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Harmonization of Australia's OHS Laws

Work safety: Why one word---'control'---is so important

14 October 2011

Background



There's an attempt to introduce new work safety laws across Australia. We've explained before [what's going on](#). We explain here again why the word 'control' must be maintained in the laws and not removed as is planned. 'Control' is the central identifier to ensure that everyone is responsible for safety.

Not having the word 'control' risks creating further deaths and injuries in the workplace. It's a risk that should not be taken.

This assessment focuses on comparisons with the South Australian laws as an example to show how 'control' is embedded in current laws and should be included in the new laws. The message is the same across Australia and, for that fact, across the globe.

Overview

The starting point to understand is that the current South Australian OHS Act and the model Bill are creatures of completely different structures. The Bill comes to the OHS issue of allocation of responsibilities from a perspective not seen before. It is new and entirely untested law and therefore creates confusion. This will critically damage work safety objectives in SA---something which is explained below.

The most important high-order objective that OHS legislation must secure is to provide the framework for who---in, and involved at workplaces---is responsible for safety. This provides the starting point for the laws from which everything else follows. If this is badly done, the outcome is a cascade of error and confusion through the legislation, regulations and application of the law. This is the situation with the model OHS Bill.

'Control' is the key

The international principle for OHS legislation is that all parties at work are held responsible for what they '*reasonably and practicably control*'. The concept was developed in Britain in the 1970s (it is typically referred to as 'the Robens principles') and has since been formalised in International Labour Organisation Conventions to which Australia became a signatory in 2004.

Understanding the idea of 'control' within the existing SA Act. The status quo

The existing SA Act was conceived during the 1980s and applied the principles of 'reasonable, practicable *control*' in a particular way. The legislators who framed the SA Act did what was normal at the time in Australia (and the developed world) and used the employer--employee relationship to identify 'control'---that is, under common law the employer has the 'right to control' the employee. Therefore, the employment relationship conveniently identified 'control' for the purposes of OHS. The Act inserts the terms 'reasonably, practicable' alongside 'control', therefore making the Act consistent with the Robens principles.

19---Duties of employers

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(1) An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is *reasonably practicable* that the employee is, while at work, safe from injury and risks to health and, in particular.

The Act further allocates obligations to employees. The Act does not qualify the employees' duties with 'control', presumably because it's assumed that employees exercise direct control over the work they are doing at any time.

21---Duties of workers

(1) An employee must take reasonable care to protect the employee's own health and safety at work.

(1a) An employee must take reasonable care to avoid adversely affecting the health or safety of any other person through an act or omission at work.

The Act also allocates obligations to self-employed people, but then makes specific reference again to employers and their obligations to people who are not employees. This is because employers do not have a 'right to control' people who are not their employees. The Act inserts the term 'under the management and control of' specifically to identify that obligations apply to people who have control of the work.

22---Duties of employers and self-employed persons

(1) An employer or a self-employed person must take reasonable care to protect his or her own health and safety at work.

(2) An employer or self-employed person must ensure, so far as is reasonably practicable, that any other person (not being an employee employed or engaged by the employer or the self-employed person) is safe from injury and risks to health---

(a) while the other person is at a workplace that is *under the management and control of the employer or self-employed person*; or ...

This is the status quo of the SA OHS Act. People are held responsible for matters they control:

- Employers: to employees because common law under the employment relationship denotes 'control';
- Workers: to themselves and others because they personally 'control' their work;
- Self-employed people: to themselves; and
- Self-employed people and employers: to anyone else where the self-employed person or the employer has 'control.'

Suppliers and others also have responsibilities over matters they control where they supply equipment for example, and so on. This is specifically referred to in the SA Act.

Allocating responsibility for work safety according to what people 'control' is common sense, but it's also a matter of criminal law.

- 'Control' being central to OHS responsibilities under law has more than two decades of legal certainty behind it, having been repeatedly tested in the courts. It is known and it is certain.
- 'Control' means people understand when they are responsible. If they 'control' something, then they are responsible. This is how it should be. 'Control' directs and motivates their behaviours toward being safe. There is no confusion.

What happens when the term 'control' is removed?

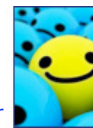
What has driven the OHS harmonisation push across Australia is that, around 2001, NSW amended its OHS laws, effectively removing 'reasonable, practicable control' as the identifier of responsibility. The result was that, over a decade, many people in NSW were prosecuted and convicted for matters over which they had no control.

Example: One example was that of a NSW plumber who installed a hot water safety valve in a nursing home. The valve failed and an elderly woman was badly scalded and died. It was found that the valve failed due to a microscopic, hairline fracture in the internal sealed workings of the valve. However, the plumber was prosecuted and convicted. The court found that the plumber had installed and maintained the valve

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correctly and had done everything possible that was within his control. He was blameless. Yet the court said that the wording of the NSW OHS Act required the court to convict the plumber.

This was just one of many repeated examples.

The consequence of this malfunctioning of criminal justice is not just that innocent people are convicted, but that the OHS law itself is bought into disrepute. People don't trust the law. It creates an environment of fear around OHS law. It damages work-safety objectives because it creates environments of distrust between the community and those who have to enforce work safety laws. It diminishes a cooperative and open environment of trust. It threatens work safety. This is the risk the model OHS Bill poses for SA.

The NSW law was effectively declared unconstitutional by the High Court in 2010, but only after much injustice was done and at huge expense to individuals and the community.

What's happening across the jurisdictions

NSW implemented the model OHS Bill around May 2011 which, in its case, actually created an improvement in NSW OHS law. This was because the model Bill introduced the words 'reasonably and practicable'. But it is still deficient because the word 'control' is missing. It is inevitable that, over time, problems will again emerge similar to the plumbing example above, and that NSW will have to amend its OHS laws.

Queensland also implemented the model OHS laws around May 2011, but this is a backward step in that state because of the removal of the word 'control'. The Queensland opposition has stated its intention to amend the laws when it obtains government.

Western Australia and Victoria have OHS laws very similar in their structure to those in SA. Both WA and Victoria have expressed serious reservations about the model OHS Bill on many fronts and both announced at least a one-year delay to allow further time for consideration.

The Federal Parliament is yet to consider the model Bill. The Federal Opposition has already flagged a range of amendments consistent with the propositions in this article.

The model 'harmonised' OHS Bill

The model Bill is deficient on several fronts, but the most important is the non-inclusion of 'control' in the identification of duties of care---that is, who is responsible. In this respect and, quite amazingly, it defies both the Robens principles and the OHS international conventions.

The Bill applies a totally different approach to the identification of responsibilities by inventing a new term, never seen before, namely that of a Person Conducting a Business or Undertaking (PCBU). This term has no meaning at law other than the definition in the proposed Bill and no legal testing to support or define it. In lay language, it is an invention of a term that has no commonsense resonance for the average person. It is a term that will create confusion for ordinary people involved in business---particularly small business people.

The Bill fails to define what is a PCBU other than essentially to say that a PCBU is a PCBU.

Section 5 Meaning of *person conducting a business or undertaking*

(1) For the purposes of this Act, a person conducts a business or undertaking:

- (a) whether the person conducts the business or undertaking alone or with others; and
- (b) whether or not the business or undertaking is conducted for profit or gain.

It is inevitable that this lack of definition will result in extensive testing before the courts (probably over many years) before a definition is anywhere near determined.

The problem this creates for the SA OHS status quo

The aim of the SA Liberal Party is to amend the Bill to maintain the SA OHS status quo. But because the model Bill is not structured around 'employers', the task of amending it creates conceptual confusion. Conceptually the model Bill and the

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existing SA Act are alien rather than complementary creatures.

But there are several approaches that could perhaps be used to ensure that the status quo is maintained:

1. Amend the definition of a PCBU to define a PCBU as an 'employer'.
2. Delete 'PCBU' throughout the entire Bill, replacing 'PCBU' throughout with 'employer'.

Both approaches, however, would require vast amendments throughout the entire Bill, which would likely render it totally different to its current form. Both alternatives are certainly options, but it would probably be easier simply to reject the model Bill.

3. The third option is to retain the substance of the model Bill while ensuring that the word 'control' is inserted into the duties of care. This is required primarily in clause 19, but is also needed in the objectives of the Bill at clause 3.

Importantly, doing nothing in this respect (that is, making no amendments to ensure that 'control' is up front and centre) will guarantee that the status quo under SA OHS law will *not* prevail.

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