



fact sheet

Work Health & Safety

November 2011

NUMBER 19

HR Managers

This fact sheet provides some general tips on issues that human resources managers and practitioners may need to consider as a result of the new work health and safety (WHS) legislation. This fact sheet makes reference to draft codes of practice and model regulations that may change. It should not be relied on as legal advice.

The new framework

The States, Territories and the Commonwealth have committed to enacting new WHS laws based on the Model Work Health and Safety Bill. The Commonwealth Work Health and Safety Bill 2011 passed the federal Parliament on 24 November 2011. When it takes effect, the new WHS legislation will place duties on a number of persons. Key elements of those duties are summarised below.

Duty includes

Primary duty	A person who conducts a business or undertaking (PCBU) owes a duty of care to all workers carrying out work in the business or undertaking. They must ensure the health and safety of all workers, so far as is 'reasonably practicable'. A PCBU also has duties to other persons who may be put at risk from work carried out as part of the conduct of the business or undertaking.
Officer's duty	An officer of a PCBU has a duty to exercise 'due diligence' to ensure that the PCBU complies with its duty.
Worker's duty	A worker must take 'reasonable care' for themselves and others, comply with reasonable instructions and cooperate with reasonable policies and procedures of the PCBU.
Others' duty	Persons must take 'reasonable care' for themselves and others and comply with reasonable instructions of the PCBU.

What changes are of particular interest to human resources managers?

- significantly higher criminal sanctions for noncompliance
- different use of civil penalties
- a new duty on 'officers' to ensure that the organisation is complying with its obligations under the WHS laws
- duties owed to 'workers' – a definition that is broader than 'employees'
- an issues resolution process
- broader obligations to consult with relevant stakeholders and coordinate with other duty holders
- a union right of entry to workplaces.

Has the ‘reasonably practicable’ test changed?

The ‘reasonably practicable’ test has not changed, although the term ‘reasonably practicable’ is defined (not exhaustively) in the WHS laws and no longer relies on the common law meaning. However, the primary duty now rests on the person who conducts a business or undertaking (PCBU) (not the ‘employer’) and applies to all ‘workers’. The term ‘worker’ has a broader definition than ‘employee’.

Deciding on what is ‘reasonably practicable’ to ensure health and safety of workers and others requires taking into account and weighing up all relevant matters, including:

- the likelihood of the hazard or the risk occurring
- the degree of harm that might result from the hazard or the risk
- what the relevant person knows or ought to know about the hazard or risk and ways of eliminating or minimising the risk
- the availability and suitability of ways to eliminate or minimise the risk
- after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with the available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

A draft Code of Practice on how to manage WHS risks has been made available by Safe Work Australia (www.safeworkaustralia.gov.au).

What are the new penalties?

The WHS laws create 3 categories of offences, each of which attracts different criminal sanctions.

In summary:

- **Category 1** – without reasonable excuse, engages in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury or illness and is reckless to that risk:
 - person: \$300,000 or 5 years imprisonment
 - officer or natural person who is a PCBU: \$600,000 or 5 years imprisonment or both
 - PCBU that is a body corporate or the Commonwealth: \$3,000,000
- **Category 2** – fails to comply with their WHS duty and that failure exposed an individual to a risk of death or serious injury:
 - person or natural person who is a PCBU: \$150,000
 - officer: \$300,000
 - PCBU that is a body corporate or the Commonwealth: \$1,500,000
- **Category 3** – fails to comply with their WHS duty:
 - person: \$50,000
 - officer or natural person who is a PCBU: \$100,000
 - PCBU that is a body corporate or the Commonwealth: \$500,000.

Different use of civil penalties

Breaches of the fundamental duties under the WHS laws, such as a breach of the PCBU’s primary duty or the officer’s duty, are criminal offences under the WHS laws and they attract considerably higher criminal sanctions than under the *Occupational Health and Safety Act 1991* (OHS Act). Civil penalties, which were widely available under the OHS Act for many types of breaches, are no longer available for breaches of fundamental duties – they are now largely confined to lower range civil penalties for contraventions of certain requirements relating to WHS entry permits.

In contrast to civil penalties matters under the OHS Act, for criminal offences:

- the fault elements of the Criminal Code (Cth) will need to be met
- alleged breaches will need to be proved to the criminal standard (beyond reasonable doubt), not the civil standard (on the balance of probabilities).

How does the 'officer's' duty work?

Officers can be held personally responsible for contraventions of the WHS laws, so this is an important question.

An 'officer' of a PCBU must exercise 'due diligence' to ensure that the PCBU complies with its duties and obligations under the WHS laws. There are a couple of defined terms to consider.

First, what is 'due diligence'? The WHS laws say that it includes taking reasonable steps to:

- maintain up-to-date knowledge of WHS matters
- understand the nature of the PCBU's operations and generally the hazards of risks
- ensure that the PCBU has and uses appropriate resources/processes to eliminate/minimise risks
- ensure adequate reporting
- implement processes to comply with duty
- verify the provision of resources/processes.

Secondly, who is an 'officer' for the purposes of the WHS laws? This is not always an easy question to answer, so we have prepared a separate fact sheet - number 17. The key question will be whether the person makes or participates in making decisions that affect the whole or a substantial part of the relevant business or undertaking.

It will be important for agencies to understand who the 'officers' are within their organisation. Officers will need assistance to discharge their duties (and avoid personal liability) arising under the WHS laws.

What does consultation involve under the WHS laws?

The WHS laws set out consultation obligations on PCBUs. A PCBU has an obligation to consult with 'workers', any health and safety representatives of those workers and other persons who have a duty in relation to the same matter.

Under the WHS laws, 'consultation' means sharing information, providing an opportunity to express views and contribute to the decision-making process, allowing views to be taken into account and giving timely advice on the outcome.

The term 'worker' is defined broadly, so the PCBU is obliged to consult with a wider range of people than just employees. A 'worker' is a person who carries out work in any capacity for a PCBU and includes an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, a labour hire worker, an outworker, an apprentice or trainee, a student gaining work experience and a volunteer.

Consultation needs to occur when:

- identifying hazards and assessing risks
- making decisions about elimination or minimisation of hazards or risks
- making decisions about the adequacy of facilities and decisions about procedures (for certain matters)
- proposing changes that may affect health and safety.

Duty holders also have a duty, so far as is reasonably practicable, to consult, cooperate and coordinate activities with each other and any other persons who have a duty in relation to the same matter.

How are WHS issues resolved?

The WHS laws introduce an issue resolution process. The process aims to ensure that issues are resolved by discussions between the relevant parties. If an issue cannot be resolved by discussion, it must proceed to resolution through an agreed procedure (or the default procedure in the regulations). If that fails, a party can ask the regulator to appoint an inspector, who will attend the workplace to assist in its resolution. Once the inspector is in the workplace, they can exercise any of their usual compliance powers under the WHS laws.

When can a union official come into a workplace?

The WHS laws allow a union official or employee of the union who holds a WHS entry permit to enter workplaces for WHS purposes. The union can enter the workplace for 3 reasons:

- (1) If the union reasonably suspects that a contravention of the WHS laws has occurred or is occurring, a WHS entry permit holder can enter the workplace to inquire into a suspected contravention that relates to, or affects, a worker. The union can only exercise that power if:
 - the worker is a member of that union or is eligible to join
 - the worker works at the workplace
 - the union is entitled to represent the industrial interests of that worker
 - as soon as reasonably practicable after entering a workplace, the union gives notice of the entry and the suspected contravention of the WHS laws.

Once the WHS entry permit holder is in the workplace, they can inspect the relevant area, consult with relevant workers, inspect and copy relevant documents and warn any person they reasonably believe is at serious risk of injury.

- (2) A WHS entry permit holder can enter a workplace to inspect employee records or information relevant to a suspected contravention. This power only operates if the permit holder would be entitled to enter the workplace to inquire into a suspected contravention. This type of entry is only permitted with advance notice of between 24 hours and 14 days.
- (3) A WHS entry permit holder can enter a workplace to consult with and advise workers. Once the permit holder has entered the workplace under this power, they are entitled to warn any person they reasonably believe is at serious risk of injury. This type of entry is also only permitted with advance notice of between 24 hours and 14 days.

Don't forget – keep an eye out for the Codes of Practice!

A number of draft Codes of Practice have been released for consultation. In most cases, complying with a Code of Practice on a particular subject will mean that a duty holder has complied with their health and safety duty under the WHS laws on that subject. A Code of Practice will be admissible in proceedings for a contravention of a duty as evidence of whether or not the duty has been complied with. However, the WHS laws make it clear that a duty holder may be able to demonstrate compliance with their duty in a manner that is different from a Code of Practice.

All of the draft Codes of Practice are important, but a number of them may be of particular interest to public sector human resources managers (www.safeworkaustralia.gov.au):

- Managing the Work Environment and Facilities
- First Aid in the Workplace
- Preventing and Managing Fatigue in the Workplace
- Preventing and Responding to Workplace Bullying
- Work Health and Safety Consultation, Cooperation and Coordination.

Other resources

The Commonwealth WHS regulator, Comcare, provides further information on the WHS laws at the following link:

<http://www.comcare.gov.au/WHS>

Safe Work Australia provides a range of information on national WHS laws, including interpretive guidelines, fact sheets and the agreed National Compliance and Enforcement Policy, at the following link:

<http://www.safeworkaustralia.gov.au/Legislation/Resources/Pages/Resources.aspx>

What do I need to do next?

We suggest you consider:

- reviewing governance and risk management arrangements
- determining who potential ‘officers’ are and what their duties are
- informing workers of new safety obligations
- reviewing consultation arrangements
- planning a communication and training strategy for your managers and workers
- reviewing procurement procedures, contracts and contract templates to ensure that WHS requirements are adequately addressed
- seeking advice on the new WHS laws if you need any help.

More information

If you require further information about work health and safety please contact:

Primary contacts

Rodger Prince Director AGS Adelaide and Darwin
T 08 8205 4231
rodger.prince@ags.gov.au ADELAIDE

Paul Barker Senior Executive Lawyer
T 03 9242 1257
paul.barker@ags.gov.au MELBOURNE

Stuart Robertson Senior Lawyer
T 02 9581 7720
stuart.robertson@ags.gov.au SYDNEY

Bianca Wellington Counsel
T 02 6253 7429
bianca.wellington@ags.gov.au CANBERRA

Other experts

Nicky Nicolaou Senior Executive Lawyer
T 03 9242 1442
nicky.nicolaou@ags.gov.au MELBOURNE

Richard Harding Senior Executive Lawyer
T 02 9581 7671
richard.harding@ags.gov.au SYDNEY

Tim Begbie Senior General Counsel
T 02 6253 7521
tim.begbie@ags.gov.au CANBERRA

Craig Rawson Senior Executive Lawyer
T 03 9242 1248
craig.rawson@ags.gov.au MELBOURNE

Cathy Reid National Group Manager Commercial
T 03 9242 1203
cathy.reid@ags.gov.au MELBOURNE

Steve Webber Senior Executive Lawyer
T 02 6253 7430
steve.webber@ags.gov.au CANBERRA

Amanda Johnston Senior General Counsel
T 02 6253 7591
amanda.johnston@ags.gov.au CANBERRA

Paulina Fusitu’a Senior Lawyer
T 02 9581 7759
paulina.fusitu'a@ags.gov.au SYDNEY

Leisa Pendle Senior Lawyer
T 07 3360 5781
leisa.pendle@ags.gov.au BRISBANE

Kelly Taylor Senior Lawyer
T 03 9242 1347
kelly.taylor@ags.gov.au MELBOURNE

Graham Bannerman Counsel
T 02 6253 7278
graham.bannerman@ags.gov.au CANBERRA

Simone Krauss Lawyer
T 03 9242 1318
simone.krauss@ags.gov.au MELBOURNE

This material is provided to AGS clients for general information only and should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of this fact sheet.

© AGS All rights reserved