

# Strateg-Eyes:

## Workplace Perspectives

ISSUE 3 | APRIL 2011



### A message from our Managing Principal

Welcome to our first Strateg-Eyes for 2011. I do hope the breadth of topics we cover in this publication continues to be both informative and relevant to your organisation.

My personal thanks to Mim Gaetano who has graciously contributed an excellent article on mental health. PCS values greatly its relationship with Mars and is delighted to be able to promote the work done through Mars' Ombudsman Program.

Our webinar program is in full swing (with two successful sessions already which addressed mental health issues in the workplace and OHS harmonisation). By now you should have received our Schedule of Events for this year which sets out the remaining webinar topics and other major events we will be hosting in 2011.

The PCS team continues to expand and I am truly delighted to welcome Professor Joellen



Riley as a Consultant to our firm. Joellen is one of Australia's leading labour law academics, and has also taught commercial and corporations law subjects at leading law schools (including the Universities of Sydney and New South Wales) for a number of years.

The addition of Joellen to our team gives our clients access to a level of expertise that will enhance their decision-making quality in people management. We have also welcomed Maria Crabb as an Associate. Maria has been practising as a workplace lawyer both here and in the UK for several

years and, importantly, has been heavily involved in training and education programs for her clients.

Finally, we continue to be selected by both existing and new clients as their advisers and representatives in some of the most high-profile litigation, disputes and situations in the country. We value the trust reposed in our firm enormously and, as always, welcome your feedback on any aspects of our business as your partners in workplace law.

**Joydeep Hor, Managing Principal** •

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# Managing mental health at work



NATALIE CHYRA,  
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**Managing mental health issues improves employee wellbeing, company profitability and ensures legal compliance.**

Over the years, mental health issues have become increasingly prevalent throughout Australian workplaces and this has understandably raised legitimate concerns for many employers. Increased working hours, tight deadlines, stressful workplace dynamics, work/life imbalances and commuting to and from work are just some of the factors that contribute to the one in five Australians who suffer from mental illness each year.

HR departments are often the first to be confronted with the complexities of this issue, both on an organisational as well as an individual level, which is why it is imperative for employers to ensure that they have the appropriate knowledge and resources to assist employees who are suffering with mental health issues.

Although there is no federal legislation which specifically governs the treatment of mental illness, most states and territories have legislation in place that similarly define mental

illness as a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person, and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions;
- (b) hallucinations;
- (c) serious disorder of thought form;
- (d) a severe disturbance of mood;
- (e) sustained or repeated irrational behavior indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d)<sup>1</sup>.

## Research and statistics

Mental illness affects one in every five Australians. Research completed by the Australian Human Rights Commission for its *2010 Workers with Mental Illness: A Practical Guide for Managers* reveals that more than three million Australians experience depression, anxiety or related alcohol and drug problems each year. Depression is currently the leading cause of non-fatal disability

<sup>1</sup> Section 4 of the *Mental Health Act 2007* (NSW)



in Australia but only 3 per cent of the population identifies it as a major health problem.

Despite these statistics, many employers to their detriment and cost ignore the impact that mental health-related problems can have on their workplace. *beyondblue's* 'National Workplace Program' reveals that:

- (a) on a national level, businesses lose over \$6.5 billion each year by failing to provide early intervention or treatment programs for employees with mental health issues;
- (b) stress related workers' compensation claims have doubled in recent years costing over \$10 billion each year;
- (c) a total of 3.2 days per week are lost each year through workplace stress<sup>2</sup>;
- (d) each year, undiagnosed depression in the workplace costs \$4.3 billion in lost productivity and this excludes WorkCover/insurance claims, the cost of part-time or casual employees, retrenchment, recruitment and training;
- (e) in relation to psychological injury claims, work pressure accounts for around half of all claims and harassment and bullying for around a quarter of claims;
- (f) there are over 18 million absentee days Australia-wide each year;
- (g) on average, every full-time employee with untreated depression costs an organisation \$9,665 per year;
- (h) each employee with depression will, on average, take three to four days off work per month which is equivalent to over six million days lost each year in Australia; and
- (i) in addition to absenteeism, depression accounts for more than 12 million days of reduced productivity each year<sup>3</sup>.

2 (a)-(c); Australian Human Rights Commission: 2010 Workers with mental illness: A practical guide for managers: p4

3 (d)-(i); [http://www.beyondblue.org.au/index.aspx?link\\_id=4.1028](http://www.beyondblue.org.au/index.aspx?link_id=4.1028): *beyondblue* National Workplace Program

## Contributing factors to mental illness

There are various factors that can increase the likelihood of mental illness in workplaces, including:

- excessive work-related stressors such as poor management or unreasonable performance demands;
- physical demands such as noise and overcrowding, health and safety risks or ergonomic problems;
- organisational practices such as lack of autonomy, poor communication, or unclear roles and responsibilities;
- workplace change such as job insecurity, poor chances for advancement or promotion, or high staff turnover; and
- inter-office relationships such as competition and conflicts, poor relationships with superiors, or bullying or harassment<sup>4</sup>.

An individual's ability to cope and manage with stressors depends on their own behaviour as well as the behaviour and practices of the people around them. Managers and supervisors need to be aware that the way they treat their workers can have a psychological impact on employees and can harm workplace dynamics.

## Employers must be aware of the legal pitfalls

The legal pitfalls that employers are exposed to extend far beyond the general OH&S and workers compensation obligations. Employers are probably aware that OH&S legislation across the nation requires them to provide a safe and healthy workplace and to identify the potential hazards that may arise from an unsafe work environment which also extends to employees with mental illness. Breach of these statutory obligations can result in fines and personal prosecution. However, employers

4 The five dot points have been extracted from Medibank Private: The cost of workplace stress in Australia, August 2008: p4



can also face claims arising from discrimination, trade practices or even contract claims for failing to provide a safe workplace for employees.

Federal and state anti-discrimination legislation also governs unlawful discrimination in workplaces. Hazards associated with discrimination can stem from bullying and harassment, unrealistic workloads, minimal support from colleagues, lack of control or poorly defined roles, poor relationships due to a lack of knowledge of mental illness and organisational injustice.

The *Trade Practices Act 1974* (Cth) was amended on 1 January 2011 and renamed the *Competition and Consumer Act 2010* (Cth) (the "CC Act"). The amendments retained the main



## Strategy to deal with mental illness

Developing an organisational mental health strategy can reduce employee absenteeism and turnover, increase morale and create loyalty, minimise stress levels and the costs associated with the lack of mental health management including litigation as discussed above.

Increasing awareness through training to improve attitudes and behaviours helps to decrease the stigma attached to mental illness. By having an open workplace that encourages trust, confidence and support, employees suffering from mental health issues will be more inclined to seek assistance to help manage their illness.

There are eight key steps employers should take to risk manage their workplaces:

1. Ensure all policies and procedures are effective, up-to-date and address the relevant issues through regular compliance checks
2. Establish systems that regularly monitor conditions in the workplace
3. Regularly inspect and audit workplace environments and assess the potential for hazards
4. Promote flexible working arrangements for employees suffering from mental health issues
5. Develop mentoring and "buddy" systems
6. Provide access to counselling/ support groups such as an Employee Assistance Program
7. Educate and train all employees (including management) about the prevalence of mental health issues to promote understanding in the workplace
8. Ensure legislative compliance by providing safe working conditions through auditing potential hazards ●

provisions of the former act including those relating to misleading and deceptive conduct.

Codes of conduct and company value statements can give rise to an employer being held accountable for the information and wording contained within such documents. If a company's values include providing a safe and healthy working environment, that may constitute a representation for the purpose of the CC Act to which an employer may be bound.

Employers also face legal pitfalls in relation to contract claims. Policies and procedures may constitute a contract between the employer and employee.

If the company has a dispute resolution policy which sets out the manner in which grievances are handled, poor adherence to the guidelines contained within the policy may result in costly litigation if an employee (for example, suffering with mental illness) is not afforded the correct procedure.

Whether in an OH&S, discrimination, trade practice or contract context, any form of claim can result in a loss of time and productivity and can be very costly to an employer who mishandles an employee suffering from mental health issues.

### Case

***Bull v Botany City Council*** [2008] NSWIRComm 1041 highlights the importance of correctly managing an employee with mental health issues. In that case, Mr Bull was employed as the Mayor's office driver and office assistant regularly working outside of office hours on short notice.

Mr Bull raised concerns with the council's general manager about the short notice given for overtime and the

requirement that he wait in the car until the Mayor was ready to leave from his appointments. Mr Bull was informed he was required to work overtime as part of his job and if he was not going to do it, then he could leave.

Mr Bull agreed to work on the nights of Friday 7 December 2007 and Sunday 9 December 2007. On Saturday 8 December 2007, he became ill and communicated this to his employer.

On Monday 10 December 2007, Mr Bull obtained a WorkCover NSW Medical Certificate which diagnosed him with an "adjustment disorder with anxious mood" as a result of "workplace stress". The medical certificate provided that Mr Bull would be unfit for work from 10 December 2007 to 14 January 2008.

Mr Bull was terminated for misconduct for not attending his Sunday evening shift and incorrect use of Council provided equipment.

Mr Bull brought an unfair dismissal claim before the NSW Industrial Relations Commission. At the hearing, the Council presented evidence that Mr Bull had been counselled in relation to his attitude and performance, however these were not given as reasons for his termination.

Rather, it was held that the termination was harsh, unjust or unreasonable. Mr Bull's failure to attend his Sunday evening shift did not constitute serious misconduct and was justified in the context of the medical certificate.

The Commission found that if the Council did not believe the authenticity of the medical certificate, they should have requested that Mr Bull be reviewed by their own doctor (as provided for by the relevant award). Mr Bull was awarded \$16,500 in compensation.



## Mental health: A personal perspective by Mim Gaetano, Ombudsman for Mars Inc.



MIM GAETANO, MARS INC

Mim Gaetano is one of four corporate ombudsmen for Mars Inc. His work covers the regions of Asia-Pacific and Africa, India and the Middle East. He has been an ombudsman for eight years and has been with Mars Inc. for almost 24 years. Prior to this current role, he has worked in R&D, Finance and Commercial with Mars Inc. Prior to joining Mars he held the role of Regional Chemist for Chesebrough-Ponds Intl, responsible for the Asia-Pacific region.

### Emotional Wellbeing – R U OK?

*“Each time I would fall into this big black hole, it became more and more difficult to climb out of. It was energy sapping and debilitating. This was all getting to be too much. Life was no longer fun and enjoyable. Why was this happening to me? What could I do to escape? This is not the person I am. This is not who I enjoy being.”*

The words above are an extract from a journal I wrote during one of my “dark” periods a few years ago. I didn’t know it at the time but I was suffering from depression. Not long after my diagnosis and treatment I was asked to complete a research paper as part of my Conflict Resolution studies and decided to do some research on this illness that had so profoundly impacted upon my life.

I am going to use some of those findings to talk briefly about depression and its causes and then consider how it can affect us in the workplace. Depression is only one form of mental illness but I have chosen it as my focus here not only because of my own personal experience, but also because a discussion of the impact of this mental illness can provide some guidance as to how we can approach mental health issues generally in the workplace.

### What is depression?

How do we know we are experiencing depression and not just feeling down or burnt – out? According to the World Health Organisation:

*“Depression is a common mental disorder that presents with depressed mood, loss of interest or pleasure, feelings of guilt or low self-worth, disturbed sleep or appetite, low energy, and poor*

*concentration. These problems can become chronic or recurrent and lead to substantial impairments in an individual’s ability to take care of his or her everyday responsibilities.”<sup>1</sup>*

The Annual Review of Psychology<sup>2</sup> explains “burn-out” in this way:

*“Burnout is a prolonged response to chronic emotional and interpersonal stressors on the job, and is defined by the three dimensions of exhaustion, cynicism, and inefficacy.”*

As we can see there are overlaps and links between depression and burn-out which pose that classic chicken or egg question: do we burn out because we are depressed, or do we

<sup>1</sup> [http://www.who.int/mental\\_health/management/depression/definition/en/](http://www.who.int/mental_health/management/depression/definition/en/)

<sup>2</sup> Maslach C., Schaufeli W., Leiter M., *Job Burnout*, Annual Review of Psychology, Vol. 52: Feb. 2001, pp. 397 – 422





get depressed because we are burnt-out? The answer to this will vary from person to person.

In a physiological sense, depression is most commonly associated with low levels of the hormone serotonin, and common anti-depressants work by slowing down the body's absorption of serotonin, thereby increasing their levels.

So how do mental health issues play out in the workplace?

### From a personal perspective

If you are in a role that spends a great amount of time dealing with other people's emotions (HR professionals, counsellors, health nurses etc), and perhaps ignoring your own, it is not difficult to see how you may become emotionally exhausted and burnt-out, which in turn can lead to episodes of depression. There is a belief among psychologists that "individuals in the caring profession are experts at one-way caring."<sup>3</sup> So if you hope to function effectively in a professional role, it is essential that you learn and practice the art of self-care. Effective self-care will be different for each individual. We each need to find that "re-energiser" that works for us. Here is a list of some non-medical activities that research shows can be helpful in treating depression.



1. Exercise – if we were looking for a low-cost, non-invasive and safe treatment for depression, it would be hard to bypass the simple daily walk or any other form of suitable exercise.
2. Pet Therapy – attempts to measure and quantify the benefits of pet therapy with hard scientific data are ongoing, but if depression is linked to feelings of loneliness and isolation, the touch, cuddles and responsibility that come with caring for an animal companion may be powerful medicine.
3. Gardening – apart from the exercise and vitamin D overload

<sup>3</sup> Bradshaw D., *Becoming a helper*, 2007, Thomson Brooks/Cole, USA, p 5.

through sun exposure that gardening provides, research has shown that microbes found in the earth's soil can have a similar impact on the brain, as do common anti-depressants.

4. Journaling – keeping a journal may help to alleviate some feelings of isolation and anxiety, as the cathartic experience of letting your thoughts out on paper can provide an opportunity for the writer to be themselves, whilst sorting out complicated feelings, in a private space.
5. Slowing Down – many people are finding it increasingly difficult to "switch off" once they leave work. Mobile phones and email devices mean we can now be contacted virtually anywhere in the world. Having some time to yourself after work can allow the brain to relax and reap the benefits of peace and quiet.
6. A Higher Being – having a faith can help as it may mean spending regular time in the company of other similar faith people, taking some regular "time out" from your hectic life to reflect and slow down, and making an attempt through faith to understand and cope with whatever is happening in your life.

### From a workplace perspective

The OH&S Act requires that we provide our employees with a safe working environment. It is understandable that we immediately think of physical safety but it is important to understand that the Act also covers emotional wellbeing. Statistics will tell us that one in five people experience depression at some stage of their life. With that as a backdrop, here are some points to consider for your workplace:

- **Channels of Communication** – how effective are the channels of communication in your workplace? Do you think your people feel "safe" talking about issues that might be impacting their emotional health, be it workload,



bullying or harassment? Do you have both formal and informal channels available to them and are these well communicated and actively supported by senior management? Do your people have access to external channels, such as Employee Assistance Programs? Being able to talk to someone about how you are feeling is the first step to addressing any illness.

- **Job Roles / Expectations** – in our demanding workplaces, where trying to do more with less appears to be the norm, are you confident that the bigger jobs and increased expectations of roles created via downsizings or restructurings are actually fair and reasonable? Do we have reasonable rest breaks for people and an environment which allows employees to “switch off” during these breaks? Do we encourage behaviour that has employees responding to emails or phone calls whilst on leave or after hours/weekends?
- **Education** – most manufacturing workplaces would inevitably do a reasonable job of educating their people on areas that can create physical injuries. I am sure we have all been taught how

to lift correctly by bending our knees, to switch off power points when removing power leads etc. However, what do I do and where can I go if I am feeling depressed or emotionally frail? Are there any outlets for me to reach out to? So the question here for us is whether we do enough to educate our people on emotional health as well as providing appropriate resources to assist in this area.

Two such initiatives that spring to mind are the public education activities that the *beyondblue* organisation are able to arrange (see <http://www.beyondblue.org.au/index.aspx>) or a recent initiative called RUOK Day (<http://www.ruokday.com.au/content/home.aspx>). Both of these activities can help to create a work environment that encourages people to better understand, and therefore deal with, emotional concerns they may be experiencing themselves or are seeing in their work colleagues.

Emotional “injuries” can be just as debilitating as any physical injury, but unfortunately they can be quite invisible to many people, including those who are suffering from the illness. The past has also seen a “stigma” associated with admitting to having a mental health issue and this has prevented the proper diagnosis

and treatment of many sufferers. Thankfully, with programs such as those mentioned above, this is now starting to change.

## Summary

If your position in the workplace is one that involves caring for and/or counselling people you are likely to have a higher probability of suffering depression or similar emotional illnesses. Also, if the symptoms I mentioned above resonate with you, I would strongly suggest you seek some professional help and adopt a program (be it medicinal or non-medicinal) that works for you and that can help blow those dark clouds away.

If your position in the workplace is in the human resources field, I would encourage you to consider emotional wellbeing in the same light as physical wellbeing and to review your workplace policies and practices in this area. Are you doing all that is fair and reasonable to provide a “totally” safe workplace?

*PCS would like to extend a special thank you to Mim for his valuable contribution to this edition of Strateg-Eyes. PCS was proud to make a donation to beyondblue in December 2010 to support this very worthy organisation. ●*





# Sham contracts: your questions answered



MARIA CRABB, ASSOCIATE

This year the Fair Work Ombudsman (“FWO”) is taking steps to identify and cut down on employers entering into sham contracting arrangements. In this article, we make suggestions on how to avoid falling foul of the provisions of the Fair Work Act 2009 (the “FW Act”).

## What is it?

Sham contracting is where a person misrepresents to an individual that they are engaged as a contractor, when in reality the relationship is that of employer and employee. The FW Act also prohibits an employer from dismissing or threatening to dismiss an individual in order to re-engage them as a contractor performing substantially the same work, and making representations which are false to persuade an employee or previous employee to become a contractor performing substantially the same work for the employer.

## Why enter into a sham contracting arrangement?

Employers who create a sham contracting agreement may receive numerous perceived benefits, including not paying payroll tax, superannuation contributions, and workers compensation. The individual entering into the sham contracting arrangement also has fewer rights as an independent contractor compared to an employee (which might preclude them from, for example, bringing an unfair dismissal claim).

## Defence to sham contracting arrangements

There has been some criticism of these provisions of the FW Act, due to the ease with which employers and persons can avoid being found in contravention of the sham contracting provisions. The employer has to be able to show that at the time they made the representation, they did not know and were not reckless as to whether the contract was a contract of employment as opposed to a contract for services.

To date, there is yet to be a successful case against an employer or person in breach of the sham contracting provisions of the FW Act. Although there were some prosecutions under the *Workplace Relations Act*

1996 (“WR Act”), which had similar provisions about sham contracting arrangements, the FW Act provisions are yet to be tested.

## Consequences of a breach

If prosecuted, employers face civil penalties of up to \$33,000 per offence, and persons entering into sham contracting arrangements may also be held personally accountable if they have aided and abetted the breach. They will be liable for a civil penalty of up to \$6,000 per offence.

Employers may also face tax fraud implications. There have been numerous investigations by the Australian Tax Office (“ATO”) in recent months to crack down on sham contracting arrangements.

In light of the FWO and the ATO joining forces to address sham contracting arrangements, employers and persons engaging staff should pay careful attention to the relationship with the individual concerned.

## The Australian Building Construction Commission (“ABCC”)

The ABCC is currently hosting a government and industry round table inquiry into eliminating sham contracting in the building and





construction industries. The ATO is also taking part in these discussions. This will ensure that sham contracting is to be the focus of a number of influential governmental groups, meaning that employers need to be on their guard to ensure that they are not in breach of these provisions.

Part of the review is to suggest that Fair Work Australia has more powers when making orders where sham contracting has been entered into, including the granting of injunctions. It will be interesting to see how this area of law develops over the next twelve months.

### Employee or Contractor?

Determining whether an individual is a contractor or an employee is a difficult task as it will often depend on the particular circumstances. A court applies a common law test where a number of factors will assist in demonstrating whether the individual is engaged as an independent contractor. These include:

- the individual having control over the way they perform a task;
- the individual supplying and/or maintaining their own tools or equipment;
- the individual working varied hours to those of employees;
- the individual being paid for the work actually performed instead of a wage;

- the individual being able to work for others;
- the individual being able to delegate any of their work;
- the individual being responsible for their own tax; and
- the individual not receiving leave and/or sick pay etc.

The above list is non-exhaustive and employers should take steps not to blur the distinction between contractors and employees.

### CASE

The case of *Fair Work Ombudsman v Land Choice Pty Ltd & Anor [2009] FMCA 1255* was a decision in which the FWO prosecuted a small business for breaching the sham contracting provisions.

Although they were found to be in breach under the old provisions of the repealed WR Act, the court ordered the payment of penalties by the employer, and the person who was involved in misrepresenting the employment contract as a contract for services. It was irrelevant that the company was a small business, which demonstrates how these provisions apply to all businesses.

### What steps can you take?

Organisations should consider the following:

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Ensure your employee and contractor agreements are reduced to writing. You should take steps to show that the independent contractors are engaged as such and that their terms vary from your employee terms and conditions

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Take steps to implement the independent contractor's contract.

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Review all your independent contractor arrangements – if, over time, the relationship has altered, consider engaging the contractors as employees or review the way in which their work is carried out to clearly establish an independent contractor relationship.

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Ensure that independent contractors have some degree of flexibility in performing their work

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Notes should be kept of any negotiations which occur whilst entering into contracts for services to demonstrate the true nature of the employment relationship and the parties' intentions •

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# National OH&S Laws: Getting Prepared



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From 1 January 2012 occupational health and safety (“OH&S”) legislation will be “harmonised,” creating a uniform set of laws and safety standards intended to establish a nationally-consistent OH&S scheme. This harmonisation will represent one of the most significant changes to the OH&S landscape since the release of the Robens Report in 1972.

Currently, the states, territories and the Commonwealth operate under different OH&S legislation, regulations and codes of practice, which presents a particular conundrum for multi-state businesses, where costly company time may be currently spent interpreting each jurisdiction’s particular requirements.

A nationally-consistent OH&S scheme is expected to benefit organisations by reducing the time spent interpreting and complying with complex legislation, regulations and codes of practice across multiple states, and will consequently provide a more cost-effective system and a much needed simplification of administrative processes.

With the implementation of new OH&S legislation less than nine months away, organisations will need to begin considering how this new legislation will affect their organisation.

## The OH&S Harmonisation Process

The development of uniform OH&S legislation has been the subject of many government reviews and commissions since the 1990s. However, in 2007, the Rudd Government promised that, if elected, it would harmonise OH&S legislation and streamline the nine OH&S jurisdictions to create a uniform approach.

The OH&S harmonisation process formally commenced in 2008 with all states and territories (which at that time were all Labor governments) agreeing to co-operate and pass model OH&S legislation to be implemented by 1 January 2012.

To assist with the co-ordination of the OH&S harmonisation process, the Federal Government created a new national body, Safe Work Australia. This organisation, in conjunction with the Workplace Relations Ministers’ Council, has been responsible for the drafting and review of model OH&S legislation, regulations and codes of practice.

## OH&S Harmonisation – the Key Changes

The model OH&S legislation, which has been approved by the Workplace Relations Ministers’ Council, aims to provide organisations with certainty around the key features of the new legislation.

The key features of the model OH&S legislation include:

- **Primary Duty of Care:** a primary duty of care to ensure health and safety in the workplace will be imposed on a “person conducting a business or undertaking”. The move away from imposing the primary duty of care on employers (which is the current approach) is designed to reflect the changing nature of work relationships. It is expected that as a result of this change a broader range of people will have a primary duty of care under OH&S legislation.
- **Standard of Care:** a person conducting a business or undertaking has an obligation to ensure health and safety *as far as reasonably practicable*.



This standard of care represents a significant change in Queensland and New South Wales jurisdictions where the standard imposes a more stringent duty whereby the employer “must ensure” the welfare of all workers.

- **Increased Penalties:** there will be significant increases to the maximum penalties under the new legislation. There will be three categories of penalties with the most serious category, category 1, attracting a maximum penalty of \$3 million for a corporation and \$600,000 and 5 years’ imprisonment for an individual in breach of the legislation.
- **Union Prosecution:** the ability for unions to prosecute organisations or individuals for breaches of the legislation will be removed (although NSW has indicated that it intends to amend the model OH&S legislation so that unions may retain the right to prosecution).
- **Positive Obligations:** the model OH&S legislation will impose a positive obligation on the officers of an organisation to exercise due diligence in ensuring that their company meets its safety obligations. The OH&S legislation sets out a non-exhaustive set of steps that an officer must comply with to discharge their obligations.
- **Consultation Obligations:** while consultation obligations have always existed, the obligations have generally been confined to consultation between employers and employees. Under the new model OH&S legislation a person conducting





a business or undertaking will now have an obligation to consult with “workers.” This will require consultation with a broader range of parties such as contractors, subcontractors and employees of labour hire companies.

## Reducing your OH&S Risk Exposure

The new OH&S legislation is no less onerous than current OH&S standards, and in fact, the significant increase in penalties should send a clear message to persons conducting a business or undertaking that they must take their OH&S obligations extremely seriously.

In our view, the new OH&S legislation will result in significant changes and all employers and persons conducting a business or undertaking should ensure they have the necessary checks in place to comply with present and future obligations. The checklist below will assist you in ensuring that the correct procedures are in place.

It is hoped that OH&S harmonisation will improve health and safety outcomes for employees, reduce compensation costs, and simplify administrative processes in businesses across Australia. In particular, this new legislation is designed to benefit those who conduct business across multiple states and the employees working alongside them.

Individual directors and managers should be ready, willing and able to meet the duty imposed by the new “due diligence” test, providing appropriate safety management systems, and ensuring that all staff members are properly informed of the impending changes.

## OH&S Harmonisation Checklist

- 1. Ensure familiarity with the new OH&S obligations** – ensure all employees and persons involved with the management or control of the workplace and have attended training on the legislation, the expanded obligations, the codes of practice and any new procedures in place. Attendance at this training should be compulsory and records of attendance should be kept.
- 2. Revise contracts and arrangements with third parties** to ensure these contractors (for example labour-hire companies) are contractually required to comply with OH&S obligations and that due diligence can be shown.
- 3. Implement clear procedures for carrying out and documenting risk assessments** and complying with risk management obligations. This includes ensuring assessments are carried out on a regular basis, discussing the findings with management and taking steps to remedy any risks. All of these steps should be documented.
- 4. Update your safety notice boards** in the workplace. They should contain details of the upcoming changes and details on the new regulations and codes of practice.
- 5. Promulgate accident books** in prominent locations and employees, contractors and visitors alike should be trained and encouraged to report any risks or suspected breaches.
- 6. Update dispute resolution procedures** to allow labour-hire workers, volunteers and contractors to raise any concerns they may have about risks or breaches of OH&S laws.
- 7. Introduce processes to facilitate constructive discussions with union officials** about OH&S issues. The union rights of entry will expand after 1 January 2012. Unions will have the power not only to investigate incidents, but to advise and consult with workers about OH&S issues. You should ensure your policies are up-to-date.
- 8. Educate company directors/officers** as to their obligations and that they may escape prosecution if they are able to demonstrate that they took all reasonably practicable steps to prevent the contravention. This requires due diligence to be performed by those who have the capacity to influence the management of a company, including facilities to report and review OH&S breaches and concerns at board level. In order to establish that he or she has used all due diligence, an officer of a company must:
  - have a **current knowledge of work health and safety** matters;
  - understand** the nature of the **operations of the business** and generally of the hazards and risks associated with it;
  - ensure** that the company uses **appropriate resources and processes to control or eliminate hazards** associated with its operations;
  - ensure** that the company has **appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding** in a timely way to that information;
  - ensure** that the body has, and **implements, processes for complying with any duty or obligation of the body under the legislation** (this might include the obligation to notify incidents, consult with workers, etc.); and
  - have in place a **system for verifying the continued compliance** by the business and its obligations. •



## A WORD ON OUR WEBINARS

In February this year, PCS commenced a series of monthly webinars to allow its busy clients to participate in our education programs without leaving their desks. Thank you to all who have participated so far and for the overwhelmingly positive feedback. Our webinars are provided as a complimentary service to current PCS clients. Individuals from organisations who are not current clients are welcome to attend for a small fee.

Our next webinar will take place on **Tuesday, 12 April 2011 at 12noon AEST** on *"Paid parental leave and flexible work"*. We encourage you to visit our website for more details or contact Sarah Lilley for a schedule of PCS' events in 2011. ●

## BREAKFAST SEMINAR – 5 MAY 2011

PCS will be holding a breakfast seminar on **Thursday, 5 May 2011** on the topical issue of *"Future of employment litigation in Australia"*. In light of recent high profile litigation in areas such as sexual harassment, restraint of trade and trade practices (including some cases where PCS has represented clients) this is a must-attend session for senior HR practitioners, in-house counsel and senior finance/risk executives. More details will be released shortly. ●

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If you are interested in receiving regular updates and invitations to our events please register on our website – [www.peopleculture.com.au](http://www.peopleculture.com.au) – or email our Practice Manager, Sarah Lilley, directly at [sarah.lilley@peopleculture.com.au](mailto:sarah.lilley@peopleculture.com.au). ●

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