

Duties of Care

Businesses - A person conducting a business or undertaking (PCBU) has an absolute duty to take all reasonably practicable steps to ensure the health and safety of workers and other persons impacted by the business or undertaking. **Reasonably practicable steps** means those available ways of eliminating or minimising the risk of injury after have considered a number of relevant matters together, such as the likelihood and severity of the risk and the means to control it, weighed against the costs associated with eliminating or minimising the risk. A PCBU whose activities include the management or control of workplaces, fixtures, fittings and plant must ensure, so far as is reasonably practicable, that the workplace and anything arising out of it are without risks to health and safety.

Officers – An officer of a PCBU has a positive duty to exercise “due diligence” to ensure that the PCBU complies with its safety obligations. Officers must be proactive and owe a continuous duty to ensure compliance. **Due Diligence** means an officer must acquire and keep up-to-date knowledge of work, health and safety matters and ensure the PCBU has, and implements, processes for complying with the PCBU’s obligations. The standard of care required relates to the position and influence of the officer within the PCBU. **Officer** means a director or person who makes or participates in the decision making of the business or who has the capacity to significantly affect the business’ financial standing eg. senior or operational management.

Workers – A worker has a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their conduct does not adversely affect the health and safety of other persons at the workplace. **Reasonable care** is proportionate to the level of control a worker is able to exercise over his or her work activities in a work environment. Workers must comply with reasonable directions and instructions as well as cooperate with any reasonable policy or procedure of the PCBU.

Visitors – A visitor must take reasonable care for their own health and safety at the workplace and take reasonable care that their conduct does not adversely affect the health and safety of others at the workplace. Visitors must comply, so far as they reasonably are able to, with any reasonable instructions given by the PCBU.

Volunteers – A volunteer cannot be prosecuted for a failure to comply with a health and safety duty, other than in their capacity as a worker or visitor at the workplace. A volunteer means a person who is acting on a voluntary basis, irrespective of whether the person receives payment for out-of-pocket expenses.

Volunteer Associations – are excluded from the definition of a PCBU for the purposes of the Act. These associations are groups of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly, employ any person to carry out work for the association.

Unincorporated Associations – are excluded from the operation of the Act and cannot commit an offence. Nevertheless, an officer or worker of an unincorporated association can still be liable under the Act, unless they are a volunteer.

Designers, manufacturers, importers, suppliers – A person who designs, imports, supplies, installs, constructs or commissions or manufactures plant, substances or structures must ensure, so far as is reasonably practicable, that the plant, substance or structure is without risk to health and safety of persons including those who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose such as storage, decommissioning, dismantling, demolition or disposal.

Notification of Incidents – A PCBU must report immediately to the regulator any workplace incident that involves the death of a person, serious illness or injury, or exposure to a serious risk to a person’s health or safety. In most cases, a person with control of a workplace must ensure, so far as is reasonably practicable, that the site of the incident is not disturbed until the inspector arrives or as otherwise directed by an inspector. Records of such workplace incidents must be maintained for at least 5 years. Notification must be by telephone or in writing in approved form.

Consultation: Health & Safety Committees/Representatives

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Consultation with other duty holders – A PCBU must consult, cooperate and coordinate activities with all other persons who have a duty in relation to the same matter. A PCBU is required to work together with other duty holders in a proactive and reciprocal way so that all risks associated with the activity that they have some involvement in are eliminated or minimised as far as is reasonably practicable. Relevant factors include (i) who else has influence and control in the work activity; (ii) how do duty holders each affect work health and safety in relation to that activity; (iii) where do work activities interact and what impact do they have; (iii) what information should be shared; and (iv) what action is needed to be taken to work together with the other duty holders.

Consultation with workers – A PCBU must consult, so far as is reasonably practicable, with workers who carry out work for the business or undertaking and who are (or are likely to be) directly affected by health and safety matters. “Workers” include employees, apprentices, contractors, sub-contractors and volunteers. Consultation must be effective, in respect of certain occasions (eg. when identifying hazards and assessing risks arising from work). Consultation with workers who are represented by a health and safety representative, must involve that representative. Consultation requires: (i) relevant work health and safety information to be shared with workers; (ii) a reasonable opportunity for workers to express their views; (iii) workers are given a reasonable opportunity to contribute to the decision making process relating to the health and safety matter; (iv) the workers’ views are taken into account; and (v) workers are advised of the outcome of any consultation in a timely manner. **Reasonably practicable** means consultation to the extent that is reasonable in the particular circumstances. This will depend on factors such as (i) the size and structure of the business, (ii) the nature of the work that is carried out, (iii) the nature of the particular decision, including the urgency to take action; (iv) the work arrangements such as shift work and/or remote work; and (v) the characteristics of workers, including languages spoken and literacy levels. The more likely that the hazard may cause serious harm, the more extensive your consultation should be. Consultation is only required with those workers directly affected by the health and safety matter.

Safety Committees – A PCBU must establish a health and safety committee within 2 months of being requested to do so by: (i) a HSR for a work group or (ii) 5 or more workers at that workplace or (iii) if prescribed by the regulations. A PCBU may also establish a committee on its own initiative. The committee may be agreed between the PCBU and the workers however, at least half of the members must be workers who are not nominated by the PCBU and the committee can have one or more HSR.

The committee must meet at least once every 3 months and at any reasonable time at the request of at least half of the members. The committee must be granted access to information that the PCBU has relating to workplace hazards and the health and safety of the workers. Unless the worker has consented, the committee must not be permitted to access any personal or medical information of the worker unless the information does not identify the worker or lead to their identification.

Issue Resolution – If a dispute or issue about work health and safety arises and it is not resolved after discussion between the parties, the parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the agreed procedure or, if none, the default procedure in the regulations. If the issue remains unresolved, a party may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the issue.

Election of HSRs – A worker is eligible to be elected if he/she is a member of the work group, unless disqualified. The workers in a work group may determine how an election of an HSR is to be conducted and the PCBU must provide any resources, facilities and assistance that are reasonably necessary or prescribed to enable elections to be conducted. All workers in a work group are entitled to vote. An election is not required if the number of candidates equal the number of vacancies. An HSR holds office for 3 years unless they resign, cease to be a worker in the work group, or are disqualified or removed by the majority of the work group members. Deputy HSRs may also be elected or appointed.

PCBU Duties – A PCBU must (i) consult on safety matters with any HSR; (ii) allow any HSR to have access to information relating to health and safety, (iii) allow the HSR to be present in interviews; (iv) provide any resources, facilities and assistance that is reasonably necessary; (v) allow a person assisting an HSR to have access to the workplace; (vi) permit an HSR to accompany an inspector and allow an HSR to spend such time as is reasonably necessary to exercise their powers and functions.

Training – PCBU’s must train HSRs in courses approved by the regulator at the cost to the PCBU if the HSR requests training. They must allow HSRs time to attend training and must pay the HSR their normal pay during any time off to attend the course.

Health & Safety Representatives (HSR) – An HSR is entitled to represent workers in safety matters, monitor the measures taken by the PCBU, investigate complaints relating to safety, and enquire into anything that appears to be a risk to health or safety. **Powers:** An HSR may: (i) inspect the workplace or any part of the workplace after giving the PCBU reasonable notice, or immediately without notice if an incident involves serious risks to the health and safety of any person; (ii) accompany an inspector during an inspection; (iii) be present at an interview concerning safety with an inspector and a worker (with consent); (iv) request that a health and safety committee be established; and (v) request the assistance of any person, including a union, whenever necessary. HSR’s have the **power to direct any unsafe work to cease**. This is limited to directing workers in their own work group unless the HSR for another work group is unavailable and there is a serious risk to health or safety or a member of that group asks for their assistance. HSR’s may also **issue provisional improvement notices (PIN)**. HSR’s may not exercise these latter two powers unless they have the requisite approved training. A PIN can be reviewed by an inspector.

HSR Appointment – If a worker requests the PCBU to facilitate the conduct of an election to appoint HSR’s then the PCBU must facilitate the determination of one or more work groups. A work group is generally determined by negotiation and agreement between the PCBU and the workers who will form the work group. Negotiations in relation to work groups must be commenced within 14 days of a request for elections. The PCBU must notify workers of the outcome of the negotiations as soon as practicable and, if there is a failure of negotiation, any person can request an inspector to attend and resolve the deadlock.

Union Right of Entry

Entry regarding Suspected Contravention – A union official or employee may be a Work Health & Safety (WHS) entry permit holder. A permit holder may enter a workplace without prior notice to inquire into a suspected contravention. The suspicion must be reasonably held by the permit holder before entering the workplace and if the suspicion is disputed, the onus is on the permit holder to prove that the suspicion is reasonable. A permit holder must also hold a valid permit under the Fair Work Act.

Powers – A permit holder may do any of the following:

- Inspect anything relative to the suspected breach;
- Consult with relevant workers about the suspected breach;
- Require the PCBU to allow inspection and make copies of any documents directly relevant to the suspected breach (other than employee records or records held by a third party without prior notice); or
- Warn any person of a serious risk to their health or safety.

Restrictions – A permit holder must provide written notice of the entry and suspected contravention as soon as reasonably practicable after entering the workplace unless it would defeat the purpose of the visit or unreasonably delay them. Notice is required to be given to make copies of employee records and documents that are not held by the PCBU of at least 24 hours and not more than 14 days, before the proposed entry.

Entry to Consult and Advise Workers – A permit holder may enter a workplace to consult with and advise relevant workers who wish to participate in discussions about work, health and safety matters. Notice must be given during usual business hours at least of 24 hours and not more than 14 days before the proposed entry. A valid permit under the Fair Work Act is also required.

Restrictions – Production of the permit and photographic identification must be provided on request. Entry must be during usual business hours and the permit holder may only enter the area of the workplace where the relevant workers carry out work or where their health and safety is directly affected. A permit holder must comply with any reasonable request by the PCBU to comply with a work, health and safety requirement.

PCBU Duties to Permit holders – The PCBU must comply with the request to provide documents unless it would contravene a law and, a failure or refusal to do so is an offence unless the PCBU can show that they had a reasonable excuse for not complying, such as a belief that to provide access would contravene another law. A person must not unreasonably refuse or delay entry into a workplace if the permit holder is entitled to enter. A person must not intentionally and unreasonably hinder or obstruct a permit holder who is exercising a right of entry or any other right.

Investigations

Powers on Entry – An inspector can enter any workplace at any time with or without consent of the person with management or control of the workplace. Notice must be given as soon as practicable after entering the workplace to the PCBU, person with management or control of the workplace and HSR. An inspector can inspect, examine and make enquiries and can conduct various tests and analyses. An inspector can require any person to assist him or her in the exercise of their compliance duties as long as it is reasonable. A person may not refuse reasonable help without a reasonable excuse. An inspector may issue a search warrant and seize evidence. An inspector can require a person to tell him or her who has custody of documents and may require their production. An inspector may require a person to answer any questions subject to an appropriate warning and legal professional privilege.

Improvement Notice – If an inspector reasonably believes a person is contravening the Act an Improvement Notice to take remedial action can be issued. The Notice must set out the grounds for the inspector's decision and how the law has been breached. A date for compliance must be included allowing a reasonable time. The Notice must be complied with or an extension of time sought or review requested.

Prohibition Notice – If an inspector reasonably believes an activity is occurring involving a serious risk to health or safety, or may occur, a Prohibition Notice may be issued to stop or prevent the activity. The Notice takes effect immediately and continues to operate – subject to review – until an inspector is satisfied that the matters have been remedied. Directions may be given orally but then confirmed in writing. The basis for the belief of the inspector must be included in the Notice. It is an offence to fail or refuse to comply irrespective of any reasonable excuse.

Non Disturbance Notice – An inspector may issue a Non-Disturbance Notice if the inspector reasonably believes it is necessary to ensure non-disturbance of a site to facilitate the exercise of his or her compliance powers. The Notice cannot operate for longer than 7 days. A person must comply with the Notice unless there is a reasonable excuse.

General Powers – The regulator can serve a written notice on a person requiring information or documents to be produced or attendance at an interview with the regulator. A notice to attend an interview with the regulator cannot be issued unless the regulator has taken all reasonable steps to first obtain the information by seeking written information and documents.
Answering questions - A person may not refuse or fail to comply with answering a question or providing information to the inspector without a reasonable excuse. The risk of self-incrimination is not a reasonable excuse.
No right to claim privilege against self-incrimination - There is no right to claim the privilege against self incrimination, so long as the person is provided with a caution by the inspector.
Legal Privilege applies – The right to refuse to provide information subject to legal professional privilege remains available under the Act.

Review of Decisions

General - Eligible persons can apply to have a number of decisions made under the Act reviewed, either internally (if made by an inspector) and/or externally (if made or taken to have been made by the regulator), within the prescribed time limits (14 days in the majority of circumstances). Reviewable decisions include but are not limited to the decision to issue an improvement, prohibition and non-disturbance notices and the decision on review of a provisional improvement notice. The internal reviewer must make the decision to vary, confirm or set aside and substitute the decision, as soon as reasonably practicable and within 14 days of receipt of an application (unless further information is required). Generally, an application for review automatically stays the operation of the decision.

Review of decision to issue improvement notice – An application for an internal review of a decision to issue an improvement notice must be made within the period specified in the notice for compliance or within 14 days of the day the person became aware of the decision, whichever is the lesser.

Review of decision to issue a prohibition notice - An application for an internal review of a decision to issue a prohibition notice must be made within 14 days of the day the person became aware of the Notice. The application does not automatically stay the operation of the decision. However the reviewer may stay the operation on their own initiative or by application.

Review of decision to issue a non-disturbance notice – An application for an internal review of a decision to issue a non-disturbance notice must be made within 14 days of the day the person became aware of the Notice. The application does not automatically stay the operation of the decision. However the reviewer may stay the operation on their own initiative or by application.

Licensing & Qualifications - Workplaces, plant or substance and work or classes of work may be required to be authorised by a licence, permit, registration or other authority. Failure to obtain the necessary authorisation before engaging in certain conduct (e.g. using unauthorised plant or substances) or directing or allowing a worker to engage in that conduct is an offence.
 It is also an offence for a person to carry out work at a workplace, or for a PCBU to direct or allow a person to carry out work at a workplace, if the person does not have the necessary qualifications or experience or if the work is not carried out under the supervision of a person who has the necessary qualifications and experience.

Offences

Category 1 - It is an offence under the Act to recklessly engage in conduct that exposes an individual to a risk of death or serious injury or illness, without reasonable excuse. The maximum penalties are: \$300,000 or 5 years imprisonment or both for an individual; \$600,000 or 5 years imprisonment or both for a PCBU or an officer of a PCBU; and \$3,000,000 for a body corporate.

Category 2 - It is an offence under the Act to fail to comply with a health and safety duty owed, exposing an individual to a risk of death or serious injury or illness. There is no requirement for recklessness. The maximum penalties are: \$150,000 for an individual; \$300,000 for a PCBU or an officer of a PCBU; and \$1,500,000 for a body corporate.

Category 3 - It is an offence under the Act to fail to comply with a health and safety duty owed. The maximum penalties are: \$50,000 for an individual, \$100,000 for a PCBU or an officer of a PCBU; and \$500,000 for a body corporate.

False & Misleading Information - It is an offence under the Act for a person to give information that the person knows is false or misleading, or to omit any matter or thing without which the information is misleading. It is also an offence to produce a document that the person knows to be false or misleading.

Discriminatory, Coercive and Misleading Conduct – It is an offence to hinder or obstruct an inspector, impersonate an inspector or assault, threaten or intimidate an inspector. It is an offence for a person to engage in discriminatory conduct (actions that detrimentally alter or affect a worker) for a prohibited reason (including a person being an HSR or assisting an HSR or raising health and safety issues).

Legal Proceedings - The regulator, an authorised inspector or the DPP can bring proceedings for offences within 2 years after the offence first comes to the notice of the regulator or within 1 year after a finding in a coronial or official inquiry, whichever is the later. In relation to a Category 1 offence, the time limit does not apply if fresh evidence is discovered and it was not reasonably discoverable during the limitation period. The DPP can review the regulator's decision not to prosecute Category 1 or 2 offences on request of any person subject to time limits. The regulator must provide a copy of the DPP advice and any written reasons declining to prosecute to that person. In NSW, a union can commence a prosecution of Category 1 or 2 offences if the regulator declines to follow the advice of the DPP.