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Work Health and Safety Act 2011 (Qld)

The *Work Health and Safety Act (Qld)* (Qld WHS Act) was assented to on 6 June 2011. The main feature of the Qld WHS Act is the implementation of the national model work health and safety laws contained in the final draft of the Model Work Health and Safety Bill released by Safe Work Australia in November 2010.

Queensland was the first jurisdiction to pass the necessary legislation to implement the model laws. New South Wales recently passed a modified version of the model legislation and other jurisdictions have introduced, or are in the process of introducing, legislation to implement the reforms. It is anticipated that the national scheme will commence on 1 January 2012.

On commencement, the Qld WHS Act will repeal the *Workplace Health and Safety Act 1995 (Qld)* and, because the new Act will regulate dangerous goods and major hazard facilities, the *Dangerous Goods Safety Management Act 2001 (Qld)*. Amendments will also be made to the *Electrical Safety Act 2002 (Qld)* to ensure consistency with the new legislation. Other miscellaneous amendments, which commenced on 6 June 2011, have been made to the *Workers' Compensation and Rehabilitation Act 2003 (Qld)* and to other work related legislation.

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Key Points

1. The [Work Health and Safety Act 2011 \(Qld\)](#) (the [Qld WHS Act](#)) was assented to on 6 June 2011 and is expected to commence on 1 January 2012 (although some miscellaneous amendments to other laws commenced on the date of assent). The main feature of the Qld WHS Act is the implementation of the national model health and safety laws contained in the final draft of the Model Work Health and Safety Bill released by Safe Work Australia in November 2010.
2. The Qld WHS Act also gives effect to the Council of Australian Government's (COAG's) [Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety \(IGA\)](#) requiring each state and territory to introduce the model provisions by December 2011. It is anticipated that the national scheme will commence on 1 January 2012 and Queensland was the first jurisdiction to pass the necessary legislation to implement the reforms.
3. It is intended that each jurisdiction will implement the Model WHS Bill provisions (subject to minor permissible variations that do not impact on harmonisation to ensure workability with other laws) by the end of 2011. The Model WHS Bill is based on WHS policies common to many jurisdictions, including the [Workplace Health and Safety Act 1995 \(Qld\)](#) (to be repealed), and does not radically differ from most existing WHS laws.
4. The main features of the Qld WHS Act – some of which are already found in the soon to be repealed *Workplace Health and Safety Act 1995* (Qld) – include:
 - a new concept of a '**person conducting a business or undertaking**' (PCBU) upon whom the main duties and obligations under laws are placed. The term replaces the notion of 'employer', appears to have a broad application, and covers employers, principal contractors, head contractors, franchisors and Commonwealth and State Governments. Exclusions are also expressly provided (e.g. volunteer associations). The definition of '**worker**' is also broad, aiming to cover a variety of work relationships, including (but not limited to) work as an employee, a contractor/subcontractor (or an employee thereof), an employee of a labour hire company, an outworker, an apprentice or trainee, a work experience student, a volunteer, or a prescribed class of person;
 - health and safety **duties** requiring the duty holder to eliminate risks to health and safety of workers and others (e.g. clients, customers) qualified by what is 'reasonably practicable'. Such duties apply to **PCBUs**, upstream PCBUs (**designers, manufacturers, installers, constructors, importers** and **suppliers** of plant, structures and substances), **officers** (who now have a proactive duty to exercise reasonable diligence to ensure compliance irrespective of any liability of the corporation), and **workers**;
 - higher **penalties** for breaches of WHS duties, particularly relating to those involving recklessly exposing another person to a risk of death/serious injury or illness (an individual faces a fine of up to \$300,000 or up to 5 years imprisonment; a corporation being liable to a fine of up to \$3 million);
 - a requirement that a PCBU notify the regulator immediately after becoming aware of the occurrence of a **notifiable incident**. A 'notifiable incident' is a death, or serious injury or illness, or a dangerous incident immediately or imminently exposing a worker or others to serious risks to health and safety;
 - a framework for **authorisations** (e.g. licence or permit) that will be required under the proposed WHS Regulations to undertake activities that are of such a high risk as

- to need demonstrated competency (e.g. particular qualifications or experience) or a certain safety standard;
- a process for electing **health and safety representatives (HSRs)** who will have regular participation in WHS matters and have the necessary legislative support and powers to be involved in WHS consultations and in taking certain actions in regard to WHS;
 - establishing **Health and Safety Committees (HSCs)** which are consultative bodies that help in the development of WHS standards, rules and procedures at the workplace. HSCs also seek to facilitate cooperation between the PCBU and workers;
 - providing a right to **cease unsafe work** in serious cases, including by direction of a HSR, and allowing a HSR to issue a **provisional improvement notice** requiring the prevention or remedying of a contravention of WHS laws;
 - establishing criminal and civil causes of action to deal with **discriminatory, coercive and misleading conduct** regarding WHS matters;
 - providing a **right of workplace entry** to a WHS entry permit holder to investigate possible contraventions and carry out various functions upon entry (such as inspect work systems) and to consult with and advise workers about WHS matters. New **civil penalty provisions** will apply to various breaches of obligations by entry permit holders;
 - establishing the **regulator** who will undertake oversight type regulatory functions and **inspectors** who will have a range of powers to secure compliance with the Qld WHS Act. Inspectors can issue compliance notices, improvement notices and non-disturbance notices;
 - setting out the process for the regulator to accept **enforceable undertakings**, for the **prosecution** of offences under the Qld WHS Act by the regulator (or by an inspector with the regulator's authorisation), and the range of possible **orders** that can be made;
 - providing for the making of **Codes of Practice** and **Regulations** under the Qld WHS Act, which are currently undergoing consultation.
5. **New South Wales** recently passed a modified version of the model legislation and **other jurisdictions** have introduced, or are in the process of introducing, legislation to implement the reforms.
6. On its commencement, the Qld WHS Act will **repeal** the [Workplace Health and Safety Act 1995 \(Qld\)](#) and, because the new Act will regulate dangerous goods and major hazard facilities, the [Dangerous Goods Safety Management Act 2001 \(Qld\)](#).
7. Amendments are also made to the [Electrical Safety Act 2002 \(Qld\)](#) to ensure consistency with the new legislation. Specific changes have been made to the [Workers' Compensation and Rehabilitation Act 2003 \(Qld\)](#) as well as certain miscellaneous amendments to the [Workplace Health and Safety Regulation 2008 \(Qld\)](#) and other work related legislation.

The information in this Research Brief is current to **1 September 2011**.

For further clarification and analysis of the relevant issues, the reader should consult the Research Brief and refer to the Explanatory Notes to the Bill as well as to the Bill itself.

1 Introduction

The [Work Health and Safety Act 2011 \(Qld\)](#) (the [Qld WHS Act](#)) was assented to on 6 June 2011. The main feature of the Qld WHS Act is the implementation of the national model work health and safety laws contained in the final draft of the Model Work Health and Safety Bill released by Safe Work Australia in November 2010. The Qld WHS Act also gives effect to the Council of Australian Government's (COAG's) [Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety \(IGA\)](#) for each state and territory to introduce the model provisions by December 2011. Queensland was the first jurisdiction to have passed the necessary legislation to implement the reforms. New South Wales recently passed a modified version of the model legislation and other jurisdictions have introduced, or are in the process of introducing, their legislation to implement the reforms. It is anticipated that the national scheme will commence on 1 January 2012.

The Qld WHS Act, on its commencement, will repeal the [Workplace Health and Safety Act 1995 \(Qld\)](#) and, because the new Act will regulate dangerous goods and major hazard facilities, the [Dangerous Goods Safety Management Act 2001 \(Qld\)](#). Amendments are made to the [Electrical Safety Act 2002 \(Qld\)](#) to ensure consistency with the new legislation. Other miscellaneous amendments, which commenced on 6 June 2011, have been made to the [Workers' Compensation and Rehabilitation Act 2003 \(Qld\)](#) and to certain other work related legislation.

When introducing the legislation that became the Qld WHS Act into the Queensland Parliament, the Minister for Industrial Relations, the Hon Cameron Dick MP,¹ indicated that the harmonised laws would end disparities and inconsistencies faced by businesses operating across jurisdictions when seeking to comply with a myriad of state and territory work health and safety (WHS) laws. However, the Minister also said that health and safety standards currently applying in Queensland workplaces would not be lessened. The Minister observed that, although the Model WHS Bill compared favourably with the *Workplace Health and Safety Act 1995 (Qld)* (to be repealed) in its overall approach, there are some differences, including a broader definition of 'worker' to include labour hire company employees, contractors/subcontractors; the imposition of an onus of proof on the regulator to prove an offence under the legislation; and increased maximum penalties for contraventions. The Minister considered that the national harmonisation of workplace health and safety laws would save the Queensland economy more than \$30 million each year.²

The information in this Research Brief is current to 1 September 2011.

2 Background

Australian workers expect that, on any given day, they will return home from work without suffering from workplace injury, illness or, even, death. Nevertheless, the [Australian Bureau of Statistics](#) (ABS) reported that, in 2009-2010, of the 12 million or so Australians who had worked at some time during that period, 640,700 (5.3%) had suffered a work-related injury or illness.³ The type of work having the highest rates was labouring (88 per 1,000 employed persons) followed by machinery operation and driving (86 per 1,000 persons).⁴

Of the 640,700 persons who experienced illness or injury, 24% had required 5 or more days off work and 3% had not returned to work since the injury or illness.⁵ Sadly, between 1 July

2009 and 30 June 2010, there were 124 work-related notified fatalities across Australia (i.e. worker (111) and bystander (13) deaths).⁶

The ABS estimated that Queenslanders had the second highest rates of work-related injury and illness at 58.7 per 1,000 persons employed during 2009-2010. The highest rates were in the Northern Territory at 60.7 per 1,000 persons.⁷ The ABS warns, however, that there are some limitations (such as sampling errors) in the comparability of work-related injury and illness data between the states and territories.⁸

Factors such as WHS regime structures and the industrial composition of employment in each jurisdiction can influence workplace injury and illness incidences. Queensland, for instance, has many workers in mining, which is inherently dangerous work, thus raising the number of incidences in this state.⁹ Thus, it has been acknowledged that it is difficult to draw conclusions about the performance of work health and safety laws across jurisdictions from outcomes data.¹⁰

Between July 2010 and May 2011, around 55 workplaces were [prosecuted](#) by Workplace Health and Safety Queensland (WHSQ) and a range of penalties were imposed. Among the relevant incidents were 10 fatalities. Four defendants were made subject to good behaviour bonds where a fatality and/or grievous bodily harm had occurred. The highest fine imposed was \$135,000.¹¹

[Safe Work Australia](#) notes that the total economic cost of work-related injuries and illnesses for the 2005–2006 financial year was estimated at \$57.5 billion, representing 5.9% of GDP for that period. Almost half of the cost is borne by the community (compensation and welfare costs if worker has to go on disability support, obtain rent assistance, mobility allowance etc., public hospital costs).¹² These figures do not, of course, provide any indication of the physical pain or mental suffering of the worker involved.

2.1 Existing Regulatory Framework

Each state and territory has its own workplace health and safety (WHS) laws. In Queensland, the relevant legislation, prior to the commencement of the new Qld WHS Act, is the [Workplace Health and Safety Act 1995 \(Qld\)](#) and the [Workplace Health and Safety Regulation 2008 \(Qld\)](#).¹³ While the laws in each jurisdiction have a similar thrust, the considerable differences in detail and operation have caused confusion and difficulties for businesses that operate across the country in attempting to comply with varying safety standards. It has been observed that, by 2008, there were over 400 work health and safety Acts, Regulations and Codes of Practice.¹⁴

[Safe Work Australia](#) is the lead government body for national work health and safety and workers' compensation policy development. It is driving the harmonisation of WHS legislation, having published a [Draft Model Work Health and Safety Bill](#) (Model WHS Bill) with supporting [Draft Model Work Health and Safety Regulations](#) and [Draft Model Codes of Practice](#)¹⁵ for implementation across the country.

2.2 Steps Towards National Work Health and Safety Laws

National uniformity and harmonisation of WHS laws became an agenda item for governments around the country from the early 1990s. For many years, industry has pressed for greater harmonisation of WHS legislation. Early efforts were made in developing and adopting national standards and codes of practice for certain areas such as manual handling,

hazardous substances, noise etc.¹⁶ However, progress on implementation was slow. By 1995, continuing substantial discrepancies in WHS legislation across the country were seen as impacting on compliance costs faced by businesses operating in more than one jurisdiction, especially whenever changes to systems in the workplace occurred or workers moved jurisdictions.¹⁷

In 1995, the Industry Commission¹⁸ released a report, *Work, Health and Safety Inquiry into Occupational Health and Safety*, recommending template WHS legislation for all jurisdictions to adopt with no or little amendment. There was little progress on this proposal, leading the Productivity Commission to report, in 2004, that previous attempts at gaining nationally consistent WHS laws had failed, despite there being broad support for such laws. The Productivity Commission believed that progress on uniform WHS legislation should be a priority.¹⁹

The first major step towards harmonisation of WHS laws was the signing of the [Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety \(IGA\)](#) by the Commonwealth, State and Territory Governments in July 2008 committing each government to work towards developing and implementing model WHS legislation. At this time, harmonisation of WHS legislation had become part of COAG's National Reform Agenda, particularly the [National Partnership Agreement to Deliver a Seamless National Economy](#). A comprehensive National Review into Model Occupational Health and Safety Laws ensued, culminating in two reports being provided to the Workplace Relations Ministers' Council (WRMC).²⁰ The reports made recommendations about the best structure of the Model WHS Bill and the content thereof. In May 2009, the WRMC provided its [Response to National Occupational Health and Safety Review Recommendations](#), accepting most but not all of the recommendations, and requested Safe Work Australia to begin developing model legislation.

An exposure draft of the Model WHS Bill (with some key administrative Regulations) was released in September 2009 for a six week public comment period. Amendments were then made to the draft legislation, incorporating some proposals arising out of the public consultation. The WRMC endorsed the revisions in December 2009. Further technical and other revisions occurred in April 2010 and, in November 2010, the next version of the [Draft Model Work Health and Safety Bill](#) and the [Explanatory Memorandum](#) were published to the Safe Work Australia website. On 7 December 2010, [Draft Model Work Health and Safety Regulations](#) and [Draft Model Codes of Practice](#) were released for public comment (closing 4 April 2011) together with an [Issues Paper](#) and, in January 2011, a [Consultation Regulation Impact Statement](#) prepared by Access Economics was published.²¹ Some further technical revisions were incorporated in a revised [Model Work Health and Safety Bill](#) released on 23 June 2011.

It is intended that each jurisdiction will implement the Model WHS Bill provisions (subject to minor permissible variations that do not impact on harmonisation to ensure workability with other laws ('local provisions')) by the end of 2011.²² It is expected that the laws will commence on 1 January 2012. The Model WHS Bill is based on WHS policies common to many jurisdictions and does not radically differ from most existing WHS laws.²³ An overview of the Model WHS Bill is provided in Safe Work Australia's [Summary of the Model Work Health and Safety Act](#) (albeit before the December 2010 revisions) and the [Explanatory Memorandum](#) to the Model WHS Bill.

It is anticipated that, once WHS laws are consistent in each jurisdiction, it will be easier for businesses and employers to comply with their health and safety obligations because the requirements will be substantially similar in each state or territory in which they operate.

The Queensland Government notes that the available evidence indicates that the Model WHS Bill will result in reduced compliance costs of around \$179 million per annum for businesses operating across a number of jurisdictions (with the Queensland share around \$31 million). The savings will be the result of less red tape currently confronted by businesses having to deal with several pieces of WHS legislation in each jurisdiction in which they operate. There may, however, be some costs associated with businesses adapting to the new WHS provisions but these may not be high because the general duties of care under the existing Queensland WHS Act are retained by the new laws.²⁴

Queensland stands to receive facilitation payments under the *National Partnership Agreement to Deliver a Seamless National Economy* of \$41.01 million in 2011-2012 and a total of \$112.27 million over the period between 2008-2009 and 2012-2013.²⁵

2.3 Reaction to the National Work Health and Safety Laws

In relation to the recently introduced model WHS laws in New South Wales (discussed below in 'Further Reading'), the Australian Industry Group (AiG) NSW said that industry had '*eagerly awaited the time when all governments could agree on consistent workplace safety laws*'.²⁶ With some states seeking to depart to some extent from the Model WHS Bill – the recently passed New South Wales legislation allowing for union prosecution of some offences in limited circumstances and a role for the NSW Industrial Relations Commission, and the Western Australian Government also proposing less than complete adoption of the scheme – the AiG has said that it would be disappointing if there was a fracturing of the commitment to harmonisation. The Business Council of Australia has also affirmed that '*a truly effective and national system of workplace safety ... needs the involvement of every jurisdiction*'.²⁷

While the Australian Chamber of Commerce and Industry (ACCI) expressed support for the new WHS laws, it called for a reduction in 'red tape', to ensure that small to medium business and national employers were not disadvantaged.²⁸ The ACCI and some larger employers have previously indicated concern that there could be more 'red tape' and extra costs arising from requirements such as risk assessments to identify hazards (which could mean listing even small electronic devices such as sharpeners).²⁹ More recently, the ACCI has commented that insufficient time had been given to businesses to test the new regulations for practicality and workability in the wide range of workplaces because of the political timeframe.³⁰ Workplace law experts have warned employers that the new legislation has a larger reach, covering not only employees and workers but even contract and subcontract workers and volunteers.³¹

3 Work Health and Safety Act 2011 (Qld)

On 10 May 2010, the [Work Health and Safety Bill 2011 \(Qld\)](#) was introduced into the Queensland Legislative Assembly to implement the abovementioned Model WHS Bill in Queensland. In addition, the Minister for Education and Industrial Relations also introduced the [Safety in Recreational Water Activities Bill 2011 \(Qld\)](#). During the process leading up to the harmonisation of the WHS legislation, most jurisdictions decided that the model WHS laws would not include specific regulations or codes of practice for recreational diving and snorkelling (these having more of a public safety than work health and safety focus). Accordingly, the Bill that became the [Safety in Recreational Water Activities Act 2011 \(Qld\)](#)

was introduced seeking to maintain ‘*high standards of safety for the recreational water activities industry*’.³² Both Bills were passed, with bipartisan support, by the Queensland Parliament³³ and assented to on 6 June 2011. The provisions of the [Qld WHS Act](#) that implement the Model WHS Bill commence on a date to be proclaimed (with other miscellaneous amendments to other legislation, having commenced on the date of assent). As noted earlier, commencement is expected to be 1 January 2012.

It is important to note (as does the Explanatory Memorandum to the Model WHS Bill (paras 60-61)) that the model laws (and, thus, the Qld WHS Act) seek to protect persons from any work-related harm, irrespective of whether such persons are workers or members of the public. However, the Qld WHS Act, like the Model WHS Bill, does not intend to operate in public health and safety contexts not related to work.

Workplace Health and Safety Queensland’s (WHSQ’s) [Understanding the Model WHS Act](#) webpage provides an overview of the Model WHS Bill and this, together with the Act’s [Explanatory Notes](#), should be consulted for a detailed understanding of the new provisions. The main features of the proposed laws are very briefly outlined under the headings which follow.

3.1 Objects

The main **object** of the Qld WHS Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplace by the various measures set out in s 3 (found in **Part 1**). One such measure is protecting workers and others against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant. The Dictionary (Sch 5) defines ‘health’ to mean physical and psychological health. According to the Explanatory Memorandum (para 10) to the Model WHS Bill, this wide definition covers psychosocial risks to health such as stress, fatigue and bullying. The overriding principle is that workers and others should, as far as reasonably practicable, be given the highest level of protection against harm from hazards and risks arising from work or from particular types of substances or plant.

3.2 Key Terms

Part 1 sets out [key terms](#) used throughout the Qld WHS Act,³⁴ in particular, the new concept of a **person conducting a business or undertaking** (PCBU) upon whom the main duties and obligations under laws are placed. The term replaces the notion of ‘employer’, appears to have a broad application, and covers individuals and bodies corporate. The Explanatory Notes (p 20) observe the definition will cover employers, principal contractors, head contractors, franchisors and Commonwealth and State Governments. Exclusions are also expressly provided (e.g. volunteer associations).

The definition of **worker** is also broad, aiming to cover a variety of work relationships, including (but not limited to) work as an employee; a contractor/subcontractor (or an employee thereof);³⁵ an employee of a labour hire company; an outworker; an apprentice or trainee; a work experience student; a volunteer; or a prescribed class of person. It also covers a person conducting a PCBU who carries out work in the business or undertaking.

3.3 Health and Safety Duties

Part 2 establishes the [health and safety duties](#), the principles applying to those duties and the concept of what is 'reasonably practicable'. The *Workplace Health and Safety Act 1995* does not place such a qualification on the applicable duties. The duties are non-transferrable and a person can have more than one duty. Further, more than one person may have the same duty. A duty to ensure health and safety requires the person to eliminate risks to health and safety so far as 'reasonably practicable'. If such elimination is not reasonably practicable, then the duty is to minimise the risks so far as is 'reasonably practicable'. What is 'reasonably practicable' (a concept not actually used in this context in the current *Workplace Health and Safety Act 1995* (Qld)) is what can reasonably be done at a particular time, taking into account and balancing relevant matters, including those in s 18 (e.g. the likelihood of the hazard or risk occurring; degree of harm that might result etc.).

3.3.1 PCBU Primary Duty of Care

Part 2, Division 2 imposes a primary WHS duty of care on a PCBU to ensure the health and safety of the PCBU's workers (including those workers whose activities are influenced or directed by the PCBU), so far as is reasonably practicable, through:

- the provision and maintenance of a work environment without risks to health and safety as well as to safe plant and structures and safe systems of work;
- the safe use, handling and storage of plant,³⁶ structures,³⁷ and substances;³⁸
- the provision of adequate facilities for the welfare of workers, including ensuring access thereto;
- the provision of information, training, instruction or supervision necessary to protect persons from risks;
- monitoring the health of workers and conditions at the workplace to prevent illness or injury (the current *Workplace Health and Safety Act 1995* does not specifically include this duty).³⁹

A PCBU must also ensure, so far as is reasonably practicable, that others affected by the carrying out of the work are not put at risk.

3.3.2 Further 'Upstream' Duties

Part 2, Division 3 imposes further duties on certain PCBUs and also imposes 'upstream' duties on **designers, manufacturers, installers, constructors, importers** and **suppliers** of plant, structures and substances.

3.3.3 Officers' Duties

A positive duty is imposed (see s 27) on **officers** of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with any duties or obligations imposed on it. An 'officer of a corporation' will have the same meaning as under s 9 of the Commonwealth [Corporations Act 2001](#) to cover, among other persons, someone who can make decisions that affect the whole, or a substantial part, of the business of the corporation or who has the capacity to significantly affect its financial standing. Thus, it is a defence for a person to show that he or she is not such an officer by virtue of not being in such a position of influence (see Explanatory Notes (p 9)). The concept of 'officer' is narrower than the previous 'executive officer'.⁴⁰

An officer also means an officer of the State, Commonwealth or other State (see s 247), and an officer of a public authority (see s 252).

An officer can be convicted or found guilty of an offence whether or not the PCBU has been convicted or found guilty. This is a shift away from the previous situation of being held liable for contraventions of the organisation and the law now requires officers to be proactive.⁴¹ Thus, officers could be liable for breaches of duties even if an incident or accident has not occurred.⁴²

Examples of exercising due diligence include keeping up-to-date about WHS matters and understanding the risks and hazards in the organisation's operations and ensuring there are proper resources available to eliminate or minimise such risks and that the business has processes for complying with its obligations such as how to report notifiable incidents (s 27(5)).

3.3.4 Workers' Duties

Workers will also have WHS duties (s 28) including taking reasonable care for their own health and safety, complying with reasonable instructions and policies etc., and ensuring their actions or omissions do not adversely affect the health and safety of other persons.

3.4 Categories of Offences

Part 2, Division 5 sets out the various categories of offences for breaches of WHS duties (some exceptions apply) by persons with such WHS duties and the applicable penalties. The maximum penalties have been increased for various reasons (as explained by the Explanatory Notes to the Bill (p 8)), including to reflect the serious nature of the offences under the Act and provide greater deterrence.

The Qld WHS Act expressly (s 10) makes the State, the Commonwealth and other States liable for an offence against the Act as well as for a contravention of a WHS civil penalty provision.

Category of Offence	Elements of the Offence	Penalty
Category 1	<p>A breach of a duty involving recklessly exposing another person to a risk of death/serious injury or illness (amounting to a crime).</p> <p>The prosecution has to prove that the conduct was engaged in without reasonable excuse.</p>	<p>This offence attracts the harshest maximum penalties:</p> <ul style="list-style-type: none"> • if committed by an individual – \$300,000⁴³ or 5 years imprisonment; • if committed by an individual conducting a PCBU or officer of a PCBU – \$600,000 or 5 years imprisonment; • If committed by a corporation – \$3 million.

Category of Offence	Elements of the Offence	Penalty
Category 2	A breach of duty exposing a person to a risk of death/serious injury or illness.	This offence involves less culpability than a Category 1 offence (no jail term). The maximum penalty for an offence is: <ul style="list-style-type: none"> • if committed by an individual – \$150,000; • if committed by an individual conducting a PCBU or officer of a PCBU – \$300,000; • If committed by a corporation – \$1,500,000.
Category 3	A general breach of duty without the need for the prosecution to prove exposure of others to risk of death or serious injury or illness.	The maximum penalty for such an offence is: <ul style="list-style-type: none"> • if committed by an individual – \$50,000; • if committed by an individual conducting a PCBU or officer of a PCBU – \$100,000; • If committed by a corporation – \$500,000

3.5 Incident Notification

Part 3 covers [incident notification](#) which enables the regulator to investigate notifiable incidents in a timely fashion. A 'notifiable incident' occurs if there has been a death, or serious injury or illness, or a dangerous incident immediately or imminently exposing a worker or others to serious risks to health and safety. A PCBU must notify the regulator immediately after becoming aware of the occurrence of a notifiable incident. There is also a duty to preserve incident sites until an inspector arrives. In each case, non-compliance is an offence and penalties apply.

3.6 Authorisations

Part 4 establishes the offence framework for [authorisations](#) that will be required under the model WHS Regulations to undertake activities that are of such a high risk as to need demonstrated competency (e.g. particular qualifications or experience) or a certain safety standard. Such authorisations include licences, permits and registrations to allow certain work to be undertaken (e.g. high risk work); for work to be carried out at a particular workplace (e.g. a major hazard facility); or before certain plant or substances can be used (e.g. a high risk substance such as asbestos). There might also be a requirement for work to be carried out by, or under supervision of, a person with prescribed qualifications or

experience. The Qld WHS Act sets out the penalties that apply if the required authorisation is not obtained or the requisite qualification or experience is not evident.

3.7 Consultation, Representation and Participation

Part 5 establishes [consultation, representation and participation](#) measures that operate under the Qld WHS Act.

3.7.1 Consultation

Part 5, Divisions 1-2 requires:

- each person with the same duty under the Qld WHS Act to consult etc., so far as is reasonably practicable, with other duty holders having duties in relation to the same matter (non-compliance attracting a fine of up to \$20,000);
- a PCBU to consult etc., so far as is reasonably practicable, with workers who are likely to be directly affected by a matter relating to WHS, in accordance with any relevant agreed consultation procedures (non-compliance attracting a fine of up to \$20,000). Among other things, the nature of the required consultation is set out.

3.7.2 Health and Safety Representatives

The [Understanding the Model WHS Act](#) webpage notes that it may be inefficient for the PCBU to consult with all affected workers. Accordingly, Part 5, Division 3 of the Qld WHS Act (as does the Model WHS Bill) sets up a single point of contact, a **health and safety representative (HSR)** who will have regular involvement in WHS matters and has legislative support to be involved in WHS consultations and in taking certain actions in relation to WHS matters.

The process for electing a HSR begins with a worker asking the PCBU to facilitate the conduct of an election for one or more HSRs to represent workers who carry out work for the PCBU. The PCBU must then facilitate the determination of one or more **work groups**. The purpose of determining a work group is to allow for the representation of workers of the group by one or more HSRs. Division 3 sets out the process for determining work groups through negotiation and agreement between PCBUs and those workers who will form the work group or their representative (e.g. a union). If the worker asks for negotiations to be through a representative, that representative must not be excluded from negotiations or a penalty applies. The provisions also set out what happens if negotiations fail.

A worker is eligible to be elected as an HSR for a work group only if he or she is a member of that work group (see s 60; Dictionary in Sch 5) and not disqualified under s 65. The work group's HSR is to be elected by its members. The term of office is three years.⁴⁴

Powers and functions of HSRs for their work group are set out in Part 5, Division 3, Sub-Div 5 in relation to which (see s 66) they have personal immunity, if exercised in good faith. In respect of their work group, HSRs represent workers in the group in relation to WHS matters; monitor the relevant PCBU's compliance with the Act; investigate complaints; and inquire into apparent risks arising from the conduct of the business or undertaking.

HSRs may, in performing their functions (which are generally limited – but see s 69 – to their particular work group), do a number of things such as:⁴⁵

- inspect the relevant workplace at any time having given reasonable notice, or without notice in the event of an incident or situation involving a serious risk to health and safety emanating from an immediate or imminent exposure to a hazard;
- attend a WHS related interview between workers (but only with consent of at least one of the workers) and either an inspector, or a PCBU or their representative;
- request the establishment of a health and safety committee;
- receive non-identifying information about the WHS of the work group members;⁴⁶

As will be discussed later, HSRs also have power to:

- direct cessation of work in certain circumstances; and
- issue provisional improvement notices.

3.7.3 Health and Safety Committees

Health and Safety Committees (HSCs) are established pursuant to Part 5, Division 4. They are consultative bodies that help in the development of WHS standards, rules and procedures at the workplace. HSCs also seek to facilitate cooperation between the PCBU and the workers in working out and undertaking measures designed to ensure workers' health and safety. They can have other agreed or prescribed additional functions.

HSCs can be established on a PCBU's own initiative but must be established in certain cases: at the request of a HSR or five or more workers at the workplace (within two months of such request), or if required by Regulation. An offence is committed if this does not occur and a penalty applies.

The provisions set out how HSCs are constituted (generally as agreed between workers and the PCBU). HSCs comprise HSRs and workers (at least half of the workers must not be nominated by the PCBU).

PCBUs have duties regarding HSCs (e.g. allowing members to spend such work time (to be paid time) as is reasonably necessary to attend meetings or carry out necessary functions; and giving access to certain WHS information). Failing to meet such obligations will attract a fine.

3.7.4 Resolution of WHS Issues

Resolution of WHS issues is covered in Part 5, Division 5. The Division sets out the parties in relation to an issue (relevant PCBU(s)/representative(s); the HSRs; or the affected workers/representative (e.g. union)). A resolution process is provided: first by discussing the issue and, if there is no resolution, then by using the agreed or prescribed default procedure. If there is still no resolution, a party can ask the regulator to appoint an inspector to assist.

3.7.5 Right to Cease Unsafe Work

Workers can (see Part 5, Division 6) **cease unsafe work** as defined in s 84 (if the worker has a reasonable concern that to carry out the work would expose him or her to a serious risk to health and safety, emanating from an immediate or imminent exposure to a hazard). An appropriately trained HSR can also direct a worker in his or her work group to cease unsafe work in the same circumstances provided that, first, there is an attempt at consulting with the PCBU about the matter, unless the risk is so serious and immediate or imminent that it is not reasonable to consult first (in which case the consultation should occur as soon as practicable after giving the direction).

Various notification and other requirements and parameters exist (e.g. worker availability for safe and appropriate alternative work). An inspector (established under Part 9, see below) can be asked to assist in resolving any issues that arise.

3.7.6 Provisional Improvement Notices

HSRs, provided they have the appropriate training, may issue **provisional improvement notices** under Part 5, Division 7 if the HSR reasonably believes a person is contravening, or has contravened, the Qld WHS Act and may be likely to continue or repeat such contravention. These notices can require:

- that a person remedy the contravention or prevent a likely contravention; or
- remedy things or operations causing the problem.

A time, at least eight days after issue of the notice, must be given in the notice, by which the contravention or likely contravention is to be remedied. Certain other requirements for the notice are set out (e.g. prominent display of the notice at or near the workplace). A right of review is given and is to be undertaken by an inspector. Section 99 makes it an offence to contravene a provisional improvement notice.

3.8 Discriminatory, Coercive and Misleading Conduct

Part 6 prohibits [discriminatory, coercive and misleading conduct](#) regarding WHS matters, establishing criminal and civil causes of action to deal with such conduct. These provisions seek to complement existing Commonwealth and State legal remedies (e.g. under the Commonwealth [Fair Work Act 2009](#)). The intention is to *'encourage engagement in work health and safety activities and the proper exercise of roles and powers under the [Qld WHS Act] by providing protection for those engaged in such roles and activities from being subject to discrimination or other forms of coercion because they are so engaged'*.⁴⁷

Discriminatory conduct (e.g. dismissal) designed to deter people from being involved in WHS roles or activities – such as being a HSR or a HSC, helping an inspector, raising a concern about WHS – is unlawful under s 104 and attracts a penalty of up to \$100,000 for an individual.

If a person is convicted or found guilty of discriminatory conduct, he or she may be ordered to compensate the affected person or reinstate him or her (s 111).

Certain forms of **coercion or inducement** for a person to exercise/ perform or not to exercise/not to perform WHS powers or functions etc. (e.g. threatening adverse action such as dismissal) are also prohibited under s 108.

Civil remedies are provided in relation to actions brought for discriminatory or coercive conduct such as injunctions, compensation, and reinstatement. The burden of proof for discriminatory conduct is lower than for criminal proceedings. The Queensland *Workplace Health and Safety Act 1995* does not currently provide for civil actions for such behaviours.

It will also be an offence for a person to knowingly or recklessly make a **false or misleading representation** to another person about the person's rights or obligations or ability to undertake processes under the Act or their ability to make a complaint or inquiry.

While the 1995 Act did make discrimination and victimisation an offence, there is no equivalent of the new offences of coercion or misrepresentation.

3.9 Right of Workplace Entry by Entry Permit Holder

Part 7 covers the [right of workplace entry](#) by a WHS entry permit holder.

A WHS **entry permit holder (permit holder)** is (see s 131) a union official. That union official must have completed prescribed training and hold, or will hold, an entry permit under the [Fair Work Act 2009 \(Cth\)](#) or an industrial officer authority under the [Industrial Relations Act 1999 \(Qld\)](#). Once the application for the permit is granted, it lasts for up to three years unless s 137 applies or it is revoked.

A permit holder can enter a workplace to:

- inquire into a reasonably suspected contravention of the Qld WHS Act that relates to or affects a relevant worker (i.e. a worker who is a member or potential member of the relevant union (i.e. the union represented by the permit holder)). Part 7, Division 2 outlines what the permit holder can do upon entry (e.g. inspect work systems, plant or substances etc.; consult workers and the PCBU; give warnings of the relevant risk to those believed to be exposed to serious risk; inspect documents and relevant employee records etc.); or
- consult with, and advise, relevant workers about WHS matters.

Notice of entry has to be given to the PCBU and other specified persons. In each case, and, in the case of a suspected contravention, it must be given as soon as reasonably practicable after entry, unless doing so would defeat the purpose of entry or cause delay in an urgent case. Permit holders will have to meet specified requirements under Division 4 in exercising their entry rights and must comply with the permit conditions. Various civil penalties apply for breaches of these requirements.⁴⁸

3.9.1 WHS Civil Penalty Provisions

Part 13, Division 7 covers **WHS civil penalty provisions** (which are new to Queensland) for Part 7 breaches that specify a 'WHS civil penalty provision' (as contravention will not be an offence). These civil penalty actions must be brought by the regulator or an inspector with the authorisation of the regulator (roles of inspectors and the regulator are discussed later), within 2 years of the contravention coming to light.

3.10 The Regulator

Part 8 sets out the functions of the [regulator](#). Under Sch 2, Part 1, the 'regulator' is a public service officer appointed by the Governor-in-Council. There has been no direct equivalent in Queensland's WHS system in the past but various regulatory functions are currently undertaken by Workplace Health and Safety Queensland. The regulator will have all the powers and functions that an inspector has. The regulator's functions include (but are not limited to (s 152)):

- advising and making recommendations to the Minister and reporting on the effectiveness and operation of the legislation;
- monitoring and enforcing compliance;

- giving WHS advice and information to duty holders and the community;
- conducting and defending proceedings under the Act.

If the regulator has reasonable grounds to believe that a person is capable of providing information, documents or evidence relating to a possible contravention or that will facilitate his or her monitoring and compliance function, the regulator can require that such information or documents be given or the person appear to give evidence. It will be an offence for a person not to comply without reasonable excuse.

3.11 Inspectors

Part 9 establishes the WHS inspectorate and provides powers for [securing compliance](#) with the Qld WHS Act.

3.11.1 Appointment

Part 9, Division 1 covers the appointment of inspectors and related issues. Inspectors can be drawn from the public service and other entities as described in s 156.⁴⁹ The regulator has power to suspend or end inspectors' appointments.⁵⁰

3.11.2 Powers and Functions

Part 9, Division 2 sets out inspectors' powers and functions and these include:

- providing information and advice about compliance;
- assisting in resolving WHS issues at workplaces or other issues relating to workplace access;
- reviewing disputes about provisional improvement notices;
- issuing a notice to require compliance with the Act (see below under 'Enforcement'); and
- investigating breaches and assisting in prosecuting offences.⁵¹

Part 9, Division 3 gives inspectors powers relating to entry of a workplace with or without consent. No prior notice of entry is required to be given but notification should be given to specified persons as soon as practicable after entry. Other places can be entered with a search warrant.⁵²

Upon entry to a workplace, inspectors have a range of general powers similar to those found in other legislation establishing officers involved in compliance activities (e.g. inspecting, examining and inquiring, requiring persons to assist the inspector).

Further specific powers on entry include that inspectors can require a person at the workplace to provide certain information, documents or answer questions. Overall, as the Explanatory Notes to the Bill that became the Qld WHS Act indicate (p 13), the entry powers of inspectors are greater than those of the WHS permit holders (e.g. to seize documents and property).

Various safeguards will apply: privacy of interviews; presence of a representative; and giving of warnings about matters including that failing to comply without reasonable excuse is an offence and that the privilege against self-incrimination does not apply. Persons must comply

with requests of inspectors or an offence is committed.⁵³ Compensation for damage due to the exercise of an inspector's powers is provided for in Division 4.

As with other persons engaged in administering the Qld WHS Act, s 270 gives immunity to inspectors for acts or omissions done in good faith (s 270 instead attaches civil liability to the State).

3.12 Enforcement

Part 10 deals with [enforcement measures](#) that may be taken by inspectors. These include:

- where the inspector reasonably believes a person is or has contravened a provision of the Act, issuing an **improvement notice** which requires the person to remedy the contravention or prevent a likely contravention from happening, or to take operational remedial action. It will be an offence not to comply and a monetary penalty applies (up to \$50,000 for an individual; \$250,000 for a corporation);
- where the inspector reasonably believes that a workplace activity is or may occur that involves or may involve a serious risk to health and safety emanating from an immediate or imminent exposure to a hazard, giving a **prohibition notice** to prohibit or to modify a activity until the inspector is satisfied the problem has been remedied. Non-compliance may attract a fine of up to \$100,000 for an individual (\$500,000 for a corporation);
- issuing a **non-disturbance notice**, a new concept for Queensland, to ensure that 'notifiable incident' sites (or certain other sites: see s 199(1)(b)) are not disturbed or are preserved for up to 7 days in order to facilitate the exercise of the inspector's compliance powers. Failure to comply with the foregoing notices will be an offence attracting a fine of up to \$50,000 for an individual and \$250,000 for a corporation.

Magistrates can also issue injunctions to compel compliance with, or restrain a contravention of, a notice (Part 10, Division 6). If a person has not complied with a prohibition notice or a person managing or controlling the workplace cannot be found to issue such a notice, the regulator can, under Division 5, undertake remedial action in order to make a workplace or situation safe and then recover the reasonable costs of such action.

A number of decisions relating to the foregoing notices can be reviewed under Part 12.

3.13 Enforceable Undertaking

Part 11 enables written, [enforceable WHS undertakings](#) to be given to the regulator by a person instead of the person being prosecuted for a breach or alleged breach of the Act (apart from a Category 1 offence – the most serious type involving reckless conduct exposing someone to a risk of death or serious illness or injury). The undertaking is voluntary and the regulator can accept or reject the written undertaking (giving reasons for acceptance or rejection and publishing the reasons for acceptance of an undertaking on its website).

The undertaking becomes enforceable upon notice of acceptance by the regulator. Contravention of the undertaking is an offence (maximum penalty is \$50,000 or \$250,000 for a corporation) and a magistrate may make orders in relation to a contravention of an undertaking.

3.14 Review of Decisions and Legal Proceedings and General Matters

3.14.1 Review of Decisions

Part 12 covers [review of decisions](#) under the Qld WHS Act. Part 12 refers to Sch 2A which sets out the reviewable decisions and who is eligible to seek review.

Decisions made by inspectors (e.g. issue of a prohibition notice) will be subject to internal review undertaken by the regulator and then may go to external review by the Queensland Civil and Administrative Tribunal (QCAT). However, reviewable decisions made by the regulator proceed straight to external review by QCAT.

While QCAT will review decisions of an administrative nature, the Queensland Industrial Relations Commission (QIRC) will review decisions of an industrial nature (e.g. HSR training).⁵⁴

3.14.2 Offence Proceedings

Part 13 deals with [proceedings for offences](#) under the Act. Such proceedings can be brought by the regulator or an inspector who is authorised by the regulator to do so.

If a person reasonably considers that a Category 1 or 2 offence has occurred and no prosecution has been brought between 6 and 12 months of the alleged contravention, the person can make a written request to the regulator to bring a prosecution. Provision is also made the Director of Public Prosecutions (DPP) to prosecute if the regulator advises the person that the prosecution will not be brought. The DPP must consider the matter and advise the regulator within one month whether the DPP thinks a prosecution should be brought. If the regulator declines the DPP's advice to bring a prosecution, the regulator must provide reasons to the person who initiated the request.

All proceedings for offences, apart from a Category 1 offence, are summary proceedings under the [Justices Act 1886 \(Qld\)](#). Usually, proceedings will have to commence within 2 years of the offence coming to light⁵⁵ but other time limits exist in other circumstances stated in s 232. A longer timeframe will be allowed where the proceedings relate to a Category 1 offence and new evidence is discovered after expiry of the relevant time limit and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

3.14.3 Orders that May be Made for Offences

Part 13, Division 2 covers sentencing of offenders under the Qld WHS Act and gives a variety of options to the courts other than traditional penalties (fine or imprisonment), some of which are new to Queensland WHS legislation. The range of possible orders (breach of which, without reasonable excuse, is an offence) are:

- an adverse publicity order (requiring the offender to publicise the offence, its consequences and penalty);
- a restoration order to remedy problems caused by the offence;
- a WHS project order to undertake a stated project for the general improvement of WHS;
- an injunction;
- a court ordered WHS undertaking not to commit an offence under the Qld WHS Act during the adjournment period (up to two years); and/or

- a training order.⁵⁶

3.14.4 Imputation of Offences to Bodies Corporate, the Crown, Public Authorities and Local Governments

Under Part 13, Divisions 4 and 5, conduct engaged in on behalf of a body corporate or on behalf of the State, Commonwealth or another State (the Crown) by its employee, agent or officer acting within actual or apparent scope of employment or authority is conduct of the body corporate, the Crown.

If the Crown is found guilty of an offence, the penalty is that applicable to a body corporate. If it contravenes a civil penalty provision (or conduct of an employee, agent or officer is imputed to the Crown), the penalty is that applicable to a body corporate.

Similarly, under Part 13, Division 6, conduct of an employee, agent or officer acting within actual or apparent scope of employment or authority is imputed to the public authority.

3.15 General Matters

Part 14 covers a range of [general matters](#) including, but not limited to, the matters discussed under the headings below.

3.15.1 Regulation Making Power

In terms of **Regulations**, public comment on the [Draft Model Work Health and Safety Regulations](#) has closed. The [meeting of the WRMC](#) on 10 August 2011 saw the majority of Ministers endorse in principle the draft model Work Health and Safety (WHS) Regulations and the first stage Codes of Practice and all Ministers agreed to advise of their decisions regarding approval of the draft model WHS Regulations and Codes of Practice as soon as possible.⁵⁷

The Regulations, in the present draft form, are quite extensive and include matters including further duties of PCBUs regarding general facilities at workplaces such as first aid, emergency plans, amendments to workplace management measures; further requirements for right of entry for unions; extensive regulation of plant and structures and of certain hazardous work and substances. The WHSQ's '[Harmonisation of WHS laws in Australia – a Brief Introduction](#)' notes that many of the model Regulations are largely consistent with Queensland provisions but there are some additional areas of regulation (e.g. emergency procedures, fatigue).

3.15.2 Codes of Practice

The Minister, in consultation with other Governments, unions and employer bodies, approves codes of practice. **Codes of Practice** provide practical guidelines to help duty holders meet their obligations under the Act and a code of practice will apply to anyone having a duty of care as described in the code. Generally, adherence to an approved code of practice will be compliance with the WHS duties under the Act in relation to the relevant subject matter of the code. Duty holders can also show compliance by following another method which provides the same or a higher standard of health and safety than does the code (see Explanatory Notes (p 115)). An article by the law firm, Blake Dawson, comments that the issue of the [first stage Model Codes of Practice](#) in December 2010 by Safe Work Australia gave organisations a chance to comment on whether they, in fact, reflected current knowledge about managing the risks identified.⁵⁸ Codes of Practice, relevant to almost all PCBUs, concern how to consult on WHS, how to manage WHS risks, how to prevent falls, and

how to manage the work environment and facilities. As noted above, the August meeting of the WRMC saw the majority of Ministers endorse in principle the first stage model Codes of Practice and the draft model Work Health and Safety (WHS) Regulations. [Draft Model Mining Codes of Practice](#) are open for consultation until 7 October 2011.

3.16 Transitional Provisions and Repeals

Transitional provisions are provided for in Part 16 of the Qld WHS Act, while Part 15 repeals the WHS Act and the [Dangerous Goods Safety Management Act 2001 \(Qld\)](#).

3.17 Definition of 'Asbestos'

The meaning of **asbestos** in a number of pieces of legislation is amended by **Part 17** to ensure that only asbestiform mineral silicates are 'asbestos'. The Explanatory Notes (p 4) comment that the current definition inadvertently captures non-asbestiform mineral silicates found in products like imported decorative stone tiles which do not have the characteristics that cause asbestos related diseases.

Appendix – Other States and Territories

New South Wales

Shortly after the passage of the Queensland legislation implementing the Model WHS Bill, the New South Wales Parliament passed the [Work Health and Safety Act 2011 \(NSW\)](#) (NSW WHS Act) on 7 June 2011. Unlike the Queensland laws, the NSW legislation does differ in some key respects from the Model WHS Bill. Those are:⁵⁹

- unlike the Qld WHS Act (and the Model WHS Bill) where only the Regulator (or an inspector with the Regulator's authority) can commence a prosecution for offences, the new NSW WHS Act allows unions to continue to be able to bring prosecutions – albeit in more limited circumstances – for WHS Act offences. Unions have had this right in relation to WHS offences under the existing *Occupational Health and Safety Act 2000* (NSW). When the 2011 WHS legislation was introduced into Parliament, the NSW Government intended to remove the right of industrial organisations to bring proceedings (in line with the Model WHS Bill provisions). However, as the Government did not have the numbers in the Legislative Council to pass the legislation with these changes to union rights, the Government was forced to amend the Bill. Nevertheless, the right of a union to bring a prosecution will be only for Category 1 or 2 offences and only if WorkCover (the Regulator) has decided not to accept the NSW DPP's recommendation to bring a prosecution. Also, while unions have been able to receive half of the fine in a successful prosecution, they will no longer be entitled to do so;
- under the new NSW WHS Act, the NSW Industrial Court will continue to have a role, albeit limited, in enforcement measures regarding Category 3 offences and for appeals from the Local Court. While the original Bill made no provision for the Industrial Court in prosecutions, the NSW Government was again required to retain a role for it in order to secure passage of the legislation. Concerns had been raised by the head of the NSW Industrial Relations Commission about proposals to remove WHS matters to the courts rather than being handled by the Commission.⁶⁰ Most offences, particularly the more serious ones, will be heard by the Supreme, District or Local Courts.

Amendments were also made to the [Occupational Health and Safety Act 2000](#)⁶¹ to implement some of the new Model WHS Bill changes with effect from 7 June 2011. These include: qualifying existing duties of employers and others with 'upstream' functions (e.g. designers, manufacturers etc.) to what is 'reasonably practicable' (rather than absolute as previously); expressly stating what the due diligence obligation on officers entails and enabling them to be prosecuted irrespective of liability of the corporation.

Commonwealth

On 6 July 2011, the [Work Health and Safety Bill 2011 \(Cth\)](#) (Commonwealth WHS Bill) was introduced into the Commonwealth Parliament by the Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts, to implement the Model WHS Bill for Commonwealth businesses and undertakings. The Commonwealth WHS Bill was referred to the Senate Education, Employment and Workplace Relations Legislation Committee on 7 July 2011 and the [Committee Report](#) was tabled on 26 August 2011 recommending passage of the Bill apart from two minor amendments. Under the Bill, Comcare is intended to be the single WHS regulator rather than sharing the function with the Safety Rehabilitation and Compensation Commission, as is currently the case (although the Commission will have oversight functions as well as providing a forum for consultation between Comcare and PCBUs and their representatives).⁶²

To follow the progress of the Bill, please go to the [Bill Homepage](#).

South Australia

The **South Australian** Parliament introduced a Work Health and Safety Bill 2011 earlier in 2011 but it was withdrawn in the Legislative Council in early May 2011. On 19 May 2011, a [Work Health and Safety Bill 2011](#) was introduced into the House of Assembly (see Second Reading Speech, Work Health and Safety Bill 2011 (SA), *Legislative Assembly Hansard*, 19 May 2011, p 3819). It is yet (as of 1 September 2011) to be passed. To follow the further progress of the Bill, please go to the [Bill Homepage](#).

Australian Capital Territory

The [Work Health and Safety Bill 2011 \(ACT\)](#) was introduced into the ACT Legislative Assembly on 23 June 2011. It is expected to be debated in the latter half of 2011. The ACT Crimes Act has industrial manslaughter provisions which will be unaffected by the new WHS laws (see Hon K Gallagher MLA, Chief Minister, Minister for Health, Minister for Industrial Relations and Treasurer, [Second Reading Speech](#), *ACT Legislative Assembly Hansard*, 23 June 2011, pp 2341-2342, p 2342). To follow the progress of this Bill, please go to the [Bill Homepage](#).

Western Australia

Western Australia has indicated it may not fully participate in the national WHS scheme.⁶³ The WA Government has designated some of the areas of the Model WHS Bill and Model Regulations it will amend in its version of the laws implementing the Model WHS Bill. These include:⁶⁴

- that the decision to cease work where there is an imminent risk of serious harm or injury should remain with the worker rather than be given to the HSR, as provided for in the Model WHS Bill (although the Model Bill does allow a worker to stop work where there is a 'reasonable concern' for his or her health and safety);
- the reverse onus of proof regarding discriminatory etc conduct provided for in the Model WHS Bill will not be adopted;
- the possibility that the mining industry will not be covered by the Model WHS Bill but will, instead, be regulated by new legislation which will mirror the main provisions of the WA's laws implementing the Model Bill but retain core elements of the *Mines Safety and Inspection Act 1994* (WA).

Victoria

The [WorkSafe Victoria](#) website states that legislation to implement the Model WHS Bill will be passed later in 2011.

Northern Territory

It is unclear when the NT Government will introduce legislation to implement the Model WHS Bill but the [NT WorkSafe](#) website provides links to the relevant Safe Work Australia documents, including the Model Regulations, Codes of Practice and the public consultation on the Mining Regulations.

Tasmania

It is yet unclear when the Tasmanian Government will introduce legislation to implement the Model WHS Bill but [Workplace Standards Tasmania](#) provides links to the relevant Safe Work Australia documents.

Key Documents and Links

Work Health and Safety Act 2011 (Qld) and Accompanying Material

- [Work Health and Safety Act 2011 \(Qld\)](#); [Explanatory Notes](#) to the Bill; [Second Reading Speech](#), pp 1282-1283

Affected Legislation

The Qld WHS Act repeals and replaces the [Workplace Health and Safety Act 1995 \(Qld\)](#) upon commencement.

As observed by the [Explanatory Notes](#) (p 3) to the Bill that became the Qld WHS Act, Queensland has various industry specific work safety laws that will be affected by the introduction of the harmonised legislation. Accordingly:

- the [Dangerous Goods Safety Management Act 2001 \(Qld\)](#), which applies to dangerous goods and major hazards facilities, will be repealed by the Qld WHS Act. The Explanatory Notes (p 3) state that the provisions of this Act are effectively covered by the Model WHS Bill and, consequently, the Qld WHS Act;⁶⁵
- amendments made to the [Electrical Safety Act 2002 \(Qld\)](#) seek to ensure consistency with the Model WHS Bill.

It appears that the Government continues to support the retention of separate mining safety laws in Queensland but that these laws should be harmonised where possible, including the duties and defences. The harmonisation of mining safety laws is being undertaken as a separate process (with the [Draft Model Mining Codes of Practice](#) currently open for public comment).⁶⁶

In addition, amendments are made to the [Workers' Compensation and Rehabilitation Act 2003 \(Qld\)](#) to provide for a review of the operation of the workers' compensation scheme at least every five years. The amendments also expressly provide for Queensland's private sector employees to accrue sick leave and annual leave while off work and receiving workers' compensation payments. The [Fair Work Act 2009 \(Cth\)](#), now covering those private sector employees, does not entitle private sector employees to such rights, unless compensation legislation provides otherwise. The amendments will restore these entitlements of private sector employees that existed prior to the Fair Work Act 2009. Various changes are also made in order to strengthen insurance premium compliance and data collection in the construction industry (see Explanatory Notes (pp 3-5)).

The building and construction work fee provided for under the [Workplace Health and Safety Regulation 2008 \(Qld\)](#) will be transferred to the [Building and Construction Industry \(Portable Long Service Leave\) Act 1991 \(Qld\)](#).

Model Work Health and Safety Legislation – Safe Work Australia

Safe Work Australia, created in 2009, is comprised of Commonwealth, State and Territory Governments and employer and employee representatives. Safe Work Australia developed the [Model Work Health and Safety Legislation](#) and will also be responsible for reviewing its implementation and effectiveness: see:

- [Model Work Health and Safety Bill](#) (revised draft November 2010), [Explanatory Memorandum](#)

- [Draft Model Work Health and Safety Regulations](#)
- [Issues Paper](#), December 2010
- [Consultation Regulation Impact Statement](#), January 2011 (Access Economics)
- [Draft Model Codes of Practice](#) (webpage provides links to 12 draft model codes)
- [Draft Model Mining Codes of Practice](#)
- [Fact Sheet](#)

Council of Australian Governments and National Review Panel Documents

The harmonisation of WHS laws is an aspect of COAG's *National Partnership Agreement to Deliver a Seamless National Economy*. Implementation of the nationally consistent legislation is being overseen through the COAG Reform Council:

- [Intergovernmental Agreement for Regulatory and Operational Reform in OHS \(IGA\)](#), July 2008
- [National Review into Model Occupational Health and Safety Laws First Report](#), October 2008
- [National Review into Model Occupational Health and Safety Laws Second Report](#), January 2009
- [WRMC response to National Occupational Health and Safety Review Recommendations](#), May 2009

Queensland Workplace Health and Safety Website Information

- [Harmonisation of Workplace Health and Safety Laws; Understanding the model WHS Act](#)

Ministerial Media Statements

- [Have your say on National Workplace Health and Safety Laws](#), 3 March 2011
- [New workplace safety Bill to protect workers and cut red tape](#), 10 May 2011

Endnotes

- 1 The Hon Cameron Dick MP is also Minister for Education.
- 2 Hon CR Dick MP, Minister for Education and Industrial Relations, [Second Reading Speech](#), Work Health and Safety Bill 2011 (Qld), *Queensland Parliamentary Debates*, 10 May 2011, pp 1282-1283, p 1282.
- 3 Australian Bureau of Statistics (ABS), [Work-Related Injuries 2009-2010](#), Cat 6324.0, December 2010, p 4. The statistics were compiled from part of the Multipurpose Household Survey conducted throughout Australia from July 2009 to June 2010 and presented information about persons aged 15 and over who worked at some time over that period and suffered a work-related injury or illness during that time. Work-related fatalities were excluded (see pp 2-3).
- 4 ABS, [Work-Related Injuries 2009-2010](#), pp 5-6. The ABS notes that the distribution across different types of work/industries is influenced by the total number of men and women working in those types of work/industries.
- 5 ABS, [Work-Related Injuries 2009-2010](#), p 8.
- 6 Safe Work Australia, [Notified Fatalities Statistical Report 2009-10](#), March 2011, p v.
- 7 ABS, [Work-Related Injuries 2009-2010](#), p 14.
- 8 Discrepancies can also be due to a range of other factors: ABS, [Work-Related Injuries 2009-2010](#), pp 2, 29.
- 9 Access Economics Pty Limited, [Consultation Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice](#) (Consultation Regulation Impact Statement), 10 January 2011, pp 109, 110.
- 10 Access Economics, [Consultation Regulation Impact Statement](#), p 110, citing observations by other bodies such as the Productivity Commission. The [Q-COMP Statistics Report 2009-2010](#) indicates that, in 2009-2010, there were 98,016 workers' compensation claims made in Queensland (excluding cancelled and withdrawn claims), down by 4.7% from 2008-2009 (pp 3, 7). There were 68 fatality claims during that period, mainly in the manufacturing industry (16.2%) (p 13). Q-Comp is Queensland's Workers Compensation Regulatory Authority.
- 11 Workplace Health and Safety Queensland (WHSQ), [Prosecution List](#), up to July 2011.
- 12 Safe Work Australia, [The Costs of Work-related Injury and Illness for Australian Employers, Workers and the Community: 2005-2006](#), March 2009, p 2, pp 11-12, Table 1.1. Safe Work Australia also notes that '*this estimate represents foregone economic activity, and not the proportion of GDP that is lost as a result of work-related injury and illness*'.
- 13 See also, [Workplace Health and Safety \(Codes of Practice\) Notice 2005 \(Qld\)](#).
- 14 Access Economics, [Consultation Regulation Impact Statement](#), p 114, citing Workplace Relations Ministers' Council, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, 5th ed, 2008, Commonwealth Department of Education Employment and Workplace Relations, Canberra.
- 15 As well as draft Mining Codes of Practice.

- ¹⁶ Access Economics, Consultation Regulation Impact Statement, p 112.
- ¹⁷ Access Economics, Consultation Regulation Impact Statement, p 112, citing Industry Commission, *Work, Health and Safety: An inquiry into Occupational Health and Safety*, Vol I, 1995, Canberra.
- ¹⁸ The Industry Commission was one of three bodies (the others being the Bureau of Industry Economics and the Economic Planning Advisory Commission) which were merged to form the Productivity Commission, established on 16 April 1998: Productivity Commission, [Annual Report 1997-1998](#), p 39.
- ¹⁹ See the overview of the Productivity Commission's 2004 report (*National Workers' Compensation and Occupational Health and Safety Frameworks*) in Access Economics, Consultation Regulation Impact Statement, pp 113-114. The Commonwealth Government established the Australian Safety Compensation Council made up of governments, employers and trade unions to progress uniform national WHS legislation and workers' compensation and, in 2005, a Regulation Taskforce, set up to review areas of unnecessary regulatory burdens, recommended (see [Rethinking Regulation](#) pp 121-122) that the COAG implement nationally consistent WHS standards.
- ²⁰ Those reports were the [National Review into Model Occupational Health and Safety Laws First Report](#), in October 2008 and the [National Review into Model Occupational Health and Safety Laws Second Report](#), in January 2009.
- ²¹ It is envisaged that development of further model codes of practice and guidance materials will extend beyond December 2011: see [Explanatory Notes](#) (p 2) to the WHS Bill 2011 (Qld).
- ²² The IGA requires a high degree of uniformity of legislation and provides that any jurisdiction proposing to amend its WHS laws that may impact on this uniformity has to seek the agreement of the WRMC. If the WRMC agrees to the proposed amendment, then all the other states and territories have to adopt the same amendment to maintain consistency of the legislation: Safe Work Australia, [Model Work Health and Safety Laws Fact Sheet](#), p 3. However, as will be discussed later in this Research Brief, there has already been some divergence from the model by New South Wales in the passage of its WHS Act and it appears that the Western Australian Government will not implement the full package of harmonised WHS laws (Michaela Whitbourn & Mark Skulley, 'NSW backs COAG reforms', *Australian Financial Review*, 5 May 2011, p 7).
- ²³ Safe Work Australia, Model Work Health and Safety Laws Fact Sheet, p 2. It was based on many, but not all of, the recommendations of the first and second reports of the National Review into Model Occupational Health and Safety Laws (thus, those reports are a guide only to the underpinning policy of the draft Act): see, Model OHS Act, [Explanatory Memorandum](#), Outline.
- ²⁴ Explanatory Notes, p 5.
- ²⁵ Explanatory Notes, p 6. When introducing the Commonwealth WHS Bill implementing the Model WHS Bill for the Commonwealth, the Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government and Minister for the Arts said that under the national partnership, the Commonwealth provides reward payments to states and territories based on achievement of key milestones as assessed annually by the COAG Reform Council (see Second Reading Speech, Work Health and Safety Bill 2011 (Cth), [House of Representatives Hansard](#), 6 July 2011, pp 7,699-7,704, p 7,701).
- ²⁶ Michaela Whitbourn & Mark Skulley, 'NSW backs COAG reforms'.

- 27 Pip Freebairn, 'Business at odds on safety laws', *Australian Financial Review*, 27 July 2011, p 8, quoting BCA spokesman, Scott Thompson.
- 28 Michaela Whitbourn & Mark Skulley, 'NSW backs COAG reforms'.
- 29 Ewin Hannan, 'Work safety backlash builds', *Australian*, 21 April 2011, p 1.
- 30 Pip Freebairn, citing ACCI spokeswoman, Carolyn Davis.
- 31 Fiona Carruthers and John Stenholt, 'Danger: work safety laws', *Australian Financial Review*, p 1, referring to comments by Michael Tooma, partner with law firm Norton Rose Australia.
- 32 [Explanatory Notes](#) to the Safety in Recreational Water Activities Bill 2011 (Qld), p 2.
- 33 Work Health and Safety Bill 2011 (Qld) and Safety in Recreational Water Activities Bill 2011 (Qld), Cognate Debate, [Queensland Parliamentary Debates](#), 26 May 2011, p 1743.
- 34 Other definitions are contained in Schedule 5 of the 2011 Act (Dictionary).
- 35 The [Workplace Health and Safety Act 1995 \(Qld\)](#), s 11, does not currently include contractors and subcontractors.
- 36 Defined in the Dictionary and includes things such as machinery, tools and equipment.
- 37 Defined as anything that is constructed whether fixed, moveable, temporary or permanent (e.g. buildings, pipelines, transport infrastructure, tunnels).
- 38 Defined as any natural or artificial substance, whether solid, liquid, gas or vapour.
- 39 There is also a duty imposed where a worker occupies accommodation owned or managed by the PCBU (s 19(4)). Also, self-employed persons must ensure, so far as reasonably practicable, their own health and safety while at work. Thus, s 19(5) covers where a person is both a PCBU and a worker.
- 40 Minter Ellison Lawyers, '[OHS harmonisation 2012 – where things stand and what you need to do now](#)', *Legal Insights*, 22 June 2011.
- 41 WHSQ, '[Harmonisation of WHS laws in Australia – a Brief Introduction](#)', p 2.
- 42 Dr G Smith and R French, '[National OH&S laws bring tough new duties for "officers" from 1 January 2012](#)', *Clayton Utz Occupational Health and Safety Insights*, 2 June 2011.
- 43 1 penalty unit is \$100: see [Penalties and Sentences Act 1992 \(Qld\)](#), s 5. Under s 181B, the maximum fine for a corporation, if not expressly provided, is 5 times that for an individual.
- 44 Unless he or she first resigns, ceases to be part of the work group, is disqualified, or otherwise removed by the work group: see also, s 65. The disqualification process is set out in Part 5, Division 3, Sub-Div 4A.
- 45 PCBUs have obligations corresponding to HSRs' powers (e.g. consult with HSRs on WHS matters; allow HSRs to attend the interviews involving workers and PCBUs or inspectors; provide resources and assistance as reasonably necessary). Various exceptions from those obligations are provided (see Part 5, Division 3, Sub-Div 6).
- 46 See also, s 68(3) for consent to having identifying information.
- 47 Explanatory Notes, p 60.

48 **Part 7, Division 6** establishes how disputes about the exercise of a right of entry are dealt with by an inspector (who can assist to resolve the dispute but not make any determination) or by the Queensland Industrial Relations Commission (which can make various orders to deal with the dispute). Certain types of actions and conduct are prohibited under **Part 7, Division 7**.

49 The Explanatory Notes (p 14) state that while the Qld WHS Act does not impose approved training as a prerequisite for appointment as an inspector, in practice all Queensland WHS inspectors undergo extensive training in the exercise of their powers. Further, a national training program will be rolled out this year on the new Model WHS Bill.

50 Inspectors will have identity cards which must be produced in the exercise of their powers and they must report any conflicts of interest that arise in the performance of their functions.

51 The regulator will also be required (see Explanatory Notes (p 14)) to issue directions to inspectors regarding the exercise of their powers to ensure that any adverse effects on privacy, confidentiality and security are minimised.

52 If the place is residential, certain limits set out in s 170 apply.

53 Inspectors can also do things such as copy and retain documents; seize evidence; seize dangerous workplaces, plant or substances etc., again subject to safeguards regarding treatment of seized things. Part 9, Division 6 covers offences in relation to inspectors.

54 See Explanatory Notes, p 99.

55 The Explanatory Notes (pp 9-10) comment that the longer timeframe is needed in work-related injury type offences to enable evidence to be gathered relating to varying and complex work systems. There is also an agreed national compliance and enforcement policy about whether a prosecution should be brought and three criteria in the DPP guidelines (common to all jurisdictions) need to be met.

56 In Queensland, the [State Penalties Enforcement Act 1999 \(Qld\)](#) allows for on-the-spot fines.

57 [Communiqué from Australian, State, Territory And New Zealand Workplace Relations Ministers' Council](#), 10 August 2011.

58 S Nettleton & J Sutherland, '[Model Work Health and Safety Regulations – the final piece](#)', Blake Dawson, 8 December 2010. It may also be the case that Codes of Practice could be admissible in court to show what steps were reasonably practicable for the PCBU defendant to have taken in relation to a particular risk.

59 See, Work Health and Safety Bill 2011, Occupational Health and Safety Amendment Bill 2011, In Committee, [Legislative Council Hansard](#), 27 May 2011, pp 1,254-1,263; esp. pp 1,268-1,272; 1,285-1,290. See also, Minter Ellison Lawyers, [OHS harmonisation 2012 – where things stand and what you need to do now](#)'; J Kennedy, '[NSW Work Health and Safety Bill passes through Parliament – the disharmony of harmonisation](#)', *McCulloch Robertson Focus*, 2 June 2011.

60 See, e.g. Heath Aston, 'Workplace judge blasts broken promise', *Sydney Morning Herald Online*, 8 May 2011.

61 See the [Occupational Health and Safety Amendment Act 2011 \(NSW\)](#).

62 See also, Steve O'Neill, Mary Anne Neilsen, Law and Bills Digest Section, [Work Health and Safety Bill 2011](#), Bills Digest No 29, 2011-2012, 17 August 2011.

63 Michaela Whitbourn & Mark Skulley, 'NSW backs COAG reforms'.

- ⁶⁴ Minter Ellison Lawyers, 'OHS harmonisation 2012 – where things stand and what you need to do now'.
- ⁶⁵ The Explanatory Notes (p 7) state that the repeal of this Act will impact on local governments that issue and collect fees for flammable and combustible licences (unique to Queensland), which licences are proposed to be abolished on and from the 1 January 2012 commencement of the Act.
- ⁶⁶ Mr S Wettenhall MP, Parliamentary Secretary assisting the Premier on Economic Development in the Far North, Work Health and Safety Bill 2011 (Qld), [Second Reading Debate](#), 26 May 2011, p 1709. See also, [Draft Model Mining Codes of Practice](#).