



## NSW Legislation Reference Document for GELSafe

This document is a basic guide to the NSW legislative framework that will assist employers in the adaptation and implementation of the GELSafe management system to their own workplace.

For any queries please contact [info@gelsafe.com.au](mailto:info@gelsafe.com.au)

### Sources of Information

Most legislation and supporting documentation referred to in this document can be downloaded from the SafeWork NSW website. Useful websites are listed below:

State Insurance Regulatory Authority	<a href="http://www.sira.nsw.gov.au">www.sira.nsw.gov.au</a>
SafeWork NSW	<a href="http://www.safework.nsw.gov.au">www.safework.nsw.gov.au</a>
Standards Australia	<a href="http://www.saiglobal.com">www.saiglobal.com</a>
Austlii	<a href="http://www.austlii.edu.au">www.austlii.edu.au</a>
Safe Work Australia	<a href="http://www.safeworkaustralia.gov.au">www.safeworkaustralia.gov.au</a>

SafeWork NSW and Safe Work Australia also publish a wide variety of supporting guides and documents for specific issues that can be easily accessed via their websites.

### Background Legislation Information

In NSW, the Work Health and Safety legislative framework is hierarchical with the Work Health and Safety Act 2011 (WHS Act 2011) supported by the Work Health and Safety Regulation 2011 (WHS Regulation 2017) which is supported in turn by Codes of Practice and Australian Standards.

The WHS Act 2011 contains general duties, establishing overarching health and safety obligations. The WHS Regulation 2017 provides a range of performance-based and prescriptive requirements to inform duty holders more specifically of what they need to do to discharge their general duties.

Supporting the WHS Act and Regulation and addressing more specific issues Safe Work Australia has issued Codes of Practice (COP) giving practical guidance on how to implement aspects of the legislation. Many of these COP's have been adopted by SafeWork NSW and are available on their website listed above.

In addition to this Australian Standards issue their own guidelines for example (AS/NZS 4801) that are prescriptive and address detailed specific technical issues. There are many hundreds of these Standards and employers are only expected to be aware of those that directly affect their work activities. Standards are applicable to all Australian States unlike the NSW Act, Regulation and COP.

COP and Australian Standards are not 'laws' themselves but it is expected that where such COP's and Standards exist employers will act in accordance with those requirements. In the event of a WHS prosecution employers are expected to be aware of COPs and Standards relevant to their industry or specialty.

The WHS Act 2011 and WHS Regulation are both available on the SafeWork NSW and Austlii websites and the most important sections of the WHS Act 2011 are reproduced below.

### Work Health and Safety Act 2011

#### 19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- (a) workers engaged, or caused to be engaged by the person, and
- (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.



(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

- (a) the provision and maintenance of a work environment without risks to health and safety, and
- (b) the provision and maintenance of safe plant and structures, and
- (c) the provision and maintenance of safe systems of work, and
- (d) the safe use, handling, and storage of plant, structures and substances, and
- (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities, and
- (f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking, and
- (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

Section 19 is the essence of the WHS Act 2011 and drives the application of WHS across all industries. The most important point to note is that the Person Conducting a Business Undertaking (PCBU) which is essentially the employer “must” ensure the health safety etc. This is a mandatory duty and there is no possibility of “opting out” or delegating the duty to others. The WHS Act 2011 allows the PCBU some ability to adjust this duty using the term ‘Reasonably practicable’ however where an employer relies on this clause it must be able to demonstrate an assessment as described in S18 below.

#### **18 What is “reasonably practicable” in ensuring health and safety**

In this Act, ***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- (a) the likelihood of the hazard or the risk concerned occurring, and
- (b) the degree of harm that might result from the hazard or the risk, and
- (c) what the person concerned knows, or ought reasonably to know about:
  - (i) the hazard or the risk, and
  - (ii) ways of eliminating or minimising the risk, and
- (d) the availability and suitability of ways to eliminate or minimise the risk, and
- (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.

In the event of Safework NSW issuing penalties, fines or prosecutions it is almost always for breach of one or more of the subclauses in Section 19 above.

### **Division 4 Duty of officers, workers and other persons**

#### **27 Duty of officers**

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

(5) In this section, ***due diligence*** includes taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the person conducting the business or undertaking 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 business or undertaking, and



(d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and

(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act, and

**Example.** For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- reporting notifiable incidents,
- consulting with workers,
- ensuring compliance with notices issued under this Act,
- ensuring the provision of training and instruction to workers about work health and safety,
- ensuring that health and safety representatives receive their entitlements to training.

(f) to verify the provision and use of the resources and processes referred to in paragraphs (c)–(e).

## **28 Duties of workers**

While at work, a worker must:

- (a) take reasonable care for his or her own health and safety, and
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act, and
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

Clause 28 is the only clause specifying the duties of employees however employers cannot use this as a potential defence in the event of a WorkCover prosecution

Part 5 of the WHS Act 2011 addresses the need for consultation and this is covered in considerable detail. S 47 below outlines the principles

## **47 Duty to consult workers**

(1) The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety.

Maximum penalty:

- (a) in the case of an individual—\$20,000, or
- (b) in the case of a body corporate—\$100,000.

(2) If the person conducting the business or undertaking and the workers have agreed to procedures for consultation, the consultation must be in accordance with those procedures.