

Work Health and Safety Act 2011

Harmonisation of OH&S Laws

Royal Prince Alfred Yacht Club



Why harmonisation?

- Create uniformity of OH&S legislation throughout the country
- Reduce confusion from State to State
- Some new concepts
- Some positives and some negatives
- Not the “nirvana” of uniformity that was desired

What do we look at in this Presentation?

- New Work Health and Safety Act 2011
- Key changes to the OH&S laws in NSW
- What impact do these changes have on Clubs?
- What Clubs need to do to comply with the new laws.

Key Changes

The Title

- ***Work Health and Safety Act 2011*** will replace the current *Occupational Health & Safety Act 2000*
- Similarly there will be a new set of Regulations which have now been published

Key Changes (con't)

- The concept and def'n of “*Employer*” will change – will now be know as a “***person conducting a business or undertaking***” (PCBU)
- The concept and def'n of “worker” will be broadened to include ***any person who carries out work for a PCBU in any capacity***
- Greater requirement to **consult with workers and other PCBUs** (This is important)

Key Changes (con't)

- Prosecutions will have a **reverse onus of proof** (as distinct and contrary to the old NSW OH&S Act) (speeding fine)
- Onus of proof now on the prosecution to prove their case.
- PCBU officers now must exercise **due diligence to ensure compliance with new legislation and Regulations.**

Key Changes (con't)

- Elected **Health and Safety Representatives (HSR)** will have the ability to issue **provisional improvement notices (PINs)** which may have an impact on operations
- Union officials may apply for a **WHS entry permit** to investigate suspected breaches and consult with “workers”

PCBU

What is a PCBU?

“Person who conducts a business or undertaking...alone or with others.....whether or not conducted for profit or gain”:

- Company
- Contractor
- Sub-contractor
- Self employed person
- Franchisees
- **Not volunteer organisations** that have **no employees**
- **Not an employee** employed **solely as a “worker”**

PCBU

Responsibilities

- Health and Safety of all **“workers”** and **“others”**
- **“Workers”** defn – discuss later.
- **“Others”** that may be impacted by the activities of the PCBU eg. members of the public; customers and patrons and visitors

PCBU

Responsibilities (con't)

PCBUs are responsible for the health and safety of all workers and others, **so far as is reasonably practicable**:

- General duty of care to **manage and eliminate risks**
- **Consultation** with workers and other PCBUs
- **Resolving** health and safety issues
- **Ensuring** the health and safety of others
- Ensuring **compliance** with WH&S legislation and Regulations

Worker

What is a Worker?

Person who carries out work in **any** capacity for a PCBU, including when that person works as an:

- An employee
- Contractor or sub-contractor
- Employee of a labour hire company contractor to work for the PCBU
- An outworker
- An apprentice or trainee
- Student on work experience
- A volunteer

Worker

Responsibilities

Workers and Others have their own set of responsibilities:

- Take **reasonable care** of their own **health and safety**
- Take **reasonable care** that their conduct **does not adversely affect others**
- **Comply with instructions**, so far as he/she is **reasonably able**
- Workers must cooperate with **reasonable policies and procedures**
- **Cease work if he/she** 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** (S. 84)

Ref S.28

What is an Officer?

Defn comes from the Corporations Act 2001 (Cth)

"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**; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)

Duties of an Officer

Exercise **due diligence** which means take reasonable steps to

- Acquire and keep up to date with **health and safety knowledge**
- **Understand the nature of the business** and the inherent risks to health and safety
- **Provide resources** to identify and manage risks
- Ensure the PCBU has **the processes** to consider and receive information about hazards risks and incidents and be able to respond in a timely fashion
- Ensure **compliance** with the WHS Act
- **Verify** the provision and use of the resources and processes

Stakeholders Duties and Responsibilities

- **PCBU** – set of responsibilities and a primary duty of care
- **Officers** – due diligence
- **Workers** – their own health and safety and a primary duty of care
- **Others** - their own health and safety and a primary duty of care
- **Self Employed person** - their own health and safety and a PCBU

Reasonably Practicable

What does this mean?

That which is reasonably practicable to be done in the circumstances, weighing up all relevant matters. Taking into account:

- The **likelihood** of the hazard or risk occurring
- The **degree of harm** or possible consequences
- The state of knowledge about the risk and the availability and suitability of way of **eliminating or minimising the hazard or risk**
- Only after considering all of the above, reasonably practicable take into account the **costs of eliminating the risk and whether the cost is grossly disproportionate to the risk.**

Consultation

Who do you have to consult with?

- Each person that has a duty under the Act has a duty to **consult**, co-operate and co-ordinate activities with all other persons who have a duty.
- Consult with all workers who carry out work or may be directly affected by a WHS matter
- Or with the HSR – if workers are represented by an HSR

Ref S. 46 and 47

What is meant by consultation?

Consultation requires

- that relevant information about the matter is shared with workers
- that workers be given a reasonable opportunity:
 - a. to express their views
 - b. to raise work health or safety issues in relation to the matter
 - c. to contribute to the decision-making process
 - d. that the views of workers are taken into account
 - e. that the workers consulted are advised of the outcome of the consultation in a timely manner
 - f. if the workers are represented by an HSR, the consultation must involve that representative.

When do you have to consult?

You need to consult in the following circumstances:

- Identifying hazards, assessing risks and making decisions about eliminating or minimising risks.
- Making decisions about facilities
- Proposing changes that will have an impact on the health and safety of workers
- Making decisions about procedures, resolving health and safety issues and monitoring the work environment.

Health and Safety Representatives

HSRs

- Must be **elected or nominated** (if there is no contest).
- Elected for 3 years
- Must **undertake training** by WorkCover approved provider and course
- Employer (**PCBU**) **must organise such training** and allow paid time off for HSR to attend within 3 months
- Employer (PCBU) must maintain and display a list of the names of HSRs

Duties and Responsibilities of HSRs

- To **represent the workers**
- To monitor the measures taken PCBUs to comply with the Act
- To **investigate complaints** from workers
- To **inquire** into anything that appears to be a risk to the health or safety of workers

Powers and Functions of HSRs

- **Inspect the workplace** by giving reasonable notice
- At any time, **without notice**, in the event of an incident, or any situation involving a **serious risk to the health or safety of a person**
- **Accompany an inspector** during an inspection of the workplace
- **Be present at an interview** concerning work health and safety between the worker/s and the PCBU or an inspector (with the consent of the worker/s)

Ref S. 68 and 69

Powers and Functions of HSRs (con't)

- Request the establishment of a health and safety committee
- **Not entitled** to have access to any **personal or medical information** concerning a worker without the worker's consent
- **Direct a worker to cease work** if the HSR 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 (S. 85)
- But **must not** give a worker a direction to cease work unless the matter is not resolved after: (a) consulting with the PCBU, and (b) attempting to resolve the matter
- **May issue a provisional improvement notice**

Ref S. 68 and 69

Health and Safety Committees

PCBU **must** establish a Health and Safety Committee (HSC)

- 5 or more workers **or**
- If requested by HSR
- Of own initiative

Constitution

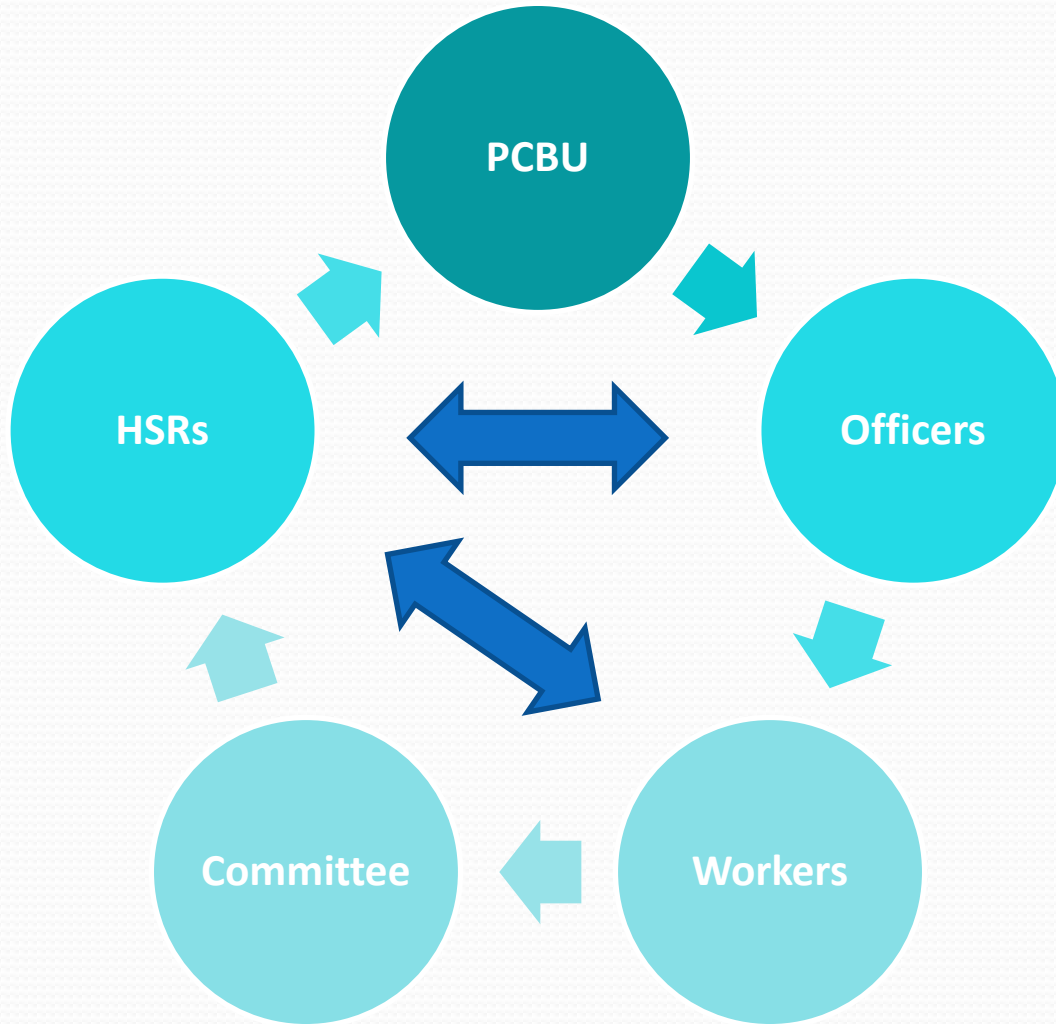
- may be agreed between the PCBU and the workers
- HSR/s may be a member
- HSRs may choose who are members
- **At least half** of the members of the committee must be workers who are **not nominated by the PCBU**

Functions of the HSCs

- Facilitate co-operation between the PCBU and workers in instigating, developing and carrying out measures designed to ensure the workers' health and safety at work,
- assist in developing standards, rules and procedures relating to health and safety
- any other functions prescribed by the regulations or agreed between the PCBU and the committee.
- PCBU **must** allow each member of the HSC to **spend paid time that is reasonably necessary to attend meetings of the committee or to carry out functions** as a member of the committee.

Ref Part 5 Division 4

Consultation



Issue Resolution

- The parties **must make reasonable efforts to achieve a timely, final and effective resolution of the issue** in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed in the regulations.
- A representative of a party to an issue may enter the workplace for the purpose of attending discussions with a view to resolving the issue

Provisional Improvements Notices (PINs)

Previously only able to be issued by Inspectors

If a HSR **reasonably believes** that a person:

- (a) is contravening a provision of this Act, or
- (b) has contravened the Act and that the contravention will continue or be repeated

The HSR **may issue** a PIN requiring the person to:

- (a) remedy the contravention, or
- (b) prevent a likely contravention from occurring, or
- (c) remedy the things or operations causing the contravention or likely contravention.

Provisional Improvements Notices (PINs) (con't)

HSR must not issue a PIN unless

- He or she has first consulted the person, and
- Completed the prescribed training
- HSR cannot issue a PIN in relation to a matter if an inspector has already issued (or decided not to issue) an improvement notice

The person issued with the PIN may ask WorkCover to appoint an inspector to review the notice

Ref S. 90, 91 and 100

Union Officials

Union official who holds a WHS Entry Permit may:

- Enter a workplace for the purpose of inquiring into a **suspected contravention** of the Act
- Must **reasonably suspect** that a contravention has occurred or is occurring before entering the workplace
- **Consult** on work health and safety matters with, and **provide advice** to workers who wish to participate in the discussions
- **Warn** any person that the Official reasonably believes to be exposed to a serious risk to his or her health or safety

Ref Part 7

Incident Notification

PCBU must ensure that WorkCover is notified immediately after becoming aware that a **notifiable incident** has occurred.

Notifiable incident means:

- (a) the death of a person, or
 - (b) a serious injury or illness of a person, or
 - (c) a dangerous incident.
- Notification must be by fastest possible means, phone call, email or fax

Incident Notification (con't)

What is a “serious injury or illness” ?

Requiring the person to have:

- immediate treatment as an in-patient in a hospital, or
- immediate treatment for injuries or illnesses such as:
 - (i) the amputation of any part of his or her body, or
 - (ii) a serious head injury, or
 - (iii) a serious eye injury, or
 - (iv) a serious burn, or
 - (v) medical treatment within 48 hours of exposure to a substance, and includes any other injury or illness prescribed by the regulations but does not include an illness or injury of a prescribed kind.

.....Etc etc

Full description at **Section 36** of the Act and the **Regs.**

Ref Part 3

Incident Notification (con't)

What is a “dangerous incident”?

a "dangerous incident" means an incident in relation to a workplace that exposes a worker or any other person to a serious risk to a person's health or safety emanating from an immediate or imminent exposure to:

- (a) an uncontrolled escape, spillage or leakage of a substance, or
- (b) an uncontrolled implosion, explosion or fire, or
- (c) an uncontrolled escape of gas or steam, or
- (d) an uncontrolled escape of a pressurised substance, or
- (e) electric shock,

.....Etc etc – Full description at **Section 37** of the Act and also in the **Regs**

Ref Part 3

Onus of Proof

In matters relating to allegations of non-compliance with duties under the Act

- The **burden of proof** rests with the **prosecution** to prove that the conduct was **without reasonable excuse**
- Previously with the **Defendant** to prove that they had a “reasonable excuse”
- **Except for civil proceedings** related to discriminatory conduct and WH&S permit holders

Penalties and Sanctions

Penalties for breaches of WHS duties and responsibilities are now divided into 3 categories:

Category 1 Reckless Conduct

Reckless in exposing an individual to a risk of death and serious illness or injury



Category 2 High Risk Breach

Failure to comply where person is exposed to risk of death or serious injury or illness



Category 3 Low Risk Breach

Failure to comply with a duty

Penalty Structure

Category 1 Reckless Conduct

- Bodies Corporate : \$3 million
- Individuals as a PCBU or Officers: \$600k / 5 yrs jail
- Other individuals: \$300k / 5 years jail

Category 2 High Risk Breach

- Bodies Corporate : \$1.5 million
- Individuals as a PCBU or Officers: \$300k
- Other individuals: \$150k

Category 3 Low Risk Breach

- Bodies Corporate : \$500k
- Individuals as a PCBU or Officers: \$100k
- Other individuals: \$50k

Ref Division 5

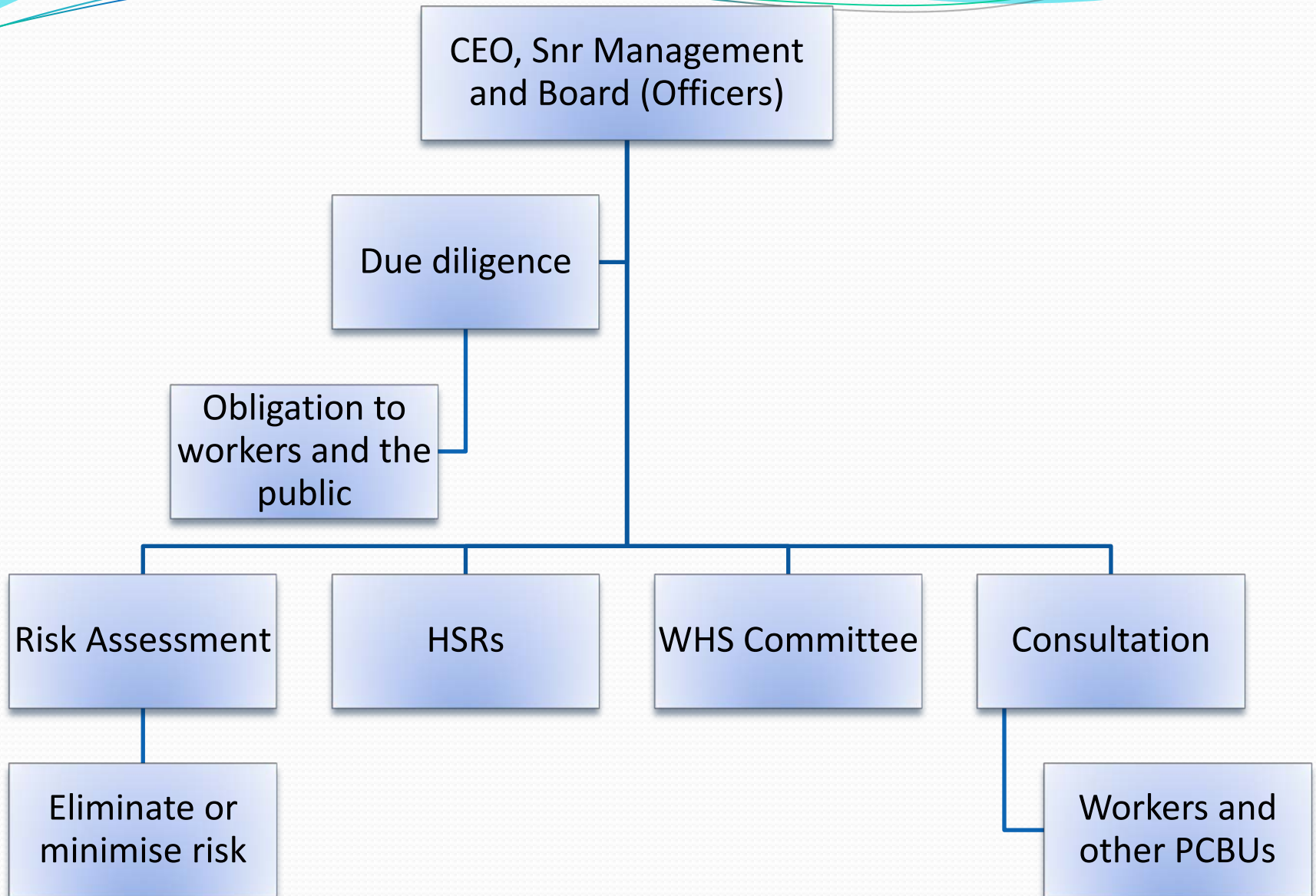
Prosecutions

Who can commence proceedings?

- WorkCover or WorkCover Inspector, or
- Union, but only in respect to Category 1 or 2 offences and only where WorkCover has declined to prosecute.

Jurisdiction

- Local Court
- District Court
- Category 3 offence, Local Court or Industrial Court



Pro-Active –WH&S a Priority

Due diligence

Control and manage safety in the workplace

Risk Analysis

Eliminate and minimise the risks

Consult

When necessary and with all stakeholders

Safe workplace – no interventions