

## High Level Overview: *Work Health and Safety Act 2020 (WA)*

### Definitions – Part 1

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<b>Officer:</b>	General definition found within the <i>Corporations Act 2009</i> (Cth); an officer of the Crown; or an officer of a public corporation (but excludes the Governor, Minister and local government member i.e. elected members).
<b>PCBU:</b>	Any person that conducts a business or undertaking. It does not matter if the PCBU is acting alone or with others, or whether the business or undertaking is conducted for profit or gain.
<b>Plants:</b>	A non-exhaustive term for machinery, equipment, tools and/or relevant components.
<b>Reasonably Practicable:</b>	Involves weighing up any relevant matters that could be reasonably done to ensure work health and safety. A non-exhaustive list of relevant matters can be found in the Act at s 18.
<b>Worker:</b>	Broad definition that captures a wide range of persons that carry out work in any capacity e.g. employees, contractors and volunteers.

<b>Notifiable Incident:</b>	A notifiable incident is the death, serious injury or a dangerous incident experienced by a person.
<b>Dangerous Incident:</b>	An immediate or imminent exposure to a serious risk to a person's health or safety.
<b>Serious Injury or Illness:</b>	An injury or illness that required a person to undergo immediate or urgent treatment (dependent on circumstance or exposure) or prevents them for working for at least 10 days.

### Duties – Part 2

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In general, a duty will be imposed on a person conducting a business or undertaking (**PCBU**) to ensure that risks to health and safety should be eliminated or minimised so far as is reasonably practicable (**Division 2**).

A further duty will be imposed on a PCBU that is involved in the management, control, design, manufacturing, importing, supplying, installation, construction or commission of fixtures, structures or plants at a workplace, to ensure that they are executed, as reasonably practicable, without risks to health and safety (some limitations may apply, see **Division 3**).

An officer has a duty to exercise due diligence, this includes taking reasonable steps to (**Division 4**):

1. have an up to date knowledge of WHS matters;

2. understand the operations and its hazards and risks;
3. have resources and processes to identify, eliminate or control hazards and risks
4. have processes for receiving, considering and responding to incidents, risks and hazards
5. have processes to ensure compliance; and
6. have processes to verify compliance and effectiveness.

**\*\*See section 27(5) of the WHS Act 2020 (WA)**

Workers also have positive due diligence obligations placed on them; practically these are to:

*Know* – take reasonable steps to acquire and keep up to date knowledge in relation to WHS matters (i.e. know their legal obligations).

*Learn* – taking reasonable steps to acquire and keep up to date knowledge in relation to WHS matters. (i.e. participate in training)

*Engage* – taking reasonable steps to acquire and keep up to date knowledge in relation to WHS matters. (i.e. consultation, risk assessments).

*Report* – taking reasonable steps to acquire and keep up to date knowledge in relation to WHS matters. (i.e. report hazards and incidents).

*Comply* – obligation to comply with the requirements of any safety management system in place, safety policies & procedures.

*Verify* – obligation to comply with the requirements of any safety management system in place, safety policies & procedures.

**\*\*See section 28 WHS Act 2020 (WA)**

A supervisor of a PCBU must also manage their due diligence obligations, practically these are set out below:

*Leadership* – ensuring health and safety procedures are followed by workers.

*Resourcing* – allocating resourcing appropriately to meet safety duties.

*Training and competence* – use of training records to ensure people are qualified and have sufficient training to do the job allocated.

*Risk management* – ensuring hazards and controls are understood and managed to a reasonably practicable level. Use of risk assessments to determine what is required for tasks and monitor effectiveness.

*Operations* – giving clear instruction, scope of authority and job description.

*Consultation and involvement* – engaging in visible leadership involving the work force in safety programs and conducting in field verification.

*Inspect, monitor, review & report* – is across lead and lag indicators of the business and monitors them, systematic audit and inspection process, regular system reviews and reports issues to management.

*Communication* – clear, accurate and open communication to create a safe working environment where safety matters can be raised without reprisal.

*Change management* – identify significant change and manage the hazards that it creates.

*Responsibility* – only accept statutory roles they are qualified for.

\*\* See MIAC Guideline: Effective Safety and Health Supervision in Western Australia 2014.

## Offences and Penalties – Part 2

An offence that is committed when a person fails to comply with a health and safety duty will fall into 1 of the 3 categories. (**Division 5 – Subdivision 3**).

**Category 1:** A failure to comply with a health and safety duty that *results* in serious injury or death.

**Category 2:** A failure to comply with a health and safety duty that *exposes* an individual to serious injury or death.

**Category 3:** A failure to comply with a health and safety duty.

Industrial manslaughter is also an available criminal punishment if the PCBU has knowingly disregarded a health and safety duty, and this conduct has led to the death of an individual. The penalty for a body corporate is a fine of \$10 000 000 (**Division 5 – Subdivision 2**).

See a summary of the penalties below:

	Body corporate	Individual PCBU
<b>Industrial manslaughter</b>	\$10 000 000	\$5 000 000; and 20 years imprisonment
<b>Category 1</b>	\$3 500 000	\$680 000; and 5 years imprisonment
<b>Category 2</b>	\$1 800 000	\$350 000
<b>Category 3</b>	\$570 000	\$120 000

*\*Smaller penalties will apply for an individual that is not a PCBU*

*\*Some exceptions apply to Category 1-3 offences and Industrial Manslaughter for volunteers and unincorporated associations*

## Incident Notification – Part 3

A PCBU must ensure the WorkSafe Regulator is notified immediately after a notifiable incident arising out of the conduct of a business or undertaking (see definitions for what constitutes a notifiable incident).

The incident site must be preserved until an inspector arrives on site.

## Authorisations – Part 4

Penalties will be enforced if the person conducts a business or undertaking without the necessary authorisations for that workplace, plant or substance, or work being conducted (**Division 2**).

Failing to comply with any requirements is also punishable. For instance, if you carry out work without the necessary qualifications or have not complied with the conditions of any authorisations (**Division 3**).

## Consultation – Part 5

Where more than one person has a duty related to the same matter, each person must, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other persons who have this same duty (**Division 1**).

Further, workers must be consulted if they are directly affected by a matter relating to work health or safety. Section 49 contains an exhaustive list of when consultation is required for workers (**Division 2**).

## Health and Safety Representatives – Part 5

A worker is within their right to ask a PCBU to host an election for one or more health and safety representatives to represent workers (**Division 3 – Subdivision 1**). The PCBU is

expected to negotiate with their workers to agree on the number of work groups, the number of health and safety representatives and the workplace/s that work groups will apply. Once negotiations are completed a notice of the outcome must be sent to the workers as soon as practicable.

A worker is only eligible to be elected if they are a member of that work group and they have not been disqualified for either: pursuing an improper purpose or previously disclosed information as a health and safety officer for an unconnected purpose. If a worker should be disqualified from the election, see s 65 to make an application. A work group may also determine how an election is conducted; and all workers in the relevant work group can vote.

Health and safety representatives are given the power to represent workers in matters pertaining to health and safety, monitor any measures taken for health and safety, investigate complaints from members of the work group and inquire into anything that appears to demonstrate risks to the health and safety of workers in that work group (**Division 3 – Subdivision 5**).

A health and safety representative may also issue a provisional improvement notice if they believe that a person is contravening or likely to contravene a provision of the Act (**Division 7**). This notice can require the person to remedy the contravention, prevent a likely contravention from occurring and remedy what may be causing the contravention. A notice must not be issued unless the person has first been consulted and the representative has completed the necessary training.

## Health and Safety Committees – Part 5

The PCBU at a workplace must also ensure that they establish a health and safety committee (**Division 4**) –

Within 2 months after the day on which they were requested to do so by:

- (a) a health and safety representative; or
- (b) five or more workers at that workplace.

Or required by regulations to do so, within the time prescribed.

The functions of the committee are to facilitate cooperation to ensure workers' health and safety, to assist with the development of workplace standards, rules and procedures related to work health and safety, and any other functions agreed or prescribed by regulations.

The duty of a PCBU is (1) to allow the committee to spend the necessary time to attend meetings and perform functions; (2) give the committee access to information on hazards and the health and safety of workers; and (3) ensure the committee does not have access to any personal or medical information.

The PCBU must, without reasonable delay, consider any recommendations given by the committee, provide responses outlining the degree of implementation of such recommendation, and take any necessary action required when agreeing to a recommendation.

## Discriminatory, Coercive and Misleading Conduct – Part 6

A person must not engage in or authorise discriminatory conduct for any of the prohibited reasons outlined in s 106 of the Act (**Division 1**). The prohibited reasons outline many different circumstances where an employee might advocate for their concerns about the health and safety in the workplace.

A person must not coerce another person in relation to any powers or functions they have under the Act. Further, a person must not knowingly mislead another person about the powers or functions they have under the Act.

## The Regulator – Part 8

A WorkSafe Commissioner (regulator) has a multitude of functions outlined in s 152 of the Act; they consist of making recommendations to the Minister, and monitoring, advising, promoting and/or investigating work health and safety (**Division 1**).

The regulator has the power to do all things necessary to perform its functions.

## Securing Compliance (Inspectors Powers) – Part 9

Part 9 outlines the general functions of inspectors and their powers of entry. An inspector is appointed by the relevant regulator (**Division 1**), and predominantly has the role of ensuring compliance with the Act, investigating contraventions of the Act and resolving any disputes about work health and safety (**Division 2**).

An inspector can only enter a place after acquiring the appropriate entry warrant (**Division 3 – Subdivision 2**).

An inspector has multiple powers relating to documents and information, they can:

- require a person to tell them who has custody/access to a document;
- require the provision or copy of the document from a person who has custody/access to it;
- require a person to submit to an interview at a reasonable time and place;
- require a person to answer any questions during an interview;
- require a person to verify any answers given in an interview by statutory declaration; and
- require a person to answer a question by means other than an interview, and

verify those answers by statutory declaration;

Notably, a person is not excused from providing information or documents on the grounds that it may incriminate or expose the person to a penalty (**Division 4**). However, the information or document provided is not admissible as evidence against in civil or criminal proceedings, unless it is false or misleading.

## Enforcement Generally – Part 10 & 11

To enforce the provisions of the Act, an inspector can issue –

**Improvement notices:** to remedy or prevent a contravention.

**Prohibition notices:** to prohibit an activity if it will involve serious risk or exposure to a hazard.

**Non-disturbance notices:** to preserve or prevent disturbances of a site for a specified period, so the inspector can appropriately exercise their compliance powers.

There are penalties for noncompliance with orders (**Part 10 – Divisions 1-3**).

A regulator can accept undertakings given by a person in connection with a contravention or alleged contravention (**WHS undertakings – Part 11**). When making a proposed WHS undertaking, the regulator must give written reasons for accepting or refusing.

## Review of Decisions and Legal Proceedings – Part 12 & 13

Reviewable decisions under the Act include–

- Failed negotiations on health and safety representatives;
- decisions relating to the health and safety committee;
- improvement notices;

- prohibition notices; and
- non-disturbance notices.

The review will be conducted by either an internal reviewer or a Tribunal (**Part 12 – Division 1-3**).

Proceedings for an offence may only be brought by the regulator or a relevant public service officer that is authorised by the regulator (**Part 13 – Division 1**).

During legal proceedings, the Act permits the court to admit evidence that was obtained unlawfully, which would otherwise be inadmissible. To admit unlawfully extracted evidence, the court must be satisfied that *the desirability of admitting the evidence outweighs the undesirability of admitting the evidence*.

## Transitional provisions – Part 16

The Act will not apply to offences, contraventions, accidents, deaths, injuries or illnesses that occur prior to its enactment (**Division 2**). Also, any provisional improvement notices, improvement notices and prohibition notices given prior to the commencement of the Act will fall under past regulations.

The health and safety duties will only start applying on commencement day e.g. it will only apply to a manufacturer of a plant, substance or structure if the manufacturing started on or after the commencement of the Act.

## Other

WHS Authorities have no civil liability for acts done in good faith when in performance or purported performance of the Act (**Part 14**).

Further, a significant addition to the Act is that an insurance policy has no effect where it would indemnify a person for the person's liability to pay a fine (**Part 14 – Division 1**).

## Contact



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