



**Government of South Australia**

SafeWork SA

# **Familiar principles, new approach**

*Work health and safety legislation*

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safe, fair, productive working lives



## New laws

- The work health and safety legislation came into effect on 1 January 2013
- The legislation consists of the *Work Health and Safety Act 2012 (SA)* and the *Work Health and Safety Regulations 2012 (SA)* supported by Work Health and Safety Codes of Practice.
- The WHS Act is based on the 'model' Work Health and Safety Act developed by Safe Work Australia.
- The aim is to provide all workers in Australia with the same standard of health and safety protection regardless of the work they do or where they work
- Consistent compliance and enforcement arrangements across Australia



## Other jurisdictions

- Commonwealth
- New South Wales
- Queensland
- Northern Territory
- Australian Capital Territory – all started 1 January 2012
  
- Tasmania
- South Australia – both started 1 January 2013
  
- Western Australia – maybe (since 2010), but on conditions...
  
- Victoria – Absolutely not!



## Consistent principles

The Act is consistent with long established principles:

- applies to all industries (including the Crown)
- establishes health and safety duties (including primary duty to protect any person from exposure to hazards and risks arising from work)
- provides for worker representation, consultation and participation (including through Health and Safety Representatives and Health and Safety Committees)
- establishes a role for the regulator (SafeWork SA) and inspectors with compliance and enforcement powers
- provides protection to workers from discrimination because of their role in promoting and ensuring health and safety
- provides for the creation of regulations and Codes of Practice
- establishes local consultation arrangements (SafeWork SA Advisory Council)



## New elements

- PCBU (Person Conducting a Business or Undertaking)
- Officer duties
- Removal of responsible officer provisions
- Clarification for volunteers
- Health & Safety Representatives - changes
- WHS Right of Entry
- Enforceable Undertakings
- Internal review of Inspectors' decisions
- Increased penalties



## Person Conducting a Business or Undertaking (PCBU)

- The primary duty holder is the Person Conducting a Business or Undertaking (previously the primary duty holder was the employer)
  - A person may be an organisation or an individual
  - A business is usually an enterprise conducted with a view to making a profit and have a degree of organisation, system and continuity
  - Undertakings may have elements of organisation, systems and possibly continuity, but are usually not for profit or commercial in undertaking



## PCBU

- An employer will be a PCBU
- The intention is to recognise the broad range of modern work relationships and business structures
- Provides clarity by removing ambiguities around responsibilities of:
  - principal contractors
  - sub-contractors
  - labour hire agencies
  - group training schemes
  - franchisors
  - and so on
- They all have the duties of care – they are all PCBUs



# PCBU

- The PCBU must ensure, so far as is reasonably practicable, the health and safety of:
  - workers engaged or caused to be engaged by the PCBU; and
  - workers whose work is influenced or directed by the PCBU  
(while the workers are at work in the business or undertaking)
  - other persons as a result of work carried out as part of the conduct of the PCBU  
(e.g. customers, passersby, delivery people, people on work experience or practical training placement, etc)
- A PCBU which has Management or Control of:
  - a Workplace, or
  - fixtures or plant at a workplace, or
  - the commissioning of plant at a workplace

has particular duties related to those matters



# Reasonably practicable

- The PCBU's duty is qualified by the words '*so far as is reasonably practicable*'
- There are two elements to what is 'reasonably practicable'
- A duty holder must consider:
  - what can be done – that is, what is possible in the circumstances for ensuring health and safety
  - whether it is reasonable in the circumstances to do all that is possible



## Reasonably practicable

- Factors that may determine whether something is ‘reasonably practicable’ include:
  - the **likelihood** of the hazard or the risk concerned occurring
  - the **degree of harm** that might result from the hazard or the risk
  - what the person concerned knows, or **ought reasonably to know** about the hazard/risk and ways of eliminating the hazard/risk
  - the **availability and suitability of ways** to eliminate or minimise the risk
  - the **cost associated with available ways** of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk
  - Importantly, the issue of **influence and control** is also considered in what is reasonably practicable



# Removal of responsible officer provisions

- The requirement for the appointment and training of responsible officers in the *Occupational Health, Safety and Welfare Act 1986* is not included in the *Work Health and Safety Act 2012 (WHS Act)*
- This was an issue of particular concern to volunteer associations under the previous laws
- Instead the WHS Act requires **all officers** to exercise due diligence. The key change is that the responsibility is a collective one for all officers.



# Officers

- Under the *Work Health and Safety Act 2012*, an officer is:
  - an officer within the meaning of the *Corporations Act 2001 (Cth)* (Section 9)
  - an officer of the Crown
  - an officer of a public authority
- An officer is usually a senior executive who makes, or participates in making, decisions affecting the whole, or a substantial part, of a business or undertaking
- HR and OHS managers, supervisors or WHS advisors are not generally officers for WHS purposes



## Officers & due diligence in 50 words or less...

- Officers of a PCBU must exercise due diligence to ensure that the PCBU complies with its duty or obligation
- Due diligence essentially means:
  - being proactive in keeping up to date with work health and safety issues and
  - being proactive in ensuring the PCBU meets its work health and safety obligations
- The meaning of 'Officers' and 'due diligence' and the implications for the public sector will be covered in detail by Michael Kay



# Volunteers

- **If an association is run purely by volunteers it is:**
  - not captured by the WHS Act, and
  - does not have duties under the WHS Act (however, common law obligations to ensure the safety of their volunteers remain)
- **If an association employs someone to carry out work then it:**
  - meets the definition of a PCBU
  - falls within the scope of the WHS Act
  - has a duty to all of its workers, including any volunteers.

**The duty to volunteers is no different to the duty which applied under the OHSW Act.**



# Health and Safety Representatives

- Health and Safety Representatives provisions are:
  - generally consistent with the provisions under the OHSW laws
  - less prescriptive in relation to HSR processes such as determining work groups and conducting elections
- Work groups may be composed of workers who work at more than one workplace; workers carrying out work for two or more PCBUs; or through negotiation and agreement, persons in managerial positions
- Default Notice has been renamed Provisional Improvement Notice (PIN)
- HSR is entitled to receive five days of training in the first year after their election, three days in the second year, and two days in the third year



# Health and Safety Representatives

- Transitional arrangements
  - Current HSR and committee appointments are recognised under the new laws
  - For one year HSRs elected under the old laws can exercise all the powers under the Act
  - During the first year they will need to attend a one day bridging course (in addition to their prescribed entitlement to training) to continue to issue PINs or direct unsafe work to cease into the second year



# WHS Entry Permits

- The Act introduces union right of entry in South Australia for work health and safety purposes
- WHS entry permit holder provisions are generally consistent with the *Fair Work Act 2009* (Commonwealth)
- In South Australia, the Industrial Relations Commission of South Australia is the authorising authority which issues right of entry permits and will deal with any disputes



## WHS Entry Permits

- A union official may enter to:
  - inquire into a suspected contravention of the Act
  - inspect employee records relevant to a contravention, and
  - consult and advise workers in relation to WHS
  
- Prior notice is not required to enter to inquire into a suspected contravention. However, there are procedures for notifying SafeWork SA in advance of entry
  
- However, after entry to the workplace the permit holder is required to give the PCBU notice of the entry and details of the suspected contravention as soon as is reasonably practicable
  
- At least 24 hours notice is required to enter to inspect documents or consult with workers



# Enforceable Undertakings

- An enforceable undertaking is an agreement between an alleged offender and the regulator to implement specific actions relevant to improving work health and safety where there has been a serious breach of the WHS laws
- Undertakings provide an alternative to prosecution
- A breach of an undertaking can be referred to a court to have the undertaking enforced
- Provides a non litigious vehicle to enforce compliance
- Regulators will continue to prosecute serious breaches
- Potential to alleviate concerns and the impact of legal proceedings on small business, workers and victims families



## Internal review of decisions

- The Act provides a mechanism for internal review of a number of 'reviewable decisions'
- Provides a new transparency and accountability in inspector decision making
- Regulator must publish reasons for decisions following an internal review
- **External review is available** (by application to the Industrial Relations Court of South Australia) for reviewable decisions of the regulator or on decisions made in an internal review



# WHS Regulations

The WHS Regulations set out more detailed requirements to meet the duties in the Work Health and Safety (WHS) Act, including:

- authorisations  
registration and licences, for example, asbestos removal and high risk work
- workplaces  
facilities, first aid, personal protective equipment
- chemicals  
lead, asbestos, labelling, safety data sheets and major hazard facilities
- other hazards  
plant, manual tasks, noise, work at heights, remote and isolated work, confined spaces, electricity
- construction work
- occupational diving
- mining



# Transitional regulations

- Licenses, permits and authorisations issued under the old laws are recognised under the new laws
  - The expiry date printed on it, continues to be the expiry date
- Significantly new obligations in the regulations have transitional periods to enable time to prepare
- These include regulations dealing with:
  - diving
  - audiometric testing
  - some areas of construction
  - hazardous chemicals
  - mining
  - asbestos assessors



# Codes of practice

- The Codes of Practice:
  - provide practical guidance on how to meet the standards set out in the Act and Regulations
  - are a tool to help PCBUs comply
  - are admissible in court proceedings as evidence of whether or not a duty has been complied with.
- If there is an equivalent or better way to reach the standard then that can be used instead of the code of practice



# Penalties

- Categories based on degree of 'culpability' and risk/degree of harm:

## **Category 1**

corporations – up to \$3 million

officers – up to \$600 000 / 5 years jail

workers – up to \$300 000 / 5 years jail

## **Category 2**

corporations – up to \$1.5 million

officers – up to \$300 000

workers – up to \$150 000

## **Category 3**

corporations – up to \$500 000

officers – up to \$100 000

workers – up to \$50 000

[safework.sa.gov.au](http://safework.sa.gov.au)

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