

**MACROSSAN & AMIET**  

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**S O L I C I T O R S**

**Summary of the *Work Health and Safety Act 2011***

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# KEY DIFFERENCES FROM PREVIOUS ACT

- ▶ **Definition of worker** – includes contractors and subcontractors – used to be excluded
- ▶ **Positive duties – due diligence**
  - Officers and PCBU now have a positive duty to eliminate risks and monitor the health of workers and conditions at workplace
  - Officers can be in breach of the new Act without a safety incident even occurring
  - used to be that Officers were attributed liability for conduct committed by the company
- ▶ **Onus of proof**
  - the onus is on regulator to establish that there has been a lack of due diligence
  - used to be that the onus was on the officer to prove they had a defence
- ▶ **Officers, PCBU and employees must answer questions**
  - The right to privilege on the grounds of self incrimination has been removed
  - It is now an offence to refuse to answer questions or assist an inspect without reasonable excuse

# GENERAL DUTIES

- ▶ The new Act imposes **positive obligations** on officers and persons conducting a business or undertaking (PCBU).
  - **Officer** – means an officer within the meaning of the *Corporations Act 2001* (s.4) and also includes an officer of the Crown or a public authority.
  - Broadly – a person who makes or participates in making decisions that affect all or a substantial part of the organisation’s activities.
  - **PCBU** – means a person who conducts a business or undertaking alone or with others regardless of whether the business is conducted for profit or gain (s.5).
- ▶ More than one person can have the same duty (i.e. all directors will owe a duty).
- ▶ A person may have more than one duty (i.e. executive director has a duty as a director and as an officer)
- ▶ **General duty** (s.17):
  - To **eliminate** risks to health and safety so far as reasonably practicable; and
  - IF NOT reasonably practicable to eliminate risks – to **minimise** risks as far as reasonably practicable.

# GENERAL DUTIES CONT.

- ▶ **Reasonably practicable** (s.18) means what could reasonably be done at a particular time to ensure health and safety measures were in place.
  - The test is objective – A duty-holder must meet the standard of behaviour expected of a reasonable person in the duty-holder's position.
  - Two elements:
    - A duty-holder must first consider what can be done – that is, what is possible in the circumstances for ensuring health and safety.
    - They must then consider whether it is reasonable, in the circumstances to do all that is possible.
- ▶ What can be done should be done unless it is reasonable in the circumstances for the duty-holder to do something less.
- ▶ In order to determine this – weigh up all relevant matters including:
  - The likelihood of a hazard or risk occurring
  - The degree of harm that would result if the hazard or risk occurred
  - What the person knows or ought reasonably know about ways to eliminate or minimise risk
  - The availability of suitable ways to eliminate or minimise risk
  - The cost of eliminating or minimising the hazard or risk
- ▶ **Financial Capacity is NOT relevant** – A duty-holder cannot expose people to a lower level of protection simply because it is in a lesser financial position than another duty-holder.

# DUTIES OF A PCBU

## ▶ Primary duty of care –

- PCBUs must ensure the health and safety of workers – so far as reasonably practicable (s.19)
- **Workers** = employees, contractors, subcontractors, outworkers, apprentices, trainees, work experience students, volunteers
- PCBUs must ensure that the health and safety of other persons are not put at risk from the work carried out as part of the business or undertaking – so far as reasonably practicable (s.19)

## ▶ Duty includes:

- Providing and maintaining a safe working environment
- Providing and maintaining plant, structure and systems of work
- Ensuring the safe use of, handling, storage and transport of plant, structures and substances
- Providing adequate facilities for the welfare of workers at workplaces under their management and control (i.e. toilets, kitchens)
- Monitoring the health of their workers to prevent injury or illness
- Maintaining accommodation owned or under their management to ensure health and safety of workers

## ▶ Duty to consult (ss46–49) – A PCBU must consult with workers and Health and Safety Representatives (HSRs) about matters that directly affect them

- this includes consulting with contractors and their workers

# DUTIES OF OFFICERS

- ▶ **Due diligence** – there is a positive duty imposed on officers of a PCBU to exercise due diligence to ensure compliance with health and safety duties (s27).
  - The duty imposed corresponds to the position of the officer in question and their ability to influence work practices
- ▶ These due diligence obligations require an officer to ensure that the PCBU uses and applies appropriate resources, policies, procedures and health and safety practices in the conduct of a business or undertaking.
- ▶ If an officer fails to exercise due diligence requirements, they can be held personally liable.
- ▶ Due diligence includes personally taking **reasonable steps** to:
  - Acquire and keep current information on work health and safety matters
  - Understand the nature of operations of the work and associated hazards and risks
  - Ensure the PCBU has and uses appropriate resources and processes to eliminate or reduce risks
  - Ensure the PCBU has appropriate processes to receive and consider information about incidents, hazards and risks and to respond in a timely manner
  - Ensure the PCBU has and implements processes for complying with their duties obligations

# DUTIES OF WORKERS AND OTHERS

- ▶ **Workers (s28)**
  - **Own safety** – workers are required to take reasonable care for their own health and safety in the workplace.
  - **Safety of others** – workers are required to take reasonable care for the health and safety of others in the workplace who may be affected by their actions or omissions.
  - **Reasonable instruction or policy of PCBU** – workers must cooperate with any reasonable instruction given by a PCBU or any reasonable policy or procedure of the PCBU which seeks to comply with the Act.
- ▶ **Others (s.29)** these same duties are placed on any person in the workplace, which includes customers and visitors.

# NOTIFICATION OF INCIDENTS

- ▶ **Incidents involving serious injury, illness or death** – PCBU must notify WHS QLD as soon as they become aware of a death, serious injury or serious illness which results in:
  - Immediate medical or hospital treatment
  - Medical treatment within 48 hours of exposure to a substance
- ▶ **Definition of serious injury or illness** – an injury or illness requiring:—
  - immediate treatment as an in-patient in a hospital; or
  - immediate treatment for:
    - the amputation of any part of his or her body; or
    - a serious head injury; or
    - a serious eye injury; or
    - a serious burn; or
    - the separation of his or her skin from an underlying tissue (for example, degloving or scalping); or
    - a spinal injury; or
    - the loss of a bodily function; or
    - serious lacerations; or
  - medical treatment within 48 hours of exposure to a substance



# NOTIFICATION OF INCIDENTS CONT.

- ▶ **Dangerous incident** – A PCBU must notify WHS QLD as soon as they become aware of a dangerous incident which exposes a person to a serious health or safety risk from the immediate or imminent exposure to:
  - Uncontrolled escape, spillage or leakage of a substance
  - Uncontrolled implosion, explosion or fire
  - Uncontrolled escape of gas, steam or a pressurised substance
  - An electric shock
  - fall or release from height of any plant, substance or thing
  - collapse, overturning, failure or malfunction of or damage to plant
  - Collapse or partial collapse of a structure
  - Inrush or water, mud or gas into an underground excavation or tunnel
  - Interruption of the main system of ventilation to an underground excavation or tunnel

# CONSULTATION WITH WORKERS

- ▶ A PCBU must **consult** with workers and take their views into account when making decisions about (ss46–49):
  - Ways to eliminate or minimise risks
  - The adequacy of facilities for workers' welfare
  - Procedures for consulting workers
  - Resolving health and safety issues
  - Monitoring the health and safety of workers in workplace conditions
  - How to provide health and safety information and training to workers
- ▶ Workers are entitled to:
  - Elect a health and safety representative
  - Request that a health and safety committee be formed
  - Cease unsafe work
  - Agree on a procedure to have health and safety issues resolved
  - Be free from discrimination for raising health and safety issues

# HEALTH AND SAFETY REPRESENTATIVES

- ▶ A Health and Safety Representative (HSR) represents the interests of a work group in relation to workplace health and safety issues.
- ▶ **Work Groups** (ss50–57)
  - workers have the right to ask a PCBU to set up a work group for the purposes of electing a HSR
  - A work group is a group of workers who share a similar work situation (i.e. people of the same trade, all people who work in the office, all people who work in the factory, etc)
- ▶ **Election of HSR**
  - Where a workers request a HSR be elected, PCBU must start negotiations within 14 days to determine:
    - Number and composition of work groups
    - Number of HSRs
    - Workplaces to which work group apply

# HEALTH AND SAFETY REPRESENTATIVES CONT.

## ▶ Powers and Functions of HSR (ss68–69)

- Role is generally limited to HSR's work group – But may assist others where there is an immediate hazard or a worker in another work group asks for assistance
  - Inspect the area where work is carried out by work group
  - Accompany a workplace health and safety inspector during inspection of the area
  - Be present in an interview with a worker that the HSR represents about health and safety issues
  - Request a health and safety committee be established
  - Monitor compliance measures by PCBU
  - Represent the work group in health and safety matters
  - Investigate complaints from members of the work group
  - Inquire into any risk to the health or safety of workers in the work group
- ▶ A HSR is not personally liable for anything done or not done in good faith whilst carrying out their role
- ▶ PCBUs must allow HSRs to attend work health and safety courses approved by Workplace Health and Safety QLD

# HEALTH AND SAFETY REPRESENTATIVES CONT.

- ▶ **Provisional improvement notice (PIN) (ss90–102) –**
  - if a HSR reasonably believes that a person is contravening or has contravened the Act and it is likely that the contravention will continue or be repeated, can issue a PIN.
  - A PIN must be in writing and:
    - Outline the contravention
    - Specify the section of the Act contravened
    - Give a date by which contravention must be remedied (at least 8 days from issue date)
    - A PIN can include directions on how to remedy contravention
    - PCBU must display a PIN in a prominent place in the workplace
    - If receive a PIN, can ask Workplace Health and Safety QLD to review the notice and decide whether it must be complied (must apply within 7 days of receiving the notice)
- ▶ **Direct workers to cease unsafe work (s83–89)**
  - If a HSR has a reasonable concern that carrying out work would expose a worker to a serious health and safety risk, the HSR may direct a workers to cease work
  - BUT – must first try to resolve the matter with the PCBU unless the risk is so serious and immediate that it is not reasonable to consult first

# FUNCTIONS AND POWERS OF WORKPLACE HEALTH AND SAFETY QLD

- ▶ **Power of WHS QLD to require documents and information**
  - WHS QLD has the power to require a person to provide documents or to provide information upon serving the person with a written notice
  - A person cannot refuse or fail to comply with a request without reasonable excuse
  - There is no longer any privilege on the grounds of self incrimination
- ▶ **Powers of Entry of Inspectors**
  - Inspectors have the power to enter a workplace or a suspected workplace at any time with or without consent of the manager/owner
  - The power includes the right to inspect, examine or seize anything, including documents
  - A person cannot refuse to assist an inspector without reasonable excuse

# PENALTIES

CATEGORY	CORPORATION	OFFICER OR INDIVIDUAL PCBU	WORKER OR OTHER
1	\$3m	\$600,000 5 years jail Both of the above	\$300,000 5 years jail Both of the above
2	\$1.5m	\$300,000	\$150,000
3	\$500,000	\$100,000	\$50,000

- ▶ **Category 1** – Duty holder engages in conduct that recklessly exposes a person to a risk of death or serious injury or illness
- ▶ **Category 2** – Duty holder fails to comply with a health and safety duty that exposes a person to risk of death or serious injury or illness
- ▶ **Category 3** – Duty holder fails to comply with a health and safety duty

# ALTERNATIVE PENALTIES

- ▶ **Adverse publicity orders** – require the offender to publicise the offence and its consequences
  - ▶ **Restoration orders** – require the offender to take steps to remedy anything that occurred as a result of the offence
  - ▶ **Work health and safety projects** – require the offender to undertake a project for the general improvement of work health and safety
  - ▶ **Work health and safety undertakings** – court can adjourn proceedings and make an order for the release of an offender
  - ▶ **Injunctions** – to prevent a person from continuing to contravene the Act
  - ▶ **Training orders** – a person may be ordered by the court to undertake or arrange for one or more workers to attend a specified training course
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