

***Apply knowledge of legislation
in the role of a safety and
health representative***

What are your expectations for this course?

Questions:

- What do you hope to take away from this course to help you in your role as a safety and health representative?
- Where else can you go to get assistance and help?

Let us consider the following questions:

- What do you think are the functions of a safety and health representative?
- Who do you think is responsible for occupational safety and health (OSH) in your workplace?
- Do you think OSH legislation provides all the answers to your workplace's OSH problems?
- Where would you go to get answers to OSH problems you may have in your workplace?

In discussing the questions:

- Talk about your experience of safety and health representatives in your workplace. What are some of the challenges or issues that you think safety and health representatives face in carrying out their role?
- Think about the role of legislation in managing OSH in your workplace. What do you think are some of the strengths and some of the weaknesses in relying mainly on legislation to fix safety and health problems?

Emphasis on “Consultation”

OSH legislation emphasises consultation because safety and health problems or issues are best fixed by the people in the workplace doing the work – though supported by OSH standards and guidance.

Framework for consultation in OSH and MSI Acts has four levels:

- Tripartite Commission for Occupational Safety and Health recommending OSH Policy and Standards for WA;
- Ongoing involvement and participation of all persons in the workplace;
- Safety and health representatives; and
- Safety and health committees.

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| <p><i>Occupational Safety and Health Act 1984</i></p> <p><i>Mines Safety and Inspection Act 1994</i></p> | | <ul style="list-style-type: none"> • the general duties • resolution of issues • safety and health representatives • safety and health committees • enforcement of Act and regulations • sets out penalties for offences |
| Supported by | | |
| <p><i>Occupational Safety and Health Regulations 1996</i></p> <p><i>Mines Safety and Inspection Regulations 1995</i></p> | | <p>Regulations spell out specific requirements and have the force of law. They may:</p> <ul style="list-style-type: none"> • have a general application; • set minimum requirements for specific hazards or work practices; • set requirements for registration of plant, licensing or granting of approvals or certificates • also have penalties for offences. |
| and | | |
| <p>Codes of practice</p> | | <p>A code provides practical advice on how to achieve safe workplaces and on how to meet a standard (eg: set by regulations and referred to in the code).</p> <p>However, the solutions or advice in a code are not the only acceptable means of achieving the standard. A code does not have the same legal force as a regulation and does not by itself provide sufficient reason for prosecution.</p> |
| and | | |
| <p>Guidance notes</p> | | <p>A guidance note is an explanatory document not a means of meeting a standard.</p> |

'Duty of Care' or General Duties

- The term 'duty of care' describes broad safety and health responsibilities established by the OSH Act 1984 and the MSI Act 1994 for a wide range of parties associated with the work environment.
- These duties for responsibilities are fairly broad, for example:
 - An employer must, so far as practicable, provide and maintain a work environment in which employees are not exposed to hazards.

Who else do you think has legal responsibilities for OSH?

OSH ACT 1984 and MSI ACT 1994 are statute law

- Statute law is developed through the process of Government and written down.
- It includes Acts and regulations and is **ENFORCEABLE**. Failure to meet the requirements of statute law can result in prosecution.

***There is another body of law called
common law***

- Common law has been built up over time through decisions made by a court of law as a result of civil actions.
- Civil actions are when a person believes that he or she has been wronged by another party and takes that party to court to seek justice. Individuals can claim compensation for their loss caused by the wrong.

What does 'duty of care' mean under statute law?

- The courts have determined what 'duty of care' means under common law – that all employers must take reasonable care for the safety of their employees.
- Under OSH statute law, the duty of care is based on common law but is written down as statute law and can be ENFORCED.

So far as is practicable

Many of the general duties under OSH statute law say that something only has to be done

‘.... so far as is practicable’.

What do you think this means?

What does 'practicable' mean?

If something is practicable it means:

- it can be done; and
- it is reasonable to do so.

How to work out what is practicable to do?

To work out what to do to fix an unsafe situation the OSH and MSI Acts require the duty holder to take into account:

- The severity (or seriousness) of any injury or harm to health that may occur;
- The likelihood (degree of risk) of that injury or harm occurring;
- How much is known about the hazard and the ways of reducing, eliminating or controlling it; and
- The availability, suitability and cost of the safe guards.

In practice what does this mean?

In practice, the duty to provide a safe work environment so far as is practicable involves a process of:

- hazard identification;
- risk assessment; and
- risk control.

You will look at the process of hazard identification and risk management fully in Module 3 of the introductory training for safety and health representatives.

Important amendments to OSH and MSI Act in 2004

- A statutory review of the OSH and MSI Acts (Laing, 2002) found that while much has been achieved since the introduction of the 'duty of care' style OSH and MSI Acts, there are areas in which improvements can and should be made.
- In 2004 a number of significant amendments were made to the Acts to expand the application of the Act to close some identified gaps in coverage and to broaden some of the existing duties.
- Importantly, changes were made to improve the flexibility of the consultation provisions and to introduce Provisional Improvement Notices (PINS).

2004 Amendments:

- Expansion of general duties of care – to make sure those who have control at a workplace are responsible for the safety and health of those in their care. Covers new ways of working, such as labour hire companies and group apprentice schemes.
- Substantial increase in penalties, particularly for corporations.

2004 Amendments:

| Penalty Level | Offenders | | | | | |
|--|------------------|--------------------|--|--|---|--------------------|
| | <i>Employees</i> | | <i>Individuals as Non-employees (eg employers) -</i> | | <i>Corporate Non-employees (eg employers) -</i> | |
| | First Offence | Subsequent Offence | First Offence | Subsequent Offence | First Offence | Subsequent Offence |
| Level One (General Penalty) | \$5,000 | \$6,250 | \$25,000 | \$31,250 | \$50,000 | \$62,500 |
| Level Two (General Duty Breach) | | | \$100,000 | \$125,000 | \$200,000 | \$250,000 |
| Level Three (General Duty Breach resulting in serious harm or death) | | | \$200,000 | \$250,000 | \$400,000 | \$500,000 |
| Level Four (General Duty Breach involving gross negligence resulting in serious harm or death) | | | \$250,000 and imprisonment for two years | \$312,500 and imprisonment for two years | \$500,000 | \$625,000 |

2004 Amendments:

- more FLEXIBLE PROCESSES FOR ELECTING SAFETY AND HEALTH REPRESENTATIVES and establishing safety and health committees – including provisions for parties at the workplace to agree on representational arrangements that are most suitable for the workplace concerned – includes establishment of a ‘SCHEME’ which may allow safety and health representatives to be elected to represent employees at one or more workplaces or one or more representatives may be elected for any group of employees of the employer concerned if it makes up a distinct unit of the employer’s workforce.

2004 Amendments:

- safety and health representative election processes include the ability for contractors or employees of a contractor to participate in an election for safety and health representatives – allowing for industries and workplaces where there is a significant reliance on contract labour.
- allows parties to agree on how to deal with casual vacancies for safety and health representatives.
- provision for safety and health representatives to issue Provisional Improvement Notices (PINS) in their workplaces.
- clarification of entitlements for safety and health representatives – representatives will be entitled to other associated costs (travel/accommodation) - to the extent provided for in legislation - in addition to course fees when attending introductory safety and health representative training. Representatives can also receive pay when attending a prescribed course during their own time or time off work with pay when attending during work time.

What are the Employer's duties under Section 19 of the OSH Act 1984 and Section 9 of the MSI Act 1994?

Employers must so far as is practicable provide a workplace where employees are not exposed to hazards. While not limiting this broad duty, employers must in particular:

- provide and maintain safe workplaces, plant and systems of work;
- provide information, instructions, training and supervision so that employees can carry out their work in a safe way;
- consult and cooperate with safety and health representatives and other employees on safety and health matters;
- provide adequate personal protective clothing – where it is not possible to get rid of a hazard;
- provide for the safe use, handling, processing, storage, transportation and disposal of plant and substances (chemicals etc).

Employer's duties cont.....

EMPLOYERS DUTY TO NON-EMPLOYEES eg: the public, clients, work experience students

- Section 21 (2) of the OSH Act 1984 and Section 12 (2) of the MSI Act 1994 provides for employers (and self employed persons) to make sure as far as practicable that non-employees are not put at risk by work including:
 - work that has been or is being undertaken; and
 - any hazard that arises from or is increased by the system of work.

Employer's duties cont.....

EMPLOYERS also have duties to:

- report injuries, diseases and deaths to the WorkSafe Commissioner under Section 23I of the OSH Act or to the district inspector for the region under section 76 of the MSI Act;
- where an employee has reported an unsafe situation and the employee cannot fix it, investigate and report back to that employee on what action the employer has or intends to take to fix the problem;
- maintain safe residential premises for accommodation provided in certain work situations. There are however, important conditions that limit this duty under both the OSH and MSI Act.

What are the Employee's duties under Section 20 of the OSH Act and Section 10 of the MSI Act?

Employees have duties to:

- take reasonable care to look after their own safety and health and avoid doing anything that may harm the safety and health of others;
- cooperate with their employer on work-related safety and health matters;
- follow safety and health instructions so far as reasonably able;
- use protective clothing and equipment (following any instructions) provided by the employer;
- report any work-related injuries or any hazardous situation in the workplace if they cannot fix it themselves; and
- not misuse or damage any equipment put in place for safety and health.

How does OSH legislation apply to contractors?

- When a person uses a contractor to carry out some of the work associated with the business that person becomes the employer of the contractor, the contractor's employees and any sub-contractor and is called "THE PRINCIPAL".
- The duty of the "principal" employer is limited to matters over which they have the capacity to exercise control. The contractor must still meet their duties as an employer, but where they are working for a principal employer both parties have duties as an employer.
- The principal employer cannot however try to pass on control of matters to the contractor or anyone else if those matters are part of their duty of care.

What is meant by “.... under their control”?

EXAMPLE:

Where an electrical contractor is doing maintenance work on plant, the “principal” employer may have control over the overall workplace and isolation of the plant, but the contractor has control over the electrical work itself and the maintenance of the electrical contractor’s own equipment.

What about Labour Hire Companies?

The situation:

- A worker (employee or contractor) is provided by a labour hire organisation (the agent) to a host workplace (the client) without a contract of employment between the worker and that client (though there may be a contract or agreement between the worker and the agent).

Although there is not a contract of employment between the worker and the client in relation to the work, the OSH and MSI Acts provide that both the agent and the client both have the equivalent of an employer's duty for matters over which each has the capacity to exercise control. In addition, the worker has the equivalent of an employee's duties.

2004 Amendments to OSH and MSI Act - What are the new flexible consultative provisions?

“A Scheme” - parties consulting in a workplace may agree to the establishment of a scheme.

- A scheme allows safety and health representatives to be elected to represent employees at one or more workplaces; or
- One or more safety and health representatives may be elected for any group of employees of the employer concerned as long as they make up a clear and separate unit of the workforce; and
- A scheme may also allow a contractor or employees of a contractor to participate in the election for a safety and health representative or be elected. This recognises the needs of industries and workplaces where contractors are used a lot.
- Parties may also agree a scheme may apply to subsequent elections.

Discrimination

It is an offence under both the OSH and MSI Acts for an employer or prospective employer to disadvantage any person for the dominant or substantial reasons that the person:

- is or was a safety and health representative; or
- is performing or has performed any function as a safety and health representative.

Similarly, a “principal” must not terminate the engagement of a contractor or subject that contractor to any other disadvantage for the dominant or substantial reason that the contractor or a person employed by the contractor:

- is or was a safety and health representative; or
- is performing or has performed any function as a safety and health representative.

What do the MSI and OSH Acts require for Issue Resolution?

The OSH and MSI Acts require employers to try and resolve safety and health issues that arise at their workplace in accordance with the relevant procedure:

- with the safety and health representative(s);
- safety and health committee; or
- employees,

Whichever is specified in the relevant procedure.

What are Issue Resolution Procedures?

The OSH and MSI Acts encourage:

- each workplace to consult and agree on a procedure to deal with safety and health “issues” that is suitable for that workplace

The procedure can vary depending on the variety and complexity of issues likely to arise and the nature of the workplace.

Default Procedure

Where there is no procedure agreed, the OSH and MSI regulations set out a DEFAULT PROCEDURE which requires the employer to meet with:

- the employees and the safety and health representative, where there is one; or
- where there is no safety and health representative, the employees or a person authorised by them to meet with the employer

at a time as soon after the issue arises as is mutually convenient.

What happens if issues are unresolved?

- Safety and health representative must refer the problem to the safety and health committee (if any).
- If this does not resolve the issue and there is a risk of imminent and serious injury or harm to health to a person, then the safety and health representative or employer may notify a WorkSafe inspector.
- Where there is no safety and health representative any employee may refer a serious and imminent issue to an inspector.
- The inspector will attend as soon as possible after being notified and take whatever action he or she thinks appropriate.

The inspector should be involved only when everything has been done to try and sort the issue out at the workplace!

“Right to refuse unsafe work”?

Section 26 of OSH Act and Section 74A of MSI Act

- An employee may refuse any work where they have reasonable grounds to believe there is a “risk of imminent and serious injury or harm to health arising from the work.
- An employee who refuses to do such work must immediately notify his or her employer and the safety and health representative (if any), and the matter automatically becomes an “issue” to be resolved according to the issue resolution procedure for that workplace.

“Right to refuse unsafe work” cont.

Section 26 of OSH Act and Section 74A of MSI Act

- The employee(s) is not to leave the workplace without the employer’s approval - unless they have reasonable grounds to believe that remaining at the workplace would expose them to a risk of imminent and serious injury or harm to health. In this situation they may leave without approval.
- The employee(s) may be given reasonable alternative work (at the same level of their usual pay) away from the risk area – but they must be capable of performing the work eg: this requires taking into account such factors as whether they have sufficient expertise and training and whether instruction or supervision is required and can be given in the timeframe.

What is “... reasonable grounds”?

A number of factors are taken into account when deciding whether or not reasonable grounds exist to support a belief that to continue to work would expose employee(s) to imminent and serious risk of injury or harm to health:

- whether an inspector has attended the workplace (issue resolution);
- whether the measures specified by the inspector have been put in place to remove the cause of the risk;
- whether the measures, if any, required by the inspector are not working or are no longer in effect;
- whether the inspector has determined that no action is required under the Act(s).

The powers of an inspector include the power to:

- enter, inspect & examine workplaces;
- conduct examinations & enquiries;
- provide information to any person that may help achieve compliance with the Act(s);
- take/remove samples of any substance or thing & take possession of plant & materials for further examination or testing or as evidence;
- take photos & measurements, sketches & recordings;
- interview people at the workplace;
- issue improvement or prohibition notices.

What are improvement notices?

An improvement notice:

- is a written direction requiring a person to remedy a breach of the legislation;
- will state the reasons why the inspector has formed the opinion that a breach of legislation is occurring;
- will refer either to a provision of the Act or to the regulations;
- may provide directions on how the breach may be fixed – though the workplace can fix it another way as long as the “fix” meets the standard set by the legislation; and
- will state the time before which the breach must be fixed.

What are prohibition notices?

A prohibition notice:

- is a written direction prohibiting the carrying on of any activity that the inspector believes on reasonable grounds involves or will involve fairly immediate and serious risk to the safety and health of any person; and
- will say exactly what work activity has to stop and outline why it is unsafe.

The inspector will stay at that workplace until the employer is advised and the activity in question is stopped.

Right for Review of Notices?

- Both improvement and prohibition notices may be referred to either the WorkSafe Commissioner (under the OSH Act) or the State Mining Engineer (under the MSI Act) for “REVIEW” – but must be before compliance date.
- They may decide to affirm a notice as is, affirm it with modifications or to cancel it.
- If not satisfied with the review, there is a further right by the party to whom a notice has been issued to have the notice reviewed by the Safety and Health Tribunal.

How will we cover the functions of safety and health representative on this course?

Function:

- To regularly inspect the workplace areas your were elected to represent at agreed times and frequency.

This is covered in detail in Module 2 of introductory training for safety and health representatives – inspections and investigations.

How will we cover the functions of safety and health representative on this course?

- Function:
- To immediately carry out any appropriate investigation (while not interfering or disturbing the scene) of the scene and details of any accident, dangerous incident or risk of serious injury or harm to any person, while not interfering with any evidence.

This is covered in detail in Module 2 of introductory training for safety and health representatives – inspections and investigations.

How will we cover the functions of safety and health representative on this course?

Function:

- To keep up to date with workplace safety and health information provided by the employer and liaise as necessary with government and other bodies.

This is covered in detail in Module 4 of introductory training for safety and health representatives – communication and representation.

How will we cover the functions of safety and health representative on this course?

Function:

- To report hazards in the workplace to the employer.

This is covered in detail in Module 3 of introductory training for safety and health representatives – hazard identification and risk management.

How will we cover the functions of safety and health representative on this course?

Function:

- Where there is a safety and health committee for the workplace, to refer any matters that you think should be considered by the Committee.

This is covered in detail in Module 4 of introductory training for safety and health representatives – communication and representation.

How will we cover the functions of safety and health representative on this course?

Function:

- To consult and cooperate with the employer on safety and health matters.

This is covered by all 5 Modules of introductory training for safety and health representatives.

How will we cover the functions of safety and health representative on this course?

Function:

- To liaise with employees about safety and health matters.

This is covered by all 5 modules of introductory training for safety and health representatives.

What does my employer have to do to help me carry out my functions as a safety and health representative?

- Make safety and health information for that workplace available eg: MSDS on chemicals and other substances, testing results for such things as noise or air monitoring, statistics...
- Allow you as the safety and health representative to be present at any interview on safety and health matters between the employer (or his/her representatives eg: manager/supervisor) and the employee if the employee wants you to be there.

What does my employer have to do to help me carry out my functions as a safety and health representative?

- Consult with you on any changes in the workplace that may affect employees' safety and health.
- Notify you of any accident or dangerous occurrence in the workplace.
- Provide assistance to you and access to facilities so you can carry out your functions eg: telephone, computer, photocopying, storage, meeting room and use of notice boards.

What does my employer have to do to help me carry out my functions as a safety and health representative?

- Notify you if a WorkSafe or Mines inspector visits your workplace.
- Allow you to take time out of your normal work with pay to carry out your safety and health representative functions or attend accredited training under the OSH or MSI Act.
- Ensure you receive entitlements that are due to you ie: employer pays for you to attend accredited safety and health representative training (including associated costs as prescribed) and employer allows you time out of normal work with pay to attend training or carry out your functions or pays for any time you spend undertaking accredited safety and health representative training in your own time.

Who can issue Provisional Improvement Notices (PINS)?

- ONLY SAFETY AND HEALTH REPRESENTATIVES WHO HAVE BEEN TRAINED TO DO SO CAN ISSUE PINS (QUALIFIED)
- THEY MUST HAVE COMPLETED ALL FIVE OF THE MODULES FOR THE INTRODUCTORY TRAINING FOR SAFETY AND HEALTH REPRESENTATIVES.

There are important controls on the use of PINs by safety and health representatives!

- A safety and health representative can only issue a PIN where he or she has met the requirements for consultation (with the person to whom PIN issued) about the matter which they believe is a breach of the OSH or MSI Act or regulations.
- The safety and health representative must, where practicable, consult with another safety and health representative (if there is one – does not have to be “Qualified” safety and health representative in this case) at the workplace concerned before issuing a PIN.
- If a person on whom a PIN is issued disagrees with it, he or she has a right of review by a WorkSafe or Mines inspector (in case of a PIN being issued to an employee, the employee and the employer of that employee has the right to a review)
- Misuse of the power to issue a PIN can result in disqualification from being a safety and health representative.

You, as a safety and health representative, need to understand and apply these controls!

PINS should not be used for situations where there is an immediate and serious risk of injury or harm!

The compliance date for fixing the safety and health problem identified in the PIN must be more than 7 days after the date on which the PIN is issued. So, situations where there is an fairly immediate and serious risk of harm to the safety and health of any person(s) are not suitable for PINS and should be pursued through the resolution of issues process.

In Module 5 of the introductory training course: conflict resolution and Provisional Improvement Notices (PINS), you will develop more detailed knowledge and skills, including:

- how to fill out a PIN;
- how to gather your information eg: forming your opinion;
- who you can issue the PIN to;
- rights for review of a PIN; and
- procedures to follow where a PIN has not been complied with.