

NSW RESPONSE TO SAFE WORK AUSTRALIA'S HARMONISED HEALTH & SAFETY LEGISLATION

In response to Safe Work Australia's Work Health and Safety harmonisation program the NSW Government has recently taken two major legal steps:

1. The **NSW Work Health & Safety Act 2011** was passed by both Houses of Parliament on 1st June 2011 and will come into force 1st January 2012.
2. **Amendments to the NSW OHS Act 2000** were passed on 7th June 2011 to alter the current Act (OHS Act 2000) until the commencement of the Work Health and Safety Act 2011. The amendments cover "core" changes to the current OHS system contained in the 2011 HS legislation.

Core changes to the 2000 legislation include:

- Changing OHS duties from requiring a duty holder (normally an employer) to "ensure" the safety, health and welfare of employees (and others) affected by the workplace to duties that require safety health and welfare to be ensured "so far as is reasonably practicable";
- Changing the duty of officers in the organisation (safety obligations) from equal to that of the organisation by "exercising "due diligence" (now particularised in the legislation), rather than demonstrating that "all due diligence" had been exercised.
- Changing the previous reverse onus of proof requiring an employer to establish, on the balance of probabilities, certain defences in order to avoid conviction to placing the burden of proof for a breach of a duty on the prosecution.
- The amendments also provide a "Concept of ensuring health and safety".

The changes remove the presumption of guilt so that an employer is now presumed innocent until proven guilty of not doing what was "reasonably practicable" to ensure health and safety.

In considering what is reasonably practicable, an employer must take the view of a reasonable person who is committed to providing the highest level of protection to eliminate or minimise risks to a person's health and safety, and who is proactive in taking measures to ensure this protection takes place.

Duty of care does not now focus exclusively on elimination of risks as it specifically decrees that if it is not reasonably practicable to eliminate a risk, then the duty is to minimise the risk so far as that is reasonably practicable.

All relevant matters are to be considered including;

- The likelihood of the risk (hazard) occurring.
- The degree of harm that may result from the risk (hazard).
- What a person concerned knows, or ought reasonably to know, about the risk and ways of eliminating or minimising it.
- The availability and suitability of ways to eliminate or minimise the risk.
- After assessing the extent of the risk and ways available to eliminate/minimise the risk to then determine whether the effectiveness and associated cost in eliminating or minimising the risk are 'grossly disproportionate' to the risk .

The law that joined any relevant person in a management role to a legal action has also been changed and where guilt was previously presumed, duty holders (managers, controllers, suppliers, etc) must now show "due diligence" to ensure that their employer does "everything reasonably practicable" to comply with OHS law.

Officers of corporations within the meaning of sect..9 of the Corporations Act 2001 are now required to exercise "**due diligence**" to ensure that their organisation complies with its duties and obligations under the Act including:

- Keeping up to date with work health and safety matters and applying them in the workplace;
- Understanding the nature of operations of the organisation and the risks and hazards associated with it;
- Making sure that the organisation has sufficient resources and processes to eliminate or minimise risks to health and safety and that these resources and processes are effectively used (wherever employees carry out their work);
- Ensuring that the organisation has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- Ensuring the organisation has, and implements, processes for complying with duties and obligations under the provisions of this Act including - notification, consulting, complying with notices, training and information;
- Verifying the provision and use of resources and processes for the above;

Employees are now required to cooperate with their employer "as far as is reasonably practicable" and volunteers are no longer liable for prosecution under this amendment of the Act