

# Occupational Health & Safety

## Obligations of TAFE Boards and Directors

### NATIONAL CONTEXT

Occupational Health and Safety (OHS) law aims to protect the health, safety and welfare of employees and other persons who are at, or come in to contact with a workplace.

The Model Work Health and Safety Act 2011 (Clth) was introduced with the aim of harmonizing legislation nationally. However, OHS is primarily the role of the States and Territories and differences remain in Western Australia and Victoria which apply their own state-based laws.

The following provisions are common to the States and Territories that have enacted legislation based on the Work Health and Safety Act 2011:

- duties to provide a safe and healthy workplace for all employees and other people who attend the workplace
- work systems that are safe and without risk to health
- training of employees to work in a safe and competent manner
- requirements to take steps to prevent injury, illness and disease
- requirements to consult with employees and their representatives over safety matters
- provision for workplace inspectors to visit workplaces, investigate accidents and enforce legislative provisions.

The harmonised legislation was intended to make it easier for organisations and employees to comply with their requirements across different states and territory boundaries. Although it is not significantly different from the current Victorian Occupational Health and Safety Act, there are some differences.

Where a Victorian organisation trades interstate, or with the Commonwealth, or has employees based outside Victoria, it may have duties under the work health and safety laws that apply in the other jurisdictions. It is the responsibility of these Victorian organisations to ensure they are aware of the duties that apply.

Common law (the law that has been developed by the courts when deciding cases over time) also imposes duties on employers to provide employees with a safe workplace. Under common law, all employers have a legal duty to take reasonable care to avoid exposing employees and others who might be exposed to risks from the organization, to reasonably foreseeable risks of injury.

### OVERVIEW OF THE VICTORIAN OCCUPATIONAL HEALTH & SAFETY ACT 2004

Workplace safety in Victoria is regulated by the Occupational Health and Safety Act 2004 (the Act) and the Occupational Health and Safety Regulations 2007 (Vic). The Regulations specify the ways duties imposed by the Act must be performed, or prescribe procedural or administrative matters to support the Act, such as requiring licenses for specific activities,

keeping records, or notifying certain matters. The regulations are not expanded on in this document.

The Act aims to:

- secure the health, safety and welfare of employees and other people at work;
- protect the public from the health and safety risks of organisation's activities;
- eliminate workplace risks at the source; and
- involve employers, employees and the organisations that represent them in the formulation and implementation of health, safety and welfare standards.

The Act outlines the following principles:

- the importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
- persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
- employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
- employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
- employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

Throughout the Act, the meaning of **health** includes **psychological health** as well as **physical health**.

## **WORKSAFE VICTORIA**

OHS law is regulated and enforced by WorkSafe Victoria. WorkSafe has a broad range of functions designed to improve OHS and has the power to enter workplaces and obtain information or documents in a person or organisation's custody or control for the purposes of determining whether the Act or regulations have been complied with or for investigating suspected contraventions.

WorkSafe may prosecute organisations and individuals that breach the OHS law duties.

Effective OHS regulation requires that WorkSafe provides clear, accessible advice and guidance about what constitutes compliance. Consequently, the Act is supplemented by comprehensive Regulations and Compliance Codes and Codes of Practice and non-statutory guidance materials that cover specific aspects of OHS in detail.

## **DUTIES IMPOSED BY THE ACT**

The Act outlines duties and rights in relation to occupational health and safety. The general nature of the duties imposed by the Act means that they cover a very wide variety of circumstances, do not readily date, and provide considerable flexibility for a duty holder to determine what needs to be done to comply.

### **Employers (TAFE Institutes)**

TAFE Institutes are incorporated entities and are the "employer" for the purposes of the Act. They must provide a safe and healthy workplace for employees, contractors and others. This includes:

- providing and maintaining safe plant (such as machinery and equipment) and safe systems of work (such as controlling entry to high risk areas, controlling work pace and frequency and providing systems to prevent falls from heights);
- implementing arrangements for the safe use, handling, storage and transport of chemicals (such as dangerous goods and other harmful materials);
- maintaining the workplace in a safe condition (such as ensuring fire exits are not blocked, emergency equipment is serviceable, and the worksite is generally tidy);
- providing employees and contractors with adequate facilities (such as clean toilets, cool and clean drinking water, and hygienic eating areas); and
- making sure employees have adequate information, instruction, training and supervision to work in a safe and healthy manner.

Employers must also:

- adequately monitor employees' health (such as providing hearing tests for employees exposed to high noise levels, providing blood tests for employees exposed to lead and monitoring fatigue levels of transport and other employees);
- keep information and records relevant to employees' health and safety (such as records of biological monitoring, asbestos assessments, first aid records and relevant medical information);
- employ or engage people with the necessary qualifications or expertise to advise you on health and safety issues affecting employees;
- consult with employees on matters that may directly affect their health, safety or welfare. Where the employees are represented by a health and safety representative (HSR), the HSR must also be involved in the consultation;
- nominate a senior management representative to deal with employees and their health and safety representatives in resolving health and safety issues at the workplace; and
- provide employees with information in the appropriate languages about your workplace health and safety arrangements, including the names of those to whom the employees can make an inquiry or complaint.

Employers must ensure that other people (such as students, customers, visitors and the general public) are not endangered by the conduct of their organisation (for example, by providing protection from falling debris around construction sites, controlling traffic access to your workplace and limiting public access within your workplace). In the case of students, this would include providing safe equipment (eg. tested and guarded as required by Worksafe Regulations, and instruction in safe use of tools and equipment etc.)

Employers have additional specific obligations if the organisation involves the:

- manufacture, importation, transportation, supply, storage, handling or use of dangerous goods;
- design, manufacture, importation, supply, erection or installation of plant; and
- manufacture, importation, or supply of substances.

Employers also have obligations to:

- meet particular licensing, registration and certification requirements;
- immediately notify WorkSafe of certain dangerous incidents;
- co-operate with WorkSafe Inspectors; and
- comply with notices and written directions issued by WorkSafe OHS Inspectors.

## Employers' Return to Work Obligations

Employers have an obligation under the Victorian Workers Compensation legislation to support injured workers to return to safe and sustainable work as soon as possible.

These obligations are to:

- Plan for the worker's return to work including:
  - obtaining relevant information about their capacity for work;
  - considering reasonable workplace support, aids or modifications to assist in the worker's return to work;
  - assessing and proposing options for suitable employment;
  - providing them with clear, accurate and current details of their return to work arrangements; and
  - monitoring their progress,
- consult directly with the worker about their return to work, with their treating health practitioner (subject to the consent of the worker) and occupational rehabilitation provider (if involved);
- for a period of 52 weeks, provide the injured worker with suitable employment if they have an incapacity for work or pre-injury employment or equivalent when they have returned to full capacity;
- nominate and appoint a Return to Work Coordinator who has an appropriate level of seniority and is competent to assist you meet your return to work obligations;
- make information about return to work available to all workers;
- for people engaged through a labour hire arrangement, cooperate with the labour hire employer's efforts to meet their return to work obligations and facilitate the worker's return to work.

## Officers

Directors of TAFE Institute Boards are "officers" as defined by the Act. Officers are expected to take a lead role in health and safety in their organisation and are required to exercise due diligence and take reasonable care to ensure that their organisation complies with the Act.

The definition of an officer in the Corporations Act 2006 (Clth) has been adopted for the purposes of the OHS Act and 'officers' of an organisation include any of the following:

- a **director** or secretary of a corporation;
- an office holder or a partner in a partnership, unincorporated body or an association;
- a person who makes decisions that affect the whole or a substantial part of the operations of the organisation;
- a person who has the capacity to significantly affect the entity's financial standing;
- a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (unless the person is providing advice in a professional capacity);
- a receiver, or receiver and manager, of the property of the corporation;
- an administrator or liquidator, of a corporation; or
- a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

## Employees

The Act requires employees to:

- take reasonable care of their own safety and health (and that of others);
- cooperate with their employer with respect to any action taken by the employer to comply with the Act;
- work safely and follow safety procedures and rules;
- report any OHS hazards or other problems;
- cooperate with OHS inspections, investigations and training; and
- not recklessly engage in conduct which places, or may place another person in danger of serious injury (other persons can be other employees, contractors, students, members of the public or any person who is present at or near the workplace).

## Other persons

A person (including a student) who, without lawful excuse recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence under the Act. This should be covered in a Student Code of Conduct or similar policy.

## LEGAL LIABILITY

**Employers** can be prosecuted for breaches of the Act by its officers, employees, or agents, where those officers, employees or agents are performing tasks within the scope of their authority.

**Employees** may also be prosecuted personally for a breach of the Victorian OHS laws where they are found to have failed to take reasonable care.

**Officers (Directors)** may also be prosecuted personally for a breach of the Victorian OHS laws. If a corporate body contravenes the OHS Act 2004 and this is due to a director failing to take reasonable care, then the officer is guilty of an offence and can be fined the maximum amount for an individual. Directors can be prosecuted and convicted for contravention of the Act, regardless of whether or not the employer/organisation itself has been convicted.

An officer may be found personally liable for a breach of the Victorian OHS laws if:

- they receive payment for their position as an officer in the organisation; and
- they fail to take reasonable care, so that a breach of a duty (that the organisation is required to comply with) may be attributable to them personally.

In determining whether an officer is guilty, the prosecution will take into account:

- what they knew about the matter;
- the extent of their ability to make, or participate in making decisions that relate to the matter;
- whether any other person was involved in the decision-making and action taken or not taken; and
- any other relevant matter.

## **DISCHARGING “DUE DILIGENCE” AND DEMONSTRATING “REASONABLE CARE”**

Establishing that an officer exercised “due diligence,” took “reasonable care” and that any breach by the company was not attributable to the officer's failure, can depend on the implementation of robust procedures to ensure that officers are informed of OHS performance and have taken positive steps to ensure compliance.

There are a number of ways for Boards and Directors to fulfill due diligence and reasonable care as outlined below.

Providing leadership by:

- being aware of your legislative responsibilities, legislative changes and compliance requirements; and
- holding management accountable for safety performance.

Ensuring good corporate governance by:

- establishing an OHS policy and reporting framework which establishes objectives and targets for the organisation and information channels to directors of the Board;
- considering OHS in decision-making;
- requiring and reviewing regular OHS board reports that contain a sufficient level of detail (at least quarterly);
- having a process for receiving, considering and timely response to information on incidents, hazards and risks; and
- ensuring that directors respond to issues and have a proactive attitude to safety.

Understanding the hazards of the organisation by:

- learning about the nature of operations and generally the hazards and risks associated with those operations;
- making site visits; and
- periodically reviewing the organisation's OHS systems and programs (eg. induction and training for employees and managers and contractors, risk management systems (hazard identification, assessment and control), consultation with employees on OHS, and reporting of incidents and hazards).

### **Penalties**

Penalties for breaches of the Occupational Health & Safety Act 2004 are substantial. The maximum penalties are now \$1,075,050 for a body corporate and \$215,010 for individuals. These amounts are correct from 1 July 2016 and are indexed annually.

### **Acknowledgements:**

Occupational Health and Safety Act 2004 (Vic) <http://www.austlii.edu.au>

Victorian Occupational Health and Safety Compliance Framework Handbook, WorkSafe Victoria 2013

Occupational Health & Safety in Boards, WorkSafe Victoria July 2006

Summary of the Occupational Health & Safety Act 2004, WorkSafe Victoria, 2005

Information for Senior Officers of Organisations, Occupational Health and Safety Act 2004, Worksafe Victoria, 1<sup>st</sup> Edition May 2005

Victoria Not-for-profit Law Guide – Occupational Health and Safety Laws, September 2014.