

# Work Health & Safety Act 2012 (SA) - changes to occupational health & safety laws

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Workplace Relations, Employment & Safety

## Background

After extensive debate, the *Work Health and Safety Act 2012 (SA) (WHS Act)* came into operation in South Australia on 1 January 2013. The WHS Act and the related *Regulations and Codes of Practice* replaced the *Occupational Health, Safety and Welfare Act 1986 (SA)* and Regulations.

## Key Changes

The changes will significantly affect the way in which businesses operate and will have a particular impact on those in the construction industry and other industries which do business utilising a contractor or labour hire workforce. The key changes can be summarised as follows:

- *OHS responsibilities of employers to their employees have been removed. A person conducting a business or undertaking (PCBU) now has work health and safety responsibilities to workers.*
- *A PCBU is defined to include a person conducting a business or undertaking alone or with others and regardless of whether the business or undertaking is conducted for profit or gain<sup>1</sup>.*
- *The term “worker” has been defined broadly to include contractors, employees, subcontractors, out-workers, apprentices, trainees, work experience students and volunteers<sup>2</sup>.*
- *The definition of “workplace” has been significantly broadened to include a place where a worker is likely to go or is likely to be while at work<sup>3</sup>.*
- *Workplace entry for health and safety purposes is permitted for the holders of a WHS entry permit<sup>4</sup>.*
- *The responsibilities of a PCBU are not transferrable, are concurrent and can involve more than one duty or responsibility<sup>5</sup>.*
- *A PCBU has a duty to ensure the health and safety of workers when the PCBU has influence and control over the work being performed, so long as the work activity is performed in connection with the PCBU’s business or undertaking<sup>6</sup>. The duty applies to the extent that it is reasonably practicable.*
- *The obligation to consult has increased. During the planning phase of any organisational change all PCBUs must consult on issues which may affect a worker’s health and safety<sup>7</sup>.*
- *A PCBU must communicate and consult with other organisations that come into contact with their workers<sup>8</sup>. This has major implications for the use of contractors.*
- *Directors and other officers of a PCBU have a duty to exercise due diligence to ensure that the PCBU complies with his, her or its duties or obligations arising from the WHS Act<sup>9</sup>. These responsibilities are new to South Australia and should be carefully considered by all as the duties are extensive and onerous.*
- *The common law privilege against self-incrimination has been given statutory force<sup>10</sup>. This privilege affords a person the right to refuse to answer questions or provide documents as requested by a SafeWork inspector on the grounds that the answer or the documents may tend to incriminate them.*

Liability limited by a scheme approved under the Professional Standards Legislation



## Categories of offences and increased penalties

Offences under the WHS Act can be criminal or civil. The burden of proof remains with the prosecution and must be established “beyond reasonable doubt” in a criminal offence.

There has been a significant increase in the penalties available under the WHS Act. The fines and jail terms are personal in the case of an officer or worker and can neither be excused through delegation to another person nor covered by insurance. The maximum fine for a category 1 offence for a corporation is \$3 million, \$600,000 or 5 years in prison for an officer and \$300,000 or 5 years in prison for a worker<sup>11</sup>.

There are three categories of offences:

Category 1 offences are those which involve reckless conduct that exposes an individual to a **risk of death** or serious injury or illness and is engaged in without reasonable excuse.

Category 2 offences involve failing to comply with a health and safety duty and exposing an individual to a risk of death or serious injury or illness.

Category 3 offences arise through failure to comply with a health and safety duty.

Persons who consider they may fall within the definition of a PCBU and/or are officers or directors of a PCBU are strongly encouraged to review the WHS Act to determine what steps they need to take to ensure that they are in a position to discharge their duties.

*If you are concerned about how this legislation will affect your business, please contact Jodie Bradbrook on (08) 8227 2829.*

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### Endnotes

1. s5
2. s7
3. s8
4. Part 7
5. s14
6. s13
7. s46-49
8. s46
9. s27(1)
10. s172
11. Part 2, Division 5

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*This Fact Sheet is provided for information purposes and does not constitute legal advice. If you require legal advice regarding your particular circumstances please contact Jodie Bradbrook.*