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**Industrial Relations Society of New South Wales
Annual Conference 2011
Fair Work – Moving beyond the rhetoric**

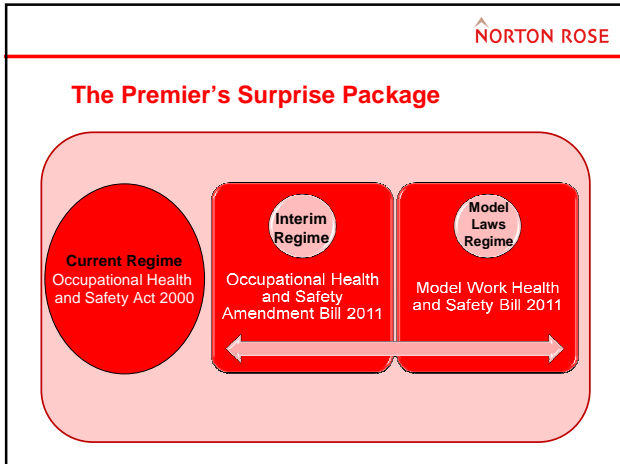
**The Model Work Health and Safety Laws –
*The more things change, the more they stay the same***

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Occupational Health Safety and Security
14 May 2011

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Today

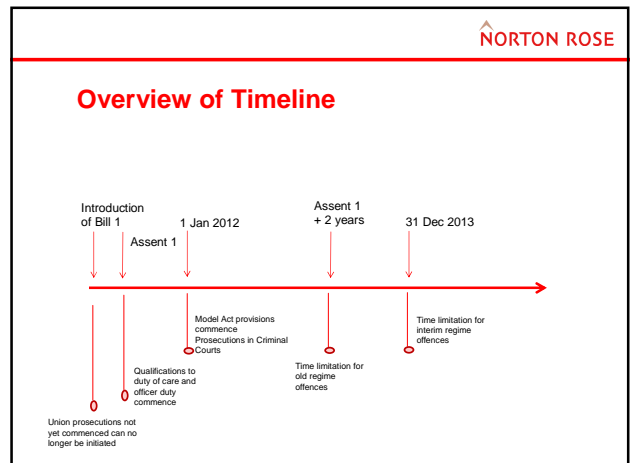
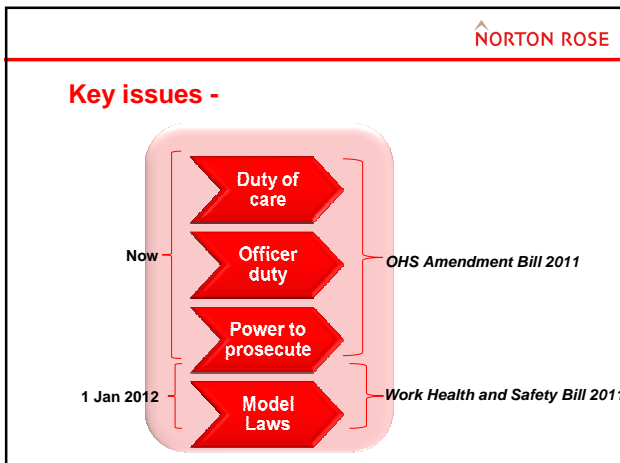
1. The Premier's surprise move & its consequences
2. The Model Laws:
 - reform without significant change?
 - national laws without uniformity; &
 - how did the "greatest reform process in 30 years" fail to deliver a stable national system or significant reform - *A story of*
 - *failed leadership; and*
 - *competent public servants.*



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The Surprise Package Delivers

1. Three OHS regimes in operation until at least 1 July 2013 and two OHS regimes in place until 31 December 2013;
2. two venues (1st instance courts) dealing with OHS laws from 1 January 2012 until 31 December 2013 (we think – see transitional provisions section 7); and
3. three changes in the law from 1 July 2011.

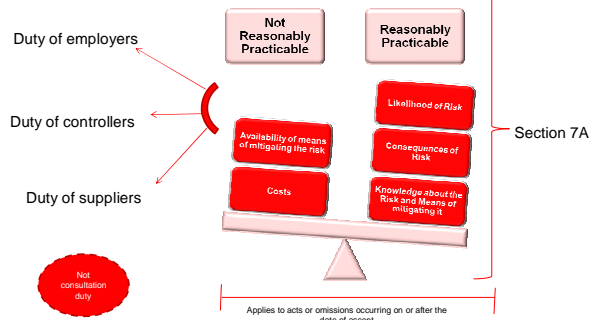


Power to prosecute

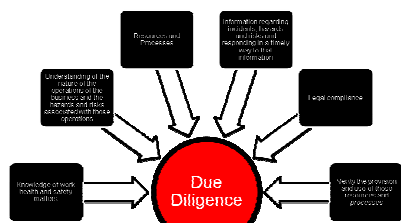
- WorkCover
- Secretary of a Union
- Anyone with written consent of Minister

Has effect from date of introduction into Parliament

Duty Qualified by Reasonable practicability



Due Diligence Duty of Officers



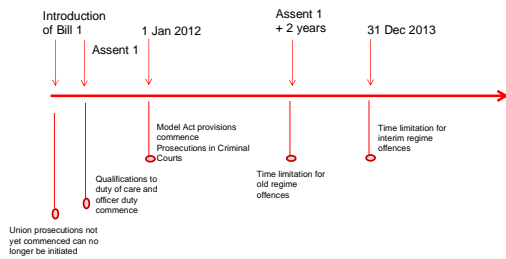
Applies to acts and omission from the date of Royal assent

Proactive duty to exercise duty diligence applies in NSW 6 months ahead of schedule

Premier O'Farrell's Model Laws Regime

- Commences 1 January 2012
- Is consistent with the Model Work Health and Safety Act
- Prosecutions in Local Courts and District Court
- Category 1 offences are indictable offences
- Time limitation 2 years (+1 from coronial) or if category 1 if fresh evidence is uncovered

Overview of Timeline



Union prosecutions not yet commenced can no longer be initiated

The Model Laws – the more things change, the more they stay the same

1. **First** - the Model Laws do not deliver a national, uniform system.
2. **Second** - the Model Laws do not deliver sufficient reform.
3. **Third** – these flawed outcomes are a failure of business and union leadership and the success of our public servants
4. **Fourth** – it matters that the process failed to deliver sufficient reform and a uniform system & it matters that this fact is under the radar.

Issue 1 - The Model Laws do not deliver a national, uniform system (and it will get worse)

Three key issues:

1. the Model Laws are based on an unstable architecture that will not retain the limited uniformity that exists on day 1;
2. the Model Laws will *not* be uniform from day 1; &
3. the content of the Model Laws will change further on a jurisdictional basis.

The Model Laws do not deliver a national, uniform system (and it will get worse)

Issue 1

The Model Laws will not be uniform from day 1

- 58 jurisdictional notes
- 9 different regulators
- 9 different prosecutors
- 9 different 1st instance courts

The Model Laws do not deliver a national, uniform system (and it will get worse)

Issue 2 - Harmonisation cannot produce stable uniformity because:

1. it is dependent on voluntary co-operative federalism;
2. there is *not* any mechanism to ensure that jurisdictions do not make material changes; and
3. changes to the regulations will occur overtime, unnoticed with significant cumulative effect (i.e. significant jurisdictional differences).

Issue 3 - The Model Laws Do Not Deliver Reform – this is partially due to the harmonisation model

1. The Model Act:
 - does not and was not designed to deliver much reform – *per the Regulatory Impact Statement for the Model Provisions (the RIS)*
 - was designed to provide a platform for real reform within the regulations – *per the RIS*
1. In fact there is *nil* significant reform in the draft regulations:
 - the adoption of the UK Construction Design & Management Regulation?
 - the recasting of safety as an investment instead of a cost?
2. Anecdotal evidence suggests that the final regulations will not deliver substantive reform.
3. Jurisdictional interests distracted from delivering reform in the regulations.

Did we get what we deserve? Probably A story of failure & success

A of business & union leadership which did not:

1. paint a clear picture of what the stakeholders' required early enough;
2. demand change when the terms of reference for a new OHS system were released and only provided for a "harmonised" system; and
3. push back hard enough when our very competent public servants defended their "Model Act".

Did we get what we deserve? Probably A story of failure & success

The success is that of our public servants who filled the vacuum by:

- drafting a technically strong Model WHS Act (c.f. the draft regulations); and
- mounting a tenacious defence of the Model Act back when criticisms started to flow in early 2010 (& on every occasion thereafter).

It matters that the process failed to deliver sufficient reform and a uniform system & it matters that this fact is under the radar

1. Reform has not been achieved to an acceptable level and we need to lobby for sufficient reform;
2. decisions are being made at both government and private sectors levels based on the mythology of 'national uniformity'
 1. government decisions: Non-Commonwealth Licensees; &
 2. private sector decisions: reduced OHS expertise because we will have uniform laws.

The Future

1. Harmonisation has not delivered its promise of national uniformity and significant reform.
2. Those who are concerned should, in my view, lobby for recognition that:
 - the harmonization of OHS laws must be a first step only; and
 - OHS reform must be treated as seriously as IR reform and produce:
 - *One (1) principle WHS Act for Australia (not nine)*
 - *One (1) principle prosecutor/regulator for Australia (not nine)*
 - *One (1) principle (1st instance) court for prosecutions (not nine).*

About the Presenter



Siobhan Flores-Walsh is a Special Counsel in Sydney.

1. Siobhan has worked in Occupational Health Safety and Security/Employment/Industrial Relations for 20 years and is listed as a leading Australian OHS/Employment lawyer in *Chambers Global 2011*.
2. Siobhan is a contributing author to the Australian Master Human Resources Guide published by CCH (5th and 6th Editions).
3. Siobhan is published and speaks regularly in relation to OHS and related areas.

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