

CG LAW BULLETIN

THE NEW *WORK HEALTH AND SAFETY ACT 2011* (QLD) – EMPLOYER'S FRIEND OR FOE?

In July 2008, the Commonwealth and each State agreed to harmonise their work health and safety laws, including Regulations and Codes of Practice, in an effort to promote equality and certainty for employers and workers across the jurisdictions.

The new Queensland *Work Health and Safety Act 2011* ("the new Act") will commence on 1 January 2012. The Act gives effect to the national model Work Health and Safety Act, developed by Safe Work Australia as part of the Australian Government's commitment to the harmonisation of work health and safety laws in Australia.

DUTIES OWED UNDER THE NEW LEGISLATION

Under the previous legislation, a duty holder could only discharge their duty owed under the Act by strictly complying with the Codes of Practice and/or Regulations that prescribed how particular risks should be managed.

In contrast to this, section 17 of the new Act imposes a duty on the duty holder to **eliminate risks** to health and safety as far as is **reasonably practicable**. If it is not reasonably practicable to eliminate the risk, the person has a duty to **minimise** the risk as far as is reasonably practicable.

The term 'reasonably practicable' in this context refers to what can reasonably be done 'at a particular time' taking into account and weighing up all relevant matters including:

- the seriousness of the risk;
- what the person concerned knows, or ought reasonably to know, about the hazard or the risk, and ways of eliminating or minimising the risk; and
- the availability and suitability of ways to eliminate or minimise the risk.

Consequently, while a duty holder must still comply with applicable Regulations, it is no longer mandatory to comply with relevant Codes of Practice. The duty holder can vary their compliance with a Code, as long as the action they take to manage a particular risk is equivalent or higher than the standard action prescribed by that Code.

While these changes allow duty holders certain freedoms in relation to deciding how to discharge duties under the Act, duty holders must now consider all risks associated with the work and not just those which are provided for in Regulations and Codes of Practice.

THE ROLE OF CODES OF PRACTICE UNDER THE NEW ACT

A relevant Code of Practice may still be used as evidence in any court proceedings to assist in establishing what is 'reasonably practicable' in the circumstances. Specifically, the court may have regard to a Code of Practice as evidence of what is known about a particular hazard or risk, risk assessment or risk control to which the Code relates.

Codes of Practice also act as guidelines for duty holders in relation to the minimum standards required in managing particular risks.

Accordingly, Safe Work Australia has drafted twelve Model Codes of Practice, covering a broad range of topics including, 'Managing the Work Environment and Activities', 'Labelling of Workplace Hazardous Chemicals', 'How to Prevent Falls at Workplaces' and 'Hazardous Manual Tasks'. All of the Model Codes of Practice can be found on the Safe Work Australia website (www.safeworkaustralia.gov.au/Pages/default.aspx).

ONUS ON REGULATOR TO PROVE BREACH OF DUTY

Another significant change under the new Act is the removal of the reverse onus of proof. Under previous legislation, to avoid being found guilty of an offence, a duty holder accused of breaching a work health and safety duty was required to prove that they had complied with the relevant Regulation and/or Code of Practice in managing the risk.

Under the new Act, the burden of proof (beyond reasonable doubt) lies with the regulator in matters relating to non-compliance with duties of care. This includes whether the defendant failed to do what was 'reasonably practicable' to protect the health and safety of the persons to whom the duty was owed (and, in relation to category 1 offences, whether the reckless conduct was engaged in without reasonable excuse).

NEW THREE-TIERED PENALTIES SYSTEM

Despite these changes, the new Act should not be taken to be encouraging a less rigorous approach to work health and safety. This is highlighted by significantly increased maximum penalties for breaches of obligations imposed under the Act and the inclusion of a new category of penalties to provide for duty holders who behave recklessly.

The three types of penalties that exist under the new Act are:

- Category one offence: where a duty holder **recklessly** exposes a person to whom they owe a duty to a risk of death or serious injury or illness. The maximum fine is \$3 million for a corporation and \$600,000 for officers or up to five years' imprisonment. Workers will also be liable to a \$300,000 fine or up to five years' imprisonment.
- Category two offence: where a duty holder breaches a work health and safety obligation and thereby exposes a person to serious harm. A corporation is liable to a \$1.5 million fine, while officers and workers will be liable to \$300,000 and \$150,000 fines respectively.
- Category three offence: where a duty holder fails to comply with a duty. A corporation will be liable to a \$500,000 fine, while officers and workers will be liable to \$100,000 and \$50,000 fines respectively.

Employers and other duty holders should therefore be mindful not to relax procedures for managing work health and safety risks in light of the new Act. The new Act may offer more flexibility for duty holders in relation to discharging duties under the Act, but the new three-tiered penalties system imposes significant consequences for those duty holders who fail to discharge these duties.

Employers who are unsure as to whether their current work health and safety risk management procedures will be sufficient under the new Act should firstly consult the relevant Model Codes of Practice. If you are still unsure, please contact Clifford Gouldson to organise a review of your risk management procedures.

If you have any questions relating to how the *Work Health and Safety Act 2011* (Qld) may affect you, please do not hesitate to contact any of the members of Clifford Gouldson's Workplace team.

Danny Clifford
Clifford Gouldson Lawyers
P +7 4688 2101
E danny@cglaw.com.au

Angela Pratt
Clifford Gouldson Lawyers
P +7 4688 2188
E angela@cglaw.com.au

Nadia De Pascali
Clifford Gouldson Lawyers
P +7 4688 2115
E nadia@cglaw.com.au

Ben Favaro
Clifford Gouldson Lawyers
P +7 4688 2108
E benfavaro@cglaw.com.au

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