

WISE NEWS



Workplace Industrial Safety and Environment Newsletter

Workplace Health & Safety—The Federal Perspective

Pulp & Paper Industry
Occupational Health, Safety
& Environment Unit

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In recent months Safe Work Australia has been very active in planning and implementing changes that will bring Australia's state based workplace health and safety laws into a consistent, national approach.

In February they conducted a workshop to define the key priorities, themes and challenges to 2013. These themes (below) will now form the basis of the strategic plan, which will go to the Workplace Relations Ministers' Council (WRMC) for endorsement.

Key Theme 1: Model Work Health and Safety Act

WRMC endorsed the *Model Work Health and Safety Act* on 11 December 2009, however permitted Safe Work Australia to make technical and drafting amendments. A number of amendments have been made to improve and clarify the operation of the provisions, as well as amendments aimed at:

- removing overlap, unnecessary prescription and unintended consequences
- achieving consistency with WRMC determinations, and
- ensuring the provisions are effective and in practice operate as intended.

Safe Work Australia members will be provided with the amended draft of the model Act for final approval prior to their next meeting on 29 April 2010.

Key Theme 2: Model Work Health and Safety Regulations

There continues to be progress in the development of the model work health and safety (WHS) Regulations and the draft structure.

The Strategic Issues Group on Occupational Health and Safety (SIG-OHS) is progressively considering various parts of the draft Work Health and Safety Regulations as they are received from the Parliamentary Counsel's Committee. By June 2010 the SIG-OHS will have been provided, for consideration, a first draft of all matters to be subject to regulation.

They considered particular issues with the building and construction industry and agreed to ask the SIG-OHS to consider the creation of a Temporary Advisory Group or another mechanism to address these matters.

Safe Work Australia members will be provided with an exposure draft of the Work Health and Safety Regulations for approval in September 2010. If approved, this will be provided to WRMC for endorsement so they can be released for public comment for a period of four months.

Key Theme 3: National Code of Practice for the prevention of falls in housing construction

It was agreed to begin the process to declare the *National Code of Practice for the Prevention of Falls in Housing Construction*.

Noise Induced Hearing Loss Project

Safe Work Australia have also been implementing a project focused on Noise Induced Hearing Loss (NIHL) and ways in which they can assist employers to further improve the control of noise in the workplace. The Pulp & Paper Industry OHS&E Unit recently participated in an extensive interview on this subject. Safe Work Australia was seeking our views on the current state of noise control in the pulp & paper industry; how widespread the use of appropriate control measures are and what (if anything) could provide employers with further incentive to improve noise control at the source and minimise noise exposure in the workplace. This interview also addressed the harvesting; sawmilling and further processing sectors. Results for this project will be available later in 2010. The report that preceded this project "National Hazard Exposure Worker Surveillance Report: Noise Exposure and the Provision of Noise Control Measures in Australian Workplaces" can be found at www.safeworkaustralia.gov.au.



OHS Harmonisation and Model Laws

Whilst the federal Government press on with the development of national work health and safety laws to simplify compliance, opinion is greatly divided as to whether the new laws are going to be beneficial to employers, employees or none of the above.

Experts are divided on whether new occupational health and safety laws based on a national Model Act will bring "a race to the bottom" or much needed clarity for employers. Either way, there is at least agreement that the changes are going to have a big impact on employers and unions.

Three key issues are dominating discussion around the country: the burden of proof; personal liability of company

officers; and the impact of prosecutions. Neil Foster, senior law lecturer at the University of Newcastle, says personal liability is at the heart of the changes.

"The harmonisation process seems to have been driven by directors' fears of personal liability and the hope that there would be some watering down of the laws," he claims.

"In my view, the Model Act inappropriately waters down the personal responsibility of company officers - although I do support some of the proposed changes in this area, including the acknowledgement that the officer has obligations to exercise due diligence to protect the workers. But, with the change to the current onus of proof provisions, it is quite possible that guilty people will now escape justice."

Michael Tooma of law firm Deacons, says that while current state laws differ in their approach to personal liability of officers, all will be reshaped by the proposed Model Act.

"Despite the range of liabilities, all have one thing in common - the officer will be personally liable only if their company commits an offence. The new regime does not require this," he explains.

"Under the approval recommendations for the new OH&S laws, officers will be liable if they fail to exercise due diligence. That is, the duty has been recast as a positive obligation on officers to proactively ensure compliance with OH&S laws, rather than an attributed liability in the event of a breach by the company. This is a landmark shift in approach which will have a significant impact on OH&S enforcement and compliance."

The definition of "due diligence" may also be contentious. "The Workplace Relations Minister's Council (WRMC) did not approve the recommendation for a definition of due diligence," Tooma says.



"Instead, WRMC preferred to rely on the courts to interpret due diligence. Practically, that means that the true harmonisation of the scope of the personal liability of officers may have some way to go as each state court and territory court attempts to interpret due diligence in the context of the case before it, until a case is brought to the High Court so that an authoritative determination of that term is made which is binding on all state and territory courts."

New South Wales employers, however, may enjoy some relief as the burden of proof shifts to prosecutors.

"The new Model Act will have a more significant impact on NSW employers than those in any other states because it is largely based on the Victorian and Queensland acts," Michael Selinger of Holding Redlich says.

"For NSW, the onus of proof will move away from the employer as a result of the inclusion of the qualifier 'reasonably practicable' in the general duty to ensure safety under the Act. When it comes to proving liability, the prosecutor will now need to show the employer has not taken all reasonable steps to prevent injury.

"In 95 per cent of cases, shifting the burden of proof to the prosecutor will not affect the outcome. This is because, when an injury occurs, employers examine the workplace to see what actions need to be taken to prevent a recurrence. By doing that, they show there were reasonable steps that could have been taken, which makes it easier for the prosecution to prove liability. To some extent, there has always been this tension between trying to improve the safety system and protecting your legal position."

According to Selinger, the legislation in NSW has historically been enforced more vigorously than in other

jurisdictions, but most regulators initiate a prosecution only if it is in the public interest and they have a good prospect of success. "Under the new Act, there is likely to be more of an emphasis on education and co-operation between the regulator and business," he says.

"We will not really know the answer to whether there's likely to be fewer prosecutions until the new Act is implemented - at the end of the day, how it is enforced will be the key factor. The regulator will still have plenty of enforcement tools and there is likely to be a uniform enforcement policy applied across the country."

If, indeed, employers are the winners under the changes, unions, which will lose the right to launch prosecutions, are protesting vigorously against the proposed Model Act, claiming it would be detrimental to safety.

The ACTU has been protesting the content of the proposed Act vigorously for some time. As well as sitting on the relevant Councils, they have been conducting an extensive campaign around this issue.

"Unions support a harmonised approach to OHS law in Australia, provided that it delivers the highest standards in health and safety and that every worker is better off. That's why unions developed the Charter of Rights for OHS, Compensation and Rehabilitation. Any new law must enshrine the rights and responsibilities that are set out in the Charter".

In December 2009 all jurisdictions, apart from Western Australia, agreed to enact the draft model OHS laws by January 2012.

Sources: ACTU Campaigns /OHS Alert



ENVIRONMENT

As we continue to focus more and more on the environmental impact of climate change and ways to mitigate its impact newspapers have more and more information about emissions reduction, trading and ways in which businesses can reduce their environmental footprint. Please find below some of the more common terms and their definitions from the Carbon Edge Dictionary. Further information can be found at www.carbonedge.com.au

Biofuel

Any solid, liquid, or gaseous fuel produced from organic matter. This can mean a wide range of products, some commercially available today. Research is continuing for development of new ones.

Biomass

Biomass comes from materials that were once living, such as plants.

Biomass energy

Energy produced by the conversion of biomass directly to heat — or to a liquid or gas which would be biofuel — for conversion into energy.

Carbon Asset

How much greenhouse gas emission reductions that an emissions reduction project is able to generate and could sell.

Cap and Trade

Cap and Trade is a market-based policy. A cap and trade program establishes an ideal cap, or maximum limit, on emissions. Sources covered by the program then receive authorisations to emit — these are emissions allowances and must not be greater than the cap. Each authorised source is then able to determine its own strategy to comply and meet the overall reduction requirement. This might include: selling or purchasing allowances; installing pollution controls, implementing efficiency measures. A cap and trade program does not set particular strategies to be followed, but each emissions source must comply by giving up allowances equal to its actual emissions. Each source must also measure and report all emissions accurately and thoroughly in a timely manner to guarantee that the overall cap is achieved.

Carbon Pollution Reduction Scheme (CPRS)

The Australian Government's 2008 policy to address anthropogenic climate change through a mix of international and domestic measures and underpinned by a limited number of permits to emit and the establishment of a market to trade in permits.

Carbon Sinks

Carbon reservoirs and conditions that take in and store more carbon (carbon sequestration) than they release. Carbon sinks — such as oceans and forests — can partially offset greenhouse gas emissions.

Climate

The average weather for a particular area and time period — often about 30 years. Climate is not the same as weather. It is the average pattern of weather for a particular region. Weather describes the short-term state of the atmosphere. Climatic elements include precipitation, temperature, humidity, sunshine, wind velocity, phenomena such as fog, frost, and hail storms, and other measures of the weather.

Climate Change (also referred to as 'global climate change')

The term 'climate change' is sometimes used to refer to all forms of climatic inconsistency, but because the Earth's climate is never static, the term is more properly used to imply a significant change from one climatic condition to another. In some cases, 'climate change' has been used synonymously with the term, 'global warming'; scientists however, tend to use the term in the wider sense to also include natural changes in climate. (EPA)

EITE (Emissions Intensive Trade Exposed industries)

Industries that are both emissions intensive because of their high energy use per unit of production and that are also exposed to international trade. For these firms, an additional 'cost of emissions' could increase the competitive pressures they face from international competitors.

Emission

The release of a substance (usually a gas when referring to the subject of climate change) into the atmosphere.

Emission Permit

A non-transferable or trade-able allocation of entitlements by a government to an individual firm to emit a specific amount of a substance.

Emission Quota

The portion or share of total allowable emissions assigned to a country or group of countries within a framework of maximum total emissions and mandatory allocations of resources or assessments.

ETS

Emissions Trading Scheme: A financial and administrative approach used to control emissions by providing economic incentives for achieving reductions in the emissions of pollutants. It is sometimes called a cap and trade system and operates in effect to increase the cost of emissions to apply financial pressure for less energy to be used. An ETS is the alternative measure to a carbon tax or direct regulation of the level of emissions.

Kyoto Protocol

Adopted at the Third Conference of the Parties to the United Nations Convention on Climate Change held in Kyoto, Japan in December 1997, the Kyoto Protocol commits industrialized country signatories to reduce their greenhouse gas (or "carbon") emissions by an average of 5.2% compared with 1990 emissions, in the period 2008–2012.

Renewable Energy Target (RET) (Australia)

The Government's RET scheme is designed to ensure that 20 per cent of Australia's electricity comes from renewable sources by 2020. The expanded RET increases the current RET by over four times, from 9,500 gigawatt-hours to 45,000 gigawatt-hours in 2020, driving significant investment and accelerating the deployment of a broad range of renewable energy technologies. In ten years time the amount of electricity coming from sources like solar, wind and geothermal will be about equal to all of Australia's current household electricity use.

Sequestration

Refers to the capture of carbon dioxide in a manner that prevents it from being released into the atmosphere for a specified period of time.

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