

EMPLOYMENT UPDATE

MAY 11

HARMONISATION OF WORKPLACE HEALTH AND SAFETY LAWS

Harmonisation of Workplace Health & Safety Laws will take effect from 1 January 2012. In this Update we provide you with a summary of the changes under the new legislation.

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The Queensland Parliament passed the *Workplace Health and Safety Act 2011* on 27 May 2011 as part of its commitment to participate in the harmonisation of workplace health and safety laws across all States and Territories.

The *Workplace Health and Safety Act 2011* (New WHS Act) will replace the current *Workplace Health and Safety Act 1995* (Qld) (Current WHS Act) from 1 January 2012.

The New WHS Act will change several key elements of the Current WHS Act. This update will summarise the more important changes that employers should take note of in preparation for the changes that will be in force next year.

Primary Duty of Care

The duty under the Current WHS Act is to 'ensure workplace health and safety'. Under the New WHS Act, this will be changed to the obligation to ensure, so far as 'reasonably practicable', the health and safety of workers and others who may be affected by the carrying out of work.

This change will, in effect, remove the strict liability encompassed by the obligation to 'ensure workplace health and safety' and should give more scope for businesses to defend workplace health and safety prosecutions.

Executive Officers

Executive officers of a corporation are presently 'deemed' to have committed an offence if the corporation breaches its workplace health and safety obligations. There is also a reverse onus of proof under the Current WHS Act.

Under the New WHS Act, executive officers will no longer be 'deemed' to have committed an offence and the reverse onus of proof is removed.

In addition, the use of 'executive officers' will be replaced with the term 'officers' as defined under the *Corporations Act 2001* (Cth).

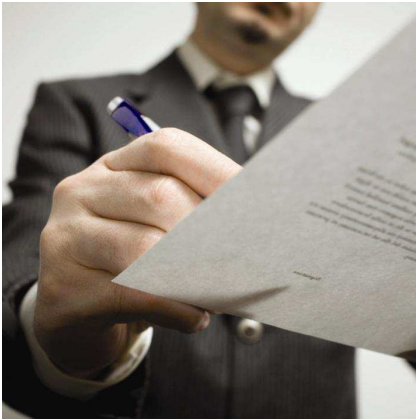


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The New WHS Act places very broad due diligence obligations on officers requiring them to be aware of and involved in safety in the workplace. Officers will be required to:

- a) acquire and keep up-to-date knowledge of health and safety matters;
- b) gain an understanding of hazards and risks associated with the business's operations;
- c) ensure appropriate resources are available for use to eliminate or minimise risks from work carried out;
- d) ensure appropriate process for obtaining information about incidents, hazards and risks, and respond to them; and
- e) ensure processes for complying with duties are implemented, e.g. reporting, consultation arrangements, training and instruction.

Workers

Under the Current WHS Act, 'persons conducting a business or undertaking' have obligations to

'workers' to ensure their health and safety in the workplace.

In a very important change, under the New WHS Act, the definition of 'worker' will be expanded to include labour hire workers, contractors and subcontractors. This marks a significant change for businesses in Queensland and broadens the scope of workplace health and safety obligations for those who are conducting a business in a major way.

Cease Work Provisions

The New WHS Act introduces the concept of 'cease work' and provides a worker the right to cease, or refuse to carry out, unsafe work. The worker may exercise this right where there is a reasonable concern that carrying out the work would expose the worker to a serious and immediate, or imminent hazard to the worker's health or safety.

If the worker exercises the right to cease work, then he or she must notify the person conducting the business or undertaking (PCBU) as soon as reasonably practicable and remain available to carry out suitable 'alternative work' at the direction of the PCBU. The alternative work may be at the same workplace or another workplace provided that the work is safe and appropriate for the worker to carry out until normal duties can be resumed.

The cease work provisions under the New WHS Act also allow a Health and Safety Representative (HSR) of a business or company to 'direct that unsafe work cease' if there is a reasonable concern that to carry out the work would expose workers to a serious health or safety risk. That risk must be an immediate or imminent exposure to a hazard.

The HSR may make this direction only if there has been consultation with the PCBU to attempt to resolve the concern and there has been no resolution to that consultation. However, if the risk is so serious and imminent that it is not reasonable to consult before giving the direction to cease work, the HSR may direct the worker to cease work.

Discriminatory Conduct

Under the Current WHS Act, discrimination and victimisation is prohibited in relation to workplace health and safety matters.

The New WHS Act expands on the current provisions and provides broader definitions for 'discriminatory conduct'. The effect of this means discriminatory conduct is no longer just limited to the narrow terms of 'dismissal of a worker' and 'to the detriment of a worker', but now includes discrimination against 'prospective workers' and 'commercial arrangements with another person'. Discriminatory conduct therefore includes a circumstance where:

- a contract for services with a worker is terminated;
- the worker's position is altered;
- a person refuses or fails to engage a prospective worker;
- a person treats a prospective worker less favourably than another prospective worker;
- a person terminates a commercial arrangement with another person; or
- a person refuses or fails to enter into a commercial arrangement with another person.

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In addition, the New WHS Act introduces the concept that a person must not 'request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct'.

The consequences for breach of the discrimination and coercion provisions under the New WHS Act allow for both criminal and civil criminal proceedings in relation to such conduct.

Notification of an Incident

Under the Current WHS Act, workplace incidents which must be notified include incidents resulting in a person suffering a work injury that is a 'serious bodily injury'. The New WHS Act broadens this by providing that a 'notifiable incident' is one where there is a 'death of a person', a 'serious illness or injury of a person' or a 'dangerous incident'.

This change provides a wider scope of injury or illnesses that will be notifiable and include where a person is required to have:

- immediate treatment as an in-patient in a hospital; or
- 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;
 - serious lacerations; or
- medical treatment within 48 hours of exposure to a substance; or

- any other injury or illness prescribed by the regulations.

In addition, the time frames for notifying WHSQ of an incident have been shortened. Under the Current WHS Act, notification was required within 24 hours of becoming aware of an incident (or prompt notification if the incident causes a death) with records of an incident required to be kept for at least one year.

Under the New WHS Act, a 'notifiable incident' must be reported immediately after becoming aware of the incident, with records of the incident to be kept for at least five years.

Consultation

The New WHS Act provides an obligation on employers to consult with their workers and other duty holders in relation to workplace health and safety. Many employers may do this as a matter of course, but this will be a legislative requirement from 1 January 2012.

Company WHS Officers and HSR's

Under the New WHS Act, businesses will no longer be required to appoint workplace health and safety officers (WHSO's). However, given the due diligence obligations for officers, the continued use of WHSO's may remain beneficial for keeping up to date with the risks and hazards associated with the operations of the business.

HSR's are retained under the New WHS Act with increased powers. For example, under the New WHS Act, HSR's will have the ability to direct unsafe work to cease as discussed above.

Investigation

Under the Current WHS Act, a person has the ability to refuse to answer questions by an inspector as part of an investigation on the grounds of self-incrimination. Under the New WHS Act, the privilege against self-incrimination will no longer be permitted.

Prosecutions – Jurisdiction

Prosecutions are presently conducted under the jurisdiction of the Industrial Magistrates Court with appeals being heard in the Industrial Court of Queensland. This will change under the New WHS Act to the jurisdiction of the Magistrates Courts with appeals to be heard by the District Court and so on in the usual system.

Penalties

Both financial penalties and maximum jail terms for officers and individuals will be increased under the New WHS Act.

By way of example, under the Current WHS Act, the maximum penalty for a corporation is \$1 million and is available in circumstances involving multiple fatalities. This will be increased to a maximum penalty of \$3 million under the New WHS Act.

Key Points: Overall, the proposed amendments will see Queensland businesses having to take a more proactive approach in administering their workplace health and safety obligations. Whilst executive officers will have the benefit of not being 'deemed' to have committed an offence if the corporation breaches its WHS obligations, officers will still have to exercise due diligence in ensuring workplace health and safety

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to the extent that it is 'reasonably practicable'.

The changes also bring with it tougher penalties with an increase of at least three times the current financial penalty demonstrating that the New WHS Act is aimed at facilitating greater compliance with workplace health and safety obligations.

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