

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

The *Occupational Health and Safety Amendment Bill 2011* is cognate with this Bill.

Overview of Bill

This Bill provides the basis for New South Wales' participation in the nationally harmonised system of work health and safety.

The Bill enacts the nationally agreed *Model Work Health and Safety Act* in this State. It will be supplemented by Model Work Health and Safety Regulations and Codes of Practice.

At the Safe Work Australia Members' meeting of 2 December 2010, members agreed to the Explanatory Memorandum to the *Model Work Health and Safety Act* available at:

www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/ExplanatoryMemorandum.aspx

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Outline of provisions

Part 1 Preliminary

The proposed Part (proposed sections 1–12A) sets out the name (also called the short title) of the proposed Act, provides for the commencement of the proposed Act on 1 January 2012, defines certain words and expressions used in the proposed Act, provides for the application of the proposed Act to the Crown and provides for offences to be strict liability offences.

Part 2 Health and safety duties

Division 1 Introductory

Subdivision 1 of Division 1 (proposed sections 13–17) sets out the principles that apply to all duties under the proposed Act. The proposed Subdivision provides that duties are not transferable, that a person may have more than one duty, that more than one person may have the same duty and that a person who has a duty under the proposed Act must eliminate or reduce risks to health and safety so far as is reasonably practicable.

Subdivision 2 of Division 1 (proposed section 18) of the proposed Part sets out the matters to be considered when determining whether a reduction or elimination of a hazard or risk to health and safety is reasonably practicable.

Division 2 Primary duty of care

Clause 19 provides that a person conducting a business or undertaking has a duty of care with respect to the health and safety of workers engaged by the person, caused to be engaged by the person or whose activities in carrying out work are influenced or directed by the person.

Division 3 Further duties of persons conducting businesses or undertakings

Clause 20 provides that a person with management or control of a workplace has a duty, so far as is reasonably practicable, to ensure that the means of entering and exiting the workplace, and anything arising from the workplace, are without risks to the health and safety of any person.

Clause 21 provides that a person with management or control of the fixtures, fittings or plant at a workplace has a duty, so far as is reasonably practicable, to ensure that the fixtures, fittings or plant are without risk to the health and safety of any person.

Clause 22 provides that a person who designs plant, or any substance or structure that is reasonably expected to be used at a workplace, has a duty, so far as is reasonably practicable, to ensure that the plant, substance or structure is designed to be without risks to the health and safety of certain persons.

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Clause 23 provides that a person who manufactures plant, or any substance or structure that is reasonably expected to be used at a workplace, has a duty, so far as is reasonably practicable, to ensure that the plant, substance or structure is manufactured to be without risks to the health and safety of certain persons.

Clause 24 provides that a person who imports plant, or any substance or structure that is reasonably expected to be used at a workplace, has a duty, so far as is reasonably practicable, to ensure that the plant, substance or structure that is imported is without risks to the health and safety of certain persons.

Clause 25 provides that a person who supplies plant, or any substance or structure that is reasonably expected to be used at a workplace, has a duty, so far as is reasonably practicable, to ensure that the plant, substance or structure that is supplied is without risks to the health and safety of certain persons.

Clause 26 provides that a person who installs, constructs or commissions plant or a structure that is reasonably expected to be used at a workplace, has a duty, so far as is reasonably practicable, to ensure that the plant or structure that is installed, constructed or commissioned is without risks to the health and safety of certain persons.

Division 4 Duty of officers, workers and other persons

Clause 27 provides that an officer of a person who has a duty under the proposed Act has a duty to exercise due diligence to ensure that the person is complying with that duty.

Clause 28 provides that a worker has a duty, while at work, to take reasonable care for the worker's own health and safety and that of other persons and to comply with reasonable instructions given by, and co-operate with the reasonable policy and procedure of, a person who has a duty under the proposed Act.

Clause 29 provides that a person at a workplace has a duty to take reasonable care for the person's own health and safety and that of other persons and to comply with reasonable instructions given by, a person who has a duty under the proposed Act.

Division 5 Offences and penalties

Clause 30 defines a term that is used in the proposed Division.

Clause 31 creates an offence for a person who has a duty under the proposed Act to engage in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury or illness if the person is reckless as to the risk.

Clause 32 creates an offence for a person who has a duty under the proposed Act to fail to comply with that duty if that failure exposes an individual to a risk of death or serious injury or illness.

Clause 33 creates an offence for a person who has a duty under the proposed Act to fail to comply with that duty.

Clause 34 provides a number of exceptions to the offence provisions including exemptions for volunteers and unincorporated associations in certain circumstances.

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Part 3 Incident notification

The proposed Part (proposed sections 35–39) creates an offence for a person conducting a business or undertaking for failing to notify the regulator of certain incidents (including the death, serious injury or illness of a person or a dangerous incident) arising out of the conduct of the business or undertaking.

The proposed Part also provides that the person with the management or control of a workplace at which such an incident occurs must, so far as is reasonably practicable, ensure that the site where the incident occurred is not disturbed before an inspector arrives or otherwise directs.

Part 4 Authorisations

Clause 40 defines *authorised*, for the purposes of the proposed Part, as authorised by a licence, permit, registration or other authority required by the regulations.

Clause 41 creates an offence with respect to the carrying out of work at a workplace if the regulations require the workplace to be authorised and the workplace is not authorised.

Clause 42 creates offences with respect to the use of plant or a substance if the regulations require that the plant or substance or its design be authorised and the plant, substance or design is not authorised.

Clause 43 creates offences with respect to the carrying out of work if the regulations require that the work be carried out by, or on behalf of, a person who is authorised, and the person is not authorised.

Clause 44 creates offences with respect to the carrying out of work if the regulations require that the work be carried out or supervised by a person who has certain qualifications and the person does not have the qualifications or is not supervised by a person who has the qualifications.

Clause 45 creates an offence for failing to comply with the conditions that apply to an authorisation given under the regulations.

Part 5 Consultation, representation and participation

Division 1 Consultation, co-operation and co-ordination between duty holders

Clause 46 provides that if more than one person has a duty in relation to a matter under the proposed Act, each of the persons must consult, co-ordinate and co-operate with the other persons in relation to that matter.

Division 2 Consultation with workers

Division 2 of Part 5 (proposed sections 47–49) provides for the consultation of workers on matters relating to work health and safety.

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Division 3 Health and safety representatives

Subdivision 1 Request for election of health and safety representatives

Subdivision 1 of Division 3 (proposed section 50) provides that a worker may request that a person conducting a business or an undertaking facilitate the election of health and safety representatives for workers who work for the business or undertaking.

Subdivision 2 Determination of work groups

Subdivision 2 of Division 3 (proposed sections 51–54) provides for the determination of work groups. Each work group is to be represented by one or more health and safety representatives.

Subdivision 3 Multiple-business work groups

Subdivision 3 of Division 3 (proposed sections 55–59) provides for the determination of work groups in circumstances where workers are carrying out work for 2 or more persons at one or more workplaces.

Subdivision 4 Election of health and safety representatives

Subdivision 4 of Division 3 (proposed sections 60–67) deals with the election of health and safety representatives including eligibility to be elected, election procedures, eligibility to vote, the term of office of representatives, disqualification of representatives, immunity from liability for acts done in good faith by representatives and the election of deputy health and safety representatives.

Subdivision 5 Powers and functions of health and safety representatives

Subdivision 5 of Division 3 (proposed sections 68 and 69) provides that a health and

safety representative for a work group has certain powers and functions relating to work health and safety in respect of that work group, including representing workers in matters relating to health and safety, monitoring compliance with duties under the proposed Act and inquiring into apparent risks to the health and safety of workers.

Subdivision 6 Obligations of persons conducting business or undertaking to health and safety representatives

Subdivision 6 of Division 3 (proposed sections 70–74) deals with consultation between a person conducting a business or undertaking and health and safety representatives for a work group of workers carrying out work for the person.

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The person is also required to allow the representatives to attend training in relation to work health and safety, provide financial assistance in certain circumstances and to maintain a list of health and safety representatives for each work group.

Division 4 Health and safety committees

Division 4 (proposed sections 75–79) provides for the establishment and constitution of health and safety committees. A health and safety committee has functions relating to the instigation of, and the development of, measures, standards, rules and procedures to ensure the health and safety of workers. A person conducting a business or undertaking must allow members of the health and safety committee to spend the time that is reasonably necessary to attend committee meetings and to carry out the functions of the committee.

Division 5 Issue resolution

Division 5 (proposed sections 80–82) provides a mechanism for the resolution of disputes relating to work health and safety. If the parties are unable to resolve the issue, and are unable to agree on a dispute resolution procedure, the dispute is to be resolved in accordance with the procedure prescribed by the regulations. If the parties remain unable to resolve the dispute, a party to the dispute may seek the appointment of an inspector to resolve the dispute.

Division 6 Right to cease or direct cessation of unsafe work

Division 6 (proposed sections 83–89) provides circumstances in which a worker may cease, or a health and safety representative may direct a worker to cease, unsafe work. A worker who ceases, or is directed to cease, unsafe work must notify the person conducting the business or undertaking that they have ceased the unsafe work and must remain available to perform other safe and appropriate duties.

Division 7 Provisional improvement notices

Division 7 (proposed sections 90–102) provides for the issue of a provisional improvement notice by a health and safety representative if the representative reasonably believes that a person is contravening provisions of the proposed Act and has consulted with the person. It is an offence for a person to contravene a provisional improvement notice.

The proposed Division also provides that a person who is issued with a provisional improvement notice, or the person conducting the business or undertaking affected by the notice, may apply to the regulator for the appointment of an inspector to review the notice. A notice may be cancelled by the health and safety representative who issued the notice or an inspector appointed by the regulator.

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Division 8 Part not apply to prisoners

Division 8 (proposed section 103) provides that nothing in proposed Part 5 (Consultation, representation and participation) applies to a worker who is in lawful

detention or custody.

Part 6 Discriminatory, coercive and misleading conduct

Division 1 Prohibition of discriminatory, coercive or misleading conduct

Division 1 (proposed sections 104–109) creates offences relating to engaging in discriminatory conduct for a prohibited reason and encouraging, authorising or assisting in discriminatory conduct for a prohibited reason and defines the terms **discriminatory conduct** and **prohibited reason**. The proposed Division also creates offences relating to coercing or inducing a person to exercise or not to exercise a power under the proposed Act and knowingly or recklessly misrepresenting a persons right or obligations.

Division 2 Criminal proceedings in relation to discriminatory conduct

Division 2 (proposed sections 110 and 111) creates a rebuttable presumption that, in criminal proceedings relating to discriminatory conduct for a prohibited reason, if it is adduced that discriminatory conduct was engaged in for a prohibited reason, that prohibited reason is the dominant reason for the conduct.

If a person is convicted or found guilty of an offence relating to discriminatory conduct for a prohibited reason, the court may order that the offender pay compensation or that a person be reinstated or reemployed, or both.

Division 3 Civil proceedings in relation to discriminatory or coercive conduct

Division 3 (proposed sections 112 and 113) provides that a person affected by discriminatory conduct for a prohibited reason (or his or her agent) may apply to the District Court for an order in relation to the person who has engaged in the conduct. The court may order an injunction, the payment of compensation to the affected person, reinstatement of the affected person or such other order as the court considers appropriate. Such an application must be made within 12 months after the applicant knew, or ought to have known, that the cause of action accrued.

Division 4 General

Division 4 (proposed sections 114 and 115) limits the circumstances in which the District Court may make orders relating to discriminatory conduct for a prohibited reason.

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Part 7 Workplace entry by WHS entry permit holders

Division 1 Introductory

Division 1 (proposed section 116) defines certain terms that are used in proposed Part 7.

Division 2 Entry to inquire into suspected contraventions

Division 2 (proposed sections 117–120) provides that a WHS entry permit holder may enter a workplace for the purpose of inquiring into suspected contraventions of the proposed Act and may inspect any work system, plant, substance or structure, inspect employee records and consult with workers in relation to a suspected contravention.

Division 3 Entry to consult and advise workers

Division 3 (proposed sections 121 and 122) provides that a WHS entry permit holder may also enter a workplace for the purpose of consulting and advising on work health and safety and may warn any person whom the permit holder believes is exposed to a serious risk to his or her safety.

Division 4 Requirements for WHS entry permit holders

Division 4 (proposed sections 123–130) creates offences relating to the conduct of

WHS entry permit holders including prohibitions on breaching conditions of the permit, failing to have the permit available for inspection and the time and place at which rights granted by the permit may be exercised.

Division 5 WHS entry permits

Division 5 (proposed sections 131–140) contains provisions relating to applications for and the issue of WHS entry permits to an official of a union, including the imposition of conditions on such a permit, the term of a permit and the expiry of the permit. The proposed Division also provides for the revocation of a WHS entry permit in certain circumstances.

Division 6 Dealing with disputes

Division 6 (proposed sections 141–143) establishes a mechanism for resolving disputes arising from the exercise or purported exercise of the right of entry by a WHS entry permit holder. If the parties to the dispute are unable to resolve the matter, the authorising authority (the Industrial Relations Commission) may deal with the matter in any manner it thinks fit, including arbitration. If the authorising authority deals with the dispute by arbitration, the proposed Division creates an offence for contravening an order made under arbitration.

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Division 7 Prohibitions

Division 7 (proposed sections 144–148) creates offences relating to the exercise of powers by WHS entry permit holders including refusing or delaying entry of a permit holder or hindering or obstructing a permit holder. The proposed Division also provides that a WHS entry permit holder must not, in exercising or purported exercise of rights, unreasonably delay, hinder or obstruct any person, disrupt any workplace or otherwise act in an improper manner.

Division 8 General

Division 8 (proposed sections 149–151) contains general provisions relating to WHS entry permits including the return of revoked, suspended or expired permits, the keeping of a register of permit holders and the provision of certain information about a permit holder to the authorising authority.

Part 8 The regulator

Division 1 Functions of regulator

Division 1 (proposed sections 152–154) sets out the functions and powers of the regulator. In addition to functions conferred on the regulator by other provisions of the proposed Act, the regulator has functions including advising the Minister of the operation and effectiveness of the proposed Act, monitoring and enforcing compliance with the proposed Act and the promotion and support of education and training on matters relating to work health and safety.

Division 2 Powers of regulator to obtain information

Division 2 (proposed section 155) grants the regulator power to compel a person to provide any information, documents or other evidence that the person may have in relation to a possible contravention of the proposed Act.

Part 9 Securing compliance

Division 1 Appointment of inspectors

Division 1 (proposed sections 156–159) provides for the appointment, identification and accountability of inspectors. The proposed Division also provides for the suspension and ending of the appointment of inspectors.

Division 2 Functions and powers of inspectors

Division 2 (proposed sections 160–162A) sets out the functions and powers of inspectors. The functions and powers of an inspector include providing information and advice about compliance with the proposed Act, assisting in the resolution of

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certain issues and the investigation of contraventions of the proposed Act. The powers of an inspector are subject to the conditions specified in the inspector's instrument of appointment and directions from the regulator.

Division 3 Powers relating to entry

Subdivision 1 General powers of entry

Subdivision 1 of Division 3 (proposed sections 163–166A) enables inspectors, and persons assisting inspectors, to enter workplaces to determine whether the proposed Act is being complied with or contravened.

Subdivision 2 Search warrants

Subdivision 2 of Division 3 (proposed section 167) provides for the issue of search warrants.

Subdivision 3 Limitation on entry powers

Subdivision 3 of Division 3 (proposed section 170) prohibits entry into residential premises except with the consent of the person with management or control of the place or under a search warrant.

Subdivision 4 Specific powers on entry

Subdivision 4 of Division 3 (proposed sections 171–181) sets out the powers of inspectors to inspect and seize documents and other things and to deal with seized things.

Division 4 Damage and compensation

Division 4 (proposed sections 182–184) provides that inspectors are to minimise damage caused, and for the payment of compensation for loss or expense incurred, as results of the exercise of a power under the proposed Act.

Division 5 Other matters

Division 5 (proposed sections 185–187) sets out the powers of inspectors to require certain information, take affidavits and examine witnesses at a coronial inquest relating to the death of a worker while carrying out work.

Division 6 Offences in relation to inspectors

Division 6 (proposed sections 188–190) makes it an offence to hinder or obstruct an inspector, impersonate an inspector or assault, threaten or intimidate an inspector.

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Part 10 Enforcement measures

Division 1 Improvement notices

Division 1 (proposed sections 191–194) provides for the issue of improvement notices by an inspector if the inspector believes that a person is contravening a provision of the proposed Act. The proposed Division also sets out the contents of an improvements notice and requires compliance with such a notice.

Division 2 Prohibition notices

Division 2 (proposed sections 195–197) provides for the issue of prohibition notices by an inspector if the inspector believes that an activity is occurring, or is likely to occur, at a workplace that involves serious risk to health and safety. The proposed Division also sets out the contents of a prohibition notice and requires compliance with such a notice.

Division 3 Non-disturbance notices

Division 3 (proposed sections 198–201) provides for the issue of a non-disturbance notice by an inspector for the purpose of preserving, or preventing disturbance to, a site for a specified period. The proposed Division also sets out the contents of a non-disturbance notice, requires compliance with such a notice and provides for the issue of a subsequence notice after the expiry of the original notice.

Division 4 General requirements applying to notices

Division 4 (proposed sections 202–210) requires notices to be in writing and provides for changes to a notice by an inspector, the cancellation of a notice by the regulator, the preservation of a notice despite formal irregularities and the manner of issue and display of notices.

Division 5 Remedial action

Division 5 (proposed sections 211–213) grants the regulator power to carry out certain remedial work where a person has been issued with a prohibition notice and has failed to comply with that notice. The regulator may recover the costs of remedial work from the person to whom the notice was issued.

Division 6 Injunctions

Division 6 (proposed sections 214 and 215) authorises the regulator to apply to the District Court for an injunction compelling the person to comply with, or restrain the person from contravening an improvement notice, prohibition notice or non-disturbance notice.

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Part 11 Enforceable undertakings

Part 11 (proposed sections 216–222) authorises the regulator to accept undertakings given by a person in connection with a matter relating to a contravention of the proposed Act. If the regulator accepts an undertaking, proceedings can not be brought against a person in relation to an offence under the proposed Act relating to a matter covered by that undertaking. If a person contravenes such an undertaking the regulator may apply to the District Court for an order directing compliance with, or discharging, the undertaking.

Part 12 Review of decisions

Division 1 Reviewable decisions

Division 1 (proposed section 223) provides for the review of certain decisions made under the proposed Act and specifies who is entitled to seek such a review.

Division 2 Internal review

Division 2 (proposed sections 224–228) provides for the review of decisions (other than decisions made by the regulator or delegate of the regulator) by a person appointed by the regulator on the application of certain persons. On review, the decision may be confirmed or varied or may be set aside and substituted and reasons for the outcome of the review must be provided to the applicant.

Division 3 External review

Division 3 (proposed section 229) provides for an application for the review of certain decisions to be made to, and for the review of such a decision by, the Industrial Relations Commission.

Part 13 Legal proceedings

Division 1 General matters

Division 1 (proposed sections 229A–233) sets out the procedure for the commencement and carrying on of proceedings for offences against the proposed Act and provides a limitation on the period in which such proceedings may be brought against a person.

Division 2 Sentencing for offences

Division 2 (proposed sections 234–242) makes provision for the sentencing of a person convicted, or found guilty, of an offence against the proposed Act and for the making of further orders in relation to such an offence including adverse publicity orders, orders for restoration and training orders.

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Division 2A Sentencing guidelines

Division 2A (proposed sections 242A–242H) provides for the making of guideline judgements by the District Court that set out the guidelines for the sentencing of offenders. Such guidelines are intended to be indicative only and are not intended to be applied in every case as if they were rules binding on judges but help to ensure consistency in sentencing decisions.

Division 3 Penalty notices

Division 3 (proposed section 243) enables penalty notices to be issued for offences under the proposed Act if they are prescribed by the regulations for that purpose.

Division 4 Offences by bodies corporate

Division 4 (proposed section 244) imputes conduct to a body corporate where a person is acting on behalf of, or with the apparent authority of the body corporate.

Division 5 The Crown

Division 5 (proposed sections 245–248) deals with the application of provisions to the Crown with respect to legal proceedings for offences and identifying officers and the designation of responsible agencies.

Division 6 Public authorities

Division 6 (proposed sections 249–253) deals with the application of provisions to public authorities with respect to legal proceedings for offences, imputing conduct to public authorities, identifying officers and proceedings against successors to public authorities.

Division 7 WHS civil penalty provisions

Division 7 (proposed sections 254–266) provides for proceedings for the contravention of a provision of the proposed Act that are designated as WHS civil penalty provisions. The contravention of such a provision is not an offence and the rules of court applying to civil proceedings are to apply to proceedings for a contravention. The proposed Division also provides for double jeopardy, the commencement of proceedings and the recovery of monetary penalties ordered by the court.

Division 8 Civil liability not affected by this Act

Division 8 (proposed section 267) makes it clear that nothing in the proposed Act confers a right of action in civil proceedings, a defence in civil proceedings or otherwise affects a right of action in respect of the duties or obligations under the proposed Act.

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Part 14 General

Division 1 General provisions

Division 1 (proposed section 268–273) deals with the general application of the proposed Act including an offence for giving false or misleading information in purported compliance with the proposed Act, maintaining legal professional privilege, immunity from liability for actions in good faith in execution of powers and functions under the proposed Act, and confidentiality with respect to information and documents obtained under the proposed Act.

Division 2 Codes of practice

Division 2 (proposed sections 274 and 275) provides for the approval of a code of practice and the use of an approved code of practice in proceedings for offences against the proposed Act.

Division 3 Regulation-making powers

Division 3 (proposed section 276) is a standard regulation-making power.

Division 3A Miscellaneous

Division 3A (proposed sections 276A–276C) allows for a regulation to prescribe a specified government department or agency as being the regulator in relation to the application of the proposed Act to a mining workplace or a coal workplace, provides

for the review of the proposed Act after 5 years, and provides for the repeal of the *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation 2001*.

Schedule 1 Application of Act to dangerous goods and high risk plant

Schedule 1 provides for the special application of the proposed Act to the storage and handling of dangerous goods and the operation of high risk plant affecting public safety, even if the dangerous goods or plant are not stored, handled or operated at a workplace.

Schedule 2 The regulator and local tripartite consultation arrangements and other local arrangements

Schedule 2 is not included in NSW.

Schedule 3 Regulation-making powers

Schedule 3 contains regulation-making powers.

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Schedule 4 Savings, transitional and other provisions

Schedule 4 enacts savings and transitional provisions.

Schedule 5 Amendment of other legislation

Schedule 5 amends the legislation specified in the Schedule. Other Acts will require consequential amendment before the commencement of the proposed Act.