



# **WORK HEALTH AND SAFETY IN AUSTRALIA**

A HARMONISED APPROACH

CLAYTON UTZ

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# CONTENTS

<b>Part 1: Introduction</b>	<b>3</b>
<b>Part 2: Development of the Model WHS Legislation</b>	<b>5</b>
<b>Part 3: General WHS Law</b>	<b>7</b>
Overview	7
Commonwealth and State legislation	7
Key differences across jurisdictions	9
<b>Part 4: Major Concepts</b>	<b>10</b>
General duties and the primary duty of care	10
Who is a PCBU?	11
Who is covered?	12
So far as is reasonably practicable	12
General risk management	14
Systematic WHS management	15
Australian Standards	16
Regulations	18
Codes of Practice	19
Contractor management	19
Consultation	21
Workers obligations	23
Officer obligations	24
<b>Part 5: Offences and Regulators</b>	<b>28</b>
Regulators and Inspectors	28
Enforcement and prosecution of offences	30
Incident notification	34
Legal professional privilege	37
Union involvement and right of entry	38
<b>Part 6: Specific regimes</b>	<b>42</b>
Electrical safety in the workplace	42
Mining and Resources	49
Construction	56
Specific duties relating to construction work	57
Petroleum and gas	64
Aviation	66
Rail	67
Marine	67
Heavy vehicles	68
<b>Part 7: Common risks and how they are managed in the legislation</b>	<b>69</b>
Fitness for work and health monitoring	69
Fatigue management	72

Drug and alcohol testing.....	77
Workplace bullying .....	80
<b>Part 8: Conclusion.....</b>	<b>82</b>
<b>Part 9: Tools to assist .....</b>	<b>83</b>
<b>Part 10: Key Contacts .....</b>	<b>84</b>
<b>Part 11: Footnotes .....</b>	<b>85</b>

## PART 1: INTRODUCTION

Work health and safety (**WHS**) is a key priority in every business. All companies value their workers and are committed to their employees returning home safe to their family and friends at the end of a work day. How then is there such a complex and ever changing legislative framework relating to WHS and why is it so often an area of dispute between employers, contractors, unions and workers?

In July 2008, the Council of Australian Governments (**COAG**) formally committed to the harmonisation of WHS laws by signing an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (**the IGA**). The introduction of harmonised WHS laws in Australia represented a watershed moment in the development of Australian WHS regulation. While the laws emanated from a process of harmonisation of existing state and territory-based WHS laws, the final outcome went well beyond that.

On 1 January 2012, new WHS laws commenced in New South Wales, Queensland, the Australian Capital Territory, the Commonwealth and the Northern Territory. A year later, South Australia and Tasmania implemented similar laws. Both Western Australia and Victoria have indicated an intention to overhaul their safety legislation. We are yet to see how closely this will reflect the harmonised WHS laws.

These efforts have culminated in the most significant reform to WHS laws in Australia in over thirty years. The changes have positioned safety at the forefront of corporate decision making and reflect the need for the law to accommodate changes in the way in which work is arranged and executed.

Often the underlying tension arises from a misconception that because every person's acceptance of personal risk is different - so too is each employer's. However, this misconception misses the fundamental premise of most safety legislation which is to provide a systemised approach to ensure safety "so far as reasonably practicable". This approach does not rely on a person's value judgement of what is or is not safe, but provides a system that operates at all levels to "ensure" safety.

Safety systems which are unwieldy, inflexible or out of alignment with the way work is done will inevitably lead to safety systems which are not followed. This not only fails to reduce risk but can lead to increased incidents and a greater likelihood of prosecution if an incident occurs.

This booklet provides a high level overview of safety regulation in Australia and identifies some steps organisations can take to ensure their systems are practical, flexible, innovative and above all workable.

As our clients are generally organisations we use the term “organisation” throughout as the main obligation holder. However, there are obligations on persons conducting a business or undertaking which may not necessarily be an organisation.

## PART 2: DEVELOPMENT OF MODEL WHS LEGISLATION

In the mid-1980s, a collaborative and consultative process for developing greater consistency in WHS regulations began. It led to the development of National Standards and National Codes of Practice by the National Occupational Health and Safety Commission (the **NOHSC**), a tripartite body comprising representatives from Commonwealth, State and Territory WHS regulators, industry and unions. The National Standards were developed in consultation with a broad range of stakeholders including after extensive consultation with the public.

There was no binding agreement nationally on the adoption and implementation of the National Standards, so the degree and level of adoption varied between jurisdictions. Some of the reasons for this included the differences between the jurisdictional WHS Acts, differences between legislative drafting protocols, and jurisdictions choosing to adopt the National Standards as a Code of Practice rather than as regulation.

The lack of national consistency of WHS regulations became the subject of two major reviews; the Industry Commission<sup>1</sup> and the Productivity Commission<sup>2</sup>. The Productivity Commission’s 2006 report reiterated the concerns from its earlier findings<sup>3</sup> and recommended the implementation of national consistent standards for WHS. The importance of harmonised WHS laws was also recognised at this time by the COAG as part its National Reform Agenda aiming to reduce regulatory burdens and create a seamless national economy. The National Standards were used as the basis for developing the harmonised model WHS Regulations.

Following the recommendations outlined in the various government reports, COAG directed the Workplace Relations Ministers’ Council (**the WRMC**) to develop strategies to improve the implementation and uptake of national WHS standards and to identify priority areas that should be harmonised in the principal WHS Acts in each state and territory. In February 2008, the WRMC<sup>4</sup> initiated a review of the existing laws in order to develop model legislation. Following that decision, Terms of Reference for the review were agreed on by the WRMC and, in April 2008, a panel was established to undertake the review.

In May 2008, the panel produced an Issues Paper inviting submissions on 152 questions raised on the various aspect of WHS regulation. The panel consulted widely and produced two reports in October 2008 and January 2009<sup>5</sup>. The COAG signed the IGA in July 2008 which set out the principles and processes for cooperation between the Commonwealth,

states and territories to implement model legislation. Under the IGA, the Commonwealth Government and each of the states and territories agreed to implement a harmonised legislative regime involving a *Model Work Health and Safety Act 1* (WHS Act), and supported by WHS regulations, model Codes of Practice and a National Compliance and Enforcement Policy.

The IGA also established the means by which national uniformity of the WHS legislation would be maintained by creating processes for the justification and adoption of changes. It was complemented by consistent approaches to achieve compliance and enforcement by the end of 2011. The IGA marked the first time all jurisdictions formally committed to harmonise WHS laws in Australia within a set timeframe.

On 18 May 2009 the WRMC considered the recommendations contained in the two reports produced by the panel<sup>6</sup> and engaged Safe Work Australia to develop the model WHS laws. The model WHS Act, model WHS regulations and model Codes of Practice are the outcome of that process.

The main objective of the model WHS Act is to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. It aims to achieve this by:

- ▶ protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work; and
- ▶ providing for fair and effective workplace representation, consultation, co operation and issue resolution on WHS; and
- ▶ encouraging unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
- ▶ promoting the provision of advice, information, education and training on WHS; and
- ▶ securing compliance with the WHS Act through effective and appropriate compliance and enforcement measures; and
- ▶ ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under the WHS Act; and
- ▶ providing a framework for continuous improvement and progressively higher standards of WHS; and
- ▶ maintaining and strengthening the national harmonisation of laws on WHS.<sup>7</sup>

## PART 3: GENERAL WHS LAW

### Overview

Currently, the Commonwealth, New South Wales, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory have adopted WHS laws based on the model WHS legislation. Victoria and Western Australia have yet to pass amended legislation.

- ▶ In Western Australia, the Minister for Commerce tabled the bill in parliament and public consultation for this draft legislation has now closed.
- ▶ In Victoria, the government announced they will not be adopting the model WHS laws in their current form.

The cumulative effect of these pieces of legislation has had significant impact on WHS regulation within the Australian commercial environment. The various Commonwealth and state legislation which regulates WHS are tabled below.

### Commonwealth, State and Territory legislation

Jurisdiction	Legislation
Commonwealth	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i> (Cth)</li> <li>▶ <i>Work Health and Safety Regulations 2011</i> (Cth)</li> <li>▶ <i>Work Health and Safety (Transitional and Consequential Provisions) Act 2011</i> (Cth)</li> </ul>
Australian Capital Territory	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i> (ACT)</li> <li>▶ <i>Work Health and Safety Regulation 2011</i> (ACT)</li> </ul>
New South Wales	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i> (NSW)</li> <li>▶ <i>Work Health and Safety Regulation 2011</i> (NSW)</li> <li>▶ <i>Work Health and Safety (Mines) Act 2013</i></li> </ul>

Jurisdiction	Legislation
Northern Territory	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety (National Uniform Legislation) Act 2011</i> (NT)</li> <li>▶ Work Health and Safety (National Uniform Legislation) Regulations 2011 (NT)</li> <li>▶ <i>Work Health and Safety (National Uniform Legislation) Implementation Act 2011</i> (NT)</li> <li>▶ <i>Work Health Administration Act 2011</i> (NT)</li> </ul>
Queensland	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i> (Qld)</li> <li>▶ Work Health and Safety Regulation 2011 (Qld)</li> <li>▶ Work Health and Safety (Codes of Practice) Notice 2011 (Qld)</li> </ul>
South Australia	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2012</i> (SA)</li> <li>▶ Work Health and Safety Regulations 2012 (SA)</li> </ul>
Tasmania	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2012</i> (Tas)</li> <li>▶ Work Health and Safety Regulations 2012 (Tas)</li> <li>▶ <i>Work Health and Safety (Transitional and Consequential Provisions) Act 2012</i> (Tas)</li> </ul>
Western Australia	<ul style="list-style-type: none"> <li>▶ <i>Occupational Safety and Health Act 1984</i> (WA)</li> <li>▶ Occupational Safety and Health Regulations 1996 (WA)</li> <li>▶ <i>Occupational Safety and Health (Validation) Act (1999) 1998</i> (WA)</li> <li>▶ Work Health and Safety Bill 2014 (WA)</li> </ul>

Jurisdiction	Legislation
Victoria	<ul style="list-style-type: none"> <li>▶ <i>Occupational Health and Safety Act 2004</i> (Vic)</li> <li>▶ Occupational Health and Safety Regulations 2007 (Vic)</li> <li>▶ <i>Equipment (Public Safety) Act 1994</i> (Vic)</li> <li>▶ Equipment (Public safety) Regulations 2007 (Vic)</li> </ul>

## Key differences across jurisdictions

Although the WHS laws have been harmonised, the Commonwealth, States and Territories are responsible for making and enforcing their own WHS laws. Although there are many similarities between the laws there are also some differences that can cause confusion.

**For the laws that follow the model WHS Act, these differences include:**

- ▶ material differences that address specific concerns arising in the specific jurisdiction, for example industry-specific exclusions and specific risk-based content, rights of inspectors, unions and health and safety representatives and adoption of certain codes of practice;
- ▶ differences specifically provided for in the model WHS Act to allow for procedural and jurisdictional differences occurring in different jurisdictions, for example the use of injunctions, undertakings and rights of review; and
- ▶ minor differences that ensure consistency with other legislation in the specific jurisdiction on style and defined terms, for example the use of penalty units.

The differences between the Victorian and Western Australian Acts and the other jurisdictions are greater, as those States have not yet adopted the model legislation.

## PART 4: MAJOR CONCEPTS

### General duties and the primary duty of care

The primary duty of care is a central provision in the model WHS Act, which in many cases is supplemented by a series of further specific obligations.

The primary duty of care is owed by “a person conducting a business or undertaking” (**PCBU**). For the purpose of this booklet, we will use the terms PCBU and organisation interchangeably. The duty is owed to “workers” and “others”. Essentially, the duty requires that a PCBU ensures so far as it is reasonably practicable, the health and safety of workers and other persons affected by the business or undertaking.<sup>8</sup> A PCBU must ensure, so far as is reasonably practicable:

- ▶ the provision and maintenance of a work environment without risks to health and safety;
- ▶ the provision and maintenance of safe plant and structures;
- ▶ the provision and maintenance of safe systems of work;
- ▶ the safe use, handling, storage and transport of plant, structures and substances;
- ▶ the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;
- ▶ the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- ▶ that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

The duty is a proactive one, so there does not need to be an injury to the worker or other person for an offence to occur.

### Who is a PCBU?

A PCBU is a person conducting a business or undertaking, alone or with others, whether or not for profit or gain.<sup>9</sup>

#### This definition includes:

- ▶ organisations including not for profit organisations;
- ▶ partnerships and joint ventures;
- ▶ unincorporated associations;
- ▶ self-employed persons.

#### Examples of a PCBU include:

- ▶ retailers;
- ▶ wholesale businesses;
- ▶ manufacturing businesses;
- ▶ an importer that is on selling imported goods;
- ▶ an owner/driver of their own transport or courier business;
- ▶ a government department;
- ▶ a local council;
- ▶ a school;
- ▶ a charity;
- ▶ a manufacturer employing outworkers.

The WHS Act excludes persons engaged solely as a worker or officer of the business or undertaking, volunteer associations, and individuals who undertake domestic or private work around their own home.

## Who is covered?

The duty is to ensure the safety of “workers” who are “at work”. The relationship between the PCBU and the protected workers does not have to be a direct contractual relationship, however, at minimum the worker must have been “caused to be engaged” by the PCBU, or the worker’s work activities must be “influenced or directed” by the PCBU. The duty extends to:

- ▶ contractors engaged by the PCBU and their employees;
- ▶ sub-contractors, sub-sub-contractors and their employees; and
- ▶ volunteers.

The effect of the duty is that employees of contractors at the bottom of the contract chains may be owed a primary duty by parties above in the chain. Examples include:

- ▶ outworkers at the bottom of a supply chain in the clothing and textile industry being owed the primary duty by the retailer at the head of the chain;
- ▶ a labour hire agency and a host employer owing the primary duty to the labour hire worker; and
- ▶ a franchisor owing a duty to the franchisee, and subsequently any individuals employed by the franchisee.

## So far as is reasonably practicable

The model WHS Act places a duty on those conducting a business or undertaking to eliminate or minimise risk “so far as is reasonably practicable”. Reasonably practicable means that which is, or at a particular time was, reasonably able to be done to ensure health and safety, taking into account and weighing up all the relevant matters. This includes:<sup>10</sup>

### The likelihood of the hazard or the risk concerned occurring:

- ▶ the greater the likelihood of a risk eventuating, the greater the likelihood of action taken to eliminate or minimise that risk being viewed as reasonably necessary.

### The degree of harm that might result from the hazard or the risk:

- ▶ the greater the degree of harm that may result, the more onerous the responsibility of the duty-holder to eliminate or minimise that particular 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:

- ▶ a duty-holder can be expected to take reasonable steps to identify hazards or risks in the workplace by, for example, consulting their workers and others in the industry, undertaking risk assessments, analysing previous incidents and considering relevant regulations and Codes of Practice.
- ▶ the court may have regard to control measures contained in Codes of Practice as evidence of what is known about a hazard or risk, risk assessment or risk control, and rely on this to determine what is reasonably practicable in the circumstances.
- ▶ a duty-holder can introduce evidence of compliance with the WHS Act in a manner that is different from the code but provides a standard of WHS that is equivalent to or higher than the standard required in the code.
- ▶ more generally, organisations should identify as many methods for minimising risk as possible so the most appropriate can be considered and applied to the particular circumstances.

### The availability and suitability of ways to eliminate or minimise the risk:

- ▶ equipment will generally be regarded as available if it is provided in the open market or can be manufactured.
- ▶ a method for eliminating a risk will generally be considered to be suitable if it is effective in eliminating or minimising the likelihood or degree of harm emanating from a risk, does not introduce new risks and is practical to implement in the circumstances.

### After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

The cost of a method will be relevant when considering the reasonableness of implementing it. The duty-holder must balance safety and cost, however only after assessing the extent of the risk and the available ways of managing it.

It is not enough to simply declare that a control measure is too expensive. There is a clear presumption in favour of safety. A more significant cost will be reasonable to be incurred where there is a higher likelihood and degree of harm, and the particular method employed in mitigating that risk is highly effective.

Often in making such a decision an organisation will rely on expert opinion. It is important that such opinion is documented and fully informed.

As the High Court outlined in *Baiada*, the prosecution cannot simply point to an act the person conducting a business or undertaking might have taken. The person only has to take such steps as are “reasonably practicable”.

Similarly, while an organisation won’t be able to simply say it is “entitled” to rely on its independent contractors, it also shouldn’t be convicted simply for failing to exercise a theoretical right of direction.

Persons conducting a business or undertaking can’t simply outsource the problem and should take a serious look at their outsourcing arrangements.

## General risk management

The model WHS Act requires organisations to take a risk-based approach to safety. Rather than prescribing specific actions that must be undertaken, it requires organisations to consult with their workers, health and safety representatives and in some cases external consultants (where there is insufficient in-house experience or a risk is too complex) in order to identify and appropriately manage risk in accordance with the WHS Act and regulations. PCBUs must:<sup>11</sup>

### Identify hazards

PCBUs are required to find out what could cause harm to workers and visitors at their workplace. The PCBU should consult with workers and analyse every task undertaken to find potential risks. PCBUs can obtain industry-specific information from regulators, unions and other external entities. Manufacturers and suppliers may supply safety data sheets for specific substances and instruction manuals for plants or processes. A PCBU is expected to analyse internal records of health monitoring, workplace incidents, sick leave and other relevant materials. Identified hazards should be documented as part of the risk management process together with the ways identified for managing the risk (as outlined below).

### Assess risks

PCBUs are required to consider the possible result of exposure to a hazard and the likelihood of it occurring. The expected complexity of a risk assessment will depend on the types of hazards involved in the particular work and the information, data and resources that are available to the PCBU.

### Control risks

An organisation is expected to implement measures to control identified risks. An organisation must, where reasonably practicable, first look to eliminate the hazard altogether by substituting it with something that creates a lesser risk, isolating the hazard from any person exposed to it and/or implementing engineering controls. Only after it has been determined that the risk cannot reasonably be eliminated, can remaining risk be minimised by implementing administrative controls (e.g. directives, policies and procedures) and providing exposed persons with personal protective equipment (e.g. safety boots, glasses and gloves).

### Review control measures

Risk management is an ongoing process and organisations are expected to take into account changes in the workplace by reviewing procedures and risk controls:

- ▶ on a regular basis;
- ▶ when it no longer controls the risk so far as is reasonably practicable;
- ▶ prior to any change in the workplace that is likely to give rise to a new risk; and/or
- ▶ when a new hazard is identified.

The WHS Act also provides specific times when the risk management process must be reviewed including when a consultation process indicates that a review is necessary, when a health and safety representative requests a review and where a control measure has not previously been adequately reviewed.

## Systematic WHS management

Systematic WHS management requires an ongoing process to prevent, detect, and abate workplace hazards. The key elements include:

- ▶ senior management drive the WHS management strategy;
- ▶ a planned approach to WHS management;
- ▶ a comprehensive approach to risk management;
- ▶ workers are actively involved and legally entitled to perform WHS functions;

- ▶ a local understanding of WHS management and WHS “know-how”;
- ▶ arrangements to address WHS for contractors and other non-employment work relationships;
- ▶ the organisation learns from past experience;
- ▶ WHS management policy, procedures and action taken are documented, complexity of documentation is minimised, and understanding and ownership of principles by those implementing is maximised;
- ▶ WHS management is monitored using positive performance indicators; and
- ▶ WHS management is integrated into the organisation’s other management arrangements.<sup>12</sup>

Although the model WHS Act makes little reference to systematic WHS management, the primary and specific duties require a person to ensure health and safety by eliminating and minimising risks to health and safety so far as is reasonably practicable - and this requires a systemised approach.

## Australian Standards

Organisations can be guided by AS/NZS 4801:2001, the Occupational Health and Safety Management Systems (OHSMS) Standard (Standard), used as the benchmark to assess OHSMS for organisations in Australia and New Zealand.<sup>13</sup> The Standard is a voluntary and useful tool however compliance with it does not guarantee compliance with legal obligations under the WHS legal framework. Whilst this Standard is not enforceable in itself, it may be incorporated into contracts. Certain organisations must be certified to the Standard as a prerequisite to entering building contracts funded by the Australian Government under the Australian Government Building and Construction WHS Accreditation Scheme.

The Standard requires organisations to establish and maintain an effective OHSMS. This is achieved through five main steps:<sup>14</sup>

### Creating an Occupational Health and Safety (OHS) policy

Organisations are required to create a OHS policy which clearly sets out OHS objectives. This must be authorised by the organisation’s top management.

## Planning

Organisations must establish, implement and maintain documented procedures for hazard identification, risk assessment and control of hazards. They must also maintain procedures to identify and access information about legal requirements under applicable WHS laws, and this should be communicated to staff. OHS objectives and targets should be established in accordance with identified risks and legal requirements. Management plans should be created which designate responsibility, and outline means and timeframes for achieving the objectives and targets.

## Implementation

Management must identify and provide the necessary human resources, specialised skills, technology and financial resources required to implement the OHSMS. They must define, document and communicate areas of accountability and responsibility of all personnel involved in the OHSMS’s operation. Employees should be consulted to identify training needs and develop training procedures on OHS functions. There should be documented procedures for employee involvement and consultation in OHS issues, communication of pertinent OHS information, timely reporting of incidents for OHS monitoring and maintenance of relevant data and records. There should also be a documented procedure for identifying, assessing and controlling risks as well as a process for evaluation of those steps. All potential emergency situations should be identified and procedures documented for preventing and mitigating the associated risks.

## Measurement and Evaluation

Documented procedures should be developed to regularly monitor and measure the key characteristics of the organisation that can cause illness or injury, as well as the health of employees who may be exposed to specific hazards. Organisations should implement procedures for investigating and recording OHS incidents and for appropriate corrective and preventative action to be taken in response to such incidents. An audit program should be created for evaluating the effect of the OHSMS. The results of these audits should be provided to management and employees.

## Management Review

Management should periodically review the OHSMS to ensure its continuing suitability, adequacy and effectiveness. These reviews must be documented and take into consideration relevant audit results, changing circumstances and the commitment to continuing improvement.

## Regulations

The model WHS Act is accompanied by the model WHS regulations. The regulations assist with harmonisation between jurisdictions and therefore aim to reduce complexity and compliance costs for businesses operating across jurisdictions. To date, each jurisdiction that has enacted laws following the model WHS Act has also adopted the model regulations.

The regulations consist of mandatory obligations on organisations on specific matters, in the form of processes or outcomes that must be followed or achieved to satisfy their general duty under the WHS Act. Chapter 1 of the model regulations acts as a preliminary, and chapters 2-11 consist of the specific areas being regulated. They are (and please note any state-specific variations footnoted below):

- ▶ Chapter 2 - Representation and Participation;
- ▶ Chapter 3 - General Risk and Workplace Management;
- ▶ Chapter 4 - Hazardous Work;
- ▶ Chapter 5 - Plant and Structures;
- ▶ Chapter 6 - Construction Work;
- ▶ Chapter 7 - Hazardous Chemicals;<sup>15</sup>
- ▶ Chapter 8 - Asbestos;
- ▶ Chapter 9 - Major Hazard Facilities;<sup>16</sup>
- ▶ Chapter 10 - Mines;<sup>17</sup> and
- ▶ Chapter 11 - General (including transitional provisions).

Organisations must ensure that they comply with all relevant obligations under the regulations to avoid breaching the general duty under the model WHS Act. Unlike previous health and safety legislation in some jurisdictions, compliance with the regulations does not automatically discharge the general duty placed on organisations.<sup>18</sup> The model WHS regulations do not limit the duty imposed by the model WHS Act.

This means that an organisation who has complied with all obligations under the regulations may still be in breach of its general duty under the model WHS Act if they have failed, for example, to ensure the health and safety of a worker so far as is reasonably practicable. However, a failure to comply with a relevant regulation does constitute a breach of the relevant WHS Act provision,<sup>19</sup> and may be used as evidence of a failure to comply with the

general duty of care. Additionally, a regulation may have its own prescribed penalty for non-compliance.

## Codes of Practice

Safe Work Australia is responsible for developing model Codes of Practice to support the model WHS Act and regulations. These are intended to provide practical guidance for organisations in achieving the standards prescribed by the WHS Act. They generally relate to a specific industry or practice, for example the Concrete Pumping Code of Practice 2005 and the Sugar Industry Code of Practice 2005. Once submitted to and approved by the Workplace Relations Ministers' Council, the Minister responsible for WHS legislation in each jurisdiction is committed to implement the model Code of Practice. At the date of writing, there are 40 Codes of Practice in force in Queensland. They may be accessed on the website of the Department of Justice and Attorney-General.<sup>20</sup>

The Codes of Practice do not carry the same force as the WHS Act and regulations; a PCBU cannot be prosecuted for failure to comply. That said, they are admissible in court proceedings as evidence of knowledge of a hazard, risk, control or "reasonable practicability". They may also be relied upon by a WHS inspector when issuing an improvement or prohibition notice.

## Contractor management

Contractors, sub-contractors and employees fall under the definition of "worker" in the model WHS legislation.<sup>21</sup> This means that organisations owe the primary duty not only to contractors they engage directly, but also to any other people or groups that those contractors engage. The people lower down in the chain do not need to have a direct contractual relationship with the organisation for a duty to be owed. The model WHS Act also prohibits organisations from contracting out of WHS obligations or transferring them to a third party.<sup>22</sup>

For example, where a building developer contracts a crane company, who sub-contracts a second crane company due to shortage of resources, the principal company still owes the primary duty to the sub-contractors even though they did not engage them directly. The developer has caused the sub-contractor to be involved in the business or undertaking by making an agreement with the principal contractor. In such a case the sub-contractors are owed the primary duty by both the PCBU and the principal contractor. It is important for PCBUs and principal contractors to consult regularly to ensure both are meeting their duties.

Often a contractor will be engaged because they have a special skill or area of expertise outside of the PCBU's own knowledge. In such a case, the PCBU is entitled to rely on the expertise of the specialist to perform the specific task safely. However the PCBU still has the responsibility to ensure that the specialist:

- ▶ does in fact have the required expertise required to carry out the work safely;
- ▶ has systems and processes in place that consider WHS and will ensure the work is carried out safely;
- ▶ is carrying out the work in a way that does not create WHS risks for other employees in the workplace;
- ▶ is working in an environment that meets WHS requirements.

The following steps should be taken by a PCBU who is engaging contractors or labour hire workers: <sup>23</sup>

#### **Before the workers arrive on site:**

- ▶ provide the contractor or agency with detailed information about the work to be carried out, the work environment, plant or equipment to be used,
- ▶ WHS requirements of the PCBU, any WHS risks associated with the work, and any specific skills or knowledge required to perform the work safely;
- ▶ verify that the workers who will be carrying out the work have the necessary qualifications or licenses;
- ▶ consult with the contractor or agency on WHS matters such as who will provide safety equipment and what standards need to be met;
- ▶ consult with the contractor or agency to ensure general WHS information has been provided to the workers;
- ▶ eliminate (or minimise) any risks in the workplace;
- ▶ establish open communication with the contractor or agency including points of contact for WHS issues and an agreed means and frequency of communication;

#### **When the workers arrive to perform the work:**

- ▶ provide a site-specific safety induction including any policies or procedures of the PCBU on WHS;
- ▶ provide adequate supervision of external workers to ensure tasks are being performed safely;
- ▶ provide any specific training or information before transferring a worker to a new task on the site;
- ▶ provide for frequent consultation between the PCBU, the contractor or agency, and the workers themselves;
- ▶ engage a qualified independent verifier to conduct regular audits to ensure the workers have complied with instructions and obligations.

It is important to consider the consequences of directing contractors to perform a task in a certain way to comply with WHS obligations. Giving directions may increase a PCBU's liability, breach the contracting agreement, and blur the distinction between contractor and employee. To avoid these issues, PCBUs should ask a contractor how they plan to remedy any safety issues they identify, rather than giving them directions. Appropriate consultation and compliance audit systems should allow for safety issues to be resolved without interfering with the relationship between the PCBU and the contractor.



## **Consultation**

The model WHS Act places considerable emphasis on consultation. From the outset, consultation must be distinguished from mere communication. A PCBU must, so far as is reasonably practicable:

- ▶ consult, cooperate and coordinate activities with all other persons who have a duty in relation to the same matter (this will include principal contractors)<sup>24</sup>; and
- ▶ consult with workers who carry out work for the business or undertaking who are, or are likely to be directly affected by a matter relating to WHS (including a principal contractor's employees and sub-contractors).<sup>25</sup>

PCBUs are required to share information with workers and allow workers to have a reasonable opportunity to be involved in the process and be informed of any outcome.

The duties to consult impose distinct penalties, and are not predicated upon a PCBU breaching any other health and safety duty to be applicable.

The table below sets out what form of consultation is required and when it is required under the WHS Act.<sup>26</sup>

Consultation includes that:	Consultation is required:
Relevant information is shared with workers	▶ When identifying hazards and assessing risks arising from the work carried out or to be carried out
Workers are given a reasonable opportunity to express their views and to raise WHS issues	▶ When making decisions about ways to eliminate or minimise those risks
Workers are given a reasonable opportunity to contribute to decision making	▶ When making decisions about the adequacy of facilities for the welfare of workers
The views of workers are taken into account	▶ When proposing changes that may affect the health and safety of workers

Consultation includes that:	Consultation is required:
Workers are advised of outcomes of the consultation process in a timely way	<ul style="list-style-type: none"> <li>▶ When making decisions on procedures for:</li> <li>▶ consulting with workers</li> <li>▶ resolving WHS issues at the workplace</li> <li>▶ monitoring the health of workers</li> <li>▶ monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking</li> <li>▶ providing information and training for workers</li> <li>▶ when carrying out any other activity prescribed under a regulation for this section</li> </ul>

## Workers obligations

Workers have a critical role to play in the delivery of safety outcomes. By law, while at work workers must take reasonable care for their own personal health and safety, the health and safety of their fellow workers, and that of other people, such as members of the public who may be affected by their activities at work.

They are also required to follow the reasonable directions of the PCBU to allow the PCBU to comply with the WHS Act. This includes the obligation for workers to cooperate with reasonable WHS policy and procedures they have been notified of.<sup>27</sup>

The standard of the duty is to take “reasonable care” expected in their “individual capacity” as a worker. This means for example, taking into

account the degree of control they have over work activities and work environment. This duty is not strict or absolute, it simply requires that a worker does what is reasonably able to be done to ensure the health and safety of people at work who may be affected by their acts and omissions at work. Further, the actual intent of the worker is not relevant. In determining whether “reasonable care” was taken, matters which will be taken into account include the worker’s:

- ▶ state of knowledge;
- ▶ training;
- ▶ qualifications;
- ▶ expertise; and
- ▶ the worker’s experience and seniority.

## Officer obligations

Under the WHS Acts, officers have a proactive duty to ensure that the PCBU is complying with its primary duty.<sup>28</sup> An officer is obliged to exercise due diligence, essentially by ensuring that the PCBU has appropriate WHS systems in place and by monitoring and evaluating WHS management on an ongoing basis.

For the purposes of the WHS Acts, an officer includes:

- ▶ a director or secretary of the PCBU; or
- ▶ a person:
  - (a) who makes, or participates in making decisions that affect the whole or a substantial part, of the business of the PCBU; or
  - (b) who has the capacity to affect significantly the PCBU’s financial standing;
  - (c) in accordance with whose instructions or wishes the directors of the PCBU are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the persons professional capacity or their business relationship with the directors or the corporation);
- ▶ as well as an administrator, liquidator, or receiver manager of an organisation.<sup>29</sup>

When deciding if a person is someone who participates in making decisions that affect a substantial part of the business, the relevant considerations include whether the person has an ongoing or repeated involvement with the making of decisions in the company. These decisions do not need to directly relate to WHS, as other decisions such as organisational structure and resource allocation may indirectly affect how WHS is managed.

To determine what constitutes a substantial part of the business, considerations include contribution to the revenue and reputation of the business, the number of personnel engaged in that part of the business, whether it is considered to be a core part of the organisation, and whether the decision makers can affect strategy.

The recent decision of the ACT Industrial Court found Kenoss Contractors guilty of breaching their duties under the WHS Act, however, Mr Munir al-Hasani, a project manager, was not found guilty. Both Kenoss and Mr al-Hasani were charged under section 32 of the WHS Act. The court held that Mr al-Hasani’s role did not rise to the level of an officer as while he managed the area that involved the relevant risk, his role did not extend to affecting the whole, or a substantial part of the business.

The definition of an officer also includes volunteer officers, people who are engaged in one of the roles listed above but without remuneration or reward. Volunteer officers have the same duty as other officers to exercise due diligence, but cannot be prosecuted for failing to comply with that duty.<sup>30</sup> However, a volunteer can still be compelled to comply with the duty if issued with an improvement notice by the regulator (see Enforcement and prosecution of offences on page 30).

The WHS Act places obligations of due diligence on officers because they can strongly influence the culture of a business or undertaking through their decisions and behaviour, and they make decisions regarding the resources that will be made available for WHS purposes and what WHS policies will be developed and implemented.

The WHS Act also provides a checklist of steps and actions that constitute due diligence.<sup>31</sup> In summary, exercising due diligence requires an officer to take reasonable steps to:

1. acquire and keep up-to-date knowledge about health and safety matters;
2. understand the business operations and operation’s hazards and risks;

3. ensure that there are appropriate resources and processes available in order to eliminate or minimise risks;
4. ensure there is a protocol or process for obtaining, and considering information about incidents, hazards and risks and respond to that information in a timely fashion;
5. ensure there are processes for compliance with WHS duties and obligations and that they are implemented. For example, reporting procedures, appropriate consultation with workers and other relevant parties, ensuring the provision of WHS training and ensuring compliance with notices issued under the WHS Act; and
6. be able to verify the matters in (1) to (5) above, which from a practical aspect, means to have a process that closes the loop on the manner in which the directors and officers evidence compliance with these steps.

This checklist is not exhaustive, and there may be other things required of an officer to show that they have exercised due diligence, for example appropriate management of contractors.

An officer is required to take reasonable steps in exercising due diligence. What is considered reasonable will depend on the individual circumstances of the officer, including their role and level of influence. Officers may be entitled to rely on the information and activities of others, but must be able to demonstrate the reasonableness of that reliance.

Importantly, the duty of an officer under the WHS Acts is separate from the PCBU's duty. An officer will not be held liable simply because a PCBU has failed to comply with its duty of care. A PCBU may fail to comply even though its officers have exercised appropriate due diligence, and conversely an officer may be found to have breached his or her duty even though the PCBU has not breached the general duty.

The following are examples of things a PCBU can do to assist its officers to satisfy their due diligence requirements:

- ▶ have an appropriate governance structure in place with people who are appropriately authorised and accountable to enable WHS to be attended to;
- ▶ develop information gathering and reporting processes to facilitate the flow of WHS information and advice to officers, to allow the officers to

understand hazards and risks, be aware of the performance obligations of the organisation, and make decisions accordingly;

- ▶ provide education and assistance to officers regarding documentation, minutes and protocols developed to ensure that the officers:
  - A. turn their mind to the significant hazards and risks of the operations; and
  - B. close out and minute appropriately matters which are addressed;
- ▶ maintain a written register or other record of decisions made which are likely to affect a substantial part of the business. The record should include the subject matter and purpose of the decision, who made the decision, who else was involved in the decision making process, and any other relevant matters in the decision making process.

Other steps to evidence engagement and due diligence include systematic ongoing education, verifying and benchmarking of issues through experts which may include receiving industry reports, annual presentations by experts, attending seminars etc. Particular care should be taken to ensure directors who do not have an operational role are able to evidence compliance.



## PART 5: OFFENCES AND REGULATORS

### Regulators and Inspectors

It is the responsibility of the Commonwealth, as well as each state and territory to regulate and enforce WHS in their individual jurisdiction. Each jurisdiction has its own Regulator and regulatory bodies, and each version of the model act sets out procedures for appointing a Regulator. For example in Queensland the Regulator is an individual who holds a public service office and is appointed to the position under the *Public Service Act 2008*, while in New South Wales the WHS Act specifies that the Regulator is the WorkCover Authority constituted under the *Workplace Injury Management and Workers Compensation Act 1998*.

Regulators across all jurisdictions have a broad range of functions, including to:

- ▶ monitor and enforce compliance with the WHS Act and WHS regulations;
- ▶ provide advice and information on WHS to duty holders and the community;
- ▶ foster a cooperative, consultative relationship between duty holders and the people to whom they owe WHS duties, and their representatives;
- ▶ promote and support education and training on matters relating to WHS;
- ▶ engage in, promote and coordinate the sharing of information to achieve the object of the WHS Act, including the sharing of information with other WHS regulators;
- ▶ conduct and defend legal proceedings under the WHS Act;
- ▶ collect, analyse and publish statistics relating to WHS;
- ▶ promote public awareness and discussion of WHS matters in the community; and
- ▶ perform any other function conferred on the Regulator by the WHS Act.<sup>32</sup>

The Regulator has the power to do all things necessary and convenient to be done for or in connection with the performance of these functions, including delegating powers or functions to another person.

In order to achieve the function of monitoring and enforcing compliance with the WHS Act and regulations, the Regulator may appoint inspectors to perform the following functions:

- ▶ to provide information and advice about how to comply with the WHS Act and regulations;
- ▶ to help resolve WHS issues at workplaces;
- ▶ to help resolve issues about entry to workplaces by assistants to Health and Safety Representatives (**HSRs**) and WHS entry permit holders under the WHS Act;
- ▶ to review disputed provisional improvement notices;
- ▶ to require compliance with the WHS Act by issuing notices;
- ▶ to investigate contraventions and assist to prosecute offences; and
- ▶ to attend coronial inquests in respect of work-related deaths and examine witnesses.

Inspectors remain subject to the Regulator's directions when exercising powers in relation to enforcement and compliance.

Inspectors have the power to enter workplaces with or without consent and without any prior notice. Entry may be in response to complaints, notification of serious incidents, or proactively as part of a program or campaign. The WHS Act gives inspectors a broad spectrum of inspection and investigative powers. An inspector who has entered a workplace can:

- ▶ make inquiries;
- ▶ inspect and examine anything (including a document) that is at the workplace;
- ▶ remove a document (either a copy or original, however if it is an original the inspector must make it available to the document's owner and the person who provided it at all times)
- ▶ take measurements, conduct tests and make recordings (including sketches, photographs, audio or video recordings);
- ▶ remove samples for analysis without paying compensation to the PCBU;

- ▶ require a person at the workplace to provide reasonable help with the exercise of the inspector's powers (the person must not, without reasonable excuse, fail to comply); and
- ▶ exercise any enforcement power that is reasonably necessary.

Upon entry an inspector must inform the PCBU, the person with management or control of the workplace, and any HSRs that the inspector has arrived, and provide identification on request. If the place that the inspector has entered is not a workplace, they must leave immediately unless they have a search warrant or consent of the person in control of the site. Inspectors may apply for search warrants to enter a place that is not a workplace if they have reasonable grounds that evidence of a WHS violation is at the place (or will be within 72 hours).

Inspectors have the power to require a person to provide a name and address, if the inspector finds them committing an offence against the WHS Act, reasonably believes that they have committed an offence against the WHS Act, or reasonably believes that the person may be able to assist in an investigation.

It is an offence for a person to refuse or fail to comply with an inspector's request without a reasonable excuse, except if information or a document that has been requested is subject to legal privilege. Inspectors may compel self-incriminating answers to questions but cannot use them as evidence in civil or criminal proceedings, unless the proceeding arises out of the false or misleading nature of the answer. It is an offence to refuse to answer an inspector's question on the grounds of self-incrimination unless the inspector has not given the appropriate warning (identifying the inspector and making the person being questioned aware of the offences under the act and the effect of legal privilege).

## Enforcement and prosecution of offences

Enforcement of obligations under the WHS Acts is achieved through the issuing of notices to remedy non-compliance, as well as offences with pecuniary and non-pecuniary penalties for breaching the acts.

The types of notices that can be issued by inspectors and the Regulator include:

### Improvement notices

A written notice that requires a contravention of the WHS Act or regulations to be remedied within a certain time period; or a likely future contravention to be prevented in circumstances where it is likely a contravention will continue or repeat. The notice must include the investigator's belief about the contravention, specify which provision of the legislation is being contravened, how the provision is being or has been contravened and provide a reasonable date by which to remedy the contravention. The notice may also include recommendation on how to remedy the contravention. The deadline for compliance may be extended by the Regulator if it has not yet been reached.

### Prohibition notices

A written notice that prohibits an activity at a workplace from continuing or being carried out in the first place. This type of notice is issued if an inspector reasonably believes that an activity involves a serious risk to health and safety from exposure to a hazard. The notice remains in force until the inspector is satisfied that the risk has been fixed. The notice may include recommendations or directions to remedy the risk. A failure to strictly comply with these recommendations is not an offence, so long as the risk is remedied.

### Non-disturbance notices

A written notice given to a person with management or control over a workplace to preserve a "notifiable incident" site. The notice can only be issued where the inspector reasonably believes that a site needs to be undisturbed for the purposes of exercising compliance powers. The notice can require non-disturbance for up to seven days, and must be complied with unless the person issued with the notice has a reasonable excuse for non-compliance.

Notices must be displayed prominently at or near the workplace concerned, until the notice has been fully complied with. It is an offence to remove, damage or destroy a notice while it is in force. The Regulator may apply to a court for an injunction to compel compliance with a notice, or prevent contravention of a notice.

The decision of an inspector is subject to internal review by the Regulator. An application for review of a decision must be brought within the longer of

the time specified in the notice or 14 days. The Regulator may confirm, vary, or set aside the initial decision and make another course of action.

If the applicant of the internal review is unsatisfied with the internal review, they may apply for an external review of that decision by the relevant appeals tribunal in each jurisdiction. The application for external review must be made within 14 days of the applicant receiving notice of the internal review decision, unless the decision involved forfeiture of an item or thing in which case the time limit is 28 days.

Aside from the above notices, other enforcement measures available to inspectors as an alternative to prosecution include:

### Infringement notices

These notices are on-the-spot fines issued by inspectors for minor offences as an alternative to prosecution.

### Enforceable undertakings

An enforceable undertaking is available as an alternative to prosecution for all but the most serious offences (category 1 offences) under the WHS Acts. It is a legally binding contract between the regulator and the PCBU, where the PCBU promises to improve WHS in its workplace, and sometimes to undertake WHS initiatives in the industry or wider community, in exchange for the Regulator not bringing criminal proceedings. Giving an enforceable undertaking is not an admission of guilt on the part of the PCBU. If the undertaking is contravened then the Regulator may seek to prosecute the original contravention.

In addition to the issuing of enforcement notices by inspectors, the model WHS Act provides for three categories of criminal offences for breach of duties under the act. Category 1 is the most serious, and category 3 is the least:

- ▶ Category 1 – a duty holder, without reasonable excuse, engages in conduct that recklessly exposes a person to a risk of death or serious injury or illness.
- ▶ 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.

The maximum penalties are different depending on the category of the offence and whether the offender is an a worker, a PCBU, an officer, or a corporation.

	Corporation	PCBU or officer	Worker
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

Unincorporated associations cannot be prosecuted, however officers of an unincorporated association can. Volunteers cannot be prosecuted as officers but may be if they only acted in the capacity of a worker.

A court may decide to impose an alternative penalty to those outlined in the above table. These alternative penalties include:

- ▶ adverse publicity orders;
- ▶ restoration orders;
- ▶ work health and safety project orders;
- ▶ court-ordered work health and safety undertakings;
- ▶ injunctions; and
- ▶ training orders.

Finally there are a number of other specific offences under the model WHS Act aside from breaches of duty, including offences in relation to:

- ▶ incident notification;
- ▶ authorisations;
- ▶ consultation;

- ▶ the establishment of work groups;
- ▶ health and safety representatives;
- ▶ health and safety committees;
- ▶ discriminatory, coercive or misleading conduct;
- ▶ the Regulator and inspectors; and
- ▶ WHS entry permit holders.

Many of these offences are mentioned in the relevant sections of this booklet.

## Incident notification

Part 3 of the WHS Act provides that PCBUs are to immediately notify the Regulator after becoming aware of a 'notifiable incident' and preserve the scene of that incident until an inspector arrives or instructs otherwise. PCBUs may also be required to provide written notification of an incident within 48 hours of a request from the Regulator. Failure to adhere to the obligations under Part 3 is a criminal offence and penalties apply.

A notifiable incident must arise out of the conduct of a business and it is not necessarily relevant whether the event actually takes place at or near the workplace. For example, if a worker suffers a heart attack at work which has nothing to do with the conduct of the business, then this is likely not a notifiable incident. On the other hand, if scaffolding collapses and causes a risk of serious injury to persons adjacent to the construction site (but not on the worksite), then this is likely to be a notifiable incident.

A 'notifiable incident' includes any of the following events if they arise out of the conduct of a business or undertaking at a workplace and relate to any person, whether an employee, contractor or member of the public:

- ▶ The death of a person.
- ▶ A 'serious injury or illness' which results in, or would ordinary require, immediate treatment:
  - » as an in-patient in a hospital;
  - » for the amputation of any part of the body;
  - » for a serious head injury (e.g. fractured skull, loss of consciousness);
- » for a serious eye injury (e.g. likely to result in loss of eye or vision);
- » for a serious burn (e.g. requiring intensive care or a compression garment/skin graft);
- » for the separation of skin from an underlying tissue (e.g. degloving or scalping);
- » for a spinal injury;
- » for the loss of a bodily function (e.g. loss of movement in limb or function in an organ);
- » for serious lacerations (e.g. causing muscle, tendon, nerve or blood vessel damage);
- ▶ A 'serious injury or illness' caused by exposure to a substance that results in or would ordinarily require medical treatment within 48 hours of the incident.
- ▶ A 'serious illness' involving any infection which is reliably attributable to carrying out work:
  - » with micro-organisms;
  - » that involves providing treatment or care to a person;
  - » that involves contact with human blood or body substances; or
  - » that involves handling or contact with animals, animal hides, skins, wool or hair, animal carcasses or animal waste products.
- ▶ Occupation zoonoses contracted in the course of work involving handling or contact with animals, animal hides, skins, wool or hair, animal carcasses or animal waste products, including:
  - » fever;
  - » Anthrax;
  - » Leptospirosis;
  - » Brucellosis;
  - » Hendra Virus;
  - » Avian Influenza; and
  - » Psittacosis.

- ▶ A ‘dangerous incident’ (commonly referred to as ‘near misses’), which is any incident in relation to a workplace that exposes a worker or any other person to a serious risk of a serious illness or injury resulting from an immediate or imminent exposure to:
  - » an uncontrolled escape, spillage or leakage of a substance;
  - » an uncontrolled implosion, explosion or fire;
  - » an uncontrolled escape of gas or steam;
  - » an uncontrolled escape of a pressurised substance;
  - » electric shock;
  - » the fall or release from a height of any plant, substance or thing;
  - » the collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be design or item registered under the WHS regulations;
  - » the collapse or partial collapse of a structure;
  - » the collapse or failure of an excavation or of any shoring supporting an excavation;
  - » the inrush of water, mud or gas in workings, in an underground excavation or tunnel; or
  - » the interruption of the main system of ventilation in an underground excavation or tunnel.

Following a notifiable incident at a workplace, the PCBU must ensure so far as is reasonably practicable that the incident site is not disturbed until an inspector arrives or directs otherwise. The requirement to preserve the site applies only to the immediate area where the incident occurred and not the entire workplace. An incident site may be disturbed to assist with an injured person, to remove a deceased person, to make the site safe, to facilitate a police investigation or after an inspector has provided directions to do so either in person or by telephone.

The PCBU is also charged with preserving any evidence that may assist the inspector with their investigation. The notifier must maintain records of the incident for five years, including any directions provided by the inspector. Failure to adhere to these requirements may attract penalties.<sup>33</sup>

## Legal professional privilege

When a WHS incident occurs or a safety concern otherwise comes to light, PCBUs often conduct investigations and produce reports detailing the results of these. The WHS Act empowers inspectors to inspect and obtain documents such as these to assist with their investigation. These may also be obtained via the discovery process in later court proceedings. PCBUs should be minded of the potential for such documents to be used as evidence in a range of legal proceedings against them, including prosecutions for breach of the WHS Act. The doctrine of legal professional privilege may provide limited protection in this respect if investigations of incidents and safety issues are genuinely undertaken for the purpose of obtaining legal advice or in anticipation of legal proceedings.

Legal professional privilege may render documents inadmissible as evidence in court. The privilege will attach to documents that are confidential between a client and its legal representatives and where such documents are prepared for the dominant purpose of giving or receiving legal advice, or in anticipation of legal proceedings.

The recent case of *Nicholson v Waco Kwikform Limited*<sup>34</sup> (‘the Kwikform case’) considered whether the privilege applied to internal investigation reports prepared by Kwikform following the fatal injury of a worker. WorkCover issued legal proceedings in order to obtain those reports, arguing that they had been produced for multiple purposes unrelated to the provision of legal advice or anticipated proceedings. They alleged that these reasons included, for example, to conform with Kwikform’s internal procedures relating to incident reporting. The NSW Industrial Relations Commission found that the reports were protected by privilege, stating ‘the dominant if not only purpose set out in the letter for the preparation of these documents was for the provision of legal advice’. This was demonstrated by the early engagement of solicitors by Kwikform, the fact that the reports had been commissioned by the solicitors for the specified purpose of assisting them in providing legal advice and by the marking of each document as ‘privileged and confidential’.

However, the position is not necessarily as straightforward as the Kwikform case suggests. The decision of *Perry v Powercor Australia Ltd*<sup>35</sup> (‘the Powercor case’) is illustrative of the complications that may arise in attempting to rely on legal professional privilege. This case concerned the Black Saturday bushfires in Victoria and the involvement of Powercor, an electricity distributor alleged to have started the bushfire via negligent maintenance of a power line. Powercor had commissioned a number of

investigation reports in the wake of the incident and the applicants sought discovery of those on the basis that they were not commissioned for the dominant purpose of legal advice or anticipation of legal proceedings.

Rather, they argued that these documents were required for a multiplicity of reasons, including to identify the cause of the fire as part of its normal business operations and to comply with reporting obligations imposed by the *Electrical Safety Act 1998* (Vic). The Court ultimately held that the reports did not attract privilege and this decision was upheld by the Court of Appeal.<sup>36</sup> The decision was made on the basis that the assertions of privilege were not supported by evidence from Powercor employees, particularly on the non-legal purposes for which the reports were commissioned.

In practice it may be prudent for organisations to implement a procedure determining which incidents should be investigated with the benefit of legal professional privilege. This may include any incident which must be notified to the Regulator under Part 3 of the WHS Act, as these are more likely to form the basis of an external investigation and possibly legal action. Once determined, any such incident should be referred to solicitors to lead the investigation. The content of communication with them must be carefully worded to ensure that privilege is attached. This procedure should be communicated to senior employees and others likely to engage with solicitors following an incident.

 Consideration of whether legal advice is required should be done as soon as possible to ensure that privilege is established at an early stage. It is likely that privilege will be claimed on the basis of proposed / pending litigation as a result of the incident, or the dominant purpose of obtaining legal advice (as a consequence of the incident). At all stages of the process, organisations must be careful about what information is disclosed, as a key requirement to claiming privilege is that the information must be and remain confidential. Any acts inconsistent with this may waive inadvertently privilege.

## Union involvement and right of entry

*The Fair Work Act 2009* (Cth) (**FWA**) now makes provision for union officials who hold permits as required by the FWA with the right to enter a workplace to investigate breaches of the FWA. Only a WHS permit holder may enter a workplace for the purposes provided in the model laws and exercise the rights provided in the model laws.

A union may apply to the authorising authority for the issue of a WHS entry permit to a person who is an official of the union. That person must satisfactorily complete prescribed training, and also hold an entry permit under the FWA or relevant state or territory industrial law. The model laws include detailed provisions for making and considering an application for a WHS entry permit. The model laws also provide for disqualification of a person from obtaining a permit, and for imposing conditions, suspending or revoking a permit.

A WHS permit holder may only seek entry under the model laws in specified circumstances, which include:

- ▶ to enquire into a suspected contravention of the model laws that relates to or affects a relevant worker;
- ▶ the WHS permit holder must reasonably suspect that the contravention has occurred or is occurring, before entering the workplace; and
- ▶ to consult and advise relevant workers who wish to participate in discussions on WHS matters.

A WHS permit holder may enter a workplace immediately to enquire into a suspected contravention, but must as soon as is reasonably practicable after entering the workplace give notice of entry and the suspected contravention to the relevant person conducting a business or undertaking (unless giving the notice would defeat the purpose of the entry or unreasonably delay the permit holder in an urgent case).

A WHS permit holder must give written notice of intended entry to consult and advise workers at least 24 hours but not more than 14 days before the entry, unless the permit holder has given notice under s 487(1)(b) of the FWA to the person conducting a business or undertaking of the entry to hold discussions with workers. While immediate entry may be made to inquire into a suspected contravention (which may deal with a serious and immediate or imminent risk), entry to a workplace for the purposes of consultation and advice to workers is aligned to the provisions of the FWA.

Upon entry, the WHS permit holder must present for examination, on request, a photograph and entry permit. A WHS permit holder may only enter a workplace during usual working hours, and must not enter any part of a workplace that is used only for residential purposes.

A WHS permit holder may, upon entering a workplace to enquire into a suspected contravention:

- ▶ inspect any work system, plant, substance, structure or other thing relevant to a suspected contravention;
- ▶ consult with the relevant workers in relation to the suspected contravention;
- ▶ consult with the person conducting a relevant business or undertaking about the suspected contravention;
- ▶ acquire the relevant PCBU to allow the permit holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention that is kept at the workplace or is accessible from a computer that is kept at the workplace; and
- ▶ warn any person the entry permit holder reasonably believes to be exposed to a serious risk to his or her health or safety, emanating from an immediate or imminent exposure to a hazard, of that risk.

Although a WHS permit holder may immediately enter a workplace to inquire into a suspected contravention, the permit holder must give at least 24 hours' notice before entry for the purpose of inspecting or making copies of certain documents that are directly relevant to a suspected contravention.

A WHS permit holder may exercise a right of entry to a workplace only in the area of the workplace where the relevant workers work, or any other work area that directly affects the health and safety of those workers. Provisions of the FWA limiting the times during which consultation and advice may occur, and where within a workplace they may occur, are not included in the model laws.

The right of entry of a WHS permit holder is supported by prohibitions against a person refusing or delaying entry of a WHS entry permit holder, without reasonable excuse. A person must not intentionally and unreasonably hinder or obstruct a WHS entry permit holder in entering a workplace, or in exercising any rights at a workplace.

The model laws provide for breaches by a WHS permit holder, being:

- ▶ intentionally and unreasonably delaying, hindering or obstructing any person or disrupting any work at a workplace or otherwise acting in an improper manner;
- ▶ using or disclosing information or a document obtained in the exercise of entry powers for a purpose that is not related to the enquiry or rectifying of the suspected contravention, unless the permit holder reasonably believes that the use or disclosure is necessary to lessen or prevent a serious risk to a person's health or safety or to public health or safety, or the disclosure is a necessary part of an investigation or other legal process noted in the section.

A WHS permit holder must not exercise a right of entry to a workplace under the model laws unless that person complies with any reasonable request by a relevant organisation to comply with any WHS requirement that applies to the workplace, and any other legislated requirement that applies to that type of workplace. This is relevant to the reasonableness of an organisation or other person refusing or delaying entry to a workplace, or hindering or obstructing the WHS permit holder, and to the potential breach of a permit holder of acting in "an improper manner". Unlike the model WHS Act, in Queensland the *Work Health and Safety Act 2011* (Qld) requires WHS entry permit holders to give at least 24 hours' notice before entering a workplace for suspected contraventions. However the State Government introduced a bill on 7 May 2015 which proposes to return the Queensland legislation to the position under the model WHS Act.

## PART 6: SPECIFIC REGIMES

### Electrical safety in the workplace

#### Overview

Between 1 July 2000 and 31 October 2011, 321 people died from electrocution in cases closed by Australian coroners.<sup>37</sup> Of those which were unintentional, more than half occurred while the deceased was engaged in paid work.<sup>38</sup>

Poor electrical safety in the workplace creates a number of serious risks to the health and safety of workers and other people in a workplace. This includes:

- ▶ electric shock causing injury or death, which may be received by direct or indirect contact, tracking across a conductive medium, or arcing;
- ▶ explosion or fire causing burns;
- ▶ toxic gases causing illness or death as a result of fires in electrical equipment;
- ▶ falls from ladders or other high work positions due to electric shock; and
- ▶ muscle spasms, heart palpitations, nausea, vomiting and unconsciousness as a side effect of electric shock.

The risks of exposure to electrical hazards can depend on the type of equipment being used (for example older or portable equipment may have a greater chance of having damaged components and leads) and on the environmental conditions that equipment is operating in. Use of electrical equipment outdoors, in wet surroundings, and cramped spaces with earthed metalwork will generally increase the risk of electric shock and a resulting injury.

#### Implications for business

PCBUs have a responsibility to manage electrical risks, as far as is reasonably practicable, at their workplace as part of the primary duty under the model WHS Act. This includes ensuring that any electrical equipment the PCBU has control over is safe to use, and any equipment in a workplace shared by multiple PCBUs is safe to use even if the PCBU is not the owner of the equipment.

General steps to ensure the management of electrical risks and hazards include:

- ▶ identifying hazards such as:
  1. the design or construction of electrical equipment;
  2. how equipment has been installed;
  3. whether equipment is old or damaged;
  4. whether extension cords are damaged;
  5. the operating conditions of the equipment; and
  6. whether work is being carried out near electrical hazards such as overhead or underground power lines through consultation with workers, inspection and testing of equipment, and reviewing incident reports;
- ▶ if necessary, assessing the risks associated with these hazards by considering what the potential impacts of the hazard are and how likely the hazard is to cause harm;
- ▶ implementing and maintaining risk control measures (e.g. removing the hazard, isolating the hazard, substituting new equipment for old equipment, substituting safer equipment such as battery operated tools, installing residual current devices (RCDs) and ensuring proper protective equipment is worn by workers); and
- ▶ reviewing risk control measures.

The Safe Work Australia Code of Practice “Managing Electrical Risks in the Workplace” has further information about how to manage a large number of specific electrical risks that may be present in certain workplaces.

Part 4.7 of the model WHS regulation sets out specific obligations for PCBUs dealing with electrical equipment. There are monetary penalties under the regulations for:

- ▶ failing to disconnect and isolate unsafe electrical equipment;
- ▶ failing to ensure electrical equipment is inspected and tested by a competent person;

- ▶ failing to keep records of inspections and testing;
- ▶ allowing untested equipment to be used;
- ▶ allowing electrical work (installation, maintenance, etc) to be carried out on energised (“live”) equipment;
- ▶ failing to determine whether or not equipment is energised before electrical work is done on it;
- ▶ allowing equipment that has been de-energised to become re-energised during the course of electrical work;
- ▶ allowing unauthorised access to or contact with equipment that is being worked on; and
- ▶ failing to ensure the work is being carried out by a competent person with appropriate tools.

The regulations do permit electrical work to be carried out on energised equipment in certain circumstances, such as where it is necessary for the equipment to be energised for the work to be carried out properly, where it is necessary in the interests of health and safety, or where there is no other reasonable means of carrying out the work <sup>39</sup>.

Finally, duty holders including PCBUs, officers and workers may have additional duties under specific electrical safety legislation in each state.

The table below provides a list of the governing legislation and the relevant regulator of electrical safety in each jurisdiction.<sup>40</sup>

### Electrical Safety - Overview of Commonwealth and state legislation and regulators.

Jurisdiction	Governing law	Safety regulator
Commonwealth	<ul style="list-style-type: none"> <li>▶ <i>Work Healthy and Safety Act 2011</i></li> <li>▶ Work Health and Safety Regulation 2011, Pt 4.7</li> </ul>	Comcare
Australian Capital Territory	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i></li> <li>▶ Work Health and Safety Regulation 2011</li> </ul>	WorkSafe ACT
New South Wales	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i></li> <li>▶ Work Health and Safety Regulation 2011</li> <li>▶ <i>Electricity (Consumer Safety) Act 2004</i></li> <li>▶ Electricity (Consumer Safety) Regulation 2006</li> </ul>	WorkCover NSW

Jurisdiction	Governing law	Safety regulator
Northern Territory	<ul style="list-style-type: none"> <li>▶ <i>Electricity Reform Act 2000</i></li> <li>▶ Electricity Reform (Safety and Technical) Regulations 2000</li> <li>▶ <i>Work Health and Safety (National Uniform Legislation) Act 2011</i></li> <li>▶ Work Health and Safety (National Uniform Legislation) Regulations 2011</li> </ul>	NT WorkSafe
Queensland	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011</i></li> <li>▶ Work Health and Safety Regulation 2011</li> <li>▶ <i>Electrical Safety Act 2002</i></li> <li>▶ Electrical Safety Regulation 2002</li> </ul>	Worksafe Queensland

Jurisdiction	Governing law	Safety regulator
South Australia	<ul style="list-style-type: none"> <li>▶ <i>Electricity Act 1996</i></li> <li>▶ Electricity (Principles of Vegetation Clearance) Regulations 2010</li> <li>▶ Electricity (General) Regulations 1997</li> </ul>	SafeWork SA
Tasmania	<ul style="list-style-type: none"> <li>▶ <i>Electricity Industry Safety and Administration Act 1997</i></li> <li>▶ Electricity Industry Safety and Administration (Energy Efficiency) Regulations 2009</li> </ul>	Workplace Standards Tasmania
Western Australia	<ul style="list-style-type: none"> <li>▶ <i>Electricity Act 1945</i></li> <li>▶ Electricity (Licensing) Regulations 1991</li> <li>▶ Electricity Regulations 1947</li> <li>▶ Electricity (Supply Standards and System Safety) Regulations 2001</li> </ul>	EnergySafety/ WorkSafe Western Australia

Jurisdiction	Governing law	Safety regulator
Victoria	<ul style="list-style-type: none"> <li>▶ <i>Electricity Safety Act 1998</i></li> <li>▶ Electricity Safety (Equipment) Regulations 2009</li> <li>▶ Electricity Safety (Equipment Efficiency) Regulations 2009</li> <li>▶ Electricity Safety (Registration and Licensing) Regulations 2010</li> <li>▶ Electricity Safety (Electric Line Clearance) Regulations 2010</li> <li>▶ Electricity Safety (Bushfire Mitigation) Regulations 2003</li> <li>▶ Electricity Safety (Cathodic Protection) Regulations 2009</li> <li>▶ Electricity Safety (Management) Regulations 2009</li> <li>▶ Electricity Safety (Installations) Regulations 2009</li> </ul>	Energy Safe Victoria

In addition to this legislation, there are a number of Australian Standards which play an important role in electrical safety, including:

- ▶ AS/NZS 3000:2007 Electrical Installations (known as the Australian/New Zealand wiring rules)
- ▶ AS/NZS 3012:2010 Electrical Installations — Construction and Demolition Sites, and
- ▶ AS/NZS 3760:2010 In-service safety inspection and testing of electrical equipment.

## Mining and Resources

### Overview

The minerals industry (encompassing exploration, extraction and processing) is a major contributor to national income, investment, high-wage jobs, exports and government revenues in Australia.

The health and safety obligation imposed on mining operations across Australia is onerous and strictly applied. Australian mines are some of the safest in the world<sup>41</sup> and this can be attributed to the strict regulation of safety procedures and commitment by employers to ensuring compliance with these regulations. Safety in the mining industry is subject to a complex array of state, Commonwealth and industry-based legislation which have:

- ▶ differences between jurisdictions;
- ▶ differences across industries e.g. oil and gas, coal, and metalliferous;
- ▶ a number of different stakeholders responsible for various obligations;
- ▶ been reviewed and changed as a result of the harmonisation process.<sup>42</sup>

In each jurisdiction, the goal of the relevant statute is to provide a mine site free from injury to mine workers or other stakeholders through risk management processes. Specifically, mining operations are required to focus on elimination of risk or where risk cannot be eliminated, minimisation of risk as far as is reasonably practicable. Safety regulation in the mining industry is a balance between risk assessment based management and proscriptive regulation in relation to certain identified hazards. In practical terms this generally means that mining operations must:

- ▶ conduct operations with the focus on eliminating risk to the extent that is reasonably practicable, and only if elimination is not reasonably practicable, minimise the risk so far as is reasonably practicable;
- ▶ identify that the control measures used to manage risk are appropriate. This is completed generally by adopting the hierarchy of controls through the use of tangible measures to eliminate the risk, to substitute the risk for a lesser risk, to isolate mine workers and others from the risk or to use engineering means to minimise the risk, before consideration is given to administrative controls such as training and the use of personal protective equipment;
- ▶ ensure that the risk management processes and systems not only exist, but that the mine workers practise and apply the systems diligently, rigorously and systematically;
- ▶ must respond to identified hazards and risks actively and immediately;
- ▶ ensure that its officers and managers apply due diligence to ensure the mine operation's compliance with regulations; and
- ▶ be diligent, engaged, innovative and responsive when considering its health and safety obligations.

Effective compliance with WHS obligations is only achieved when comprehensive systems and procedures are in place that are implemented and practised, monitored and reviewed. It requires a systematic approach of continuous improvement. Subsequently, compliance with WHS obligations is imperative for any mining operation in Australia.

This requires not only having a strategy to manage safety issues, implement safe work practices and maximise safety benefits but also ensuring safety leadership is provided throughout the operation. It requires diligent, responsive active and imaginative approach to safety supported by robust and effective systems.

Below is an overview of the safety legislation in the mining and resources industry.

## Mining Safety - Legislative Overview

Jurisdiction	Governing law
Australian Capital Territory	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2011 (ACT)</i></li> <li>▶ <i>Work Health and Safety Regulation 2011 (ACT)</i></li> <li>▶ <i>Dangerous Substances Act 2004 (ACT)</i></li> <li>▶ <i>Dangerous Substances (Explosives) Regulation 2004 (ACT)</i></li> <li>▶ <i>Dangerous Substances (General) Regulation 2004 (ACT)</i></li> <li>▶ <i>Machinery Act 1949 (ACT)</i></li> <li>▶ <i>Machinery Regulation 1950 (ACT)</i></li> </ul>
New South Wales	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety (Mines) Act 2013 (NSW)</i></li> <li>▶ <i>Work Health and Safety Act 2011 (NSW)</i></li> <li>▶ <i>Work Health and Safety Regulation 2011 (NSW)</i></li> <li>▶ <i>Coal Mine Health and Safety Act 2002 (NSW)</i></li> <li>▶ <i>Coal Mine Health and Safety Regulation 2006 (NSW)</i></li> <li>▶ <i>Mine Health and Safety Act 2004 (NSW)</i></li> <li>▶ <i>Mine Health and Safety Regulation 2007 (NSW)</i></li> <li>▶ <i>Explosives Act 2003 (NSW)</i></li> <li>▶ <i>Explosives Regulation 2013 (NSW)</i></li> </ul>

Jurisdiction	Governing law
Northern Territory	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety (National Uniform Legislation) Act 2011</i> (NT)</li> <li>▶ Work Health and Safety (National Uniform Legislation) Regulations 2011 (NT)</li> <li>▶ <i>Dangerous Goods Act 1998</i> (NT)</li> <li>▶ Dangerous Goods Regulations 1985 (NT)</li> <li>▶ Dangerous Goods Regulations 1985 (NT)</li> <li>▶ <i>Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act 2010</i> (NT)</li> <li>▶ Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Regulations 2011 (NT)</li> <li>▶ <i>Radioactive Ores and Concentrates (Packaging and Transport) Act 1980</i> (NT)</li> <li>▶ Radioactive Ores and Concentrates (Packaging and Transport) Regulations 1980 (NT)</li> </ul>

Jurisdiction	Governing law
Queensland	<ul style="list-style-type: none"> <li>▶ Electrical Safety Regulation 2002 (Qld)</li> <li>▶ <i>Petroleum and Gas (Production and Safety) Act 2004</i> (Qld)</li> <li>▶ Petroleum and Gas (Production and Safety) Regulation 2004 (Qld)</li> <li>▶ Work Health and Safety Regulation 2011 (Qld)</li> <li>▶ <i>Mining and Quarrying Safety and Health Act 1999</i> (Qld)</li> <li>▶ Mining and Quarrying Safety and Health Regulation 2001 (Qld)</li> <li>▶ Electrical Safety Regulation 2002 (Qld)</li> <li>▶ Work Health and Safety Regulation 2011 (Qld)</li> <li>▶ <i>Explosives Act 1999</i> (Qld)</li> <li>▶ Explosives Regulation 2003 (Qld)</li> <li>▶ Work Health and Safety Regulation 2011 (Qld)</li> <li>▶ <i>Transport (Rail Safety) Act 2010</i> (Qld)</li> <li>▶ Transport (Rail Safety) Regulation 2010 (Qld)</li> </ul>

Jurisdiction	Governing law
South Australia	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2012 (SA)</i></li> <li>▶ Work Health and Safety Regulations 2012 (SA)</li> <li>▶ <i>Mines and Works Inspection Act 1920 (SA)</i></li> <li>▶ Mines and Works Inspection Regulations 2013 (SA)</li> <li>▶ <i>Dangerous Substances Act 1979 (SA)</i></li> <li>▶ Dangerous Substances Regulations 2002 (SA)</li> <li>▶ Dangerous Substances (Dangerous Goods Transport) Regulations 2008 (SA)</li> </ul>
Tasmania	<ul style="list-style-type: none"> <li>▶ <i>Work Health and Safety Act 2012 (Tas)</i></li> <li>▶ Work Health and Safety Regulations 2012 (Tas)</li> <li>▶ <i>Dangerous Goods (Road and Rail Transport) Act 2010 (Tas)</i></li> <li>▶ Dangerous Goods (Road and Rail Transport) Regulations 2010 (Tas)</li> <li>▶ <i>Dangerous Substances (Safe Handling) Act 2005 (Tas)</i></li> <li>▶ Dangerous Substances (Safe Handling) Regulations 2009 (Tas)</li> </ul>

Jurisdiction	Governing law
Western Australia	<ul style="list-style-type: none"> <li>▶ <i>Occupational Safety and Health Act 1984 (WA)</i></li> <li>▶ Occupational Safety and Health Regulations 1996 (WA)</li> <li>▶ <i>Mines Safety and Inspection Act 1994 (WA)</i></li> <li>▶ Mines Safety and Inspection Regulations 1995 (WA)</li> <li>▶ <i>Dangerous Goods Safety Act 2004 (WA)</i></li> <li>▶ Dangerous Goods Safety (General) Regulations 2007 (WA)</li> <li>▶ Dangerous Goods Safety (Explosives) Regulations 2007 (WA)</li> </ul>
Victoria	<ul style="list-style-type: none"> <li>▶ <i>Occupational Health and Safety Act 2004 (Vic)</i></li> <li>▶ Occupational Health and Safety Regulations 2007 (Vic)</li> <li>▶ <i>Dangerous Goods Act 1985 (Vic)</i></li> <li>▶ Dangerous Goods (Explosives) Regulations 2011 (Vic)</li> <li>▶ <i>Equipment (Public Safety) Act 1994 (Vic)</i></li> <li>▶ Equipment (Public Safety) Regulations 2007 (Vic)</li> </ul>

### Conclusion

Safety in the mining industry is governed by a complex system of laws and regulations with various stakeholders being charged with responsibility for different aspects of safety management. In order to achieve effective compliance, mining operators will need a diligent, responsive, innovative and imaginative approach to safety.

Mining operators need strategic safety leadership from their officers and senior managers supported by effective and systematic policies and procedures. Safety systems must be implemented, audited and sufficiently flexible to deal with a changing risk environment. Workers must be competent, trained and engaged.

## Construction

Construction work is defined in the model WHS laws as any work carried out in connection with the construction, alteration, conversion, fitting out, commissioning, renovation, repair, maintenance, refurbishment, demolition, decommissioning or dismantling of a structure. "Structure" for the purposes of this definition includes anything that is constructed, including but not limited to buildings, transport infrastructure, communications towers, underground tunnels and pipelines.

The definition under the regulations includes commercial, civil and housing construction as well as areas in connection with one or more of these. This includes, for example, architects working in on-site offices, a mechanic fixing an excavator and traffic control on and immediately outside a construction site.

Given the broad definition of construction work, it is important to identify what activities do not qualify as construction work under the act, even if they involve similar activities. The following are not included in the definition of construction work:

- ▶ the manufacture of plant;
- ▶ prefabrication of elements, unless the prefabrication occurs at a place specifically established for the particular construction work and the elements are only to be used in that construction work;
- ▶ the assembly of a structure that, once constructed, is intended to be transported to another location;
- ▶ minor testing, maintenance or repair work carried out in connection with a structure; and
- ▶ mining or the exploration for or extraction of minerals.

Some types of construction work are given specific definitions under the regulation. The regulations specify 18 different activities that qualify as "high risk construction work",<sup>43</sup> including work where there is a risk of falling from a height greater than 2 metres, work involving the disturbance of asbestos, and work involving the use of explosives. The term "construction project" is also given a specific definition under the regulations as any construction work with a cost of \$250,000 or more.<sup>44</sup>

Because of the nature of construction work, multiple PCBUs may owe the primary duty on a work site. For example, the duty may be simultaneously owed by the principal contractor carrying out the construction work, the PCBU that designs the structure and the PCBU that commissions the work. Additionally, officers and workers of each business and undertaking will owe their respective duties under the WHS laws. It is therefore important to remember the requirements for consultation between duty holders discussed in the Consultation section on page 21.

The general risk management steps of identifying hazards, assessing risks, implementing control measures and reviewing the effectiveness of those measures apply to construction work the same as they do to any other business or undertaking, however the WHS regulations impose additional duties and obligations on PCBUs and workers who are engaged in construction work.

## Specific duties relating to construction work

### Duties of designers

The PCBU who designs a structure has specific WHS duties. The designer of a structure or any part of a structure must provide a written safety report to the PCBU who commissioned it.<sup>45</sup> The report must detail, so far as the designer is reasonably aware, the hazards relating to the design that may create risks to workers who are performing the construction. It is not necessary to identify general hazards of construction work, just those hazards that are specific to the particular design.

### Duties of PCBU that commissions construction work

The PCBU that commissions construction work has a duty under the regulations to consult with the designer of the structure about how to ensure WHS risks are eliminated or minimised. This involves providing the designer with any information the commissioning PCBU has regarding hazards or risks of the site where the construction will occur.<sup>46</sup>

If the PCBU commissioned the construction work generally but did not personally commission the design of the structure, then the PCBU must take all reasonable steps to obtain a copy of the designer's safety report.<sup>47</sup>

The commissioning PCBU also has a duty to give the principal contractor who will be carrying out the construction work any information the commissioning PCBU has regarding hazards or risks of the site where the construction will occur.<sup>48</sup>

### **Duties of the principal contractor**

The principal contractor has several specific duties under the regulations, including to:

- ▶ ensure signs are installed on the site that identify the principal contractor, provide contact details, show the location of the site office, and that are clearly visible from outside the site;
- ▶ prepare and review the WHS management plan for the site and ensuring, so far as it is reasonably practical, that every person who is carrying out construction work on the site is aware of the plan and that a copy is accessible at all times;
- ▶ obtain the safe work method statement before any high risk construction work commences on the site;
- ▶ ensure compliance with the requirements for general workplace management under the regulations; and
- ▶ manage WHS risks associated with storage, removal and disposal of construction materials, storage of unused plant, traffic control around the site and any other essential services at the workplace.

### **Duties of persons who have management or control of a construction workplace**

Depending on the circumstances, the principal contractor and any subcontractors may have management and control of the site. The person with management or control of a site has a duty under the regulations to ensure, so far as is reasonably practicable, that the site is secured from unauthorised access. This person also has a duty under the regulations to obtain essential services information (location of water mains, power lines,

etc.) when excavation work is to be carried out on the site and provide it to any person who is going to be carrying out the excavation work.

### **Duties of persons carrying out high risk construction work**

Where a business or undertaking involves high risk construction work, the PCBU must ensure that:

- ▶ a Safe Work Method Statement (**SWMS**) is prepared before the work commences;
- ▶ the work is carried out in accordance with the SWMS;
- ▶ a copy of the SWMS is given to the principal contractor before work commences;
- ▶ the SWMS is revised and updated as required;
- ▶ a copy of the SWMS is available and accessible until the high risk construction work is completed, or for a further two years after an incident occurs.

### **Other duties**

Officers, workers and other persons in the workplace or on the worksite have the same duties under the WHS laws as workers, officers and other persons in other businesses or undertakings.

Construction workers have the additional duty of keeping their general construction induction training card or certification available for inspection. General construction induction training provides basic knowledge of construction work, including an overview of health and safety laws and common hazards. If a worker has not completed this training, or has completed it more than two years ago without doing any construction work, the worker must not be allowed to carry out construction work until he or she has received the training.<sup>49</sup>

### **Safe Work Method Statements (SWMS)**

A SWMS is a written document that contains details of any high risk construction work that is to be carried out at a workplace, the specific hazards of each high risk activity and what measures are to be put in place to control these risks.

While a SWMS is only required for high risk construction work, similar considerations should be made by a PCBU in all construction work to ensure that it meets its obligation under the primary duty.

It is the responsibility of the PCBU to prepare a SWMS or otherwise ensure one has been prepared before high risk construction work commences, remembering that a construction project may involve multiple PCBUs who will need to consult to ensure a SWMS has been prepared. However, it is the PCBU who is directly responsible for the workers who are carrying out the high risk construction work that is best suited to prepare the SWMS.

If construction work involves two different high risk activities, for example at a height above 2 metres and also near a trench 1.5 metres deep, then a single SWMS can be prepared to cover all risks or separate SWMS can be prepared for each risk.

A SWMS must do all of the following:

- ▶ identify the specific work that is high risk construction work;
- ▶ specify hazards relating to the high risk construction work and outline the WHS risks associated with those hazards;
- ▶ describe the control measures used to eliminate, minimise or otherwise control the risks; and
- ▶ describe how the control measures are to be implemented and reviewed.

The control measures contained in the SWMS should not be ambiguous or involve a direction from supervisors to come later. For example “use appropriate personal protective equipment (PPE)” is too ambiguous, instead the SWMS should specify the specific PPE to be worn, when and by whom.

It is important for a SWMS to have a workplace specific focus. If a PCBU has a generic SWMS for high risk construction activities that it performs often, it must be adapted to each specific workplace before work is carried out. Considerations include the environmental conditions, location, and other works being carried out on the same site.

A PCBU should consult workers and HSRs when preparing a SWMS, and the SWMS should include details of who was consulted during the development process and when they were consulted.

Where high risk construction work is carried out as part of a construction

project that requires a WHS management plan, the PCBU who prepared the SWMS must provide the principal contractor with a copy before high risk work commences.

Once a SWMS has been prepared, the PCBU must put in place arrangements to ensure that the high risk construction work being carried out complies with the SWMS. This may include routine or random workplace inspections to check for compliance, or allocating the responsibility of monitoring compliance to the on-site supervisor. If the high risk construction work fails to comply with the SWMS at any point it must stop immediately or as soon as it is safe to stop.

### **WHS management plans for construction projects**

For a construction project (where construction work costs over \$250,000), the principal contractor must prepare a WHS management plan before any work on the site can begin. The purpose of a WHS management plan is to set out the arrangements for health and safety matters on a site in order to manage the risks associated with a complex construction project with many different workers engaged by various PCBUs completing a variety of construction activities.

The WHS management plan must be in writing and should be able to be accessed and easily understood by all workers, including contractors and subcontractors, before a project commences.

The WHS management plan must contain:

- ▶ names of persons at the workplace whose positions or roles involve specific health and safety responsibilities, for example site supervisors, project managers, first aid officers;
- ▶ arrangements for consultation, cooperation and coordination;
- ▶ arrangements for managing incidents;
- ▶ site-specific health and safety rules and how people will be informed of the rules; and
- ▶ arrangements to collect and assess, monitor and review SWMS.

In addition to these requirements, the plan may also include information on:

- ▶ the provision and maintenance of a hazardous chemicals register, safety data sheets;

- ▶ hazardous chemicals storage;
- ▶ the safe use and storage of plant;
- ▶ the development of a construction project traffic management plan;
- ▶ obtaining and providing essential services information;
- ▶ workplace security and public safety; and
- ▶ ensuring workers have appropriate licences and training to undertake the construction work.<sup>50</sup>

Similarly to a SWMS, a principal contractor may have a generic WHS management plan for use at the various sites they are engaged to carry out work on. This generic plan must be updated with site specific information and considerations before work on a project begins.

Under the regulations the principal contractor must ensure, as far as is reasonable practicable, that all workers who are to carry out construction work for the construction project are made aware of the WHS management plan and its impact on their work.<sup>51</sup> While workers do not need to be aware of the entire WHS policy, they must be aware of any aspects that relate to the work they are doing on the site.

A principal contractor may inform people about the WHS management plan by providing subcontractors a copy of the plan and requiring them to inform their own workers about its contents, displaying the plan on a sign or sticker on the work site, or giving each worker a copy of the plan directly.



As with a SWMS, a copy of the WHS management plan must be kept accessible for the duration of the construction project, or if a noticeable incident occurs for a further two years after the time of the incident.

A WHS management plan should be reviewed and revised by the principal contractor, particularly where there are significant changes in the site conditions or a change in the people responsible for health and safety.

### General workplace management arrangements

A principal contractor for a construction project (costing over \$250,000) has a duty to ensure compliance with general workplace management arrangements, including:

- ▶ providing a safe working environment, including layout of work areas, proper entry and exit locations, safe floors and surfaces, appropriate lighting and temperature, the location of underground essential services, etc.;
- ▶ providing and maintaining adequate and accessible facilities including change rooms, toilets, hand washing facilities, sanitary disposal means;
  - » note: with regard to toilet facilities the minimum is 1 closet pan for every 15 males, and one urinal for every 20 males (or fraction thereof); and 1 closet pan for every 10 females (or fraction thereof);
- ▶ providing first aid;
- ▶ preparing, maintaining and implementing emergency plans;
- ▶ providing workers with PPE, if PPE is to be used to minimise a risk to health and safety;
- ▶ managing risks associated with airborne contaminants;
- ▶ managing risks associated with hazardous atmospheres including ignition sources;
- ▶ storage of flammable and combustible substances;
- ▶ managing risks associated with falls; and
- ▶ managing risks associated with falling objects.

It must be noted that the principal contractor providing for these arrangements does not absolve any other PCBU from responsibility under the laws. For example, if a principal contractor provides first aid, then other PCBUs do not have to provide further first aid but must ensure that the first aid provided by the principal contractor is adequate, otherwise they would be in breach of their duty under the WHS Act.

Similarly the principal contractor may use contractual arrangements or rely on other PCBUs to provide for some of these arrangements, but will not comply unless they ensure that the arrangements made by other parties are adequate.

## Conclusion

All PCBUs should take careful notice of the extra duties and obligations involved in construction work, particularly the need for a SWMS before commencing high risk construction work and the need for a WHS management plan before commencing work on a construction project. All PCBUs involved in construction work should consult the Safe Work Australia Construction Work Code of Practice for more detailed information regarding the duties and obligations of PCBUs and principal contractors. The code is available through the Safe Work Australia website.

## Petroleum and gas

Despite the high risks associated with the use of dangerous and flammable fluids in hostile operating environments, the Australia oil and gas industry has outperformed the safety record of the transport, construction, mining and manufacturing industries over the last 10 years. A continued commitment to these high standards is necessary to ensure the industry remains a key contributor to the success of the economy.

The industry has not been without incident, however. The Montara oil spill in the Timor Sea in 2009 and the Deep Water Horizon explosion in the Gulf of Mexico in 2010 both led to recent regulatory reform.

Changes made as a result of recommendations by the Commonwealth Government's 2009 Productivity Commission Research Report, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (Productivity Commission Report) included establishment of a national offshore petroleum regulator. Additionally, inquiries into the Montara and Deep Water Horizon incidents drove further legislative changes aimed at improving safety and operational practices.

Regulation of health and safety in the oil and gas industry covers oil, natural gas, liquefied natural gas and coal seam gas, and varies for offshore and onshore operations. The Commonwealth and state governments jointly administer petroleum exploration and development in Australian offshore areas (beyond three nautical miles from the territorial sea baseline), while onshore petroleum operations, and those within the three nautical mile limit ("coastal waters"), are the responsibility of the individual state and territory governments.

While offshore petroleum regulation has been harmonised, onshore petroleum activities are still regulated by each state and territory. Regulation

differs in each jurisdiction, with some states having industry-specific legislation and others regulating the industry under its primary WHS laws. Previous recommendations to harmonise have been rejected due to the potential creation of new regulatory overlaps and the difficulty in restructuring the current legislative arrangements, which also cover issues such as environmental aspects and land access for exploration. Therefore, it is expected that the current regime will remain.

### Safety in the oil and gas industry - overview of State legislation:

Jurisdiction	Governing law
Commonwealth	<ul style="list-style-type: none"><li>▶ <i>Work Health and Safety (National Uniform Legislation) Act 2011</i></li><li>▶ Work Health and Safety (National Uniform Legislation) Regulations 2011</li></ul>
Australian Capital Territory	<ul style="list-style-type: none"><li>▶ <i>Dangerous Substances Act 2004</i></li><li>▶ <i>Gas Safety Act 2000</i></li></ul>
New South Wales	<ul style="list-style-type: none"><li>▶ <i>Petroleum (Onshore) Act 1991</i></li><li>▶ Petroleum (Onshore) Regulation 2007</li></ul>
Northern Territory	<ul style="list-style-type: none"><li>▶ <i>Petroleum Act 1984</i></li></ul>
Queensland	<ul style="list-style-type: none"><li>▶ <i>Petroleum Act 1923</i></li><li>▶ <i>Petroleum and Gas (Production and Safety) Act 2004</i></li></ul>

Jurisdiction	Governing law
Tasmania	<ul style="list-style-type: none"> <li>▶ <i>Gas Act 2000</i></li> <li>▶ <i>Gas Pipelines Act 2000</i></li> <li>▶ Gas Pipelines Regulation 2000 (In Tasmania, onshore petroleum is regulated by the general mining and WHS legislation)</li> <li>▶ <i>Mineral Resources Development Act 1995</i></li> <li>▶ <i>Workplace Health and Safety Act 1995</i></li> <li>▶ Workplace Health and Safety Regulations 1998</li> </ul>
Victoria	<ul style="list-style-type: none"> <li>▶ <i>Petroleum Act 1998</i></li> <li>▶ Petroleum Regulations 2011</li> <li>▶ <i>Gas Safety Act 1997</i></li> </ul>

Onshore petroleum safety investigations are conducted separately by the relevant safety regulator for each State and Territory.

## Aviation

Work health and safety (**WHS**) in the aviation industry is governed by a national body, the Civil Aviation Safety Authority (**CASA**). CASA occupational health and safety rules are contained within the Civil Aviation Safety Regulations 1998 (**CASR**), which operate under the *Civil Aviation Act 1988*.

CASR is divided into a number of parts which govern specific areas of the aviation industry, including:

- ▶ Airworthiness
- ▶ Aircraft registration and marking

- ▶ Flight operations
- ▶ Flight crew licensing
- ▶ Aerodromes and airspace
- ▶ Dangerous goods
- ▶ Drug and alcohol management plans and testing
- ▶ Regulatory process

Following the Full Federal Court decision in *Heli-Aust v Cahill*,<sup>52</sup> it is worth noting that where there is a direct conflict between the state and Commonwealth legislative schemes, the state law is invalid, to the extent of the inconsistency. Whilst this clarifies the position that the CASR applies to incidents in flight, it is still the case that the states' occupational health and safety laws will apply to incidents which occur on any land based work in or on aircraft.

## Rail

WHS in the rail industry is managed by the Office of the National Rail Safety Regulator (**ONRSR**). ONRSR is an independent body corporate established under the *Rail Safety National Law (South Australia) Act 2012* (note that the name varies within each state).

ONRSR state that their primary objective is “to encourage and enforce safe railway operations and to promote and improve national rail safety”.

Each of the states, except for Queensland and Western Australia, have introduced mirrored legislation. It is expected that Queensland and Western Australia will follow suit. Until this occurs, the following acts apply:

- ▶ in Queensland, the *Transport (Rail Safety) Act 2010* and Transport (Rail Safety) Regulations 2010; and
- ▶ in Western Australia, *Rail Safety Act 2010* and Rail Safety Regulations 2011.

## Marine

There is a national marine regulator, the Australian Maritime Safety Authority (**AMSA**). AMSA is established under established under the *Australian Maritime Safety Authority Act 1990*.

AMSA's principal functions are:

- ▶ promoting maritime safety and protection of the marine environment;
- ▶ preventing and combating ship-sourced pollution in the marine environment;
- ▶ providing infrastructure to support safety of navigation in Australian waters; and
- ▶ providing a national search and rescue service to the maritime and aviation sectors.

The AMSA operates as the national regulator for all marine incidents which occur within Australian waters, but further than 3 miles off the coast. For incidents which occur within 3 miles of the coast, the relevant state authority and laws will apply.

## Heavy vehicles

The National Heavy Vehicle Regulator (**NHVR**) is Australia's independent regulator for all vehicles over 4.5 tonnes gross vehicle mass. The NHVR manages the safety, accreditation and compliance of relevant vehicles, a task that was previously managed by each of the relevant state authorities.

Although the regulator is referred to as national, the Heavy Vehicle National Laws have not yet been adopted in the Northern Territory and Western Australia.

NHVR manages the safety, accreditation and compliance of heavy vehicles through the National Heavy Vehicle Accreditation Scheme (**NHVAS**). This scheme is currently under review as part of the National Heavy Vehicle Roadworthiness Program, with the renewed program expected to apply from 1 July 2016.

In relation to WHS specifically, a key area of the Heavy Vehicle National Laws seeks to manage fatigue through managing "standard hours". The standard hours prescribe a maximum amount of work and minimum amount of rest possible that can be performed safely without additional safety countermeasures. However, entities which are accredited with either basic or advanced fatigue management, are afforded flexibility in their standard hours.

## PART 7: COMMON RISKS AND HOW THEY ARE MANAGED IN THE LEGISLATION

### Fitness for work and health monitoring

#### Overview

Fitness for work is a broad concept that incorporates issues such as physical fitness, mental condition, pre-existing health problems, fatigue and drug and alcohol abuse. Fatigue and drug and alcohol abuse are each discussed in detail below. An employee can be considered fit for work if he or she is in a physical and mental state that allows them to complete all tasks and fulfil all responsibilities competently and safely.

An employee's fitness for work is not an issue that is caused solely by the individual. Working conditions and systems such as location, hours of work, equipment use, training, commute times, etc. can contribute significantly to an employee's or an entire staff's fitness for work.

The following factors may contribute to poor fitness for work:

- ▶ workload, specifically the physical effort required for tasks such as lifting, the demands of prolonged strenuous activities or monotonous repetitive activities, the hours of work and whether job performance changes with the time of day, etc.;
- ▶ the working environment, such as heat, dust, noise or exposure to chemicals and other hazardous substances for a prolonged time;
- ▶ travel time to and from work that may reduce sleep and recovery time available to employees;
- ▶ pre-existing health conditions such as diabetes that may lower an employee's threshold for heat exposure or fatigue;
- ▶ smoking;
- ▶ obesity, particularly in relation to strenuous activities and the use of safety equipment including seatbelts;
- ▶ family and social commitments of employees outside of work;
- ▶ a lack of appropriate training and supervision with regards to manual handling, equipment and plant use; and

- ▶ inappropriate recruitment, selection, and personnel practices.

Employees who are not fit for work within an organisation greatly increase the risk of:

- ▶ accidents in the workplace, usually caused by fatigue and associated lapses in concentration or loss of situational awareness;
- ▶ musculoskeletal disorders including back injuries, strains, sprains, neck injuries and joint injuries; and
- ▶ poor work performance among employees.

### Implications for business

Aside from the increased risk of accidents and employee injuries, poor fitness for work has a large impact on work performance and quality within an organisation. Employees with poor health, low workplace morale and high stress levels all contribute to levels of absenteeism and sick leave, and studies have shown that when at work the healthiest employees are almost three times more productive than unhealthy workers.<sup>53</sup>

To effectively manage risks associated with fitness for work issues, a PCBU should ensure that:

- ▶ shift work arrangements minimise risks including fatigue;
- ▶ work arrangements do not contribute to drug and alcohol consumption, for example by monitoring workplace social events where alcohol is served;
- ▶ work arrangements do not unreasonably interfere with employees' family and social commitments;
- ▶ work systems are flexible enough to deal with fitness for work issues, for example the rescheduling of tasks due to worker fatigue or illness;
- ▶ any fitness for work testing or policy does not attempt to shift responsibility of managing risks onto the individual worker. Fitness for work issues are caused and should be managed by both the employee and the PCBU.

Fitness for work issues are often difficult for organisations to manage as there are many factors outside the employer's control and implementing control measures may cut across a worker's personal freedoms and right to

privacy. Generally a good place to start will be with an effective consultation process.

After consultation and implementation of risk assessment activities including reviewing incident reports, gathering data and receiving expert advice, a PCBU should implement risk control strategies. These strategies may involve:

- ▶ the elimination of risk factors such as shift work or excessive manual handling, although this is often undesirable or impossible depending on the nature of the business or undertaking;
- ▶ the substitution of unsafe practices with safe practices, such as improved work scheduling and rostering;
- ▶ engineering controls such as temperature controls, alarms and monitoring, and ergonomic workplace design;
- ▶ revised administrative systems including a selection and recruitment process that finds appropriate people for the job without discriminating, and a roster design that does not contribute to fatigue;
- ▶ improved work practices in relation to breaks and travel arrangements;
- ▶ health promotion programs such as weight loss or quit smoking campaigns;
- ▶ suitable training programs about fitness for work issues, particularly for managers and supervisors to allow them to effectively monitor employees; and
- ▶ the provision of protective gear, such as hats and sunglasses to reduce heat stress and fatigue in outdoor workers.

### Health monitoring under the WHS Act and regulations

The model WHS Act contains a general duty to monitor the health of employees and the conditions of the workplace in order to prevent illness or injury.<sup>54</sup> The model regulations contain specific requirements for health monitoring of employees who work with hazardous chemicals,<sup>55</sup> lead,<sup>56</sup> or the removal of asbestos.<sup>57</sup>

Under the regulations, “health monitoring” means to monitor an employee to identify changes in their health status because of exposure to certain substances. The regulations specify the type and level of monitoring required for different types of hazardous chemicals. Types of monitoring can include:

- ▶ demographic, medical and occupational history;
- ▶ records of personal exposure;
- ▶ physical examinations with emphasis on a particular system when required (e.g. respiratory system, nervous system)
- ▶ urine testing for various indicators;
- ▶ blood testing for various indicators;
- ▶ chest x-rays;
- ▶ inspections of hands and forearms; and
- ▶ the provision of health advice, counselling, and information about risks.

Health monitoring of exposure to hazardous chemicals must be supervised by a registered medical practitioner with experience.<sup>58</sup> A PCBU must consult with the worker who is being monitored regarding the selection of an appropriate health practitioner.

The regulations set out various monetary penalties for failing to monitor the health of employees working with hazardous substances. At the time of writing the maximum penalty is \$6,000 for an individual and \$30,000 for a body corporate.

## Fatigue management

### Overview

Fatigue is one of key consequences stemming from the fitness for work issues outlined above. Fatigue has been defined as being more than just feeling tired or drowsy. It is an acute and/or ongoing state of tiredness that leads to mental or physical exhaustion and prevents people from functioning within normal boundaries.<sup>59</sup>

There are various causes of fatigue that may be work related, non-work related or a combination of both. These causes may also accumulate over

time, and can be categorised in the following way:

### **Mental and physical demands of work:**

- ▶ repetitive or monotonous work;
- ▶ sustained physical or mental effort; and
- ▶ sustained and/or complex physical or mental tasks.

### **Work scheduling and planning:**

- ▶ length of shift;
- ▶ time of shift;
- ▶ frequency of breaks during work;
- ▶ average weekly hours;
- ▶ total hours over a three month period;
- ▶ daily work hours; and
- ▶ daily work related travel.

### **Work environment conditions:**

- ▶ exposure to hazardous substances and atmospheric contaminants;
- ▶ exposure to noise;
- ▶ exposure to extreme temperatures; and
- ▶ exposure to vibrations.

### **Individual and non-work factors:**

- ▶ poor quality of sleep;
- ▶ health;
- ▶ fitness for work;
- ▶ social life;
- ▶ family needs other employment; and
- ▶ travel time.<sup>60</sup>

**The effects of fatigue on health and workplace performance can be both short and long term. The short term effects on a worker include diminished work performance and include the impaired ability to:**

- ▶ concentrate and avoid distraction;
- ▶ think laterally and analytically;
- ▶ make decisions;
- ▶ remember and recall events and their sequences;
- ▶ maintain vigilance;
- ▶ control emotions;
- ▶ appreciate complex situations;
- ▶ recognise risks;
- ▶ coordinate hand-eye movements; and
- ▶ communicate effectively.

**Fatigue may also:**

- ▶ increase error rates;
- ▶ slow reaction times;
- ▶ increase the likelihood of accidents and injuries; and
- ▶ cause micro-sleeps.

**The long term effects on health associated with prolonged shift work and chronic sleep loss may include:**

- ▶ heart disease;
- ▶ diabetes;
- ▶ high blood pressure;
- ▶ gastrointestinal disorders (eg peptic ulcers, heartburn and nausea)
- ▶ depression; and
- ▶ anxiety.<sup>61</sup>

Fatigue may also have a compounding effect on other fitness for work issues discussed previously including:

- ▶ reducing physical fitness;
- ▶ increasing consumption of alcohol or other drugs;
- ▶ contributing to psychiatric and domestic problems;
- ▶ increasing the risk of incidents involving hazardous chemicals or environments; and
- ▶ increasing risks following poor training in the use of equipment or machinery.

As the above indicates fatigue is a serious health and safety issue. The effects of fatigue can be likened to those seen in people who have been drinking. Clinical tests comparing fatigue to blood alcohol content have found that being awake for 17 hours impairs performance to the same level as having a 0.05 blood alcohol content and that being awake for 20 hours impairs performance to the same level as having a 0.1 blood alcohol content. A worker who has been drinking would not be allowed onto a work site, operate machinery or drive, and this comparison suggests that a fatigued worker should not be allowed to do the above tasks either.

While the practical effects of blood alcohol content and fatigue are similar, human error due to fatigue, unlike blood alcohol content, is not fundamentally a behavioural problem but a problem of human physiology.<sup>62</sup> Fatigue is often caused by work related factors and as such addressing the issue of fatigue is a serious issue for all workplaces.

### **Implications for business**

While the model WHS Act does not address the issue of fatigue specifically, it is a well known hazard in workplaces and is also identified in the Safe Work Australia Code of Practice on How to Manage Work Health and Safety Risks. Consequently the primary duty under the model WHS Act would require PCBUs to address risks associated with fatigue. Additionally officers have a duty of due diligence to ensure the PCBU is meeting its primary duty, which is especially important in the case of less obvious risks such as fatigue.

Workers also have a duty under the model WHS Act to take reasonable care for their own health and safety and not adversely affect the health and safety of other persons.<sup>63</sup>



In terms of fatigue issues this means that workers cooperate with any reasonable policy or procedure relating to fatigue at the workplace, such as fitness for work requirements or conditions on holding second jobs. Workers should let their manager or supervisor know when they are fatigued, and should avoid working additional hours or undertaking dangerous tasks when they suspect they are fatigued.

Methods of managing fatigue at work will be different across various workplaces and industries depending on the nature of the work being done, the individual characteristics of workers, and environmental factors of the workplace.

### **Safe Work Australia sets out the following steps to manage the risk of fatigue:**

- ▶ Identify risk factors that may contribute to or increase the risk of fatigue, by
  - » consulting with workers;
  - » examining systems of work such as rostering and breaks;
  - » examining worker records and human resource data;
  - » reviewing workplace incident data; and
  - » obtaining advice and information about fatigue;
- ▶ Assess the risks to determine:
  - » which workers are at risk of becoming fatigued, where they are located and how many there are in total;
  - » how often fatigue is likely to occur;
  - » the degree of harm which may result;
  - » whether existing control measures are effective; and
  - » what action should be taken and how urgently is it required to control the risk of fatigue;
- ▶ Control the risks through methods including:
  - » work scheduling, e.g. designing a roster system that allows for adequate sleep, limiting excess hours, etc.;
  - » structuring shift work appropriately;
  - » redesigning job processes and introducing job rotations to reduce mental and physical demands;

- » ensuring equipment is fit for use and will not contribute to excess physical exertion;
- » reducing exposure to harsh environmental conditions such as heat, cold, noise or vibration;
- » developing a fatigue policy for all employees; and
- » facilitating open consultation about fatigue issues faced at work and away from work;
- » provide information, training and supervision including material on
  - » symptoms of fatigue;
  - » risk factors contributing to fatigue;
  - » reporting and consultation policies within the workplace;
  - » effective control methods for both the organisation and the individual worker to reduce the risk of fatigue; and
- ▶ Monitor and review control measures to ensure they continue to effectively manage fatigue.<sup>64</sup>

## **Drug and alcohol testing**

### **Overview**

Similarly to fatigued workers, workers who are affected by drugs or alcohol have an increased risk of causing accidents and injuring themselves and other workers. Drug and alcohol misuse can undermine workers' physical and mental health and damage their family life, and can result in decreased productivity and increased absenteeism for organisations.

Alcohol can impair an individual's coordination, judgment, response time and other intellectual processes and motor functions. Additionally some types of hazardous materials can magnify the effects of low level alcohol consumption, and a person can be impaired at a much higher level than they would expect.

The effect of drug use on an individual depends upon the type of drug involved. Cannabis can impair motor coordination, sensory function, perception and short-term memory, while amphetamines can increase alertness and delay fatigue but impair other aspects of performance.

## Testing methods

The trend towards drug and alcohol testing as a means of reducing safety risks associated with their use has gained momentum in Australia. Available methods of testing include analysis of blood, urine, saliva, oral fluid, hair, breath or sweat, and tests may be conducted pre-employment or at random times during employment.

Alcohol testing is generally carried out using a breath alcohol test that determines how much alcohol is in a person's blood. Generally two tests are required in order to avoid false positives. The policies regarding acceptable limits and what is to happen in the event of a positive result will depend on the individual organisation.

Drug testing can be carried out using a number of different methods, the most popular of which are urine testing and oral fluid testing. However, most testing methods will result in significant numbers of false positives and false negatives, particularly in the case of urine testing as the results will only show past use rather than present intoxication or impairment.

In Australia, the focus and purpose of drug and alcohol testing is to ensure safety in workplaces rather than to monitor employee's personal habits. However, drug and alcohol testing is not always the most reliable method of ensuring employees are not impaired at work. An individual may be significantly impaired the morning after consuming alcohol but return an acceptable breath test result, and another individual may be functioning perfectly well but return a positive drug test because of cannabis usage several weeks in the past.

There are also other factors such as fatigue, stress or illness that can impair a worker in the same way as drug or alcohol abuse but cannot be detected through the testing methods. For this reason, a focus on employee behaviour and function is a more appropriate way to identify risks of impairment. Once a worker has been identified as unfit for work, an appropriate course of action can be determined depending on the underlying cause.

## Implications for business

It is important for PCBUs to realise that drug and alcohol abuse is not a condition that is entirely attributable to the individual worker. Workplace pressures and management issues as well as personal and domestic matters can contribute to abuse, including:

- ▶ management style;
- ▶ work practices;
- ▶ deadlines and workload fluctuations;
- ▶ shiftwork;
- ▶ discrimination;
- ▶ harassment; and
- ▶ organisational restructuring.

It is also important to remember that it is not only long-term systematic substance abusers that pose a safety risk in workplaces. Occasional "bingeing" brought on by a celebration or sudden increase in stress for an individual can create the same safety issues as any other type of substance abuse.

A PCBU should:

- ▶ assess potential workplace causes of alcohol and drug abuse and try to alleviate work based factors contributing to abuse;
- ▶ provide training and education about drug and alcohol abuse;
- ▶ develop a drug and alcohol policy, including any testing methods, acceptable levels, and consequences of positive results;
- ▶ clearly communicate the drug and alcohol policy to all staff; and
- ▶ if required provide counselling services to lessen the non-work pressures that contribute to abuse.

In terms of testing, PCBU's must respect the privacy concerns of employees and limit testing to situations where it is required for health and safety reasons. Employers should focus more on how employees are functioning rather than the results of a test.

Finally PCBU's may wish to implement an Employee Assistance Program (EAP), that provides employees and their families with assistance with issues that may affect their behaviour, job performance and productivity. Issues may include drug and alcohol abuse, or other personally destructive behaviours such as gambling addiction.





An EAP not only provides counselling and assistance to employees, but can allow PCBUs to identify patterns within their staff to assist with identifying workplace factors that may contribute to negative behaviour. Referral to an EAP would be an appropriate step following a positive drug or alcohol test result in an employee who is not functioning properly at work.

## Workplace bullying

### Overview

The FWA now allows a worker who believes that they have been bullied to apply to the Fair Work Commission (FWC) for an order to stop the bullying. This provision is not limited to employees and extends to contractors, labour hire personnel and persons engaged under other workplace arrangements.

The FWC will be required to commence dealing with an application order to stop bullying within 14 days of an application and may make any orders it considers appropriate to stop the bullying (other than a pecuniary penalty). Before making an order, the FWC must be satisfied that the worker would otherwise continue to be bullied, and a breach of these orders may lead to significant pecuniary penalties.

### When is someone bullied at work?

The amendments to the existing laws provide a new definition of “bullied at work”. A worker is considered to be “bullied at work” if an individual or group repeatedly behaves unreasonably towards that worker and that behaviour creates a risk to health and safety. This definition is consistent with that provided in the Safe Work Australia draft model Code of Practice: Preventing and Responding to Workplace Bullying. Although “unreasonable behaviour” is not defined in the amended FWA, the draft model Code of Practice defined unreasonable behaviour as behaviour that a reasonable person, having regard to the circumstances, would see as unreasonable. This specifically includes behaviour that is victimising, humiliating, intimidating or threatening.

Examples of behaviour that may be considered workplace bullying if they are repeated, unreasonable and create a risk to health and safety include:

- ▶ abusive, insulting or offensive language or comments;
- ▶ unjustified criticism or complaints;
- ▶ setting unreasonable timelines or constantly changing deadlines;
- ▶ spreading misinformation or malicious rumours; and

- ▶ changing work arrangements, such as rosters or leave, to deliberately inconvenience a particular worker or workers.

### Reasonable management action

Importantly, reasonable management action carried out in a reasonable way will not be considered bullying. There are times where PCBU may take reasonable management action to effectively direct and control the way work is carried out. It is reasonable for managers and supervisors to allocate work and to give fair and reasonable feedback on a worker’s performance. These actions are usually not considered to be bullying if they are carried out in a reasonable manner, taking the particular circumstances into account. Examples include:

- ▶ setting reasonable performance goals, standards and deadlines;
- ▶ rostering and allocating working hours where the requirements are reasonable;
- ▶ transferring a worker for operational reasons;
- ▶ deciding not to select a worker for promotion where a reasonable process is following and documented;
- ▶ informing a worker about unsatisfactory work performance when undertaken in accordance with any workplace policies or agreements such as performance management guidelines;
- ▶ informing a worker about inappropriate behaviour in an objective and confidential way; and
- ▶ implementing organisational changes or restricting termination or employment.

### Implications for business

The new bullying provisions apply to all “constitutionally-covered business” including all registered corporations, the Commonwealth, Commonwealth authorities and body corporates incorporated in a Territory that conduct a business or undertaking. Some state public sector employees, unincorporated partnerships, federal security agencies, and the Defence Force have been made exempt from the effects of these new laws.

For those organisations who are not exempt, they should ensure that they:

- ▶ understand the scope of the FWC's new bullying powers and the orders that can be made- particularly in relation to a breach of an order;
- ▶ understand the definition of "bullied at work" and appreciate the difference between bullying and reasonable management action;
- ▶ have a clear policy stating that bullying is unacceptable, and conduct training in respect of this policy;
- ▶ have a procedure for addressing allegations of bullying in the workplace in a prompt and fair manner; and
- ▶ manage the risk of bullying by monitoring patterns of behaviour and conducting regular health checks on the business.

## PART 8: CONCLUSION

The move toward harmonised work health and safety laws in Australia has allowed for greater consistency across jurisdictions. PCBUs, officers, workers and other people who are present at a workplace should be aware of all duties imposed on them by the model WHS laws, and what steps need to be taken to comply with those duties. Regard must also be had to major hazards in the workplace, and the specific additional obligations associated with certain high risk industries.

Please note that the information in this booklet is current as at 1 October 2015 and is designed as a guide only.

## PART 9: TOOLS TO ASSIST

This booklet is just one tool we have developed to assist you with managing WHS issues.

We recently developed an app, to help you respond quickly and decisively to a serious safety and/or environmental incident.

The first 48 hours after a serious safety or environmental incident are the most important – but also the most demanding. Even experienced professionals and management can find their incident response process derailed by conflicting demands and priorities.

That's why we've developed CU SAFE (Serious Accident, Fatality and Environmental Incident Response Guide).

Whether in high risk and remote areas or in a corporate environment, the CU SAFE app will guide you through the incident response process, from the time an incident occurs through to commencing an investigation.

CU SAFE is designed for:

- ▶ In-house legal counsel
- ▶ Environment and safety professionals and managers
- ▶ On-site managers and operational staff

To download the app, go to [www.claytonutz.com](http://www.claytonutz.com) and search CU SAFE.

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These guidelines reflect the law as at October 2015. The contents do not constitute legal advice and should not be relied upon as a substitute for detailed advice or as a basis for making decisions. Persons listed may not be admitted in all States and Territories. © Clayton Utz 2015

## PART 11: FOOTNOTES

<sup>1</sup> Industry Commission, Work Health and Safety: Enquiry into Occupational Health and Safety, Canberra, Commonwealth of Australia, 1995.

<sup>2</sup> Productivity Commission, National Workers' Compensation and Occupational Health and Safety Frameworks, Canberra, Commonwealth of Australia, 2004.

<sup>3</sup> Productivity Commission, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Canberra, Commonwealth of Australia 2006.

<sup>4</sup> Workplace Relations Ministers' Council, National Review into Model Occupational Health and Safety Laws: First Report to the Workplace Relations Ministers' Council (First Report), Canberra, WRMC. October 2008, Terms of Reference, pp ii-v.

<sup>5</sup> Workplace Relations Ministers' Council, National Review into Model Occupational Health and Safety Laws: First Report to the Workplace Relations Ministers' Council (First Report), Canberra, WRMC, October 2008; and WRMC, National Review into Model Occupational Health and Safety Laws: Second Report to the Workplace Relations Ministers' Council (Second Report), Canberra, WRMC, January 2009.

<sup>6</sup> See Communiqué from Australian, State and Territory and New Zealand Workplace Relations Ministers' Council, 18 May 2009.

<sup>7</sup> *Work Health and Safety Act 2011* (Cth) s 3(1).

<sup>8</sup> *Model Work Health and Safety Act 2011* (Cth) s 19.

<sup>9</sup> *Model Work Health and Safety Act 2011* (Cth) s 5.

<sup>10</sup> Safe Work Australia, 'Interpretative guideline - model Work Health and Safety Act - the meaning of "reasonably practicable"' (Canberra, 2012).

<sup>11</sup> Safe Work Australia, 'Legislative Fact Sheet Series - managing risks to health and safety at the workplace' (Canberra, 2012).

<sup>12</sup> E Bluff, "Systematic Management of Occupational Health and Safety" (Working Paper no 20, National Research Centre for Occupational Health and Safety Regulation, Australian National University, Canberra, 2003) 7-8.

<sup>13</sup> Standards Australia and Standards New Zealand, "AS/NZS 4801:2001 - Occupational health and safety management systems" (Sydney, 2001).

<sup>14</sup> Standards Australia and Standards New Zealand, "AS/NZS 4801:2001 - Occupational health and safety management systems" (Sydney, 2001) section 4.

<sup>15</sup> The Australian Capital Territory act omits this chapter as the area is covered by the Dangerous Substances Act 2004 (ACT) and the associated regulations.

<sup>16</sup> The Australian Capital Territory act omits this chapter as the area is covered by the Dangerous Substances Act 2004 (ACT) and the associated regulations.

<sup>17</sup> The Queensland, Northern Territory, Tasmania, Australian Capital Territory and New South Wales acts omits this chapter. In each of the States, health and safety in the mining industry is covered by the specific mining acts, for example, in New South Wales, mining health and safety is governed by the Work Health and Safety (Mines) Act 2013 (NSW).

- <sup>18</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 11.
- <sup>19</sup> Model Work Health and Safety Regulations 2011 (Cth) note to reg 9.
- <sup>20</sup> <https://www.business.qld.gov.au/business/running/workplace-health-safety/laws/codes-practice>
- <sup>21</sup> *Model Work Health and Safety Act 2011* (Cth) s 7 (b).
- <sup>22</sup> *Model Work Health and Safety Act 2011* (Cth) s 14.
- <sup>23</sup> Safe Work Australia, 'Legislative Fact Sheet Series - Labour hire: duties of persons conducting a business or undertaking' (Canberra, 2012).
- <sup>24</sup> *Model Work Health and Safety Act 2011* (Cth) s 46.
- <sup>25</sup> *Model Work Health and Safety Act 2011* (Cth) s 47.
- <sup>26</sup> *Model Work Health and Safety Act 2011* (Cth) s 49.
- <sup>27</sup> *Model Work Health Safety Act 2011* (Cth) s 28.
- <sup>28</sup> *Model Workplace Health and Safety Act 2011* (Cth) s 27 (1).
- <sup>29</sup> *Corporations Act 2001* (Cth) s 9.
- <sup>30</sup> *Model Workplace Health and Safety Act 2011* (Cth) s 34 (1).
- <sup>31</sup> *Model Workplace Health and Safety Act 2011* (Cth) s 27 (5).
- <sup>32</sup> *Model Workplace Health and Safety Act 2011* (Cth) s 152.
- <sup>33</sup> Safe Work Australia, 'Legislative Fact Sheet Series - incident notification' (Canberra, 2012).
- <sup>34</sup> [2009] NSWIRComm 123 (30 July 2009)
- <sup>35</sup> [2011] VSC 308
- <sup>36</sup> *Powercor Australia Ltd v Perry* [2011] VSCA 239
- <sup>37</sup> NCIS Fact Sheet, "Electrocution Related Deaths", January 2012 at 1.
- <sup>38</sup> *Ibid.*
- <sup>39</sup> Model Health and Safety Regulations 2011 (Cth) reg 157.
- <sup>40</sup> Australian Master Work Health and Safety Guide [7-070] Electricity.
- <sup>41</sup> Current statistics from the Minerals Council of Australia ('MCA') 2012 Annual Report indicate a downward trend for fatalities between the 1999-2000 financial year (19 fatalities) and 2011-2012 (2 fatalities) (there was an anomaly of 18 fatalities in 2008-2009). The MCA has also reported that there has been no fatalities so far in 2012-2013.
- <sup>42</sup> Some states adopted new laws for mining effective 1 January 2012, others are in the process of reviewing their industry specific legislation and are proposing new legislation to take effect 1 January 2013.
- <sup>43</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 291.
- <sup>44</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 292.
- <sup>45</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 295.
- <sup>46</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 294.
- <sup>47</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 295 (2).
- <sup>48</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 296.
- <sup>49</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 316.
- <sup>50</sup> Safe Work Australia, 'Construction work model code of practice (November 2013).
- <sup>51</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 310
- <sup>52</sup> [2011] FCAFC 62.
- <sup>53</sup> CCH, Australian Managing Occupational Health and Safety, 'Fatigue and Fitness for Work' (at 11 December 2013) 35-500.
- <sup>54</sup> *Model Work Health and Safety Act 2011* (Cth) s 19 (3) (g).
- <sup>55</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 368.
- <sup>56</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 405.
- <sup>57</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 435.
- <sup>58</sup> Model Work Health and Safety Regulations 2011 (Cth) reg 371.
- <sup>59</sup> Fatigue prevention in the workplace WorkSafe Victoria.
- <sup>60</sup> NSW Mine Safety Advisory Council Fatigue Risk Management Chart; Fatigue prevention in the workplace WorkSafe Victoria
- <sup>61</sup> Fatigue prevention in the workplace WorkSafe Victoria.
- <sup>62</sup> Caterpillar viewpoint article 2007.
- <sup>63</sup> *Model Work Health and Safety Act 2011* (Cth) s 28.
- <sup>64</sup> Safe Work Australia, 'Guide for managing the risks of fatigue at work' (November, 2013).

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