



Model Australian Work Health & Safety Laws

**Important briefing paper for School Council Members, Principals, Executives
and Business Managers of Non-Government Schools**

The Information in this whitepaper is current as at February 2016. The law in this area is in a constant state of change. Please visit www.complispace.com.au to ensure that you have the most up-to-date version of this briefing paper.



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Executive Summary

New uniform Work Health and Safety (WHS) laws commenced on 1 January 2012 in New South Wales, Queensland, the Australian Capital Territory, Northern Territory and the Commonwealth, and on 1 January 2013 in Tasmania and South Australia. Western Australia is committed to harmonisation of its WHS regime in principle, with modified legislation still to be finalised." Victoria has indicated it will not enact the harmonised laws.

Employer and Worker Definitions:

These laws introduced the concept of a "Person Conducting a Business or Undertaking" (PCBU), to replace the concept of an employer, and together with the expansion of the definition of "worker", these terms have together greatly increased traditional employer obligations. A PCBU is not only responsible for the health and safety of its own employees but also for other workers who are involved in the PCBU's activities; the definition of "worker" includes volunteers contractors, sub-contractors, labour hire staff, and even work experience students. PCBUs are responsible for "other persons" who are exposed to health and safety risks arising out of the activities of the PCBU.

Duty of Care:

- ❏ The scope of that responsibility is that employers (PCBUs), must ensure that, so far as is "reasonably practicable", their workers and other persons, such as students and visitors are not exposed to health and safety risks as a result of the PCBU's activities.
- ❏ The concept of "reasonably practicable" requires each employer to effectively implement a formalised risk management program, through which it identifies workplace hazards, assesses them and takes action to either eliminate or control them.
- ❏ The WHS laws must be considered in addition to the legal obligation a school has to ensure measures are in place to protect students from risks of harm that reasonably ought to be foreseen.

Due Diligence:

- ❏ Under these WHS laws all school Council/Board members, directors and officers have a positive obligation to undertake due diligence to ensure that their organisations are compliant.
- ❏ Directors (School Board/Council members) and officers are required to have a good working knowledge of WHS matters and how they apply in practice to their school.

Board/Council members and officers are also required to ensure their schools have appropriate resources and processes in place to manage WHS and, critically, to verify that these processes actually work in practice. This requires the implementation of an integrated WHS system that provides both transparency and visibility.

Consultation:

- ❏ The obligation to consult with workers is a key element of the laws, as it is seen as critical to identifying hazards and implementing the WHS system. Consultation is also required with other PCBUs where there exists a joint responsibility to care for the safety of workers, for example, contractors hired by a school.
- ❏ A school can consult with its employees on WHS matters in a number of different ways, however employees have the right to trigger changes which may better address their needs:
 - It only takes one worker (it could even be a work experience student), to request that a Health and Safety Representative (HSR) be elected and an organisation must comply with this request.
 - HSRs have expansive powers and can issue directions to cease work, which must be complied with.
 - Health and Safety Committees may need to be established if requested by 5 or more workers, or by the Health & Safety Representative.

National Codes of Practice:

- ❏ In conjunction with the introduction of the Model Law, Model Codes of Practice have been developed by Safe Work Australia in consultation with the States and Territories. These Codes provide guidance on how to comply with certain aspects of the legislation. Courts can reference the Codes to determine what is “reasonably practicable”, however, each State and Territory must specifically adopt each Code of Practice for it to apply in their jurisdiction

Fines & Penalties:

- ❏ A breach of the harmonised laws comes with significant fines and penalties - up to \$3 million per breach for a corporation, and \$600,000 per breach for directors and officers. Directors and officers (and potentially, workers) face prison terms of up to five years.
- ❏ If directors or officers fail to discharge their duty, they can be prosecuted, even if the PCBU is not prosecuted, or the PCBU is found not guilty.
- ❏ In some jurisdictions (including New South Wales and Queensland) criminal proceedings arising from WHS events have been moved from the Industrial Courts to the mainstream court system, where prison terms are handed down on a daily basis. This means that prison sentences for directors and officers are more likely to be applied.
- ❏ Unpaid volunteer Board/Council members and officers have immunity from criminal prosecution or fines under the Model Laws however may still have liability as a worker and/or be subject to civil liability for breaching their statutory duties and/or duty of care responsibilities.

PCBU –Duty of Care

The primary responsibility for work health and safety in a workplace lies with a PCBU, a term which replaces the concept of an employer. A PCBU may be a corporation, partnership, unincorporated association, a self-employed person or a sole trader. Schools are PCBUs.

A PCBU's primary duty of care is to ensure, so far as is 'reasonably practicable' (explained below), that workers (note expanded definition), and other persons (for example people visiting your premises), are not exposed to health and safety risks arising from its activities or undertakings. This duty covers both workers engaged, or caused to be engaged, by the PCBU, and workers whose activities in carrying out their work are influenced and directed by the PCBU.

Each PCBU has a duty of care that applies *"to the extent to which the PCBU has the capacity to influence and control the matter."* This takes into account that a contractor, for example, may be performing work which is mainly controlled by their own employer rather than the school, or performing work which is of a specialist nature and the school may have a very limited ability to control or influence the way the work is performed.

If your school engages a "temp", through a labour hire company to cover a short term position, as a PCBU, your organisation will be jointly responsible with the labour hire company for the safety of the temporary worker, probably more so than their employer as the school will have a greater ability to influence and control their activities.

Additionally, if your school engages a volunteer to assist with the school's activities, then your school will be responsible for the safety of the volunteer, and should treat them as if they were an employee.

The school's responsibility for students is essentially covered by the school's student duty of care which is higher than their WHS responsibility. However, there are obvious overlaps in terms of measures which need to be taken to protect teachers and students, and the application of WHS laws to students as "other persons affected by" the school's activities.

The 'Reasonably Practicable' Test

For a school to ensure, so far as is 'reasonably practicable', that workers, or other persons, are not exposed to health and safety risks arising from its business or undertaking, the Model Laws require that the school, as a PCBU, takes into account and weighs up all relevant matters including:

- a) the likelihood of the hazard or the risk concerned occurring;
- b) the degree of harm that might result from the hazard or the risk (consequences);
- c) what the school knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating, or minimising, the risk;
- d) the availability and suitability of ways to eliminate or minimise the risk; and
- e) after assessing the extent of the risk, and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

In broad terms, this obligation requires a school to implement a **risk management program** through which it takes positive steps to **identify** workplace safety hazards, **assess each hazard** in terms of likelihood and potential consequence, and **take action to either eliminate or reduce** each hazard it has identified.

The test is an objective one having regard to a reasonable person in the PCBU's position. Safe Work Australia has released a useful guideline for those PCBUs that are struggling to deal with this issue¹.

One important point to note with respect to the cost assessment in (e) above: although the cost of eliminating or minimising risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of safety ahead of cost.

¹ <http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/interpretive-Guideline-reasonably-practicable.aspx>

Directors' & Officers' Duty to Exercise Due Diligence

Directors and officers of a school have an express duty to exercise due diligence to ensure that the school is complying with its WHS obligations.

The introduction of this duty formalised a situation that had been evolving in the courts, where non-executive directors have been held liable for some omissions or actions even though they pleaded ignorance. Directors and officers can no longer attempt to plead ignorance – they now have a **positive duty to know what is going on**.

In the case of death caused by reckless acts or omissions, officers can be held liable to the same extent as the PCBU – with fines of up to \$600,000 per breach and / or imprisonment for up to five years².

Definition of Officer

The Model Laws adopt the Corporations Act definition of an “officer” which covers directors, company secretaries, as well as a person:

- ✔ who makes or participates in making decisions that affect the whole, or a substantial part, of the business of the corporation;
- ✔ who has the capacity to affect significantly the corporation’s financial standing; or
- ✔ whose instructions or wishes are usually acted on by the directors (but not those giving professional advice in specified areas i.e. external lawyers or accountants).

Note in particular that the definition of “officer” does not cover frontline or middle managers, except where they might fall under any of the above criteria.

Within most schools it is clear that members of the school board, the principal, heads of school and business managers will fall within the definition of an “officer”. Depending on the size, nature and complexity of a particular school, other key executive roles may also be caught, thus expanding those individuals within the school environment that have personal liability exposure.

What Do Directors & Officers Have to Do To Satisfy Their Obligations?

For a director or officer to exercise ‘due diligence’ to ensure that the PCBU complies with its WHS duties and obligations, he or she must:

- ✔ acquire and keep up-to-date knowledge of work health and safety matters;
- ✔ gain an understanding of the nature of the operations of the business or undertaking of the PCBU and understand generally the hazards and risks associated with those operations;
- ✔ ensure that the school has appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the school;
- ✔ ensure that the school has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- ✔ ensure that the school has, and implements, processes for complying with any WHS duty or obligation; and
- ✔ verify the provision and use of the above resources and processes.

It is clear that in order to satisfy the laws, the directors and officers must not only have a system but be able to demonstrate that their school’s WHS systems are actually in place and working effectively.

N.B. Failure to properly exercise this duty may expose a non-volunteer director or officer to criminal prosecution, even if the PCBU is not prosecuted or the PCBU is found not guilty. It may also expose a volunteer director or officer to a civil claim for negligence and/or breach of statutory duty.

² There is an exemption for volunteer officers which is explained in the following pages.

Consultation with Workers and Other PCBUs

Your school must, so far as is reasonably practicable, consult with workers who carry out work for the school who are, or are likely to be, directly affected by a work health and safety matter. Work experience staff and unpaid volunteers are considered workers and should be considered as if they were employees for the purposes of WHS. It is also important to note again that a “worker” need not be your employee; it can be an employee of your contractor, or subcontractor, or temporary employee hired through a labour hire agency. The effect of this obligation is that schools have an obligation to consult with other PCBUs in certain circumstances.

The Model Laws (including the Code of Practice on Consultation, Cooperation, and Co-ordination) are less prescriptive as to how the consultation can be conducted – the Code talks of finding what works best for your organisation, in consultation with your workers and other PCBUs. Notwithstanding the general nature of the consultation obligation, a prudent employer should ensure that it has a paper trail to evidence the fact that consultation has taken place.

The Model Laws are, however, quick to reveal the iron fist in the velvet glove: it only takes one “worker” to ask for a Health and Safety Representative (explained below) to be appointed, before the PCBU must do so. Additionally, it only takes five workers asking for a Health and Safety Committee (and there is no requirement for a minimum number of staff to be employed by the PCBU) to trigger this provision.

Failure to comply with the general duty to consult attracts penalties of up to \$100,000 for the organisation. Failure to comply with the specific requirements, including timing of beginning negotiations in response to requests, and giving notices to workers on progress, can range from \$10,000 to \$50,000 for the organisation depending on the circumstances.

Engaging Volunteers

Many members of school communities, including the parents of students, volunteer their time and effort in assisting the various activities of a school. Volunteers are defined as workers who are not working for payment or financial reward, although they may be reimbursed for their out of pocket expenses. It is a school’s obligation to ensure the health and safety, so far as reasonably practicable, of all workers, including volunteers.

This being the case, volunteers must also be included in the consultation process with other workers, if they are, or are likely to be, directly affected by a work health and safety matter. For example, parents who volunteer in a school canteen should be consulted about new equipment being purchased for the canteen. Similarly volunteers must be provided with information, training, instruction and supervision suitable to the type of work that they are doing for the school.

Conversely, under the Model Laws, as workers, volunteers also have duties at the workplace and must ensure:

- ✓ reasonable care is taken for their own health and safety;
- ✓ reasonable care is taken so their conduct does not adversely affect the health and safety of others;
- ✓ compliance with any reasonable instructions given by the school, to assist the organisation to comply with WHS laws; and
- ✓ co-operation with any reasonable policy or procedure relating to health and safety at the workplace.

N.B If a worker, including a volunteer worker, fails to comply with these duties, they can be prosecuted.

Volunteer Directors and Officers

Many schools have boards substantially made up of volunteer members. These volunteer board members are “officers” for the purpose of the Model Laws. All officers, volunteer or paid, must exercise due diligence to ensure the organisation complies with its health and safety obligations.

However, unlike paid officers, volunteer officers cannot be prosecuted under the Model Laws for failing to comply with their due diligence and other officer duties.³ This immunity, which means volunteer members are protected from criminal liability and fines under the Model Laws, is designed to ensure voluntary participation on not-for-profit boards is not discouraged.

The immunity of volunteer board members is however not complete. Significantly;

- ❖ it does not prevent prosecution of the volunteer officer in their capacity as a worker, if they do not take reasonable care as a worker;⁴, for example if they fail to follow safety instructions and don't wear a hard hat when inspecting a school construction site; and
- ❖ it does not provide protection against civil proceedings that may be taken by a worker claiming damages as a result of a volunteer board member's breach of statutory duty and/or negligence in failing to meet his or her duty of care to exercise 'due diligence'.

In short, whilst the immunity from criminal prosecution and fines will provide volunteer members with some comfort, if they choose to ignore their core obligation to exercise due diligence they still might find that their personal assets are on the line.

The HSR (the Health and Safety Representative)

The role of the HSR encompasses representing the health and safety interests of a particular work group and has a considerable amount of power. The Model Laws give the HSR a set of broad powers to:

- ❖ investigate complaints;
- ❖ inspect a workplace;
- ❖ attend interviews with the safety regulator or the school;
- ❖ issue provisional improvement notices; and
- ❖ issue directions to cease work.

Importantly, it only takes one worker (note expanded definition) to request a HSR and you, as a PCBU, are required set in train a process to elect one.

The first step is to define the work group for which the HSR will be responsible, and this requires consultation with workers. A single “work group” can encompass the entire school. Once a work group has been defined, elections for a HSR are held within that work group.

Note that there are penalties if the PCBU fails to include the HSR in consultation relating to that work group. In simple terms, you can't bypass a troublesome HSR by talking directly to the members of the work group.

³ *Work Health and Safety Act 2011*(Cth) s34(1).

⁴ *Work Health and Safety Act 2011*(Cth) s28.

Health and Safety Committees

There is no minimum threshold number of employees that a PCBU must have before a Health and Safety Committee may be requested. The request to form a committee can come from just one Health and Safety Representative, or five or more “workers”. The workers need not be the school’s employees: they can also be, for example a contractor’s or subcontractor’s employees. If the school has one or more HSRs, then they must be given an opportunity to participate in the Committee.

Risk Assessment Procedures

While the Model Laws do not specify a methodology for risk assessment, this gap is filled with a Code of Practice – “How to Manage Work Health and Safety Risks”. The obligation to identify hazards and to assess and control workplace safety hazards is a central feature of the regime. This can only be satisfied by a school implementing a documented risk management framework.

The framework must include a hazard register within which all identified workplace hazards are recorded and assessed in terms of the likelihood of the event occurring and the potential consequence if the event were to occur. In addition, for each hazard identified, a school should have a corresponding workplace safety policy and possibly a treatment plan in the event that the organisation’s current controls are not considered to be adequate.

Model Codes of Practice

To assist in the development of a more uniform approach to workplace health and safety, SafeWork Australia, in consultation with the States and Territories, has developed a series of Model Codes of Practice to provide guidance in implementing the provisions of the legislation. Courts can use the Codes to identify what is “reasonably practicable” in particular circumstances, but there is still room for alternatives to the Codes, as long as the standard of the alternative is equivalent or higher than the relevant Code.

Copies of all Model Codes of Practice can be accessed on the [SafeWork Australia](#) site. If there is a Model Code of Practice that appears to be relevant to your business operations, you should review your current safe work policies against the relevant Code to ensure compliance.

N.B Each State or Territory must explicitly adopt a Model Code of Practice before it applies in that jurisdiction. So you will need to check with your local workplace safety regulator as to whether a particular code applies to your organisation.

The Sharp End of the Stick - Fines & Penalties

Whilst volunteer directors and officers cannot be prosecuted under the Model Laws⁵ this immunity does not extend to directors or officers who receive payment, or financial reward, for their work.

In most States the penalties introduced by WHS legislation are significant in monetary terms (maximum of \$3 million per breach for a corporation and \$600,000 per breach for officers), but the real caveat is with prison sentencing. The laws provide for prison sentences of up to five years.

Under the model WHS laws, prosecutions in some States are being taken out of the industrial courts and into the criminal court system. In the criminal courts people are sentenced to prison terms every day, unlike the industrial courts. The likelihood of prison time for a serious breach of the WHS legislation became a stark reality from 1 January 2012.

⁵ *Work Health and Safety Act 2011*(Cth) s34(1).

Integrated Management of WHS and Student Care Obligations

One question that is often asked is how a school's legislated WHS obligations work in practice with its common law Student Duty of Care obligations.

Because the principles of Student Duty of Care are largely derived from the common law, unlike WHS there are no specific legal requirements regarding the undertaking of risk assessments, consultation, training, injury management, record keeping etc.

However, in broad terms, the Student Duty of Care obligation also requires schools to take a risk based approach weighing up all relevant matters including:

- ✔ identifying foreseeable safety hazards;
- ✔ undertaking hazard risk assessments; and
- ✔ effectively implementing hazard risk controls.

In practice many schools utilise the definitions of likelihood and consequence as well as the risk matrix set out in their WHS Program for the purpose of assessing student safety risks.

Summary & Conclusion

In our own experience, it is common to come across schools that do not have effective workplace safety programs in place. A common scenario is for a school to have a few workplace safety policies tucked away in a staff handbook. Schools rarely have workplace safety hazard registers with linked controls, as they are required to do under existing legislation.

Organisations often struggle to implement their workplace safety programs effectively. In our experience, directors and officers rarely make adequate enquiry and rarely receive adequate assurance that their workplace safety systems are working in practice.

The model laws have positive individual obligations to acquire and keep up-to-date knowledge of work health and safety matters, to ensure that organisations have appropriate resources to manage workplace safety issues effectively and, perhaps most importantly, to verify that these systems are actually working in practice.

Failure to meet this obligation can result in significant fines and prison sentences for the individuals concerned.

Attached to this whitepaper is a list of 10 steps you should take to ensure your school is compliant with the workplace safety laws.

What CompliSpace Can Do To Help

At CompliSpace we have long recognised the difficulties that organisations have in establishing and maintaining up-to-date policies and procedures in a wide range of areas that are heavily reliant on legal interpretation, including workplace safety and human resources.

For many years now, we have been providing our clients with high quality online workplace safety and human resources programs that are designed to be rapidly tailored to the specifications of individual organisations. These programs come with online training and testing programs, to ensure that core policies are effectively communicated to front line staff and appropriate records are maintained.

A key feature of our service is that we continuously update the content with relevant legal and regulatory changes, thus allowing our clients to focus on their core business. We also provide assurance software through which the undertaking of key safety obligations (e.g. staff training, workplace safety inspections, reporting of injuries and incidents) can be verified by line managers. This gives directors and officers the transparency and visibility they require under the new legislation.

Our clients range from top 100 ASX listed entities, well know companies, not-for-profits, educational groups and small independent schools.

If you have any questions or would like to know more about how we can assist your organisation, please feel free to contact us on **1300 132 090** or contactus@complispace.com.au.

WHS Checklist

10 Steps to Help You Prepare	Completed?
1. Ensure each of your directors and officers has been briefed as to the core elements of the new workplace health and safety laws.	
2. Conduct a gap analysis of your organisation's current workplace safety program identifying areas, such as consultation, which will need to be revised.	
3. Ensure that your organisation's hazard risk register has been maintained up-to-date and records all reasonably foreseeable safety hazards.	
4. Ensure that for each safety hazard that has been identified, your organisation has an appropriate safety policy or treatment plan in place.	
5. Conduct training sessions for your directors, officers and managers ensuring that they understand key concepts such as the "PCBU", "reasonably practical", "consultation" and "due diligence".	
6. Identify the other PCBUs (Person Conducting the Business or Undertaking) with whom you will need to consult, coordinate and cooperate with, and incorporate that in your workplace safety program.	
7. Ensure that your organisation has maintained up-to-date records of workplace safety inspections, names of Health and Safety Representatives and Health and Safety Committee members, minutes of meetings, injuries and incidents, as well as staff training.	
8. Implement and document a system of regular workplace safety reviews if your organisation has not done so before.	
9. Establish an internal assurance program that allows your organisation to monitor the overall effectiveness of its workplace safety program.	
10. Ensure that workplace safety matters are considered as a regular agenda item in management and board meetings.	

For a more detailed analysis of how your organisation is currently prepared for the new WHS Model Laws visit www.complispace.com.au, complete our WHS Risk Self-Assessment Survey and receive a personalised risk report for your organisation.