



Harmonisation of Work Health and Safety Laws

QSport
State Administrators' Workshop
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Harmonisation

- **Not a federal system**
- **State based “mirror” legislation**
- **In Queensland - Work Health and Safety Act 2011 commences on 1 January 2012**

- **Workplace Health and Safety Queensland will continue to be the regulator**
- **Will be some jurisdictional differences to achieve consistency with other laws and processes operating in the various jurisdictions**

Repeal of laws and application

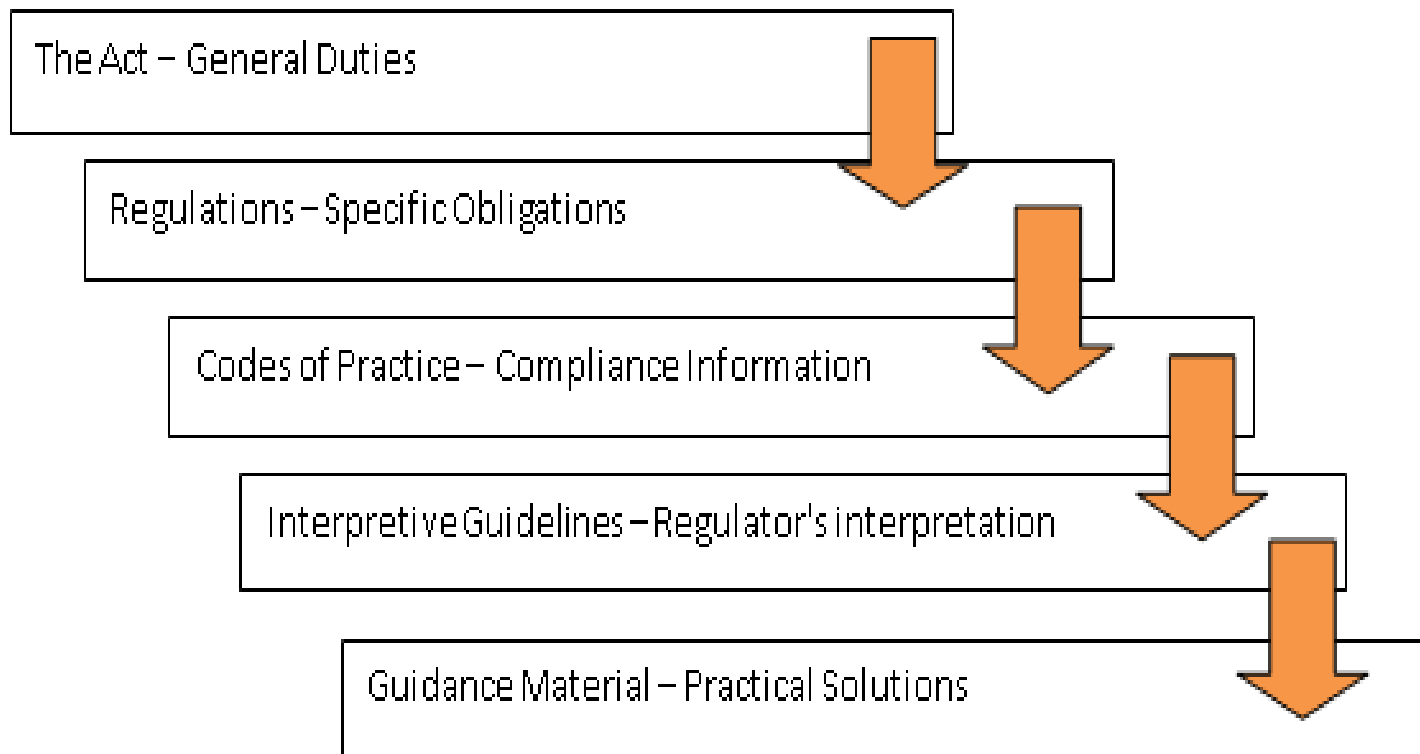
- **The following laws will be repealed:**
 - *Workplace Health and Safety Act 1995*
 - *Dangerous Goods Safety Management Act 2001*

- **However, the new Act does not apply to:**
 - Coal mines to which the *Coal Mining Safety and Health Act 1999* applies
 - A mine to which the *Mining and Quarrying Safety Health Act 1999* applies
 - "Operating plant" within the meaning of the *Petroleum and Gas (Production and Safety) Act 2004*
 - the extent that the *Electrical Safety Act 2002* has application
 - the extent that the *Transport (Rail Safety) Act 2010* has application.

Safety in Recreational Water Activities Act 2011

- **Operates in tandem with Work Health and Safety Act 2011**
- **Commences on 1 January 2012**
- **Adopts the key provisions of the WHS Act for health and safety duties, penalties, compliance, enforcement and legal proceedings**
- **Applies to “recreational water activities” – an activity carried out:**
 - for the purposes of recreation; and
 - on, in or under waters

Regulatory overview - how does it all fit together?



What's new?

- a new positive duty of care on officers with a due diligence requirement
- broadened definition of “worker”
- broadened consultation obligations – both vertically and horizontally
- emphasis on graduated enforcement but higher penalties
- changes to powers of questioning and reduced rights of individuals
- HSRs will have powers to issue PINs (Provisional improvement notices) and direct a work stoppage
- broadened union right of entry
- greater protection against discrimination and coercion

Concepts – “Person conducting a business or undertaking”

■ A PCBU includes:

- a person who conducts a business:
 - alone or with others; and
 - whether or not for profit or gain;
- a business or undertaking conducted by a partnership or an unincorporated association

■ Does not include:

- a person engaged solely as a worker in, or as an officer of, the business or undertaking
- a volunteer association (i.e. a group of volunteers working for a community purpose where none of the volunteers employs any person to carry out work for the volunteer association)
- ministers and local government councillors

Concepts – “worker”

- **Any person who carries out work in any capacity for a PCBU, including work as:**
 - an employee
 - a contractor or subcontractor
 - an employee of a contractor or subcontractor
 - an employee of a labour hire company who has been assigned to work in the person's business or undertaking
 - an outworker
 - an apprentice or trainee
 - a work experience student
 - a volunteer
 - an individual who is a PCBU who carries out work in that business or undertaking.

Concepts – “workplace”

- **A workplace is any place where work is carried out for a business or undertaking including any place where a worker goes, or is likely to be, while at work**

Health and safety duties – overarching principles

- **The Act sets out the principles that apply to work health and safety duties:**
 - Duties are not transferrable/non-delegable
 - A person may have more than one duty
 - More than one person can have the same duty (each duty holder is responsible for compliance)
 - A duty to ensure health or safety requires the person:
 - to eliminate risks so far as is "reasonably practicable"; and
 - otherwise, to minimise those risks so far as is "reasonably practicable".
- **Hierarchy of controls**

What is “reasonably practicable”?

- **Requires a duty holder do that which is *reasonably able to be done in relation to ensuring health and safety* taking into account and weighing up all relevant matters including:**
 - the likelihood of the hazard or risk occurring
 - the degree of harm that might result from the hazard or risk
 - what the person knew or ought reasonably to know about the hazard or risk and the ways of eliminating or minimising it and
 - the availability and suitability of ways to eliminate or minimise the risk.
- **Only once these matters have been assessed, the cost associated with available ways of eliminating or minimising risk, including whether the cost is grossly disproportionate to the risk, may also be taken into account.**

Who are the duty holders under the Act?

- **PCBU**
- **Officers**
- **Workers**
- **"other persons"**

PCBU - Primary duty

- **There is a duty on a PCBU to ensure, *so far as is reasonably practicable*, the health and safety of workers engaged in carrying out work as directed by that person for the business or undertaking**
- **Duty extends to ensuring that no other person is put at risk from work carried out as part of the business or undertaking**

PCBU - Primary duty (cont)

- **The primary duty includes:**
 - the provision and maintenance of a work environment without risks to health or safety
 - safe plant and structures
 - safe systems of work
 - safe use, handling, storage and transport of plant, structures and substances
 - the provision of and access to adequate facilities for the welfare of workers
 - the provision of information, training, instruction or supervision
 - the monitoring of the health of workers and the conditions at the workplace

PCBU - Primary duty (cont)

- **The duty is owed to:**
 - workers engaged or caused to be engaged by the PCBU
 - workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are at work in the business or undertaking.

Duties of officers

- a specific duty on officers of corporations and unincorporated bodies (such as clubs and associations) take *reasonable steps* to exercise *due diligence* to ensure that the PCBU meets its workplace health and safety obligations
- An officer can be convicted or found guilty of an offence regardless of whether the PCBU has also been convicted or found guilty of an offence relating to the duty or obligation

Who is an “officer”

- **Same meaning as it does under section 9 of the *Corporations Act 2001* (other than a partner in a partnership):**
 - a company director or secretary
 - an office holder of an unincorporated association
 - a person:
 - who makes, or participates in making, decisions that affect the whole or a substantial part, of the business of a corporation/entity
 - who has the capacity to affect significantly a corporation's/entity's financial standing; or
 - in accordance with whose instructions or wishes the directors of a corporation are accustomed to act
 - a receiver, or receiver and manager, of the property of the corporation
 - an administrator, liquidator, trustee or other person administering a compromise or arrangement made between the corporation and someone else

Officer duties – “due diligence”

- **“Due Diligence” is defined to include taking *reasonable steps* to:**
 - acquire and keep up to date knowledge of work health and safety matters
 - gain an understanding of the nature of the operations and the hazards and risks associated with those operations
 - ensure that the PCBU has available and uses appropriate resources and processes to enable hazards to be identified and risks eliminated or minimised
 - ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding to these in a timely way
 - ensure that the PCBU has and implements processes for complying with the body's duties and obligations
 - verify all of the above

Worker duties

- **Workers have a duty to:**
 - take reasonable care for their own health and safety
 - take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons
 - comply, so far as the worker is reasonably able with any reasonable instruction given by a PCBU to allow the PCBU to comply with the WH&S Act; and
 - cooperate with any reasonable policy or procedure of the PCBU which relates to work health and safety and that has been notified to workers

“Other person” duties

- **Other persons at a workplace have a duty to:**
 - take reasonable care for their own health and safety
 - take reasonable care that their acts or omissions do not adversely affect the health or safety of other persons
 - so far as they reasonably can, comply with any reasonable instruction given by the PCBU to allow the person to comply with the WH&S Act

Offences and penalties

Category of Offence	Conduct	Maximum penalty
Category 1	Reckless conduct that exposes an individual to a risk of death or serious injury and is engaged in without reasonable excuse	Corporations: \$3 million Officers: \$600,000 / 5 years jail Workers: \$300,000 / 5 years jail
Category 2	Failure to comply with a health and safety duty and exposing an individual to a risk of death or serious injury or illness	Corporations: \$1.5 million Officers: \$300,000 Workers: \$150,000
Category 3	Failure to comply with a health and safety duty	Corporations: \$500,000 Officers: \$100,000 Workers: \$50,000

No reverse onus of proof

- **Currently duty holder must prove that the duty was not breached or that a defence was available**
- **New laws place onus of proof on the prosecution**
- **No “defences” but qualified by “reasonable practicability”**

Volunteers

- a person who acts on a voluntary basis (i.e. without any kind of remuneration other than out-of-pocket expenses).
- can't be prosecuted for an offence unless they fail to comply with duties imposed on them as “workers” or “other persons” at the workplace.
- volunteer officers can't be prosecuted for breach of the officer duties

Unincorporated associations

- **Can't be prosecuted for a breach of a duty imposed on the association**
but
- **its officers can be prosecuted for breach of the “officer” duties and members can be prosecuted as workers or other persons**

Consultation, cooperation and coordination

■ Other duty holders

- Duty holders with overlapping duties must, *so far as is reasonably practicable*, consult, cooperate and coordinate activities

■ Workers

- PCBU must, *so far as is reasonably practicable*, consult with workers who are, or are likely to be, directly affected by a matter relating to health or safety at work
- Consultation should be proportionate to the circumstances and the significance of the health and safety issue (including the seriousness of the matter, the number of affected workers and how the matter affects individual workers)
- The consultation must be in accordance with an agreed consultation process.

What is “consultation”

- **"Consultation" means:**
 - sharing relevant information;
 - giving workers a reasonable opportunity to express their views, raise issues and contribute to decision-making;
 - taking workers' views into account; and
 - advising workers of the outcome of the consultation in a timely manner.
- **If there is a Health & Safety Representative, the consultation must involve the representative.**

Incident notification

- **A notifiable incident means:**
 - Death;
 - A serious injury or illness:
 - Immediate treatment as an in-patient in a hospital;
 - Immediate treatment for amputation, a serious head or eye injury, a serious burn, the separation of skin from underlying tissue, a spinal injury, the loss of a bodily function or serious lacerations;
 - Medical treatment within 48 hours of exposure to a substance; or
 - Any other injury prescribed by the Regulations;
 - A dangerous incident
- **Must notify the regulator immediately upon becoming aware of the incident**
- **Must keep a record of the incident for 5 years**

Health and Safety Representatives (HSRs)

- **PCBU must facilitate elections for one or more HSRs if requested by a worker**
- **HSRs represent “work groups”**
- **Must commence negotiations for determination of work groups within 14 days**
- **PCBU must notify workers of the outcome of negotiations**
- **PCBU must facilitate elections of a HSR for each work group**

What does a HSR do?

- **The primary function of a HSR is to represent workers in their work group in relation to health and safety matters.**
- **They may also:**
 - monitor compliance of the PCBU
 - investigate complaints from work group members about health and safety matters
 - inquire into anything arising from the conduct of the business or undertaking that appears to be a risk to the health and safety of work group members
 - inspect the workplace or any part of the workplace at which work group members work:
 - after giving reasonable notice to the PCBU; or
 - immediately if there has been an incident or any situation involving a serious risk to the health or safety of any person at the workplace

What can a HSR do? (cont)

- **HSRs may also:**
 - accompany an inspector during an inspection of the workplace
 - if they have completed the required training, direct a work group member to cease unsafe work and issue a Provisional Improvement Notice
- **Unless there is a serious and immediate risk to a worker, must consult with the PCBU before directing a worker to cease work**
- **No personal liability for actions or omissions done in good faith**

PCBU's obligations to HSRs

- **Must allow a HSR to exercise their entitlements and provide the necessary resources, facilities and assistance to do so**
- **Must also:**
 - consult, so far as is reasonably practicable, with the HSR about work health or safety matters
 - confer with the HSR whenever reasonably requested, to ensure the work health and safety of work group members
 - provide HSRs with access to information relating to work risks that affect work group members
 - provide any other assistance required by the Regulations

Training of HSRs

- **HSRs are entitled to attend a course of approved training of their choice provided it is consistent with the requirements set out in the Regulations**
- **The PCBU must allow the HSR paid time off to attend courses and must pay the course fees and other reasonable costs associated with attendance**

What happens to WHSOs?

- From 1 January 2012, there will be no legislative requirement to appoint WHSOs
- However, a PCBU may wish to voluntarily retain their WHSOs to assist them in complying with their obligations under the new laws.
- In particular, a WHSO will be very useful in assisting officers to meet their new due diligence obligations

Right to cease work

- **Workers who have reasonable concerns that carrying out work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard are entitled to cease work.**
- **HSRs who have received the requisite training and who have complied with their consultation obligations can also direct a worker to cease unsafe work. They must have a reasonable concern that to carry out the work would expose the worker to a serious risk, emanating from an immediate or imminent exposure to a hazard**
- **Workers must notify the PCBU and be available for suitable alternative work**

Increased questioning powers

- No “right to remain silent”
- A person must answer an inspector’s questions but regulator can’t use that information against the person
- Regulator can use that information against others

Codes of Practice

- **Court may have regard to an approved Code of Practice as evidence of:**
 - whether a duty has been complied with
 - what is known about a particular hazard or risk, risk assessment or risk control
 - what is reasonably practicable in the circumstances
- **Failure to comply is not an offence**
- **Existing Qld Codes of Practice which are not replaced will continue to apply**

Model Codes of Practice – first stage

How to manage a health and safety risk	How to consult on work health and safety	Managing the work environment and facilities	Facilities for construction sites
Managing noise and preventing hearing loss at work	Hazardous manual tasks	Confined spaces	How to manage and control asbestos in the workplace
How to prevent falls at workplaces	How to safely remove asbestos	Labelling of workplace hazardous chemicals	Preparation of safety data sheets for hazardous chemicals

Model Codes of Practice – Second Stage

First aid	Vibration	Plant (x 3)	Blood-borne pathogens
Fatigue	Safe design of buildings and structures	Chemicals (x 3)	Forestry
Bullying	Welding	Electricity (x 3)	Mining
Traffic management	Abrasive blasting	Construction (x 6)	Occupational diving

Accrual of leave

- **Amendment to the *Workers' Compensation and Rehabilitation Act 2003* to provide for the accrual of annual, sick and long service leave during periods of time off work whilst on workers' compensation**

Tips

■ Officers should:

- Focus on WH&S and not compliance
- Treat WH&S duties the same as other duties under the *Corporations Act*
- Know and understand their WH&S duties and obligations – get training/assistance if required
- Understand all aspects of their business and the associated risks – what Codes of Practice apply?
- Ensure adequate resources (financial and human) are dedicated to WH&S
- Understand and ensure that there are adequate hazard and incident reporting and response processes
- Identify any gaps between current compliance processes and what is now required
- Keep an audit trail
- Be part of the process, not just an interested observer

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