

WHS at a glance

The following is a practical summary of key elements of the work health and safety (WHS) laws, concentrating on the main provisions that set out what a business needs to do. It is not a substitute for reading relevant sections of the WHS Act, Regulations and Codes.

What is harmonisation?

Harmonisation means each State and Territory will still have their own safety laws, but they will be based on an agreed model Work Health and Safety Act supported by model Regulations and model Codes of Practice.

The Model Act, Regulations and initial Codes have been through extensive public comment processes to deliver a package of laws available for implementation from 1 January 2012.

Public comment is currently underway for the next stage of Codes, with more expected to be released for consultation in 2012.

Harmonisation also involves a National Compliance and Enforcement Policy, designed to support the consistent application of the laws across Australia by the different state regulators.

The WHS laws only commence in each state when they are passed by the state or territory Parliament. They can operate in those states even if other states do not pass them. It is now clear not all states will pass the laws before 1 January 2012 and the operative date will be later in some states.

The final page of this booklet will direct you to an online update on the status of the laws in each state.

Key elements

1

Duty of care

A business must use risk management to, so far as is reasonably practicable, ensure the health and safety of workers and other people exposed to your business operations.

2

Meaning of worker

Workers include those engaged in the course of running the business, whether they are engaged as employees, or contractors, labour hire, franchisees, volunteers etc. Those workers also have safety duties.

3

Cooperate with other businesses

The business must consult, cooperate and coordinate with other businesses that have a similar duty for those workers so, as far as possible, nothing within your influence or control falls between the cracks.

4

Consult with workers

The business must consult with workers when the business makes a decision that could affect their health and safety. If the workers have chosen to elect health and safety representatives, the business must involve those representatives in the consultation.

5

Upstream duties

The business must consider the health and safety impacts of what it designs, makes, imports, sells or installs if those things are used in Australian workplaces.

6

Union Right of Entry

The business must permit union officials access to the workplace in certain circumstances and under certain conditions.

7

Due Diligence

The directors and senior managers of a business must exercise due diligence to ensure the business is meeting its WHS duties.

So what's new?

More detail on each of the seven elements above can be found on the following pages. Very little of it is really new. However, some elements may sound unfamiliar, and businesses should make sure they understand them. These include:

- Workers means more than employees, see **2**
- Consultation with other businesses, see **3**
- Due diligence for officers, see **7**

1 Duty of Care

WH S requires a person conducting a business or undertaking (PCBU) to, so far as is reasonably practicable, ensure the health and safety of workers it engages, or workers whose work activities it influences or directs, while they are at work in that business. The PCBU must also ensure the health and safety of other persons, such as visitors, is not put at risk by the activities of the business.

This specifically includes looking at the work environment; work systems; plant and structures used; substances used, handled or stored; as well as providing adequate information, instruction, training and supervision for work to be carried out safely. Access to facilities for the welfare of workers is also required.

Ensuring health and safety is defined as eliminating risks, so far as is reasonably practicable, or if that is not possible, minimising the risks.

Reasonably practicable is defined as what could reasonably be done at the time to ensure health and safety, taking into account:

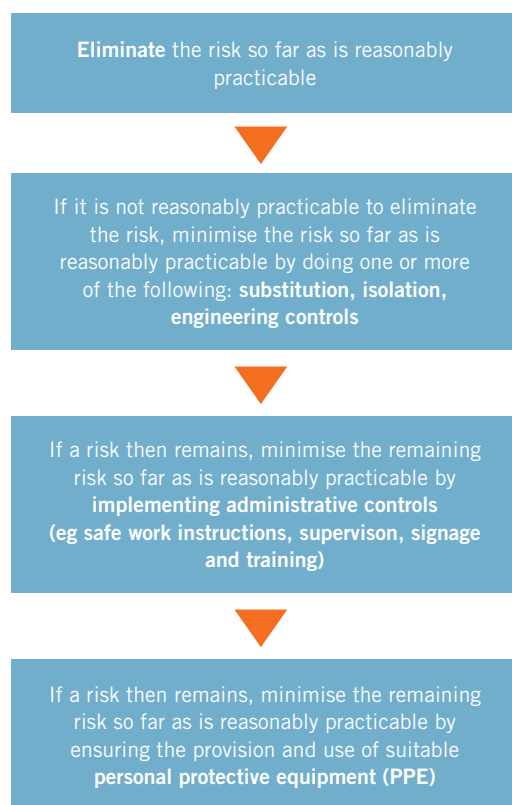
- The likelihood of the hazard or risk occurring and the degree of harm it could cause;
- What the business knows or ought to know about the hazard or risk and the available and suitable ways of eliminating or minimising it; and
- After assessing the above, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

Specific obligations relating to particular risks or industries are detailed in the WHS Regulations and you must comply with them.



Codes of Practice provide practical guidance on compliance. You should follow a Code of Practice unless you can show you have an alternative way of meeting your obligations that is at least as safe. That allows some flexibility, but deviating from a Code is not something you should do lightly or without good advice.

There is a specific Code of Practice setting out a systematic approach to managing risks. The Regulations and that Code both refer to the *hierarchy of controls* as part of that systematic approach and it is illustrated here:



This is a process to help identify the most effective and appropriate control, and to meet the obligation to always try to eliminate a risk

first, before looking at ways to minimise it. The strongest controls are at the top of the hierarchy, with the least preferred and least effective controls at the bottom. These low level administrative and PPE controls essentially rely on people always doing the right thing, so they are inherently weak, and that is why they are least preferred.

When using the *hierarchy of controls* you should work from the top down, settling on the highest reasonably practicable solution. You can use a combination of different levels of control – say, isolation **and** warning signs. If you only apply lower level solutions, you may be asked why the controls above were not reasonably practicable. It may seem obvious to you why a process, machine or substance could not be done away with or modified but always ask the question – why can't I apply a higher level control? You should regularly go back and test whether a higher level control can be applied as things change over time, especially for your most risky work.

If you control a workplace that is used by others, say by renting out a factory space, you have some WHS duties as well, set out in section 20 of the WHS Act.

What is a person conducting a business or undertaking (PCBU)?

A PCBU is the legal entity conducting the business. It is not intended to mean individual persons unless they are operating the business in their own name – say, as a sole trader or a partner. A person who is a director of, or employed by, a company is not a PCBU – the company is. The responsibilities of individuals who are directors or senior managers of companies is covered under due diligence. See 7

2 Meaning of 'workers'

Because so much work is now done in businesses by people who are not direct employees, WHS defines worker very broadly to include: employees; contractors; sub-contractors; employees of contractors or sub-contractors; outworkers; employees of labour hire companies; and volunteers.

Clearly those workers who are not your direct employees may well work for another business, which would also be a PCBU with the same duty to protect its workers. How you should interact with those other PCBUs to jointly look after those workers, and how responsibility is apportioned between you and the other PCBU, is set out in 3

What obligations do workers and other persons have while at work?

Workers and other persons at a workplace, such as visitors, also have duties under the WHS law. See diagram, right. These duties do not in any way take away from the PCBU's responsibilities covered in 1. The worker duties are very similar to duties under current law. Businesses should make sure their workers understand the nature of these duties and should not tolerate material breaches of them without taking the matter up with the worker in an appropriate way consistent with workplace relations laws. They are an important part of the behaviour that makes workplaces safe.

Obligations of workers and other persons at work

| Worker (section 28) | Other persons at the workplace (section 29) |
|---|---|
| Take reasonable care for his or her own health and safety | Take reasonable care for his or her own health and safety |
| Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons | Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons |
| Comply, so far as reasonably able, with any reasonable instruction that is given to them by the PCBU to allow the PCBU to comply with the law | Comply, so far as reasonably able, with any reasonable instruction that is given to them by the PCBU to allow the PCBU to comply with the law |
| Cooperate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers | |

3 Obligation to consult, cooperate and coordinate with other duty holders

WHS clearly identifies that more than one person can have the same duty. For example, a labour hire company and a host employer both hold the duty to ensure the health and safety of a labour hire worker placed with the host employer. Both are PCBUs with the same duty towards the labour hire worker. The following principle (in section 16 of the Act) outlines how these duties interact:

If more than one person has a duty for the same matter, each person:

- Retains responsibility for their own duty;
- Must discharge that duty to the extent that they have the capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

In order to support this concept, section 46 of the Act requires duty holders to consult, cooperate and coordinate, so far as is reasonably practicable, with all other persons who have a duty in relation to that matter. So the labour hire company and the host each has a duty to consult with each other, cooperate and coordinate their efforts to keep this worker safe.

You can see in the above extract from section 16 that your ability to influence or control a situation will be taken into account when other businesses can impact on the safety of your workers.

However, this part of the law dealing with influence or control is written in a very deliberate way. A business that has a duty to consult, cooperate and coordinate with another business over the safety of a worker, must do so until it runs up against the actual limits of its influence or control. It will be very dangerous for a business to argue that it didn't try to consult, or did so only superficially, because it assumed it had no

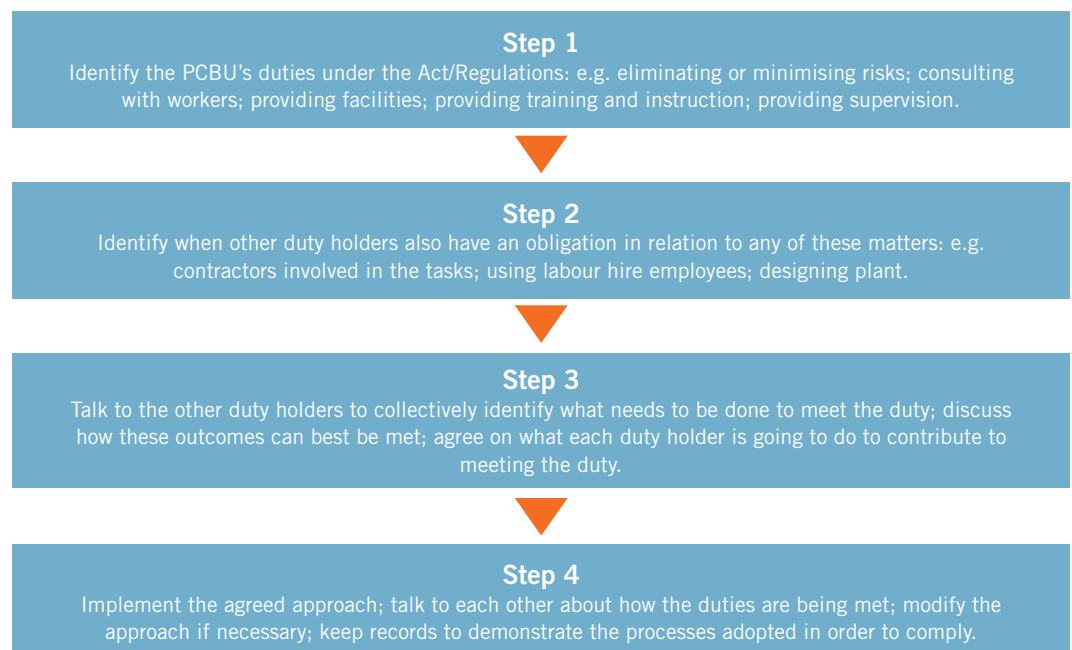
influence or control. A business also can't contract its control away – even if we formally agree that another business will look after an issue that is within our influence or control, we still have to take reasonable steps to make sure that they do so.

Existing safety laws have been interpreted this way on many occasions. The new laws make it clearer in an effort to avoid a risk being unaddressed because everyone thought someone else was looking after it, which is a major cause of accidents in multi-business

situations like construction, labour hire and maintenance contracting.

While documentation is important to clarify agreements and demonstrate compliance, it is ongoing conversations and observations that complete the task of meeting these obligations. Exchanging large amounts of paperwork often provides a false sense of security – it is not a substitute for actually knowing who is doing what.

How can the PCBU meet the obligations to consult, cooperate and coordinate?



4 Obligations to consult with workers

The overarching worker consultation obligation is outlined in section 47 of the WHS Act. A PCBU must, so far as is reasonably practicable, consult with workers who carry out work for the PCBU and are, or are likely to be, directly affected by a health and safety matter.

Consultation is required whenever the PCBU is identifying risks and how to control them; making decisions about the adequacy of facilities; proposing changes that may affect health and safety; or making decisions about procedures that relate to health and safety (section 49).

Section 48 of the Act outlines what is required as part of consultation:

- Relevant information about the matter must be shared with workers; and
- Workers must be given the opportunity to:
 - Express their views and raise work health and safety issues; and
 - Contribute to the decision-making process.
- Views of workers are taken into account by the PCBU; and
- Workers are advised of the outcomes; and
- If the workers consulted are represented by a health and safety representative, that person must be involved in the consultation.

Do I have to consult with contractors and labour hire employees?

Yes. The broad definition of workers in the Act means that anyone you engage to undertake work for your business is a worker. This means that you need to consult, so far as is reasonably practicable, with all workers whose health and safety may

be affected by your actions or decisions. This is a situation where it may be appropriate to consult, cooperate and coordinate with other duty holders to identify how to best meet this collective obligation.

Does consultation need to lead to agreement?

While an agreement is preferable, it is not necessary. The important consideration is whether the consultation was a genuine process of sharing information and taking views into account. Ultimately, the PCBU has the responsibility to eliminate or minimise risks and make the decisions to do so.

What is the best way to undertake consultation?

There is a Code of Practice on Consultation. It states “you may establish any arrangements for consultation to suit your workers and workplace situations... as long as those arrangements are consistent with the requirements of the WHS Act” (Sections 48 and 49 set out above). Including health and safety as an agenda item in other meetings (such as tool box meetings) may be the best approach for some organisations, while others will find it more appropriate to set up formal processes such as safety committees. The important consideration is whether the processes you do set up give you good, timely information from workers about health and safety issues and how they might be addressed.



Issue Resolution

In addition to the consultation obligations, the Act (sections 80 to 82) and the Regulations (22 to 23) establish requirements to have procedures in place to resolve issues.

The requirements apply if “a matter about work health and safety arises at a workplace or from the conduct of the business or undertaking and the matter is not resolved after discussion between the parties to the issue”.

A PCBU is required to:

- have an agreed procedure for dealing with issues, that meets the minimum requirements outlined in the Regulations; OR
- apply the default procedure outlined in the Regulations.

5 Upstream Duty Holders

The Act and Regulations establish obligations on businesses who:

- design plant or structures (section 22)
- manufacture plant, substances or structures (section 23)
- import plant, substances or structures (section 24)
- supply plant, substances or structures (section 25)
- install, construct or commission plant or structures (section 26)

These upstream duty holders have obligations to eliminate and minimise the risks, so far as is reasonably practicable, associated with their plant, substances or structures;

and to provide the necessary information to enable them to be used safely. The obligations relating to the design of structures include their final use, and also the health and safety of those constructing them. In relation to supplying plant, the obligations extend to those who sell second hand plant.

Upstream duties have been established to focus on eliminating or minimising risks at their source. It is much easier to deal with a health and safety issue during the design phase than to try and retrofit a solution once the plant, substance or structure is in use in the workplace.

Message for leaders

7 Due diligence

WHS makes it clear that where duties are held by an organisation (such as a company), there is an obligation on the officers of the organisation to exercise due diligence to ensure that the organisation complies with those duties (section 27). In other words, those who make decisions about how a company is run have their own individual obligation to contribute to it being run in compliance with the safety laws.

Six steps of due diligence

Officers have:

1. Up to date knowledge of WHS matters;
2. An understanding of hazards and risks of the business.

6 Right of Entry

Legislation in most states and territories has, for many years, included a right for union officials who hold appropriate permits to enter a workplace to inquire into a suspected breach of safety law. In a few states, these same people have also had a right to enter the workplace to consult or advise workers or to assist a health and safety representative. The WHS laws establish a right to enter for both purposes. Other provisions in the Act and Regulations establish other circumstances where a union may become involved in the workplace. The table, right, provides a summary of the key considerations for union right of entry provisions under WHS.

| Requirement | Entry for a suspected contravention | Entry to consult and advise workers |
|--|-------------------------------------|-------------------------------------|
| Prior notice of entry | ✗ | ✓ |
| Prior notice to inspect/copy relevant documents | ✗ | N/A |
| Prior notice to inspect employee records | ✓ | N/A |
| Prior notice to inspect information held by another person | ✓ | N/A |
| Ability to advise workers of risk | ✓ | ✓ |
| Ability to cause work to cease | ✗ | ✗ |
| Enforcement powers | ✗ | ✗ |

In what other ways can the union get involved under WHS?

When these right of entry powers are being exercised...

The union official:

- **Must** comply with any WHS or other legislated requirement that applies to the workplace if requested by the PCBU or person with management of the workplace; and
- **Must not** delay, hinder or obstruct any person or disrupt work at the workplace.

The business:

- Cannot refuse or unduly delay a permit holder entitled to enter the workplace.

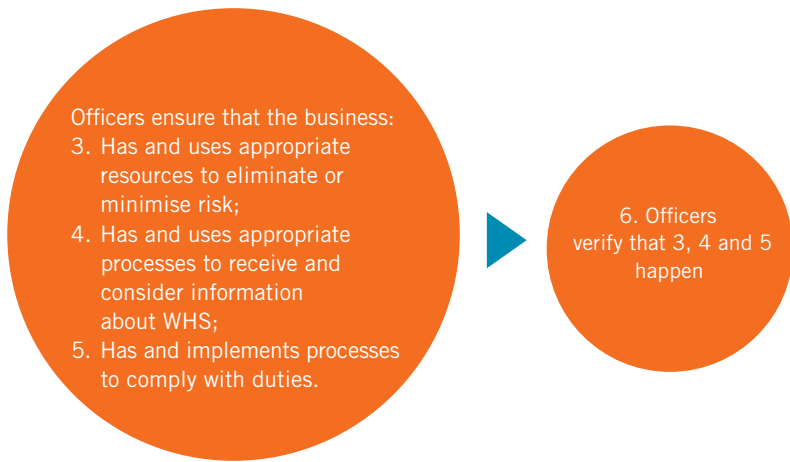
| Section of Act | Subject | How |
|----------------|--|--|
| s68 | Powers and functions of HSRs | HSR can request assistance of any other person. |
| s70 | General obligations of PCBUs in relation to HSRs | PCBU must allow a person to assist HSR the PCBU can refuse access "on reasonable grounds". |
| s52 | Negotiations for agreement for a work group | Can represent the workers in place of HSR. |
| s61 | Election of HSRs | Assist in conducting the election. |
| s81 | Resolution of health and safety issues | Attend with view to resolving issue. |

Who is an officer?

Officer is defined to mean those who make or participate in the making of decisions that affect the whole business or a substantial part of it. In practice, due diligence will operate more effectively if the whole management team tries to apply its principles, regardless of who may legally be an officer.

As an officer, what should I do to demonstrate due diligence?

- Understand your WHS duties and those of the company; understand what risk management requires, including what is meant by 'reasonably practicable' and the hierarchy of controls; know your industry's WHS issues.
- Know the business and the key things that can potentially harm people's health and safety.
- Allocate appropriate resources, with clear support from the top, to enable the organisation to implement control measures and generally comply with the WHS duties. This is more than establishing a safety management system; it is about establishing a culture where dealing with health and safety is built in to how you do business and where information about problems and solutions freely flows up, down and across the organisation. The best companies, large and small do this now.
- Make sure you check the organisation is actually doing what it says it is about health and safety. Audits and injury reports can provide valuable data, but an officer needs to seek out their own verification that the organisation is complying with the law. Talk to workers; ask them if supervisors and managers talk to them about safety; test their knowledge of the health and safety requirements in the workplace; seek their views on how health and safety could be improved in the workplace. Compare these responses with the official reports you get on compliance.



The WHS Regulations and Codes of Practice

Here we have highlighted the key provisions requiring the attention of PCBUs when implementing the Regulations. We have also indicated where relevant Codes of Practice are finalised. We encourage you to access further Ai Group documents on our website and participate in Ai Group training and seminars to ensure that you have a full understanding of the requirements.

| Regulations – Part 3.2 – General Workplace Management Code of Practice: Managing the work environment and facilities | |
|---|---|
| Information, instruction and training | Must be: suitable and adequate and readily understandable |
| General workplace environment | Ensure adequate and appropriate: layout; space; floors and other surfaces; lighting; ventilation; controls for work in extreme temperatures; and protection from essential services (gas, electricity etc.) |
| First aid | Ensure access to appropriate first aid |
| | Develop plans; train and test |
| | Taking into account: <ul style="list-style-type: none"> • Nature of the work • Nature of the hazards • Size and location of workplace • Number and composition of workers and others |
| Personal protective equipment (PPE) | <ul style="list-style-type: none"> • Must be provided by the PCBU directing the work, unless provided by another PCBU • Must be selected to minimise risk • PCBU has an obligation to ensure that the PPE is worn • Workers and others have an obligation to wear the PPE |
| Remote and isolated work <i>Work that is isolated from the assistance of others because of location, time or the nature of the work</i> | Manage the risks, including the provision of a system that includes effective communication |
| Falling objects <i>Relates to an object falling on a person if the falling object is reasonably likely to injure the person</i> | Manage the risks associated with falling objects, including preventing an object falling freely OR providing a system to arrest the fall of a falling object |
| Managing the risks from airborne contaminants | Ensure a person is not exposed to a substance or mixture in excess of the exposure standard. Includes specific requirements for air monitoring |
| Hazardous atmospheres <i>Defined by considering levels of oxygen; flammable gas, vapours, mist or fumes; or combustible dust</i> | Manage the risks of hazardous atmospheres, including the presence of ignition sources |
| Storage of flammable and combustible material <i>Including, flammable and combustible liquids; and gas cylinders (whether empty or full)</i> | These materials must be kept to their lowest practicable level |

| Regulations – Chapter 4 – Hazardous Work | |
|---|--|
| Noise Code of Practice: Managing noise and preventing hearing loss at work | <ul style="list-style-type: none"> • Must ensure that workers are not exposed above the exposure standard: 8 hour average of 85dB(A); or a peak exposure of 140dB(C) • Audiometric testing required if frequently required to wear PPE to protect against exposure to noise in excess of the exposure standard – within the first three months and then every two years • Designers, manufacturers, suppliers and importers of plant must minimise the level of noise emissions |
| Hazardous manual tasks Code of Practice: Hazardous manual tasks | PCBU must manage the risks of a musculoskeletal disorder associated with hazardous manual tasks (as defined in the regulations); Designers, manufacturers, importers and suppliers of plant and structures must ensure that the need to perform hazardous manual tasks is eliminated or minimised, and must provide information about control measures |

| | |
|--|---|
| <p>Confined spaces <i>A space not intended to be occupied by a person; at normal atmospheric pressure; and likely to be a risk to health and safety from: insufficient oxygen; contaminants that may cause fire or explosion; harmful concentrations of contaminants; or engulfment</i></p> <p>Code of Practice: Confined spaces</p> | <p>Designer, manufacturer, importer, supplier or installer must eliminate or minimise the need to enter the space; Detailed requirements in relation to doing work in a confined space, including: training, entry permits, risk assessments, record keeping</p> |
| <p>Falls <i>A fall by a person from one level to another that is reasonably likely to cause injury to the person or any other person</i></p> <p>Code of Practice: How to prevent falls at workplaces</p> | <p>In managing the risks, the preferred control measure is to undertake the work on the ground or on a solid construction. If this is not reasonably practicable, adequate protection must be provided: fall prevention device (e.g. fence, edge protection, cover); work positioning system; or fall arrest system, supported by rescue and emergency systems</p> |
| <p>High risk work (licensing)</p> | <p>Largely adopting current licensing provisions. New category of 'reach stacker' for handling of shipping containers</p> |
| <p>Demolition work (notification)</p> | <p>Requirements to notify the regulator of demolition work when:</p> <ul style="list-style-type: none"> • A structure is involved that is at least six metres high and related to the integrity of the structure; or • Load shifting machinery is in use on a suspended floor; or • Explosives are being used. |
| <p>General electrical safety in workplaces and energised electrical work</p> | <p>Prohibition on live electrical work, unless the work meets specific criteria specified in the regulations. If live work is undertaken, detailed requirements must be met, including: risk assessments, safe work method statements; safety observer. Requirements for inspection and testing of electrical equipment and use of Residual Current Devices (RCDs) in specified circumstances; Specific provisions regarding work near electrical lines</p> |
| <p>Diving work</p> | <p>Provisions for general, incidental and scientific diving work In relation to high risk diving work – reference to AS/NZS 2299.1:2007</p> |

Regulations – Part 5.1 – Plant and Structures – General

The regulations relating to plant and structures are based on the national standard which has previously been adopted in most states. The regulations establish specific duties for upstream duty holders (designers etc.) relating to the provision of information (these are in addition to the obligations in the Act to eliminate or minimise risk).

Detailed information is included about the requirements for guarding, operational controls, emergency stops and warning devices. A PCBU must: prevent unauthorised alteration or interference with plant; ensure proper use of plant and controls; and ensure that plant that is not in use does not create a risk. The Regulations also specify particular controls for: powered mobile plant; roll-over protection on tractors; protective structures on earthmoving machinery; industrial lift trucks; plant that lifts or suspends; plant used in connection with tree lopping; industrial robots; lasers; pressure equipment; scaffolds; plant with pressure sensing safeguarding systems; registered mobile cranes and tower cranes; lifts; and amusement devices.

Regulations – Part 5.2 – Plant and Structures – Registration

Schedule 5 of the Regulations identifies a range of high risk plant/structures that require design registration and/or registration of individual items of plant/structures. This list is very similar to the previous requirements in legislation across Australia, with some minor variations.

Regulations – Chapter 6 – Construction Work

Construction work (as defined in the regulations) has the following requirements:

- A PCBU commissioning construction work must consult with the designer and pass on health and safety information to the principal contractor;
- All workers undertaking construction work must have undertaken the prescribed construction induction course;
- High-risk construction work (also defined) requires the use of safe work method statements;
- Excavation work has specific controls related to essential services and management of risks; and
- Construction projects above \$250,000 create specific additional obligations for principal contractors.

Regulations – Chapter 7 – Hazardous chemicals (including lead)

The regulations establish specific duties for manufacturers, importers and suppliers of hazardous substances in relation to labelling and safety data sheets (these are in addition to the obligations in the Act to eliminate or minimise risk).

Obligations of a PCBU include: having safety data sheets; ensuring correct labelling; maintaining a hazardous chemicals register; management of risks; implementing specific controls outlined in the regulations; and health monitoring.

If the PCBU has schedule 11 chemicals (dangerous goods) above specific quantities there are requirements for placarding; development of a manifest; and notification to the regulator.

Codes of Practice: Labelling of workplace hazardous chemicals; Preparation of safety data sheets for hazardous chemicals.

Regulations – Chapter 8 – Asbestos

Asbestos Management

- Asbestos register required (unless workplace was built after 31 December, 2003); if no asbestos, the register will state as such;
- Asbestos management plan required if there is asbestos present;
- Asbestos management plan (and register if there is asbestos present) must be reviewed if things change or at least every five years.

Code of Practice: How to manage and control asbestos in the workplace

Asbestos Removal

- Class A licence required for removal of friable asbestos
- Class A or B licence required for removal of non-friable asbestos > 10m²
- Trained and competent person can remove non-friable asbestos < 10m²

Code of Practice: How to safely remove asbestos

Regulations – Chapter 9 – Major Hazard Facilities (MHF)

Schedule 15 of the regulations lists the chemicals that are considered when determining whether a workplace is a major hazard facility (MHF). A PCBU is required to notify the regulator if they have more than 10% of the threshold amount of a chemical listed in the schedule.

- If >10% – the workplace will automatically be determined as a MHF
- If <10% – the workplace may be determined by the regulator to be a MHF

Once determined to be a MHF, there is a requirement for the development of a safety case and a safety management system, as part of the process for licensing.

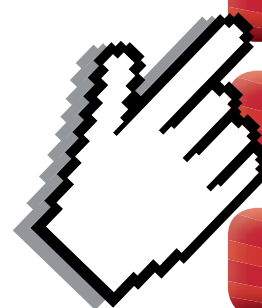
Regulations – Chapter 10 – Mines

At the time of printing, the regulations and codes of practice for mines had not been completed. It is our understanding that each jurisdiction that implements the new WHS laws on 1 January 2012 will be putting in place legislative arrangements to maintain their current mines laws until the new regulations are finalised.

Dig deeper

Ai Group's website will be **continually updated** as developments unfold in the implementation of the new WHS Act, Regulations and Codes of Practice. If you're seeking further information, look for the following buttons online now:

www.aigroup.com.au/ohs/nationalohsreview



Do you want to read the Act, Regulations and Codes of Practice in full?

How do the new laws differ from the current laws in your state or territory?

When will your state or territory be implementing the new WHS laws?