



Harmonisation of OHS

Work Health and Safety Act Queensland

November 2011

WLQ is a division of  msl
MEMBERSHIP MANAGEMENT SOLUTIONS

General



Topics Covered in this Presentation:

- General Introduction
- Who is Covered
- The Duty - to do what is "Reasonably Practicable"
- Work Health and Safety Duties
- Due Diligence
- Consultation with Workers and Representatives
- Enforcement Measures
- Offences and Penalties

General



The new laws:

- Come into effect from 1st January 2012;
- Replace existing work health and safety laws in all states and territories (bar WA);
- Aim to give greater certainty and consistency, particularly for employers operating across borders;
- Based on model WH&S Laws developed by Safe Work Australia; and
- Regulated in Queensland by WHSQ

Purpose of the Act



S.3

- Protect the health and safety of “workers and other people” by eliminating or reducing workplace risks.
- Ensure effective representation, consultation and cooperation to address health and safety issues in the workplace.
- Encourage unions and employers to take a constructive role in improving health and safety practices.
- Promote information, education and training on health and safety.
- Provide effective compliance and enforcement measures.
- Deliver continuous improvement and progressively higher standards of health and safety.

Purpose of the Act



S.3

Regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is ***reasonably practicable***.

Coverage



Who is covered by the WHS Act?

S.7 Definitions - Meaning of Worker

- “**Worker**” now includes employees, contractors, subcontractors, outworkers, apprentices and trainees, work experience students, volunteers and employers who perform work.

Wider definition than “employee”

Coverage



Who is responsible under the Act?

S.5 Persons Carrying on a Business or Undertaking - "PCBU"

- (1) (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.
- (2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.
- (3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.
- (4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.
- (5) An elected member of a local government does not in that capacity conduct a business or undertaking.
- (6) A regulation may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.
- (7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.
- (8) volunteer association means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

"Reasonably Practicable"



Reasonably practicable (section 18)

The guiding principle of the WHS Act is that all people are given the highest level of health and safety protection from hazards arising from work, so far as is **reasonably practicable**.

The term 'reasonably practicable' is less than an absolute obligation.

It means what could reasonably be done at a particular time to ensure health and safety measures were in place.

“Reasonably Practicable”



S.18 In determining what is **reasonably practicable**, relevant matters include:

- The likelihood of a hazard or risk occurring (i.e. the probability of a person being exposed to harm).
- The degree of harm that would result if the hazard or risk occurred (i.e. the potential seriousness of injury or harm).
- What the person concerned knows, or ought to reasonably know, about the hazard or risk and ways of eliminating or minimising it the availability of suitable ways to eliminate or minimise the hazard or risk.
- The cost of eliminating or minimising the hazard or risk.

TIP: Regulations, Codes, Australian Standards and industry practice will all be relevant.

Cost of Reasonably Practical Measures



- Ordinarily, cost will not be the key factor in determining what it is reasonable for a duty holder to do unless it can be shown to be ‘grossly disproportionate’ to the risk.
- If the risk is particularly severe, a PCBU will need to demonstrate that costly safety measures are not reasonably practicable due to their expense and that other less costly measures could also effectively minimise the risk.

TIP: Decisions involving WH&S which are subject to budgetary control or restriction are likely to be scrutinised in the event of an accident - so keep good records of the decision making process!

Work Health and Safety Duties



General principles (sections 13-17)

The WHS Act outlines the general health and safety duties of PCBUs, officers of companies, unincorporated associations, government departments and public authorities (including local governments), workers and other people at a workplace.

These general duties require the duty holder to ensure health and safety, so far as is **reasonably practicable**, by eliminating risks to health and safety.

If this is not possible, risks must be minimised so far as is **reasonably practicable**.

Duties of a PCBU



Primary duty of care (section 19)

- The WHS Act requires all PCBUs to ensure the health and safety of workers, so far as is reasonably practicable. Workers include volunteers, contractors and contractors' workers.
- PCBUs also have the same duty of care to any other people who may be at risk from work carried out by the business.
- A self-employed person must ensure his or her own health and safety while at work, so far as is reasonably practicable.

Duties of a PCBU



General duties (sections 19-26)

The WHS Act sets out specific duties which a PCBU must comply with as part of their general duty so far as is reasonably practicable. These include:

- Providing and maintaining a working environment that is safe and without risks to health, including the entering and exiting of the workplace.
- Providing and maintaining plant, structure and systems of work that are safe and do not pose health risks (e.g. providing effective guards on machines and regulating the pace and frequency of work).
- Ensuring the safe use, handling, storage and transport of plant, structure and substances (e.g. toxic chemicals, dusts and fibres).
- Providing adequate facilities for the welfare of workers at workplaces under their management and control (e.g. washrooms, lockers and dining areas).

Duties of a PCBU



- Providing workers with information, instruction, training or supervision needed for them to work safely and without risks to their health.
- Monitoring the health of their workers and the conditions of the workplace under their management and control to prevent injury or illness.
- Maintaining any accommodation owned or under their management and control to ensure the health and safety of workers occupying the premises.

Duties of a PCBU



- In addition, a PCBU with management or control of a workplace must ensure, so far as is **reasonably practicable**, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace do not affect the health and safety of any person.
- Similarly, a PCBU with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is **reasonably practicable**, that the fixtures, fittings and plant do not affect the health and safety of any person.
- PCBU who installs, erects or commissions plant or structures must also ensure all workplace activity relating to the plant or structure including its decommissioning or dismantling is without risks to health or safety.

Duty of Officers



Duty of officers (section 27)

It is the duty of an officer of a PCBU to exercise **due diligence** to ensure the PCBU complies with its health and safety duties and obligations.

An officer may be charged with an offence under the WHS Act independently of any breach of duty by the PCBU.

Duty of Officers



Who is an **Officer**?

Corporations Act Definition

- Director or Secretary of a company
- Person who makes or participates in making decisions that affect the whole of substantial part of the company
- Person who has the capacity to significantly affect the company's financial standing, in accordance with whose instructions or wishes the directors are accustomed to act.

Managers, CEO's, CFO's, HRO's, CIO's???

Duty of Officers Due Diligence



S27(5) Due diligence includes personally taking reasonable steps to:

- Acquire and keep current information on work health and safety matters.
- Understand the nature and operations of the work and associated hazards and risks.
- Ensure the PCBU has, and uses, appropriate resources and processes to eliminate or reduce risks to health and safety.
- Ensure the PCBU has appropriate processes to receive and consider information about incidents, hazards and risks, and to respond in a timely manner.
- Ensure the PCBU has, and implements, processes for complying with their duties and obligations (e.g. reports notifiable incidents, consults with workers, complies with notices, provides training and instruction and ensures HSRs receive training entitlements).

Duty of Officers



Officer Checklist

- Acquire and keep up to date knowledge of WHS issues
- Understand fully the nature of the business or undertaking at all stages and steps to fully appreciate and identify the hazards and risks
- Take reasonable steps to ensure appropriate resources and processes to eliminate/deal with the hazards and risks
- Ensure there are appropriate processes to receive and consider information regarding hazards and risks and to respond to them in a timely fashion.
- Be satisfied that compliance process is in place for notification, consultation, instruction and training .

Consultation (Sections 46 - 49)



A PCBU has a duty to consult with:

- Workers and HSRs about matters that directly affect them
- Contractors and their workers
- Employees of labour hire companies
- Students on work experience
- Apprentices and trainees
- The PCBU's own employees and volunteer workers.

There may be a number of different duty holders involved in work (e.g. suppliers, contractors and building owners). If more than one person in the workplace has a health and safety duty they must consult all other people with the same duty. Each duty holder must share information in a timely manner and cooperate to meet health and safety obligations.

Consultation



Consultation, cooperation and coordination (sections 46-49)

Consultation is a collaborative process between the PCBU and any workers undertaking work within or for the business or undertaking. It involves sharing information about health and safety. PCBU's must give workers who are, or are likely to be, directly affected by a matter relating to health and safety, a reasonable opportunity to express their views or raise issues. If an HSR is representing workers, the consultation must involve them.

Consultation



A PCBU must consult with workers when:

- Identifying hazards and assessing risks arising from work
- Proposing changes that may affect the health and safety of workers
- Carrying out activities prescribed by the WHS Regulation.

Consultation



A PCBU must also consult with workers and take their views into account when making decisions about:

- Ways to eliminate or minimise risks
- The adequacy of facilities for workers' welfare
- Procedures for consulting workers
- Resolving health and safety issues
- Monitoring the health and safety of workers or workplace conditions
- How to provide health and safety information and training to workers.

Consultation



Consultation Short Summary

- Share relevant information
- Give workers an reasonable opportunity to express their views and contribute to the decision making process
- Take account of the views of workers
- Advise workers of the outcome of any decision making process

Provisional Improvement Notices



Provisional improvement notices (sections 90-102)

If an HSR reasonably believes that a person is contravening, or has contravened the WHS Act in circumstances that make it likely that the contravention will continue or be repeated, they must consult with the person before issuing a provisional improvement notice (PIN).
Guide to the Work Health and Safety Act 2011 23

A PIN must be in writing and include:

- That the HSR believes the WHS Act is being contravened or has been contravened in circumstances that make it likely that the contravention will continue or be repeated.
- The section of the WHS Act considered to have been contravened and how the section is being or has been contravened
- The date (at least eight days from the issue date) by which the contravention must be remedied.

A PIN can include directions on how to remedy a contravention. These directions may refer to a Code of Practice and offer the person a choice of solutions.

Provisional Improvement Notices



- If a PCBU receives a PIN they must display it in a prominent place in the workplace, or part of the workplace, at which work is being carried out that is affected by the notice.
- Within seven days of being issued with a PIN, any person (or the PCBU if the person issued with the PIN is a worker), can ask WHSQ to review the notice. An inspector will attend the workplace to confirm the notice, confirm it with changes or cancel it.
- A confirmed PIN must be complied with.
- The inspector will give a copy of their decision to the person who applied for the review and the HSR who issued the notice.

Direct Workers to Cease Unsafe Work (sections 83-89)



- If an HSR has a reasonable concern that carrying out work would expose a worker to a serious health and safety risk, the HSR may direct a worker to cease work. However they must first attempt to resolve the matter with the PCBU unless the risk is so serious and immediate that it is not reasonable to consult first. In this case, the HSR must consult the PCBU as soon as practicable after giving the direction.
- A PCBU, worker or HSR may request an inspector to attend the workplace and assist in resolving an issue with the cessation of work

Entry Permit Holders



Entry permit holders (section 131-137, 149)

A WHS entry permit holder is a **union official** who has completed an approved training course and holds a valid and current entry permit under the Commonwealth *Fair Work Act 2009* or the Queensland *Industrial Relations Act 1999*.

An entry permit allows the holder to investigate suspected contraventions of the WHS Act, meet with workers and exercise their legal rights under WHS Act.

Workplace health and safety entry permit holders must show their identification upon request.

Suspected Contraventions



Suspected contraventions (sections 117-120, 144-146)

A WHS entry permit holder may enter a workplace during working hours to inquire into a contravention if they reasonably suspect one has or is occurring and may:

- inspect any work or thing that directly relates to the matter,
- talk to any worker who is entitled to be represented by the union and warn anyone they believe is exposed to a serious health or safety risk.
- consult with the PCBU about the matter,
- request to look at, and make copies of, relevant records or documents kept at the workplace in hard copy or on a computer.
- inspect or make copies of employee records that are directly relevant to the contravention or other documents that are directly relevant that are not held by that PCBU. (At least 24 hours notice of the entry must be given.)

A workplace health and safety entry permit holder must advise the PCBU and person with management or control of the workplace of their entry as soon as reasonably practicable unless in an urgent case.

A person must not, without reasonable excuse, refuse or unduly delay a permit holder's entry to a workplace, or obstruct them from exercising their rights. A PCBU must not, without reasonable excuse, refuse or fail to comply with this request, however they do not have to make records available if this breaches the *Privacy Act 1988* (Cth).

Functions and Powers of Inspectors



Functions and powers of inspectors (sections 156,160-162)

Inspectors have the following functions and powers:

- To provide information and advice about how to comply with the law
- To help resolve work health and safety issues
- To help resolve right of entry disputes
- To review a disputed PIN
- To issue notices to require compliance with the law
- To investigate contraventions and assist to prosecute offences.

An inspector in a workplace may require a person to provide information about and access to a document, as well as answers to questions. While inspectors will be able to compel answers, the answers to questions or information provided can not be used as evidence against that person in civil or criminal proceedings. Inspectors may also copy and retain documents and seize evidence.

Powers of Entry



Powers of entry (sections 163-166)

An inspector may enter a workplace, or a suspected workplace, at any time with or without the consent of the person with management or control. If it is not a workplace they must leave immediately.

An inspector must show their identification on request.

An inspector must advise the PCBU, person with management or control of the workplace and any HSR they have entered the workplace as soon as practicable. This is not needed if it would defeat the purpose of entry or cause unreasonable delay.

An inspector entering a workplace can:

- Inspect, examine and make inquiries
- Inspect, examine and seize anything, including documents
- Bring and use any equipment or materials they may need
- Take measurements, conduct tests, and make sketches or recordings (e.g. photographs, films, audio and video)
- Take and remove samples for analysis.

A person may accompany an inspector to a workplace if they require assistance. An inspector can also require a person at a workplace to give them reasonable help to do these things. A person asked to assist must not, without reasonable excuse, refuse or fail to comply.

Enforcement Measures



Improvement notices (sections 191-193)

- An inspector may issue an improvement notice if they **reasonably believe** a person is contravening, or has contravened the WHS Act or WHS Regulation in circumstances that make it likely that a contravention will continue or be repeated.
- The notice will identify the provisions of the WHS Act that have or may have been contravened, the reasons for the notice, and a reasonable date to fix the contravention by. An improvement notice may also include directions and/or recommendations about how to fix or prevent a contravention.
- A person issued with an improvement notice must comply.

Enforcement Measures



Prohibition notices (sections 195-197)

- An inspector may issue a prohibition notice if they reasonably believe an activity involves a serious risk to a person's health or safety from immediate or imminent exposure to a hazard.
- The notice prohibits the activity continuing or being carried out in a specific way, and is issued to the person with control over the activity.
- It may include directions on how to remedy the risk and remains in place until an inspector is satisfied the risk has been fixed.
- A person issued with a prohibition notice must comply.

Enforcement Measures



Non-disturbance notices (sections 198-200)

- If an inspector believes it is necessary to enable them to exercise their powers, they may issue a non-disturbance notice to the person with management or control of a workplace.
- A notice may require the person to preserve the site or prevent disturbance for up to seven days, and must include the measures to be taken to do so.
- A person issued with a non-disturbance notice must comply.

Enforcement Measures



Injunctions (section 215)

- WHSQ may apply to the Magistrates Court for an injunction to require or compel a person to comply with a notice, or to restrain them from contravening a notice.
- An injunction can be sought even if separate proceedings are underway about a matter to which the notice relates.

Enforcement Measures



Infringement notices

- Infringement notices ('on the spot' fines) may be issued by inspectors as an alternative to prosecution for prescribed offences.
- An infringement notice can be withdrawn by the person who issued it within 28 days of issue.
- The withdrawal of an infringement notice does not prevent other proceedings in relation to the alleged offence (unless the penalty has already been paid even if refunded).
- If the penalty imposed by an infringement notice is paid within the set time, no proceedings may be taken for the offence and no conviction recorded. A payment can not be taken as an admission of guilt or liability for any future civil claim. Prosecution may take place if penalties are not paid.

Enforcement Measures



Remedial action (sections 211-213)

- If a person to whom a prohibition notice is issued fails to take reasonable steps to comply with the notice, WHSQ may take any remedial action it believes is reasonable to make the workplace or situation safe.
- The costs of undertaking the remedial action will be charged to the PCBU or the owner of the premises; however, they can only be recovered by WHSQ if a notice has been given of its intention to take the action and the PCBU or owner's liability for the cost of that action.

Enforcement Measures



Enforceable undertakings (sections 216-222)

- WHSQ may accept a work health and safety undertaking given by a person in connection with a contravention or an alleged contravention of the Act.
- However, a work health and safety undertaking cannot be accepted for a Category 1 offence.
- An undertaking takes effect and becomes enforceable when WHSQ's decision to accept it is given to the person.
- A person who has made an undertaking may apply to WHSQ to change or withdraw the undertaking.
- An undertaking is not an admission of guilt.
- If a person contravenes a work health and safety undertaking, WHSQ may apply to the Magistrates Court.
- In addition to imposing a penalty for the breach, the court may make an order directing the person to comply with the undertaking or discharging the undertaking, as well as orders directing the person to pay the costs of the proceedings and the reasonable costs of monitoring compliance with the undertaking in the future.

Offences and Penalties (sections 30-34)



The WHS Act provides for three categories of offences for breach of health and safety duties and outlines the maximum penalties that apply to an individual, a PCBU, a worker or an officer of a corporation or unincorporated association, and to a body corporate.

Category 1 – a duty holder engages in conduct that recklessly exposes a person to a risk of death or serious injury or illness. This offence is a crime and will be prosecuted in the District Court.

Category 2 – a duty holder fails to comply with a health and safety duty that exposes a person to risk of death or serious injury or illness.

Category 3 – a duty holder fails to comply with a health and safety duty. Proceedings for Category 2 and 3 offences will be taken summarily in the Magistrates Court.

Offences and Penalties



Volunteers are exempt from prosecution for failure to comply with a health and safety duty owed by a PCBU (ss.19-26) or an officer of a corporation or unincorporated association (s.27). Volunteers are, however, liable for duties owed as workers (s.28) or other people at a workplace (s.29).

An **unincorporated association** is also exempt from prosecution. However, an officer of the unincorporated association (other than a volunteer) may be prosecuted for a failure to comply with an officer's duty (s.27) and a member of the association may be prosecuted for failure to comply with the duty of a worker (s.28) or of another person at a workplace (s.29).

Offences and Penalties



Penalties for breach of health and safety duty offences are outlined in the following table:

- Corporation
- Individual as PCBU or officer
- Individual as worker or other

	Corporation	Individual as PCBU or officer	Individual as worker or other
Category 1	\$3 million	\$600,000, five years jail or both	\$300,000, five years jail or both
Category 2	\$1.5 million	\$300,000	\$150,000
Category 3	\$500,000	\$100,000	\$50,000

Offences and Penalties



In addition to the above penalties, courts may impose additional or alternative sentencing options and other types of orders including:

- Adverse publicity orders
- Restoration orders
- Work health and safety project orders
- Court ordered work health and safety undertakings
- Injunctions
- Training orders

Summary



- Definition of “Worker” broadened.
- Employer broadened to “PCBU”
- Obligation to do what is “reasonably practicable.
- Prosecution must prove breach beyond reasonable doubt.
- Offences now graded into categories.
- Consultation, representation and participation rights and obligations are expanded.
- HSR roles and powers expanded.
- Gives rise to significant workplace rights-which if denied-may give rise to **adverse action claims**.
- Powers of inspectors-are extensive

How we can help you?



- General and specific advice on WHS Issues
- Assist in advising on compliance issues
- Representation in any investigation process
- Representation in any prosecutions
- Drafting policies and procedures
- Urgent attendances at your workplace
- Associated claims

Contact Details



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