

## Information on Health and Safety at Work Act (HSWA) 2015

The Health and Safety at Work Act (HSWA) 2015 comes into force on 4 April 2016. This legislation replaces the Health and Safety in Employment Act 1992 (HSE Act).

Regulations in support of the HSWA have been finalised, and will come into force at the same time as the HSWA.

Prior to the effective date, all parties need to be aware of their responsibilities in relation to the new legislation.

Here is some initial information about the HSWA.

It will be important for everyone to identify their own responsibilities in relation to the HSWA. It is recommended that this identification process is coordinated with all other parties you work with, to ensure their responsibilities/expectations are fully understood and to understand how they will co-relate or overlap with your own.

### Summary of key roles in the HSWA

Term	Explanation
<b>PCBU (Person Conducting a Business or Undertaking)</b>	<p>This will usually be an entity, such as a company or other organisation, rather than an individual.</p> <p>The PCBU will have the primary duty of care under the HSWA to ensure the health and safety of its workers and any other workers it influences or directs, and must ensure other people are not put at risk by the work it carries out.</p> <p>It will also need to consult with other PCBUs where it shares a worksite or is part of a contracting or supply chain, to make sure all workers are safe and healthy.</p>
<b>Officers</b>	<p>Officers include company directors and other people who make governance decisions that significantly affect a business or undertaking.</p> <p>Officers have a duty of due diligence to ensure their PCBU complies with its H&amp;S obligations.</p>

<b>Workers</b>	<p>A worker is an individual who carries out work in any capacity for a PCBU.</p> <p>All workers must take reasonable care to ensure the H&amp;S of themselves and others, and to comply with the PCBU's reasonable instructions and cooperate with reasonable policies and procedures.</p>
<b>Other persons</b>	<p>Other persons who come to the workplace, such as visitors or customers, also have the same H&amp;S duties as workers, but do not have to cooperate with policies and procedures.</p>

It's all about taking your share of the responsibility for what you control.

## Key changes in the new legislation

### Eliminate and minimise

The law currently provides for a three tiered approach for managing safety hazards i.e. eliminate, isolate and minimise.

*Refer Section 30 of the HSWA*

The HSWA provides a two tiered approach, requiring PCBUs to eliminate and where this is not reasonably practicable, minimise risks.

Isolation as defined by the HSE Act will no longer be recognised as a separate measure. Instead, isolation will be part of minimising risks.

This duty to manage risks is limited by the extent the duty holder has the ability to influence and control the matter to which the risks relate.

### Person Conducting a Business or Undertaking (PCBU)

The HSE Act places duties on defined participants i.e. employers, principals, the self-employed, persons controlling a place of work and suppliers of plant.

*Refer Section 17 of the HSWA*

These are all replaced under the HSWA by a new primary duty holder, being a **PCBU**.

A PCBU means a person conducting a business or undertaking:

- whether the person conducts a business or undertaking alone or with others; and
- whether or not the business or undertaking is conducted for profit or gain.

A PCBU *does not* include workers or officers of PCBUs (refer to Officers below), volunteer associations, and occupiers of a home who employ or engage another person solely to do residential work.

## Officers

*Refer Section 18 of the HSWA*

The HSWA introduces a positive duty on officers to exercise **due diligence** to ensure that the PCBU complies with its duties.

This is a key change from the HSE Act, where directors of a company can only be held liable where they have directly participated in, contributed to, or acquiesced in their company's failure.

**Under the HSWA, officers may be convicted for a breach of due diligence regardless of whether the PCBU has been convicted of an offence.**

Due diligence includes taking reasonable steps to:

- acquire, and keep up-to-date, knowledge of work health and safety matters
- gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
- ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from its work
- ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information
- ensure that the PCBU has, and implements, a process for complying with any duty or obligation of the PCBU under the Act
- verify the provision and use of resources and processes.

## Worker duties/Personal safety

The HSWA's definition of a worker is broad and is designed to encompass all of the relationships that are typical in a work environment.

*Refer Section 19 of the HSWA*

A worker is defined as a person who carries out work as:

- an employee
- a contractor or subcontractor
- an employee of a contractor or subcontractor
- an employee of a labour hire company who has been assigned to work in the business or undertaking
- an apprentice or a trainee
- a person gaining work experience or undertaking a work trial
- a volunteer worker
- a person of a prescribed class (such as a constable or member of the Armed Forces).

In terms of the HSWA, a volunteer worker is a person:

- who carries out work in any capacity for a PCBU:
  - with the knowledge or consent of the PCBU; and
  - on an ongoing and regular basis; and
  - that is an integral part of the business or undertaking; but
- does not include a volunteer undertaking any of the following voluntary work activities:
  - participating in a fund-raising activity
  - assisting with sports or recreation for an educational institute, sports club, or recreation club
  - assisting with activities for an educational institute outside the premises of the educational institution
  - providing care for another person in the volunteer's home.

The new legislation confirms the obligation on workers to keep themselves safe, to not harm others but implements a new requirement that workers comply with instructions from PCBUs and cooperate with the PCBUs reasonable policies and procedures related to their health and safety.

## Reasonably practicable

The current standard under the HSE Act 'all practicable steps' is replaced in the HSWA with a new '**reasonably practicable**' standard.

*Refer Section 22 of the HSWA*

'**Reasonably practicable**' is defined as: '...that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including:

- the likelihood of the hazard or the risk concerned occurring;
- the degree of harm that might result from the hazard or risk;
- what the person concerned knows, or ought reasonably to know, about
  - the hazard or risk; and
  - ways of eliminating or minimising the risk;
- the availability and suitability of ways to eliminate or minimise the risk; and
- after assessing the extent of the risk and 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 new standard is broadly similar to the existing concept of 'all practicable steps', except that the assessment of costs must only be taken **after** the assessment of the risk and the ways to eliminate that risk.

This means that costs will only take precedence over safety when the cost of taking a step is 'grossly disproportionate' to the risk. 'Grossly disproportionate' is not defined in the HSWA, but the concept is considered to apply where the risk is insignificant in relation to the cost. The greater the risk, the higher the proportion of cost before the measure can be considered 'grossly disproportionate'.

## Primary duty of care

*Refer Section 36 of the HSWA*

The HSWA introduces a new general duty on all PCBUs to ensure, so far as reasonably practicable, the health and safety of:

- workers working for the PCBU, while the workers are at work in the business or undertaking; and
- workers whose activities in carrying out work are influenced or directed by the PCBU while the workers are carrying out the work.

PCBUs must also ensure, so far as reasonably practicable, that the health and safety of other people is not put at risk from work carried out as part of the PCBU's business.

There are also specific duties imposed on PCBUs if their business involves:

- the management and control of fixtures, fittings, and plant in the workplace;
- the design and manufacture of plant to be used in a workplace; and
- the supply, importation and installation of plant to be used in a workplace.

These PCBUs should seek additional guidance on the impact of the changes for their business.

## Offences and penalties

Refer Sections 47 to 49 of the HSWA

The HSWA creates three offence tiers relating to breaches of the health and safety duties. The offences and the respective maximum penalties can be summarised as follows:

Offense	Action	Penalty upon conviction
<b>Reckless Conduct in respect of duty</b> <i>Section 47</i>	A person commits an offence against this section if the person: <ul style="list-style-type: none"> <li>• has a duty, and</li> <li>• without reasonable excuse, engages in conduct that exposes any individual to whom the duty is owed to risk of death or serious injury/illness, and</li> <li>• is reckless as to that risk.</li> </ul>	The following may apply: <ul style="list-style-type: none"> <li>• for an individual who is not a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding \$300,000, or both</li> <li>• for an individual who is a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding \$600,000, or both</li> <li>• for any other person, to a fine not exceeding \$3 million.</li> </ul>
<b>Failure to comply with a Duty</b> <i>Section 48</i>	A person commits an offence against this section if the person: <ul style="list-style-type: none"> <li>• has a duty, and</li> <li>• fails to comply with that duty, and</li> <li>• exposes an individual to risk of death or serious injury/illness.</li> </ul>	The following may apply: <ul style="list-style-type: none"> <li>• for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$150,000</li> <li>• for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$300,000</li> <li>• for any other person, to a fine not exceeding \$1.5 million.</li> </ul>
<b>Failure to comply with a Duty</b> <i>Section 49</i>	A person commits an offence against this section if the person: <ul style="list-style-type: none"> <li>• has a duty, and</li> <li>• fails to comply with that duty.</li> </ul>	The following may apply: <ul style="list-style-type: none"> <li>• for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$50,000</li> <li>• for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$100,000</li> <li>• for any other person, to a fine not exceeding \$500,000.</li> </ul>

## New orders which the court may impose at sentencing

*Refer Sections 153 to 156 of the HSWA*

In addition to the current regime, which provides for injunctions, training orders, fines and imprisonment that may be imposed, the HSWA provides for new orders which the court may impose at sentencing:

- **Adverse publicity orders** – requiring the offender to publicise in a particular manner the offence, its consequences, and the penalty imposed
- **Restoration orders** – requiring an offender to take specified steps to remedy any matter caused by the offence
- **Work H&S project orders** – requiring an offender to undertake a specific project for the general improvement of work health and safety
- **Court-ordered enforceable undertakings** – adjourning the proceeding for up to two years, during which the offender undertakes to comply with certain conditions.

## What do I need to do?

If your organisation already has a strong commitment to H&S, you might not have to do anything new.

However, it is still worthwhile reviewing your procedures in light of the new legislation so you know if and how the changes affect your operations.

You will need to think about what could go wrong in operations under your control and how to manage your health and safety risks. Make sure all your staff and other affected parties you work with understand and meet these new obligations.

These tips will help you stay on the right track:

- gain an understanding of the H&S requirements for all operations under your control
- identify H&S hazards and risks, and take steps to prevent these from happening
- involve all affected parties in these steps
- make sure your H&S policies are led by management, understood by all staff and reviewed regularly
- hold regular training on H&S matters
- engage workers in H&S matters that affect them
- support all officers to get up to date with H&S issues and key risk factors.
- report and monitor H&S goals
- carry out frequent H&S audits
- review all incidents as they arise including “near misses”
- document all of the above steps.