

CLAYTON UTZ

## AAPA Road Construction & Surfacing Health and Safety Conference

### Management within harmonisation of WHS regulations

Presented by:

Shae McCartney, Partner  
Clayton Utz

23 September 2013

## Overview of the session

### Part 1 - Harmonisation

- The current state of play
- WHS harmonisation - 18 months in
  - Duties (shift in emphasis)
  - Officers' obligations
  - "Horizontal" CCC

### Part 2- Significant management issues

- Contractor Management
- Bullying in the Workplace
- Terminating employment for safety breaches - golden rule

CLAYTON UTZ

## Harmonisation - where are we at

### Part 1 - Harmonisation

- The current state of play
- WHS harmonisation - 18 months in
  - Duties (shift in emphasis)
  - Officers' obligations
  - "Horizontal" CCC

CLAYTON UTZ

**Under the harmonised legislation working  
from heights still requires a SWMS.....**



CLAYTON UTZ

**...you must consider safety in design.....**



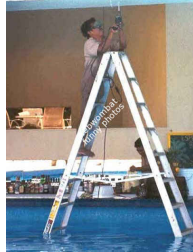
CLAYTON UTZ

**You must still carry out a risk assessment  
including when operating circumstances  
change....**



CLAYTON UTZ

Under the WHSA appropriate PPE is important but is not your first control...



CLAYTON UTZ

You need to look at people risks including fatigue management, drug and alcohol and bullying....



CLAYTON UTZ

You need a holistic approach to safety....



CLAYTON UTZ

### Harmonisation - what actually happened

- As at 23 September 2013:
  - Cth, Qld, NSW, ACT, NT commenced 1 January 2012
  - SA and Tas commenced 1 January 2013
  - Vic and WA are yet to introduce WHS Bills
- Estimated Commencement Date?
  - WA does not intend to adopt the whole of the Model Act, it is now considering overhaul its whole legislation and adopting parts - no date is announced
  - Vic has announced that it will not adopt the Model WHS laws in its current form



CLAYTON UTZ

### Some key points



The Model Work Health and Safety Act

- duties owed beyond the employment relationship
- concept of a "person conducting a business or undertaking"
- reasonably practicable defined - creates almost strict obligations
- requires documented systems and for these systems to be practised
- requires verification that the systems are practised
- requires additional consultation with workers and other obligation holders

CLAYTON UTZ

### Some key points

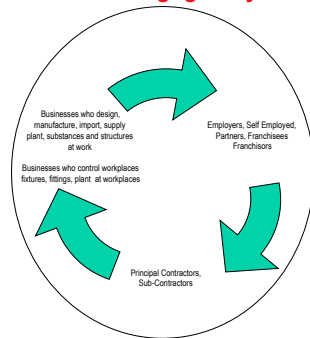
The Model WHS Act

- imposes personal liability on *officers* to be actively engaged to ensure compliance of the PCBU (exercise due diligence)
- imposes personal liability on workers to
  - take reasonable care for his or her own health
  - take reasonable care not to adversely affect the health and safety of others
  - comply, so far as the worker is reasonably able, with any reasonable instruction
  - co-operate with any reasonable policy or procedure relating to health or safety at the workplace
- increased penalty regime

CLAYTON UTZ

## Duty extends beyond workers engaged by the PCBU

- The primary duty is owed by the operator of the business or undertaking to workers at work in the business or undertaking (wherever they are) (Section 19)



CLAYTON UTZ

## What is "reasonably practicable"?

- Defined in section 18 of the Model WHS Act
- Reasonably practicable is an element of almost every duty in the Model WHS Act
- Means - that which is, or was at a particular time, reasonably able to be done in relation to ensuring health or safety, taking into account and weighing up all relevant matters
- Assessment of what is "reasonably practicable" is an objective test and no single "matter" is determinative
- Cost is secondary - The associated cost is grossly disproportionate to the risk

CLAYTON UTZ

## Officers and DD - Who is an Officer?

- Corporations Act definition of "officer" applies and includes:
  - a director or secretary
  - a person who makes or participates in making decisions that affect the whole, or a substantial part of the corporation or
  - a person who has the capacity to affect significantly the corporation's financial standing (see Workbook page 9)
- Officers can also be **"a person who makes, or participates in making decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority"** (Section 247)
- Officers can be personally liable under the Model Act

CLAYTON UTZ

## Due diligence "checklist"

- Acquire and keep up-to-date knowledge of WHS matters
- Understanding operations and BOQ's particular hazards and risks
- Ensure resources and processes for risk elimination or minimisation
- Get, considering and ensuring timely response to information about incidents, hazards and risks
- Ensure there is a process for compliance with WHS duties and obligations
- Verify (c), (d) and (e) above

CLAYTON UTZ

## Fulfilling the duty of "due diligence"

- Greater level of awareness/training amongst "officers" of OHS matters
- Right governance structures
- Increased level of overt consideration of OHS matters in decisions that affect the business or undertaking
- Monitoring and regular reporting of OHS matters to all "officers"



CLAYTON UTZ

## Consultation Obligations (onerous)

- New specific obligation:
 

*If more than one person has a duty in respect of the same matter under this Act, each person with the duty must so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter*
- Must consult with other persons who have duties (e.g. other companies operating on the same project)

CLAYTON UTZ

## Penalty Regime

Category	Description	Maximum Penalty
Category 1	Most serious cases - breach of the primary (general) duty involving recklessness and serious harm (fatality or serious injury) to a person or a risk of such harm.	Corporation = \$3 million Individual = \$600,000 Imprisonment - up to five years Workers and other persons = \$300,000 Imprisonment - up to five years
Category 2	Breach of the primary (general) duty where serious harm or the risk of it <u>without the element of recklessness</u> .	Corporation = \$500,000 Individual officers = \$300,000 Workers and other persons = \$150,000
Category 3	Breach of the duty that does not involve high risk of serious harm.	Corporation = \$500,000 Individual officer = \$100,000 Workers and other persons = \$50,000

CLAYTON UTZ

## Significant management issues

### Part 2- Significant management issues

- Contractor Management
- Bullying in the Workplace
- Terminating employment for safety breaches - golden rule

CLAYTON UTZ

## Contractor management

- The importance of control
- What is Reasonably Practicable
- Concept of principle contractor

CLAYTON UTZ

## WHS Cases - contractor management

### Austberry and Santos

- Eastern Star Gas Ltd (now known as Santos NSW Pty Ltd) was Principal Contractor
- Director of a contractor told to stand behind tree while Austberry used excavator and chains to try to extract the pipe, after it became stuck in a bore hole beneath the creek
- Chain broke free (second time that day) killing the Director who was not standing behind the tree

CLAYTON UTZ

## Prosecutions

- Austberry fined \$170,000
- Eastern Star Gas pleaded guilty to failing to check whether Austberry's SWMSs were specific to the task, failing to ensure entities involved in the project were instructed to stop work before an unplanned activity that hadn't been risk assessed was carried out, and failing to provide adequate supervision.
- Eastern Star fined \$120,000

CLAYTON UTZ

## Thoughts from Baiada

- The prosecution cannot simply point to an act the person conducting a business or undertaking might have taken. The person only has to take such steps as are "reasonably practicable"
- Similarly, while the employer won't be able to simply say it is "entitled" to rely on its independent contractors, it also shouldn't be convicted simply for failing to exercise a theoretical right of direction
- Persons conducting a business or undertaking can't simply outsource the problem and should take a serious look at their outsourcing arrangements.



CLAYTON UTZ

## So how can you manage it?

CLAYTON UTZ

## Importance of contracts/documentary evidence

- MOU, RFT and contracts
- Also, minutes of meetings, correspondence confirming understanding etc
- Actions consistent with the above
- What about
  - contractor management
  - policies and procedures

CLAYTON UTZ

## Checklist

- exercising due diligence in assessing and appointing the contractor, including ensuring that they have sufficient skills, expertise and resources to carry out the contract safely;
- identifying where you are relying on the contractor's specialised skills and expertise and particularly where the principal does not have the skills and expertise itself;
- providing the contractor with information known in relation to the hazards associated with the contract and asking the contractor to address how it will manage those hazards;
- ensuring the contractor has in place a safe system of work and effective health and safety management systems;

CLAYTON UTZ

## Checklist

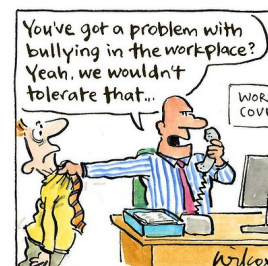
- having the contractor provide regular reporting on compliance (including in relation to training, competencies, hazard identification and analysis, incident reporting etc);
- provide for a system of internal and independent audits and reporting on compliance with audit recommendations;
- appoint a qualified independent verifier to verify compliance;
- acting immediately and proactively on identified breaches, incidents or identified unsafe practices;
- creating contractual obligations on compliance with legislation; discharging obligations and providing a safe and healthy working environment;
- establishing safety key performance indicators; and
- providing for a system on consultation, co-operation and co-ordination in relation to safety matters.

CLAYTON UTZ

## Workplace Bullying Overview

- Increased profile eg Brodie's law, law reform, House of Reps Committee inquiry into workplace bullying
- Workplace bullying is an OHS issue
  - Model WHS Legislation
- Workplace bullying as a cultural issue - intersection with physical risks
- Basic steps to minimise risk

CLAYTON UTZ



CLAYTON UTZ

### Bullying under the Model WHS Act?

- Due diligence obligation will increasingly require officers to ensure their PCBU has in place processes for complying with obligations under the WHS Act to prevent or address bullying.
- Officers can be liable - contravention is attributable to an officer of PCBU failing to take reasonable care
- An awareness of the obligations under the Model Code of Practice, *Preventing and responding to Workplace Bullying* is critical

CLAYTON UTZ

### Fair Work Amendment Act 2013

- Assent date - 28 June 2013
  - Delayed proposed start date - 1 January 2014
  - FWC bullying won't apply to Defence Force, Australian security agencies and AFP



CLAYTON UTZ

### Fair Work Amendment Act 2013

- A worker who reasonably believes that they have been bullied may apply for an Order
- Worker definition per *Work Health & Safety Act 2011* and includes:
  - Employee, contractor, subcontractor, outworker, apprentice, trainee, student gaining work experience or volunteer

CLAYTON UTZ

### What is Bullying - Draft Code

- Repeated behaviour: persistent nature of the behaviour and can refer to range of behaviours over time
- Unreasonable behaviour: means behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening

CLAYTON UTZ

### Minimising Risks - Practical Tips

- Educate employees:
  - What is and is not bullying/discrimination
  - Standard of conduct expected in workplace
  - Develop and implement policies and procedures to assist manage
  - Develop your papertrail



CLAYTON UTZ

### Minimising Risks - Practical Tips

- Action to be taken when aware of complaint - RMA
  - Acting promptly and consistently to investigate and respond/educate - consider policies - act consistently
  - Understand the signs of bullying - increase in absenteeism, high turnover
  - Don't condone bad behaviour - early intervention - don't acquiesce
  - Communicate about standards and expectations
  - Refresh policies



CLAYTON UTZ

## Terminating employment for safety breaches

- Breach of employment contract
- Employees should not be dismissed in circumstances that are harsh, unjust and unreasonable
- Balance WH&S obligations to ensure health and safety of workers against liability for unfair dismissal claims

CLAYTON UTZ

## Termination for breach of safety - Cases

- Leonard v. Bluescope
  - History of serious incidents involving forklifts
  - Strict exclusion zone policy
  - Breached twice within a month
  - Termination found to be harsh
    - 30 years
    - Mitigating factors
    - First incident questionable



CLAYTON UTZ

## Termination for breach of safety - Cases

- Wililo v Parmalat Food Products
- Even though the forklift driver's dismissal was for a valid reason and was considered procedurally fair, the Commission found the dismissal to be harsh
- Overturned on appeal
- "Anomalous that an employee found guilty of serious misconduct for breaching safety rules and after due process could be found to be harsh"

CLAYTON UTZ

## 10 steps to minimise discrimination claims and disputation

1. Manage medical certificates
2. Comply with company policies, contracts and industrial instruments
3. Performance management - misconduct v. performance
4. Employee training in safety policies - if it is a golden rule - say so

CLAYTON UTZ

## 10 steps to minimise discrimination claims and disputation (cont.)

6. Consistent treatment of employees - say what you are taking into account
7. Has a thorough investigation occurred - consider privilege
8. Complaints/dispute resolution process
9. Whistle-blower's hotline
10. Separate the issues where necessary
11. Paper trail

CLAYTON UTZ

## Conclusion

### Risk management in road construction

What is safe does not change, however, management of your safety obligations amongst such a complex overlay of current and changing legislation requires:

- understanding of obligations
- communication
- management plan
- reporting/audit system
- constant vigilance
- proactive response

diligent

innovative

engaged

proactive

CLAYTON UTZ

**Questions?**

CLAYTON UTZ

**Contact details**

**Shae McCartney, Partner**

**Clayton Utz**

**D** +61 7 3292 7306

**M** 0434 152 915

**E** smccartney@claytonutz.com

CLAYTON UTZ

[www.claytonutz.com](http://www.claytonutz.com)