



SUBJECT	DATE ISSUED	REVISION NUMBER
WHS Harmonisation	16 th January 2012	Revision 0

This Briefing Note has been prepared from data available at the time of writing and is for general information purposes only. This information should not be relied upon for legal advice. Professional legal advice should be sought on individual circumstances.

Background

As part of its proposals to reduce inconsistency and regulatory burden across state boundaries, the Federal Government proposes to harmonise work health and safety regulations.

The Harmonised safety legislation was originally scheduled to commence on 1st January 2012 and a revised schedule follows.

Harmonisation will comprise a model Work Health and Safety Act (WHS Act) with the expectation that each state and territory will adopt the model legislation.

The Act will be supported by model Work Health and Safety Regulations (WHSR) again with the expectation that those Regulations will be adopted in each jurisdiction.

The Regulations will be administered by each State's regulatory authority and Comcare, with the Heads of Workplace Safety Authority (HWSA) in each jurisdiction charged with maintaining consistency across boundaries. This will be followed by a harmonisation of the Workers Compensation process.

The Regulations will reference a large number of Codes of Practice.

These Codes of Practice are recommendations on safety issues and are not mandated. However, if they are not followed there will be a requirement to prove that the alternative method of operation adopted provides as good – or a better - outcome.

The Codes of Practice will reference Australian Standards - but only where Australian Standards commit to keeping the Standards up to date. Overseas standards will also be accepted where they are considered to offer an equal or higher level of safety.

Codes of Practice

An approved Code of Practice is a practical guide to achieving the standards of health, safety and welfare required under the WHS Act and the WHS Regulations. A Code of Practice applies to anyone who has a duty of care in the circumstances described in the Code.

In most cases, following an approved Code of Practice would achieve compliance with the health and safety duties in the WHS Act, in relation to the subject matter of the Code. Like regulations, Codes of Practice deal with particular issues and do not cover all hazards or risks which may arise. The health and safety duties require duty holders to consider all risks associated with work, not only those for which regulations and Codes of Practice exist.

Codes of Practice are admissible in court proceedings under the WHS Act and Regulations. Courts may regard a Code of Practice as evidence of what is known about a hazard, risk or control and may rely on the Code in determining what is reasonably practicable in the circumstances to which the Code relates.

Compliance with the WHS Act and Regulations may be achieved by following another method, such as a technical or an industry standard, if it provides an equivalent or higher standard of work health and safety than the Code.

An inspector may refer to an approved Code of Practice when issuing an improvement or prohibition notice.

Codes of Practice have been developed by Safe Work Australia as model Codes of Practice under the Council of Australian Governments' *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* for adoption by the Commonwealth, State and Territory governments.

In Codes of Practice, the word 'should' is used to indicate a recommended course of action, while 'may' is used to indicate an optional course of action. The words 'must', 'requires' or 'mandatory' indicate that a legal requirement exists and must be complied with.

Codes also include various references to provisions of the WHS Act and Regulations which set out the legal requirements. These references are not exhaustive.

Current Status

The current status on implementation is now understood to be as follows:-

- 1st January 2012
 - Commonwealth / ACT / NSW / NT / Queensland
- 14th February 2012
 - SA
- 1st January 2013
 - Vic / Tas
- Unknown

- WA (“will now not meet 1st January 2012 deadline”)

Main Elements

The Bill includes the following key elements:

- a **primary duty of care** requiring persons conducting a business or undertaking (PCBUs) to, so far as is reasonably practicable, ensure the health and safety of workers and others who may be affected by the carrying out of work
- duties of care for persons who influence the way work is carried out, as well as the integrity of products used for work
- a requirement that ‘**officers**’ exercise ‘**due diligence**’ to ensure compliance
- reporting requirements for ‘**notifiable incidents**’ such as the serious illness, injury or death of persons and dangerous incidents arising out of the conduct of a business or undertaking
- a framework to establish a general scheme for **authorisations** such as licences, permits and registrations (e.g. for persons engaged in high risk work or users of certain plant or substances)
- provision for **consultation** on work health and safety matters, participation and representation provisions
- provision for the resolution of work health and safety issues
- protection against **discrimination** for those who exercise or perform or seek to exercise or perform powers, functions or rights under the Bill
- an **entry permit scheme** that allows authorised permit holders to inquire into suspected contraventions of work health and safety laws affecting workers who are members, or eligible to be members of the relevant union and whose interests the union is entitled to represent, and consult and advise such workers about work health and safety matters.
- provision **for enforcement** and compliance including a compliance role for work health and safety inspectors, and
- regulation-making powers and administrative processes including mechanisms for improving cross-jurisdictional cooperation.

A large number of the terms used in the legislation required detailed explanation and understanding.

KEY CHANGES

While much of the detail of the new legislation has changed, the legislation has retained the general duty to ensure that workplaces are – as far as reasonable – safe and without risk to the health of persons.

The procedures are still risk based and demand an increased level of consultation and risk management.

Some of the key changes include the following:-

Duty Holder

The primary duty of care for ensuring the health and safety of workers who are engaged by the person lies with the Person Conducting a Business or Undertaking (PCBU). It also covers workers whose activities are influenced or directed by the person.

This definition moves away from the traditional stricter employer / employee relationship and has a much wider scope by removing the need to prove an employment, or deemed employment, relationship.

Consultation

Duty holders must consult with other duty holders that have a duty in respect of the same matter. This covers other worker, contractors and unrelated businesses on the same site. The process of consultation has been expanded to include the opportunity for workers to contribute to the decision making processes around safe work.

Health and Safety Representatives (HSR's)

On request from any single worker, workers can be grouped into "work groups" and can elect a member to represent them. In such a case, a proper election process must be followed with the representative being appointed for a period of 3 years.

HSR's must undergo formal training and work is still underway to define the competencies to be covered. The most recent proposals indicate a 5 day training schedule.

HSR's will have the power to issue provisional improvement notices and, if necessary, direct the cessation of work. They also have responsibilities to investigate complaints from workers and make other enquiries in respect of worker safety.

Worker Liability

Having increased the range of the duty holder, the legislation also increases the responsibility on the worker by requiring the worker to take reasonable care of their own safety including complying with reasonable policies and procedures that they have been made aware of.

The worker has also been empowered to be able to cease work if it is deemed unsafe by the worker.

Officer Liability

There is no need to prove liability by the company and the officer has direct liability. The prosecution would have to prove beyond reasonable doubt that the officer did not exercise due diligence in its duties and responsibilities for worker health and safety. To defend against prosecution the officer should be able to demonstrate the steps taken to exercise due diligence.

Right of Entry

Right of entry must be given to union officials holding a permit where a contravention is suspected. No notice is required prior to entry but must be given as soon as practicable after entry.

The permit holders may inspect plant and systems, consult with workers, inspect records and take copies of documents that are directly relevant.

Penalties

There are three categories of offence each carrying substantial penalties in a criminal jurisdiction

Category 1 –

Offences causing or with high risk of causing death or serious injury INVOLVING RECKLESSNESS:-

- Corporation - \$3 million
- Officer - \$600,000 or 5 years imprisonment
- Individual / Worker - \$300,000 or 5 years imprisonment

Category 2 –

Offences causing or with high risk of causing death or serious injury NOT INVOLVING RECKLESSNESS:-

- Corporation - \$1.5 million
- Officer - \$300,000
- Individual / Worker - \$150,000

Category 3 –

Less serious offences - placing persons at risk of injury or illness

- Corporation - \$500,000
- Officer - \$100,000
- Individual / Worker - \$50,000

Additional Information

For detailed information and explanation of terms visit the Safe Work Australia website at:-

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

For other additional information on working at height issues, please refer to other Technical Briefing Notes on this website.

Please use the links on this website to contact your member of choice at:-

The Working at Height Association Limited.

www.waha.org.au