

# Key risks – knowing what they are and how they can be managed *cont.*

## Legal

### *Legal Terms, Key Concepts and Legislation*

#### **A basic guide to legal terms, concepts and new legislation.**

The law comes from legislation (statutes and by-laws) created in federal and state parliaments and also from judges' decisions in courts (the 'common law'). The laws that apply, state or federal, depend upon the subject matter involved.

State legislation, for example, impacts fundraising and gaming practices, occupational health, safety and welfare and equal opportunity.

Federal legislation is responsible for such things as taxation and trade practices laws.

Over-lapping state and federal legislation, such as employment law, govern some areas. In addition, there is a wealth of law contained in administrative regulations drawn up to assist the implementation of legislation.

The sport and recreation industry covers a wide range of organisations. The legal framework under which you operate will determine your legal obligations. For example, incorporated associations are less highly regulated than companies limited by guarantee.

In addition, requirements will vary across states and territories for organisations with the same legal structure. You will need to check the state and territory act (law) relevant to your organisation to determine your responsibilities. It will usually cover things such as constitutions, number of meetings per year, record keeping and auditing of accounts.

People involved in recreation and sport activities as administrators, volunteers or participants are unlikely to be aware of the full array of legislation and rules. Ignorance of the existence of a prohibition or regulation is usually not a defence. One of the crucial aspects of legislation is that when a provision is breached, a set penalty is incurred, which, unlike civil law, may involve a fine or a term of imprisonment. Legal issues are not always quickly resolved and can have far-reaching ramifications.

How do you find legislation? Most legislation is accessible on the Australasian Legal Information Institute<sup>23</sup> website (if you know the name of the Act) or on the South Australian Legislation<sup>24</sup> website.

To locate particular legislation in the statute books, you need to know the name of the act and the year it was passed.

Acts are often updated or repealed, changing parts of the legislation. Therefore, you need to ensure that what you are reading has been updated to include subsequent amendments.



<sup>23</sup> <http://www.austlii.edu.au/>

<sup>24</sup> <http://www.legislation.sa.gov.au/>

# Key risks – knowing what they are and how they can be managed *cont.*

## Key Legal Concepts

Several key legal concepts are important in risk management. They can be complex and confusing because of the language used and how they affect each other. This section tries to provide a basic understanding of each concept.

### **Negligence**

Negligence occurs when a person is harmed unintentionally by someone due to carelessness. It is the failure to use reasonable care and skill in a given situation. In order for a negligence claim to be successful, four things need to be established:

1. A duty to take reasonable care was owed to the injured person.
2. There was a breach of that duty of care.
3. Injury or other damage was sustained.
4. There was a reasonable causal connection between the breach of duty of care and the injury or damage sustained.

These four factors must be satisfied to establish that a person was negligent. Courts will consider the gravity of the risk of injury or damage, the likelihood of it occurring and the costs involved in avoiding that injury or damage. The courts may award compensation ('damages') arising out of a suit alleging negligence.

### **What is duty of care?**

There is a general expectation that everyone is responsible for taking reasonable care not to harm others. In law this is known as the 'duty of care'. This concept is based on the idea of looking after your neighbour. In law, you owe a duty of care to a person only if you can reasonably foresee that your conduct may be likely to cause loss or damage to that person or a class of persons to which the injured person belongs.

Namely, there needs to be a reasonably close connection between the conduct giving rise to the breach of duty and the injury or damage caused. If you are responsible for making decisions or taking action that ensures other people are not harmed, you owe a duty of care to those individuals.

To determine the scope of the duty of care and whether there has been a breach of that duty, the following factors are considered:

- **Foreseeability** - This refers to the possibility of harm occurring that is reasonably foreseeable and not too remote. Could a person reasonably foresee that there is a real risk that someone could be harmed? For example, it is reasonably foreseeable that if a coach takes players on a run in 40-degree heat that there is a risk of dehydration. Some risks may still be reasonably foreseeable even if they are extremely unlikely or rare (like being bitten by a shark while surfing).
- **Proximity** - This concept relates to the nature of the relationship between the person who owes a duty of care and the person to whom they owe that duty. There must be a sufficient relationship of closeness (referred to as 'proximity') between the two people in order for a duty of care to exist. The degree of proximity can vary considerably depending on the circumstances. For example, a lifeguard would have greater proximity when on duty than when off duty.
- **Standard of care** - In order to determine whether a duty of care has been breached, the standard of care that is expected in the circumstances will be assessed. Where a person has acted in an unreasonable way or their actions fell below the standard of care expected, they will have breached their duty of care.

The standard of care required is based on what a reasonable person would have done (or not done) in similar circumstances. It will also vary according to the person involved. For instance, the duty of care owed by someone such as a coach would be based on what a reasonable coach, with similar experience, would do in similar circumstances.

# Key risks – knowing what they are and how they can be managed *cont.*

The standard of care required would also be higher for someone who is less able to look after themselves (less skilled, unfit, injured, children, etc.). Industry standards and organisation documents such as codes of practice and/or behaviour may all be used to determine the standard of care required.

- **Voluntary assumption of risk** - The main defence to a negligence claim as a result of sport and recreation activities is 'volenti non fit injuria' or the voluntary assumption of risk. The duty of care that is owed can be completely removed if the harmed person had full knowledge of the risk of injury to themselves and had voluntarily assumed the risk of the actual act that caused the harm.

For example, if an ice hockey player had voluntarily and completely assumed the risk of physical harm within the rules of the game, he or she cannot complain when injured while playing that game.

- **Contributory negligence** - Harmed persons who have compounded the harm by failing to exercise reasonable care for themselves may have contributed to some of the loss suffered. As a result, any damages will be reduced in proportion to the extent to which their actions contributed. Say a mountain bike rider is injured after colliding with another rider during a race. The rider had a blood alcohol of more than 0.15, which would have impaired his ability to judge speed and distance and, as a result, the collision occurred. His ability to claim damages against the race organisers could be reduced considerably.
- **Vicarious liability** - In some circumstances an organisation may be liable for the conduct of others. For example, an organisation may be directly responsible for the conduct of its officials or employees. A club can be held responsible for liability arising out of a coach's instructions or behaviour.

## Exemption clauses and waivers

No waiver or exemption clause is a fool-proof way to avoid litigation. Obviously, preventing injury in the first place is preferable, but a carefully worded waiver that is distributed and explained to all affected can strengthen your defence in the event of a claim. In some circumstances, the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*) prohibits the exclusion of some terms, which it includes in all consumer contracts for consumer protection. Seek legal advice to make sure you get the wording right and that you meet the technical requirements to ensure the document can be enforceable.

You need to be able to convince someone else, somewhere else, at some other time that the person that undertook the activity actually understood the risks involved. For example, in Formula One racing they video the reading and signing of the waiver with the drivers. These waivers are very specific and detailed and they outline all possible risks. In the sport and recreation industry, it is important not to opt for a brief, generic waiver.

Recreation service providers, like other service providers, are subject to the implied warranties under the Australian Consumer Law that services will be provided with due care of skill and are reasonably fit for purpose. The *Recreational Services (Limitation of Liability) Act 2002 (SA)*, which allowed recreational service providers to limit their liability in relation to personal injury by registering and subscribing to a safety code, was repealed on 1 January 2011. Both the *Competition and Consumer Act 2010 (Cth)* and the *Fair Trading Act 1987 (SA)* allow recreation service providers to exclude, restrict or modify the implied warranties under the Australian Consumer Law in order to limit their liability for personal injury suffered by consumers. However, recreational service providers will not be able to limit their liability in circumstances where their conduct was reckless.

Waivers can still be used by recreational service providers to limit liability for property damage and other things that are not directly related to participation in the recreational or sport activity. For example, a waiver is appropriate for property loss and travel to an event that has been arranged by the club or association.

# Key risks – knowing what they are and how they can be managed *cont.*

The Consumer and Business Services website<sup>25</sup> provides detail about limiting your liability, together with the necessary actions for an effective waiver, including the requirement for the consumer to complete the form (i.e. sign and date).

An additional example includes the paragraphs contained in the terms and conditions<sup>26</sup> of the popular City to Bay Fun Run. Participants are required to sign a form to demonstrate that they agree and abide by the terms and conditions of the competition, thus acting as a waiver of liability for the organiser and event sponsors.

***It is important to remember that while a good release or waiver has value for defence from civil action in the event of a claim, you should never rely on it in lieu of other measures and risk management procedures.***

## **Natural justice**

Players or participants of a club or organisation who have broken the rules need to be dealt with appropriately.

To ensure that legal matters do not arise, the accused person needs to be treated fairly. To do this, the principles of natural justice need to be followed. These principles include:

- The right of the accused person to know the charges and to be given reasonable time to consider them
- The right to be heard in one's defence before an independent (that is, not biased or prejudiced) body.

A denial of natural justice to a member by any club or society, no matter how small or large, sophisticated or unsophisticated, may lead to an application to the courts for remedies and costs.

<sup>25</sup> <http://www.cbs.sa.gov.au/wcm/business-and-traders/business-advice/recreational-services/>

<sup>26</sup> <http://www.city-bay.org.au/pdf/Indemnity.pdf>

<sup>27</sup> <http://www.ofv.sa.gov.au/resources/fact-sheets>

## **Legal status and corporate liability**

Incorporation gives a club or organisation legal status, which means that the club or organisation is able to sue and be sued in its own name. Once incorporated, it will be the club itself that will have to satisfy any claim or liability so long as the members have acted properly and within their authority.

'Officers' – committee members, secretaries, treasurers, public officers and managerial employees – of incorporated bodies are now faced with similar responsibilities to directors and other officers of corporations governed by the due care and diligence sections of the Corporations Act 2001 (Cth) even if they are voluntary and unpaid officers.

For a fact sheet on incorporation visit the Office for Volunteers<sup>27</sup> website.

The sheet highlights some of the advantages of being incorporated and some of the responsibilities of an incorporated association.

## **Due diligence**

To limit liability, directors and officers of an organisation need to demonstrate that they took the necessary steps to prevent a reasonably foreseeable loss or injury from occurring. The concept of due diligence comes from company law.

Essentially, due diligence means that a director or officer of an organisation should:

- Act in good faith and for a proper purpose
- Not have a material interest
- Reasonably inform themselves
- Consider their decision in light of the best interests of the organisation.

# Key risks – knowing what they are and how they can be managed *cont.*

## Key legislation and regulations

### **Good Samaritans**

Under the *Civil Liability Act 1936 (SA)* (as amended), an individual who provides assistance, advice or care to another person in an emergency, where there is no expectation of payment by money or other means, will not be able to be sued for any injury or harm he/she causes if acting in good faith without recklessness (provided the good Samaritan's ability was not significantly impaired by alcohol or drugs).

### **Volunteer protection**

Many sport and recreation organisations rely heavily on volunteers to keep their operations viable. The *Volunteers Protection Act 2001 (SA)* was introduced in South Australia to protect volunteers from being personally liable to pay compensation for negligent actions arising out of authorised activities of the volunteer, which may have unintentionally caused personal injury, property damage or financial loss. The Act is designed to limit personal liability of volunteers, except for liability for defamation or if the volunteer was impaired by recreational drug use or if the volunteer was acting outside the scope of the authorised activities or contrary to instructions.

While the Act benefits volunteers, it subjects the organisations to the risks of liability for the acts of the volunteer. Organisations will need to make sure that volunteer roles and responsibilities are clearly defined and that those acting in these roles have the required training and experience to fulfil their duties.

### **Privacy**

While organisations with a turnover of \$3 million or less are exempt under the Privacy Act, this exemption does not apply if you disclose the personal information of your members to a state or national body in return for a benefit or service from that organisation or sponsor. This means that the vast majority of sport and recreation organisations will need to comply with the Privacy Act.

### **What's changed?**

The Privacy Amendment (Enhancing Privacy Protection) Act 2012 commenced on 12 March 2014 and resulted in many significant changes to the Privacy Act 1988. The Privacy Regulation 2013, made under the Privacy Act, also commenced on that date. The Act now includes 13 privacy principles that replaced the Information Privacy Principles (IPPs) and the National Privacy Principles (NPPs). These principles regulate the handling of personal information.

A summary of each Australian Privacy Principle (APP) is provided below<sup>28</sup>.

#### **APP 1 – Open and transparent management of personal information**

Ensures that APP entities manage personal information in an open and transparent way. This includes having a clearly expressed and up-to-date APP privacy policy.

#### **APP 2 – Anonymity and pseudonymity**

Requires APP entities to give individuals the option of not identifying themselves or of using a pseudonym. Limited exceptions apply.

#### **APP 3 – Collection of solicited personal information**

Outlines when an APP entity can collect personal information that is solicited. It applies higher standards to the collection of 'sensitive' information.

#### **APP 4 – Dealing with unsolicited personal information**

Outlines how APP entities must deal with unsolicited personal information.

#### **APP 5 – Notification of the collection of personal information**

Outlines when and in what circumstances an APP entity that collects personal information must notify an individual of certain matters.

#### **APP 6 – Use or disclosure of personal information**

Outlines the circumstances in which an APP entity may use or disclose personal information that it holds.

<sup>28</sup> As summarised by the OAIC: [http://www.oaic.gov.au/images/documents/AustralianPrivacyPrinciples\\_summary.pdf](http://www.oaic.gov.au/images/documents/AustralianPrivacyPrinciples_summary.pdf)

# Key risks – knowing what they are and how they can be managed *cont.*

## **APP 7 – Direct marketing**

An organisation may only use or disclose personal information for direct marketing purposes if certain conditions are met.

## **APP 8 – Cross-border disclosure of personal information**

Outlines the steps an APP entity must take to protect personal information before it is disclosed overseas.

## **APP 9 – Adoption, use or disclosure of government-related identifiers**

Outlines the limited circumstances when an organisation may adopt a government-related identifier of an individual as its own identifier or use or disclose a government-related identifier of an individual.

## **APP 10 – Quality of personal information**

An APP entity must take reasonable steps to ensure the personal information it collects is accurate, up to date and complete. An entity must also take reasonable steps to ensure the personal information it uses or discloses is accurate, up to date, complete and relevant, having regard to the purpose of the use or disclosure.

## **APP 11 – Security of personal information**

An APP entity must take reasonable steps to protect personal information it holds from misuse, interference and loss and from unauthorised access, modification or disclosure. An entity has obligations to destroy or de-identify personal information in certain circumstances.

## **APP 12 – Access to personal information**

Outlines an APP entity's obligations when an individual requests to be given access to personal information held about them by the entity. This includes a requirement to provide access unless a specific exception applies.

## **APP 13 – Correction of personal information**

Outlines an APP entity's obligations in relation to correcting the personal information it holds about individuals.

## ***Responding to the privacy legislation and recent changes***

- Become familiar with the APPs and the requirements of the Act. For further information, refer to the Office of the Australian Information Commissioner (OAIC).<sup>29</sup>
- Review the way you collect, hold, use and disclose personal information and make the appropriate changes to ensure you meet the APPs.
- As a priority, ensure you develop a privacy policy as part of your overall risk management strategy.

As a matter of good practice, regardless of whether or not the new provisions apply to your organisation, consider reviewing the checklist<sup>30</sup> compiled by the OAIC to help understand the main changes that need to be made by organisations.

## **Discrimination and harassment**

In recent times, there have been a number of high-profile cases of individuals and organisations in the courts for breaches of anti-discrimination laws. Discrimination is covered by both state and federal legislation.

The *Equal Opportunity Act 1984 (SA)* (proclaimed in March of 1986) consolidated all of the anti-discrimination legislation that applied to that date in South Australia.

This Act deals with a range of discriminations (race, age, gender, marital status, sexuality, pregnancy and physical or intellectual impairment), disability (includes 'disease-causing organisms present in the body') in employment (including contracts and partnerships), education, provision of goods and services, accommodation, clubs and associations, advertising, conferral of qualifications, and disposal of land.

<sup>29</sup> From 1 January 2015, the OAIC will no longer exist as a unified organisation. Its functions will be redistributed among four other government agencies. <http://www.oaic.gov.au/privacy/about-privacy>

<sup>30</sup> <http://www.oaic.gov.au/privacy/privacy-resources/privacy-agency-resources/privacy-agency-resource-2-privacy-act-reforms-checklist-for-app-entities-agencies>

# Key risks – knowing what they are and how they can be managed *cont.*

Discrimination is really treating someone less favourably because of one or more of the characteristics previously mentioned. Everyone has choices about how they treat other people. Those choices can be made using real and relevant information or they can be based on prejudice, stereotypes, misinformation and bias.

The Act provides for general exemptions where the exclusion of a person may be lawful in a competitive sporting activity (i.e. where the strength, stamina or physique of the competitor is relevant to the outcome of the competition). Those exemptions arise in limited circumstances as outlined in the Act.

Some discrimination is unlawful (for example, sexual harassment and racial discrimination) and some is not (for example, coaches who show favouritism towards their children over other players). Discrimination and harassment is a critical issue for everyone involved in sport and recreation and it can be a complex area.

For example, one sporting organisation ended up in court after refusing to allow a pregnant athlete to play her sport. This is a difficult issue, especially when you consider the balance between the duty of care owed to the player and the unborn child and the probability of breaching discrimination laws. The Australian Sports Commission has issued guidelines that provide some advice on how to handle such a situation.

The following case study is taken from the Play by the Rules website<sup>31</sup>:

## **Strength/Stamina/Physique Argument Rejected:**

### *Emily South v Royal Victorian Bowls Association (RVBA) (2001)*

Ms Emily South, a 19-year-old keen bowler, had been a member of the St Kilda Bowling Club for about seven years. The club was an affiliated member of the Royal Victorian Bowls Association (RVBA).

The RVBA conducts a Metropolitan Pennant Bowls Competition on Saturday afternoons. Ms South wanted to play on Saturday afternoons because she was unable to play in the Women's Pennant Competition, which was a mid-week competition that clashed with her school and university commitments.

She wished to play at the highest level and her club considered her capable of competing in the Saturday afternoon RVBA competition. Only clubs affiliated with the RVBA with members affiliated to the RVBA are eligible to compete in their Saturday pennant competitions. RVBA rules stated that only male members of affiliated clubs could then affiliate as individuals with the association.

The request to register Ms South as an affiliated member was refused by the RVBA.

Ms South lodged a complaint of Sex Discrimination with the Victorian Equal Opportunity Commission.

The RVBA argued that strength, stamina and physique are involved in the playing of bowls. In particular, the drive shot, which is produced by the application of strength, is an important tactical shot that may decide the outcome of the game. Evidence was presented that men employ the drive shot more frequently than women.

However, the Tribunal found that strength, stamina and physique were not significant in bowls and that discrimination had occurred. It ordered the RVBA to amend its rules so that it did not prohibit women from registering as affiliated members and competing in the Saturday pennant bowls competition.

For further examples of court and tribunal decisions and conciliated complaints, visit the Play by the Rules<sup>32</sup> website.

<sup>31</sup> <http://www.playbytherules.net.au/news-centre/81-resources/links/936-court-decision-emily-south-v-royal-victorian-bowls-association-rvba-2001-link>

<sup>32</sup> <http://www.playbytherules.net.au>

# Key risks – knowing what they are and how they can be managed *cont.*

## Harassment

Harassment covers a wide range of behaviours of an offensive nature. It is commonly understood as behaviour intended to disturb or upset and it is characteristically repetitive. In the legal sense, it is intentional behaviour that is found threatening or disturbing.

The following are some examples of unfair and possibly unlawful discrimination:

- **Sex Discrimination** - Prizes of different value are given for male and female competition in the same club.
- **Racial Discrimination** - An Aboriginal player is overlooked for team selection due to his race.
- **Age Discrimination** - A club refuses to clear players to other teams if they are younger than 21.
- **Marital Status Discrimination** - A player is deliberately excluded from team activities and social functions after she divorces her husband who is a club official.
- **Pregnancy Discrimination** - A woman is dropped from her softball team when she reveals she is pregnant.
- **Sexuality Discrimination** - A footballer is ridiculed by his teammates after his homosexuality is disclosed.
- **Impairment or Disability Discrimination** - A junior player is overlooked because of her mild epilepsy.
- **Sexual Harassment** - A male tennis coach keeps putting his hand on a woman's bottom during coaching sessions, making her feel very uncomfortable.
- **Victimisation** - A player is ostracised by her coach for complaining about his racist behaviour to another club official.

These examples are taken from the Play by the Rules website, which is supported by the Australian Sports Commission, Australian Human Rights, State and Territory Equal Opportunity and Departments for Recreation and Sport.

The Play by the Rules website combines information about legislation, frequently asked questions about discrimination and sport, as well as training and resources to support safe, fair and inclusive sport environments.

## Children's Protection Act

People who have a suspicion on reasonable grounds that a child has been or is at risk of being abused or neglected are mandated by the *Children's Protection Act 1993 (SA)* to report it to the Child Abuse Report Line (13 14 78) or to the SA Police, where the suspicion is formed in the course of the person's work or in carrying out official duties.

Recreation and sport organisations are required to have strategies in place to prevent and minimise opportunities for abuse and to respond when it occurs or is suspected. All staff and volunteers who hold a management position or work in a prescribed position for an organisation providing sporting or recreational services wholly or partly for children are mandated to report their suspicions.

The Act also requires:

- The development of policies and procedures to establish and maintain child safe environments
- All paid or volunteer persons holding a prescribed position are required to have a relevant history assessment completed before they are engaged or appointed unless an exemption applies
- Organisations to lodge, or have lodged on their behalf by a governing body, a Child Safe Environment Compliance Statement with the Department for Education and Child Development (DECD).

Refer to the section titled *Member and Child Protection* for more information and strategies.

# Key risks – knowing what they are and how they can be managed *cont.*

## Work Health and Safety (WHS)

Everyone has a right to be safe at work. This includes paid and volunteer workers who contribute in diverse ways to organisations. New WHS laws, which came into effect in South Australia from 1 January 2013, may mean the responsibilities and duties of your organisation have changed.

Information in this section is not intended to be read in place of the WHS laws and should be used in conjunction with South Australia's *Work Health and Safety Act (2012)* and the approved WHS codes and practices. The following information is a summary of key points identified in the Safe Work Australia publication *Essential Guide to Work Health and Safety for Organisations that Engage Volunteers*<sup>34</sup> and Australian Sports Commission's *Sporting clubs guide to a safe workplace*<sup>34</sup>. Some minor modifications have been made.

Each publication is a useful starting point for your organisation to gain an understanding of its work health and safety duties and responsibilities.

For more information on the duties for volunteers and volunteer organisations under the WHS laws, you can also contact South Australia's work health and safety regulator, SafeWork SA<sup>35</sup>, by phoning the Help Centre 1300 365 255 or visiting their website.

### Organisations and their duties

New WHS laws require that a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, the physical and mental health and safety of its workers, including volunteers.

A PCBU does not include a 'volunteer association'. The definition of a volunteer association for the purposes of the WHS Act is a group of volunteers working together for one or more community purposes that has no employees. A group of volunteers that employs any person to carry out work for the association is not a volunteer association, but rather a PCBU. The new WHS laws require most organisations to meet specific duties but volunteer associations – organisations that do not have any paid staff – do not have those duties.

The following chart will assist in determining if your organisation falls within the scope of the new WHS laws.



### Examples

- Mary is appointed secretary of the local sporting club. The club was established and incorporated in 1962 and is operated by paid employees and volunteers. The club employs someone to manage the club's accounts and another to manage the office on a part-time basis. As the club employs people, it has duties as a PCBU under the WHS Act. It also means that Mary has duties as a worker and officer under the WHS Act.
- John is elected secretary of the local sporting club. The club was established in 1962 and is operated by a group of volunteers. The club's committee meets each month. Occasionally the club pays a handyman to maintain its clubrooms. The handyman isn't employed by any members of the club. As the group of volunteers does not employ others to operate their club and they all work together for a community purpose, they are classified as a volunteer association. This means John and the sporting club do not have any duties under the WHS Act.

<sup>34</sup> [http://www.ausport.gov.au/supporting/clubs/resource\\_library/whs\\_reform](http://www.ausport.gov.au/supporting/clubs/resource_library/whs_reform)

<sup>35</sup> <http://www.safework.sa.gov.au/>

# Key risks – knowing what they are and how they can be managed *cont.*

**Key point:** *If your organisation is a volunteer association and does not fall under the WHS Act, it is still a good idea to comply with general WHS duties, as general and common law duties of organisations that engage volunteers apply.*

*Australian courts have long recognised that volunteers are owed a general duty of care by the people and the organisations they support.*

*The Australian Sports Commission's document, Sporting clubs guide to a safe workplace, outlines seven steps for organisations to improve health and safety in their workplace, which may be of assistance for organisations that are aiming to comply with general WHS duties. These steps are a guide only and PCBU organisations may need to implement other strategies to meet their legal WHS requirements.*

## **What your organisation (as a PCBU) needs to do**

If the WHS laws apply to your organisation (i.e. your organisation meets the PCBU criteria), it must ensure, so far as is reasonably practicable, the health and safety of all of its workers, including volunteers. This means that the organisation must provide the same protections to its volunteer workers as it does to its paid workers. The protection covers the physical safety and mental health of all workers, including volunteers.

This primary duty of an organisation is qualified by 'so far as is reasonably practicable'. This means the organisation does not have to guarantee that no harm will occur, but it must do what can reasonably be done to ensure health and safety.

Other factors that will be taken into account in determining what the organisation is required to do to protect its workers, including volunteers, are:

- The type of business or undertaking.
- The type of work that the organisation performs.
- The nature of the risks associated with that work and the likelihood of injury or illness occurring.
- What can be done to eliminate or minimise those risks.
- The location or environment where the work is carried out.

The primary duty of a PCBU organisation includes ensuring, so far as is reasonably practicable:

- The provision and maintenance of a work environment without risks to health and safety.
- The provision and maintenance of safe plant and structures and safe systems of work.
- The safe use, handling and storage of plant, structures and substances.
- The provision of adequate facilities to support the welfare of workers at work, including volunteers (for example toilets and first aid facilities).
- The provision of information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from their work.
- Monitoring the health of workers and conditions at the workplace to prevent illness or injury of workers.



# Key risks – knowing what they are and how they can be managed *cont.*

PCBU organisations that have work health and safety obligations will need to be quite thorough and establish a comprehensive work health and safety framework that:

- manages health and safety risks
- provides information, training and instruction to workers and volunteers
- communicates effectively and consults with its workers and volunteers, keeping them informed and involved in decisions that may affect their health and safety
- considers appointing health and safety representative(s)
- implements a policy or procedure for the reporting of incidents.

Your organisation is legally obliged to advise SafeWork SA immediately after becoming aware that a notifiable incident<sup>36</sup> has occurred as a result of the conduct of the organisation.

Guidance on these essential elements of a WHS framework is provided in each of the publications referenced at the beginning of this section.

## ***Obligations of the volunteers in your organisation***

Your organisation's volunteers must take reasonable care for their own health and safety and ensure that their actions do not adversely affect others. They must also comply with any reasonable instructions, policies and procedures relevant to health and safety issued by their organisation as a PCBU or volunteer association.

Basically, what is reasonable care and what is expected of workers is what a reasonable person would do in circumstances, having regards to things such as:

- their knowledge
- their role
- their skills
- the resources available to them
- their qualifications
- the information that they have
- the consequences to health and safety of a failure to act in the circumstances.



<sup>36</sup> A notifiable incident is a serious incident that relates to the work the organisation carries out and involves:

- the death of a person
- the serious injury or illness of a person
- a dangerous incident.

Serious injury or illness and dangerous incidents are further defined in the Act.

# Key risks – knowing what they are and how they can be managed *cont.*

## Liquor licensing

If your organisation wants to sell alcohol on their premises, it must apply for a liquor licence and comply with the legal requirements and licence conditions. The licence controls the way alcohol is sold and distributed to members and their guests.

The relevant Act is the *Liquor Licensing Act 1997 (SA)* and the purpose of the Act is to regulate and control the sale, supply and consumption of liquor. Particular emphasis is placed on encouraging responsible attitudes towards the promotion and advertising of liquor and minimising the harm associated with liquor consumption. It is also a condition of every licence that the licensee complies with the Commissioner's codes of practice. Failure to comply with a provision in the General Code of Practice will be a breach of licence condition. There are many licences under the Act. Your organisation will need to determine what type of licence it requires.

For example, clubs that intend to sell liquor for consumption on or off the premises may require a club licence or a limited club licence. A club licence may only be held by a club that is either a non-profit association incorporated under the *Associations Incorporation Act 1985* or a company limited by guarantee under the *Corporations Act 2001* of the Commonwealth.

A club licence permits the sale and supply of liquor on licensed premises to any member of the public who is not a minor. This type of licence does not allow the sale of take-away liquor unless special approval has been granted. A limited club licence permits the sale and supply of liquor on licensed premises to club members or guests of members only. A member of the club will not be permitted to have more than five guests on the club premises at any time. This type of licence does not permit the sale of take-away liquor.

A further condition of a limited club licence is that the club will keep the Commissioner informed of any changes to the composition of the committee of management of the club and will provide the information required by the Commissioner (in the form required by the Commissioner) about the members of the committee of management.

If your organisation is a holder of a limited club licence and wishes to hire out the club's premises, it can do so under a limited licence for members who wish to hold a function and invite more than the five guests per member or non-members who are looking for a venue to hold a function. The supply of liquor during the function can be provided by the club or by the person holding the function. In either situation there are certain requirements to be met by the club.



# Key risks – knowing what they are and how they can be managed *cont.*

**Key point:** *If your organisation already has a liquor licence, you should, as part of your risk management strategy:*

- *Review the recent amendments to the Act that took effect in November 2013, December 2013 and January 2014 and understand the impact that these amendments may have on your organisation. The amendments include:*
  - *A new object in the Act to ensure that the sale and supply of liquor occurs in such a manner as to minimise the risk of intoxication and associated violence or anti-social behaviour (including property damage and causing personal injury). This amendment specifically addresses alcohol-related violence and property damage.*
  - *Amendments to section 11A of the Act, which remove any doubt about the validity of the Late Night Trading Code of Practice. These amendments provide that the Liquor and Gambling Commissioner (the Commissioner) may include in a code of practice, measures that can reasonably be considered appropriate and adapted to the furtherance of the objects of the Act.*
  - *An increase in the expiation fee for offensive and disorderly conduct in licensed premises or in the vicinity of licensed premises from \$160 to \$500.*
  - *An amendment to the definition of 'entertainment', removing the reference to television screens. Licensees will no longer have to obtain entertainment consent under section 105 of the Act for television screens (whatever the size).*
  - *Inclusion in the Act of a definition of intoxication, covering behaviour as a result of the consumption of liquor or some other substance.*
  - *Licensees and staff are no longer required to consider whether the intoxicated behaviour of a patron arises from liquor or some other drug. It is not necessary to establish one or the other.*
  - *The requirement for licensees to ensure that the notice to minors (minimum age) is displayed in a prominent position in each area of the licensed premises, as per the approved plan, to which access is permitted to minors by the licensee.*
- *Periodically review your organisation's licence. If specific conditions have been imposed on the licence, ensure that your organisation can demonstrate that these conditions are being complied with.*



For further assistance, you may wish to refer to the website of the Good Sports program of the Australian Drug Foundation.

This program has been established to assist clubs and volunteers with alcohol management.

# Key risks – knowing what they are and how they can be managed *cont.*

## Disclaimer

The comments on legal liability and recent legislative changes in this section of the resource and throughout the document do not purport to be a complete and accurate description of the law on these topics.

The State Government of South Australia (Office for Recreation and Sport) and its servants and agents are not by these comments providing legal advice to any person, company or organisation and make no warranties with respect thereto and to the maximum extent permitted by law disclaim all liability and responsibility for any direct or indirect loss, damage or liability that may be suffered or incurred by any person, company or organisation as a consequence of, or in reliance upon, anything contained in, implied by or admitted in this document.

## Financial

Financial risk is the risk to an organisation's cash flow. Often, financial risks are not managed effectively.

Good financial management is essential for your organisation's survival and is an important part of financial risk management and good governance. It involves:

- being provided with and reviewing financial information on a regular basis
- effectively managing the funds of the organisation
- implementing sound financial practices and policies
- understanding the organisation's financial position and obligations.

Good financial management and the ability to demonstrate that this is occurring is essential if your organisation is seeking additional external funding or capital assistance.

Often organisations will appoint a financial director/ treasurer with accounting experience to assume this responsibility. He or she will generally be involved in day-to-day transactions or maintaining the accounts.

Notwithstanding this appointment, all board members should have an understanding of their organisation's accounts and financial reports, as they are responsible in the eyes of the law.

If board members do not have this financial literacy, there are several courses that can be undertaken to assist with understanding the key responsibilities. Refer to the section titled *Financial Management – Useful Websites and Other Resources*.

## Financial responsibilities

Each organisation will have specific legal obligations in relation to their financial management and an ethical responsibility to their members in respect to managing their organisation's funds.

Corporate governance issues also need to be taken into consideration when administering an organisation's finances. It is important that all officers of your organisation (president, club director, board member, treasurer, etc.) understand their responsibilities in this area, particularly if they are a director of the organisation in the eyes of the law.

Listed below is a summary of the key issues. For further information, it is recommended that you talk to your state sport and recreation organisation or other national sporting body and/or obtain professional advice if any aspect requires clarification or further consideration.

