



## GET UP TO DATE WITH WA'S NEW WORK HEALTH AND SAFETY LAWS

WA's new work health and safety ("WHS") legislation is expected to come into force in January 2022.

The *Work Health and Safety Act 2020 (WA)* ("WHS Act") will replace the current *Occupational Safety and Health Act 1984 (WA)* and parts of some other legislation, including the *Mines Safety and Inspection Act 1994 (WA)* and the *Petroleum and Geothermal Energy Resources Act 1967 (WA)*.

The WHS Act is largely based on the national model WHS laws used in other states and territories (except Victoria), so companies will have similar obligations and requirements across Australia.

Some of the key features of the WHS Act are as follows:

### 1. Persons Conducting a Business or Undertaking

PCBU is a new term to WA's WHS laws and stands for Person Conducting a Business or Undertaking. It is a term which is intended to capture a broader range of contemporary workplace relationships. PCBUs are required to ensure, so far as is reasonably practicable, the health and safety (including psychological health) of:

- workers engaged, or caused to be engaged, by the PCBU; and
- workers whose activities in carrying out work are influenced or directed by the PCBU,

while the workers are at work or in the business or undertaking.

This primary duty of care requires the PCBU to ensure health and safety, so far as is reasonably practicable, by eliminating risks to health and safety. If this is not reasonably practicable, risks must be minimised so far as is reasonably practicable.

PCBUs owe a similar duty of care to other people who may be at risk from work carried out by the business or undertaking (e.g. visitors to the workplace).

### 2. Officers' Duties

Under the WHS Act, an "officer" of a PCBU must exercise due diligence to ensure that the PCBU complies with its duties and obligations under the WHS Act. This is a positive duty which requires officers to be proactive and means that they owe a continuous duty to ensure compliance with duties and obligations under the WHS Act.

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An “officer” includes, but is not limited to, a director or secretary of a corporation and a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, or who has the capacity to affect significantly the corporation’s financial standing, or in accordance with whose instructions or wishes the directors of the corporation are accustomed to act.

Due diligence includes taking reasonable steps to:

- Acquire and keep up-to-date knowledge of WHS matters;
- Gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations;
- Ensure that the PCBU has, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety carried out as part of the conduct of the business or undertaking;
- Ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- Ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the WHS Act; and
- Verify the provision and use of the relevant resources and processes.

A company director can be held liable even though they play a limited direct role in the operation of the business. This will happen where directors leave the decision-making to management but without at the same time making consistent and on-going enquiries aimed at ensuring that management was both capable and competent of discharging the company’s statutory obligations as to safety.

### **3. Industrial Manslaughter**

One of the most significant changes in the new legislation is the inclusion of a penalty provision for the new offence of industrial manslaughter. Under section 30A of the WHS Act, a PCBU commits the crime of industrial manslaughter if:

- the PCBU engaged in conduct (an act or omission) that caused the death of an individual;
- the conduct constituted a failure to comply with a health and safety duty; and
- the PCBU knew that the conduct was likely to result in death or serious harm and acted in disregard of that likelihood.

An officer of a PCBU may also be found guilty of industrial manslaughter where the PCBU’s conduct that constitutes the failure is attributable to any neglect on the part of the officer or is engaged in with the officer’s consent or connivance.

The offence carries maximum penalties of 20 years imprisonment plus a penalty of \$5 million for an individual and \$10 million for a body corporate.

It is intended that introducing industrial manslaughter provisions in the WHS Act will have a strong deterrence effect and it accords with community expectations that every worker has the right to come home safely after a day at work.

#### 4. Increased Penalties

All penalties have increased under the WHS Act.

The maximum penalties for a breach of WHS offences are as follows:

Offence	Duty Holder		
	Body Corporate	Individual as a PCBU or officer	Individual as worker or other
Industrial Manslaughter	\$10 million	\$5 million and/or 20 years in gaol	Not applicable
Where conduct in failing to comply with a duty caused the death of, or serious harm to, a person.	\$3.5 million	\$680,000.00 and/or 5 years in gaol	\$340,00.00 and/or 5 years in gaol
Where conduct in failing to comply with a duty exposed a person to the risk of death, injury or harm to health.	\$1.8 million	\$350,000.00	\$170,000.00
Where there is a failure to comply with a duty.	\$570,000.00	\$120,000.00	\$55,000.00

An officer may be charged with an offence under the WHS Act whether or not the PCBU has been convicted of an offence under the WHS Act and whether or not an incident has occurred.

Companies cannot indemnify employees, so if a penalty is imposed on an officer, the money must come from the officer's own pocket.

#### 5. No Insurance

PCBUs and officers can no longer obtain insurance coverage for WHS penalties. Insurance can still pay for legal fees, however when it comes to paying a penalty, company officers and PCBUs cannot take out insurance to cover fines for breaches. Penalties will be imposed for providing or purchasing this insurance.



## **What you should do**

Workplace participants have until January 2022 to become familiar with the provisions of the WHS legislation. Transitional arrangements will be in place where duties are new or substantially changed from existing requirements.

Murfett Legal recommends that officers and PCBUs obtain early advice regarding their obligations and take the following steps to adapt their safe systems of work to the new requirements:

1. Gain information by moving around your business, visiting different sites and directly asking workers for their opinions about WHS hazards and risks (including your own employees, contractors and their workers, employees of labour hire companies, students on work experience, apprentices and trainees);
2. Implement an occupational health and safety policy (or review your existing policies and procedures);
3. Ensure that you have a system for the transparent reporting of WHS issues;
4. Ensure that you have a system for monitoring your workplace safety performance;
5. Diarise to regularly review your safety systems to make sure they are in step with legal requirements;
6. Ensure that every board meeting has work, health and safety as a topic on the agenda;
7. Implement and maintain safety induction and training programs for workers; and
8. Implement a comprehensive contractor management system and ensure that a rigorous procedure for engaging contractors and subcontractors is followed.

The Department of Mines, Industry Regulation and Safety (“**DMIRS**”) has been delivering education on the new legislation and has issued publications (including interpretive guidelines) designed to help WA organisations and their associated workforces (including volunteers) prepare for the new WHS legislation. We recommend that employers review these as they become available and register for updates from DMIRS, WorkSafe WA and relevant industry bodies.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

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