



New South Wales

Occupational Health and Safety Amendment Bill 2011

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.
This Bill is cognate with the *Work Health and Safety Bill 2011*.

Overview of Bill

The object of this Bill is to amend the *Occupational Health and Safety Act 2000* (***the OHS Act***) to adopt the following proposed national work health and safety reforms pending the enactment in New South Wales of the proposed *Work Health and Safety Act 2011*:

- (a) the general duties under the OHS Act to ensure health, safety and welfare (and the duties under the regulations) will be qualified by the inclusion of “so far as is reasonably practicable” (thereby requiring the prosecution to prove what was reasonably practicable and removing the need for the defendant to establish that it was not reasonably practicable to comply with the duty),
- (b) a duty will be placed on officers of a corporation to exercise due diligence to ensure that the corporation complies with health, safety and welfare duties (with this duty to replace the existing provision that deems directors and managers of a corporation to be guilty of offences committed by the corporation),

- (c) the secretary of an industrial organisation of employees will no longer be entitled to institute proceedings for an offence under the OHS Act that concerns members of the organisation.

Outline of provisions

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 the date of assent.

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

Qualification of health and safety duties—onus of proof

Currently, the duties under the OHS Act to ensure health and safety are expressed in unqualified terms (with provision of a defence in section 28 of the Act relating to reasonable practicality). **Schedule 1 [2], [3] and [5]–[7] and Schedule 2** qualify these duties and the health and safety duties under the regulations so that they will apply only so far as is reasonably practicable. **Schedule 1 [8]** makes a similar amendment to the duty of employees to co-operate as necessary with health, safety and welfare requirements at work, so that the duty will be a duty to co-operate so far as is *reasonably* necessary to enable compliance with those requirements.

In addition **Schedule 1 [1]** inserts proposed section 7A into the OHS Act to clarify that a duty imposed to ensure health and safety so far as is reasonably practicable requires the elimination of risks so far as is reasonably practicable and the minimisation of those risks so far as is reasonably practicable (if elimination is not reasonably practicable). The matters that are relevant in determining what is reasonably practicable in relation to ensuring health and safety are also set out in proposed section 7A.

Schedule 1 [10] omits section 28 of the OHS Act which currently provides a defence in proceedings under the Act (in addition to the general provisions of the criminal law that exclude criminal liability) if it is not reasonably practicable for the person to comply with a duty or if the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision. The omission of the defence is consequential on the qualification of duties under the Act and regulations so that they apply “in so far as is reasonably practicable”.

Schedule 1 [13] amends section 90 of the OHS Act so that a failure of the occupier of premises to comply with an investigation notice is qualified by the defence of “reasonable excuse”.

Schedule 1 [11] makes a consequential amendment.

Liability of officers of corporations

Section 26 of the OHS Act currently provides that a director or person concerned in the management of a corporation is liable for any contravention of the Act or regulations by the corporation unless that person used all due diligence to prevent the contravention by the corporation or was not in a position to influence the conduct of the corporation in relation to its contravention of the provision. **Schedule 1 [9]** substitutes section 26, replacing the current provision with a new provision that imposes a duty on officers of a corporation to exercise due diligence to ensure that the corporation complies with its occupational health and safety duties. **Schedule 1 [4] and [12]** make consequential amendments. Proposed section 26 also provides that an officer who is a volunteer (that is, a person who does community work on a voluntary basis as defined in the *Civil Liability Act 2002*) is not liable to be prosecuted under the section.

Prosecutions by trade unions

Schedule 1 [14] abolishes the entitlement of the secretary of an industrial organisation of employees to institute proceedings for an offence concerning members of the organisation.

Miscellaneous

Schedule 1 [15] enables the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [16] contains provisions of a savings and transitional nature. In particular, the amendments made by the proposed Act will not apply to contraventions occurring before the enactment of the proposed Act, except that the amendment relating to prosecutions by trade unions will apply on and from the date of introduction into Parliament of the Bill for the proposed Act.

Schedule 2 Amendment of Occupational Health and Safety Regulation 2001

Schedule 2 [2] provides (as outlined above) that any duty in the *Occupational Health and Safety Regulation 2001* to take or refrain from taking any action for the protection of health or safety applies only so far as it is reasonably practicable to take or refrain from taking that action. **Schedule 2 [1], [3] and [4]** make consequential amendments.

First print



New South Wales

Occupational Health and Safety Amendment Bill 2011

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New South Wales

Occupational Health and Safety Amendment Bill 2011

No. , 2011

A Bill for

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.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Occupational Health and Safety Amendment Act 2011</i> .	3
2 Commencement	4
This Act commences on the date of assent to this Act.	5

Schedule 1 Amendment of Occupational Health and Safety Act 2000 No 40 1
2

[1] Section 7A 3

Insert before section 8: 4

7A The concept of ensuring health and safety 5

(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: 6
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(a) to eliminate risks to health and safety so far as is reasonably practicable, and 9
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(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable. 11
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(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: 14
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(a) the likelihood of the hazard or the risk concerned occurring, and 18
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(b) the degree of harm that might result from the hazard or the risk, and 20
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(c) what the person concerned knows, or ought reasonably to know, about: 22
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(i) the hazard or the risk, and 24

(ii) ways of eliminating or minimising the risk, and 25

(d) the availability and suitability of ways to eliminate or minimise the risk, and 26
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(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. 28
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[2] Section 8 Duties of employers 33

Insert “, so far as is reasonably practicable,” after “must” wherever occurring in section 8 (1) and (2). 34
35

[3] Section 8 (1)	1
Insert “, so far as is reasonably practicable” after “the following”.	2
[4] Section 8, note	3
Omit the note. Insert instead:	4
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).	5
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See also Division 2 for duty of employer to consult employees.	9
[5] Section 9 Duties of self-employed persons	10
Insert “, so far as is reasonably practicable,” after “must”.	11
[6] Section 10 Duties of controllers of work premises, plant or substances	12
Insert “, so far as is reasonably practicable,” after “must” wherever occurring in section 10 (1) and (2).	13
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[7] Section 11 Duties of designers, manufacturers and suppliers of plant and substances for use at work	15
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Insert “, so far as is reasonably practicable” after “must” in section 11 (1).	17
[8] Section 20 Duties of employees	18
Insert “reasonably” before “necessary” in section 20 (2).	19
[9] Section 26	20
Omit the section. Insert instead:	21
26 Officers of corporations required to exercise due diligence	22
(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.	23
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Maximum penalty: the same maximum penalty that is applicable to a failure by an individual to comply with the duty or obligation.	27
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(2) The following provisions are <i>relevant provisions</i> for the purposes of this section:	29
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(a) Division 1 (General duties) of Part 2 (Duties relating to health, safety and welfare at work),	31
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(b) Division 2 (Duty to consult) of Part 2,	33

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|-----|--|----------------------------|
| (c) | Division 4 (Incidents at places of work) of Part 5 (Investigations), | 1
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| (d) | any provision of the regulations that is stated to be a relevant provision for the purposes of this section. | 3
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| (3) | In this section, <i>due diligence</i> includes taking reasonable steps: | 5 |
| (a) | to acquire and keep up-to-date knowledge of occupational health and safety matters, and | 6
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| (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 | 8
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| (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 | 12
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| (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 | 17
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| (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 | 21
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| | Example. For the purposes of paragraph (e), the duties or obligations of a corporation under the relevant provisions of this Act may include: | 24
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| • | giving notice of notifiable incidents, | 27 |
| • | consulting with employees, | 28 |
| • | complying with notices issued under this Act, | 29 |
| • | providing training and instruction to employees about occupational health and safety, | 30
31 |
| • | ensuring that OHS representatives undertake any required course of training. | 32
33 |
| (f) | to verify the provision and use of the resources and processes referred to in paragraphs (c)–(e). | 34
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| (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. | 36
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| (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. | 40
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(6)	This section does not affect any liability imposed on a corporation for a failure to comply with the duty or obligation concerned.	1 2 3
(7)	In this section: <i>corporation</i> means any body corporate (including a body corporate representing the Crown). <i>officer</i> means an officer within the meaning of section 9 of the <i>Corporations Act 2001</i> 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. <i>volunteer</i> has the same meaning as in section 60 of the <i>Civil Liability Act 2002</i> . Note. That section provides that a volunteer is a person who does community work on a voluntary basis.	4 5 6 7 8 9 10 11 12 13 14 15
[10]	Section 28 Defence Omit the section.	16 17
[11]	Section 32A Reckless conduct causing death at workplace by person with OHS duties Omit the note to section 32A (3).	18 19 20
[12]	Section 32A (6) Omit the subsection.	21 22
[13]	Section 90 Offence: failure to comply with investigation notice Insert “(unless the occupier has a reasonable excuse for not doing so)” after “must”.	23 24 25
[14]	Section 106 Authority to prosecute Omit section 106 (1) (c) and (d). Insert instead: (c) by an inspector.	26 27 28
[15]	Schedule 3 Savings, transitional and other provisions Insert at the end of clause 1 (1): <i>Occupational Health and Safety Amendment Act 2011</i>	29 30 31

[16] Schedule 3, Part 7	1
Insert at the end of the Schedule:	2
Part 7 Provisions consequent on enactment of Occupational Health and Safety Amendment Act 2011	3
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24 Definition and application	6
(1) In this Part:	7
<i>amending Act</i> means the <i>Occupational Health and Safety Amendment Act 2011</i> .	8
	9
(2) This Part has effect subject to the regulations under Part 1.	10
25 Offence by corporation—liability of directors and managers	11
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.	12
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26 Qualified general duties amendments	19
(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.	20
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(2) The <i>qualified general duties amendments</i> are all of the amendments made by the amending Act except the following amendments:	23
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(a) the substitution of section 26,	26
(b) the amendments of sections 32A and 106 and Schedule 3.	27
27 Proceedings instituted by union	28
(1) The repeal of section 106 (1) (d) by the amending Act does not affect the validity of any proceedings for an offence against this Act or the regulations instituted by the secretary of an industrial organisation of employees before the date of the introduction into Parliament of the Bill for the amending Act. Those proceedings may be continued by the secretary of that industrial organisation despite that repeal.	29
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Occupational Health and Safety Amendment Bill 2011

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

- (2) Proceedings for an offence against this Act or the regulations instituted by the secretary of an industrial organisation of employees on or after the date of the introduction into Parliament of the Bill for the amending Act and before the commencement of the amending Act (and pending on that commencement) are terminated. 1
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Schedule 2	Amendment of Occupational Health and Safety Regulation 2001	1
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[1]	Clause 6 Application of provisions providing for alternative duties if primary duty not reasonably practicable	3
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	Omit the note at the end of the clause. Insert instead:	5
	Note. Clause 6A provides that the alternative duty applies only so far as is reasonably practicable.	6
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[2]	Clause 6A	8
	Insert after clause 6:	9
	6A Duties to apply so far as is reasonably practicable	10
	(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.	11
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	(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.	15
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[3]	Clause 178 Spray painting outside spray booths—particular risk control measures	18
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	Omit the note to clause 178 (1). Insert instead:	20
	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).	21
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		23
[4]	Clause 178 (3)	24
	Omit “(within the meaning of section 28 of the Act)”.	25