

News&Views

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Smarter Business Less Risk



Proposed Work, Health & Safety laws - your responsibility for risks you don't control

To comply with controversial proposed work, health and safety laws currently before South Australian Parliament¹ you may be required to drastically alter the way your business operates.

Key issues related to the *Work, Health and Safety Bill* include union right of entry, powers enabling the Regulator to seize a workplace, hundreds of pages of complicated Regulations and Codes of Practice, and significantly increased penalties and jail terms. However, the most significant change to existing OHS laws is the removal of the 'control test' as a matter of first principle. This means you will have a legal obligation to eliminate or minimise safety risks in connection with your business or undertaking even when you don't have control over the particular action that gives rise to the risk.

Failing to understand and therefore comply with your obligations could be extremely expensive. It is therefore vital your business knows the facts.

Your obligation for safety absent control

OHS laws in Australia, which are criminal laws, were founded upon the notion that 'control' should be a matter of first principle when determining OHS responsibility. Under current South Australian OHS laws, if you do not have control of a relevant safety risk, you do not have a criminal responsibility for its elimination or reduction.

In striking contrast, the proposed laws make a person liable under criminal law for something which they do not control. The laws will make a person criminally liable in circumstances that require no mental element (intention) to be proven. What is even more alarming is that the Government originally sought to remove a person's fundamental democratic right to claim



privilege against self-incrimination. However, following strong criticism has backed down and indicated that it will amend the proposed laws to maintain this protection.

The proposed laws prescribe a legal responsibility to Persons Conducting a Business or Undertaking (PCBU) to minimise or eliminate safety risks in connection with the business or undertaking. The issue of whether a PCBU had control and therefore ought reasonably be able to discharge that duty is considered **after** the Regulator has determined the duty has been breached and has issued a fine or launched a prosecution. To escape conviction a PCBU will have to demonstrate it was not reasonably practicable for them to discharge the duty.

The removal of the 'control test' as a matter of first principle completely confuses who properly has the responsibility for safety risks. Furthermore, the Government has failed to produce any evidence which clearly demonstrates the

proposed laws will improve workplace safety.

In February, as a result of intensive lobbying by a large number of industry associations and prominent South Australian businesses, the Liberal party announced it would move to defeat the proposed laws. The Government has since been attempting to persuade the opponents of the proposed laws to allow their passage through Parliament, and has recently indicated it will insert a new clause 17(2) regarding 'control' to appease concerns.

When considered carefully, it is clear the proposed clause 17(2) actually says that if you do not have direct control, then the responsibilities you will have pursuant to the laws will be determined by the extent that you can influence a matter. The drafting is doubled edged in the sense that it catches a person with direct control **and** a person who has capacity to influence absent direct control. This drafting does not return 'control' as a matter of first principle and significantly detracts from the current position in the proposed laws.

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This puts you and your business at significant risk of breaching the laws and being prosecuted.

The proposed laws have already passed the Lower House and debate could resume in the Upper House as soon as Tuesday, 17 July.

If you are concerned about how this will affect your business, you should immediately contact the following key Independents, who will be crucial to the passage of the legislation:

Hon John Darley MLC
(Independent)
C/O Parliament House
8237 9114
john.darley@parliament.sa.gov.au

Hon Ann Bressington MLC
(Independent)
C/O Parliament House, Adelaide
SA 5001
8237 9596
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If you require advice about how these laws will affect your business please contact Jodie Bradbrook on (08) 8410 3393.

¹ Work Health Safety Bill 2011