

Passed by both Houses



New South Wales

Work Health and Safety Amendment Bill 2023

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney,*

, 2023



New South Wales

Work Health and Safety Amendment Bill 2023

Act No _____, 2023

An Act to amend the *Work Health and Safety Act 2011* to incorporate amendments to the national *Model Work Health and Safety Act* relating to penalty amounts, prohibited asbestos notices, the powers and responsibilities of inspectors and the liability of corporations for the actions of officers, employees and agents; to make provision for a register of workers exposed to silica dust; and for related purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Work Health and Safety Amendment Act 2023*.

2 Commencement

This Act commences as follows—

- (a) Schedule 1[2], [18]–[20], [22], [24]–[27] and Schedule 2[1] and [6]—on the day that is 6 months after the date of assent to this Act,
- (b) Schedule 1[4]–[15], [17], [28], [32] and [37] and Schedule 2[2]–[4]—on 1 July 2024,
- (c) otherwise—on the date of assent to this Act.

Schedule 1 Amendment of Work Health and Safety Act 2011 No 10

[1] Section 4 Definitions

Insert in alphabetical order—

authorised person, in Part 13, Division 4—see section 244.

board of directors, in Part 13, Division 4—see section 244.

[2] Section 4

Insert in alphabetical order—

asbestos, in Part 10, Division 2A—see section 197A.

asbestos containing material (ACM), in Part 10, Division 2A—see section 197A.

prohibited asbestos, in Part 10, Division 2A—see section 197A.

relevant person, in Part 10, Division 2A—see section 197A.

[3] Section 31 Gross negligence or reckless conduct—Category 1

Omit section 31(1)(b). Insert instead—

- (b) the person, without reasonable excuse, engages in conduct that—
 - (i) exposes an individual, to whom the duty is owed, to a risk of death or serious injury or illness, or
 - (ii) if the person is an officer of a person conducting a business or undertaking—exposes an individual, to whom the person conducting a business or undertaking owes a health and safety duty, to a risk of death or serious injury or illness, and

[4] Section 31(1), penalty provision

Omit the penalty provision. Insert instead—

Maximum penalty—

- (a) for an individual, as a person conducting a business or undertaking or an officer of a person conducting a business or undertaking—18,805 penalty units or 10 years imprisonment, or both, or
- (b) for an individual, otherwise—9,038 penalty units or 10 years imprisonment, or both, or
- (c) for a body corporate—90,424 penalty units.

[5] Section 32 Failure to comply with health and safety duty—Category 2

Omit the penalty provision. Insert instead—

Maximum penalty—

- (a) for an individual, as a person conducting a business or undertaking or an officer of a person conducting a business or undertaking—3,626 penalty units, or
- (b) for an individual, otherwise—1,813 penalty units, or
- (c) for a body corporate—18,128 penalty units.

[6] Section 33 Failure to comply with health and safety duty—Category 3

Omit the penalty provision. Insert instead—

Maximum penalty—

- (a) for an individual, as a person conducting a business or undertaking or an officer of a person conducting a business or undertaking—1,214 penalty units, or
- (b) for an individual, otherwise—607 penalty units, or
- (c) for a body corporate—6,070 penalty units.

[7] Sections 38(1), 39(1), 52(5), 56(2), 61(4), 70(1) and (2), 71(2), 72(7), 79(1), (3) and (4), 155(5), 165(2), 171(6), 177(2) and (6), 185(4), 188, 189, 268(1) and (2) and 271(2) and (4)

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—121 penalty units, or
- (b) for a body corporate—607 penalty units.

[8] Sections 38(7), 75(1), 97, 210 and 273

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—61 penalty units, or
- (b) for a body corporate—304 penalty units.

[9] Sections 41, 99(2), 193, 200(1), 219 and 242(1)

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—607 penalty units, or
- (b) for a body corporate—3,036 penalty units.

[10] Sections 42–46 and 47(1)

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—243 penalty units, or
- (b) for a body corporate—1,214 penalty units.

[11] Sections 53, 57 and 74(1)

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—25 penalty units, or
- (b) for a body corporate—121 penalty units.

[12] Sections 104(1), 107, 108(1), 109(1) and 197

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—1,206 penalty units, or
- (b) for a body corporate—6,028 penalty units.

[13] Sections 118(3), 124–126, 128, 129, 143, 144(1), 145, 146, 147(1) and 148

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—121 penalty units, or
- (b) for a body corporate—607 penalty units.

[14] Section 123 Contravening WHS entry permit conditions

Omit the penalty provision. Insert instead—
Maximum penalty—243 penalty units.

[15] Section 150 Union to provide information to authorising authority

Omit the penalty provision. Insert instead—
Maximum penalty—
(a) for an individual—61 penalty units, or
(b) for a body corporate—304 penalty units.

[16] Section 162 Inspectors subject to regulator's directions

Insert after section 162(2)—

- (3) If exercising a compliance power requires an inspector to have a reasonable belief or reasonable suspicion as to a matter or to be satisfied of a thing, the regulator must not direct the inspector to exercise the compliance power unless the inspector has the belief or suspicion or is satisfied of the thing.

[17] Section 190 Offence to assault, threaten or intimidate inspector

Omit the penalty provision. Insert instead—
Maximum penalty—
(a) for an individual—607 penalty units or 2 years imprisonment, or both,
or
(b) for a body corporate—3,036 penalty units.

[18] Part 10, Division 2A

Insert after Division 2—

Division 2A Prohibited asbestos notices

197A Definitions

In this division—

asbestos means the asbestiform varieties of mineral silicates belonging to the serpentine or amphibole groups of rock forming minerals, including the following—

- (a) actinolite asbestos,
- (b) grunerite (or amosite) asbestos (brown),
- (c) anthophyllite asbestos,
- (d) chrysotile asbestos (white),
- (e) crocidolite asbestos (blue),
- (f) tremolite asbestos,
- (g) a mixture that contains 1 or more of the minerals referred to in paragraphs (a) to (f).

asbestos containing material (ACM) means any material or thing that, as part of its design, contains asbestos.

prohibited asbestos means asbestos or ACM, fixed or installed in a workplace on or after 31 December 2003.

relevant person in relation to a workplace means—

- (a) a person conducting a business or undertaking at the workplace, or
- (b) a person with management or control of the workplace, or
- (c) a person with management or control of fixtures, fittings or plant at the workplace, or
- (d) a person who the regulator reasonably believes is or was involved in, or caused, whether directly or indirectly, the fixing or installing of prohibited asbestos at the workplace.

197B Issue of prohibited asbestos notices

The regulator must issue a prohibited asbestos notice to a relevant person in relation to a workplace if the regulator reasonably believes prohibited asbestos is present in the workplace.

197C Contents of prohibited asbestos notices

- (1) A prohibited asbestos notice must state—
 - (a) that the regulator believes prohibited asbestos is present in the workplace and the basis of that belief, and
 - (b) details of the prohibited asbestos, including the location, type and condition of the prohibited asbestos, and
 - (c) directions in relation to specific measures the relevant person to whom the prohibited asbestos notice is issued is required to take in relation to the prohibited asbestos, including in relation to the management and removal of the prohibited asbestos, and
 - (d) the day by which the relevant person to whom the prohibited asbestos notice is issued is required to comply with the prohibited asbestos notice.
- (2) The day stated for compliance with the prohibited asbestos notice must be reasonable in all the circumstances.
- (3) The regulations may prescribe factors that must be considered by the regulator when determining specific measures the relevant person to whom a prohibited asbestos notice is issued is required to take in relation to prohibited asbestos.

197D Compliance with prohibited asbestos notice

A relevant person to whom a prohibited asbestos notice is issued must comply with the notice.

Maximum penalty—

- (a) for an individual—1,206 penalty units, or
- (b) for a body corporate—6,028 penalty units.

197E Extension of time for compliance with prohibited asbestos notices

- (1) This section applies if a relevant person has been issued with a prohibited asbestos notice.
- (2) The regulator may, by written notice given to the relevant person, extend the compliance period for the prohibited asbestos notice.

- (3) However, the regulator may extend the compliance period only if the period has not ended.
- (4) In this section—
compliance period means the period stated in the prohibited asbestos notice under section 197C, and includes that period as extended under this section.

[19] Section 202 Application of Division

Omit “or non-disturbance notice”.

Insert instead “, non-disturbance notice or prohibited asbestos notice”.

[20] Sections 204 and 205(1)

Omit “or prohibition notice” wherever occurring.

Insert instead “, prohibition notice or prohibited asbestos notice”.

[21] Section 204(b)

Insert “measures to take or” after “choice of”.

[22] Section 206

Omit the section. Insert instead—

206 Changes to notice

- (1) An inspector may—
 - (a) make minor changes to a notice issued by an inspector, or
 - (b) extend the compliance period for an improvement notice in accordance with section 194.
- (2) The regulator may—
 - (a) make minor changes to a prohibited asbestos notice issued by the regulator, or
 - (b) extend the compliance period of a prohibited asbestos notice in accordance with section 197E.
- (3) In this section, *minor changes* means a minor change to a notice—
 - (a) for clarification, or
 - (b) to correct errors or references, or
 - (c) to reflect changes of address or other circumstances.

[23] Section 207

Omit the section. Insert instead—

207 Regulator may vary or cancel notice

- (1) Except as provided in section 206, a notice issued by an inspector may only be varied or cancelled by the regulator.
- (2) A notice issued by the regulator may only be varied or cancelled by the regulator.

[24] Sections 211, 212(1)(a) and 213(b)

Insert “or prohibited asbestos notice” after “prohibition notice” wherever occurring.

[25] Section 212(1)(b)

Omit the paragraph. Insert instead—

- (b) a prohibition notice or prohibited asbestos notice cannot be issued because, after taking reasonable steps—
 - (i) in relation to a prohibition notice—the person with management or control of the workplace cannot be found, or
 - (ii) in relation to a prohibited asbestos notice—a relevant person in relation to the workplace cannot be found.

[26] Section 214 Application of Division

Omit “or non-disturbance notice”.

Insert instead “, non-disturbance notice or prohibited asbestos notice”.

[27] Section 223 Which decisions are reviewable

Insert after item 9 of the table to section 223(1)—

9A	Section 197B (issue of prohibited asbestos notice)	(1)	The person to whom the notice was issued.
		(2)	The person with management or control of the workplace.
		(3)	A person conducting a business or undertaking whose interests are affected by the decision.
		(4)	A worker whose interests are affected by the decision.
		(5)	A health and safety representative who represents a worker whose interests are affected by the decision.
9B	Section 197E (extension of time for compliance with prohibited asbestos notice)	(1)	The person to whom the notice was issued.
		(2)	The person with management or control of the workplace.
		(3)	A person conducting a business or undertaking whose interests are affected by the decision.
		(4)	A worker whose interests are affected by the decision.
		(5)	A health and safety representative who represents a worker whose interests are affected by the decision.

[28] Section 229B Procedure for offences

Omit “650 penalty units” from section 229B(4). Insert instead “1,200 penalty units”.

[29] Section 242A Definitions

Omit the definition of *CPI*. Insert instead—

CPI number means the All Groups Consumer Price Index number, that is, the weighted average of the 8 Australian capital cities, published by the Australian Statistician.

[30] Section 243 Penalty notices

Omit section 243(6). Insert instead—

(6) In this section—

authorised officer means the following—

- (a) a member of staff of the regulator authorised in writing by the regulator as an authorised officer for the purposes of this section,
- (b) a person prescribed by the regulations.

[31] Sections 244–244D

Omit section 244. Insert instead—

244 Definitions

In this division—

authorised person, for a body corporate, means an officer, employee or agent of the body corporate acting within the actual or apparent scope of the officer's, employee's or agent's—

- (a) employment, or
- (b) authority.

board of directors means the body, whatever it is called, exercising the executive authority of the body corporate.

244A Imputing conduct to body corporate

For this Act, conduct engaged in by the following on behalf of a body corporate is conduct also engaged in by the body corporate—

- (a) the body corporate's board of directors,
- (b) 1 or more authorised persons,
- (c) 1 or more persons acting at the direction of or with the express or implied agreement or consent of—
 - (i) the body corporate's board of directors, or
 - (ii) an authorised person.

244B State of mind

(1) If it is necessary to establish a state of mind of a body corporate in relation to the commission of an offence, it is sufficient to show—

- (a) the body corporate's board of directors—
 - (i) intentionally, knowingly or recklessly engaged in the relevant conduct, or
 - (ii) expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct, or
- (b) an authorised person—
 - (i) intentionally, knowingly or recklessly engaged in the relevant conduct, or
 - (ii) expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct, or
- (c) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the carrying out of the conduct.

- (2) Subsection (1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent—
- (a) the conduct, or
 - (b) the authorisation or permission of the conduct.
- (3) Factors relevant to the application of subsection (1)(c) include—
- (a) whether authority or permission to carry out conduct of the same or a similar character, had previously been given by a corporate officer, and
 - (b) whether the person who carried out the conduct believed on reasonable grounds, or had a reasonable expectation, that a corporate officer would have authorised or permitted the carrying out of the conduct.
- (4) In this section—

corporate culture means 1 or more attitudes, policies, rules, courses of conduct or practices existing within the body corporate generally or in the part of the body corporate in which the relevant activity takes place.

corporate officer means an officer within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth other than a partner in a partnership.

244C Mistake of fact

If mistake of fact is relevant to determining liability for an offence, a body corporate may rely on mistake of fact only if—

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence, and
- (b) the body corporate proves it took reasonable precautions to prevent the conduct.

244D Failure to take reasonable precautions

For sections 244B(2) and 244C, a failure to take reasonable precautions may be evidenced by the fact that the conduct was substantially attributable to—

- (a) inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers, or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

[32] Section 272A Prohibition on certain insurance or indemnity arrangements

Omit the penalty provision. Insert instead—

Maximum penalty—

- (a) for paragraph (a)—
 - (i) for an individual—250 penalty units, or
 - (ii) for a body corporate—1,250 penalty units, or
- (b) for paragraph (b) or (c)—
 - (i) for an individual—607 penalty units, or
 - (ii) for a body corporate—3,036 penalty units.

[33] Section 272A(2) and (3)

Insert at the end of section 272A—

- (2) Subsection (1) places an evidential burden on the accused to show a reasonable excuse.
- (3) A term of a contract of insurance or other arrangement is void to the extent it purports to cover a person for all or part of a liability for a monetary penalty under this Act.

[34] Part 14, Division 1A

Insert after section 273—

Division 1A Silica worker registration

273A Silica worker register

- (1) SafeWork NSW may establish and keep a silica worker register in accordance with the regulations.
- (2) A person conducting a business or undertaking must, in accordance with the regulations, give SafeWork NSW information for inclusion on the silica worker register.
Maximum penalty—
 - (a) for an individual—243 penalty units, or
 - (b) for a body corporate—1,214 penalty units.

273B Access to silica worker register

- (1) The silica worker register must not be publicly available.
- (2) The following agencies may access and use information on the silica worker register—
 - (a) SafeWork NSW,
 - (b) Insurance and Care NSW, established under the *State Insurance and Care Governance Act 2015*,
 - (c) a government sector agency prescribed by the regulations.
- (3) Information on the silica worker register may be used for the following purposes—
 - (a) tracking the health and safety of a worker with information on the register, including conducting epidemiological research,
 - (b) a purpose prescribed by the regulations.

[35] Section 274 Approved codes of practice

Insert after section 274(2)—

- (2A) Consultation under subsection (2) is not required for a variation of an editorial nature or to correct a typographic error.
Example— A variation to amend or update the name of a document referred to in a code of practice is an example of an editorial change.

[36] Section 274(5)

Omit “and a newspaper circulating generally throughout the State”.

[37] Section 276 Regulation-making powers

Omit “345 penalty units” from section 276(3)(h). Insert “365 penalty units” instead.

[38] Schedule 3 Regulation-making powers

Insert after Schedule 3, clause 14—

15 Registers

Matters relating to registers, including the following—

- (a) the keeping of registers,
- (b) the publication of registers,
- (c) fees, including for access to and searches of a register.

16 Approval or authorisation of training providers and courses

Matters relating to the approval or authorisation of training providers and training courses for the purposes of this Act, including the following—

- (a) conditions of approvals and authorisations,
- (b) revocation or variation of approvals and authorisations,
- (c) fees for approvals and authorisations.

[39] Schedule 4 Savings, transitional and other provisions

Insert at the end of the schedule with appropriate part and clause numbering—

Part Provisions consequent on enactment of Work Health and Safety Amendment Act 2023

Insurance and indemnity arrangements

Section 272A(3) does not apply to a contract of insurance or other arrangement, or a grant of indemnity for liability, in force immediately before the commencement of the *Work Health and Safety Amendment (Review) Act 2020*.

Schedule 2 Amendment of Work Health and Safety Regulation 2017

[1] Clause 5 Definitions

Omit the definitions of *asbestos* and *asbestos containing material* from clause 5(1).

- [2] Clauses 19, 22, 46, 47, 50(3), 66(2) and (5), 68, 70, 77(5), 85(1)–(3), 149, 150(1) and (2), 151, 162(4), 165(1), 176(2), 182(4), 184B, 184C, 184K, 187, 188, 195, 196, 198, 200, 213, 224, 235, 236, 239, 253, 254, 294–296, 298, 301, 302, 303(3), 304(2)–(4), 308, 310, 311, 312, 313(3), 316, 317, 327, 336–338, 344(3), (5) and (6), 346(3), 347(3), 369, 371(2), 372, 373, 385, 387, 388, 398(2), 401, 403, 409, 410, 415(2), 425–428, 429(5), 430, 432(5), 433, 438, 439, 446, 448, 451(5), 454, 455, 464(3), 465, 466, 482(3), 529, 547, 548, 551, 553, 555(5), 557(8), 560, 562, 563, 567(4), 570 and 576

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—43 penalty units, or
- (b) for a body corporate—217 penalty units.

- [3] Clauses 39–45, 48, 49, 50(1), 53, 55, 57–59, 61, 64, 65, 67, 69, 71–75, 76(1), 78–80, 84, 142B, 142C, 154–161, 163, 164, 166, 168, 177–179, 183, 184O, 184Q–184S, 189–194, 197, 199, 201, 202, 204–212, 215, 216, 218, 219, 222, 223, 225, 231–234, 238, 240, 241, 299, 300, 306, 309, 314, 329–335, 339, 340(1) and (2), 341–343, 344(1), 345, 346(1), 347(1), 348–350, 352–363, 365–368, 370, 371(1), 374–377, 379, 389, 391(2), 395–397, 398(1), 399, 400, 402, 405–408, 411–414, 415(1), 416, 417, 419, 420, 422, 424, 429(2) and (3), 432(2) and (3), 434–437, 440–443, 445(1), 449, 450, 451(2) and (3), 452, 453, 456–460, 462, 463, 464(1), 467–477, 479–481, 482(1) and (2), 483, 484, 536, 554, 555(1) and (4), 556, 557(1) and (5)–(7), 558, 559, 564–566, 567(1)–(3), 568, 569, 571, 572(1) and 573–575

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—73 penalty units, or
- (b) for a body corporate—364 penalty units.

- [4] Clauses 50(2), 66(3), 76(2), 77(2)–(4), 85(4), 94, 96–98, 111, 124–127, 139, 142, 142E, 143I–143K, 143P, 143Q, 143ZD, 150(3), 162(2), (3) and (5), 165(2), 170, 175, 176(3), 180, 181, 182(2), (3) and (5), 184J, 184T, 184U, 226, 228–230, 237, 242, 260, 262, 273, 275, 282, 287, 288, 288D, 303(1), (2) and (4), 304(5), 313(1), (2) and (4), 326, 340(3) and (4), 364, 378, 390, 391(3), 404, 418, 423, 444, 445(3) and (4), 461, 505–507, 512, 513, 525, 572(4), 587, 588, 593, 594 and 607

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty—

- (a) for an individual—15 penalty units, or
- (b) for a body corporate—75 penalty units.

[5] Clause 184U Duties of food delivery riders

Insert after clause 184U(2)—

- (3) For the Act, section 243 a police officer is an authorised officer for an offence under this clause.

[6] Clause 419 Work involving asbestos or ACM—prohibitions and exceptions

Insert after clause 419(3)(j)—

- (k) work that is being carried out in accordance with a prohibited asbestos notice issued under the Act, section 197B.