

August 2010

## OHS HARMONISATION? IS IT A PUSHMI – PULLYU IN THE MAKING?

*Published in the Safety Institute of Australia's OHS Professional Magazine 2010*

As the nation moves towards the harmonisation of workplace health and safety laws across nine jurisdictions, the question remains: once implemented, will it stick and will result in truly harmonised regulation of OHS across the country? Or will the interpretation and application of the laws by 9 separate jurisdictions result in a Dr Dolittle style pushmi – pullyu.

When Julia Gillard spoke to a members at the insurance giant Allianz's Workers' Compensation National Client Seminar in September last year she was under no illusion about the challenges that lie ahead.

"If it was easy, it would have been done by now," she said, quoting Barack Obama who was facing his own battles to reform US healthcare.

The workplace health and safety laws will consist of the model Workplace Health and Safety Act, supported by model work health and safety Regulations and model Codes of Practice that can be readily adopted around Australia. This requires each state and territory to pass their own laws that mirror the model workplace health and safety laws and adopt them by December 2011. Harmonisation, as Gillard noted, has been on Labor's agenda since 1974.

But with Western Australia's decision to reserve "the right not to adopt [future] changes recommended" by the Workplace Relations Ministerial Council (WRMC), the road to harmonisation has already shown signs that unification and consistency in the future development and application of the model laws may be difficult to achieve.

Cracks that may widen as time passes were illustrated clearly on 11 December last year as Gillard welcomed state and territory agreement to the model OHS laws when Western Australian Minister for Commerce Troy Buswell released a separate statement that drew a line in the sand over several aspects, including the level of penalties and right of entry; power for health and safety representatives to stop work; and reverse onus of proof for discrimination issues.

"We also have concerns about changes to Category 1 and 2 offences in the model laws proposed by Safe Work Australia and adopted today by the WRMC," he said.

Category 1 and 2 offences cover serious harm cases, with the categories distinguished by whether a breach was considered reckless or not. At the top end, corporations can face penalties of \$3 million, while individuals can face a \$600,000 fine and five years imprisonment.

Michael Tooma, partner at law firm Norton Rose, comments that while high level agreement was reached through the WRMC in December last year, risks to harmonisation's sustainability have not been canvassed sufficiently.

While for example the Workplace Relations Act was effectively "stamped on the country", the Workplace Model Health and Safety Act has required state government cooperation.

"If the proposed laws are implemented by state and territory governments, it will result in harmonisation," Tooma told OHS Professional.

"The laws will hopefully have little difference, but those nine jurisdictions will still be enforced by nine different regulators, and nine different court systems," he said. "Also, over time, as governments change, so may the emphasis change."

Tooma pointed to the South Australia and Tasmania's upcoming election as possible triggers for divergence from the agreement. On top of this, NSW, Queensland and the Federal Government are expected to go to election within the next two years.

"It's expecting that a change of government will keep the commitment of its predecessor, which is a significant leap of faith. You're relying on that, overtime, it won't deviate from the script," said Tooma.

OHS consultant from Simple OHS Solutions and lawyer, Sue Bottrell agreed with Tooma's observations. While Western Australia's response highlights the immediate difficulties the legislation faces, the real challenge will surface once each state's regulator and court system has been brought into the picture.

"Consistent OHS legislation is just the tip of the iceberg," Bottrell told OHS Professional.

"A company operating in several jurisdictions may face the same duties under [harmonised] legislation, but if the guidance by local regulators about how to interpret that duty and how to comply is different, then you're almost back to square one." "As Michael has said this can easily be influenced by changing contexts such as the political landscape.

"So, we've gotten over the first major hurdle, which is getting these states to give up their own legislation, but now we face the next major hurdle: consistent application within each jurisdiction, which has the right to operate independently. And that's where push will come to shove."

Even more variation may be expected as prosecutions are brought in each jurisdiction, and the courts begin to lay down case law under the legislation. Whilst we will likely see the various state and territory courts referring to decisions made in the different jurisdictions variations may start to appear as to how is legislation practically interpreted in each jurisdiction."

Bottrell urged anyone who thinks that the harmonisation of state laws means the end of the process to think again.

"We are on the journey but we're only at the beginning and if there isn't real commitment to working together over the longer term the new model laws may end up a version of Dr Dolittle's fabled pushmi – pullyu an animal pulling in opposite directions at once and unable to get anywhere."