

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Principal Safety Legislation	Jurisdictional-specific Acts and Regulations	Legislation to mirror the Work Health and Safety Act 2010	Confusion due to change in terminology from OHS to WHS. Opportunity for new thought – all inclusive. People who are involved in work and/or who make work happen, rather than employer-employee relationship.
Management of Risk	The concept of risk management is present in all current legislation. Some jurisdictions have a legal obligation to perform risk assessments	The concept of securing health and safety of workers and workplaces through risk management remains. However risk assessments are not mandated in the Act but may be mandated in the Regulations for high risk activities.	Confusion as people get used to the concept of risk management without the need to perform risk assessments in all situations. Generally a more practical approach to making work safer due to a greater focus on getting the appropriate risk controls in place rather than on paperwork.
Duties of Care Primary Duty of Care	Employer. In all OHS Acts employers have the primary duty of care. With the exception of the Commonwealth, self-employed people also have duties. The primary duty of care is based on the traditional employer/employee relationship in all jurisdictions with the exception of: Qld/ACT applies to people who conduct a business or undertaking NT an employer is a person who carries on a business.	PCBU. Broader duty of care provision to that of 'person conducting a business or undertaking' (PCBU). Protection against hazards and risks arising from the conduct of work will be extended to persons other than employees. All who are involved in the conduct of work or who are contributing things which make work happen will have a duty to ensure health and safety and are required to eliminate or minimise risks to health and safety so far as is reasonably practicable.	Only Qld, the ACT and NT take a similar approach to the WHS Act. For the six other jurisdictions NSW, Vic, SA, WA, Tas and the Cwth this will be a key change.

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Duties of Care Primary Duty of Care for PCBU Specific Classes of Duty Holders	Some provisions made for employers who design, manufacture, supply and install machinery and equipment (provisions also apply to structures in some States)	Primary duty of care will more readily apply to multiple duty holders at the same time. PCBU have additional duties (upstream duties) if they: <ul style="list-style-type: none"> • Manage or control workplaces or fixtures, fittings or plant at workplaces • That design, manufacture, import or supply plant, substances or structures • That install, construct or commission plant or structures The focus will be on what you must do.	A person can have more than one duty and more than one person can have a duty. Increased need to interact with other duty holders to avoid duplication of effort or no effort being made. A requirement to consult, cooperate and coordinate with each other.
Duties of Care PCBU <i>Reasonably practicable</i>	Most OHS Acts require the duty holder to do what is “reasonably practicable” to provide a safe workplace. NSW and Qld do not currently have this qualifier within the primary duty, creating a situation where, if an incident occurs, a duty holder is considered to be “guilty until proven innocent”.	Primary duties of care are all subject to the qualifier of reasonably practicable. Defined to assist duty holders with their obligations: <ul style="list-style-type: none"> • Likelihood • Degree of harm • What is known about the hazard/ risk and how to eliminate or minimise • Availability and suitability of ways to eliminate/minimise • After full assessment whether the cost is grossly disproportionate to the risk 	Broader implications to care for people who are not employees. Cost is last thing to consider when trying to ensure health and safety.
Duties of Care Officer	SA and Tas are currently the only jurisdictions to place a positive duty on officers for breach of a duty of care. SA/Tas restricts this to a “responsible officer”. In all other jurisdictions a breach of duty is attributed to an officer i.e. the officer can be liable but does not have any positive duty to ensure compliance.	For the first time in relation to health and safety a specific duty of care for officers (due diligence) has been introduced. The Corporations Act 2001 definition of an officer will apply to officers of a PCBU. Officers are senior management with decision-making responsibilities. Officer duties cannot be delegated.	A review of the business may be necessary to determine who is an officer. Position descriptions should accurately reflect the responsibilities of roles. SA – broader officer responsibility. More than one person can be an officer of a PCBU. NSW, Qld, Tas – removal of the reverse onus of proof.

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Duties of Care Officer <i>Due Diligence</i>	With the exception of SA/Tas, all jurisdictions impose personal liability on officers, but do not impose a positive duty.	Positive duty of care to exercise due diligence as defined: <ul style="list-style-type: none"> • Acquire and keep up-to date knowledge of WHS • Understand the nature of operations, hazards and risks of the business • Use appropriate resources to eliminate or minimise risk • Have appropriate processes for receiving and considering information and responding in a timely manner • Implement processes for compliance • Verify that risks and hazards are being appropriately controlled 	Officers need to understand their business and its risks and be actively engaged in safety. SA/Tas – No longer a “responsible officer”, the obligations have been broadened to include more than one person concurrently having an officer duty.
Duties of Care <i>Requirement to Appoint/Engage People with Specific OHS Responsibility</i>	Qld requires an employer (but not other persons conducting a business or undertaking) to appoint a qualified person as a Workplace Health & Safety Officer (WHSO), if the employer has or is likely to have > 30 at the workplace for a total of 40 days during the year. SA/Tas have “responsible officers” as outlined above. Vic requires an employer, so far as is reasonably practicable to employ or engage a person with suitable OHS qualifications to provide OHS advice to the employer.	There is no requirement in the WHS Act to appoint or engage people with specific OHS responsibility.	Qld – WHSOs no longer a legal requirement of the Act. SA/Tas – No longer a “responsible officer”, the obligations have been broadened to include more than one person concurrently having an officer duty. Vic – No longer a requirement. Although not mandated, suitably qualified/experienced people could still be used to assist officers meet their due diligence obligation of providing appropriate resources for safety to the business or undertaking.

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Duties of Care Workers and Others <i>Reasonable Care</i>	Most OHS Acts use the term 'employee'. Some broaden this to include contractors. Qld, NT, ACT – use a broader defined term of 'worker'	<p>Worker. Definition extends beyond the employment relationship to include any person who works in any capacity in or as part of the business or undertaking (including volunteers). Workers are required to:</p> <ul style="list-style-type: none"> • take reasonable care of their own health & safety at work and that others are not adversely affected by their own acts and omissions. • Comply with instruction so far as reasonably able • Cooperate with any reasonable policy/procedure of the PCBU relating to WHS. 	<p>The 'worker' definition will be a change for six of the nine jurisdictions, NSW, Vic, SA, WA, Tas and Cwth.</p> <p>The 'other' definition will be a change for all jurisdictions.</p> <p>The duty of reasonable care is an extended common law duty which now has criminal obligations.</p>
Duties of Care Workers and Others <i>Reasonable Care</i>		<p>Other. Include visitors who have the same duties as workers with the exception of the policy cooperation provision.</p>	<p>Ensure that workers and others are informed of their obligations.</p>

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Consultation	All OHS Acts in Australia require employers to consult with their employees, workers, health and safety representatives (HSRs) and/or committees in regard to safety issues.	The importance of consultation has been recognised and has been made into a specific obligation for each person who is a duty holder. More than one person can concurrently be duty holders and can have overlapping duties. Under the Act, these people must, consult, cooperate and coordinate with each other. The duty holders must also consult with workers. The Act sets out flexible ways in which consultation can occur and is qualified by 'reasonably practicable'. A breach of the consultation provisions carry significant penalties.	A key difference in the new laws is that the consultation duty is on all duty holders to consult, primarily the PCBU. This will be a change to 6 of the jurisdictions. 'Reasonably practicable' is currently a qualifier in Vic, Tas, Cwth and the ACT. Alternative methods of consultation cannot undermine the role of the HSRs.
Representation and Protection <i>Health & Safety Representatives (required only if requested)</i>	All jurisdictions currently allow for Health & Safety Representatives (HSRs) to be elected by employees. Existing functions, rights and powers of HSRs are similar in all the jurisdictions (see below for PINs and cessation of work).	The new laws maintain existing provisions for workers to elect HSRs as their representatives. HSRs will be empowered to effectively represent the workers in their work group.	No significant change although in NSW HSRs take on a more central role in WHS. There is an obligation on the PCBU to consult with the HSRs on health and safety matters.
Representation and Protection <i>Provisional Improvement Notices/ Cessation of Unsafe Work</i>	With the exception of NSW and Tas, HSRs can issue Provisional Improvement Notices (PIN) in all jurisdictions. HSRs can under current safety laws direct unsafe work to cease except in NSW, Qld and WA.	Trained HSRs will be able to issue PINs and will have the combined power to direct unsafe work to cease. Additionally workers will also have the right to cease unsafe work.	The HSR issuing a PIN will be a change for NSW and Tas. HSRs ability to cease unsafe work will be a change for NSW, Qld, WA, Tas and ACT. The ability for workers to cease unsafe work as specifically outlined in the Act will be a change for NSW, Vic, Qld,SA and Cwth.

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Representation and Protection <i>Issue Resolution</i>	Most jurisdictions require OHS issues within the workplace to be resolved but the processes differ from each other differ.	The model laws will define what an issue is. An agreed Issue Resolution procedure must be in place. If an agreed Issue Resolution procedure is not in place, the default procedure in the WHS Regulations will apply. HSRs cannot be excluded from the Issue Resolution process.	This will be a change for all jurisdictions and requires process and consultation.
Representation and Protection <i>Discrimination, Coercion & Misleading Conduct</i>	All OHS Acts deal with discrimination against a person who is involved in OHS. Only SA also prohibits coercion.	The model laws set out to achieve safe workplaces. Any discrimination, coercion, inducement and misrepresentation that prevent a person from being involved with safety will be prohibited.	These will be changes for all jurisdictions including SA where prohibition of coercion already exists. The provisions are very broad and have crossovers with EEO, Fair Work and Workers Compensation. Further details on this part of the Act will be developed and made available for information closer to 1 January 2012.
Representation and Protection <i>Union Right of Entry</i>	Currently Tas and SA are the only jurisdictions that do not have union right of entry in their OHS laws. Some jurisdictions only have the right of entry to enquire into a suspected contravention.	Union members holding a WHS entry permit will be able to enter a workplace to: <ul style="list-style-type: none"> • advise and assist in WHS or • when a contravention of the law is suspected. 24 hr notice is required for entry to consult and advise, no notice is required for a suspected contravention. Union permit holders may additionally enter a site for the purpose of: <ul style="list-style-type: none"> • Assisting HSRs • Attending to resolve issues as part of issue resolution discussions The PCBU must not reasonably refuse, delay or hinder the union permit holder.	This is a broadening of current provisions for 6 of the nine jurisdictions and a significant change for the other three. PCBUs should familiarise themselves with the right of entry provisions and have a process in place by which they can strictly comply.

Summary: Changes Under Model Work Health & Safety Act



Subject	Current arrangements (What is in place)	Model laws (What will change)	Impact Possible implications for your business
Serious/Notifiable Incidents	Current OHS laws require certain serious incidents to be reported to the relevant authority. Jurisdictions differ in regard to the preservation of an incident site.	<p>For serious and dangerous incidents the PCBU has an obligation to:</p> <ul style="list-style-type: none"> • Notify the regulator • Preserve the incident scene until an inspector attends or the regulator directs otherwise <p>There are also changes to the types of incidents that will be notifiable.</p>	<p>This will be the most significant change for NSW and ACT who place time frames for non-disturbance of an incident site and WA who currently do not have preservation of an incident site in their OHS laws.</p> <p>All jurisdictions will need to check the details of what constitutes a notifiable incident in the new laws.</p>
Enforcement and Compliance <i>Criminal Safety Offences</i>	Under Australian law, currently all breaches of duties of care are criminal offences. Only the Cwth has both criminal and civil sanctions available	Breaches of duties of care will continue to be criminal offences to reflect the seriousness of the offence.	A change only for the Cwth.
Enforcement and Compliance <i>Penalties</i>	Different penalties in place across the jurisdictions. The highest maximum penalty being \$1,650,000 in NSW and the lowest maximum penalty being 150,000 in Tasmania. Imprisonment provisions also range from 0-7 years.	<p>A significant increase in the penalties that currently exist in any Australian jurisdiction, as well as up to 5 years imprisonment for the most serious breaches. The maximum penalty for a corporation will be \$3 million and for an individual \$300,000.</p> <p>The penalties refer to general duty breaches and will be categorised:</p> <p>Cat 1 – exposure to serious harm or death through reckless behaviour Cat 2 – Exposure to serious harm through failure to comply with a health and safety duty “primary duty of care” Cat 3 – All other offences</p>	<p>Significant increase in penalties to act as a deterrent and to encourage compliance.</p> <p>Three main categories for penalties, but other forms of penalties also apply e.g. infringement notices.</p> <p>Tasmania will have a provision for imprisonment which it currently does not. Imprisonment terms represent an increase for Cwth, Qld and WA, unchanged for NSW, Vic and SA, and a reduction for The ACT.</p>

Summary: Changes Under Model Work Health & Safety Act



<p>Enforcement and Compliance <i>Sentencing options</i></p>	<p>Additional sentencing options are available but differ between the jurisdictions. For example remedial orders apply in NSW, Vic, NT, ACT and Cwth, but Training Orders apply only in SA and NT.</p>	<p>In addition to fines and custodial sentences there will be further options: Enforceable undertakings, adverse publicity orders, remedial orders, training orders, compensation orders, injunctions, community service orders and corporate probation.</p> <p>Prosecutions can only be brought by the regulator and will have a 2 year limitation.</p>	<p>A change for all jurisdictions as currently none has the entire range of sentencing options that are available in the WHS Act.</p> <p>This will be a change for NSW as the current union right to prosecute will be removed.</p>
---	--	--	---