

# Work Health and Safety Legislation

## Your Questions Answered.....

### **What is the law?**

Safe Work Australia has developed model work health and safety laws as part of an initiative of the Council of Australian Governments. This initiative demonstrates a commitment to improving the work health and safety of all Australian workers and enhancing productivity. The work health and safety laws include a model Work Health and Safety Act supported by model Regulations and model Codes of Practice. In QLD, NSW, ACT and NT, the *Work Health and Safety Act 2011* (WHS Act 2011), and in SA and TAS the Work Health and Safety Act 2012 (WHS Act 2012) gives effect to the model Act. In VIC the OHS Act 2004 and in WA the OSH Act 1984 are still in effect, and the information in this document does not apply to those States.

### **What is due diligence?**

Due diligence requires officers to be proactive in ensuring that the corporation, club or association complies with its duty. In demonstrating due diligence, officers will need to show that they have taken reasonable steps to:

- acquire and update their knowledge of health and safety matters
- understand the operations being carried out by the person conducting the business or undertaking in which they are employed, and the hazards and risks associated with the operations
- ensure that the person conducting the business or undertaking has, and uses, appropriate resources and processes to eliminate or minimise health and safety risks arising from work being done
- ensure that the person conducting the business or undertaking has appropriate processes in place to receive and respond promptly to information regarding incidents, hazards and risks
- ensure that the person conducting the business or undertaking has, and uses, processes for complying with duties or obligations under the WHS Act.

This approach emphasises the corporate governance responsibilities of officers.

Maintaining a role for a trained safety advisor/WHS Representative within a business or undertaking would:

- promote a positive work health and safety culture by sending a clear message that health and safety is valued by the business
- support officers in meeting their due diligence requirements
- ensure safety information is updated
- be a cost-effective way of demonstrating due diligence.

### **Do volunteering businesses have an obligation now?**

In answering this question, a distinction needs to be made between a charitable or community service organisation that does volunteer work and a 'volunteer association' under the WHS Act. A charitable or community service organisation, such as the RSL or the Blue Nurses for example, because it is usually incorporated and conducts its operations with a degree of organisation and repetition, does conduct a business or undertaking and will have duties under WHS Legislation.

On the other hand, a 'volunteer association' means a group of volunteers working together for one of more community purposes where *none* of the volunteers, whether alone or jointly with any other volunteers, *employs* any person to carry out work for volunteer association. Such a group is not regarded as conducting a business or undertaking for the purpose of WHS Legislation, and therefore the volunteer association does not have a duty of a person conducting a business or undertaking (PCBU) under the Act. An example of a volunteer association not intended to be regarded as a PCBU would be a swimming club at the local primary school which is run by the parents and no other person is employed by the club.

### **Is a volunteer a worker?**

Yes. The definition of a 'worker' includes a volunteer. The WHS Act also defines a 'volunteer' to mean a person who is acting on a voluntary basis irrespective of whether the person receives out-of-pocket expenses. Therefore, volunteer workers have the duty of workers under the new laws, for example, to take reasonable care for their own health and safety, comply with reasonable health and safety instructions etc.

### **Are at home workers considered workers eg: nanny and cleaner?**

Yes. In this situation, where an individual ('the resident') chooses to employ a worker rather than engage a contractor for domestic reasons, the resident is entering into an employment relationship and exercises a higher degree of control over the work being carried out by the worker. While the resident is not employing the worker as part of a business, employing the worker to carry out certain duties at the home would be regarded as an undertaking. Consequently, the resident has a duty of care as a PCBU under the new laws and the person employed by the resident has the worker's duty of care.

### **Who is an officer under legislation?**

Under the WHS Act, an officer is:

- an officer within the meaning of s.9 of the [Corporations Act 2001](#)
- an officer of the Crown (someone who makes or participates in making decisions that affect the whole, or a substantial part of the business or undertaking of the Crown but not a Minister)
- an officer of a public authority (but not an elected member of a local authority), a committee person of an unincorporated association.

An officer has a duty to exercise due diligence to ensure that their organisation complies with the new laws. An officer can be found guilty of an offence regardless of whether the organisation has been found guilty.

Due diligence includes taking reasonable steps:

- To acquire and keep up-to-date knowledge of WHS matters
- To gain an understanding of the nature of the business or undertaking and generally of the hazards and risks associated with those operations
- To ensure that the PCBU has appropriate resources and processes to eliminate or minimise risks to health and safety
- To ensure the PCBU has appropriate processes for receiving and considering information about incidents, hazards etc. and responding to that information in a timely way
- To ensure the PCBU has processes in place to comply with their obligations under the WHS Act
- To verify the provision and use of resources and processes.

## **What duties do officers of a corporation, unincorporated association or the Crown have under the WHS Act?**

The WHS Act requires officers of corporations, unincorporated bodies (such as clubs) and the Crown to exercise 'due diligence' to ensure that the company, authority or club complies with its duties under the Act. This creates a positive duty that is seen to apply immediately, i.e. the officer must be proactive in taking steps to ensure compliance by the corporation, rather than accountability of officers being deemed only after a contravention has occurred. This duty applies whether or not there has been an incident and irrespective of whether the corporation is prosecuted. For example, a work health and safety inspector may, during a routine audit or inspection, ask a company director for evidence that the company is meeting its due diligence requirements. If satisfactory evidence is not produced, the inspector might issue the director with an Improvement Notice or an on-the-spot fine or, if the failure to meet due diligence is flagrant, reckless or serious, the inspector may commence prosecution proceedings against the director.

## **If I follow the regulations and codes of practice applicable to my business, will I meet my duty of care?**

If a Regulation applies, you must comply with that Regulation.

It is not mandatory to comply with a Code of Practice and a person cannot be prosecuted for failing to comply with a Code of Practice. However, a relevant Code of Practice may be used as evidence in any court proceedings to determine what is reasonably practicable in the circumstances to which the Code relates.

A person can comply with the new laws by doing something that is different from the Code, but is equivalent to or higher than the standard in the Code.

Regulations and Codes of Practice deal with particular issues and do not necessarily cover all hazards or risks that may arise. The duties of care under the new laws require duty holders to consider all risks associated with work, not just those for which there are regulations and codes of practice.

## **Do I need to do a risk assessment of every job?**

The laws provide that a duty holder is required to *eliminate* risks to health and safety, so far as is reasonably practicable. If it is not reasonably practicable to eliminate risks to health and safety, the duty holder is required to *minimise* those risks so far as is reasonably practicable.

In addition to this, some of the WHS Regulations have specific risk assessment requirements for certain high risk or hazardous work. In this case, the PCBU must follow the requirements outlined in the Regulation. For example, an operator of a major hazard facility has a duty under the WHS Regulations to undertake a safety assessment of the workplace and to submit a safety case to the regulator.

Secondly, there may be Codes of Practice which also provide advice on risk assessments for specific hazards at the workplace. For example, Codes of Practice on the Labelling of Workplace Substances and the Preparation of Safety Data Sheets provide the standards for workplaces which process or store hazardous chemicals. Such workplaces must either comply with the Codes or show that the safety system used in the workplace is at the same or a higher standard.

PCBUs must provide and maintain safe systems of work and the safe use, handling, storage and transport of plant, structures and substances. To ensure that this duty is fulfilled, the PCBU should conduct a risk assessment of the workplace to establish a safe system of work. The relevant Code of Practice provides guidance on this process.

## **Work Health and Safety Officers (WHSOs)**

Even though WHSOs are no longer a legislative requirement, The State Workplace Health and Safety authorities encourage businesses to maintain the WHSO role in their workplace to assist with meeting the due diligence requirements for officers under the WHS Act. This role is called a WHS Representative.

The laws require a person conducting a business or undertaking (PCBU) to 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, storage and transport 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.

In particular, the laws impose a specific duty on officers of corporations and unincorporated bodies such as clubs and associations to exercise due diligence to ensure that the corporation, club or association meets its work health and safety obligations. This requires officers to be proactive in ensuring that the corporation, club or association complies with its duties. In demonstrating due diligence, officers will need to show that they have taken reasonable steps to complete all of the following:

- acquire and update their knowledge of health and safety matters
- understand the operations being carried out by the person conducting the business or undertaking in which they are employed, and the hazards and risks associated with the operations
- ensure that the person conducting the business or undertaking has, and uses, appropriate resources and processes to eliminate or minimise health and safety risks arising from work being done
- ensure that the person conducting the business or undertaking has appropriate processes in place to receive and respond promptly to information regarding incidents, hazards and risks
- ensure that the person conducting the business or undertaking has, and uses, processes for complying with duties or obligations under the WHS Act

It is important to note the duty to exercise due diligence will always remain with the senior officer and cannot be outsourced or delegated to a safety advisor such as a WHS Representative.

There are WHS courses available that can be used by PCBUs and officers to ensure WHS skills are embedded in workplaces.

## **What should I do if a worker or health and safety representative wants to stop work because of a health and safety risk?**

A worker may cease work without loss of entitlements if he or she believes on reasonable grounds that to continue work would expose him or her to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

Workers must notify management and can be redeployed to other suitable duties. Either party can request that an inspector attend to assist in resolving issues.

In addition, Health and Safety Representatives can direct workers to cease work after consultation with the PCBU and attempting to resolve the issue. There is no need to consult if the risk is so serious and immediate or imminent that it is not reasonable to consult in those circumstances.

### **How much training are WHS Representatives entitled to?**

Under the WHS Act, WHS Representatives are entitled to a five day training course followed by a refresher course every subsequent year.

If a WHS Representative makes a request to attend a relevant course of training, the business operator must allow the WHS Representative paid time off to attend the course. The PCBU is also required to pay the course fees, or, if the WHS Representative has been appointed for multiple businesses, the cost of training can be shared by these businesses. A relevant course of training is one that is approved by the regulator and chosen by the WHS Representative in consultation with the PCBU.

### **Does the WHS Regulation or a Code of Practice surpass an Australian Standard (if one is available)?**

Where appropriate, the WHS Regulation or a Code of Practice may reference technical standards including an Australian Standard. Where the Regulation does reference an Australian Standard, both the Regulation and the Standard must be followed.

### **Is there a model or template available which businesses can use to meet consultation requirements?**

Under legislation, business operators have a duty to consult with any other business operator who has the same duty in any situation, and to consult with workers, provide them with relevant safety information, give them a reasonable opportunity to express their views, raise WHS matters and contribute to decision making on:

- Identifying hazards and assessing risks
- Making decisions about ways to eliminate risks
- Decisions regarding adequacy of facilities
- Proposed changes that may affect health and safety
- Decisions on health and safety procedures.

Refer the relevant States Code of Practice on Consultation.

### **What does reasonably practical mean?**

Reasonably practicable is a concept which takes into account a number of factors that can help you decide what is reasonable in terms of controlling risks, such as defective machine guarding. To determine what is (or was at a particular time) reasonably practicable in relation to managing a risk, a person must take into account and weight up all relevant matters, including:

- the likelihood of the hazard or the risk concerned occurring
- the degree of harm that might result
- what the person concerned knows, or ought to know, about: – the hazard or the risk; and – ways of eliminating or minimising the risk
- the availability and suitability of ways to eliminate or minimise the risk.

- Only after taking into account these matters, the person may also consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

## **Penalties**

There are three categories of offences for failing to comply with a health and safety duty under legislation, depending on the degree of seriousness or culpability involved.

The highest penalty under the WHS Act is for a category 1 offence. The maximum penalty is \$3 million for a corporation. The highest penalties for individual PCBUs and officers are \$600,000 or 5 years jail.

Category 1 – most serious breaches, for a duty holder who recklessly endangers a person to risk of death or serious injury.

- Corporation: \$3m
- Individual as a PCBU or an officer: \$600k / 5 years jail
- Individual e.g. worker: \$300k / 5 years jail

Category 2 – failure to comply with a health and safety duty that exposes a person to risk of death, serious injury or illness.

- Corporation: \$1.5m
- Individual as a PCBU or an officer: \$300k
- Individual e.g. worker: \$150k

Category 3 – failure to comply with a health and safety duty.

- Corporation: \$500k
- Individual as a PCBU or an officer: \$100k
- Individual e.g. worker: \$50k.

## **Can I ignore an inspector's request?**

No – under legislation, a person must comply with an inspector's request to produce documents and answer questions.

However, where a document or answer may tend to incriminate a person, or expose them to a penalty, the document or answer cannot be used against that person.

A person does not commit an offence, however, if they fail to produce a document or answer questions which might incriminate them without the inspector having first explained that the document or answer cannot be used against them.

Also, people must comply with an inspector's direction when they exercise enforcement powers under the law, for example:

- Power to seize dangerous workplaces, plant, substances etc
- Improvement notices
- Prohibition notices
- Non-disturbance notices.

The WHS Act has review procedures for an inspector's decisions.

For more information please visit your States Work Health and Safety Authority website as listed below.

QLD - <http://www.worksafe.qld.gov.au/>

NSW - <http://www.safework.nsw.gov.au/>

VIC - <http://www.worksafe.vic.gov.au/>

ACT - <http://www.worksafe.act.gov.au/>

SA - <http://www.safework.sa.gov.au/>

WA - <http://www.commerce.wa.gov.au/WorkSafe/>

NT - <http://www.worksafe.nt.gov.au/>

TAS - <http://www.worksafe.tas.gov.au/>

Or the National website - <http://www.safeworkaustralia.gov.au/>