



New South Wales

Occupational Health and Safety Amendment Act 2011 No 11

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New South Wales

Occupational Health and Safety Amendment Act 2011 No 11

Act No 11, 2011

An Act to amend the *Occupational Health and Safety Act 2000* to adopt some national work health and safety reforms pending the enactment of new legislation; and for other purposes. [Assented to 7 June 2011]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Occupational Health and Safety Amendment Act 2011*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Occupational Health and Safety Act 2000 No 40

[1] Section 7A

Insert before section 8:

7A The concept of ensuring health and safety

- (1) A duty imposed on a person by this Division (or by any other provision of or made under this Act) to ensure, so far as is reasonably practicable, health and safety requires the person:
 - (a) to eliminate risks to health and safety so far as is reasonably practicable, and
 - (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.
- (2) For the purposes of this Division (or of any such other provision), in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety, all relevant matters are to be taken into account and weighed up, including:
 - (a) the likelihood of the hazard or the risk concerned occurring, and
 - (b) the degree of harm that might result from the hazard or the risk, and
 - (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk, and
 - (ii) ways of eliminating or minimising the risk, and
 - (d) the availability and suitability of ways to eliminate or minimise the risk, and
 - (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[2] Section 8 Duties of employers

Insert “, so far as is reasonably practicable,” after “must” wherever occurring in section 8 (1) and (2).

[3] Section 8 (1)

Insert “, so far as is reasonably practicable” after “the following”.

[4] Section 8, note

Omit the note. Insert instead:

Note. See section 12 for the penalty for an offence against this section and other provisions of this Division. Division 4 makes ancillary provision with respect to those offences, including section 26 (Officers of corporations required to exercise due diligence).

See also Division 2 for duty of employer to consult employees.

[5] Section 9 Duties of self-employed persons

Insert “, so far as is reasonably practicable,” after “must”.

[6] Section 10 Duties of controllers of work premises, plant or substances

Insert “, so far as is reasonably practicable,” after “must” wherever occurring in section 10 (1) and (2).

[7] Section 11 Duties of designers, manufacturers and suppliers of plant and substances for use at work

Insert “, so far as is reasonably practicable” after “must” in section 11 (1).

[8] Section 20 Duties of employees

Insert “reasonably” before “necessary” in section 20 (2).

[9] Section 26

Omit the section. Insert instead:

26 Officers of corporations required to exercise due diligence

- (1) If a corporation has a duty or obligation under a relevant provision, an officer of the corporation must exercise due diligence to ensure that the corporation complies with that duty or obligation.

Maximum penalty: the same maximum penalty that is applicable to a failure by an individual to comply with the duty or obligation.

- (2) The following provisions are *relevant provisions* for the purposes of this section:
- (a) Division 1 (General duties) of Part 2 (Duties relating to health, safety and welfare at work),
 - (b) Division 2 (Duty to consult) of Part 2,

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- (c) Division 4 (Incidents at places of work) of Part 5 (Investigations),
- (d) any provision of the regulations that is stated to be a relevant provision for the purposes of this section.
- (3) In this section, *due diligence* includes taking reasonable steps:
- (a) to acquire and keep up-to-date knowledge of occupational health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the trade, business or other undertaking of the corporation and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the corporation has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the trade, business or other undertaking of the corporation, and
- (d) to ensure that the corporation has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and
- (e) to ensure that the corporation has, and implements, processes for complying with any duty or obligation of the corporation under the relevant provisions of this Act, and
- Example.** For the purposes of paragraph (e), the duties or obligations of a corporation under the relevant provisions of this Act may include:
- giving notice of notifiable incidents,
 - consulting with employees,
 - complying with notices issued under this Act,
 - providing training and instruction to employees about occupational health and safety,
 - ensuring that OHS representatives undertake any required course of training.
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c)–(e).
- (4) A person may be proceeded against and convicted of an offence under subsection (1) whether or not the corporation has been proceeded against or has been convicted of an offence in relation to the duty or obligation.
- (5) An officer of a corporation who is a volunteer is not liable to be prosecuted under this section for anything done or omitted to be done by the person as a volunteer.

(6) This section does not affect any liability imposed on a corporation for a failure to comply with the duty or obligation concerned.

(7) In this section:

corporation means any body corporate (including a body corporate representing the Crown).

officer means an officer within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth, but does not include a Minister of the Crown acting in that capacity, an elected member of a local authority acting in that capacity or a partner in a partnership.

volunteer has the same meaning as in section 60 of the *Civil Liability Act 2002*.

Note. That section provides that a volunteer is a person who does community work on a voluntary basis.

[10] Section 28 Defence

Omit the section.

[11] Section 32A Reckless conduct causing death at workplace by person with OHS duties

Omit the note to section 32A (3).

[12] Section 32A (6)

Omit the subsection.

[13] Section 90 Offence: failure to comply with investigation notice

Insert “(unless the occupier has a reasonable excuse for not doing so)” after “must”.

[14] Schedule 3 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Occupational Health and Safety Amendment Act 2011

[15] **Schedule 3, Part 7**

Insert at the end of the Schedule:

**Part 7 Provisions consequent on enactment of
Occupational Health and Safety
Amendment Act 2011**

24 Definition and application

(1) In this Part:

amending Act means the *Occupational Health and Safety Amendment Act 2011*.

(2) This Part has effect subject to the regulations under Part 1.

25 Offence by corporation—liability of directors and managers

Section 26 (as substituted by the amending Act) applies only in respect of acts and omissions occurring on or after the date of assent to the amending Act, and that section (as in force immediately before its substitution by the amending Act) continues to apply in respect of any contravention of this Act or the regulations that is alleged to have occurred before the date of assent to the amending Act.

26 Qualified general duties amendments

(1) The qualified general duties amendments made by the amending Act apply only in respect of acts and omissions occurring on or after the date of assent to the amending Act.

(2) The *qualified general duties amendments* are all of the amendments made by the amending Act except the following amendments:

- (a) the substitution of section 26,
- (b) the amendments of sections 32A and 106 and Schedule 3.

Schedule 2 Amendment of Occupational Health and Safety Regulation 2001

[1] Clause 6 Application of provisions providing for alternative duties if primary duty not reasonably practicable

Omit the note at the end of the clause. Insert instead:

Note. Clause 6A provides that the alternative duty applies only so far as is reasonably practicable.

[2] Clause 6A

Insert after clause 6:

6A Duties to apply so far as is reasonably practicable

- (1) If a provision of this Regulation imposes a duty to take or refrain from taking any action for the protection of health or safety, the duty applies only so far as it is reasonably practicable to take or refrain from taking that action.
- (2) Subclause (1) extends to provisions of this Regulation made under section 135 or 135A of the Act for the protection of public health or safety.

[3] Clause 178 Spray painting outside spray booths—particular risk control measures

Omit the note to clause 178 (1). Insert instead:

Note. Despite clause 177 (a), an employer may carry out spray painting other than in a spray booth if compliance with that clause is not reasonably practicable (see clause 6A).

[4] Clause 178 (3)

Omit “(within the meaning of section 28 of the Act)”.

[Agreement in principle speech made in Legislative Assembly on 5 May 2011

Second reading speech made in Legislative Council on 11 May 2011]

BY AUTHORITY