



Government of South Australia

SafeWork SA

Familiar principles, new approach

Work Health and Safety Act 2012 (SA)

safe, fair, productive working lives



New laws

- From 1 January 2013 the *Work Health and Safety Act 2012 (SA)* comes into effect
- It 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

- New South Wales – started 1 January 2012
- Queensland – started 1 January 2012
- Commonwealth – started 1 January 2012
- Northern Territory – started 1 January 2012
- Australian Capital Territory – started 1 January 2012
- Tasmania – started 1 January 2013
- South Australia – started 1 January 2013



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



Person Conducting a Business or 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 and sub-contractors, labour hire companies, franchisors etc



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 (like customers) as a result of work carried out as part of the conduct of the PCBU



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



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

- 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



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.



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 will be the authorising authority which will issue right of entry permits and 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
- 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 and lead monitoring



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 PCBU's 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 - \$3 million

officers - \$600 000 / 5 years jail

workers - \$300 000 / 5 years jail

Category 2

corporations - \$1.5 million

officers - \$300 000

workers - \$150 000

Category 3

corporations - \$500 000

officers - \$100 000

workers - \$50 000

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