some general features of the penalty structures under the WSHA should be noticed. The main “health and safety duties” are defined in ss 19-29, Divns 2, 3 and 4 of Part 2 of the Act. Penalties for breach are then dealt with in Division 5. There is a structured progression, and decline in severity of penalties, from offences involving “reckless conduct” and a risk of serious harm (“a risk of death or serious injury or illness”), under s 31; through to offences where there has been a less “reprehensible” breach which has still exposed someone to a risk of serious harm, under s 32, to a general category where there has simply been a failure to comply with the Act, under s 33. Under each option there is a further 3-fold division of penalty, with the highest penalty being reserved for a “body corporate”; a mid-range penalty for “an offence committed by an individual as a person conducting a business or undertaking or as an officer of a body corporate”, and the lowest penalty for an offence committed by an individual who does not fall into what we might loosely call this “managerial” category.
Penalty structures for officers

To take the situation of officers for the moment, penalties may be summarised as in the following table.

**Penalties prescribed for breach of health and safety duties under Division 5, Part 2 WHSA - offence committed by “manager”**

<table>
<thead>
<tr>
<th>S 31 - reckless conduct without reasonable excuse exposing individual to risk of serious harm</th>
<th>S 32 - Failure to comply with duty exposing individual to risk of serious harm</th>
<th>S 33 - Failure to comply with duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>$600,000 or 5 years</td>
<td>$300,000</td>
<td>$100,000</td>
</tr>
</tbody>
</table>

The imposition of a more severe penalty upon a “managerial” accused is a new feature of the WHSA, in comparison to existing State legislation. However, there may be seen to be some precedent in the current situation under the NSW *OHS Act* 2000, where an employee (even one with managerial responsibilities) under s 20 is subject to a maximum penalty of 30 penalty units (currently $3,300) whereas an individual employer guilty of a breach of s 8, say, will be subject to a maximum penalty of 500 penalty units (see s 12(d)), currently $55,000. Under the current Act a “person concerned in the management” of a corporation who is convicted under the present NSW s 26 would usually face the maximum penalty applicable to an individual employer, in other words, $55,000.

How will the new law change things? For a NSW manager who might face a $55,000 penalty at the moment, they will now face a potential $600,000 penalty (or 5 years' imprisonment) under s 31 if they have been reckless and if there was a risk of death or serious injury. Perhaps the better comparison here, however, is with the current NSW s 32A, which provides a criminal penalty for manager who is personally “reckless” (the same word is used), and where death has actually resulted. (While in theory new s 31 could be applied where no actual death has occurred, it would probably be unlikely that a prosecution would be brought in those circumstances.) Under current NSW law the maximum financial penalty would be $165,000 (1500 penalty units) or 5 years' imprisonment. Hence there would be a substantial increase in possible penalty, though one that seems appropriate if recklessness has resulted in a worker’s death.

The comparison of the current NSW Act and the WHSA reveals a more substantial theoretical difference, though whether this will amount to a difference in practice is less clear. Under s 32A(3) *OHS Act* 2000, it is a defence if the accused can show that there was a “reasonable excuse” for their conduct. Under s 31 WHSA, however, the offence is only committed where there is reckless conduct creating the risk which is “without reasonable excuse”, and amazingly s 31(2) provides that: “The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse”. If ever there were a case where the burden of proof...
should lie on the defendant, this would seem to be such a case. To cast upon the prosecution the burden of negating any possible “reasonable excuse” seems far too onerous. Presumably the courts will take the common-sense view that unless the defendant has at least flagged some sort of possible excuse (and it is hard to see what it might be, since it would have to be a justification that excuses not only the risk but also the recklessness!) the prosecution will not be obliged to address the issue.

In the more common case where recklessness is not present, then the difference between the current situation of a NSW manager and that under the new Act will hinge (apart from the previously noted issues about burden of proof) entirely on the nature of the risk to which the relevant individual has been exposed. If the officer’s failure of due diligence has resulted in the company exposing someone to a risk of death or serious injury or illness, the possible liability of the officer will be increased from the current maximum of $55,000 to a new level of $300,000. In other cases, where the risk is less serious, but there is still a breach of the Act, it will be now $100,000. These seem to be reasonable levels given the differing elements of culpability and risk.

One final oddity about penalties for officers should be noted. Sub-sections 27(2) and (3) provide as follows:

| 27(2) Subject to subsection (3), the maximum penalty applicable under Division 5 for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence. |
| (3) Despite anything to the contrary in section 33, if the duty or obligation of a person conducting a business or undertaking was imposed under a provision other than a provision of Division 2 or 3 or this Division, the maximum penalty under section 33 for an offence by an officer under section 33 in relation to the duty or obligation is the maximum penalty fixed under the provision creating the duty or obligation for an individual who fails to comply with the duty or obligation. |

Subsection (2) seems straightforward- it simply reinforces the fact that there are differential “managerial” penalties in Divn 5. But subsection (3) seems odd. I had initially thought that its purpose was to say that, where other provisions of the Act outside Divns 2-4 were breached, and there was no penalty explicitly provided for an “officer” (such as, eg, s 42, noted above), then the officer would be subject to the penalty applicable to an individual. But this theory falls down because the subsection refers specifically to s 33. Section 33 is part of Division 5, it deals with breach of a “health and safety duty”, and this particular phrase is defined in s 30 (for the purposes of Divn 5) as meaning a breach of either Divisions 2, 3 or 4 of Part 2. So it seems that the class of obligations “imposed under a provision other than a provision of Division 2 or 3 or this Division (ie Div 4)” (emphasis added), which are dealt with by s 33- is an empty class. It may be that the drafters of s 27(3) assumed

Neil Foster
that s 33 deals generally with offences under the Act. But this does not seem to be the case.

**Consultation regime**

This paper, which is already too long, will only touch briefly on other aspects of the legislation. Subject to the need to double-check any changes made in the recent redraft, a number of these general matters are summarised well in the Sherriff and Tooma book noted above.

A feature of the Robens-era legislation has been encouragement of consultation with workers about safety issues. This is continued in the WHSA Part 5, although it is worth noting that whereas, under the NSW legislation, the duty to consult applied to “employers” and in relation to “employees” (s 13), the new duty under s 47 is imposed on a PCBU, and is in relation to the broadly defined category of “workers”. There may need to be some creative thought given to putting in place consultation arrangements with contractors, for example, to satisfy these new requirements.

The Act also contains provisions for “work groups” to elect “health and safety representatives”. These HSR’s are generally given powers to investigate complaints about safety, and (in a new development for NSW) to issue what are called “provisional improvement notices” or to order cessation of work (see Divisions 6 and 7 of Part 5.) There are also provisions about what are coyly called “issue” resolution (presumably it is no longer polite to call them “disputes”!)

**Discrimination and Coercion**

One aspect of improving safety is the need to encourage workers to feel that they can report safety hazards without the fear of retaliation from management. The WHSA contains a detailed regime in Part 6 prohibiting “discriminatory conduct” (s 104) on the basis of a worker’s involvement in safety issues, either in an official or unofficial capacity. Behaviour of this sort can be dealt with as a criminal offence, or by a civil action (see Divisions 2, 3 of Part 6).

**Workplace Entry and Powers of the Regulator**

The WHSA also contains provisions in Part 7 allowing entry into workplaces by what are called “WHS Entry Permit Holders” to investigate suspected safety breaches. These will mostly be union officers, but they must be specially authorised under the legislation, and there are a number of limits put on the powers of entry to try to ensure that they are not mis-used for non-safety purposes.

Without going into the details, there are a number of duty provisions in the latest draft of the Act labelled “WHS civil penalty provision”, and breach of these allows the use of the “civil penalty” regime now set up under Part 13, Division 7.

The regulators are given powers under Part 8 which are very similar to those currently enjoyed in most jurisdictions. A couple of points are worth noting. One is
that there is explicit recognition given in s 269 of the over-riding effect of the doctrine of legal professional privilege. It is fairly clear that privilege applies already, even in jurisdictions like NSW where it is not specifically mentioned, but s 269 confirms this. Sherriff and Tooma have some good advice about the circumstances in which privilege can be claimed, and those in which it cannot.²⁹

There has also been an interesting new procedure introduced, which allows a challenge to be made to a decision not to prosecute for a WHSA offence. It seems fairly clear that this was partly motivated by a desire to offer something to the union movement, which had lobbied hard for the right of union officials to institute prosecutions, a right that has been occasionally used in NSW but was resisted very strongly by employer groups. Instead, under s 231, where someone claims that a category 1 or 2 offence has been committed (one involving recklessness and/or serious harm), and a decision has been made not to prosecute, then there is a right to require the regulator to forward the matter to the DPP for a formal decision on prosecution. The regulator in the end may decline to proceed, even if advised to do so by the DPP, but must at least provide written reasons for the decision.

**The Impact of the Kirk decision**

Finally, a few necessarily brief comments about the recent decision of the High Court in *Kirk,*³⁰ and its possible impact on the uniform legislation. I have written elsewhere about the decision in detail.³¹ For the moment suffice it to say that the decision reinforced the need for a regulator to provide some precision in laying charges under safety legislation, even where (as in NSW) the legislation seems to be worded in broad terms. This will clearly be important if and when the WHSA is implemented, as it will be an essential part of the definition of the offence under, say, s 19, that the business operator has failed to do what is “reasonably practicable” to ensure safety. It will be incumbent on the prosecution to see that the precise measures that they claim were reasonably practicable are spelled out.

The other feature of the decision is what one may call the reservations expressed by the High Court as a whole about the role of “specialist tribunals” in hearing OHS prosecutions. I happen to be of the opinion that the Industrial Court of NSW has done a good job in this area applying the law it was given by the Parliament. But not every State has had the benefit of a specialist tribunal.

The definition of “court” in s 4 WHSA has been left blank, as a matter for each individual State and Territory. The National Review suggested that the most serious offences (Category One, involving recklessness) should be tried as “indictable” offences before “ordinary” criminal courts. Perhaps implementing this recommendation would provide a means of meeting some of the concerns

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²⁹ Above n 5, at 103-104.


expressed by the High Court. The vast bulk of matters would continue to be those described under the WHSA as categories 2 and 3, simple breach of the Act not accompanied by recklessness, and it would be a great pity for NSW at least to lose the benefit of the expertise built up the Industrial Court by moving those matters over to other bodies.

**Conclusion**

There are still many uncertainties associated with the move towards a “national” OHS law. It is possible that there may be further drafts which will invalidate the section numbers I have referred to! It is also entirely possible that between now and the end of 2011 some or all of the jurisdictions who have signed on to the process will lose the political will to carry it through. We have not yet seem the draft Regulations, which is where most of the “harmonising” will have most benefit (after all, for all the rhetoric about the need for uniformity, the “general duty” provisions are already, onus of proof aside, pretty well identical), and which for that very reason may well prove the hardest part of all on which to achieve agreement.

Still, if it does eventually cross the line in most of the States and Territories it will provide a good chance to see how some of the new ideas can have a serious impact on improving safety. There are some parts which seem very good. The extension of liability to a broader range of workplace participants, and an attempt to move away from arid arguments about who is an “employer” or not, are good things. The imposition of a positive duty on company officers to exercise “due diligence” seems excellent. There are some other aspects of the process which I am not so positive about, the removal of the traditional reverse onus being among them. But with a good will the WHSA may well achieve what its proponents aim for—to see that Australians can say goodbye to their families when going to work, with a good chance that they will come home again safe and well.
## Community Organisations

<table>
<thead>
<tr>
<th>Unincorporated associations employing someone</th>
<th>Unincorporated associations not employing anyone</th>
<th>Incorporated associations not employing anyone</th>
</tr>
</thead>
<tbody>
<tr>
<td>The association will be a PCBU - see s 5(2), and hence will owe duties under ss 19-26.</td>
<td>The association is not a PCBU - see s 5(7), (8) – so long as it is a group made up of volunteers working for “community purposes” and does not employ anyone.</td>
<td>The association does not owe duties as a PCBU, and hence cannot be prosecuted for breaches of ss 19-26. However, as there are other duties which can be breached by a “person”, incorporated associations may find they owe duties of these sorts and be prosecuted (even if they are volunteer associations) - see eg duties under s 39 to notify of an incident, which apply to “persons” who have control of a workplace; or s 42.</td>
</tr>
<tr>
<td>Despite owing duties, the <strong>association itself</strong> may not be prosecuted under the Act - see s 34(2).</td>
<td>The association does not owe duties as a PCBU, and in any case cannot itself be prosecuted under the Act for any offences - see s 34(2).</td>
<td>Because the association is not a PCBU, officers of the association do not owe any duty under s 27.</td>
</tr>
<tr>
<td>Because the association owes duties as a PCBU, an <strong>officer</strong> of the association owes a duty under s 27 to use due diligence to see it complies with those duties. The officer may not be prosecuted for breach if a volunteer - s 34(1), but may otherwise be prosecuted - s 34(3).</td>
<td></td>
<td>Because the association is not a PCBU, officers of the association do not owe any duty under s 27.</td>
</tr>
</tbody>
</table>

32 There is a formal “clash” between s 34(1) and s 34(3) in the case of an officer of an unincorporated association who is themselves a volunteer. But I have assumed that the courts will allow such an officer to take advantage of their “volunteer” status to avoid prosecution. The “however” in s 34(3) is, I think, meant to qualify sub-section (2), not sub-section (1).
A member of the association (including officers of course), even if they are a “volunteer” themselves, will be subject to the duties owed by “workers” under s 28- see s 7(1)(h) which includes volunteers in the definition of “worker”. Hence they may be prosecuted for s 28 breach- see s 34(1),(3).

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A member or officer, even if a volunteer, will also be subject to s 29 duties if a “person at a workplace”, and may be prosecuted for breach- s 34(1), (3).

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