

PRACTICE AND PROCEDURE

[QLD 5,000.5] Introduction

The commencement of the new Work Health and Safety Act 2011 in January 2012, repeals the Workplace Health and Safety Act 1995 (Qld) and brings significant changes to how laws for health and safety are interpreted and enforced in the Queensland jurisdiction. Most significantly, the new laws remove the absolute duty for the employer to one which is “reasonably practicable”: see *Parry v Woolworths Ltd* [2010] 1 Qd R 1; [2009] QCA 026; BC200900786, as well as *Bourk v Power Serve Pty Ltd* (2008) 175 IR 310; [2008] QCA 225; BC200807055.

The Work Health and Safety Act 2011 was passed by the Queensland Parliament on 26 May 2011. The Work Health and Safety Regulation 2011 was later approved on 24 November 2011. This Regulation does reflect the national Model Work Health and Safety Regulation, but has some changes, reflective of Queensland’s laws, and a range of transitional provisions to assist in implementation.

The development of case law on this point will set the parameters of what is considered to be reasonably practicable for the various duty holders in a set of factual circumstances. However, the concept of reasonably practicable as defined by s 18 of the Work Health and Safety Act 2011 (Qld) will not be new to the states of Victoria (s 21 of the Occupational Health and Safety Act 2004 (Vic)), South Australia (s 19 of the Occupational Health, Safety and Welfare Act 1984 (SA)) and Western Australia (s 19 of the Occupational Health and Safety Act 1984 (WA)).

The Work Health and Safety Act 2011 also ensures the Electrical Safety Act 2002 (Qld) is consistent with the national model Work Health and Safety Act and regulates dangerous goods and major hazards facilities by repealing the Dangerous Goods Safety Management Act 2001 (Qld).

[QLD 5,000.10] The Regulator — Workplace Health and Safety Queensland

Workplace Health and Safety Queensland is an agency of the Department of Justice and Attorney General and reports to the Attorney-General and Minister for Industrial Relations. The general website for the Department of Justice and Attorney General is www.deir.qld.gov.au.

The main role of the agency relates to the enforcement, investigation, prosecution and education with respect to work health and safety matters.

Other agencies, covered by the Department of Justice and Attorney General include Legal Aid Queensland, the Electoral Commission and the Public Trustee, Office of Fair Trading, Office of Liquor and Gambling Regulation as well as the areas administered by that department.

[QLD 5,000.15] The Legislative Scheme

The former Workplace Health and Safety Act 1995 (Qld) provided a legislative framework involving Regulations, Ministerial Notices and Codes of Practice. This structure, with the exception to Ministerial Notices, is maintained under the new Work Health and Safety Act 2011. Under the new scheme the framework includes the Act, Regulations and Codes of Practice.

[QLD 5,000.20] Consultative Arrangements

Workplace Health and Safety Officers

The Role of the Workplace Health and Safety Officer under Pt 8 of the Workplace Health and Safety Act 1995 (Qld) has effectively been removed by the Work Health and Safety Act 2011 (Qld).

The concept of the Workplace Health and Safety Officer was unique to Queensland. Pursuant to s 96 of the Workplace Health and Safety Act 1995 (Qld), the Workplace Health and Safety Officer had wide functions specifically aimed in assisting and advising the person conducting business and undertaking on health and safety standards at the workplace. This has not been seen in any other Australian health and safety jurisdiction.

The removal of the Workplace Health and Safety Officer from the consultative structure is somewhat balanced by the new role of Workplace Health and Safety Representative and the entitlement to training in an accredited training course. This was introduced in the amendment to the Workplace Health and Safety and Other Legislation Amendment Act 2008 (Qld), which commenced on 1 January 2009 and is maintained by Work Health and Safety Act 2011 (Qld).

Health and Safety Representatives

Registered Training Organisations under the Vocational Education and Training (“VET”) sector have been able to deliver a recognised training for Workplace Health and Safety Representatives for some time titled: 30630QLD, a “Course in Functioning as a Health and Safety Representative”. This course is a short course conducted over a period of days, not weeks or even months. The new training is yet to be finalised however, s 21 of the Work Health and Safety Regulation entitles the health and safety representative to attend an initial 5 day course and then a one day refresher course each year after that. It is also worth noting that the person conducting business or undertaking must not only notify the workers of the health and safety representative and deputy health and safety representatives, but must also provide a copy of a list of the health and safety representative and deputy health and safety representatives to the Regulator pursuant to s 74 of the Work Health and Safety Act 2011 (Qld).

With the introduction with the new Act, there now is some uncertainty as to how the person conducting a business or undertaking is likely to be properly informed on the overall state of health and safety at the workplace. It has been well established that employers have a responsibility to make themselves aware of their obligations under the law: see *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant* (2007) 163 IR 14; [2007] FMCA 9; BC200700356 (2 February 2007).

[QLD 5,000.25] Health and Safety Committees

Health and Safety Committees, mentioned in ss 75–79 of the Work Health and Safety Act 2011, have the functions (see s 77 of this Act) to:

- facilitate cooperation with respect to “instigating, developing and carrying out” measures designed to ensure health and safety;
- “assist in developing standards, rules and procedures relating to health and safety”; and
- other functions prescribed by Regulation.

In the absence of the Workplace Health and Safety Officer, there is some uncertainty as to how involved a health and safety committee will become, in the development of standards, rules and procedures relating to workplace health and safety.

For example, the National Model Regulations prescribe the requirement for some duty holders to prepare safe work methods (reg 299 of the Work Health and Safety

Regulations) and workplace health and safety management plans (Pt 6.4 of the Work Health and Safety Regulations). Historically, from a practical perspective, this type of planning and documentation as well as ensuring the onsite compliance, fell within the responsibilities of the Workplace Health and Safety Officer.

No doubt the health and safety committee will have much to say as to whether certain risk management strategies are reasonable and practicable from their perspective. However, a person conducting a business or undertaking would be well advised to ensure their Workplace Health and Safety Representatives receive adequate training and mentoring in that role to avoid the situations of confrontation, where the risk is misunderstood by the Workplace Health and Safety Representatives. Even though it is not prescribed, training for the Health and Safety Committee seems critical for the achievement of their functions pursuant to s 77 of the Work Health and Safety Act 2011. This is particularly so, if the committee is to be used by the person conducting business or undertaking as a forum or as part of the process to meet the broader duty to consult with workers pursuant to s 47 of the Work Health and Safety Act 2011.

Workplace Health and Safety Representatives are able to request the Regulator to appoint an inspector to “assist in resolving an issue arising in relation to the cessation of work”. Whilst this is a change to the entitlement of a Workplace Health and Safety Representative in the current legislative scheme, it has always been the right of a worker, pursuant to s 81(4) of the Workplace Health and Safety Act 1995 (Qld), to report to an inspector an issue that in the worker’s opinion affects workplace health and safety.

Work Groups

“Work Groups” is a concept which has been present in the Occupational Health and Safety Act 1991 (Cth) for some time (see s 24). According to the Work Health and Safety Act 2011 (Qld), the make-up of a work group is an issue that ought to be resolved between the person conducting a business or undertaking and the workers. It should be noted that the definition of workers in s 7 of the Work Health and Safety Act 2011 extends beyond the direct employees and can include contractors of sub-contractors. This is likely to add another element of complexity to the duty to consult with workers in some workplaces such as construction sites.

The person conducting a business or undertaking is not strictly required to reach an agreement about the work groups, but to *negotiate* an agreement for a work group pursuant to s 52 of the Work Health and Safety Act 2011 (Qld) (emphasis added).

There is also a provision for a party to the negotiations to apply to the Regulator to appoint an Inspector to determine the work groups in line with s 54 and for multi business workgroups to be established in s 55 Work Health and Safety Act 2011.

Transitional Provisions for Health and Safety Representatives

Section 288(1) of the Work Health and Safety Act 2011 (Qld) permits a grace period of one year for Workplace Health and Safety Representative training under s 85(6). Section 288(3) of the Act also recognises that training under the Workplace Health and Safety Act 1995 (Qld), as having satisfied the current training requirements of s 90(4)(a).

Section 287 of the Work Health and Safety Act 2011 (Qld) permits Workplace Health and Safety Representatives who have been previously elected under the Workplace Health and Safety Act 1995 (Qld) to be considered to have been elected in the Act, with a term of office of 3 years, from the original date of election pursuant to s 287(2).

Elections of Workplace Health and Safety Representatives can continue in the way that it had been established to occur under the Workplace Health and Safety Act 1995 (Qld), but only for a period of 3 months from 1 January 2012, pursuant to s 287(4) of the Work

Health and Safety Act 2011 (Qld). The work group is then taken to be the workplace or, if there is more than one Workplace Health and Safety Representative, the area of representation that the Workplace Health and Safety Representative has, pursuant to s 287(6).

Disqualification of Health and Safety Representatives

Queensland legislation has detailed the additional provisions dealing with the disqualification of Workplace Health and Safety Representatives at ss 67–67F of the Work Health and Safety Act 2011, which may be used when the Workplace Health and Safety Representative is acting outside their scope of authority.

[QLD 5,000.30] Enforcement

The National Compliance and Enforcement Policy was endorsed in principle on 10 August 2011. This policy outlines the approach the regulators will take to monitor and enforce compliance with the Work Health and Safety Act and Regulations.

This policy should be available on the website of each work health and safety regulator (Commonwealth and state and territory) as well as Safe Work Australia. Section 230(3) of the Work Health and Safety Act 2011 (Qld) requires that the Regulator publish such guidelines.

For the Safe Work Australia website please refer to www.safeworkaustralia.gov.au.

[QLD 5,000.35] Inspectors

The role of an Inspector has not significantly changed by the introduction of the Work Health and Safety Act 2011 (Qld).

Functions are not limited to the following references in the Act:

- entry: s 165;
- requirement to produce documents: s 171;
- requirement to answer questions: s 171;
- seizure and forfeiture powers: s 175–179;
- issuing of improvement notices: s 191–194;
- issuing of prohibition notices: s 195–196;
- non-disturbance notices: s 198–201;
- injunctions for non-compliance with notices: s 215.

The Work Health and Safety Act 2011 (Qld) does not contain specific provisions dealing with recreational diving and snorkelling. A new Safety in Recreational Water Activities Act 2011 (Qld) was also passed by the Queensland Parliament to remedy this legislative deficiency. Inspectors under the Work Health and Safety Act 2011 (Qld) will be inspectors under the Safety in Recreational Water Activities Act 2011 (Qld) pursuant to s 33.

[QLD 5,000.40] Compulsion and Forms of Notice

Issues relating to the requirements to produce documents and answer questions pursuant to s 171, and the abrogation of privilege against self incrimination pursuant to s 172 of Work Health and Safety Act 2011, are analogous to the related provisions of the Fair Work Act 2009 (Cth), the Workplace Relations Act 1999 (Cth) as well as relevant and corresponding provisions of the Australian Securities and Investment Commission Act 2001 (Cth).

Notwithstanding that the model legislation is new, the scope and interpretation of the law in relation to the other similar and established legislative provisions assist in determining the meaning of these new provisions.

See [FED 5,000.45] and [FED 5,000.50] for further notes on Compulsion and Forms of Notice.

[QLD 5,000.45] Reviews and appeals

Internal review of the decisions of inspectors were previously reviewable under Pt 11 of the Workplace Health and Safety Act 1995 (Qld) pursuant to ss 148–151. These provisions are retained in ss 224–228 of the Work Health and Safety Act 2011 (Qld).

External reviews, previously called “appeals” under the Workplace Health and Safety Act 1995 (Qld), are now made directly to the Queensland Industrial Relations Commission or to the Queensland Civil and Administrative Tribunal (“QCAT”).

Schedule 2A of the Work Health and Safety Act 2011 provides a schedule on the provision under which a reviewable decision is made, the eligible party to the reviewable decision and the relevant external review body such as the Queensland Industrial Relations Commission.

[QLD 5,000.50] Queensland Civil and Administrative Tribunal — QCAT

The Queensland Civil and Administrative Tribunal is part of the justice administration within the Department of Justice and Attorney General. QCAT began operation in 1 December 2009 and amalgamated 18 tribunals and 23 jurisdictions into the one tribunal. QCAT are able to make original decisions and also review decisions previously made by government agencies and statutory authorities “review decisions”. Generally all parties involved in a matter before QCAT must represent themselves.

The general website for QCAT is www.qcat.qld.gov.au.

In some cases, a party is automatically able to be represented, for example, if they are a child or a person involved in a disciplinary proceeding. All other parties must apply to QCAT to be legally represented. Legal representation is by leave only and is not permitted in all cases.

Note: disputes dealing with improvement and prohibition notices are now reviewed externally by QCAT and not the Industrial Court: see *Swift Australia Pty Ltd and Chief Executive, Department of Justice and Attorney General (C/2010/14)* (No 2), decision of President Hall, Queensland Industrial Court.

[QLD 5,000.55] Queensland Industrial Relations Commission — QIRC

The Queensland Industrial Relations Commission is an independent tribunal established to conciliate and arbitrate industrial matters in Queensland. The general website for the Industrial Court of Queensland and the Queensland Industrial Relations Commission is www.qirc.qld.gov.au.

The procedures involved in making an application to the Queensland Industrial Relations Commission are defined in the Industrial Relations Act 1999 (Qld). There are a range of information sheets available on this website to assist applicants in making an application and on court room procedure. Generally speaking, the application must be filed in accordance with the correct form of the Industrial Relations (Tribunals) Rules 2000.

Forms can be downloaded from the Queensland Industrial Relations website: www.qirc.qld.gov.au.

The forms should be re-typed to include the minimum requirements. The application must be filed in quadruplicate (original plus three copies).

Once an application has been filed in the Industrial Registrar's Office, a directions order will be prepared by the Industrial Registrar.

The directions order will typically address:

- the parties on whom a copy of the application, directions order and any other related material must be served;
- the date and nature of any hearing set; and
- the date by which responses (if any) must be filed.

The applicant will be advised when a sealed copy of the directions order is available for collection at the Industrial Registrar's Office. There may also be a requirement for the applicant to serve the other parties and to prepare an affidavit of service deposing to that effect.

[QLD 5,000.60] Legal Proceedings

Avenues open for legal proceedings under the Work Health and Safety Act 2011 include:

- prosecutions;
- infringement notices.

Practice and procedural rules in Queensland

The Uniform Civil Procedure Rules 1999 and the Criminal Practice rules 1999 are subordinate legislation pursuant to the Supreme Court Act 1991 (Qld).

The Uniform Civil Procedure Rules 1999 provides the procedural rules that must be complied with in any civil matter in the Magistrates, District and Supreme Court.

Some tribunals also make reference and prescribe adherence to the Uniform Civil Procedure Rules 1999. For example, the Uniform Civil Procedure Rules 1999 may apply in an appeal against a decision of Q-Comp under the Workers Compensation and Rehabilitation Act 2003 (Qld), heard in the Queensland Industrial Relations Tribunal, pursuant to s 553 of the Workers Compensation and Rehabilitation Act 2003 (Qld).

The Criminal Practice Rules apply to criminal matters in the Magistrates District and Supreme Courts. Section 5 of the Criminal Practice Rules does limit the provisions that apply to matters heard in the Magistrates courts.

Every practitioner should be aware of the procedural rules that relate to the matter and the relevant court. Relevant Rules can be found at <http://www.legislation.qld.gov.au>.

[QLD 5,000.65] Civil Penalty Prosecutions

Matters that are not category 1 offences as referred to in s 31 of the Work Health and Safety Act 2011, must be heard summarily by a Magistrates Court. It is envisaged that most prosecutions under the Work Health and Safety Act 2011 (Cth) will be civil penalty prosecutions. Criminal penalty prosecutions, will in practice, only be undertaken in worst case breaches and clear cases of neglect, recklessness or wilful behaviour.

In civil cases, the required standard of proof is "balance of probabilities". "More probable" means no more than that, upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood; it does not require certainty: see *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 6.

The offence of reckless conduct, which is a category 1 offence, requires the prosecution to prove a person is "reckless as to the risk of the individual of death or serious injury or illness". The prosecution will be required to prove the fault element of recklessness in addition to proving the physical elements of the offence: see cl 31 of the Explanatory Memorandum — Model Work Health and Safety Act.

The offences for failure to comply with health and safety duty categories 2 and 3 (ss 32 and 33 of the Act) are offences of strict liability. That is, offences that require proof of the physical elements of the offence. There is not a requirement to prove the offence occurred intentionally, knowingly, recklessly or even negligently. However, these issues will be relevant in sentencing.

For civil penalty prosecutions the proceeding may be brought by the Regulator or the Inspector pursuant to s 260 of the Work Health and Safety Act 2011 (Qld). It is not unusual for the matter to be brought by the Inspector, with the surname of the inspector listed as the complainant/applicant in the court documents.

A complaint and summons allows the Regulator to formally put a charge in writing. The defendant will usually be given a date to appear at the Magistrates Court in a number of weeks after the date of the summons for the first mention.

If the defendant pleads guilty, then the matter for the court is sentencing. A date for sentencing is set down. Sentencing in this respect will be in line with the sentencing guidelines pursuant to s 9 of the Penalties and Sentences Act 1992 (Qld).

If the matter is contested, ie the defendant wants to plead not guilty, then the matter is set down for a hearing. This is usually heard a few months after the first mention. As a summary matter, the Magistrate will hear the case and decide as to whether the defendant is guilty or not guilty of the charges.

A discussion as to the different approaches legislators have historically taken towards corporate misconduct is outside the scope of this section. However, it is generally agreed by legal commentators that historically, corporate crime has been dealt with very differently to conventional crime offences, with corporate crime being dealt with through administrative agencies or with relatively lenient criminal legislation. For a further discussion see article by V Comino "Civil or Criminal Penalties for Corporate Misconduct — which way ahead?" [2006] *UQLRS* 1, (2006) 34(6) *Australian Business Law Review* 428–446.

[QLD 5,000.70] Criminal Penalty Prosecutions — by indictment

If the charge is not a summary charge, such as the category 1 offences referred to in s 31 of the Work Health and Safety Act 2011, then the matter must proceed by way of "indictment".

In a criminal case the prosecution must bear the risk of both, failing to establish all or any of the various elements which make up the case, and failing to rebut any defence raised by the accused or which appear from the evidence. The standard which must be satisfied by the prosecution is the standard of proof beyond reasonable doubt: see *Woolmington v DPP* [1935] AC 462; [1935] All ER Rep 1; (1935) 25 Cr App R 72; 51 TLR 446.

This includes whether the defendant failed to do what was reasonably practicable to protect the health and safety of the persons to whom the duty was owed.

Viscount Sankey's "golden thread" speech in *Woolmington v DPP* [1935] AC 462; [1935] All ER Rep 1; (1935) 25 Cr App R 72; 51 TLR 446 is one of the more famous passages in the English criminal law:

No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

The committal procedure is the most common way in which criminal matters are moved from the Magistrates Court to the District or Supreme Court of Queensland and is pursuant to Pt 5 of the Justices Act 1886 (Qld).

The Regulator prepares the prosecutors brief containing witness statements and other information. This is then forwarded to the prosecution and the defence lawyers.

During the process of the committal, the evidence is put to witnesses in order for the Magistrate to consider whether there is enough evidence to commit the defendant to a higher court. The Magistrate in these circumstances needs to be satisfied that a jury, properly instructed, on the evidence, could find a verdict of guilty beyond a reasonable doubt.

If the matter proceeds, the matter will be set down for a mention in the higher court. During this time, the prosecutor prepares an indictment which will set out the charges against the defendant.

After the indictment is presented, the accused must enter a plea of guilty or not guilty. Further adjournments can be sought to conduct further enquiries or to negotiate.

It is envisaged that the Director of Public Prosecutions would be involved in the event of death in circumstances where charges of criminal negligence involving manslaughter may be appropriate: see *R v Patel* [2010] QSC 233; BC201004564 per Byrne SJA; *R v Patel; ex parte A-G (Qld)* [2011] QCA 081; BC201102442 (10/0169) Brisb, per Margaret McMurdo P, Muir and Fraser JJA.

[QLD 5,000.75] Appeals

Appeals from Magistrates Court decisions can be made to the District Court pursuant to s 222 of the Justices Act 1886. Under s 222(1) of the Justices Act 1886, a person who feels aggrieved as a *complainant*, *defendant*, or otherwise by an order made by a justice in a summary way *on a complaint* (emphases added), may appeal within one month to a District Court judge. Time limits are set out in s 222(2).

The Appellant must file a Notice of Appeal (Form 27 can presently be found under the heading of "Justices Act 1886" on the Queensland Courts web page at <http://www.courts.qld.gov.au/forms>).

After filing a Notice of Appeal, it is the duty of the clerk of the court to distribute the notice and give it to the Respondent pursuant to s 222D of the Justices Act 1886.

An appeal in the District Court is by way of rehearing. The judge may remit the matter and give directions as to a rehearing or reconsideration. On appeal, the judge can make procedural orders (s 224), and on the hearing itself may confirm, set aside or vary an order or make another order (s 225).

For a discussion of rehearing as it applies in various jurisdictions — see the decision of McGill SC DCJ in *Wallace v Queensland Racing* [2007] QDC 168 and in *Marchetti v Williams* [2008] QDC 75.

The judge may also order costs to be paid by either party as the judge thinks fit. Costs of an appeal are determined under s 232. If a costs order is made, that order will specify how and when that money is to be paid. Section 232A of the Justices Act 1886 applies Sch 2 of the Justices Regulations (with modifications — see the Schedule for District Court costs). Higher costs may be awarded in prescribed circumstances (s 232A(2) of the JA).

There is no appeal from the Magistrates Court to the Supreme Court. See also ss 112 and 113 of the District Court Act Queensland 1967. To start the appeal, the appellant must file a notice of appeal, Form 26, in a District Court registry in the district in which the appeal must be heard. This can presently be found under the heading of "Criminal Practice Rules 1999" on the Queensland Courts web page at <http://www.courts.qld.gov.au/forms>.

All appeals for trials in the District Court and Supreme Court are heard in the Court of Appeal in line with s 69 of the Supreme Court of Queensland Act 1991 (Qld). Three judges are present at an appeal hearing in the Court of Appeal and there is no jury.

All relevant court forms for the Magistrates, District, Supreme Court and Court of Appeal can be found by following the “Forms” link on the Queensland Courts website at www.courts.qld.gov.au.

[QLD 5,000.80] Infringement Notices

Notwithstanding that s 243 of the Act, dealing with Infringement notices, is not used in the Work Health and Safety Act 2011, this matter is addressed by the State Penalties Enforcement Act 1999 (Qld).

Under this legislation, the State Penalties Enforcement Registry (SPER) is responsible for the collection and enforcement of unpaid infringement notices or “on-the-spot” fines issued for minor breaches of the legislation.

It is anticipated that amendments to the State Penalties Enforcement Regulation 2000 (Qld) will occur to allow infringement notice offences to include those listed in the Work Health and Safety Act 2011 and related Regulation.

[QLD 5,000.85] Approach to Determining Penalty

See [FED 5,000.90] for notes on Approach to Determining Penalty.

[QLD 5,000.90] Regulations

On 24 November 2011, the Work Health and Safety Regulation 2011 was approved by the Governor in Council. This Regulation does reflect the national Model Work Health and Safety Regulation, but has some changes, reflective of Queensland’s laws, and a range of transitional provisions to assist in implementation.

In particular the Regulation provides transitional provisions in Ch 13 that apply to various other legislative provisions including:

- Work Health and Safety Regulation 2011
- Building Fire Safety Regulation 2008
- Child Employment Regulation 2006
- Coal Mining Safety and Health Regulation 2001
- Explosives Regulation 2003
- Forensic Disability Regulation 2011
- Health Regulation 1996
- Mining and Quarrying Safety and Health Regulation 2001
- Petroleum and Gas (Production and Safety) Regulation 2004
- Public Health Regulation 2005
- Building Services Authority Regulation 2003
- Queensland Civil and Administrative Tribunal Regulation
- Sustainable Planning Regulation 2009
- Transport Operations (Road Use Management — Driver Licensing) Regulation 2010

The Transitional Provisions of the Work Health and Safety Regulation 2011 aim to provide a “lead in” time for specific changes that will be required to work practices due to the legislative changes. Transitional provisions allow a period of time for duty holders to fully comply. This facilitates compliance overall when new legislation is implemented.

Specific issues that are covered by the transitional arrangements include:

- preparation of emergency plans — s 716 of the Regulation;

- implementation of fall arrest systems other than in construction work — s 717 of the Regulation;
- procedures for plant registration and plant design registration — ss 718–720;
- obtaining of “high risk work licenses” for scaffolding, dogging, rigging crane operation, material hoist operation, elevated work platform operation, concrete boom operation, forklift truck operation and boiler operation ss 722 and 723 and s 730;
- licensing of occupations generally and exemptions ss 724–728 and 742–743;
- special provisions for:
 - earth moving and crane work s 731
 - demolition work ss 732–736
 - training providers ss 737–741
 - asbestos ss 744–761
 - lead s 762
 - construction induction s 764
 - safe work method statements and work plans in construction work ss 764–765.

Further information regarding the transitional provisions including summaries can be found at www.deir.qld.gov.au.

[QLD 5,000.95] Codes of Practice

Codes of Practice provide ways on how to manage risk at the workplace and may be used in a proceeding as evidence as to whether a duty has been complied with: see s 275 of the Work Health and Safety Act 2011 (Qld).

The transitional provisions of the Work Health and Safety Act 2011 (Qld) and, in particular s 284, provide for “preserved code”. These include:

- Abrasive Blasting 2004
- Asbestos management code
- Asbestos removal code
- Cash in Transit 2011
- Children and Young Workers 2006
- Concrete Pumping 2005
- First Aid 2004
- Forest Harvesting 2007
- Formwork 2006
- Foundry 2004
- Hazardous Substances 2003
- Horse Riding Schools, Trail Riding Establishments and Horse Hiring Establishments 2002
- Manual Tasks 2010
- Manual Tasks Involving the Handling of People 2001
- Mobile Crane 2006
- Noise 2004
- Occupational Diving Work 2005
- Plant 2005
- Prevention of Workplace Harassment 2004
- Recreational Diving, Recreational Technical Diving and Snorkelling 2010
- Risk Management 2007
- Rural Plant 2004
- Safe Design and Operation of Tractors 2005
- Scaffolding 2009

- Steel Construction 2004
- Sugar Industry 2005
- Tilt-Up and Pre-cast Construction Industry 2003
- Tower Crane 2006
- Traffic Management for Construction or Maintenance Work 2008
- Tunnelling 2007

[QLD 5,000.100] Portable long service leave

The Building and Construction Industry (Portable Long Service Leave) Act 1991 provides for long service leave payments for workers in the Queensland building and construction industry, in part by causing a levy to be charged during the building notification period under the Work Health and Safety Act 2011 (Qld) pursuant to Pt 9 of the Workplace Health Safety Regulations 2008 — notifiable building work.

Amendments will need to be made to ensure that this continues, however it is forecast that either an amendment to the Regulations or the Building and Construction Industry (Portable Long Service Leave) Act 1991 will occur to ensure continuity of this benefit to workers in the construction industry.

[QLD 5,000.105] Common Law Rights and Breach of Statutory Duty

The Workers Compensational and Rehabilitation Act 2003 (Qld) has a number of restrictions preventing workers claiming common law damages. This has not been changed by the introduction of the Work Health and Safety Act 2011.

The Workplace Health and Safety Act 1995 (Qld) pursuant to s 197, made retrospective extinguishment of the common law right of breach of statutory duty. This was a very specific and effective clause to prevent actions for breach of statutory duty: see *Griffiths v Queensland* [2011] QCA 57; BC201101639; *Chapman v University of Southern Queensland Student Guild* [2010] QDC 318; *Taylor v Invitro Technologies Pty Ltd* [2010] QSC 282; BC201005331.

The related provision under the Work Health and Safety Act 2011 s 267, is worded differently. It remains to be seen as a matter of law, whether the extinguished rights, under the Workplace Health and Safety Act 1995 (Qld) remain effective.

Alternatively, the clause may be seen to not affect the pre-existing rights at common law in a cause of action for breach of statutory duty. If this is the case, then the change in the onus of the duty in the Work Health and Safety Act 2011 will likely mean that the duty for a Person Conducting a Business or Undertaking will be the general common law duty that is cast upon an employer under the laws of negligence.

In the event that the right to claim for breach of statutory duty survives, the onus in proving “practicable” however, would fall to the plaintiff in common law actions, including breach of statutory duty: see *Slivak v Lurgi (Aust) Pty Ltd* (2001) 205 CLR 304; 177 ALR 585; [2001] HCA 6; BC200100264.