INTRODUCTION TO THE WORK HEALTH AND SAFETY ACT
Agenda

• Harmonisation

• Topics
  – Person Conducting a Business or Undertaking (PCBU’s)
  – Directors & Officers inc due diligence
  – Workers
  – Consultation
  – Health & Safety Representatives (HSR’s)
  – WHS Right of Entry
  – Enforcement
  – Incident Notification

• Getting Ready
The Path to Harmonisation

Development and agreement on Model WHS Legislation and priority Model Codes of Practice

Mirroring of Model Legislation by States and Territories

Commencement of harmonised Legislation across Australia
What is new for NSW under WHS Act?

<table>
<thead>
<tr>
<th>Snapshot</th>
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<tbody>
<tr>
<td><strong>An employer</strong></td>
<td>Is captured under the definition <strong>PCBU</strong> ‘person conducting a business or undertaking’</td>
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<tr>
<td><strong>Controllers, self employed etc.</strong></td>
<td>Are also a <strong>PCBU</strong> with <strong>general duties</strong> of care</td>
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<tr>
<td><strong>General duties of Employers</strong></td>
<td>Will be subject to qualifier ‘reasonably practicable’ and will apply to <strong>all PCBUs and extend to</strong> all who are involved in the conduct of work</td>
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<td><strong>Onus of Proof</strong></td>
<td>Reverse onus removed with the prosecution having to prove a breach was committed</td>
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<td><strong>Employees</strong></td>
<td>Are captured under the definition of <strong>worker</strong> which is broadly defined to include anyone who carries out work in any capacity, including <strong>volunteers</strong></td>
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## What is new for NSW under WHS Act?

### Snapshot

<table>
<thead>
<tr>
<th><strong>Duty on Officers</strong></th>
<th>Will change from having an attributed liability to a positive duty of <strong>“due diligence”</strong> to ensure PCBU complies with duties</th>
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<tbody>
<tr>
<td><strong>Due diligence</strong></td>
<td>Is <strong>specifically defined</strong> and includes knowledge of WHS and business risks, allocation of resources, WHS reporting, compliance and verification processes</td>
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<td><strong>Duty of workers</strong></td>
<td>Workers have an expressed duty to take <strong>reasonable care</strong> of themselves at work</td>
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<td><strong>HSR powers</strong></td>
<td>After completing approved training HSRs will be able to <strong>issue PINs</strong> and <strong>direct unsafe work to cease</strong></td>
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<td><strong>Penalties</strong></td>
<td>Maximum penalty for a <strong>corporation of $3 million</strong>, for an <strong>individual $300,000</strong> &amp; up to <strong>5 years imprisonment</strong> for the most serious breaches</td>
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PERSON CONDUCTING A BUSINESS OR UNDERTAKING (PCBU)
Person Conducting a Business or Undertaking (PCBU)

• A PCBU is a person or duty holder such as a company or partnership that operates the business

• Examples of PCBUs would be companies, franchisees, self employed, contractors and sub contractors

• PCBUs are not persons employed solely as workers, or volunteer associations who do not employ anyone
Primary duty of Care

**A PCBU MUST so far as is reasonably practicable**, ensure the health & safety of:

1. Workers engaged or caused to be engaged by the PCBU
2. Workers whose activities are influenced or directed by the PCBU e.g. labour hire, apprentices, employees of contractors
3. Other persons who could be put at risk from work carried out by PCBU e.g. visitors, customers, members of the public
Safety of Others

PCBU’s must also take into account the safety of others who may be affected by the business operations such as visitors, customers and members of the public.

- More specific public safety responsibilities apply if you use or store dangerous goods or use high risk plant regardless of whether this takes place at your place of work.

- Workers and even “others” also have similar duties not to put you or anyone else at risk.
What Are PCBU’s Responsible For?

Ensuring the health and safety of workers (and others) so far as is reasonably practicable including all the common general duties such as a safe work environment, safe plant, adequate facilities, information, instruction and training and more specific responsibilities such as:

- **Consultation** with workers and other PCBUs
- **Resolving** WHS issues
- Ensuring the **health and safety of others**
- Complying with **specific regulations** that apply to the business
- **Notifying** incidents
Reasonably Practicable includes:

- Likelihood
- Degree of harm
- Availability & suitability of controls
- State of knowledge

+ Cost
CEO’s,
DIRECTORS,
OFFICERS
WHS Act specifies Duty of Care on Officers

- Introduces a “duty of care” on officers - the duty is to the PCBU
- This is a positive duty allocated to officers in their own right
- An officer may be found guilty of an offence whether or not the PCBU has been found guilty or convicted of an offence
Who is an Officer - Corporations Act 2001

*Officer* of a *corporation* means:

(a) a director or secretary of the corporation, or

(b) a person:

i. who makes, or participates in making, *decisions* that affect the whole, or a substantial part, of the business of the corporation; or

ii. who has the *capacity to affect significantly* the corporation’s financial standing
Responsibilities: Officer Duties

• The WHS Act states that if a PCBU has a duty or obligation under the Act, an **officer** of the PCBU must exercise **due diligence** to ensure that the PCBU complies with the duty of obligation

• This is a **positive duty** imposed on officers to ensure the organisation is complying
Officers must exercise Due Diligence

The key decision makers such as CEOs and Directors will need to demonstrate due diligence

What is Due Diligence?

- Audit & review WHS processes and use of resources
- Acquire safety knowledge and keep up to date
- Ensure WHS legal compliance
- Understand business health & safety risks
- Receive and consider business incidents, hazards & risks
- Provide resources to identify and control risks

Due Diligence

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DUTIES OF WORKERS & OTHERS
Duties of Workers & Others:

The WHS Act clearly specifies a duty on workers to take **reasonable care** for their health and safety and others at the workplace.

Others at a workplace, although they have limited control, are expected to also take **reasonable care**.
Who Is A Worker?

A worker is a 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 assigned to work in the business or undertaking
- an outworker
- an apprentice or trainee
- a student on work experience
- a volunteer
Workers at work

- Must take reasonable care of own health & safety
- Must take reasonable care that conduct does not adversely affect others
- Must comply, so far as he/she is reasonably able, with instructions
- Must cooperate with reasonable notified policies and procedures

Others at workplace

Duties
CONSULTATION
What is different in WHS Act about Consultation

Much broader duties for PCBUs to consult with other duty holders, and workers, including those likely to be affected by their business or undertaking.

Establishes comprehensive duties to consult on work health and safety matters so far as is reasonably practicable.
Consultation - What PCBU’s must do:

Obligation to consult with workers – s47

PCBU must, so far as is reasonably practicable, consult with workers who carry out work for the business or undertaking who are, or likely to be, directly affected by a WHS matter.

SO WHO ARE THE WORKERS LIKELY TO BE AFFECTED?
Obligation to consult with other duty holders – s46

“Duty holders with overlapping WHS duties must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with each other”

WHO ARE THESE OTHER DUTY HOLDERS?

• Same workplace – e.g. construction site, shopping centre,
• Same matter- e.g. design, installation, use of plant, labour hire
WHS Act and Issue Resolution

New Act makes an issue resolution process **open to all parties** rather than being restricted to H&S committees and HSRs

New Act mandates an issue resolution process that must be followed if there is an **unresolved WHS issue**
HEALTH AND SAFETY REPRESENTATIVES (HSR’S) & OHS COMMITTEES
What is different in WHS Act about HSRs

New Act prescribes HSR powers to issue **PINs** and direct **unsafe work be ceased** not currently found in NSW legislation

HSR training has to be **requested** rather than being an automatic entitlement
What WHS Act says PCBU’s must do:

• Respond to a request to establish a work group and negotiate an agreed arrangement

• Facilitate the election of HSRs

• Consult with HSR on WHS affecting the work group

• Allow access to WHS information relevant to work group

• Allow HSR to be present at interviews on WHS matters (with consent of worker)

• Provide resources and allow time to enable HSR to exercise functions
HSR Powers: Direct to cease unsafe work

Can only act if

- Completed *initial training*
- **Consulted** with PCBU and followed any issue resolution process

Then only if

- The representative has a reasonable concern that to carry out the work would expose the worker to a **serious risk** to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard

With the exception

- That the risk is so **serious and immediate** or imminent that it is not reasonable to consult before giving the direction
HSR Powers: Issue PIN

Can only act if

• Completed **initial training**
• **Consulted** with the person to whom the notice is issued

Then only if

• The representative reasonably believes that a person is **contravening** a provision of the Act, has contravened a provision of the Act in circumstances that make it likely that the contravention will continue or be repeated

And

• Must be in **writing** and may recommend measures to remedy issue
• PCBU can seek **review** within 7 days. Inspector may cancel, confirm or confirm with modification.
OHS Committee Arrangements

SIGNIFICANT CHANGES

- Changes the focus of the functions of the Committee
- Removes mandatory requirement for all members of Committee to undertake prescribed training
- Silent on some administrative details like who should be chair, the status of the management rep, elections
- Membership may be broadened to include all workgroups

Much about Committees is very similar to existing provisions
What WHS Act says PCBU’s must do

PCBU must establish a health & safety committee within 2 months of being requested to do so by:

- a HSR for the workgroup carrying out the work
- 5 or more workers at the workplace
- if required to do so by the regulation

PCBU may establish a committee on their own initiative
UNION PARTICIPATION IN WHS
Union Participation in the Workplace

The **authority** for Trade Unions in NSW **to initiate proceedings** for a breach of the Act has been **altered**

Trade Union officials now must undergo training prior to being issued with an entry permit and have broadened powers on entry.
The Right to Exercise Entry Powers

- Must be WHS Entry Permit Holder
- Must complete prescribed training
- Must hold relevant entry permit under IR law
- May only seek entry for specified purposes
- May enter without notice to investigate a suspected breach
- 24hrs notice if consulting workers / documents
- Must comply with WHS requirements
Permit Holder Rights

Permit holders who have reason to enter the workplace can:

- **inspect** any thing relevant to the suspected contravention
- **consult** with relevant workers or the relevant PCBU about the suspected contravention
- inspect and **make copies** of any document that is directly relevant to the suspected contravention
- **warn** any person of a serious risk to his or health or safety

A person must not:

**Recklessly & unreasonably** hinder a **WHS entry holder** in, or obstruct them from entering the workplace or exercising their rights
ENFORCEMENT
The WHS Act retains and builds on the enforcement framework found in the current legislation.

A greater range of sanctions, higher penalties, restrictions on a Trade Unions right to prosecute and abolition of the reverse onus of proof are new to the NSW enforcement framework.
Reverse Onus of Proof removed

The burden of proof (beyond reasonable doubt) rests entirely upon the prosecution in matters relating to non-compliance with duties imposed by the Act

Except for civil actions in relation to discriminatory conduct and WHS entry permit holders
The WHS Act provides a graduated enforcement regime with civil and criminal prosecutions as the ultimate sanction.

Injunctions and enforceable undertakings are new in NSW.
Penalty Structure

Category 1
Reckless Conduct

- Corporations: $3m
- Individuals as a PCBU or Officers of a PCBU: $600k / 5 years jail
- Other Individuals: $300k / 5 years jail

Category 2
Breach High Risk

- Corporations: $1.5m
- Individuals as a PCBU or Officers of a PCBU: $300k
- Other Individuals: $150k

Category 3
Duty Breach

- Corporations: $500k
- Individuals as a PCBU or Officers of a PCBU: $100k
- Other Individuals: $50k
Enforceable Undertakings

WorkCover may accept a **WHS undertaking** in connection with the matter giving rise to a contravention or an alleged contravention as an **alternative to a prosecution**

$$ to focus on positive prevention action

**NOT Available for Category 1 Offences**
Enforceable Undertakings

- Once accepted **no proceedings can be brought** in relation to the contravention
- Giving an undertaking is **not an admission of guilt**
- Decision must be given **in writing** & notice of decision **published on WorkCover’s website**
- Undertaking is enforceable **when the decision** to accept the undertaking is **given**
- It is an **offence to contravene** – and can result in proceedings and/or an order to carry out
The Right toProsecute

The right to bring a prosecution under the WHS Act rests with WorkCover in NSW

A Trade Union can bring a prosecution under the WHS Act in NSW only if:

1. the offence concerned is a **Category 3**

or

2. the offence concerned is a **Category 1 or a Category 2 offence** and **WorkCover** has (after referral of the matter to the Director of Public Prosecutions) **declined to follow the advice of the DPP to bring the proceedings**
INCIDENT NOTIFICATION
What is different in WHS Act about Incident Notification?

New Act has similar notification requirements to the current NSW legislation.

New Act does not include 7 day unfit for work provision found in NSW definition.
What is a Notifiable Incident?

An incident involving the **death** of a person, ‘**serious injury or illness**’ of a person or a ‘**dangerous incident**’

What is a serious injury or illness?

An injury or illness including: **immediate treatment** as an in-patient in a hospital or immediate treatment for amputation, spinal injury, serious lacerations etc. or medical treatment **within 48 hours** of exposure to a substance at a workplace
What is a Dangerous Incident?

An incident that exposes a person to serious risk to their health or safety arising from an immediate or imminent exposure to matters such as, for example:

- an uncontrolled escape, spillage or leakage of a substance, or
- an uncontrolled implosion, explosion or fire or
- an uncontrolled escape of gas or steam.
What WHS Act says PCBUs must do:

Notify WorkCover of a **notifiable incident** immediately after becoming aware of it.

Notify by phone or in writing—**quickest means possible**

Ensure that the **incident site is preserved** until an inspector arrives or until directed by an inspector. **Does not prevent action to assist injured persons or make site safe.**

Keep a record of notifiable incidents for **5 years**.
Complying With WHS Regulation

• The new Act will be supported by a **specific WHS regulation covering similar hazards** (e.g. manual handling, noise, chemicals) to the current NSW regulation

• Employers will need to **comply** with the WHS regulation

• The WHS regulation in many cases use the term so far as is **reasonably practicable** to guide the use of prevention measures

• The regulation includes many of the administrative aspects of **licences and permits**

**As part of this education program NSW business Chamber will also be running seminars on the new WHS Regulation in 2012**
Getting Ready
Preparation For Changes

- Review your current OHS management system to identify any gaps in meeting your new responsibilities

- Identify who the officers are in your organisation

- Ensure that the responsibilities of officers are addressed and due diligence can be demonstrated

- Make sure you are able to show due diligence for WHS in your organisation
Preparation For Changes

✓ **Think** about the WHS issues you will need to coordinate with other PCBUs such as **contractors** and how to manage them

✓ **Revise** your consultation arrangements

✓ Develop an **issue resolution** process

✓ Review your incident reporting system

✓ **Check any specific compliance requirements in the new WHS regulation**
Education Program Evaluation

- Please take a few minutes to complete the second part of the knowledge questionnaire in your packs - post knowledge review questionnaire

- Additional information is available from the fact sheets within your pack

Contact the OHS Unit on 13 26 96
Assistance
OHS Unit

OHS Consulting
- OHS Diagnostic Audits / OHS Risk Assessments
- Review or development of OHS documentation/manuals
- Ergonomic assessments
- Onsite accredited and customised training courses

Workers Compensation Assistance
- Classification; Premium issues; Claims issues; Injury Management

Training – Public Courses
- WorkCover Accredited Courses
- Certificate IV & Diploma in OH&S
- Diploma in Environmental Sustainability
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Thank You