

[Act 2000 No 40]



New South Wales

Occupational Health and Safety Bill 2000

Explanatory note

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

Overview of Bill

The object of this Bill is to revise occupational health and safety legislation.

The changes made to the existing legislation include the following:

- (a) the legislation is rewritten in modern form, including revision of the objects of the proposed Act, the clarification of the duties imposed by the proposed Act and an improved arrangement of provisions,
 - (b) a duty is imposed on employers to consult their employees on occupational health and safety matters and provision is made for more flexible arrangements for consultation,
 - (c) the court is authorised to impose additional sanctions on offenders (including requiring the offender to publicise the offence or to undertake projects to improve occupational health and safety generally),
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- (d) victims injured (or the families of persons killed) as a result of occupational health and safety offences are given the opportunity to present victim impact statements to the court when the offender is being sentenced,
- (e) explicit provision is made with respect to proceedings against government agencies (including provision to ensure that government agencies are liable for breaches committed by their predecessors).

The Bill repeals the existing legislation, including the *Occupational Health and Safety Act 1983*, the *Construction Safety Act 1912* and relevant provisions of the *Factories, Shops and Industries Act 1962*.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 sets out the following objects of the proposed Act:

- (a) to secure and promote the health, safety and welfare of people at work,
- (b) to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,
- (c) to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,
- (d) to provide for consultation and co-operation between employers and employees in achieving the objects of the proposed Act,
- (e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,
- (f) to develop and promote community awareness of occupational health and safety issues,
- (g) to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,

- (h) to protect people (whether or not at a place of work) against risks to health and safety arising from the use of plant that affects public safety (eg amusement devices).

Clause 4 defines certain words and expressions used in the proposed Act. In particular, the clause defines the following expressions:

- (a) *associated occupational health and safety legislation* refers to the *Coal Mines Regulation Act 1982*, *Mines Inspection Act 1901*, *Rural Workers Accommodation Act 1969* and *Dangerous Goods Act 1975* and the regulations and rules under those Acts,
- (b) *place of work* refers to any premises where persons work,
- (c) *premises* refers to any place (including land, buildings and vehicles),
- (d) *work* refers to work as an employee or self-employed person.

Clause 5 provides that (with certain exceptions) the proposed Act applies to all places of work.

Clause 6 defines when persons are at work.

Clause 7 defines in wide terms the extent of risks arising from the activities of persons at work.

Part 2 Duties relating to health, safety and welfare at work

Division 1 (clauses 8–12) contains the general duties of employers and others. The duties are as follows:

- (a) the duty of an employer to ensure the health, safety and welfare at work of all the employees of the employer and the duty of the employer to ensure that other people at the place of work are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking,
- (b) the duty of a self-employed person to ensure that other people at the place of work are not exposed to risks to their health or safety arising from the conduct of the self-employed person's undertaking,
- (c) the duty of the controller of non-residential premises used by people as a place of work, or the controller of any plant or substances in non-residential premises used by people at work, to ensure that the premises, plant or substances are safe and without risks to health (where they are provided by the controller in the course of a trade, business or other undertaking),

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- (d) the duty of the designer, manufacturer (including installer) or supplier of any plant or substance for use by people at work (in the course of a trade, business or other undertaking) to ensure that it is safe and without risks to health when properly used and to provide adequate information to ensure its safe use.

The maximum penalty for a breach of any such duty (according to the present value of a penalty unit) is as follows:

- (a) in the case of a corporation (being a previous offender)—\$825,000, or
- (b) in the case of a corporation (not being a previous offender)—\$550,000, or
- (c) in the case of an individual (being a previous offender)—\$82,500 or imprisonment for 2 years, or both, or
- (d) in the case of an individual (not being a previous offender)—\$55,000.

Division 2 (clauses 13–19) contains the employer's duty to consult employees. The Division:

- (a) defines the nature of consultation (that is, the sharing of relevant information, the opportunity for employees to express their views and the taking into account of those views by the employer), and
- (b) requires consultation when relevant decisions are made that may affect occupational health, safety and welfare, and
- (c) enables consultation to be undertaken with an OHS committee, with an OHS representative or in accordance with other agreed arrangements (or any combination of those means), and
- (d) sets out the functions of OHS committees and representatives, and
- (e) enables more detailed provisions to be prescribed by regulation, and
- (f) sets out the maximum penalty for a breach of the duty to consult.

Division 3 (clauses 20–25) contains related duties, including:

- (a) the duty of an employee to take reasonable care for the health and safety of people at the place of work and to co-operate with the employer and others to enable them to comply with their duties under the proposed Act,
- (b) the duty not to interfere with or misuse things provided for health, safety and welfare,
- (c) the duty of an employer not to charge employees for things done or provided pursuant to the proposed Act,

- (d) the duty of a employer not to dismiss an employee or otherwise victimise an employee because of a complaint about occupational health or safety or participation in consultative arrangements,
- (e) the duty of a person not to hinder aid to an injured worker or other acts related to occupational health and safety,
- (f) the duty of a person not to disrupt a place of work by creating health and safety fears.

The Division provides a range of maximum penalties for breaches of those duties.

Division 4 (clauses 26–32) makes ancillary provision with respect to offences for the breach of duties and other matters under the proposed Act, including:

- (a) imposing liability on directors and managers of corporations for breaches by the corporation,
- (b) making it an offence to aid and abet the commission of an offence,
- (c) providing a defence for breaches that compliance was not reasonably practicable or that the cause of the breach was beyond the control of the person,
- (d) enabling a contravention of the regulations to be used as evidence of a breach of the general duties under the Part,
- (e) making it clear that the general duties under the Part do not give rise to or affect civil proceedings.

Part 3 Regulations

This Part (**clauses 33–39**) deals with the making of regulations. The wide powers to make regulations for the purposes of occupational health, safety and welfare at work under the former Act are continued. The regulations may confer a right of review by the Administrative Decisions Tribunal in connection with licensing and other decisions made under the regulations.

Part 4 Industry codes of practice

This Part (**clauses 40–46**) deals with the preparation, approval and effect of industry codes of practice for the purpose of providing practical guidance to employers, self-employed persons and others who have duties under Part 2 of the proposed Act. Industry codes of practice are prepared by WorkCover and, after consultation, may be approved by the Minister. A code takes effect on its publication in the Gazette or on a later specified day. A failure to comply with a code is admissible in evidence in proceedings for an offence under the proposed Act or regulations for the purpose of establishing any relevant matter that the prosecution is required to prove in the proceedings.

Part 5 Investigations

Division 1 (clauses 47 and 48) provides for the appointment of inspectors by WorkCover. Inspectors are to be issued with identification cards.

Division 2 (clauses 49–75) sets out the powers of inspectors. The Division continues the existing powers of inspectors, including the following:

- (a) the power to enter any place of work (with provision for a search warrant in the case of premises used for residential purposes),
- (b) the power to carry out inspections at places of work,
- (c) the power to carry out tests and analyses,
- (d) the power to dismantle and take plant and other things used in the commission of an offence,
- (e) the power to require persons at a place of work to answer questions, provide information and produce documents.

Division 3 (clauses 76–85) deals with the entry and inspection powers of authorised employees' representatives. The Division continues the existing powers of officials authorised under the *Industrial Relations Act 1996* to enter and inspect places of work for the purpose of investigating breaches of occupational health and safety legislation.

Division 4 (clauses 86–88) deals with accidents and other occurrences at places of work. The Division requires occupiers of places of work to give WorkCover notice of accidents and other matters and not to disturb the site of a fatal or other accident. The Minister is given authority to publish special reports about accidents and other dangerous occurrences at places of work without incurring liability for doing so.

Part 6 Investigation, improvement and prohibition notices

Division 1 (clauses 89 and 90) authorises an inspector who enters premises to issue an investigation notice to permit an inspection under Part 5. An investigation notice may require the occupier of the premises to stop the use of plant or other things or to prevent the disturbance of plant or other things.

Division 2 (clauses 91 and 92) authorises an inspector to issue an improvement notice if of the opinion that a person is contravening the proposed Act. An improvement notice requires the person to remedy the contravention.

Division 3 (clauses 93 and 94) authorises an inspector to issue a prohibition notice if of the opinion that there is an immediate risk to the health or safety of a person. A prohibition notice requires the person in control of the activity giving rise to the risk to stop carrying out the activity until the matters giving rise to the risk are remedied.

Division 4 (clauses 95–104) makes ancillary provision with respect to notices, including the review of notices by WorkCover, an appeal to a Local Court if the person concerned is dissatisfied with the result of the review and the service and exhibition of notices.

Part 7 Criminal and other proceedings

Division 1 (clauses 105–110) deals generally with proceedings for offences against the proposed Act. The Division provides for the summary disposal of proceedings by the Industrial Relations Commission in Court Session or a Local Court constituted by an Industrial or other Magistrate. The Division deals with the persons who may bring or approve of the bringing of proceedings and the time within which they may be brought. The Division also enables the issue of penalty notices for alleged offences.

Division 2 (clauses 111–117) authorises the making of court orders in connection with proceedings for offences. The orders that the Industrial Relations Commission or a Local Court may make when it finds a person guilty of an offence against the proposed Act or the regulations are:

- (a) an order that the offender remedy any matter caused by the commission of the offence, and
- (b) an order that the offender pay WorkCover the costs and expenses it has incurred during the investigation of the offence, and

- (c) an order that the offender publicise the offence, its consequences and the penalty imposed and other matters, and
- (d) an order that the offender carry out a specified project for the general improvement of occupational health and safety.

Division 3 (clauses 118–123) deals with proceedings against the Crown and government agencies. The Division declares that the Crown is bound by the proposed Act and makes it clear that criminal proceedings may be taken against the Crown for contraventions of the proposed Act. Where proceedings are taken against the Crown (not being proceedings taken against an agent of the Crown that is a corporation) the Division:

- (a) provides for the agency of the Crown responsible for the contravention (or its successor) to be identified and to defend the proceedings, and
- (b) provides that the penalty applicable is the same as that for a contravention by a corporation, and
- (c) makes other ancillary provisions.

This Division enables proceedings in respect of contraventions by former government corporations (including State owned corporations, public health organisations and local councils) to be continued or instituted against their successors if their successors are government corporations.

Division 4 (clauses 124–131) enables the Industrial Commission to issue guidelines for the sentencing of offenders under the proposed Act. 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. Similar powers are conferred on the Court of Criminal Appeal in the case of other offences (see Division 4 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*). Under the proposed Division, the Attorney General may apply to the Full Bench of the Industrial Relations Commission in Court Session at any time for a guideline judgment in respect of a specified offence or category of offences relating to occupational health and safety.

Part 8 Miscellaneous

The Part (**clauses 132–142**) contains miscellaneous provisions, including the following:

- (a) provisions relating to the associated occupational health and safety legislation that require compliance with that legislation in addition to the proposed Act and that ensure the proposed Act and regulations under it prevail over that legislation in the event of an inconsistency,
- (b) provision to ensure that police officers are regarded as employees of the Crown,
- (c) the extension of the proposed Act by regulation to certain high risk plant that affects public safety even if it is not used by persons at work (eg amusement devices; lifts in residential premises),
- (d) the creation of an offence of obstructing or intimidating inspectors, occupational health and safety representatives and others in connection with the exercise of their functions under the proposed Act,
- (e) the creation of an offence if an inspector, member of an OHS committee and others make unauthorised disclosures of commercial secrets and other confidential information obtained in the exercise of their functions under the proposed Act.

Schedule 1 Repeals

The Schedule repeals the *Construction Safety Act 1912*, *Occupational Health and Safety Act 1983*, *Occupational Health and Safety Amendment Act 1997* and the *Occupational Health and Safety Amendment (Sentencing Guidelines) Act 2000*.

Schedule 2 Amendments of other Acts

The amendments include the following:

- (a) amendments to the *Crimes (Sentencing Procedure) Act 1999* to enable victims injured (or the families of persons killed) as a result of occupational health and safety breaches to present victim impact statements to the Industrial Relations Commission when the offender is being sentenced in criminal proceedings under the proposed Act (the amendments extend to the Commission the

existing rights of victims to present victim impact statements in proceedings before the Supreme Court, the District Court and the Local Court),

- (b) amendments to the *Dangerous Goods Act 1975* to transfer provisions relating to that Act from the repealed legislation,
- (c) amendments to the *Factories, Shops and Industries Act 1962* to omit occupational health and safety provisions as a result of the consolidated provisions of the proposed Act and the regulations under it,
- (d) amendments to the *Industrial Relations Act 1996* to prevent the victimisation of an employee or other person who complains about an occupational health and safety issue and to enable the Industrial Relations Commission to order the reinstatement of a dismissed employee, the payment of compensation or other relief.

Schedule 3 Savings, transitional and other provisions

The Schedule enacts savings, transitional and other provisions, including the following:

- (a) authority for the making of regulations consequent on the enactment of the proposed Act,
- (b) the repeal of regulations under the repealed legislation,
- (c) the continuation in force of industry codes of practice under the repealed legislation,
- (d) the saving of the appointment of inspectors under the repealed legislation,
- (e) the enforcement under the proposed Act of improvement notices, prohibition notices and other notices and requirements made under the repealed legislation,
- (f) the extension of provisions of the proposed Act relating to the investigation and prosecution of offences to offences committed under the repealed legislation.