



SAFETY DUE DILIGENCE.

THE 2012 WORK HEALTH AND SAFETY ACT.

What the new legislation means for you and your business.



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INTRODUCTION

The introduction of the Work Health and Safety (WHS) Act from 1st January 2012 in all Australian jurisdictions is presenting extraordinary challenges to the way safety risk management is undertaken in Australia. This legislation is the biggest change that most Senior Managers have seen in their careers.

The simple fact is, more likely than not, your current OH&S processes are not sufficient. As a Business owner, CEO, Risk Manager or Director, you have a personal obligation to ensure that your organisation is compliant with the new WHS Act and the penalties for not doing so are severe.

Essentially the new legislation requires a positive demonstration of due diligence, a large paradigm change from the traditional hazard-based approach (encouraged by the risk management standard) to a precaution based risk management system. Is your business ready for the change? So, where to from here?

R2A have provided this paper as a summary of the key requirements of the new Act. We outline why your traditional risk management processes, are likely to fail the challenge of the new Act. We conclude by practically demonstrating how R2A can help you in this process.

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R2A Due Diligence Engineers

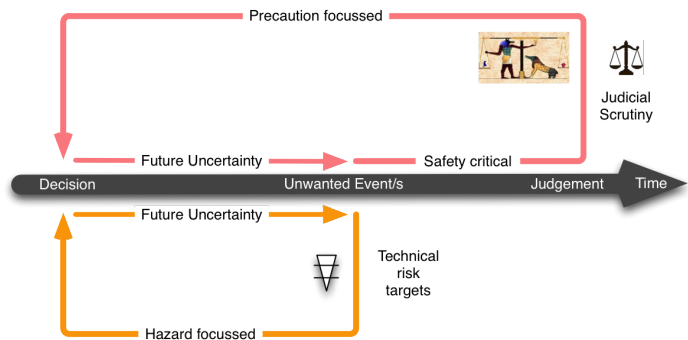
“We outline why your traditional risk management processes are likely to fail the challenge of the new Act.”

WHY YOUR CURRENT OH&S SYSTEM PROBABLY WON'T COMPLY

The new WHS Act requires a positive demonstration of safety due diligence. This will complete, in statutory terms, the risk management paradigm shift from a hazard-based approach to a precaution-based analysis consistent with common law.

It's a big change in thinking, perspective and action. This diagram and table below outlines the difference in the two approaches.

The new WHS Act will complete the risk management shift from a hazard-based approach to a precaution based analysis.



AS/NZS ISO 31000 (Hazard based)	Due Diligence (Precaution based)
Establish the context	Establish the context
Risk assessment (hazard based): (Hazard) risk identification (Hazard) risk analysis (Hazard) risk evaluation	Risk assessment (precaution based): Identify credible, critical issues Identify precautionary options Risk-effort balance evaluation
Risk treatment	Risk action (treatment)

Due diligence
is all about
precautions.

Hazard vs. Precaution based risk assessment

Most organisations have a hazard based risk management system following the requirements of AS/NZS ISO 31000, *The Risk Management Standard*.

This traditional approach to safety risk management is to identify risk issues, characterise the risk associated with each and compare this to criteria.

If the criteria are not satisfied then further controls are implemented. If this is the case for your organisation then you will almost certainly fail the due diligence requirements of the new WHS legislation.

Due diligence is all about precautions. The precautionary (WHS) approach is outcome focussed by ensuring that all reasonable practicable precautions are in place. This is a complete shift from the current approach that revolves around adding further precautions until an acceptable level of risk or safety is achieved.

When considering precautionary effort, the model Act requires organisations to ensure that the *highest level of protection...as is reasonably practicable* is in place.

That is, you start with what can be done and only do less where it is reasonable to do so and this is the big change.

TIP: To get the discussion started in your business, add WHS as an agenda item to your next Management meeting.

KEY QUESTIONS FOR YOUR BUSINESS

To ascertain if change is required in your business to comply with the WHS legislation, please refer to the information below.

Action in your businesses is required if:

- 1) Your current OH&S system was established to comply with the Risk Management Standard, especially an earlier version such as AS/NZS 4360 - 2004
- 2) Internal Risk Managers have not briefed the Management team on the new WHS changes and how they will affect your organisation
- 3) No-one in your organisation is the 'go to' person for the new legislation
- 4) No action has been taken to ascertain if your current system complies with the new Act
- 5) There is a general consensus that 'we will be compliant'.
- 6) Your risk register has business and safety risks integrated together
- 7) Precautionary decision making is based on a target level of risk or safety and not the common law balance.

“Is there a 'go to person' in your business for the new WHS Act?”

As a Senior Manager in your business, if you have answered yes to any of these questions, then you need to conduct a review of safety in your business.

Safety is one of those non-negotiable bullet points on your job description.

MANAGERS RESPONSIBILITIES

The new WHS Act requires that all responsible decision makers and managers (excluding state and federal ministers) exercise due diligence by positively demonstrating a duty of care. What does this mean? This new legislation is specifically targeting corporate governance, that is, Directors and Senior Managers.

“Safety is a non-negotiable bullet point on your job description.”

Due diligence is all about precautions and when considering precautionary effort, the Act requires that organisations ensure that the *highest level of protection.... as is reasonably practicable* is in place. Can you say for certain in your business that this is the case?

The Act makes it clear that a business must start with what can be done and only do less where it is reasonable to do so. That is, the Act specifically rejects the use of the commonly accepted notions of *acceptable* or *tolerable* risk criteria encouraged by most risk standards.

Penalties for responsible individuals who fail to ensure their organisation positively demonstrates due diligence are criminal in nature and very severe:

- For a reckless breach up to \$600,000 and/or five years jail
- For a breach without recklessness up to \$300,000

As a Manager, are you comfortable that your current safety program complies with the new Act?

Are all
the relevant
people in your
organisation
ready?

Key relevant clauses from the act are:

27 Duty of officers

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

247 Officers

(1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the Crown is taken to be an officer of the Crown for the purposes of this Act.

(2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

252 Officer of public authority

A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority is taken to be an officer of the public authority for the purposes of this Act.

officer means:

(a) an officer within the meaning of section 9 of the Corporations Act 2001 of the Commonwealth other than a partner in a partnership; or

(b) an officer of the Crown within the meaning of section 247; or

(c) an officer of a public authority within the meaning of section 252, other than an elected member of a local authority acting in that capacity.

Are all the relevant people in your organisation ready?

WHY THE NEW ACT MAKES GOOD BUSINESS SENSE

Safety makes
good business
sense too.

The law does not only require organisations and facilities to be safe and manage risk, it makes good business sense at a number of levels too.

The Workforce

The philosophy behind the new Act is consistent with the usual human response to death and injury. R2A has investigated a number of fatalities over the years. In part, this involves speaking with co-workers of the deceased. This is invariably an introspective process as the co-workers test to see if there is something that they could have done (and should have done) which would have saved their 'mate'. The safety due diligence process enforced by the act addresses this since it requires a positive organisational demonstration that all practicable precautions are in place for all reasonably foreseeable hazards. What else could have been done?

The CEO and Directors

The due diligence process enables CEO's and directors to sleep at night. It positively ensures that the decent safety thing is being done for all employees all the time in a way that is defensible in court, if required.

Risk and Safety Managers

The due diligence, precautionary process is outcome based and facilitates action. It is all about getting agreement as to what needs to be done to get on with the job. The hazard based approach encouraged by the risk management standard, is input based. This creates arguments, analysis paralysis and stifles action.

This means that applying the new Act will make risk and safety managers jobs simpler and more effective.

It totally simplifies risk registers in a way which is explicable to the workforce. For example, can a precaution address multiple hazards and be justified?

The due diligence process enables CEO's to sleep at night.

Organisational effectiveness

Managing safety in a business is the right thing to do, it reduces down time, protect workers, is good for internal communications, great for external PR and if nothing else provides your business with the solid notion that 'we are a good corporate citizen'.

TIP: Allocate a senior member of your team to be the WHS 'go to person'.

WHAT TO DO NEXT

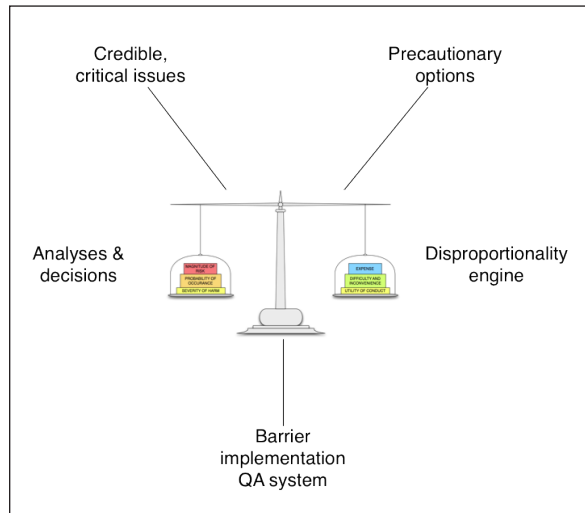
1. Add the new WHS legislation as an Agenda item at your next Board, Management and Safety meeting. Provide a briefing on the new act to each group. Get the whole organisation on the same page.
2. Allocate a person in your business to be the go to person on the new Act.
3. Contemplate a case study applying the act to a division or activity in your organisation, especially if you answered yes to any questions in Section Two.
5. Seek external help, if unsure, to ensure compliance from 1 January 2012.

Do you have a
implementation plan
to ensure
WHS compliance?

HOW AN EXTERNAL CONSULTANT CAN HELP

In conjunction with the Gladstone Area Water Board, R2A has developed a process to specifically meet the requirements of the new Act to positively demonstrate due diligence. It has three primary steps as shown in the “Y” model below.

“R2A has developed a process to specifically meet the requirements of the new Act.”



Step One - Identification of all credible critical issues

The first step is to build an argument as to why all credible, critical issues have been identified. This can be done in a number of ways. R2A favour the use of the threat and vulnerability technique, which is derived from the military intelligence community. In essence this asks the question: *What exposed groups are we trying to protect and to what credible threats are they exposed?* An exposed group can be vulnerable to a number of threats.

“An external consultant can help overcome analysis paralysis.”

Step Two - Identifying all practicable precautions

The second step is where all available practicable precautions are to be established. R2A has determined that threat-barrier (sometimes known as bow-tie) diagrams are one of the best ways to demonstrate this. The basis for the technique and its use as a defence to demonstrate due diligence in court is described in the R2A Text¹(2010) and has not been re-presented here.

Step Three - Decision and barrier implementation

Based on the balance of the significance of the risk vs the effort required to reduce it (the courts common law disproportionality decision making engine) which precautions are justifiable and then implement these.

TIP: It's time to call in extra help if everyone in your business thinks that compliance to the new WHS Act is given.

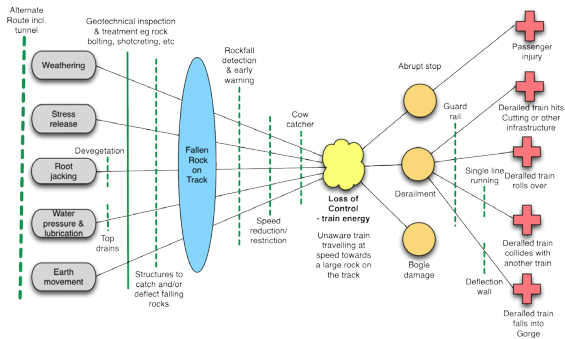
¹ Richard Robinson and Gaye Francis et al (2010).
Risk and Reliability: Engineering Due Diligence.
(8th Edition) R2A Pty Ltd Melbourne. ISBN 9780958524162

A DUE DILIGENCE CASE STUDY

R2A have recently worked with Railcorp, the state-owned corporation offering passenger rail services within New South Wales, on a project titled *Lapstone Cutting Due Diligence Review*. This case study also formed a paper which the authors presented at CORE 2010.

R2A created a threat-barrier diagram based around the legal loss-of-control point.

The concern was rocks falling to the track that were large enough to derail trains. Preliminary work had focussed on preventing rock falls at all by geotechnical work like rockbolting and shotcreting. But this can never stop all rockfalls all the time. To analyse this scenario, R2A created a threat-barrier diagram based around the legal loss-of-control point which provided an easy to understand way to demonstrate existing and available practicable precautions.



Working with R2A
made this client
WHS compliant.

Rock fall threat-barrier diagram

Barriers (or combinations of barriers), which can be justified on the balance of the significance of the risk vs. the effort required to reduce, can then be implemented. This is the *disproportionality engine* and is the standard test used by the courts as described in Sappideen and Stillman.² Some form of quality assurance system also needs to be shown as being in place to ensure that the relevant precautions are sustained over time.

The reason why this diagram and assessment is important is that it is a precautionary assessment, not a hazard assessment. It describes all the barriers that could be implemented. This makes it compliant with the new WHS act.

TIP: Start with what is reasonably practicable and only do less when it is reasonable to do so.

² Sappideen, C. & Stillman, R. H., 1995. *Liability for electrical accidents: risk, negligence and tort*. Engineers Media. Crows Nest, Sydney:



CONCLUSION

“ Being organised and WHS compliant is non negotiable. ”

The introduction of the Work Health and Safety (WHS) Act from 1st January 2012 is presenting extraordinary challenges to the way risk management is undertaken in Australia.

At R2A, we believe that the target level of risk approach encouraged by the Risk Management Standard amongst others will fail the test of the new Work Health and Safety Act.

Our thinking is that organisations that use the target level of risk approach would be considered criminally ‘reckless’ under this legislation and subject to the full penalties of the Act, in the event of a death or injury arising from that organisation’s activities.

Being organised and compliant is non negotiable, at R2A we encourage you to take action sooner rather than later.

WHERE TO NEXT

“Contact R2A to discuss your WHS compliance.”

If you would like to know more about how to comply with the act then you can:

- Contact R2A to organise a briefing for your executive management team.
- Attend one of our workshops.
- Buy a copy of the 8th edition R2A text: Risk & Reliability: Engineering Due Diligence. Order online here.
- Sign up for R2A's email newsletter.
- Attend one of the two day Risk and Liability Management (Engineering Due Diligence) courses presented by Richard Robinson on behalf of Engineering Education Australia.
- Enrol in the postgraduate unit 'Introduction to Risk and Due Diligence' Postgraduate Unit at Swinburne University, also presented by R2A.