

FACT SHEET NUMBER 1

WORK HEALTH SAFETY LEGISLATION

COMMERCIAL FISHERS

New WA WHS Act 2020 and WHS (General) Regulations 2022

The Occupational Safety and Health Act 1984 and Regulations have been in place for a long time and commercial fishers have had two set of legislation when it comes to safety on the vessel administered by AMSA and Worksafe WA.

Now the OSH Act and Regulations have been replaced by the WHS Act 2020 and Regulations (General) 2022.

So what are the key differences between the Occupational Safety and Health Act 1984 and Regulations and the new WHS Act and Regulations?

1. PCBU

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.

Previously the terms Employer and Principal Contractor were used. The legislation review found that many businesses (including fishing businesses') did not fit the framework for the terms employer or principal contractor and therefore the provisions of the legislation were in some cases difficult to apply.

As well as an employer, a PCBU can include:

- Corporation
- Association
- Partnership
- Sole trader

What does this mean for a commercial fisher?

The term PCBU is used in all states and territories (except for Victoria) and now leaves no doubt as to commercial fishers in WA being a PCBU.

What does a (Commercial Fisher) need to do?

A PCBU must ensure, so far as is reasonably practicable, the health and safety of:

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

This primary duty of care requires duty holders to ensure health and safety, so far as is reasonably practicable, by eliminating risks to health and safety. If this is not reasonably practicable, risks must be minimised so far as is reasonably practicable.

Specifically what does this mean for a commercial fisher?

The expectation that a PCBU has to a worker as it applies to a commercial fishing business is:

- The provision and maintenance of a working environment that is safe and without risks to health, including safe access to and exit from the workplace- ***e.g. procedures for getting on and off the vessel ,pot retrieval, stacking, setting , emergency procedures,etc.***
- The provision and maintenance of plant, structure and systems of work that are safe and do not pose health risks (for example, providing effective guards on machines and regulating the pace and frequency of work) ***e.g. guards on winches, guards on moving parts in the engine room***
- The safe use, handling, storage and transport of plant, structure and substances (for example, toxic chemicals, dusts and fibres)***e.g. use of chemicals***
- The provision of adequate facilities for the welfare of workers at work (for example, access to washrooms, lockers and dining areas) ***e.g. areas to eat and drink on the vessel***
- The provision of information, instruction, training or supervision to workers needed for them to work without risks to their health and safety and that of others around them ***e.g. crew induction and training***
- That the health of workers and the conditions of the workplace are monitored to prevent injury or illness arising out of the conduct of the business or undertaking- ***e.g. monitor weather, swell, conditions***
- The maintenance of any accommodation owned or under their management and control to ensure the health and safety of workers occupying the premises.***eg where there are sleeping areas they are maintained***

A vessel specific SMS that is implemented will meet all these requirements

2. Definition of a worker

The term “worker” is broader under the WHS Act, and includes any person who carries out work for a PCBU, including work as an employee, contractor, subcontractor, self-employed person, outworker, apprentice or trainee, work experience student, employee of a labour hire company placed with a ‘host employer’ and volunteers.

All crew members are considered workers. Under the OSH Act the term employee did not apply to a large number of crew in fishing business. Some fishers would have been engaged as a subcontractor but the application under the OSH Act was limited.

3. Industrial manslaughter

Industrial manslaughter applies to those with a WHS duty where their conduct in failing to comply with that duty caused a death.

Only PCBUs and their officers can be charged with industrial manslaughter.

The prosecution must establish, beyond reasonable doubt, that the person knew their conduct was likely to cause the death of, or serious harm to, an individual and they acted in disregard of that likelihood.

4. Due Diligence

Due diligence—in the context of work health and safety—means taking every precaution that is reasonable in the circumstances to protect the health, safety and welfare of all workers and others who could be put at risk from work carried out as part of the business or undertaking.

Due diligence includes taking reasonable steps to:

- Acquire and keep up to date knowledge on work health and safety matters
- Understand the nature and operations of the work and associated hazards and risks
- Ensure the PCBU has, and uses, appropriate resources and processes to eliminate or minimise risks to work health and safety
- Ensure the PCBU has appropriate processes to receive and consider information about work-related incidents, hazards and risks, and to respond in a timely manner
- Ensure the PCBU has, and implements, processes for complying with their duties and obligations (for example, reports notifiable incidents, consults with workers, complies with notices, provides appropriate training and instruction and ensures HSRs receive training entitlements)
- Verify the provision and use of the relevant resources and processes

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

A vessel specific SMS that is applicable and fully implemented will meet all these requirements

5. Increased Penalties

Penalties have significantly increased under the WHS Act.

Category 1 – applies to those with a WHS duty where their conduct in failing to comply with that duty caused the death of, or serious harm to, a person.

Category 2 – applies to those with a WHS duty where their conduct in failing to comply with that duty exposed a person to the risk of death, injury or harm to health.

Category 3 – applies to those with a WHS duty who failed to comply with that duty.

Maximum penalties for breach of health and safety duty offences

Offence	Duty holder		
	Body corporate	Individual as a PCBU or officer	Individual as worker or other
Industrial manslaughter	\$10 000 000	\$5 000 000, 20 years in jail	Not applicable
Category 1	\$3 500 000	\$680 000, 5 years in jail	\$340 000, 5 years in jail
Category 2	\$1 800 000	\$350 000	\$170 000
Category 3	\$570 000	\$120 000	\$55 000

6. Insurance

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

Under the WHS Act, 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.

You can still get insurance to pay for your legal fees, but if you're personally prosecuted the dollar figure has to come from your own pocket.

7. Incident Notification and reporting

Commercial fishers are required to report certain incidents to AMSA and have also been required to report incidents to Worksafe WA for many years. The types of incidents required to be reported under the new WHS Act and Regulations have now expanded significantly.

The vessel SMS should also contain these incident reporting categories

8. What does a (Commercial Fisher) need to do?

- Attend industry and /or government information sessions
- Have a SMS that is not generic and is made for your vessel – if there are requirements in a generic SMS you will be expected to follow them even if they are not practical or applicable
- Ensure the SMS contains both AMSA and WHS Act and Regulations requirements.
- Get your SMS reviewed to ensure it has the most up to date and applicable information
- Ensure the SMS addresses all the hazards that may be encountered and you have processes to eliminate or reduce the risk- this is the risk assessment section
- Challenge yourself to ensure you are doing what is reasonably practicable to reduce risk of an incident or injury on board
- Do what you SMS says you will do
- Ensure you and your crew attend information / training on work health safety
- Get advice if you are not sure what to do



9. What behaviours should a commercial fisher exhibit?

- Be positive influence on the crew
- Be proactive and take action to avoid injuries
- Work with the crew to set standards
- Walk the talk not just a slogan- safety is our priority
- Don't take unnecessary risks
- Seek feedback from the crew on ways to improve safety

9. What happens after 31 March 2022 when the legislation comes into force?

Transitional arrangements to provide sufficient time for duty holders to adapt their safe systems of work have been agreed but only for new laws which did not exist in the old legislation. This means that where the laws required certain things under the OSH Act and Regulations there is no transition period.

The government has taken the view that laws which are the same as those that existed under the old legislation will apply immediately the new legislation commences 31 March 2022.

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