



Work Health and Safety Bill – What does it all mean!

The following is a summary of the new changes that will affect all businesses from 1st January 2012

Item	Summary of Changes	
	<p>Key Elements of the Act are:</p> <ul style="list-style-type: none"> • a primary duty of care requiring persons conducting a business or undertaking to, so far as is reasonably practicable, ensure the health and safety of workers and others who may be affected by the carrying out of work • duties of care for persons who influence the way work is carried out, as well as the integrity of products used for work • a requirement that ‘officers’ exercise ‘due diligence’ to ensure compliance • consultation, representation and participation provisions • protection against discrimination for those exercising or performing powers, rights or function under the Act • workplace entry by WHS entry permit holders • enforcement and compliance provisions 	
Part 2 Health and Safety Duties	Work Health and Safety Act 2011	Queensland’s Workplace Health and Safety Act 1995
	Concept of reasonably practicable	Does not refer to ‘reasonably practicable’
	<p>Section 17 Management of Risks</p> <p>A duty imposed on a person to ensure health and safety requires the person:</p> <ol style="list-style-type: none"> to eliminate risks to health and safety, so far as is reasonably practicable; and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable. 	<p>Section 27A Managing exposure to risks</p> <p>Duty holders must undertake the risk management process.</p>
Part 2 Health and Safety Duties	Work Health and Safety Act 2011	Queensland’s Workplace Health and Safety Act 1995
	PCBU: Specific exclusions “Person Conducting a Business or Undertaking”	PCBU: No Specific exclusions
	Primary duty: Includes monitoring of workers’ health and conditions at the workplace.	Primary duty: Does not include monitoring of health and conditions.
	Officers: New concept	

	<p>Liability of officers: Officers have a clear duty to ensure compliance. They are liable if they do not comply with the duty.</p>	<p>Liability of executive officers: Officers are attributed liability for conduct that is committed by their company, rather than being allocated a duty in their own right.</p>
	<p>Onus of proof on the regulators to establish no due diligence</p>	<p>Onus of proof on executive officer to prove defence (s).</p>
<p>Part 2 Health and safety duties</p>	<p>Subdivision 1 – Principles that apply to duties</p> <p>This section sets out the principles that apply to all duties under the Act and duties under the regulations and codes of practice.</p> <p>Key principles apply to duties are:</p> <ul style="list-style-type: none"> • duties are not transferable (s.14) • a person may have more than one duty (s.15) • more than one person can have the same duty (s.16) <ul style="list-style-type: none"> ○ each duty holder must comply with that duty to the required standard ○ if duties are held concurrently, then each person retains responsibility for their duty regarding the matter and must discharge the duty to the matter or would have that capacity but for an agreement purporting to limit or remove that capacity. • A duty imposed on a person requires the person to eliminate to risks to health and safety so far as reasonably practicable. If it is not reasonably practicable to do so, the person has a duty to minimise the risks as far as is reasonably practicable (s.17). <p>The Act, under these principles, intends that:</p> <ul style="list-style-type: none"> • All duty holders must accept their responsibility for work health and safety and ensure that the duties of care are met. • Where a duty holders’ involvement or ability are limited to take the necessary steps to manage the risks, these factors will assist in determining what is reasonably practicable in order to comply with their duty of care. • Duty holders are not permitted to avoid their health and safety responsibilities. • Coordination of activities between duty holders will overcome risk of duplication or lack of action. <p>All duties must be discharged so far as is ‘reasonable practicable’.</p> <p>Subdivision 2 - What is reasonably practicable</p> <p>Reasonably practicable represents what can reasonably be done ‘at a particular time’ taking into account and weighing up all relevant matters including:</p> <ul style="list-style-type: none"> • The seriousness of the risk • What the person concerned knows, or ought reasonably to know, about the hazard or the risk, and ways of eliminating or minimising the risk. • The availability and suitability of ways to eliminate or minimise the risk (s.18) <p>After assessing these matters, the person may also consider whether the cost associated with eliminating or minimising the risk is grossly disproportionate to the risk.</p> <p>Where a duty holder is not able to control relevant matters, this implies that it is either not possible for duty holders to do anything, or it is not reasonable to expect them to do so.</p>	

Important aspects of reasonably practicable are:

- The reference to what could be done at the time.
- The need to weigh up **all relevant matters** – not just those listed.
- Cost is only to be considered after all other aspects have been assessed.
- Availability and suitable ways of eliminating or minimising the risk.

Under the Act, in any prosecution, WHSQ or an inspector will need to establish that a duty holder did not take reasonably practicable steps. The prosecution will need to particularise what should have been done by the duty holder.

Person Conducting a Business or Undertaking (PCBU)

The Act defines the **PCBU** in s.5:

A person conducts a business or undertaking:

- a. Whether the person conducts the business or undertaking alone or with others;
and
- b. Whether or not the business or undertaking is conducted for profit or gain.

A **PCBU** may be a partnership or an unincorporated association.

The New Act also specifies when a person does not conduct a business or undertaking:

- A person engaged solely as a worker in, or as an officer of, the business or undertaking
- A volunteer association – here a volunteer associations *a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employees any person to carry out work for the volunteer association.*

A worker (s.7)

A person is a worker if the person carries out work in any capacity for a PCBU, including work as:

- Employee, contractor or subcontractor, employee of a contractor or subcontractor, employee of a labour hire company, outworker, apprentice or trainee, student on work experience, volunteer and a person of a prescribed class.

The **PCBU** is also a worker if the person carries out work in the business or undertaking.

Duties of PCBUs

Must ensure, so far as is reasonably practicable, the health and safety of workers and other persons.

Reasonably practicable means taking into account all relevant matters including:

- likelihood of the hazard or the risk concerned occurring
- degree of harm that might result from the hazard or the risk
- what the person concerned knows, or ought reasonably to know about the hazard or the risk and ways of eliminating or minimising the risk
- the availability and suitability of ways to eliminate or minimise the risk

<p>Part 2 Health and Safety Duties Officers</p>	<p>The concept of “officers” is introduced, which included those at the top of a company management structure. Officers will have a positive duty to manage workplace health and safety and a clear duty to ensure compliance. The officer will be liable if they do not comply with that duty, though the onus of proof will be on the regulator (WHSQ) to establish whether due diligence has been exercised.</p> <p>Workplace Health & Safety Officers (WHSO)</p> <p>WHSOs are not included with the new ACT however employers and officers are still required to ensure obligations under the Act are met. Employers who are currently required to have a WHSO in place must still do so until 31 December 2011, either directly employed or using a consultant. WHSOs due for recertification on or after 13 May 2011 have been given an extension until 31 December 2011. WHSQ are encouraging WHSOs to maintain their certification, for future WHS training courses.</p>	
<p>Part 2 Monitoring Workers Health & Conditions at Work</p>	<p>There are additional requirements to monitor the health of workers and conditions at the workplace.</p> <p>While at work, a worker (s.28) or a person at a workplace (s.29) must:</p> <ul style="list-style-type: none"> • Take reasonable care for their own health and safety and that their acts or omissions do not adversely affect the health and safety of others. • Comply with any reasonable instruction to comply with the Act and cooperate with any reasonable policy or procedure relating to health or safety at the workplace. 	
<p>Part 3 Incident Notification</p>	<p>Work Health and Safety Act 2011</p>	<p>Queensland’s Workplace Health and Safety Act 1995/Regulations</p>
	<p>Notifiable Incident means the death of a person; a serious injury or illness of a person; or a dangerous incident. (s.35)</p>	<p>Workplace incidents that must be notified are <i>Workplace incidents that must be notified are an incident resulting in a person suffering a work injury that is a serious bodily injury; a work caused illness; a dangerous event (s.134 Reg).</i></p>
	<p>Serious injury or illness – note important difference in the timeframes between the <i>Work Health and Safety Act 2011</i> and the Qld Act. (s.36)</p> <p>A serious injury or illness of a person means an injury or illness requiring the person to have:</p> <ol style="list-style-type: none"> a. immediate treatment as an in-patient in a hospital; or b. immediate treatment for any of the following: the amputation of any part of his or her body, a serious head injury, a serious eye injury, a serious burn, the separation of his or her skin from an underlying tissue, a spinal injury, the loss of a bodily function or serious lacerations; or c. medical treatment within 48 hours of exposure to a substance; or 	<p>Serious bodily injury</p> <p><i>An injury to a person that causes:</i></p> <ol style="list-style-type: none"> a. <i>the injured person’s death; or</i> b. <i>the loss of a distinct part or an organ of the injured person’s body; or</i> c. <i>the injured person to be absent from the person’s voluntary or paid employment for more than 4 days (Schedule 3, WHS Act)</i>

	<p>d. any other injury or illness prescribed by the regulations.</p> <p>PCBU must notify the regulator immediately after becoming aware of the incident.</p> <p>Record of the incident to be kept for at least five years.</p>	<p><i>Notification within 24 hours of becoming aware of the incident or promptly if the incident causes a death (WHS Regulation S134).</i></p> <p><i>Record of workplace incidents to be kept for at least one year (WHS Regulation s135).</i></p>
<p>Part 4 Authorisations</p>	<p>The Work Health and Safety Act 2011 establishes the framework for authorisations that will be established under the new Regulations.</p> <p>This will relate to licences for asbestos removal work, demolition work and high risk work, registration of plant and design.</p> <p>Part 4 covers authorisation of workplaces, plant, substances and work.</p> <p>‘Authorisation’ what does it mean (s.40) Authorisation means authorised by a licence, permit, registration or other authority as required by the regulations.</p> <p>Requirements for authorisation of workplaces, plant or substances and work (s.41-44) The regulations may require certain kinds of workplaces, plant or substances or their design and work or classes of work to be authorised. The provisions in the Act establish the offences framework.</p>	
<p>Part 5 Consultation & Health and Safety Representatives (HSR’s)</p>	<p>Divisions 1-4 of Part 5 outlines the requirement for PCBUs to consult with their workers in the establishment of health and safety representatives and committees and what the roles of these positions involve. Divisions 5-8 specifically to issue resolution, ceasing unsafe work, provisional improvement notices and specific exclusions to this Part.</p> <p>There are increased obligations for consultation, including determining work groups, the training of HSR’s and actions to resolve health and safety concerns that are raised by workers. Under certain circumstances, HSR’s will be able to issue provisional improvement notices to employers, instruct workers and refer issues to the Regulator (WHSQ).</p> <p>Part 5 covers:</p> <ul style="list-style-type: none"> • the duty to consult • the consultation process • the establishment of work groups • the role of the health and safety representative • the role of health and safety committees • issue resolution • cessation of unsafe work • provisional improvement notices • exclusions to this Part <p>This is new to Queensland on the impact on how we do our work:</p> <ul style="list-style-type: none"> • Issues resolution framework, including referral to the regulator for an inspector to assist in resolving the issue. • A worker being able to cease unsafe work and arrangements that apply when this occurs • HSR being able to direct that unsafe work cease • Request for inspector to assist in resolving an issue relating to cessation of work 	

<p>Part 6 Discriminatory, Coercive & Misleading Conduct</p>	<p>The Act will prohibit discriminatory, coercive and misleading conduct for work health and safety matters and establishes criminal and civil causes of action in the event of such conduct.</p> <p>The purpose of these provisions is to encourage engagement in work health and safety activities and the proper exercise of roles and powers by providing protection against discrimination and other forms of coercion. The legislation states that discrimination, coercion and misleading conduct are unlawful and will attract penalties and other consequences.</p> <p>Part 6 covers:-</p> <ul style="list-style-type: none"> • prohibition of discriminatory conduct, coercion or misrepresentation • criminal proceedings in relation to discriminatory conduct • civil proceedings in relation to discriminatory or coercive conduct.
<p>Part 7 Workplace Entry by WHS Entry Permit Holders</p>	<p>The rights of a person who holds an office in a union, or is an employee of a union, to enter workplaces and exercise certain powers continues, with WHS entry permit holders not required to disclose names or workers. Part 7 also sets out the conduct required of WHS entry permit holders who enter a workplace.</p>
<p>Part 8 The Regulator</p>	<p>The role of the regulator, its functions and powers are set out, with the power for the regulator to do all things necessary (i.e. advise, recommend, monitor, educate, train) to perform its functions. The regulator has all the powers and functions of an inspector.</p>
<p>Part 9 Securing Compliance</p>	<p>Powers and accountability of inspectors is extended, as well as creating an offence to assault, threaten or intimidate an inspector.</p>
<p>Part 10 Enforcement Measures</p>	<p>The term “Enforcement Measures” is introduced, the Queensland equivalent being inspectors’ improvement and prohibition notices, with powers extended for issuing notices, remedial action and court-ordered injunctions.</p> <p>Part 10 covers:</p> <ul style="list-style-type: none"> • Improvement notices • Prohibition notices • Non-disturbance notices • General requirements applying to notices • Remedial action • Injunctions
<p>Part 11 Enforceable Undertakings</p>	<p>Part 11 covers that Queensland’s provisions for enforceable undertakings continue, with the Bill covering issues of regulator’s acceptance or rejection of WHS undertakings, compliance and contravention, withdrawal, variations and proceedings for alleged contraventions.</p>
<p>Part 12 Review of Decisions</p>	<p>Part 12 lists the decisions made under the <i>Work Health and Safety Act 2011</i> may be reviewed. Decisions by inspectors initially reviewed by the regulator then may go to external review. Decisions by Inspectors are initially reviewed by the regulator, and then may go to external review. Decisions by the regulator go straight to external review.</p>
<p>Part 13 Legal Proceedings</p>	<p>Part 13 outlines the various legal proceedings relating to the <i>Work Health and Safety Act 2011</i>, including prosecution of offences, sentencing, infringement notices, offences committed by body corporates, by the Crown and public authorities, WHS civil penalty proceedings and civil liability and the WHS legislation</p>

Part 14 General	Part 14 collates a number of miscellaneous provisions, including the use of Approved Code of Practice for managing exposure to risks and in proceedings. The Act governs legal professional privilege and workers' rights not to be levied for a business workplace health and safety provisions.
Penalties	<p>3 Categories of offences</p> <ul style="list-style-type: none"> • Category 1: recklessly exposes a person to risk of death or serious injury or illness <ul style="list-style-type: none"> - \$3 million corporations; \$600,000 individuals - 5 years imprisonment - Reckless = intentional, wilful or grossly negligent • Category 2: serious risk of harm without recklessness <ul style="list-style-type: none"> - \$1.5 million corporations; \$300,000 individuals • Category 3: fails to comply with WHS duty <ul style="list-style-type: none"> - \$0.5 million corporations; \$100,000 individuals <ul style="list-style-type: none"> • Category 1 offence is a crime – District Court • Category 2 and 3 – Magistrates Court • Appeals up to the High Court of Australia • Independent right of review when regulator does not prosecute for Category 1 or 2 offences – by the Director of Public Prosecutions.

This is a summary of the new Work Health and Safety Act 2011 for full details on the changes go to Workplace Health and Safety Queensland's website.

<http://www.deir.qld.gov.au/workplace/law/harmonisationohslaws/index.htm>

The Model Work Health and Safety Regulations are still to be released. Once the WHS Regulations have been released, a summary of the WHS Regulations will be sent to members.

Contact ACSEA for further assistance on 1300 007 110 or visit www.acsea.org

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