

Client Alert

Update on the progress of harmonised Work Health and Safety laws

The new nationally harmonised work health and safety laws are due to be implemented on 1 January 2012, bringing with them a number of important changes in each jurisdiction. The purpose of this alert is to outline key obligations for employers and to ensure the compliance requirements under the model legislation are understood.

Status update on harmonisation progress

The final version of the model Work Health and Safety Act was endorsed by the Workplace Relations Ministers' Council (WRMC) in December 2010.

As the harmonised work health and safety laws will not be federal law, each state and territory government, along with the Commonwealth Government, will administer the laws in their jurisdiction, with each to enact a mirrored version of the Work Health and Safety Act and Regulations. This may result in some jurisdictional differences, with each government able to amend the legislation to meet its specific needs, so long as it does not materially affect the operation of the legislation.

Currently, the states and territories and the Commonwealth are in the process of tabling their respective Work Health and Safety Bills to their Parliament for review and approval. This process must be completed by 1 January 2012 to meet the harmonisation implementation deadline.

The draft model Work Health and Safety Regulations and Codes of Practice models were released in December 2010 for public comment and this recently closed in April 2011. The model Work Health and Safety Regulations are due for release in June 2011, following review from Safe Work Australia.

Further information about the harmonisation process can be found on the **Safe Work Australia** website.

How the changes may affect your business

The following is an outline of the key duties and obligations contained within the model Work Health and Safety Act and Regulations as well as an explanation of what the changes mean for employers.

1. Key Duties

Duties of a Person Conducting a Business or Undertaking

The primary duty holder under the model Work Health and Safety Act is a Person Conducting a Business or Undertaking (PCBU). A PCBU is considered an employer, a corporation, associations, partnership, sole trader and some volunteer organisations.

A PCBU must ensure the health and safety of workers and others so far as is reasonably practicable. The term 'reasonably practicable' is used to mean what was reasonably able to be done to ensure health and safety of their employees. This takes into consideration the likelihood of the risk occurring, the risk of harm, the knowledge of the hazard, the available methods to control the hazard and the costs to implementing controls to the hazard.

Duties of Officers

An officer is taken to mean a person meeting the definition of an officer under the Corporations Act – i.e. a person who participates in making decisions affecting the whole, or a substantial part of an organisation. Officers may include board members, directors, chief executive officers, chief operating officers, company secretaries, administrators, receivers and liquidators.

Officers of a PCBU must now exercise due diligence in ensuring that the PCBU complies with its duties and obligations under the Work Health and Safety Act. Due diligence means taking reasonable steps to:

- a) acquire and keep up-to-date knowledge of work health and safety matters
- b) gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
- c) ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking
- d) ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information
- e) ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act
- f) verify the provision and use of the resources and processes referred to in (c) to (e)

2. Other changes

Definition of workers

A broader definition of the term 'worker' has been introduced. A worker now includes employees, contractors, subcontractors, employees of contractors or labour hire companies, students and volunteers.

This broadened definition has significant implications on how a PCBU must manage the health and safety of all persons engaged to perform work under the PCBU's control, including contractors and labour hire employees.

Onus of Proof

Employers in New South Wales and Queensland will be affected by the changes to the onus of proof in prosecutions.

The prosecution will now be required to prove an offence relating to non-compliance with a duty of care, including whether the PCBU failed to do what was 'reasonably practicable' to ensure the health and safety of workers.

Offences and Penalties

The model Work Health and Safety Act introduces significantly harsher offences and penalties for breaches of the law than those currently in place in any state or territory.

The table below provides a summary of the new offences and penalties system:

	Nature of Offences	Penalties
Category 1	Reckless conduct – person engages in conduct that exposes a risk of death or serious injury or illness without reasonable excuse	\$300,000 and/or 5 yrs imprisonment for an individual
		\$600,000 and/or 5 yrs imprisonment for an individual as a PCBU or an officer of a PCBU \$3,000,000 for body corporate
Category 2	Failure to comply with a health or safety duty – person fails to comply with a duty and the failure exposes an individual to a risk of death or serious injury or illness	\$150,000 for an individual
		\$300,000 for an individual as a PCBU or an officer of a PCBU \$1,500,000 for body corporate
Category 3	Failure to comply with health or safety duty – person fails to comply with a duty	\$50,000 for an individual
		\$100,000 for an individual as a PCBU or an officer of a PCBU
		\$500,000 for body corporate

Consultation

There are increased consultation requirements for PCBUs, including the requirement to consult with other duty holders e.g. another PCBU. There are also specific requirements regarding the nature of consultation with workers.

There will be a requirement to elect Health and Safety Representatives (HSRs) if requested to do so and the powers of HSRs have been increased to include, for example, the right to inspect the workplace and the power to direct any unsafe work to cease. HSRs will also have the power to issue Provisional Improvement Notices to PCBUs after they have received the appropriate training.

Issue Resolution

PCBUs must establish issue resolution procedures to manage health and safety disputes that may arise. Disputes must be managed in a timely and effective manner in accordance with the agreed issue resolution procedure, or the default procedure in the model Work Health and Safety Regulations.

Risk Management

The risk management cycle has been removed from the model Work Health and Safety Act. A PCBU will now be required to identify hazards and eliminate risks to health and safety or, if not able to eliminate, minimise those risks to health and safety so far as is reasonably practicable.

Only certain specific hazard areas within the model Work Health and Safety Regulation require a risk assessment such as confined spaces, electrical work on energised equipment, diving work and asbestos.

It is important to note that the draft Code of Practice for How to Manage Work Health and Safety Risks continues to recommend that employers should adopt the risk management cycle.

What you can do to prepare

The first step business can take to ensure compliance is to complete a gap analysis of officers within the business exercising due diligence. All effective safety management starts from senior management commitment.

Marsh has developed an online survey that can help determine your current level of compliance against the requirements of the model Work Health and Safety Act and Regulations. Please **click here** and follow the prompts to access the survey.

If requested via the survey, a Marsh OHS consultant will contact you to review your responses and assist you to plan a strategy for compliance.

Please contact the Marsh Workforce Strategies OHS helpline on **1300 091 651** if you have further questions about how to prepare your business for the model Work Health and Safety Act and Regulations.

www.marsh.com.au

Disclaimer: Marsh Pty Ltd (ABN 86 004 651 512 AFS Licence No. 238983) arrange this insurance and are not the insurer. This document contains general information only and does not take into account your individual objectives, financial situation or needs. You should consult their insurance and legal advisors regarding specific coverage and claims issues. For full details of the terms, conditions, exclusions and limitations please refer to the specific policy document which is available from us.

The information contained in this publication provides only a general overview of subjects covered, is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Insureds should consult their insurance and legal advisors regarding specific coverage and claims issues. All insurance coverage is subject to the terms, conditions, and exclusions of the applicable individual policies.

The information contained in this publication is based on sources we believe reliable, but we do not guarantee its accuracy. This information provides only a general overview of subjects covered.