

# Community organisations and WHS laws

A guide to understanding and complying  
with work health and safety laws

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# Part 1

## Introduction

# Introduction

In Australia, work health and safety (WHS) laws aim to protect the health, safety and welfare of employees and others in the workplace.

The laws also provide a framework for continuous improvement and progressively higher standards of compliance.



## Disclaimer

This guide provides information on work health and safety laws. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this guide.

Before 1 January 2012, each state and territory in Australia had its own unique set of legislation for dealing with WHS.

Safe Work Australia developed a single set of laws to be implemented across Australia, known as the 'model' or 'harmonised' laws. The purpose of the model WHS laws was to reduce the burden of having to comply with different obligations across different states and territories.

Currently, the Commonwealth and all states and territories, except for Victoria, have enacted legislation based on the model WHS laws (together, the WHS laws).

**Despite harmonisation, some differences between the application of WHS laws in each jurisdiction remain.**

It's important to check the laws in each state or territory that your organisation operates in.

Compliance with WHS laws is important. If your not-for-profit organisation doesn't comply with these laws, it risks substantial penalties, such as imprisonment and fines for individuals, including employees, directors and officers of your organisation. There are also obligations on 'officers' under the WHS laws to exercise due diligence to ensure your organisation meets its WHS obligations and officers risk fines and imprisonment if they don't comply with their due diligence obligations.

This guide focuses on the legal duties and obligations that organisations and officers of organisations owe to various people under the WHS laws, including employees, volunteers, contractors, apprentices, trainees and members of the public.



### Caution - Victoria

Victoria has not yet adopted the model WHS laws. If your organisation operates in Victoria, you will need to look at the laws in operation there. See our [Victorian guide to occupational health and safety](#).



### Note

Alongside the duties imposed under WHS Laws, there are also common law duties to provide employees and other workers with a safe workplace.

The common law is the law that has been developed by the courts when deciding cases over time. Under the common law, all employers have a legal duty to take reasonable care to avoid exposing employees (and others who might be exposed to risks from the business) to reasonably foreseeable risks of injury. These obligations are not exhaustively covered in this guide, and independent advice should be sought in relation to a question about these common law duties.

## Key terms used in this guide

Term	Definition
<b>Officer</b>	<p>An officer of a corporation for the purposes of WHS laws means:</p> <ul style="list-style-type: none"> <li>• a director or secretary of the corporation</li> <li>• a person: <ul style="list-style-type: none"> <li>– who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation</li> <li>– who has the capacity to affect significantly the corporation's financial standing, or</li> <li>– in accordance with those instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation), or</li> </ul> </li> <li>• a receiver, or receiver and manager, of the property of the corporation</li> <li>• an administrator of the corporation</li> <li>• an administrator of a deed of company arrangement executed by the corporation</li> <li>• a liquidator of the corporation, or</li> <li>• a trustee or other person administering a compromise or arrangement made between the corporation and someone else</li> </ul> <p>An officer of an entity that is neither a person nor a corporation means:</p> <ul style="list-style-type: none"> <li>• a partner in the partnership if the entity is a partnership</li> <li>• an office holder of the unincorporated association if the entity is an unincorporated association, or</li> <li>• a person:</li> </ul>



- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity, or
- who has the capacity to affect significantly the entity's financial standing

**Person conducting a business or undertaking (PCBU)**

A person conducting a business or undertaking (referred to as a **PCBU**) alone or with others, whether or not for profit or gain.

A PCBU may be a partnership, company, unincorporated body or association, a sole trader, a government department or statutory authority.

A volunteer organisation is a PCBU if it employs one or more paid workers.

Throughout this guide a PCBU is referred to as an 'organisation'.

**Reasonably practicable**

An organisation is under a duty to ensure, so far as is reasonably practicable, the health and safety of workers and other persons in a workplace of which the organisation has management or control, or of any person who could be impacted by your organisation's business or undertaking.

'Reasonably practicable' means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety to eliminate or minimise this risk, taking into account and weighing up all relevant matters including:

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

**Volunteer**

A person who is working on a voluntary basis.

**Volunteer association**

A group of volunteers working together for one or more community purposes where none of the volunteers or group of volunteers employs any person to carry out work for the volunteer association. A volunteer association is not a PCBU for the purposes of the WHS laws.

**Worker**

Any person who carries out work in any capacity for a PCBU, including as:

- an employee
- a contractor or subcontractor
- an employee of a contractor
- an employee of a labour hire company who has been assigned to work in the PCBU
- an outworker
- an apprentice or trainee
- a student gaining work experience
- a volunteer, or
- a person of a prescribed class

**WHS Act**

The model Work Health and Safety Act which has been enacted in the Australian Capital Territory (**ACT**), New South Wales (**NSW**), Northern Territory (**NT**), Queensland (**QLD**),



South Australia (**SA**), Tasmania (**TAS**) and Western Australia (**WA**). The specific legislation is listed below.

**WHS Regulations** The [model Work Health and Safety Regulations](#) which have been enacted in the ACT, NSW, NT, QLD, SA, TAS and WA. The specific regulations are listed below.

**WHS laws** The WHS Act and the WHS Regulations. Links to the Act and Regulations are below.

## Summary of the differences between the WHS laws in each jurisdiction

Jurisdiction	Key WHS laws	Differences to other jurisdictions
Australian Capital Territory	<p><a href="#">Work Health and Safety Act 2011 (ACT)</a></p> <p><a href="#">Work Health and Safety Regulation 2011 (ACT)</a></p>	<p>The ACT has adopted the WHS laws.</p> <p>Some key differences to other harmonised jurisdictions include:</p> <ul style="list-style-type: none"> <li>Hazardous chemicals and major hazard facilities are covered under separate legislation – the <i>Dangerous Substances Act 2004 (ACT)</i> and <i>Dangerous Substances (General) Regulation 2004 (ACT)</i></li> <li>The WHS Act (ACT) now includes the uniform WHS model provisions establishing offences in respect of industrial manslaughter with maximum penalties of 20 years imprisonment or \$16,500,000 fines for body corporates</li> </ul>
Queensland	<p><a href="#">Work Health and Safety Act 2011 (Qld)</a></p> <p><a href="#">Work Health and Safety Regulation 2011 (Qld)</a></p>	<p>Queensland has adopted the WHS laws.</p> <p>Some key differences to other harmonised jurisdictions include:</p> <ul style="list-style-type: none"> <li>An offence of industrial manslaughter for PCBUs and ‘senior officers’ of PCBUs where the PCBU or senior officer negligently causes the death of a worker. The maximum penalty is \$10 million for a corporation and 20 years’ imprisonment for an individual. These penalties are significantly higher than the maximum penalties in place in other harmonised jurisdictions.</li> <li>A PCBU must comply with an approved code of practice or demonstrate that equal to or better measures were followed. This is different to other harmonised jurisdictions which allow a code of practice to be admissible in court proceedings as evidence of what was known about a hazard at a particular time, to determine what was reasonably practicable in the circumstances and as evidence of compliance with WHS laws.</li> <li>The appointment of a WHS Officer is admissible as evidence of compliance with the PCBU’s general duty of care.</li> <li>Enforceable undertakings will not be accepted by the regulator for a contravention (or alleged contravention) of WHS laws that involves a fatality.</li> </ul>





		<ul style="list-style-type: none"> <li>• A WHS entry permit holder must give notice to the person in management or control of the workplace, as well as the relevant PCBUs, before entering a workplace for the purposes of consulting and advising workers</li> </ul>
New South Wales	<p><u><a href="#">Work Health and Safety Act 2011 (NSW)</a></u></p> <p><u><a href="#">Work Health and Safety Regulation 2017 (NSW)</a></u></p>	<p>NSW has adopted the WHS laws.</p> <p>Some key differences to other harmonised jurisdictions include:</p> <ul style="list-style-type: none"> <li>• The most serious category of WHS offence includes 'gross negligence' as a fault element, not only 'reckless misconduct'.</li> <li>• Insurance arrangements to cover penalties for WHS offences are prohibited. This is to make sure people cannot avoid paying WHS fines.</li> <li>• The time during which a person can ask the WHS regulators to start a prosecution in response to certain offences is 18 months after the event (rather than 12 months).</li> <li>• Work related manslaughter may be prosecuted under the <i>Crimes Act 1900</i> (NSW).</li> </ul>
Northern Territory	<p><u><a href="#">Work Health and Safety (National Uniform Legislation) Act 2011 (NT)</a></u></p> <p><u><a href="#">Work Health and Safety (National Uniform Legislation) Regulations 2011 (NT)</a></u></p>	<p>The NT has adopted the WHS laws including the model industrial manslaughter provisions.</p> <p>There are no notable differences to other harmonised jurisdictions.</p>
South Australia	<p><u><a href="#">Work Health and Safety Act 2012 (SA)</a></u></p> <p><u><a href="#">Work Health and Safety Regulations 2012 (SA)</a></u></p>	<p>SA has adopted the WHS laws.</p> <p>Some key differences to other harmonised jurisdictions include:</p> <ul style="list-style-type: none"> <li>• A health and safety representative can only request assistance from prescribed persons.</li> <li>• A health and safety representative is entitled to three days' training during the second year and two days' training during the third year in the role, compared to a one-day refresher course in other harmonised jurisdictions.</li> <li>• The privilege against self-incrimination for any individual when an inspector enters a workplace is retained.</li> <li>• Safe work method statements (<b>SWMS</b>) are required to address risks of a person falling more than three metres (as opposed to two metres in other harmonised jurisdictions).</li> <li>• There are additional requirements for WHS entry permit holders. You can read more about WHS entry permits for union officials on the <u><a href="#">South Australian Employment Tribunal website</a></u>.</li> </ul>



		<ul style="list-style-type: none"> <li>• There are no provisions in relation to industrial manslaughter.</li> </ul>
Tasmania	<p><u><a href="#">Work Health and Safety Act 2012 (Tas)</a></u></p> <p><u><a href="#">Work Health and Safety Regulations 2012 (Tas)</a></u></p>	<p>Tasmania has adopted the WHS laws.</p> <p>There are no notable differences to other harmonised jurisdictions.</p> <p>There are no provisions in relation to industrial manslaughter.</p>
Victoria	<p><u><a href="#">Occupational Health and Safety Act 2004 (Vic)</a></u></p> <p><u><a href="#">Occupational Health and Safety Regulations 2017 (Vic)</a></u></p>	<p>Victoria has <b>not</b> adopted the WHS laws.</p> <p>There are key differences in Victoria, including:</p> <ul style="list-style-type: none"> <li>• The applicable legislation is called occupational health and safety (<b>OHS</b>) law.</li> <li>• The OHS law applies to ‘employers’ and persons managing or controlling a workplace as opposed to PCBUs. Although many PCBUs will be an ‘employer’, the scope of WHS laws is broader than in Victoria.</li> <li>• The duty for officers requires them to take ‘reasonable care’.</li> <li>• There is no prescribed duty to consult, cooperate and coordinate with other duty holders who have a duty in relation to the same matter.</li> <li>• Victorian OHS laws require consultation with ‘employees’ as opposed to the broader concept of ‘workers’ under the WHS laws.</li> <li>• Health and safety representatives are not required to attend training before they can issue a provisional improvement notice or direct a cessation of work.</li> <li>• There are some variations between incident notification requirements. For example, in Victoria, an employer must give the regulator a written record of the incident within 48 hours after being required to notify, whereas in harmonised WHS jurisdictions, PCBUs are not required to give written notice of the incident unless required by the regulator.</li> <li>• The procedures for issue resolution, work cessation and provisional improvement notices are different.</li> <li>• There are topics not specifically regulated by the Victorian OHS laws which are specifically regulated in the WHS laws such as first aid, remote or isolated work, and falling objects. However, employers still need to address these issues as part of their broad safety management processes.</li> </ul> <p>You can read more about <u><a href="#">Victorian OHS laws in our guide</a></u>.</p>
Western Australia	<p><u><a href="#">Work Health and Safety Act 2020 (WA)</a></u></p> <p><u><a href="#">Work Health and Safety (General) Regulations 2022 (WA)</a></u></p>	<p>WA has adopted the WHS laws.</p> <p>Under the WHS Act, there are key differences to other harmonised jurisdictions:</p> <ul style="list-style-type: none"> <li>• An offence of industrial manslaughter has maximum penalties of 20 years’ imprisonment or a fine of \$5</li> </ul>



million for an individual, and \$10 million for a body corporate.

- It's an offence to insure or indemnify a PCBU for the cost of WHS penalties.
- Union right of entry matters are not included in the WHS Act and are instead retained in the *Industrial Relations Act 1979 (WA)*.
- Health and Safety Representatives have the right to choose their own training courses.
- There is a specific duty for providers of work health and safety services to ensure that those services do not pose a risk to persons at the workplace.

## Commonwealth

[Work Health and Safety Act 2011 \(Cth\)](#)

[Work Health and Safety Regulations 2011 \(Cth\)](#)

The Commonwealth has adopted the WHS laws.

The Commonwealth jurisdiction is different from others as the laws need to deal with potential overlap with state and territory WHS laws. In general, the Commonwealth WHS laws:

- Apply to business and undertakings of the Commonwealth, public authorities and non-Commonwealth licensees – including if the work is carried out overseas.
- Require Commonwealth duty holders to consult, cooperate and co-ordinate activities with other state or territory-based businesses that have a duty under a corresponding state or territory-based WHS Law.
- Make special provision to deal with national security, defence and Australian Federal Police operations.

There are currently no provisions in relation to industrial manslaughter, but a bill to introduce an offence of industrial manslaughter is currently before the Federal Parliament.

The Commonwealth jurisdiction laws don't generally apply to not-for-profit organisations.



# Part 2

**Applying WHS laws to not-for-profit organisations**



# Applying WHS laws to not-for-profit organisations

## When do WHS laws apply?

The WHS laws use specific legal terminology to determine whether an organisation is required to comply with WHS laws.

They state that the laws apply to PCBUs (discussed in more detail below). Note that this terminology is the same in all states and territories that have adopted the WHS laws.

To determine whether they will need to comply with the WHS laws, organisations should consider whether they fall within the definition of a PCBU for the purpose of the WHS laws. If this is unclear, legal advice may be required.

## Conducting a business or undertaking

The WHS laws don't define what a 'business or undertaking' is. A 'business or undertaking' will typically involve some sort of organised operation or enterprise that is ongoing in nature. The term 'business' applies to for-profit enterprises, and the term 'undertaking' generally captures organisations that are not profit-making or commercial in nature.

It doesn't matter whether a business or undertaking is:

- conducted for profit or gain
- conducted by a person or a group of people, or
- structured as a partnership, incorporated association or unincorporated association

The meaning of a 'business or undertaking' is very broad and may capture many not-for-profit organisations.

However, (as discussed below) this is subject to the exception under the WHS Act that a 'volunteer association' doesn't conduct a business or undertaking. A 'volunteer association' therefore doesn't have duties under the WHS Act (outside Victoria). A 'volunteer association' in Victoria will nevertheless have some duties under the Victorian OHS laws, for example where it has 'management or control of a workplace'.

## Exception for volunteer associations



### Definition of volunteer association

The WHS Laws define a volunteer association as:

a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association



This definition means that organisations consisting solely of volunteers are exempt from the duties under the WHS laws. If your organisation employs or engages anybody (whether casually or part time), it's not a volunteer association for the purposes of the WHS laws and must comply with the duties under the WHS laws.

It's important to note that payments that are made to volunteers for out-of-pocket expenses (such as travel and meals) when carrying out volunteer work are not regarded as a wage or salary. However, if other payments for carrying out volunteer work are made, they may constitute a wage or salary and mean that the person is being 'employed' by the organisation.

Sometimes, it can be unclear whether a person is a volunteer or an employee. For more information, see our [guide Employee, contractor or volunteer?](#).



### Example

A historical society is run by a group of volunteers. The society meets on a regular basis in each other's homes to discuss the society's progress and plan for the future. As the society doesn't employ anyone and they all work together for a community purpose, they are a volunteer association. This means that the society and its members don't have any duties under the WHS Laws.



### Example

A charity organisation consists of a national body with state and local divisions. The national body will be a PCBU if it engages paid workers. Whether a state or local division of the organisation is also a PCBU depends on whether it is recognised as a separate entity that engages paid workers.

If a state or local group or division is identified as a PCBU, then it will owe WHS duties to its volunteers, unless they are classified as a volunteer association.

The national body that is a PCBU because it employs paid workers will owe duties to all workers, including the volunteers of the state or local groups that are volunteer associations. This is because the work of those volunteers is directed or influenced by the national body.



### Tip

Even if your organisation is a volunteer association and is exempt from the duties under the WHS Laws, it's a good idea to comply with the general WHS duties under the WHS Laws. Australian courts have recognised that volunteers are owed a general duty of care by the organisations they support. Complying with the WHS Laws will help ensure this duty is satisfied.



# Who is a worker under WHS Law?

Once you determine that the duties under the WHS laws apply to your organisation, your organisation will owe duties to its 'workers'.

Under the WHS laws, 'worker' is given a very broad definition, and will include any of the following:

- employees
- volunteers
- contractors or subcontractors, and employees of those contractors or subcontractors
- employees of a labour hire company assigned to work in the organisation
- apprentices and trainees
- students gaining work experience, and
- outworkers

This means that – even if your not-for-profit organisation employs only one paid worker – the consequence of having an employee is that your organisation will owe WHS duties to all workers, including volunteers.

## What is a 'workplace' under WHS Law?



### Definition of workplace

The WHS Laws define a workplace as:

a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work

This means that practically any location where work can be done for your organisation could be a 'workplace' under the WHS laws. For example, under WHS laws, vehicles, roadways and oil platforms have all been considered to be 'workplaces' in the circumstances.

In a practical sense, whether a place is a 'workplace' for the purposes of the WHS laws will depend on the circumstances. If the regulator or the court is required to decide whether a place is a 'workplace', they will have regard to:

- the activities of the business or undertaking
- what is involved in the performance or delivery of those activities, and
- where the activities take place



### Tip

The following may be a 'workplace' for a not-for-profit organisation:

- for an organisation that has workers working from home, the worker's home
- for an organisation teaching children to swim, the pool
- for an organisation conducting door-to-door fundraising appeals, the streets on which the fundraising appeal is conducted, and
- for an organisation whose workers travel to rural, remote and regional areas, the worker's car (or other form of transportation used)

The 'workplaces' for your organisation will depend on the circumstances. If you are unsure what will constitute a workplace for your organisation, you should seek legal advice.



# Part 3

**Duties of not-for-profit organisations  
under WHS laws**





# Duties of not-for-profit organisations under WHS laws

## The nature of WHS duties

The WHS laws impose duties on organisations, which are intended to protect, as far as reasonably practicable, the health and safety of workers.

Where a duty is imposed on an organisation under the WHS Act to ensure health and safety, the organisation is required to eliminate (or, if it is not reasonably practicable, to minimise) risks to health and safety, so far as is reasonably practicable.

**Note** – the meaning of reasonably practicable is discussed in **part 5** of this guide.

Duties imposed on an organisation under the WHS Act are not transferable. This means that an organisation can't delegate or contract out of its duties. However, an organisation can enter into reasonable arrangements with other organisations to ensure the risks are collectively managed and these arrangements may be reflected in contracts.

An organisation can have more than one duty under the WHS laws. For example, an organisation can have duties as a PCBU as well as a 'person with management or control of a workplace'. An organisation will not be excused from its respective duties because of its multiple roles.

The duties imposed by the WHS laws are concurrent and overlapping. This means more than one organisation may have a duty in relation to the same person, workplace, plant, structure or thing. If that is the case, each duty holder must comply with that duty to the standard required by the WHS laws even if another duty holder has the same duty.

An organisation must comply with its WHS duties to the extent to which the organisation has the capacity to influence and control the matter (or would have that capacity but for an agreement or arrangement seeking to limit or remove that capacity). Having the capacity to influence or control a matter means that the organisation is able to make decisions or influence the making of decisions about that aspect of the workplace. It's not necessary for an organisation to have a significant level of control over the workplace for the duty to arise, and an ability to any extent to compel, direct or command activities at a workplace may be sufficient for the duty to arise.

## What are the key WHS duties?

The key duties under the WHS laws are listed in the table below.

Key duties under WHS Act	Section of the Act
Primary duty of care	section 19
Duty of PCBU involving management or control of workplaces	section 20
Duty of PCBU involving management or control of fixtures, fitting and or plant at workplaces	section 21



Duty of PCBU that design plant, substances or structures	section 22
Duty of PCBU that manufacture plant, substances or structures	section 23
Duty of PCBU that import plant, substances or structures	section 24
Duties of PCBU that supply plant, substances or structures	section 25
Duties of PCBU that install, construct or commission plant or structures	section 26
Duty to notify regulator immediately of notifiable incidents	section 38
Duty to preserve incident sites	section 39
Duty to consult with other duty holders	section 46
Duty to consult with workers	section 47
On request, to facilitate election of health and safety representative/s	section 50
Duty to consult with and confer with a health and safety representative	section 70
On request, to train the health and safety representative/s	section 72
On request, to establish a health and safety committee	section 75
Duty to allow health and safety committee members to attend health and safety committee meetings and carry out functions as committee members	section 79



### Caution

There are further duties and obligations set out in the WHS Regulations that will be specific to certain organisations and workplaces – these are not covered by this guide. These additional duties and obligations cover topics such as noise, hazardous manual tasks, confined spaces, falls, electrical safety, plant, hazardous chemicals and asbestos.

Organisations that deal with specific risks must be aware of and comply with these duties and obligations.



## Overarching primary duty to ensure the health and safety of workers

Organisations must ensure, as far as is reasonably practicable, the health and safety of:

- workers engaged by the organisation (whether directly, or through third parties such as contractors), and
- workers whose activities in carrying out work are influenced or directed by the organisation while they are at work for the organisation

In addition to workers, organisations must also ensure, so far as is reasonably practicable, that the health and safety of other people is not put at risk from work carried as part of the conduct of the organisation. Other people may include clients, customers, tradespeople, suppliers and members of the public who visit the workplace.

There is therefore a very large group of people that organisations covered by the WHS laws need to consider and not put at risk of harm.



### Tip

Plant means machinery, equipment, appliance, container, implement and tool. It includes components of those things, as well as anything fitted or connected to those things.

Ensuring health and safety of workers and other persons includes (but is not limited to):

- providing and maintaining a work environment without risks to health and safety
- providing and maintaining safe plant and structures
- providing and maintaining safe systems of work
- using, handling and storing plant, structures and substances in a safe manner
- providing adequate welfare facilities, including ensuring access to those facilities
- providing any necessary information, training, instruction or supervision that is necessary for protection of all persons from risks to their health and safety, and
- monitoring the health of workers and the conditions at the workplace for the prevention of illness or injury of workers

A duty imposed on an organisation to ensure health and safety requires the organisation to adopt a risk management approach that eliminates health and safety risks as much as is reasonably practicable. If it's not reasonably practicable to eliminate health and safety risks, the duty is to minimise them as much as is reasonably practicable.



### Example

A charity organisation, staffed by employees and volunteers, arranges a sausage sizzle to raise money. The event takes place at a local park, where an employee and volunteer are responsible for the setup of a barbeque. They recklessly cause a gas leak, which results in a minor explosion. The employee, volunteer and a passer-by are injured. As the charity is an employer, it is a PCBU covered by WHS Laws and owes duties to all three injured parties – the employee, the volunteer and the passer-by.



## Example

Mary volunteers for an organisation which provides assistance to elderly residents. She drives clients to and from medical appointments in her own car. There is a risk that Mary could be involved in a car accident while she is volunteering. The organisation she volunteers for can't completely eliminate the risk but they do a range of things to help minimise it.

The organisation:

- checks that Mary has a current drivers licence
- checks that Mary's car is properly maintained, currently insured and registered
- provides Mary with its 'Driving Residents Policy' and training before she begins volunteering, and
- checks that Mary understands that the 'Driving Residents Policy' requires that Mary and any passengers comply with the road rules of the state they operate in, including wearing a seat belt

By doing these things the organisation has taken steps to comply with its duties under the WHS Laws, but should continue to be aware of and monitor for specific risks that might arise in relation to particular residents or journeys.



## Case Study

In *Australian Services Union of NSW (Ms Kristyn Thompson) v Mercy Centre, Lavington Limited* [2005] NSWCIMC 156, a religious charity organisation operated a residential care facility for intellectually disabled clients with complex behavioural needs.

A worker at the facility was attacked by residents on two separate occasions. On the first occasion, a resident stabbed the worker with a used syringe she found in a public toilet while on an outing. Ten months later, a different resident assaulted the worker. Both residents had histories of physical aggression.

The magistrate found that the stabbing could have been life threatening and that the organisation didn't provide sufficient supervision on the outing. The magistrate also found the organisation provided its workers with little training in self-defence and staff levels were inadequate to deal with the residents known to have violent tendencies. The court found that the organisation had not done all that was reasonably practicable.



## Note

A 'workplace' is broadly defined under WHS Laws. When your organisation considers the people it may owe a duty of care, be sure to think of all places that will be considered to be 'workplaces' for your organisation under WHS Laws, and not just your office or site.



### Note – the primary duty of care and psychological health and safety

As a result of changes to the model WHS Laws in 2022, the primary duty of PCBUs to ensure, as far as is reasonably practicable, the health and safety of workers now expressly includes psychological health and safety. The duty is not limited to physical health and safety.

A PCBU must eliminate psychosocial risks in the workplace, or if that is not reasonably practicable, minimise these risks so far as is reasonably practicable.

To help implement this extended duty, [Safe Work Australia](#) has published a [Model Code of Practice for managing psychosocial hazards at work](#).

For the Model Code of Practice to apply in a particular state or territory, it must first be approved as a Code of Practice in that jurisdiction. Not all jurisdictions will implement the Model Code of Practice in the same way.

The extended duty of care:

- now applies in [New South Wales](#) (since 1 October 2022), [Western Australia](#) and [Tasmania](#) (since 4 January 2023), and [Queensland](#) (since 1 April 2023)
- will apply in the [Northern Territory](#) from 1 July 2023, and
- has not yet been implemented in South Australia or the ACT

[Victoria](#) (the only state or territory that is not part of the Harmonised WHS scheme) is developing regulations and a code to address the management of psychosocial risks.

## Duty of PCBUs involving management or control of workplaces

An organisation with 'management or control', in whole or part, of a 'workplace' has a duty to ensure, so far as is reasonably practicable, that:

- the workplace
- the means of entering or exiting the workplace, and
- anything arising from the workplace,

are without risks to the health and safety of any person

More than one organisation can have control over a workplace at any one time.



### Example

An organisation is leasing office space. The organisation has been made aware that the front door mat has been damaged and protrudes from the ground. The organisation fails to remove the door mat which creates a risk of a person tripping. A maintenance person arrives to fix the air-conditioning unit and trips on the mat, causing injury. The organisation may be liable under WHS Laws as it was in control of the workplace and the means of entering it at the time, even though it doesn't own the premises.

There are additional duties in the WHS Act for organisations who:

- manage or control fixtures, fittings or plant at a workplace
- design, manufacture, import or supply plant, substances or structures, or
- install, construct or commission plant or structures for a workplace

There are also specific duties in the WHS Regulations in relation to managing the risk of psychosocial hazards in the workplace.



## Duty to notify regulator immediately of notifiable incidents and duty to preserve incident sites

See **part 6** of this guide for an outline of the duties your organisation must fulfil when an incident occurs.

## Duty to consult, co-operate and co-ordinate with other duty holders

Organisations that have a duty under the WHS laws must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons or organisations that have an overlapping duty in relation to areas of overlap. This is referred to as a horizontal consultation duty.

There could be several duty holders influencing how work is carried out at a workplace (for example suppliers, contractors and the building landlord). To meet their duty, the duty holders need to consult, co-operate and co-ordinate activities so as far as is reasonably practicable for all matters where they have shared or overlapping duties. The duty to consult, co-operate and co-ordinate with other duty holders doesn't require all involved to reach agreement about how to discharge their WHS duty. Each duty holder will separately remain responsible for meeting their WHS duties.



### Tip

The Model Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination provides further guidance to duty holders who share responsibility for the same WHS matter on how to consult, cooperate and coordinate activities with each other.

To have legal effect in a state or territory, the Model Code of Practice must be an approved Code of Practice in that jurisdiction – check the website of your state or territory regulator to see which Codes of Practice apply.



### Case Study

In *Boland v Trainee and Apprentice Placement Service Inc* [2016] SAIRC 14 (27 May 2016), a not-for-profit organisation was prosecuted for failing to consult, co-operate and co-ordinate with other duty holders. The organisation had placed an apprentice with a host employer, Shear Edge Roofing.

On 15 January 2014, the apprentice sustained multiple injuries when the guttering he was holding came into contact with high voltage powerlines. The Court heard that the host employer had limited safety measures in place on the site. The Court found that the not-for-profit organisation, before the incident, had an awareness of WHS issues. It had three field officers who attempted to attend the various sites every eight weeks to check in on their apprentices. This task was a difficult one but nevertheless there remained the duty to consult, cooperate and coordinate activities with all other duty holders (for example, consult the host employer about WHS). The not-for-profit organisation was not able to provide evidence that it had consulted on WHS issues and was convicted, fined \$12,000 and ordered to pay court costs and prosecutor's costs. The host employer was also prosecuted.



## Example

A not-for-profit arts organisation has contracted a construction company to make renovations to their workshop and gallery space. Both the arts organisation and the construction company will likely owe a duty under WHS Laws to ensure, so far as is reasonably practicable, that the workers carrying out the renovations are safe. This doesn't mean that the arts organisation and the construction company are both separately required to provide protective clothing and equipment to the workers. The construction company may fulfil their duty by providing the protective clothing and equipment to the workers, and the arts organisation may fulfil their duty by satisfying themselves that the construction company has provided the protective clothing and equipment to the workers, and making sure that this fulfils their own obligations.

## Duty to consult with workers

Organisations must consult, so far as is reasonably practicable, with their workers who carry out work for the organisation who are, or are likely to be, directly affected by matters relating to WHS. This duty is owed not only to employees but also to volunteers.

The WHS Act requires organisations to ensure there is consultation with workers on the following matters:

- the identification of hazards and assessment of risks arising from the work carried out or to be carried out by the organisation's operations
- decision making about ways to eliminate or minimise risks
- decision making about the adequacy of facilities for the welfare of workers
- proposed changes which may affect the health and safety of workers, and
- decision making about procedures for consultation with workers, resolving WHS issues, monitoring the health of workers, monitoring workplace conditions and providing information and training for workers

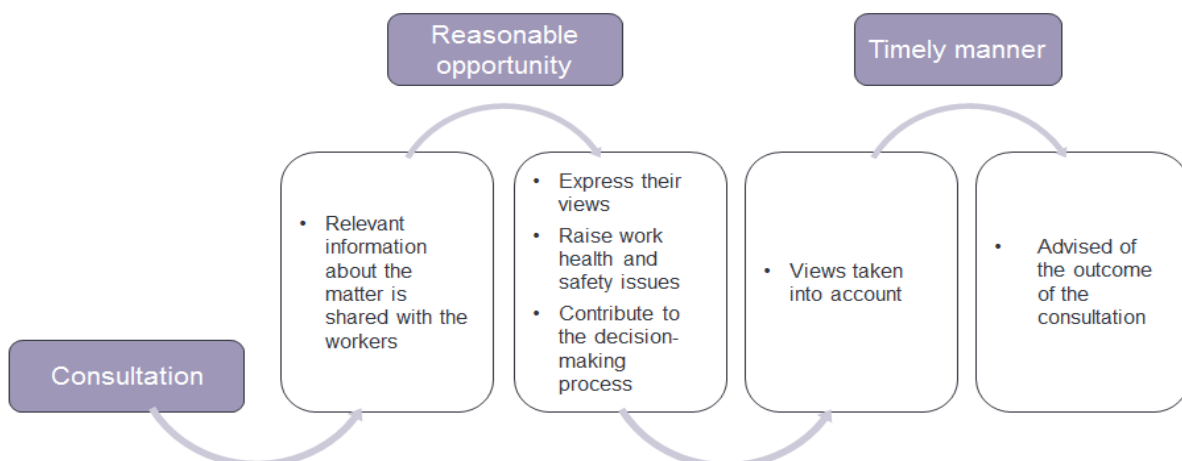
In these instances, organisations must ensure that:

- relevant information about the WHS matters is shared with workers
- workers are given a reasonable opportunity to express their views or concerns about WHS issues, and
- workers are able to contribute to any relevant decision-making processes

The views of the workers should be taken into account and workers should be advised of the outcome of consultations in a timely manner.

Where the workers are represented by a health and safety representative, consultation must involve that representative.

### The meaning of consultation





**Tip**

Consultation doesn't mean negotiation or joint decision making. The views of the worker don't have to be adopted. The duty just requires those views to be taken into account by the organisation.

However, consultation should be real and not a mere formality. It's a process designed to help the organisation by giving them access to ideas from workers and providing an opportunity for workers to point out any WHS issues arising from the relevant decision. These issues may relate to the effectiveness of controls, the interaction of various controls or the practical difficulties of implementing the proposed controls.

**Tip**

Ways that consultation can occur include:

- sending out regular newsletters by mail or email which feature WHS news, information and updates
- regularly updating the volunteer sections of notice boards or websites with information, including the organisations latest safe work policies and procedures
- having a 'suggestions' email box for workers to make suggestions about ways to work safely and other matters
- having worker surveys
- holding regular meetings to discuss the work that you do and how to do it in the safest way, and
- holding short 'toolbox talks' where specific health and safety topics relevant to the task at hand are discussed, or liaising with work groups via health and safety representatives, if workers request this
- advising of proposed changes to procedures or processes and requesting feedback on the changes

## Duty to permit election of health and safety representative, on request, and to confer with and train the representative

The workers of an organisation may request that the organisation facilitate the election of one or more persons as a 'health and safety representative' to represent the employees and volunteers of that organisation in respect of WHS matters.

The purpose of a health and safety representative is to:

- represent workers in the work group in relation to WHS matters
- monitor measures taken by the PCBU to ensure they are compliant with the WHS laws in relation to workers in the work group
- investigate complaints from members in the work group regarding WHS matters, and
- look into anything that appears to be a risk to the health or safety of workers in the work group arising from the conduct of the organisation

Where a request for election is made, the organisation must follow the prescribed procedure for establishing work groups that health and safety representatives will represent and facilitate the election of health and safety representatives by the organisation's workers.





The organisation must also:

- consult on WHS matters with any health and safety representative for a work group carrying out work for the organisation
- confer with the health and safety representative whenever reasonably requested by the representative
- allow the health and safety representative to have access to information relating to hazards (including associated risks) affecting the workers in the work group and the health and safety of the workers in the work group
- provide any resources, facilities and assistance to the health and safety representative that are reasonably necessary to enable the representative to perform their functions
- with the consent of one or more of the workers from the work group, allow the health and safety representative to be present at an interview concerning WHS between a group of workers and an inspector and the PCBU
- permit the health and safety representative to accompany an inspector during an inspection of any part of the workplace, and
- allow the health and safety representative to attend an approved WHS training course

Small organisations may not require a health and safety representative. In large organisations with both employees and volunteers, it may be useful for a health and safety representative to be elected.

## **Duty to establish a health and safety committee, on request, and to allow committee members to attend meetings and carry out functions**

The workers of an organisation may request that the organisation establish a 'health and safety committee'. This request may be made by an elected health and safety representative or by five or more workers from the organisation. If such a request is made, a committee must be established within two months of the request.

The purpose of a health and safety committee is to:

- facilitate co-operation between the organisation and workers in developing and carrying out measures designed to ensure the workers' health and safety while at work
- develop standards, rules and procedures in relation to health and safety that are to be followed or complied with at the workplace, and
- fulfil any other functions as agreed between the organisation and the committee

Organisations must allow each member of the health and safety committee to spend the time that is reasonably necessary to attend meetings of the committee or to carry out functions as a member of the committee.



# Part 4

**Who can be legally responsible  
under WHS laws?**



# Who can be legally responsible under WHS laws?

An organisation, its workers, its directors and other officers can all be liable for failure to comply with the WHS laws.

The names of the regulators in each jurisdiction are set out below.

Jurisdiction	Name of regulator
Commonwealth	<a href="#">Comcare</a>
Australia Capital Territory	<a href="#">WorkSafe ACT</a>
New South Wales	<a href="#">SafeWork NSW</a>
Northen Territory	<a href="#">NT WorkSafe</a>
Queensland	<a href="#">WorkSafe Queensland</a>
South Australia	<a href="#">SafeWork SA</a>
Tasmania	<a href="#">WorkSafe Tasmania</a>
Victoria	<a href="#">WorkSafe Victoria</a>
Western Australia	<a href="#">WorkSafe WA</a>

## Liability of the organisation itself

### Incorporated organisations

If your organisation is incorporated (such as an incorporated association or a company limited by guarantee), the organisation itself is considered to be a separate person for the purposes of the WHS laws and can be found guilty of breaches under the WHS laws.

This means that an incorporated organisation can be held responsible for breaches of the WHS laws by its officers, employees or agents, where those officers, employees or agents are performing tasks within the scope of their authority.

The regulator may prosecute not-for-profit organisations as well as commercial enterprises. The regulator may also prosecute the organisation's directors and other officers personally (see below for more information on officers' obligations).



## Unincorporated associations

If your association is unincorporated, it can't itself be penalised for breaches of the WHS laws.

However, as with an incorporated association, officers of an unincorporated association can be held personally liable for a breach of their officer duties under the WHS laws (unless they are volunteers). Others involved in an unincorporated association may also be liable under the WHS laws for a failure to comply with the duty of workers, or the duties of other persons at the workplace.

## Prosecution of officers

The regulator can prosecute the officers of an organisation when there has been a failure to comply with the officer's duty under the WHS Act.

### Who is an officer?

Under the WHS laws, officers of an organisation may include:

- a director, committee or board member of the organisation (including the secretary)
- a person who makes decisions, or participates in making decisions, that affect the whole or a substantial part of the operations of an organisation (for example, a CEO)
- a person who has the capacity to significantly affect the organisation's financial standing
- a person who commonly instructs the committee of management on how to perform its functions, and
- various people who may be involved in an organisation in positions of responsibility such as a receiver, administrator, liquidator or trustee of an organisation

### When are officers personally liable?

#### Paid officers

An officer of an organisation (whether incorporated or unincorporated), may be found personally liable for breach of the WHS Act if:

- they receive payment for their position as an officer in the organisation (that is, they are not a volunteer officer), and
- they fail to exercise due diligence (discussed below) to ensure that the organisation complies with its duties or obligations under the WHS Act

#### Volunteer officers

A volunteer officer is expected to comply with the duty of officers under the WHS laws. However, they can't be prosecuted for failing to comply with that duty. This immunity from prosecution under the WHS laws has been designed to ensure that people are not discouraged from taking up voluntary officer positions in organisations.

However, a volunteer officer can be prosecuted in their capacity as a 'worker' if they fail to meet their duty as a 'worker' under the WHS Act.



#### Tip

An officer will still be classed as a volunteer if their only form of payment from the organisation is reimbursement for out-of-pocket expenses incurred as a result of their position.



## Due diligence

An organisation's officers must exercise due diligence to ensure that the organisation complies with its duties or obligations under the WHS Act.

### Due diligence requires reasonable steps to:

- acquire and keep up-to-date knowledge of WHS matters

For example, acquire knowledge of what the WHS laws require, the strategies and processes for eliminating or minimising hazards and risks so far as is reasonably practicable and emerging issues.

- gain an understanding of the nature of the organisation's operations and the risks and hazards associated with those operations

For example, obtaining advice from a suitably qualified person and conducting safety audits to provide a general understanding of the hazards and risks associated with the organisation's operations.

- ensure the organisation has and uses appropriate resources and processes to eliminate or minimise health and safety risks

For example, gaining an understanding of what is needed for health and safety, making decisions about procedures and resources and ensuring they are used. Resources include human and not just financial resources

- ensure the organisation has appropriate processes for receiving and considering information regarding incidents and hazards, and responding to that information in a timely way

For example, considering the reporting of incidents, near misses and emerging hazards and risks, identifying if any further action is required to eliminate or minimise the hazards or risks so far as is reasonably practicable and ensuring these steps are taken by the organisation.

- ensure that the organisation implements processes for complying with any duty or obligation under the WHS laws

For example, considering legal reviews of WHS systems against legislative requirements and ensuring that any 'gaps' in compliance are addressed. This would include ensuring that risk assessments are performed in accordance with the requirements in the WHS Regulations (including in relation to psychosocial risk).

- verify the provision and use of resources and process referred to above

This requires active verification — for example verifying through inspection or auditing processes that the resources and processes are in place and being used.



### Case example

A research and public display facility allowed members of the public to feed and interact with bats. The facility's staff (including volunteers) and visitors were exposed to scratches and bites from the bats and risk of infection. None of the people who interacted with the bats were notified of the risk or treatment. And, an officer of the facility was aware of the risk of infection yet failed to implement proper procedures and protocols to eliminate or minimise the risk. The officer was sentenced to a 12 month court ordered undertaking with a recognisance of \$10,000 and was ordered to pay court costs of \$1,079.



### Tip

Officers should ensure that WHS is discussed regularly at committee meetings so that you can satisfy yourself (and discharge your due diligence duty) that all reasonably practicable steps are being taken to ensure a safe working environment for people involved in your organisation.

## Liability of workers

Workers in an organisation may also be personally liable if they don't comply with the duties that apply to 'workers' under the WHS Act. Regulators can prosecute workers for breaching their duties.

### What duties do workers owe?

#### Workers owe the following duties:

- to take reasonable care for their own health and safety
- to ensure that their acts or omissions don't adversely affect the health and safety of others
- to comply, so far as the worker is reasonably able, with any reasonable instructions the organisation gives to allow the organisation to comply with the WHS laws, and
- to cooperate with the organisation's reasonable WHS policies and procedures (that the organisation has notified the workers of)

Note that these obligations don't only apply to employees. Under the WHS laws, a worker includes any of the following people:

- employees
- volunteers
- contractors or subcontractors, and employees of those contractors or subcontractors
- officers
- employees of a labour hire company assigned to work in the organisation
- apprentices and trainees
- students gaining work experience, and
- outworkers



### Case example

In *R v Watts* [2020] ACTSC 91, a worker was killed when a mobile crane attempted to move an 11 tonne generator and rolled over. It was alleged that the crane was overloaded and the worker driving the crane overrode the safety alarm. The crane-driver knew there were several people in the vicinity and overrode the alarm several times regardless.

The worker driving the crane pleaded guilty for, without reasonable excuse, engaging in conduct that exposed an individual, who they owed a duty, to the risk of death or serious injury or illness and was reckless as to that risk. The worker was sentenced to 12 months imprisonment, which was served as a suspended sentence.



### Example

In *Campbell v Rowe* [2019] SAET 104 and *Campbell v Chenowith* [2019] SAET 181 two workers were convicted of breaching their duty as a worker in relation to the same incident.

The two defendants, both supervisors, were involved in an incident where one squirted flammable liquid onto an apprentice and lit it on fire, while the other failed to intervene. The behaviour was described as dangerous horseplay, and the victim could have sustained significant burns but fortunately did not. Both defendants pled guilty and were convicted.

Mr Rowe was fined \$12,000 and Mr Chenowith \$21,000.



### Note

A number of states and territories have introduced the offence of industrial manslaughter into legislation. This includes Queensland, New South Wales, Victoria, the Northern Territory and Western Australia. The maximum penalties for industrial manslaughter vary in each jurisdiction but generally include lengthy prison sentences, fines of more than \$10 million, or both.



# Part 5

## Complying with WHS laws





# Complying with WHS laws

Many of the duties in the WHS laws require that organisations do as much as is 'reasonably practicable' to ensure health and safety.

In this part of the guide, the meaning of 'reasonably practicable' is considered in detail.

## What does 'reasonably practicable' mean?

The primary duty under the WHS laws requires a PCBU to ensure, so far as is reasonably practicable, the health and safety of workers while at work.



### Reasonably practicable

What is reasonably practicable means:

that which is reasonably able to be done in relation to ensuring health and safety

Whether certain action is reasonably practicable requires taking into account and weighing up all of the relevant matters.

These matters include:

- the likelihood of the hazard or risk concerned occurring
- the degree of harm that might result from the hazard or the risk
- what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk
- the availability and suitability of ways to eliminate or minimise the hazard or risk, and
- after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost of eliminating or reducing the hazard or risk, including whether the cost is grossly disproportionate to the risk

No single matter determines what is (or was at a particular time) reasonably practicable to be done for ensuring health and safety.

Ordinarily cost will not be the key factor in determining what it is reasonably practicable for a duty holder to do, unless it can be shown to be 'grossly disproportionate' to the risk.



# Objective test

The question of what is 'reasonably practicable' is determined objectively. There are two elements to this test:

1.

- First, the PCBU must consider what can be done. That is, what is possible in the circumstances for ensuring health and safety?

2.

- They must then consider whether, in the circumstances, it is reasonable to do all that is possible

This means that what can be done should be done unless it is reasonable in the circumstances for an organisation to do something less.

This ensures that workers and others are provided with the highest level of protection that is reasonably practicable.



## Case example – psychosocial injury

In *Kozarov v Victoria* [2022] HCA 12, Kozarov worked as a solicitor with the Victorian Department of Public Prosecutions. She worked closely with victims of child sexual abuse.

In 2012 Kozarov was diagnosed with PTSD and major depressive disorder.

The High Court found that there was an obvious and inherent risk of psychiatric injury in Kozarov's position. Despite her employer being aware of this risk, it had not taken sufficient steps to manage this risk and that this resulted in her injury. The High Court was satisfied that in the circumstances, the employer had a duty of care to take proactive steps to reduce the risk of psychiatric injury.



## Case example

In the decision of *Awwad v Amcor Packaging (Australia) Pty Ltd* [2008] SAIRC 8 (18 February 2008), the Court stated that what must be guarded against by employers is not just conventional actions of employees.

The concept of what is foreseeable extends to foreseeable forms of misuse and includes:

- momentary lapses of skill or memory
- errors of judgment
- the deliberate taking of shortcuts
- negligence
- disregard of instructions, and
- disregard of personal safety

Essentially, organisations must guard workers against their own actions, which may sometimes be less than would be expected of a reasonable person.



In Australia, the courts have confirmed that:

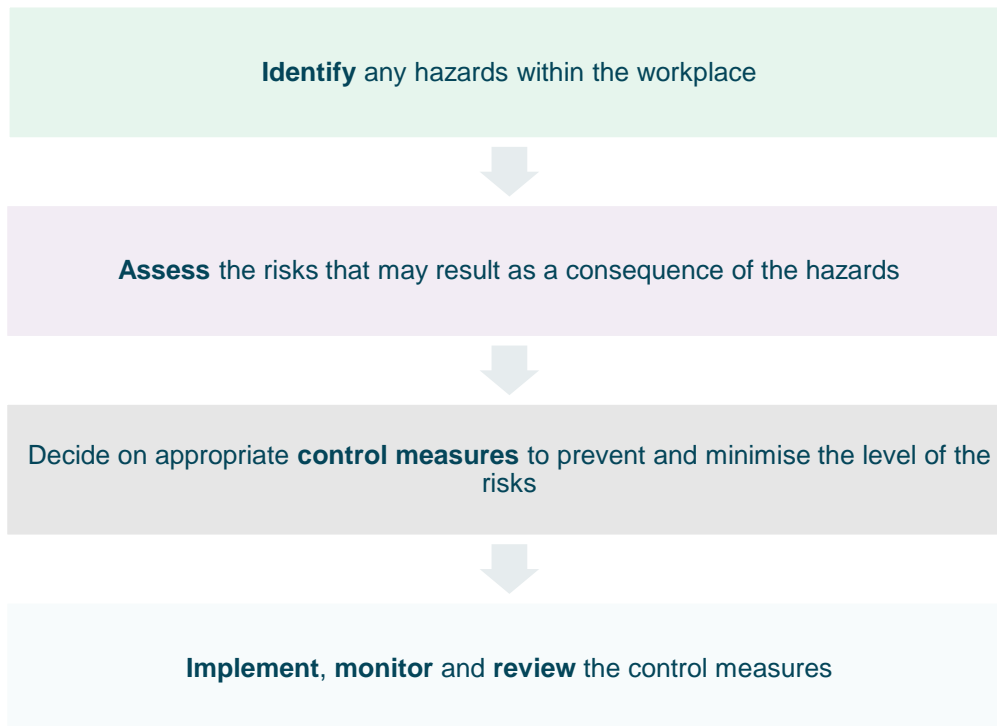
- an available way of addressing a workplace risk is likely to be reasonably practicable
- something will not be 'reasonably practicable' simply because it is physically possible
- what is 'reasonably practicable' is judged according to what was known at the time of the alleged breach, and
- to determine what is 'reasonably practicable', it's necessary to balance the likelihood of the risk occurring against the cost, time and difficulty involved in removing that risk

## Risk management

The primary duty imposed on an organisation to ensure health and safety requires a risk management process.

The Model Code of Practice: How to Manage Work Health and Safety Risks (**Code of Practice**) states that the first step in effective risk management is commitment from management (those who operate and manage the business and undertaking) as well as the support of workers.

Additionally, the Code of Practice set out a four stage process to identify, assess and control risks. This process requires organisations to:



Risk management is an ongoing process, triggered when changes affect the work activities undertaken.

The Code of Practice outlines some examples of when the risk management process may be triggered, including when:

- starting a new business or purchasing a business
- changing work practices, procedures or the work environment
- purchasing new or used equipment or using new substances
- planning to improve productivity or reduce costs
- new information about workplace risks becomes available
- responding to workplace incidents (even if they have caused no injury)
- responding to concerns raised by workers, health and safety representatives or others at the workplace, or
- required by the WHS Regulations for specific hazards, including psychosocial hazards



## The risk management process



Source: Safe Work Australia, *How to Manage Work Health and Safety Risks, Code of Practice (December 2011)*

When determining what controls are appropriate, the WHS laws require organisations to apply the hierarchy of risk controls by implementing the highest order of controls before the lower order of controls.

Specifically, duty holders are required to eliminate risks to health and safety so far as is reasonably practicable, and if it's not reasonably practicable to eliminate risks to health and safety – minimise those risks so far as is reasonably practicable.

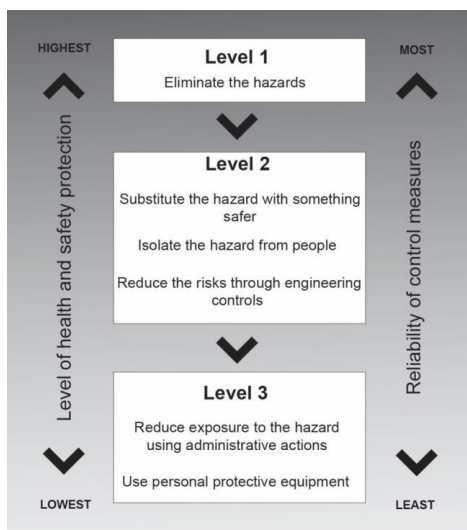
In the event that it's not reasonably practicable for a duty holder to eliminate risks to health and safety, they must minimise risks, so far as is reasonably practicable by doing one or more of the following:

- substituting (wholly or partly) the hazard giving rise to the risk within something that gives rise to a lesser risk
- isolating the hazard from any person exposed to it, or
- implementing engineering controls

Should any risk still remain, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls. Remaining risk must then further be minimised, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment. This process is known as the hierarchy of risk controls.

Psychosocial hazards must be managed in accordance with the WHS Regulations, which set out the matters to which regard must be had in managing those risks.

## The hierarchy of risk controls



Source: Safe Work Australia, *How to Manage Work Health and Safety Risks, Code of Practice (December 2011)*



For more detailed information on each of these steps, please refer to the [Model Code of Practice: How to Manage Work Health and Safety Risks](#). To have legal effect in a jurisdiction, the Code of Practice must be an approved Code of Practice in that jurisdiction.

The cost of eliminating or minimising risks may be a relevant factor for many organisations with limited resources. **However**, if there is an incident in the workplace, it's not a defence to a breach of the WHS laws to claim that 'we are a not-for-profit group and we couldn't afford to reduce that risk'.

If you can't eliminate or minimise the risk, you should give serious consideration as to whether the organisation should stop the activity which gives rise to the risk.

To reduce your chance of being found liable for a breach of the WHS laws, your organisation needs to be able to show that it identified and considered risks and then took reasonably practical steps to eliminate or minimise those risks. Documented evidence of these processes is recommended. Often the measures introduced don't need to be expensive or elaborate. For example, if your volunteers are lifting items, you may not need to buy an expensive hydraulic lifting machine, but you could train volunteers in safe lifting practices and post reminder notices around the premises.



### Tip

Your organisation may wish to review its approach to risk management and appropriate insurance options. See our separate [guide to risk management and insurance](#).



# Part 6

## Responding to a workplace incident



# Responding to a workplace incident

**There is no ‘one size fits all’ response to a WHS incident. The best and most appropriate response will largely depend on the nature of the incident. However, there are some incidents that require immediate response and notification to the regulator under the WHS laws.**

There are significant penalties for organisations that fail to follow the correct procedures following a serious workplace incident. These procedures, together with the types of incidents that require notification, are discussed below.

## What to do if a WHS incident occurs

There are steps that an organisation should follow when responding to a WHS incident. These steps are summarised in the checklist below.

### Steps an organisation should take when responding to a WHS incident:

**Assess the seriousness of the incident.** Immediately after an incident occurs, the organisation should assess the seriousness of the incident and find out if an injury has occurred to any person

**Provide appropriate medical treatment and address any immediate dangers.** If necessary in the circumstances, medical treatment should be provided to any person injured in the incident, and steps should be taken to address any immediate dangers (for example, evacuate the workplace).

**Consider if there is a requirement to report the incident.** If necessary, the incident should be reported to the regulator. The circumstances in which notification to the regulator is required and the notification process are outlined in more detail below.

**Preserve the incident site.** If the incident is notifiable, the incident site must be preserved to allow inspection and investigation by the regulator, if required. There is an obligation to ensure, so far as is reasonably practicable, that the incident site is not disturbed until an inspector arrives at the site, or unless directed otherwise by the inspector. Disturbance may be allowed in certain circumstances which are discussed in more detail below.

**Maintain records of the incident.** There is an obligation to maintain records of notifiable incidents (discussed in more detail below), but it's best practice to maintain records of all incidents, whether notifiable or not.

**Investigate and prevent re-occurrences.** Following an incident, organisations should investigate the circumstances of how the incident occurred. The investigation should be as detailed as the circumstances of the incident require. If appropriate, notes should be recorded and witness accounts should be taken to provide the PCBU with a clear picture of how and why the incident occurred.



### Tip

It's a good idea to have one or two people involved in your organisation (for example an officer or a manager) who agree to be responsible for co-ordinating the response to an incident.

This doesn't mean that the person is solely responsible – but it's helpful to have one person to co-ordinate the response and ensure that the incident is dealt with appropriately. This person should be aware of the responsibilities of the organisation under the WHS Laws (including notification and preservation requirements, as outlined below).



### Tip

Only certain 'notifiable incidents' arising out of the conduct of the business or undertaking must be notified.

For example, the following would not be a notifiable incident under WHS Laws:

- a person driving to work is injured in a car accident (where driving is not part of their work), or
- a person with a known history of epilepsy has a seizure at work

## Notification requirements

While all workplace incidents (no matter how large or small) should be recorded by organisations, there are particular legal obligations to report incidents that result in death or serious injury or illness, or a dangerous incident to regulators.

### The immediate reporting requirement for 'notifiable incidents'

An organisation must notify the regulator immediately after they become aware of the occurrence of an incident that is considered a 'notifiable incident'.

Procedures should be put into place in your organisation to ensure WHS incidents are promptly notified to the people responsible for responding to them.

To be notifiable, an incident must arise out of the conduct of the organisation's business or undertaking. An incident is not notifiable just because it happens at or near a workplace.

#### What is a 'notifiable incident'?

**A 'notifiable incident' is one in which involves any of the following:**

- the death of a person
- a serious injury or illness of a person. This includes injury or illness requiring the person to have:
  - immediate treatment as an in-patient in a hospital (a serious injury or illness does not include out-patient treatment)
  - immediate treatment for amputation, serious head injury, serious eye injury, serious burn, spinal injury, loss of a bodily function, serious lacerations or the separation of skin from tissue, or
  - medical treatment within 48 hours of exposure to a substance





- a dangerous incident. This includes an incident that exposes a worker or any other person to a serious risk to their health and safety emanating from immediate or imminent exposure to:
  - an uncontrolled escape, spillage or leakage of a substance
  - an uncontrolled implosion, explosion or fire
  - an uncontrolled escape of gas or steam or a pressurised substance
  - an electric shock
  - the fall or release from a height of any plant, substance or thing
  - the collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be authorised for use in accordance with the WHS Regulations
  - the collapse or partial collapse of a structure
  - the collapse or failure of an excavation or of any shoring supporting an excavation
  - the interruption of the main system of ventilation in an underground excavation or tunnel, and
  - the inrush of water, mud or gas in an underground excavation or tunnel

If the incident is a notifiable incident, the incident must be notified to the regulator by the fastest possible means. The notification must be given by telephone or in writing (including email or fax).

If notification of an incident is done by telephone, the person giving notice by telephone must:

- give the details of the incident requested by the regulator, and
- if required by the regulator, give a written notice of the incident within 48 hours of that requirement being made

## Maintaining records of notifiable incidents

Your organisation must keep a record of each notifiable incident that has occurred for at least five years from the day that notice of that incident is given to the regulator.

Failure to keep these records may lead to penalties under the WHS laws.

## Preservation of the incident site

The WHS laws require that notifiable incident sites be preserved to allow inspection of the site and a full investigation (if required). If a notifiable incident does occur within your organisation, you must ensure (so far as is reasonably practicable) that the site is not disturbed until an inspector arrives at the workplace, unless you have been directed otherwise by the regulator.

There are exceptions that allow a site to be disturbed, including where disturbance is required:

- to assist an injured person
- to remove a deceased person
- to make the site safe or to minimise the risk of a further notifiable incident
- to facilitate any police investigation, or
- in accordance with the authorisation of the regulator

The requirement to preserve a site only applies to the immediate area where the incident occurred and not the whole of the workplace. If you are unsure as to whether you are allowed to enter the incident site, or the extent to which you can disturb the location, you should contact the regulator to discuss your concerns.

## Investigate and prevent reoccurrences

Following an incident, organisations should investigate the circumstances of the incident. Notes should be recorded and witness accounts should be taken to give the organisation a clear picture of how and why the incident occurred. The regulator may also conduct an investigation in relation to whether there has been a breach of the WHS laws.



The WHS laws require a PCBU to consult with workers regarding the identification of any risks and possible resolution of any health and safety issues. On the basis of this investigation, PCBUs should work with workers and volunteers to put measures in place to ensure that similar incidents don't occur in the future.



### Caution

There are significant penalties for organisations that fail to comply with obligations regarding notifiable incidents under the WHS Act.



### Tip

Include notices around your workplace about incident procedures and who to contact when an incident occurs. Your organisation should hold regular training for staff and managers on the incident response process.

These health and safety systems, including any plans to prevent incident occurrence, should be regularly reviewed and updated by the organisation.



### Case example

A worker sustained head injuries while pressure testing the tank compartment of a road fuel tanker. The company didn't notify the regulator, and the regulator only became aware of the incident 17 months and 10 days after the incident when it was notified by lawyers acting for the injured worker. The company was fined \$25,000 for failing to notify a notifiable incident.

*R v KFS Fuel Services Pty Ltd* (Unreported, Toowoomba Magistrates Court, Magistrate Lee, 2 June 2017)



For more information about risk assessments and insurance, see our webpage [managing risk and insurance](#).

For more information on director's duties, read [our duties guide](#).



# Part 7

Entry and inspection powers of  
inspectors

# Entry and inspection powers of inspectors

Inspectors monitor compliance with WHS laws.

Under the WHS laws, inspectors have various powers to enter and inspect workplaces and are able to issue notices requiring organisations and people to take particular actions.

This part of the guide summarises these powers.

## Inspectors' power to enter workplaces

Inspectors have a power to enter workplaces, and they are allowed to do so with or without the consent of the person with management or control of the workplace.

As soon as is practicable after entering the workplace, the inspector must take all reasonable steps to notify the relevant PCBU, the person with management or control of the workplace and any health and safety representatives of their presence. This is not needed if it would defeat the purpose of entry or cause unreasonable delay.



### Caution

Penalties may be imposed on people who impede the work of inspectors.

In particular, fines can be imposed on people and organisations who:

- fail to give reasonable help to the inspector, when requested, without reasonable excuse
- intentionally hinder or obstruct an inspector in exercising their duties, or inducing another person to do so, or
- directly or indirectly assault, threaten or intimidate an inspector or a person assisting an inspector

Once inside a workplace, an inspector is permitted to:

- inspect, examine and make inquiries at the workplace
- inspect and examine anything (including a document) at the workplace
- bring to the workplace and use any equipment or materials that may be required
- take measurements, conduct tests and make sketches or recordings (including photographs, films, audio, video, digital or other recordings)
- take and remove for analysis a sample of any substance or thing without paying for it
- require a person at the workplace to give the inspector reasonable help to exercise the inspector's powers set out above, and
- exercise any compliance power or other power that is reasonably necessary to be exercised by the inspector for the purposes of the WHS laws



An inspector may be accompanied by an assistant (such as an interpreter) to assist the inspector if the inspector considers the assistance necessary.



### Note

Before requiring a person to answer a question or provide information or document, the inspector must warn the person that protection from self-incrimination is not a 'reasonable excuse' to refuse to answer the questions or provide the information (except in South Australia).

However, the answers provided can't be used as evidence against a person in civil or criminal proceedings, except in relation to proceedings concerning the provision of false or misleading information.

## Notices issued by the regulator

Inspectors can issue three types of notices:

- Improvement Notices
- Prohibition Notices, and
- Non-Disturbance Notices

If you receive a notice, you should take it very seriously as there are significant penalties imposed for failing to comply with notices.

Each type of notice is explained further below.



### Tip

Your organisation may wish to speak to a lawyer if it receives an Improvement, Prohibition, or Non-disturbance Notice.

## Improvement Notices

An inspector has the authority to issue an Improvement Notice to an organisation if the inspector reasonably believes that the organisation has contravened the WHS laws or believes an existing contravention is likely to continue or be repeated.

An Improvement Notice may contain directions or recommendations or both about how to remedy the breach, prevent a likely breach from occurring or remedy things or operations causing the breach.

There are penalties for failing to comply with an Improvement Notice.

## Prohibition Notices

If an inspector reasonably believes that an activity is occurring, or may occur, in the workplace that involves a serious risk to the health or safety of a person, they may give a person who has control over the activity a direction prohibiting the carrying on of that activity. This may be given initially as an oral warning but must be confirmed by a written notice issued to the person as soon as practicable.

Significant penalties can be imposed for non-compliance with a Prohibition Notice.

## Non-disturbance Notices

An inspector can issue a Non-disturbance Notice to a person with management or control of a workplace if they reasonably believe that it's necessary to do so to facilitate the exercise of their compliance powers.



A Non-Disturbance Notice may require the person to preserve the site (including any plant, substance, structure or thing associated with the site) where the notifiable incident has occurred for a period of time, or prevent the disturbance of a particular site (including the operation of plant) in other circumstances for a period, if reasonable in the circumstances. The period of time that the Non-Disturbance Notice may preserve the site or prevent disturbance is limited to seven days.

However, a Non-Disturbance Notice does not prevent actions:

- to assist injured persons
- to remove deceased persons
- essential to make the site safe or prevent further incident
- associated with police investigations, or
- that have been permitted by an inspector

## Appeals against notices

If your organisation disagrees with an Improvement, Prohibition Notice or Non-Disturbance Notice, you can appeal it.

Depending on the jurisdiction, you can generally apply to the regulator for an internal review of the notice.

An appeal against a notice must be lodged within 14 days after the day on which the decision first came to the organisation's notice (or such longer period as the regulator allows). However, in relation to Improvement Notices, the appeal must be lodged within the period specified in the notice for compliance with the notice or 14 days (whichever is the lesser), or such longer period as the regulator allows.

The internal reviewer must review the decision to issue the notice and make a decision within 14 days after the application for internal review is received (additional time is allowed if further information is required). The decision may be to confirm or vary the notice, or to set aside the notice and substitute another decision that the internal reviewer considers appropriate. As soon as practicable after reviewing the decision, the internal reviewer must give the applicant in writing, the decision on the internal review and the reasons for the decision. If the reviewable decision is not varied or set aside within the 14-day period, the decision is taken to be confirmed by the internal reviewer.

Alternatively, an organisation can also seek an external review of the reviewable decision made by the regulator, or if an internal review has been sought and the decision has been confirmed or varied, appeal that internal review decision by making an external review application. The forum for those applications differs from jurisdiction to jurisdiction.

In NSW, for example, it involves an application to the NSW Industrial Relations Commission (**NSW Commission**). The application must be made within 14 days after the day on which the decision first came to the applicant's notice. In circumstances where a regulator is required by the NSW Commission to give the eligible person a statement of reasons, within 14 days after the day on which the statement is provided. You should check the specific rules and timelines applicable in your state or territory.

You should seek legal advice if you intend to appeal a notice.

