

Safety in Recreational Water Activities Bill 2011

Explanatory Notes

Objectives of the Bill

The main purpose of the Safety in Recreational Water Activities Bill 2011 is to ensure the health and safety of people to whom recreational water activities are provided by a person conducting a business or undertaking. The Bill sets out the legal duties and operating requirements to be applied in Queensland to protect people against harm to their health, safety or welfare by eliminating or minimising risks in the provision of recreational water activities; to provide advice, information, education and training; and to secure compliance through effective and appropriate enforcement measures, among other matters. People taking part in recreational water activities and people present during those activities are to be given the highest level of protection from hazards and risks arising from the provision of recreational water activities as is reasonably practicable.

The provisions of the Work Health and Safety Bill 2011 (the WHS Bill) also apply to a person conducting a business or undertaking that provides recreational water activities, to ensure the health and safety of workers at a place where the person is providing recreational water activities.

Reasons for the Bill

The harmonisation of work health and safety (WHS) laws throughout Australia is one of the Council of Australian Governments' (COAG) priorities under the *National Partnership Agreement to Deliver a Seamless National Economy*. A National Review into Model Occupational Health and Safety Laws was completed in January 2009, resulting in two reports being submitted to the Workplace Relations Ministers' Council (WRMC). The reports made recommendations on the optimal structure and content of a national model Work Health and Safety Act (model WHS Act). As a result, all jurisdictions have agreed to enact the model WHS Act and the model WHS Regulations by 1 January 2012.

During the harmonisation of work health and safety laws coordinated by Safe Work Australia, a majority of jurisdictions decided that the model WHS laws would not include specific regulations or codes of practice for recreational diving and snorkelling. It was considered that to include such regulations would shift the focus of the model WHS laws further in favour of regulating public safety than is currently the case in those jurisdictions.

As a result, the national model WHS Act and regulations will not specifically regulate recreational underwater diving and snorkelling. In order to continue to regulate this important industry sector in Queensland, it has therefore been necessary to prepare new stand-alone legislation, the Safety in Recreational Water Activities Bill 2011 (the Bill), to maintain Queensland's high standards of safety for the recreational water activities industry.

Recreational diving and snorkelling are regulated in Queensland under the *Workplace Health and Safety Act 1995* (the WHS Act). The provisions made under the WHS Act are the *Workplace Health and Safety Regulation 2008* – Part 14 (Conducting recreational diving or recreational technical diving), and Part 15 (Conducting recreational snorkelling), and the *Recreational Diving, Technical Diving and Snorkelling Code of Practice 2010*. The regulations and code of practice for recreational diving and snorkelling will be remade under this Bill.

The definition of *recreational water activities* in the Bill has been drafted broadly in the event that Government wishes to regulate other similar activities in the future.

How the policy objectives are to be achieved

This Bill will apply to the provision of 'recreational water activities' by a person conducting a business or undertaking. This Bill and the WHS Bill will operate in tandem, with this Bill covering the field only in relation to the health and safety of people for whom recreational water activities are provided by a person conducting a business or undertaking.

This Bill will adopt the key provisions of the WHS Bill for safety duties, penalties, compliance, enforcement and legal proceedings. For example, the WHS regulator in the WHS Bill is the regulator for this Bill and WHS inspectors appointed under the WHS Bill will monitor and enforce compliance with this Bill. The WHS Bill applies to all other aspects of the business or undertaking, its workers and its workplace, in conjunction with this Bill.

Queensland regulations and code of practice for recreational diving and snorkelling will be remade under this Bill. The Bill will commence at the same time as the WHS Bill to ensure the continuity of the regulation of the recreational diving and snorkelling industry.

Estimated cost for implementation

The Bill and the remake of the recreational diving and snorkelling regulations and code of practice to the Bill will not impose any additional costs on recreational diving and snorkelling operators.

Consistency with Fundamental Legislative Principles

The main purpose of this Bill is to provide legislation that will continue to ensure the health and safety of people for whom recreational water activities are provided by a person conducting a business or undertaking. The Bill will operate in tandem with the WHS Bill and mirror its provisions in order to support the harmonisation of WHS laws, while preserving Queensland's regulations and code of practice for recreational diving and snorkelling.

As this Bill has been modelled on the WHS Bill, issues relating to Fundamental Legislative Principles in that Bill are also applicable to this Bill. The Fundamental Legislative Principles are set out in the explanatory notes for the WHS Bill.

Consultation

Dive operations and other recreational scuba diving and snorkelling industry stakeholders have been consulted on the implications of the WHS Bill for their industry, and the proposal for this Bill to ensure the continuation of their health and safety regulations and code of practice for recreational scuba diving and snorkelling. This Bill has strong support from recreational dive operators, as it will maintain Queensland's high safety standards among stakeholders in the industry.

Notes on Provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Bill to be the *Safety in Recreational Water Activities Bill 2011* (the Bill).

Clause 2 states that the Bill commences on a day to be fixed by proclamation.

Clause 3 sets out the main object of the Bill, which is to ensure the health and safety of persons to whom recreational water activities are provided by a person conducting a business or undertaking.

Subclause 3(2) extends the object of risk management set out in subclause 3(1)(a) by applying the overriding principle that persons should, so far as is reasonably practicable, be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from the provision of recreational water activities.

Subclause 3(3) states that this Bill operates in conjunction with the WHS Bill, with substantial provisions adopted from the WHS Bill. This Bill makes provision for the relationship between this Bill and the WHS Bill.

Clause 4 sets out the application of this Bill in circumstances where this Bill and the WHS Bill apply.

Subclause 4 (2) states that, in circumstances where both Bills apply, the WHS Bill continues to apply and must be complied with in addition to this Bill.

Subclause 4(3) states that where there are inconsistencies between this Bill and the WHS Bill, the WHS Bill prevails to the extent of the inconsistency.

Subclause 4(4) provides that this Bill is not inconsistent with the WHS Bill where it imposes additional duties on a person who has duties under the WHS Bill or otherwise increases the standards of safety required for recreational water activities.

Subclause 4 (5) clarifies the application of both Bills in the following circumstances:

- where it is impossible for a person to comply with both a provision under this Bill and a provision in the WHS Bill that deal with the same matter, the person must comply with the provision under the WHS Bill and not the provision under this Bill; and
- where it is possible for a person to comply with a provision under this Bill and a provision under the WHS Bill that deal with the same matter, the person must comply with both provisions.

Subclause 4(6) provides for consistency between the administration of this Bill and the WHS Bill.

Subclause 4(7) provides that an inspector must not exercise a compliance power for a breach under this Bill where a corresponding power has already been exercised for the same breach under the WHS Bill.

Subclause 4(8) provides that the regulator may not accept a recreational safety undertaking from a person under this Bill if the regulator has already accepted a WHS undertaking under the WHS Bill for the same matter.

Clause 5 provides that compliance with this Bill in itself does not constitute a defence in a proceeding for an offence against the WHS Bill.

Clause 6 states that schedule 2 defines particular words used in this Bill.

Clause 7 sets out the meaning of a recreational water activity as an activity that is carried out for the purposes of recreation on, in or under water under the management or control of a person conducting a business or undertaking. Examples include diving and snorkelling.

Clause 8 sets out the meaning of the provision of a recreational water activity, which includes access to a place, supervision, supply of anything, advice, demonstrations or training.

Subclause 8 (3) clarifies that the provision of recreational water activities by a person conducting a business or undertaking (PCBU) to a person is not done only because the person is a worker carrying out work in the business or undertaking. The WHS Bill provides for the health and safety of workers employed in the recreational water activities industry.

Clause 9 provides for all persons to be bound by the Bill. It clarifies that this state, the Commonwealth and the other states are all liable for an offence against the Bill.

Part 2 Health and Safety Duties

Division 1 Introductory

Clause 10, Clause 11, Clause 12, and Clause 13 provide that the duties under the Bill are non-transferable; a person can have more than one duty; and more than one person can concurrently have the same duty.

Subclause 13(2) provides that each duty holder must comply with that duty to the required standard even if another duty holder has the same duty. If duties are held concurrently, then each person retains responsibility for their duty in relation to the matter and must discharge the duty to the extent to which the person has capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity (subclause 13(3)).

In formulating these principles, the Bill makes it clear that:

- a person with concurrently held duties retains responsibility for each duty and must ensure that the duty of care is met,
- the capacity to control applies to both ‘actual’ or ‘practical’ control
- the capacity to influence implies more than mere legal capacity and extends to the practical effect the person can have on the circumstances
- where a duty holder has a very limited capacity to influence or control a matter, that factor will assist in determining what is ‘reasonably practicable’ for them to do in complying with their duty of care.

The provisions of the Bill do *not* permit, directly or indirectly, any duty holders to avoid their health and safety responsibilities. Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made.

Clause 14 specifies that a duty holder can ensure health and safety by managing risks, which involves:

- eliminating the risks, so far as is reasonably practicable, and
- if not reasonably practicable—minimising the risks, so far as is reasonably practicable.

Clause 15 provides for the standard of ‘reasonably practicable’. This standard has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions. This qualifier is well known and has been consistently defined and interpreted by the courts.

‘Reasonably practicable’ represents what can reasonably be done in the circumstances and this clause provides meaning and guidance about what is ‘reasonably practicable’ when complying with duties to ensure health and safety under the Bill, regulations and codes of practice. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including:

- the likelihood of the relevant hazard or risk occurring
- the degree of harm that might result from the hazard or risk
- what the person knows or ought reasonably to know, about the hazard or risk and the ways of eliminating or minimising the risk, and
- the availability and suitability of ways to eliminate or minimise the risk.

After taking these matters into account, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

Division 2 Duties

Clause 16 sets out the primary duty of care for PCBUs who provide recreational water activities. The PCBU has a duty to ensure, so far as is reasonably practicable, that the health and safety of persons for whom these activities are provided are not put at risk by the provision of recreational water activities.

Specific elements of the primary duty

Subclause 16 (2) outlines the key things a PCBU must do in order to satisfy the primary duty of care. The list does not limit the scope of the duties in subclause 16 (1).

PCBUs must comply with their primary duty by ensuring, so far as is reasonably practicable, the provision of the items listed in this subclause,

and that they have taken the relevant steps to protect the health and safety of persons for whom the recreational water activities are provided. This means that where compliance activities are undertaken by someone else, the PCBU must actively verify that the necessary steps have been taken to meet the duty.

Clause 17 casts a positive duty on the officers (as defined in the dictionary) of a PCBU to exercise ‘due diligence’ to ensure that the PCBU complies with any duty or obligation under the Bill.

Subclause 17(2) applies if officers fail to exercise due diligence to ensure that the PCBU complies with its health and safety duties under Part 2. Maximum penalties for these offences by officers are specified in clauses 21 to 23.

Subclause 17(3) sets the maximum penalties if an officer fails to exercise due diligence to ensure the PCBU complies with other duties and obligations under the Bill. In that case, the maximum penalty is the penalty that would apply to individuals for failing to comply with the relevant duty or obligation.

Subclause 17(4) clarifies that an officer may be convicted or found guilty, whether or not the PCBU was convicted or found guilty of an offence under the Bill.

Subclause 17(5) contains a non-exhaustive list of steps an officer must take to discharge their duties under this provision, such as acquiring and keeping up-to-date knowledge of health and safety in recreational water activities, including the hazards and risks associated with these activities. The officer must ensure that the PCBU has, and implements, processes for complying with any duty or obligation owed by the PCBU under the Bill.

An officer must have high, yet attainable, standards of due diligence. These standards should relate to the position and influence of the officer within the PCBU. What is required of an officer should be directly related to the influential nature of their position. This is because the officer governs the PCBU and makes decisions for management. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

Clause 18 sets out the health and safety duties of workers providing recreational water activities at work. Workers have a duty to take reasonable care that their acts or omissions do not adversely affect the health and safety of persons for whom recreational water activities are provided.

The duty of care, being subject to a consideration of what is reasonable, is necessarily proportionate to the control a worker is able to exercise over his or her work activities and work environment.

Clause 18(b) makes it clear that workers must comply so far as they are able with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill.

Clause 19 sets out the health and safety duties applicable to all persons at a place where recreational water activities are provided. They can include the PCBU, a worker in the business or undertaking, a person for whom these activities are provided or an onlooker or a visitor (subclause 19(2)).

Subclause 19(3) states that persons for whom these activities are provided, including onlookers and visitors, must take reasonable care for their own safety and take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons at the place. All persons must also comply, as far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill.

Division 3 Offences and penalties

Clause 20 sets out the meaning of a health and safety duty for recreational water activities. Contraventions of the Bill are generally criminal offences. This reflects the community's view that any person who has a legislative duty of care to ensure someone's health and safety but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice. The penalties set out in this Bill are the same as those provided in the WHS Bill.

Clause 21 sets out category 1 offences, which are offences involving recklessness. The highest penalties under the Bill apply, including imprisonment for up to five years.

Category 1 offences involve reckless conduct that exposes an individual to a risk of death or serious injury or serious illness without reasonable excuse. The prosecution will be required to prove the fault element of recklessness in addition to proving the physical elements of the offence.

Subclause 21(3) makes the category 1 offence a crime under the *Criminal Code Act 1899*.

Clauses 22 and 23 set out category 2 and 3 offences. These offences involve less culpability than Category 1 offences as there is no fault element. In each offence a person is required to comply with a health and safety duty for recreational water activities. This is the first element of the offence.

The second element of the offence is that the person commits an offence if the person fails to comply with the health and safety duty for recreational water activities. Category 2 offences have a third element, which provides that a person would only commit an offence if the failure to comply with the health and safety duty exposed an individual to a risk of death or serious injury or serious illness arising from recreational water activities. Offences without this third element would be prosecuted as Category 3 offences.

Burden of proof

The burden of proof (beyond reasonable doubt) rests entirely upon the prosecution in matters relating to non-compliance with duties imposed by the Bill. 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. This reflects the generally accepted principle that in a criminal prosecution, the onus of proof to the standard of beyond reasonable doubt normally rests on the prosecution.

Clause 24 provides that the duties set out in clauses 22 and 23 of this Bill prevail over the excuses set out in sections 23 (intention - motive) and 24 (mistake of fact) of the *Criminal Code Act 1899*.

Clause 25 Subclause 25(1) creates an exception for volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty for recreational water activities, other than as a worker or persons for whom recreational water activities are provided (see clauses 18 and 19).

Subclause 25(2) creates an exception for unincorporated associations. Although unincorporated associations may be PCBU's for the purposes of

the Bill, their failure to comply with a duty or obligation under the Bill does not constitute an offence and cannot attract a civil penalty. Instead, subclause 25(3) makes it clear that liability may rest with either an officer of the unincorporated association (other than a volunteer) under clause 17, or with a member of the association under clause 18 or 19.

Part 3 Incident Notification

All Australian work health and safety laws currently require all workplace deaths and certain workplace incidents, injuries and illnesses to be reported to a relevant authority. Most laws also require workplace incident sites to be preserved by the relevant person. The primary purpose of incident notification is to enable the regulator to investigate serious incidents and potential work health and safety contraventions in a timely manner. The duty to report incidents in clause 29 is linked to the duty to preserve an incident site until an inspector arrives or otherwise directs so that evidence is not compromised.

Clause 26 defines the kinds of incidents that must be notified to the regulator and that also require the incident site to be preserved. A ‘notifiable incident’ is an incident involving the death of a person, ‘serious injury or illness’ of a person or a ‘dangerous incident’.

Clause 27 defines a ‘serious injury or illness’ as an injury or illness requiring a person to have treatment of a kind specified in subclauses (a)–(b), including immediate treatment as an in-patient in a hospital or immediate treatment for a serious injury of a kind listed in subclause (b). The regulations may prescribe additional injuries or illnesses for this purpose, and may also prescribe exceptions to the list in this clause. The test is an objective one and it does not matter whether a person actually received the treatment referred to in the provision. The test is whether the injury or illness could reasonably be considered to warrant such treatment.

Clause 28 defines a ‘dangerous incident’ in relation to a place where recreational water activities are provided as being an incident that exposes a person to a serious risk to their health or safety arising from an immediate or imminent exposure to the matters listed in subclauses 28 (a)–(f). These matters include an uncontrolled escape, spillage or leakage of a substance, an uncontrolled implosion, explosion or fire and an uncontrolled escape of

gas or steam. Clause 28 enables regulations to be made that add events to this list and exclude incidents from being dangerous incidents.

Clause 29 specifies who must notify the regulator of a notifiable incident and when and how this must be done. Subclause 29(1) requires the PCBU providing recreational water activities to ensure that the regulator is notified immediately after the PCBU becomes aware that a ‘notifiable incident’ arising out of the conduct of the business or undertaking has occurred. The requirement for ‘immediate’ notification would not, however, prevent a person from assisting an injured person or taking steps that were essential to making the site safe or from minimising the risk of a further notifiable incident (see subclause 30(3)). Failure to notify is an offence.

Subclause 29(2) requires the notice to be given by the fastest possible means. Subclause 29(3) requires the notice to be given by telephone or in writing. A legislative note advises that written notice can be given by facsimile, email and other electronic means. Notification by telephone must include details requested by the regulator and may require the person to notify the regulator in writing within 48 hours (subclause 29(4)). If the person notifying the regulator is not required to provide a written notice, the regulator must give the relevant PCBU details of the information received or an acknowledgement of receiving the notice (subclause 29(6)). Written notice must be in a form, or contain the details, approved by the regulator (subclause 29(5)). Subclause 29(7) requires the PCBU to keep a record of each notifiable incident for five years from the date that notice is given to the regulator. Failure to do so is an offence.

Clause 30 sets out the duty to preserve incident sites. Subclause 30(1) requires the person with management or control of a place where recreational water activities are provided at which a notifiable incident has occurred to take reasonable steps to ensure that the incident site is preserved until an inspector arrives or until such earlier time as directed by an inspector. Failure to do so is an offence.

Subclause 30(2) clarifies that this requirement may include preserving any plant, substance, structure or thing associated with the incident. Subclause 30(3) sets out the kinds of things that can be done to ensure health and safety at the site, including assisting an injured person or securing the site to make it safe. Subclause 30(3)(e) allows inspectors or the regulator to give directions about the things that can be done.

Part 4 Enforcement

Clause 31 sets out the way in which certain provisions of the WHS Bill that apply to this Bill are expressed in this Bill. Subclause 31(2) provides the example that where an applied WHS provision from the WHS Bill references this Bill, it means the Safety in Recreational Water Activities Bill 2011.

Subclause 31(3) provides that when WHS provisions from the WHS Bill that apply to this Bill mention another provision in the WHS Bill, the mentioned provision is taken to be a reference to that provision as applied to this Bill.

Application of parts 3, 4, 5, 6 and 7 of the Work Health and Safety Bill 2011 to this Bill

Part 4 (Authorisations), Part 5 (Consultation, representation and participation), Part 6 (Discriminatory, coercive and misleading conduct) and Part 7 (Workplace entry by WHS entry permit holders), apply to PCBU's and workers who are also included under this Bill. Explanatory notes for these parts in the WHS Bill are included with that Bill and apply to both Bills.

Application of other relevant parts of the Work Health and Safety Bill 2011 to this Bill

Other relevant parts of the WHS Bill are included in this Bill by specific reference. For example, the WHS regulator under the WHS Bill is the regulator for the SRWA Bill; and WHS inspectors appointed under the WHS Bill will monitor and enforce compliance with the SRWA Bill. The WHS Bill will apply to all other aspects of the business or undertaking, its workers and its workplace, in conjunction with the SRWA Bill.

Clause 32 states that the regulator under the WHS Bill is the regulator under this Bill (subclause 32(1)) and has the same functions as the regulator under section 152 of the WHS Bill. Subclause 32(2)(a) and (b) adds the provisions that a reference to a health and safety matter in section 152 of the WHS Bill is a reference to a health and safety matter in recreational water activities and a reference to a corresponding regulator is a reference to a corresponding regulator in this Bill. Subclause 32(3) provides for sections 153 to 155 of the WHS Bill to apply to this Bill.

Clause 33 states that an inspector under the WHS Bill is an inspector under this Bill (subclause 33(1)) and an identity card under the applied WHS section 157(1) is taken to be issued for this Bill (subclause 33(2)). Subclause 33(2) also applies WHS sections 157 to 159 covering identity cards, accountability and suspension or ending the appointment of an inspector to this Bill.

Clause 34 sets out the application of Part 11 of the WHS Bill on Enforceable Undertakings to this Bill where the reference to a contravention of that Bill refers to a contravention of this Bill and a reference to a WHS undertaking is a reference to a recreational water activities health and safety undertaking.

Clause 35 states that the table in WHS Schedule 2A as applied to this Bill sets out decisions under this Bill that are reviewable and who is eligible to apply for a review of a decision. Sections 54(2), 72(6) and 76(6) of the Work Health and Safety Bill 2011 concerning negotiations over workgroups, training of health and safety representatives and decisions about health and safety committees in the WHS Schedule 2A are excluded under this Bill. Subclause 35(2) states that jurisdiction is conferred on the Queensland Civil Administrative Tribunal to hear and decide an external review relating to a reviewable decision.

Subclause 35(3) states that Part 12 of the WHS Bill (other than section 223(1)) on reviewable decisions and schedule 2A apply to this Bill as if a reference in those provisions to an internal review were a reference to internal review under WHS section 224. Subclause 35(3)(b) states that a reference in those provisions to a reviewable decision or eligible person is a reference to a reviewable decision or eligible person under clause 35(1) of this Bill. Subclause 35(4) provides that an external review in this clause means an external review as defined under the WHS Bill section 229 as applied to this Bill.

Clause 36 (a) provides that part 13 of the WHS Bill on Legal Proceedings applies to this Bill in relation to the following references:

- (a) a category 1 or category 2 offence in that Bill is a reference to category 1 or category 2 offence in this Bill; and
- (b) an offence against or a contravention of that Bill is a reference to an offence against or a contravention of this Bill, subject to clause 36(a) above; and

- (c) a work health and safety duty provision in that Bill is a reference to a duty under part 2 division 2 of this Bill; and
- (d) a court-ordered WHS undertaking in that Bill is a reference to a court-ordered recreational water activities health and safety undertaking in this Bill; and
- (e) an improvement, prohibition or non-disturbance notice in that Bill is a reference to those notices under an applied WHS provision in this Bill.

Clause 37 provides that nothing in the Bill is to be interpreted as conferring a right of action in civil proceedings because of a contravention of the Bill or as conferring a defence to a civil action or otherwise affecting a right of action in civil proceedings or as affecting the extent to which a right of action arises with respect of breaches of duties or obligations imposed by the regulations.

Part 5 General

Clause 38 provides for the offence of giving false or misleading information. Subclause 38(1) prohibits a person from giving information, when complying or purportedly complying with the Bill, knowing either that the information is false or misleading in a material particular or that it omits anything without which the information is false or misleading.

Subclause 38(2) prohibits a person from producing a document, when complying or purportedly complying with the Bill, knowing that it is false or misleading in a material particular, unless the person:

- indicates how the document is false or misleading and, where practicable, provides the correct information, or
- accompanies the document with a written statement indicating that the document is false or misleading in a material particular and setting out or referring to the material particular in which the document is false or misleading.

Clause 39 provides that nothing in the Bill requires a person to produce a document disclosing information or otherwise provide information that is the subject of legal professional privilege.

Clause 40 sets out provisions regarding immunity from liability. Inspectors, in particular, have a crucial role to play in the promotion of work health and safety and in eliminating or minimising serious risks to health and safety. They may be required to exercise judgment, make decisions and exercise powers with limited information and in urgent circumstances. As a result, it is important that they and others engaged in the administration of the Bill are not deterred from exercising their skill and judgment due to fear of personal legal liability.

Subclause 40(1) provides that inspectors and others engaged in the administration of the Bill are not personally liable for acts or omissions so long as those acts or omissions are done in good faith and in the execution or purported execution of their powers and functions. The protection provided by this subclause covers civil liability.

Subclause 40(2) states that any civil liability that would otherwise attach to the person instead applies to the State.

Clause 41 sets out provisions regarding confidentiality of information. Inspectors are given broad powers and protections under the Bill and clause 41 is one of a number of mechanisms designed to ensure that inspectors are accountable and credible when they perform functions and exercise powers. Clause 41 applies where a person obtains information or gains access to a document in exercising a power or function under the Bill.

Subclause 41(2) prohibits the person who has obtained information or a document from doing any of the following:

- disclosing the information or the contents of the document to another person
- giving another person access to the document, or
- using the information or document for any purpose, other than in accordance with subclause 41(3).

Prohibited disclosures are an offence. Subclause 41(3) provides a list of circumstances in which subclause 41(2) does not apply. These include where disclosure is necessary to exercise powers or functions under the Bill, certain disclosures by the regulator, or where it is required by law or by a court or tribunal or where it is provided to a Minister. It also enables the sharing of information between inspectors who exercise powers or functions under different Bills. Personal information can be disclosed with the relevant person's consent.

Subclause 41(4) prohibits a person from intentionally disclosing to another person the name of an individual who has made a complaint against that other person unless the disclosure is made with consent of the complainant or is required by law.

Clause 42 deems void any term of any agreement or contract that purports to exclude, limit or modify the operation of the Bill or any duty owed under the Bill, or that purports to transfer to another person any duty owed under the Bill. This upholds the principle that duties of care and obligations cannot be delegated therefore agreements cannot purport to limit or remove a duty held in relation to work health and safety matters.

Division 2 Codes of practice

Clause 43 permits the Minister to approve a code of practice for the purposes of the Bill and to revoke or vary such a code. Subclause 43(2) provides that an approval, variation or revocation of a code of practice takes effect when the Minister gives notice of its making. A notice under subclause (2) is subordinate legislation (subclause 43(3)). A code of practice or an instrument varying or revoking a code of practice commences on either the day the notice under subclause (2) above commences or the day that the code or instrument provides that it commences (subclause 43(4)) whichever is the later date.

Subclause 43(5) provides that a code of practice expires 10 years after its commencement.

Subclause 43 (6) states that as soon as practicable after approving, varying or revoking a code of practice, the Minister must ensure that notice of the approval, variation or revocation of the code of practice is published in a newspaper circulating generally throughout the State. Subclause 43(7) provides that the Minister must ensure that a copy of each code of practice in force from time to time and any document applied, adopted or incorporated into the code is made available for inspection without charge during normal business hours at each department office dealing with work health and safety. A code of practice can be made available in written or electronic form (subclause 43(8)).

Clause 44 sets out provisions regarding the use of codes of practice in proceedings. Codes of practice provide practical guidance to assist duty holders to meet the requirements of the Bill. A code of practice applies to

anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the Bill, in relation to the subject matter of the code.

Duty holders can demonstrate compliance with the Bill by following a code or by another method that provides an equivalent or higher standard of health and safety than that provided in a code. This allows duty holders to take into account innovation and technological change in meeting their duty and to implement measures most appropriate for their individual recreational water activities without reducing safety standards.

Subclause 44(2) provides that a code of practice is admissible in proceedings as evidence of whether or not a duty holder has complied with a duty or obligation under the Bill.

Subclause 44(3) enables a court to use a code of practice as evidence of what is known about hazards, risk, risk assessment and risk control. A code may also be used to determine what is reasonably practicable in the circumstances to which the code relates.

Subclause 44(4) does not prevent a person introducing evidence of compliance with the Bill apart from the code of practice so long as this provides evidence of a standard of health and safety in recreational water activities that is equivalent to or higher than the code of practice.

Clause 45 contains regulation-making powers that allow the Governor in Council to make regulations under the Bill. Without limiting the power in subclause 45(1), subclause 45(2) provides that a regulation may make provision for any matter stated in Schedule 1 or otherwise related to safety in recreational water activities.

Part 6 Transitional provisions

Clause 46 provides the definitions for this part.

Clause 47 allows proceedings to commence under this Bill against an obligation holder referred to in subclause 281(3) of the WHS Bill in terms of any acts of omission committed by the person after the repeal of the *Workplace Health and Safety Act 1995*. Subclause 281(4) of the WHS Bill states that proceedings for these offences must be taken within two years

(for those obligation holders with design, installation or construction obligations) or within one year (for obligation holders with other certain obligations including manufacturing and supply).

Clause 48 provides that an enforceable undertaking made under the repealed Act will continue and be subject to the enforceable undertaking provisions in the repealed Act (although where these provisions mention ‘chief executive’ that reference is taken to be ‘the regulator’). Where an application for an enforceable undertaking relating to recreational water activities has been received before the repeal and no decision has been made, the chief executive must decide on the application and that enforceable undertaking will be subject to the enforceable undertaking provisions in the repealed Act.

Clause 49 provides any power exercised by an inspector before the repeal continues to have effect under the Bill.

Clause 50 preserves all improvement notices relating to recreational water activities that were in force before the repeal. This means all improvement notices issued prior to the Bill commencing are still current and enforceable by inspectors as if the repeal did not happen. In addition, if the contravention in the notice issued corresponds with a contravention (or likely contravention) under the Bill, the improvement notice continues in force as if it was issued under this Bill.

Clause 51 provides any prohibition notice issued under the repealed Act relating to recreational water activities continues in force as if the repeal did not happen.

Clause 52 provides that any review or appeal taken under the repealed Act relating to recreational water activities continues under the provisions of the repealed Act.

Clause 53 sets out the relationship between the transitional provisions in this Bill and the transitional provisions under the WHS Bill.

Part 7 Amendment of other legislation

Division 1 Penalties and Sentences Act 1992

Clause 54 provides that the *Penalties and Sentences Act 1992* is amended in this Division.

Clause 55 amends section 5 that provides for penalty units and sets the value of a penalty unit. The clause inserts the Safety in Recreational Water Activities Bill 2011 after the Electrical Safety Act 2002 in clause 5(1)(c).

Division 2 Work Health and Safety Bill 2011

Clause 56 amends the WHS Bill.

Clause 57 renumbers schedule 1, section 6 as schedule 1, section 7 and renumbers the current schedule 1, part 2, division 4 as schedule 1, part 2, division 5. A new division 4 clarifies the relationship between the Safety in Recreational Water Activities Bill 2011 and the WHS Bill where both Bills relate to a duty imposed on a PCBU. The Safety in Recreational Water Activities Bill 2011 applies where the duty relates to persons for whom a PCBU provides recreational water activities.

Schedule 1 Regulation-making powers

Clause 45 allows the Governor in Council to make regulations under the Bill for any matter stated in this Schedule. Schedule 1 details a variety of matters that may be the subject of regulations (see clause 45). These include duties imposed by the Bill and matters relating to incidents, plant, hazards, records, forfeiture and review of decisions. These more specific regulation-making powers deal with matters that are not expressly identified within the scope or objects of the Bill for which regulations may be required. They do not limit the broad regulation-making power in subclause 45(1).

Schedule 2 Dictionary

Schedule 2 contains a dictionary that provides definitions of words and terms used in this Bill. Some substantial definitions include:

Applied WHS

This term refers to a provision of the Work Health and Safety Bill 2011 that applies to this Bill for the purposes of this Bill.

Health

The term ‘health’ is defined to clarify that it is used in its broadest sense and covers both physical and psychological health.

Place

The term ‘place’ is defined broadly to cover mobile structures such as a vessel, vehicle or aircraft and any waters including floating on or on the bed of any waters or any installation on land related to waters.

Plant

The term ‘plant’ is defined broadly to cover a wide range of items, ranging from complex installations to portable equipment and tools. The definition includes ‘anything fitted or connected’, which covers accessories but not other things unconnected with the installation or operation of the plant (e.g. floor or building housing the plant).

Officer

The term ‘officer’ is defined by reference to the ‘officer’ definitions in section 9 of the *Corporations Bill 2001*, but does not include a partner in a partnership. It also includes ‘officers’ of the State within the meaning of clause 247 of the Workplace Health and Safety Bill 2011 as applied to this Bill, and ‘officers’ of public authorities within the meaning of clause 252.

Recreational water activities health and safety

This term means health and safety relating to the provision of recreational water activities by a person conducting a business or undertaking.

Volunteer

The term ‘volunteer’ is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a ‘volunteer’ for the purposes of the Bill is a

question of fact that will depend on the circumstances of each case. 'Out-of-pocket expenses' are not defined but should be read to cover expenses an individual incurs directly in carrying out volunteer work (e.g. reimbursement for direct outlays of cash for travel, meals and incidentals) but *not* any loss of remuneration. Any payment over and above this amount would mean that the person was not a volunteer for purposes of the Bill and the volunteers' exemption would *not* apply.

Waters

This term covers waters of any description at any place whether natural or constructed including rivers, streams, watercourses, canals, lakes, rapids, waterfalls, the sea, water slides and pools.

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