

Thank you to <https://www.epigroup.com.au> for creating a very informative blog about the changes (we couldn't have put it any better). Please see blog information below:

## **What is the WA WHS Act 2020?**

The WA Work Health and Safety Act 2020 (WHS Act) is the first major overhaul of Western Australia's WHS laws for over 30 years.

The new laws are intended to improve the protection of workers by factoring in modern employment agreements, higher penalties for companies and individuals, and introducing the term 'person conducting a business or undertaking' (PCBU).

For our friends outside of WA, this is familiar territory. This Act is harmonising WA with Australia's other States and Territories (excluding Victoria) and will replace:

- the current Occupational Safety and Health Act 1984
- WHS elements of the Mines Safety and Inspection Act 1994
- WHS elements of the Petroleum and Geothermal Energy Safety Levies Act 2011

## **Who Will be Affected?**

The short answer is everyone. Moving forwards, this single Act will cover all aspects of safety in every WA workplace.

The long answer is mainly small and medium businesses, because the penalties are high enough to bankrupt them and it will be easier to prosecute individuals. But more on this later.

## **What are the Major Changes of WA's WHS Act?**

### **1. Increased Penalties**

Yes, that's right, all penalties are increasing.

But the most significant in the entire legislation is the gross negligence/industrial manslaughter penalty. The current maximum penalty for a company is \$2.7 million. Under the WHS Act this jumps to \$10 million.

Penalties are just as detrimental for individuals. If you're found guilty of industrial manslaughter, you can currently face a maximum fine of \$550,000 plus five years in prison. Once the WHS Act takes over, you could be hit with a \$5 million fine and up to 20 years in prison.

### **2. PCBU & Worker**

PCBU is a new term to WA's WHS laws and stands for Person Conducting a Business or Undertaking. This is a fairly broad term used throughout WHS legislation to describe all forms of modern working arrangements.

As well as an employer, a PCBU can be a:

- Corporation
- Association
- Partnership
- Sole trader
- Volunteer organisation that employs people to carry out work

- Local government council
- Independent school
- Government department and authorities

PCBUs must meet obligations to ensure the health and safety of their workers and others like visitors and volunteers.

Speaking of workers, the term “worker” is also broader under the WHS Act, and includes:

- An employee
- Subcontractors and casual workers
- Employee of a contractor or subcontractor
- Employee of a labour hire company
- Outworker
- Apprentice or trainee
- Volunteer
- Student on work experience

PCBUs have the equal duty of care to a worker, even if there are multiple PCBUs involved. For example, if you employ a contractor who brings in a labour hire worker, you, the contractor and the labour hire company all share the same duty of care to that labour hire worker. So, if an incident occurs, you can all be prosecuted under the WA WHS Act.

### **3. Industrial Manslaughter**

This is the one that everyone is talking about.

As you know, penalties for industrial manslaughter are increasing under the WA WHS Act, but there’s more.

The criteria for convicting someone for industrial manslaughter under the WHS Act is the same as convicting someone under our current gross negligence law. But the WHS Act states that prosecutors no longer have to convict the company to be able to convict individual company officers – but more on that later.

The industrial manslaughter provisions came into effect in WA in 2004. Since then, there has been 421 workplace fatalities in WA and one completed gross negligence prosecution, which happened near the end of 2020.

### **4. Positive due diligence**

This new legislation has made it administratively easier to prosecute company officers. Most companies go into liquidation when faced with a WHS prosecution. Under our current laws, if your company goes into liquidation, it can’t be prosecuted. This means the WA Supreme Court has to get your company reinstated in order to prosecute the company officer.

However, under the WHS Act the company doesn’t have to be convicted of an offence to be prosecuted. There doesn’t even have to be an accident or an incident. If you as a company officer have shown you have not met your obligations of due diligence, you can be prosecuted.

Key takeaway: If a company officer shows they have not met their obligations of due diligence, they can be prosecuted – even if an accident hasn’t occurred.

## **5. Insurance**

If you're prosecuted under the current OHS Act, your insurance can pay for your legal fees and your penalties.

Once the WHS Act comes into effect, your insurance can still pay for your legal fees, but when it comes to paying the penalty, company officers and PCBUs cannot take out insurance to cover fines for breaches. Companies cannot indemnify employees, so if you're handed a penalty, you're on your own.

## **6. WHS Advisors**

There is a new section in the WHS Act specifically for external WHS advisors (like us). If an external WHS advisor gives advice about health and safety in your business, we have to ensure that our advice doesn't create hazards in your business.

If hazards are created as a result of poor advice, advisors can be sued for negligence, sued under public liability insurance and prosecuted.

"But it is not a defence to say: I got bad advice," says Greg. As an employee or business owner, you cannot simply point the finger at your safety advisor and get off with a slap on the wrist if an incident occurs.

For more information on organising a WA WHS Act 2020 compliant safety manual please contact us at [sales@everythingohs.com](mailto:sales@everythingohs.com).