



Express law fast track information for clients

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New work health and safety laws now in operation

The *Work Health and Safety Act 2011* (Cth) (WHS Act), which commenced on 1 January 2012, sets out new health and safety duties for Commonwealth agencies, their 'officers' and 'workers'.

There is no 'transitional period' for compliance with the WHS Act – the substantive duties and obligations apply from 1 January 2012 – so it is important that agencies, and their officers and workers, are currently taking the necessary steps to ensure that they are complying with the WHS Act.

The new laws apply to 'persons conducting a business or undertaking' (PCBUs), as well as 'officers' and 'workers'. The PCBUs covered by the WHS Act are the Commonwealth, Commonwealth public authorities and, for a transitional period, certain bodies corporate that are non-Commonwealth licensees under the former *Occupational Health and Safety Act 1991* (OHS Act) are covered by the WHS Act.

There are some transitional arrangements set out in the *Work Health and Safety (Transitional and Consequential Provisions) Act 2011* (Transitional Act). For example, the appointments of health and safety representatives and of health and safety committees have been continued. The Transitional Act also provides for the treatment of breaches and reporting requirements where an incident or matter was outstanding at the time of the repeal of the OHS Act. The OHS Act and regulations under that Act have been repealed in full.

Health and safety duties for PCBUs

PCBUs must ensure, so far as is reasonably practicable:

- the health and safety of their workers while the workers are at work in the business or undertaking
- that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

'Ensuring health and safety' involves either eliminating or minimising risks to health and safety so far as is reasonably practicable. Section 18 of the WHS Act sets out what is meant by 'reasonably practicable' in this context, broadly reflecting the factors that a court would take into account in determining what is reasonably practicable under the former OHS Act.

PCBUs have additional duties if their business or undertaking involves certain activities – for example, designing or installing plant or structures (see ss 22–26). These duties are known as ‘upstream’ duties.

Health and safety duties for officers, workers and other persons at the workplace

The WHS Act also imposes duties on ‘officers’ of the Commonwealth and Commonwealth public authorities, as well as ‘workers’ and ‘other persons at the workplace’.

- ‘Officers’ must exercise ‘due diligence’ to ensure that their PCBU complies with its duties and obligations under the WHS Act. Section 27(5) provides examples of what this would involve. A person is an ‘officer’ if they make, or participate in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Commonwealth or of the public authority.
- ‘Workers’ must take reasonable care for their own health and safety and the health and safety of other persons, and comply with reasonable health and safety instructions, policies and procedures. ‘Worker’ is defined broadly as a person who carries out work in any capacity for a PCBU – for example, an employee, a contractor or subcontractor, an employee of a contractor or subcontractor or an employee of a labour hire company that has been assigned to work in the PCBU. Certain persons who may not otherwise fall within the listed categories of ‘workers’ may otherwise be deemed to be ‘workers’ (and employees) – for example, members of the Australian Defence Force will be deemed to be ‘workers’ (and employees of the Commonwealth).
- ‘Other persons at the workplace’ must take reasonable care for their own health and safety and the health and safety of other persons, and to comply with reasonable health and safety instructions.

Contraventions of health and safety duties

The Commonwealth, officers, workers and other persons at the workplace may be prosecuted for a criminal offence if they fail to comply with their health and safety duties (ss 31–33). The penalties for these offences vary depending on the seriousness of the conduct. Penalties for individual officers, workers or other persons at the workplace who breach their health and safety duties may include a term of imprisonment.

In addition, Comcare has a range of other compliance powers under the WHS Act. For example, Comcare inspectors have powers to issue a range of notices relating to conduct that the inspector reasonable believes to be ‘unsafe’.

The WHS Act also provides for persons to notify or deal with the relevant agency of the Commonwealth, known as the ‘responsible agency’, in relation to breaches of the Commonwealth’s duties under the Act, if the breach relates to the activities of that agency.

Regulations

The WHS Act is accompanied by the *Work Health and Safety Regulations 2011* (the Regulations).

The Regulations total over 600 pages and set out additional and more prescriptive requirements for dealing with health and safety matters in high-risk circumstances and high-risk industries. PCBUs, as well as officers or workers in those PCBUs, that engage in these

activities must comply with the Regulations as well as (and as part of) their broader health and safety duties under the WHS Act.

Codes of practice

The WHS Act and Regulations are accompanied by a number of codes of practice (the Codes) approved by the Minister for Employment and Workplace Relations. Twelve new Codes, dealing with subjects such as general risk and workplace management, hazardous work, hazardous chemicals and asbestos, commenced on 1 January 2012.

These new Codes are based on the model Codes developed by Safe Work Australia. The full text of these Codes is set out in the [Work Health and Safety Codes of Practice 2011](#). Note that Comcare has said that more codes of practice will be approved over the next 2 years.

In addition to the Codes, Parts of the former *Occupational Health and Safety Code of Practice 2008* have been preserved for up to 2 years (unless varied or revoked) including those dealing with first aid (Pt 2), falls in construction (Pt 24) and cash in transit (Pt 25). These preserved Parts are treated as if they were Codes made under the WHS Act.

Compliance with a Code is not mandatory. However, if a duty holder complies with the Codes, generally they will be seen as being compliant with their health and safety duty under the WHS Act in respect of the subject matter of the Code. A Code is also admissible in proceedings for a contravention of a duty as evidence of whether or not the duty has been complied with.

Consultation, Co-operation, Co-ordination

The WHS Act imposes positive obligations on duty holders in certain circumstances to consult, co-operate and co-ordinate with other duty holders, and with workers, about a range of health and safety matters. Guidance on how to comply with these obligations is set out in Code of Practice: Work Health and Safety Consultation, Co-Operation and Co-Ordination', which can be found in the *Work Health and Safety Codes of Practice 2011* in the section on General Risk and Workplace Management.

The Regulations contain additional obligations, including additional consultation obligations, for specific high-risk activities. For example, they require that, where practicable, a PCBU that commissions construction work must consult with the designer of the whole or any part of the structure about how to ensure that risks to health and safety arising from the design during the construction work are eliminated or minimised, so far as is reasonably practicable (reg 294).

Issue resolution

The WHS Act sets out how health and safety issues are to be resolved (see Div 5 of Pt 5). Parties to a health and safety issue may agree on an issue resolution procedure and make reasonable efforts to resolve the issue in a timely, final and effective way in accordance with that procedure. There is some default content for an agreed procedure prescribed under the Regulations (see Pt 2.2). It is also open to parties not to agree on their own issue resolution procedure. If a procedure is not agreed on, the default issue resolution procedure set out in the Regulations applies.

If the issue still has not been resolved after reasonable efforts to achieve a timely, final and effective resolution of an issue have been made, any party can ask Comcare to appoint an inspector to assist in resolving the issue. While providing this assistance, inspectors may exercise their compliance powers as they consider appropriate.

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