National OHS Harmonisation

Your Questions Answered…..

What are the new laws?

Safe Work Australia is developing 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. The Queensland *Work Health and Safety Act 2011* (the WHS Act 2011) gives effect to the model Act.

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 2011.

This approach emphasises the corporate governance responsibilities of officers.

Maintaining a role for a trained safety advisor 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 2011. 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 the WHS Act 2011.

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 the WHS Act 2011, 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 2011 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 the new laws?

Under the WHS Act 2011, 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 2011
- To verify the provision and use of resources and processes.

Will officers of a corporation, unincorporated association or the Crown have the same duties under the WHS Act 2011 as they did under the old health and safety laws?

No, there are some differences between the new WHS Act 2011 and Queensland's current health and safety laws.

Under the current legislation, the liability of executive officers is limited to *corporations*.

That is, if a corporation commits an offence against a provision of the current legislation, each of the corporation's executive officers also commits an offence. Each executive officer is then deemed to have failed their duty to ensure that the corporation complied with the relevant provision. The current legislation also provides two defences for an executive officer: that they exercised reasonable diligence or, were not in a position to influence the conduct of the corporation in relation to the offence.

On the other hand, the new WHS Act 2011 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 (new) 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 new 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 have met my duty of care under the new laws?

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.

Will I need to do a risk assessment of every job?

The new 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 model Regulations will 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 will have a duty under the model 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 model Code of Practice on risk assessment will provide guidance on this process.

Will there be WHSOs under the new legislation?

Workplace Health and Safety Queensland encourages businesses to maintain the WHSO role in their workplace to assist with meeting the due diligence requirements for officers under the new WHS Act 2011; however WHSOs will no longer be a legislative requirement from 1 January 2012.

The WHS Act 2011 impose a specific duty on officers of corporations and unincorporated bodies such as clubs and associations to exercise due diligence (refer to FAQs listed under 'Duties under the *Work Health and Safety Act 2011*') to ensure that the company, club or association meets its work health and safety obligations.

There may be WHS courses available in Queensland that could be used by PCBUs and officers to ensure WHS skills are embedded in workplaces, including options for WHSOs to upgrade their qualifications.

How do the proposed changes affect your business and your WHSO?

WHSOs provide valuable assistance to businesses in meeting their duties under current workplace health and safety laws and can continue to do so under the new harmonised laws. Workplace Health and Safety Queensland (WHSQ) expects that many businesses will voluntarily retain their WHSOs to assist them in complying with their duties under the new laws which commence on 1 January 2012.

The new 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 new 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 2011

WHSOs are currently employed to provide information on hazards and risks associated with the workplace or work activities. As from 1 January 2012, the current legislative requirement for employers to appoint WHSOs will cease in Queensland. However, WHSQ sees advantages for a corporation, club or association in retaining a trained safety advisor under the new legislation, for example, to assist officers of that corporation, club or association to satisfy their 'due diligence' obligations. 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 WHSO.

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.

Are there changes to the role of Work Health and Safety Representatives (HSRs)?

The role of Health and Safety Representatives (HSRs) will be similar under the new legislation; however, Queensland HSRs will now have a new power enabling them to give a direction to cease unsafe work.

How much training are HSRs entitled to and is training mandatory?

HSRs who have been appointed under the current legislation will be able to continue in their role for a term of three years from their point of appointment. Transitional arrangements also provide that HSRs will be able to exercise all powers for 12 months after the commencement of the new legislation; this includes the ability to give a direction to cease work or issue a Provisional Improvement Notice (PIN).

After this 12 month period, a HSR will not be able to direct the cessation of work or issue a PIN unless he or she has completed the relevant training. However, as all qualified HSRs have already completed PINs training, they will not be required to undertake further training on this matter.

Under Queensland's current health and safety legislation, HSRs were entitled to attend a three day training course. Under the new WHS Act 2011, HSRs will be entitled to a five day training course followed by a refresher course every subsequent year. A national course is currently in the process of being developed.

If a HSR makes a request to attend a relevant course of training, the business operator must allow the HSR paid time off to attend the course. The PCBU is also required to pay the course fees, or, if the HSR 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 HSR in consultation with the PCBU.

Will 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 the new laws, 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 OHS 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.

A Code of Practice on Consultation will accompany the new laws.

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.

Will higher penalties apply?

The panel of experts which reviewed national OHS laws noted a considerable disparity in the maximum fines and periods of imprisonment that can be imposed under the various Australian OHS Acts. The panel considered that the maximum penalties provided in some jurisdictions were too low to have a meaningful value as a deterrent or as a potential punishment for a breach.

The panel was also of the view that fines are a key part of achieving the deterrence required to give credibility to a process of graduated enforcement and that higher maximum fines are necessary for the model Act.

However, the panel also noted that the application of the highest levels of fines would, for a variety of legal and practical reasons, continue to be rare.

Categories of offences

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

The highest penalty under the WHS Act 2011 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 of 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 the new laws 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 new laws, for example:

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

The new WHS Act 2011 has review procedures for an inspector's decisions.

What are the licence changes?

Classes currently licensed in Queensland under the category of earthmoving or particular crane (EPC) may no longer be licensed under the new laws when they commence on 1 January 2012. If this is the case, Queensland will continue to facilitate and promote competency based training and assessment for these occupations.

The classes currently licensed in Queensland are:

- Bridge and gantry crane (remote control only)
- Dozer

- Excavator having an engine capacity of more than 2L
- Front-end loader having an engine capacity of more than 2L
- Front-end loader or backhoe having an engine capacity of more than 2L
- Grader
- Road roller having an engine capacity of more than 2L
- Skid steer loader having an engine capacity or more than 2L
- Scraper.

WHSQ will waive fees for new EPC applications where the date of the assessment is on or after 1 July 2011.

High Risk Work (HRW) licences will continue to be licensed under current arrangements as these are photographic and renewable. There are two key changes proposed - the inclusion of a new class of HRW for reach stackers; and a collapsing down of the existing boiler classes from three to two levels.

For more information please visit www.safetyconcepts.com.au