

Work health and safety

Duties of Directors

Directors have a direct legal duty to implement and monitor systems which ensure safe working conditions in their workplaces as far as reasonably practical. In nearly all Australian jurisdictions, there is a positive obligation on directors to exercise due diligence in relation to work health and safety. Directors can be personally liable for breaches of this duty and the penalties can involve imprisonment and very substantial fines. Good governance practice ensures that every board meeting has work, health and safety as a topic on the agenda.

What laws regulate work health and safety?

In the past, each state and territory had a different work health and safety law. In 2009, the Workplace Relations Ministers' Council endorsed the introduction of national harmonised work health and safety laws based on a *Model Work Health and Safety Act* ('Model Act').

Laws based on the Model Act have commenced in the Commonwealth (*Work Health and Safety Act 2011*), the ACT (*Work Health and Safety Act 2011*), New South Wales (*Work Health and Safety Act 2011*), South Australia (*Work Health and Safety Act 2012*), Tasmania (*Work Health and Safety Act 2012*), the Northern Territory (*Work Health and Safety (National Uniform Legislation) Act 2011*) and Queensland (*Work Health and Safety Act 2011*). Western Australia is in the process of introducing the vast majority of the Model Act, with the Work Health and Safety Bill, 2014.

The exception is Victoria, where the government has stated that it will not be joining the harmonised model so the *Victorian Occupational Health and Safety Act 2004* will continue to apply in that State.

There are work health and safety codes of practice which provide practical guidance to support the Model Act. These codes are not mandatory and an equivalent means of providing the same level of health and safety is acceptable. However, the codes of practice have evidentiary value in court.

What must a company do?

Under the Model Act, a person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- workers engaged, or caused to be engaged, by the person; and
- 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.

More specifically, a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable:

- the provision and maintenance of a work environment without risks to health and safety;

- the provision and maintenance of safe plant and structures;
- the provision and maintenance of safe systems of work;
- the safe use, handling and storage of plant, structures and substances;
- the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;
- the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

What does 'reasonably practicable' mean?

The duty to ensure health and safety under the Model Law requires an organisation to eliminate risks to health and safety so far as reasonably practicable. If it is not reasonably practicable to eliminate risks, then the duty is to minimise those risks as far as reasonably practicable.

In determining what is 'reasonably practicable', it is necessary to take into account and weigh up all the relevant matters, including:

- the likelihood of the hazard or the risk concerned occurring;
- the degree of harm that might result from the hazard or the risk;
- what the person concerned knows, or ought reasonably to know, about the hazard or risk and ways of eliminating or minimising the risk;
- the availability and suitability of ways to eliminate or minimise the risk;
- assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

Which 'workers' are covered?

The Model Act has a wider definition of the 'workers' who are to be covered than existed under the former State and Territory legislation. There is now a duty to ensure the safety of the following 'workers':

- An employee
- A contractor or subcontractor
- An employee of a contractor or subcontractor
- An employee of a labour hire company who has been assigned to work in the person's business or undertaking
- An outworker
- An apprentice or trainee
- A student gaining work experience, or
- A volunteer.

How does a director exercise 'due diligence'?

If a person conducting a business or undertaking has a duty or obligation under the Act, an officer (which includes a director) 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. 'Due diligence' includes taking reasonable steps:

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

- 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
- to verify the provision and use of the resources and processes referred to above.

This is a positive duty which requires directors to be proactive and means that they owe a continuous duty to ensure compliance with duties and obligations under the Model Act. There is no need to tie a director's failure to any particular failure or breach of the relevant person conducting a business or undertaking for the director to be prosecuted.

Traditionally, the courts have held that an employer's duties are very high and, accordingly, the due diligence defences are difficult to establish. The point has been made in a number of cases that 'all due diligence' contemplates a 'mind concentrated on the likely risks'.

It has been recommended by Professor Jim Galvin ('Towards zero harm', *Company Director*, April 2012) that:

“ One of the most valuable leading indicators that should feature in board reporting is significant and near-miss incidents. These provide free learnings and increase an organisation's awareness and understanding of the risks it owns.”

Can a director be liable even though 'remote' from day-to-day operations?

The short answer is 'Yes'. By definition, directors become further removed from day-to-day operations when a company becomes larger as it is their duty to focus on wider strategy and compliance, not to manage the company. Nevertheless, liability can be attracted where directors play even a limited direct role in the operation of the business. This will happen where directors leave the decision making to management but without at the same time making consistent and on-going enquiries aimed at ensuring that management was both capable and competent of discharging the company's statutory obligations as to safety (see, for example, *James v Paul (No 2)* (2011) NSWIRComm 117).

What are the sanctions for breach of duty?

Under the Model Act, where a director commits a breach involving recklessness to the risk an individual of death or serious injury or illness, the penalty can be up to a fine of \$600,000 and/or five years' imprisonment. For these serious offences, the prosecution must prove that the conduct was engaged in without reasonable excuse. 'Reasonable excuse' encompasses a concept similar to reasonable practicability. This means that the prosecution needs to prove beyond reasonable doubt that the defendant exposed a person to risk where it was reasonably practicable for the person not to have done so.

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