

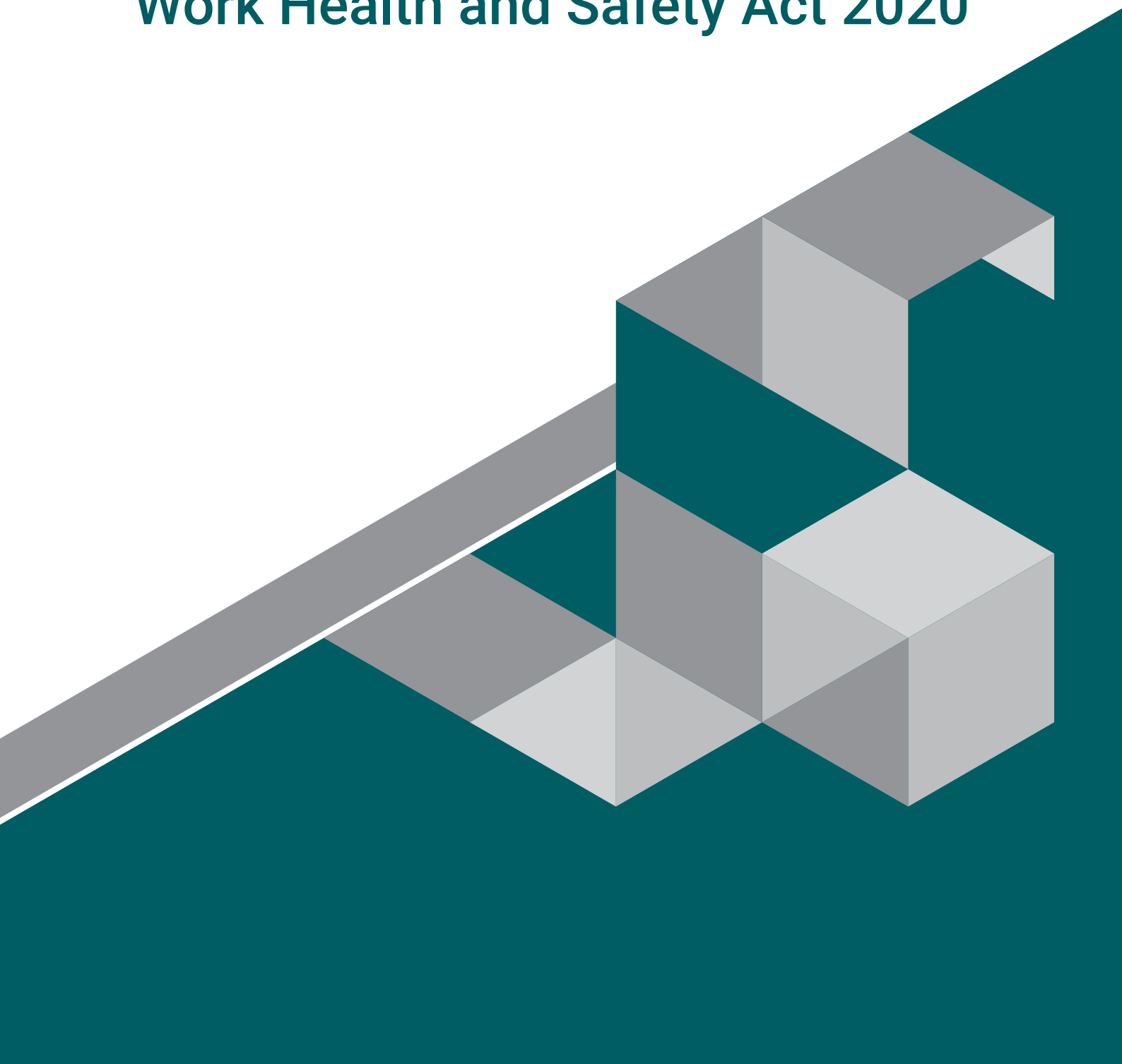


Government of **Western Australia**  
Department of **Mines, Industry Regulation and Safety**



**WorkSafe**  
Western Australia

Overview of  
**Western Australia's  
Work Health and Safety Act 2020**



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## Reference

Department of Mines, Industry Regulation and Safety, 2021, Overview of Western Australia's Work Health and Safety Act 2020: Department of Mines, Industry Regulation and Safety, Western Australia, 43 pp.

ISBN 978 1 920836 62 7 (web)

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## Acknowledgement

This publication was produced by the Department of Mines, Industry Regulation and Safety, Western Australia using information originally developed by Safe Work Australia.

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# Introduction

On 12 July 2017, the Premier announced that work would commence to develop modernised work health and safety (WHS) laws for Western Australia.

Western Australia's *Work Health and Safety Act 2020* (WHS Act) was passed by Parliament on 3 November 2020 and assented to by the Governor on 10 November 2020.

When implemented in 2022, all Western Australian workplaces will come under this single Act, which will replace the following legislation:

- *Occupational Safety and Health Act 1984*
- the work health and safety elements of the following Acts, covering mining and petroleum
  - *Mines Safety and Inspection Act 1994*
  - *Petroleum and Geothermal Energy Resources Act 1967*
  - *Petroleum (Submerged Lands) Act 1982*
  - *Petroleum Pipelines Act 1969*.

The new laws are largely based on the national model WHS Act used in other states and territories (except Victoria), so companies will have similar obligations and requirements across Australia.

Transitional arrangements will provide sufficient time for duty holders to adapt their safe systems of work to the new requirements.

*Note: Levies to cover the cost of regulating health and safety will continue to be collected and used for these purposes, under the Mines Safety and Inspection Act 1994 and the Petroleum and Geothermal Energy Safety Levies Act 2011, and supporting regulations.*

## Format of the WHS Act

Some sections of the model WHS Act were tailored for Western Australia following extensive consultation. Where possible, the new laws align with the Part, Division and section numbers of the model WHS Act, with the term 'Not used' replacing any clauses that do not apply in Western Australia.

Other changes include terminology and areas of the model WHS Act that intersect with non-WHS laws, such as industrial relations legislation.

To guide interpretation of some segments of the Act, Parliament has included 'Notes for this section' at various points.

The Act comprises 16 parts with further Divisions and subsections.

## Overview of the WHS legislation

The WHS Act covers all workplaces within the natural jurisdiction of Western Australia, including mines, petroleum and geothermal energy operations. There are a number of exceptions where other legislation applies.

Some of the differences include:

- major hazard facilities and dangerous goods storage and handling will continue to be regulated separately under the *Dangerous Goods Safety Act 2004*
- petroleum and geothermal energy operations are included in the WHS Act, supported by a dedicated set of regulations.

*Note: Commonwealth Government workers and some self-insured licensees are covered by Comcare under the Work Health and Safety Act 2011 (Cth). Comcare is responsible for workplace safety, rehabilitation and compensation in the Commonwealth jurisdiction, and is a federal statutory authority.*

The WHS Act will be supported by three sets of regulations:

- Work Health and Safety (General) Regulations – applies to all workplaces except those covered by the other two sets of regulations [WHS General Regulations]
- Work Health and Safety (Mines) Regulations – applies to mining and mineral exploration operations [WHS Mines Regulations]
- Work Health and Safety (Petroleum and Geothermal Energy Operations) Regulations – applies to onshore and offshore petroleum, pipeline and geothermal energy operations [WHS PAGEO Regulations].

The WorkSafe Commissioner, an independent statutory office reporting directly to the Minister for Industrial Relations, will be responsible for performing the functions and exercising the powers of the regulator under the WHS Act.

The Department of Mines, Industry Regulation and Safety will assist the regulator in the administration of the WHS Act, including the provision of inspectors and other staff to secure compliance with the legislation.

## Key features of the WHS Act

- The primary duty holder is the ‘person conducting a business or undertaking’ (PCBU) which is intended to capture a broader range of contemporary workplace relationships.
- A primary duty of care requiring PCBUs to, so far as is reasonably practicable, ensure the health and safety of workers and others who may be affected by the carrying out of work.
- Duties of care for persons who influence the way work is carried out, as well as the integrity of products used for work, including the providers of WHS services.
- A requirement that ‘officers’ exercise ‘due diligence’ to ensure compliance.
- The new offence of industrial manslaughter, which provides substantial penalties for PCBUs where a failure to comply with a WHS duty causes the death of an individual, in circumstances where the PCBU knew the conduct could cause death or serious harm.
- The voiding of insurance coverage for WHS penalties, and imposition of penalties for providing or purchasing this insurance.
- The introduction of WHS undertakings, which are enforceable, as an alternative to prosecution.
- Reporting requirements for ‘notifiable incidents’ such as the serious illness, injury or death of persons and dangerous incidents arising out of the conduct of a business or undertaking.
- A framework to establish a general scheme for authorisations such as licences, permits and registrations (for example, for persons engaged in high risk work or users of certain plant or substances), including provisions for automated authorisations.

- Provision for consultation on WHS matters, participation and representation.
- Provision for the resolution of WHS issues.
- Protection against discrimination for those who exercise or perform or seek to exercise or perform powers, functions or rights under the Act.
- Provision for enforcement and compliance, including a compliance role for WHS inspectors.
- Establishment of Western Australia's peak tripartite consultative bodies:
  - Work Health and Safety Commission (WHSC), replacing the Commission for Occupational Safety and Health (COSH)
  - Mining and Petroleum Advisory Committee (MAPAC), replacing the Mining Industry Advisory Committee (MIAC), which covered mining only.

# The WHS Act and its purpose (sections 1-3)

The formal title of the Act is the *Work Health and Safety Act 2020*.

The WHS Act and accompanying regulations will commence in January 2022.

The WHS Act provides a framework to protect the health, safety and welfare of workers in Western Australian workplaces, and of other people who might be affected by the work.

The WHS Act aims to:

- protect the health and safety of workers and other people by eliminating or minimising risks arising from work or workplaces
- ensure fair and effective representation, consultation and cooperation to address and resolve health and safety issues in the workplace
- encourage unions and employer organisations to take a constructive role in improving work health and safety practices
- assist businesses and workers to achieve a healthier and safer working environment
- promote information, education and training on work health and safety
- provide effective compliance and enforcement measures
- deliver continuous improvement and progressively higher standards of work health and safety.

In furthering these aims, regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable.

For these purposes, 'health' includes psychological health as well as physical health.



# WHS regulations, codes of practice and other supporting guidance (sections 274-276)

## WHS regulations

The three sets of WHS Regulations specify the way in which some duties under the WHS Act must be met, and prescribes procedural or administrative requirements to support the WHS Act (for example, requiring licences for specific activities and the keeping of records).

## Codes of practice

Codes of practice provide practical guidance on how to meet the standards set out in the WHS Act and the WHS Regulations. Codes of practice are admissible in proceedings as evidence of whether or not a duty under the WHS laws has been met. They can also be referred to by an inspector when issuing an improvement or prohibition notice.

It is recognised that equivalent or better ways of achieving the required work health and safety outcomes may be possible. For that reason, compliance with codes of practice is not mandatory providing that any other method used provides an equivalent or higher standard of work health and safety than suggested by the code of practice.

## Interpretive guidelines

Interpretive guidelines are a formal statement on how the WHS regulator believes key concepts in the WHS Act will operate and provide an indication of how the laws will be enforced.

# Key terms and definitions

The following terms are used throughout this publication.

## Selected terms (sections 4-8)

**Duty holder** – refers to any person who owes a work health and safety duty under the WHS Act including a PCBU, designer, manufacturer, importer, supplier, installer of products or plant used at work (upstream duty holders), an officer and workers. More than one person can concurrently have the same duty in which case the duty is shared. Duties cannot be transferred.

**Health and safety committee (HSC)** – a group established under the WHS Act that facilitates cooperation between a PCBU and workers to provide a safe place of work. The committee must have at least 50 per cent of members who have not been nominated by the PCBU – that is, workers or health and safety representatives.

**Health and safety representative (HSR)** – a worker who has been elected by a work group under the WHS Act to represent them on health and safety issues.

**Officer** – an officer within the meaning of section 9 of the *Corporations Act 2001* (Cth) other than each partner within a partnership. Broadly, an officer is a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the organisation's activities. This does not include a local government member acting in that capacity or a minister of a state, territory or the Commonwealth.

An officer can also be an officer of the Crown or a public corporation if they are a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the Crown or public corporation.

Each partner within a partnership is not an officer but a PCBU in their own right.

**Person conducting a business or undertaking (PCBU)** – a person conducting a business or undertaking alone or with others, whether or not for profit or gain. A PCBU can be a sole trader (for example, a self-employed person), each partner within a partnership, company, unincorporated association, government department or public corporation (including a local or regional government).

A local government member acting in that capacity is not a PCBU.

A 'volunteer association' that does not employ anyone is not a PCBU. If it becomes an employer it also becomes a PCBU for purposes of the WHS Act.

A 'strata company' responsible for any common areas used only for residential purposes is not a PCBU, unless it engages a worker as an employee.

**Plant** – includes any machinery, equipment, appliance, container, implement or tool, and any component or anything fitted or connected to these things.

**Structure** – anything that is constructed, whether fixed or moveable, temporary or permanent and includes buildings, masts, towers, framework, pipelines, transport infrastructure and underground works (shafts or tunnels). Includes any component or part of a structure.

**Substance** – any natural or artificial substance in the form of a solid, liquid, gas or vapour.

**Supply** – supply and re-supply of a thing provided by way of sale, exchange, loan, lease, hire or hire-purchase arrangement, whether as principal or agent.

**Volunteer** – a person who acts on a voluntary basis regardless of whether they receive out of pocket expenses.

**Volunteer association** – a group of volunteers working together for one or more community purposes – whether registered or not – that does not employ anyone to carry out work for the association.

**Worker** – any person who carries out work for a PCBU, including work as an employee, contractor, subcontractor, self-employed person, outworker, apprentice or trainee, work experience student, employee of a labour hire company placed with a 'host employer' and volunteers.

**Work group** – a group of workers represented by an HSR who in many cases share similar work conditions (for example, all the electricians in a factory, all people on night shift, all people who work in the loading bay of a retail storage facility).

**Workplace** – any place where a worker goes or is likely to be while work is carried out for a business or undertaking. This may include offices, factories, shops, construction sites, vehicles, ships, aircraft or other mobile structures on land or water such as offshore units and platforms (that are not already covered under the Commonwealth's offshore WHS laws).

## Definition of reasonably practicable (section 18)

A guiding principle of the WHS Act is that all people are provided the highest level of health and safety protection from hazards arising from work, so far as is reasonably practicable.

The term 'reasonably practicable' means what could reasonably be done at a particular time to ensure health and safety measures are in place.

In determining what is reasonably practicable, there is a requirement to weigh up all relevant matters including:

- the likelihood of a hazard or risk occurring (the probability of a person being exposed to harm)
- the degree of harm that might result if the hazard or risk occurred (the potential seriousness of injury or harm)
- what the person concerned knows, or ought to reasonably know, about the hazard or risk and ways of eliminating or minimising it
- the availability of suitable ways to eliminate or minimise the hazard or risk
- the cost of eliminating or minimising the hazard or risk.

Costs may only be considered after assessing the extent of the risk and the available ways of eliminating or minimising the risk.

Cost will not ordinarily 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.

# Work health and safety duties

## General principles (sections 13-17)

The WHS Act sets out work health and safety duties for PCBUs, officers, unincorporated associations, government departments and public corporations, workers and other people at a workplace.

The WHS Act covers:

- people who carry out work in any capacity for a person conducting a business or undertaking including employees, contractors, subcontractors, self-employed persons, outworkers, apprentices and trainees, work experience students and volunteers who carry out work
- other people at a workplace like visitors and customers at a workplace.

The WHS Act has limited application to 'volunteer associations' who do not employ anyone.

## Multiple and shared duties (sections 14-16)

A person may have more than one duty. For example, the working director of a company has duties as an officer of the company and also as a worker.

More than one person may have the same duty. A duty cannot be transferred to another person.

If more than one person has a duty for the same matter, each person retains responsibility and must discharge their duty to the extent to which the person has the capacity to influence and control the matter — disregarding any attempts to 'contract out' of their responsibility.

### Examples

- A labour hire company hires out its employees to 'host employers' to carry out work for them. Both the labour hire company and the 'host employer' owe a duty of care to those employees. In such cases both are fully responsible for meeting that duty to the extent to which they have capacity to influence and control the matter. It is not possible to 'contract out' work health and safety duties.
- A principal contractor and a subcontractor for construction work must ensure, so far as is reasonably practicable, the provision of adequate facilities for the welfare of the workers carrying out the construction work. This does not mean that two sets of facilities need to be provided by each duty holder. The principal contractor may agree to provide facilities for all workers and visitors to the site as part of their contractual arrangement for the construction work. The subcontractor need only be satisfied the arrangement is in place and the facilities are suitable for their workers.

## Duties of a PCBU

### Primary duty of care (section 19)

The WHS Act requires all PCBUs to ensure, so far as is reasonably practicable, the health and safety of:

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

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

PCBUs owe a similar duty of care to other people who may be at risk from work carried out by the business or undertaking.

Self-employed persons must ensure their own health and safety while at work, so far as is reasonably practicable.

### Primary duty of care, 'upstream' duties and duties of 'officers', workers and other persons (sections 19-28)

Under the primary duty of care, a PCBU must ensure, so far as is reasonably practicable:

- the provision and maintenance of a working environment that is safe and without risks to health, including safe access to and exit from the workplace
- the provision and maintenance of plant, structure and systems of work that are safe and do not pose health risks (for example, providing effective guards on machines and regulating the pace and frequency of work)
- the safe use, handling, storage and transport of plant, structure and substances (for example, toxic chemicals, dusts and fibres)
- the provision of adequate facilities for the welfare of workers at work (for example, access to washrooms, lockers and dining areas)
- the provision of information, instruction, training or supervision to workers needed for them to work without risks to their health and safety and that of others around them
- that the health of workers and the conditions of the workplace are monitored to prevent injury or illness arising out of the conduct of the business or undertaking
- the maintenance of any accommodation owned or under their management and control to ensure the health and safety of workers occupying the premises.

### Duty to consult, cooperate and coordinate (sections 46-49)

The WHS laws require duty holders with shared responsibilities to work together to make sure someone does what is needed. This requires consultation, cooperation and coordination between duty holders.

For example, there may be a number of different duty holders involved in influencing how work is carried out (that is suppliers, contractors and building owners). If more than one person has a health and safety duty in relation to the same matter, they must consult, cooperate and coordinate activities so far as is reasonably practicable in relation to the matter. Each must share health and safety-related information in a timely manner and cooperate to meet their shared health and safety obligations.

The duty to 'consult' does not require agreement, although each duty holder retains responsibility for discharging their health and safety duty.

Each PCBU must, so far as is reasonably practicable, consult with workers and HSRs (if any) about matters that directly affect them. This duty extends to consulting with all kinds of workers not just the PCBU's own employees, including any contractors and their workers, employees of labour hire companies, students on work experience, apprentices and trainees.

### **Duty of PCBUs with management or control of workplaces (section 20)**

A PCBU with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace and anything arising from the workplace does not put at risk the health or safety of any person.

### **Duty of PCBUs with management or control of fixtures, fittings or plant at workplaces (section 21)**

A PCBU with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant do not put at risk the health and safety of any person.

A PCBU that installs, erects or commissions plant or structures must ensure all workplace activity relating to the plant or structure including its decommissioning or dismantling is, so far as is reasonably practicable, without risks to health and safety.

### **Duty of PCBUs providing services relating to work health and safety (section 26A)**

A PCBU who provides services relating to work health and safety must ensure, so far as is reasonably practicable, that the services are provided so that any 'relevant use' of them at, or in relation to a 'workplace', will not put at risk the health and safety of persons at the workplace.

The duty applies only to services that could potentially pose a risk in the workplace (for example, measures to eliminate a specific hazard or control a risk), and will most commonly apply to WHS services provided to a specific PCBU and tailored to the circumstances of a particular workplace.

While it will depend on the circumstances, it is unlikely that general advice or training would be considered a WHS service for the purposes of section 26A.

If the WHS service is incorrectly used, or not used for its intended purpose, by the recipient of the service (in other words, the service is not applied to its 'relevant use'), the WHS service provider cannot be held responsible.

*Note: The provision of a WHS service does not relieve a PCBU of their duties under the WHS Act.*

### **Duty of officers (section 27)**

Officers of corporations and other organisations must manage corporate risks — including work health and safety risks.

Under the WHS Act, an officer of a PCBU must exercise due diligence to ensure the PCBU complies with its health and safety duties. This duty relates to the strategic, structural, policy and key resourcing decisions — that is, how the place is run.

Due diligence includes taking reasonable steps to:

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

An officer may be charged with an offence under the WHS Act whether or not the PCBU has been convicted or found guilty of an offence under the Act.

## **Duty of workers (section 28)**

While at work, workers must take reasonable care for their own health and safety and that of others who may be affected by their actions or omissions. They must also:

- comply, so far as they are reasonably able, with any reasonable instruction given by the PCBU to allow the PCBU to comply with WHS laws
- cooperate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

## **Duties of other persons at the workplace (section 29)**

Similar duties apply to other persons at a workplace. Any person at a workplace, including customers and visitors, must take reasonable care of their own health and safety and that of others who may be affected by their actions or omissions. They must also comply, so far as they are reasonably able, with any reasonable instruction that is given by the PCBU to comply with WHS laws.

## **Volunteers (section 34)**

Volunteers that owe duties under the WHS laws cannot be prosecuted except in relation to their worker's duty.

## **Further duties of upstream PCBUs (designers, manufacturers, importers and suppliers)**

Designers, manufacturers, importers and suppliers of plant, structures or substances can influence the safety of these products before they are used in the workplace. These businesses or undertakings have a responsibility to ensure, so far as is reasonably practicable, that their products are without risks to health and safety when used at a workplace — throughout their entire lifecycle.

Duty holder	Duty to ensure health and safety in the workplace	Duty to test	Duty to provide information
<b>Designers</b> of plant, structures or substances (section 22)	A PCBU who is a designer of a plant, structure or substance that is to be used, or could reasonably be expected to be used, at a workplace must ensure all workplace activity relating to it including its handling or construction, storage, dismantling and disposal is designed, so far as is reasonably practicable, to be without risks to health or safety when used for its intended purpose.	Designers of the plant, structure or substance must carry out tests and examinations sufficient to ensure that when used for its intended purpose the plant, structure or substance meets work health and safety requirements.	Adequate information must be given to those for whom the plant, structure or substance was designed about its intended purpose, test results and any conditions necessary to ensure that it is safe and without risks to health or safety, when used for its intended purpose.  Current relevant information must also be provided, so far as reasonably practicable, to other end users at a workplace upon request.
<b>Manufacturers</b> of plant, structures or substances (section 23)	A PCBU who is a manufacturer of any plant, structure or substance which is manufactured to be used, or could reasonably be expected to be used, at a workplace must ensure all workplace activity relating to it including its handling, storage and disposal or dismantling is so far as is reasonably practicable without risks to health or safety when used for its intended purpose.	Manufacturers must carry out or arrange tests and examinations sufficient to ensure that the plant, structure or substance is manufactured to meet work health and safety requirements when used for a purpose for which it was manufactured.	Adequate information must be given to any person to whom the product is provided about the purpose for which it was manufactured, test results and any conditions necessary to ensure that when used for its intended purpose it is safe and without risks to health or safety.  Current relevant information must also be provided, so far as reasonably practicable, to other end users at a workplace upon request.



Duty holder	Duty to ensure health and safety in the workplace	Duty to test	Duty to provide information
<b>Importers</b> of plant, substances or structures (section 24)	<p>A PCBU who is an importer of any plant, substance or structure which is to be used, or could reasonably be expected to be used, at a workplace must ensure all workplace activity relating to it including its handling, storage and disposal or dismantling is, so far as is reasonably practicable, without risks to health or safety when used for its intended purpose.</p>	<p>Importers must carry out or arrange tests and examinations sufficient to ensure that the imported plant, structure or substance meets work health and safety requirements when used for its intended purpose.</p> <p>Alternatively, importers must ensure that these tests and examinations have been carried out.</p>	<p>Adequate information must be given to any person who the importer supplies with the plant, structure or substance about its intended purpose, test results and any conditions necessary to ensure that when used for its intended purpose it is safe and without risks to health or safety.</p> <p>Current relevant information must also be provided, so far as reasonably practicable, to other end users at a workplace upon request.</p>
<b>Suppliers</b> of plant, substances or structures (section 25)	<p>A PCBU who is a supplier of any plant, substance or structure that is to be used, or could reasonably be expected to be used, at a workplace must ensure all workplace activity relating to it including its handling, storage and disposal or dismantling is, so far as is reasonably practicable, without risks to health or safety when used for its intended purpose.</p>	<p>Suppliers must carry out or arrange tests and examinations sufficient to ensure that the supplied plant, structure or substance meets work health and safety requirements when used for its intended purpose.</p> <p>Alternatively, suppliers must ensure that these tests and examinations have been carried out.</p>	<p>Adequate information must be given to any person who the supplier supplies with the plant, structure or substance about its intended purpose, test results and any conditions necessary to ensure that when used for its intended purpose it is safe and without risks to health or safety.</p> <p>Current relevant information must also be provided, so far as reasonably practicable, to other end users at a workplace upon request.</p>

Duty holder	Duty to ensure health and safety in the workplace	Duty to test	Duty to provide information
People <b>installing, constructing or commissioning</b> plant or structures (section 26)	A PCBU who installs, constructs or commissions plant or structures must also ensure, so far as is reasonably practicable, all workplace activity relating to the plant or structure including its decommissioning or dismantling is without risks to health or safety.	Not applicable	Not applicable
<b>WHS service providers</b> (section 26A)	A PCBU who provides services relating to work health and safety must ensure, so far as is reasonably practicable, the WHS services are provided so that any 'relevant use' of them at, or in relation to a 'workplace', will not put at risk the health and safety of persons at the workplace.	Not applicable	Not applicable

# Incident notification (sections 35-39)

## Notifiable incident

A PCBU must notify the regulator as soon as they become aware of a death, serious injury or illness or dangerous incident that arises out of the conduct of the business or undertaking.

## Serious injury or illness

Trigger	Examples
Immediate treatment as an in-patient in a hospital	<ul style="list-style-type: none"><li>Admission into a hospital as an in-patient for any duration, even if the stay is not overnight or longer</li></ul> <p>It does not include:</p> <ul style="list-style-type: none"><li>out-patient treatment provided by the emergency section of a hospital (i.e. not requiring admission as an in-patient) and immediate discharge</li><li>subsequent corrective surgery such as that required to fix a fractured nose</li></ul>
Immediate treatment for the amputation of any part of the body	<ul style="list-style-type: none"><li>Amputation of a limb such as arm or leg, body part such as hand, foot or the tip of a finger, toe, nose or ear</li></ul>
Immediate treatment for a <b>serious</b> head injury	<ul style="list-style-type: none"><li>Fractured skull</li><li>Loss of consciousness</li><li>Blood clot or bleeding in the brain</li><li>Damage to the skull to the extent that it is likely to affect organ or face function</li><li>Head injuries resulting in temporary or permanent amnesia</li></ul>
Immediate treatment for a <b>serious</b> eye injury	<ul style="list-style-type: none"><li>Injury that results in or is likely to result in the loss of the eye or total or partial loss of vision</li><li>Injury that involves an object penetrating the eye (for example, metal fragment, wood chip)</li><li>Exposure of the eye to a substance which poses a risk of serious eye damage</li></ul> <p>It does not include:</p> <ul style="list-style-type: none"><li>eye exposure to a substance that merely causes irritation</li></ul>
Immediate treatment for a serious burn	<ul style="list-style-type: none"><li>A burn requiring intensive care or critical care which could require compression garment or a skin graft</li></ul> <p>It does not include:</p> <ul style="list-style-type: none"><li>a burn that merely requires washing the wound and applying a dressing</li></ul>
Immediate treatment for the separation of skin from an underlying tissue	<ul style="list-style-type: none"><li>Separation of skin from an underlying tissue such that tendon, bone or muscles are exposed (de-gloving or scalping)</li></ul>
Immediate treatment for a spinal injury	<ul style="list-style-type: none"><li>Injury to the cervical, thoracic, lumbar or sacral vertebrae, including the discs and spinal cord</li></ul>

Trigger	Examples
Immediate treatment for the loss of a bodily function	<ul style="list-style-type: none"> <li>• Loss of consciousness</li> <li>• Loss of movement of a limb</li> <li>• Loss of the sense of smell, taste, sight or hearing</li> <li>• Loss of function of an internal organ</li> </ul> <p>It does not include:</p> <ul style="list-style-type: none"> <li>• mere fainting</li> <li>• a sprain, strain or fracture</li> </ul>
Immediate treatment for serious lacerations	<ul style="list-style-type: none"> <li>• Serious lacerations that cause muscle, tendon, nerve or blood vessel damage or permanent impairment</li> <li>• Deep or extensive cuts</li> <li>• Tears of wounds to the flesh or tissues – this may include stitching to prevent loss of blood and/or other treatment to prevent loss of bodily function and/or infection</li> </ul>
Medical treatment within 48 hours of exposure to a substance	<ul style="list-style-type: none"> <li>• ‘Medical treatment’ is treatment provided by a registered medical practitioner</li> <li>• ‘Exposure to a substance’ includes exposure to chemicals, airborne contaminants and exposure to human or animal blood and body substances</li> </ul>
Medical treatment following urgent transfer from remote location	<ul style="list-style-type: none"> <li>• Includes any injury or illness not specified previously that cannot be treated at or near the site of the incident</li> <li>• A remote location is any location that is not served by ordinary ambulance services, and may include mines and offshore facilities, rail camps, geological surveys, and isolated holiday facilities</li> <li>• A medical facility includes a hospital and any other facility that provides medical services</li> </ul>
Injury or illness that, in the opinion of a medical practitioner, is likely to prevent the person from being able to do their normal work for at least 10 days	<ul style="list-style-type: none"> <li>• Captures any illness or injury not specified previously that prevents a person from doing their normal work for at least 10 days</li> <li>• This determination may only be made by a medical practitioner and may be in the form of a medical certificate or letter</li> <li>• Notification must be provided even if the worker is capable of light duties (e.g. a warehouse worker who is moved to desk duties for the duration of their recovery)</li> </ul>

*Note: There will be additional notification requirements under the WHS regulations.*

‘Treatment’ means the kind of treatment that would be required for a serious injury or illness and includes ‘medical treatment’ by a registered medical practitioner, treatment by a paramedic or treatment by a registered nurse practitioner.

## Dangerous incident

The regulator must also be notified immediately of any dangerous incident that exposes a person to a serious health or safety risk from immediate or imminent exposure to:

- the uncontrolled escape, spillage or leakage of a substance
- an uncontrolled implosion, explosion or fire
- an uncontrolled escape of gas, steam or a pressurised substance
- an electric shock
- the fall or release from height of any plant, substance or thing
- the collapse, overturning, failure or malfunction of, or damage to, plant that is required to be licensed or registered
- the collapse or partial collapse of a structure, including an excavation or of any shoring supporting an excavation
- the inrush of water, mud or gas into an underground excavation or tunnel
- the interruption of the main system of ventilation to an underground excavation or tunnel
- other incidents as stated in the three sets of WHS regulations.

## Notification process

Notice of an incident must be given by the fastest possible means, by telephone or in writing (including electronic means, where available). If notice is given by telephone, the regulator may request follow-up written notice of the incident. This must be provided within 48 hours of the request.

A record of each notifiable incident must be kept by the PCBU for at least five years.

The person with management or control of a workplace at which a notifiable incident has occurred must ensure the site of the incident is not disturbed until an inspector arrives at the site or directs otherwise. This does not prevent any action required to protect a person's health or safety, help someone who is injured or make the site safe.

There will be additional notification requirements under the mines and PAGEO regulations.

# Consultation with workers and representation of workers

PCBUs are responsible for making decisions regarding health and safety, but may not have a full understanding of the finer detail or subtleties of the work or working conditions. It is important that PCBUs obtain information from their workers before making changes or implementing measures which may adversely affect health and safety. It is also important that the workers are informed of those measures and their significance to health and safety so that they can implement them and also understand the importance of doing so. This requires an ongoing exchange of information between the PCBUs and their workers, directly or through their representatives.

Given the importance of consultation in contributing to work health and safety, the WHS Act prescribes a general duty to consult.

## Consultation with workers (sections 47-49)

PCBUs must, so far as is reasonably practicable consult with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to health and safety. This includes giving workers a reasonable opportunity to express their views or raise issues about work health and safety at the workplace.

Consultation is a collaborative process between PCBUs and their workers. It involves sharing information about work health and safety and ensuring that views of workers are taken into account when making decisions about health and safety at the workplace. It does not require agreement to be reached.

If there is an agreed consultation procedure then the consultation must be in accordance with those procedures.

If an HSR represents workers, the consultation must involve the HSR so far as is reasonably practicable. The PCBU must make all reasonable efforts to consult at times, places and in ways that are convenient for the workers and the HSR.

A PCBU must consult with workers and take their views into account when:

- identifying hazards and assessing risks arising from work
- proposing changes that may affect the health and safety of workers
- whenever specifically required to do so under particular regulations

and when considering making decisions about:

- ways to eliminate or minimise risks
- the adequacy of facilities for workers' welfare at work
- procedures for consulting with workers
- procedures for resolving health and safety issues
- procedures for monitoring the health of workers or workplace conditions
- how to provide health and safety information and training to workers.

The views of workers must be taken into account when consulting under these provisions but there is no requirement for agreement to be reached.

Workers who have been consulted under these provisions must be advised of the outcome in a timely manner. There is no particular way this advice must be given — for example, it could be given at a 'toolbox' meeting or posted as an intranet news item.

## Representation and participation of workers

Workers are entitled to:

- elect a health and safety representative if they wish to be represented by one
- request the formation of a health and safety committee if they wish
- cease unsafe work in certain circumstances (see below for more information)
- have health and safety issues at the workplace resolved in accordance with an agreed issue resolution procedure
- not be discriminated against for raising health and safety issues.

## Health and Safety Representatives (HSRs)

Any worker can ask the PCBU for whom they are carrying out work to facilitate the election of one or more Health and Safety Representatives (HSR) for the workplace.

An HSR is elected by a work group to represent the health and safety interests of the work group (and must be a member of that work group). There can be as many HSRs and deputy HSRs as needed after consultation, negotiation and agreement between workers and the PCBU.

Once determined, the PCBU must keep a current list of all HSRs and deputy HSRs for the workplace(s) and display a copy at the relevant workplace.

### Work groups (sections 50-59)

A work group is a group of workers who share a similar work situation. For example, a work group might consist of all workers in the office part of a manufacturing complex, or it might consist of people of the same trade, or it might consist of all people on the night shift. If agreed, workers from multiple businesses can be part of the same work group which might include contractors, labour hire staff, outworkers and apprentices.

A work group is set up for the purposes of electing — and being represented by — one or more HSRs.

If a request is made for the election of an HSR, the PCBU must start negotiations with workers within 14 days to determine the:

- number and composition of the work group(s)
- number of HSRs and deputy HSRs
- workplace(s) to which the work group(s) apply.

The PCBU must negotiate about work groups with a worker's representative (for example, union) if asked by a worker. The PCBU must also notify workers as soon as practicable of the outcome of the negotiations.

The parties to a work group agreement may negotiate to change the size or membership of the work group at any time — for example, if it could be reorganised to provide for more effective representation.

Negotiations for the determination and variation of work groups must be aimed at ensuring workers are grouped in a way that most effectively and conveniently enables their WHS interests to be represented and allows an HSR to be readily accessible to each worker in the work group.

If negotiations fail in establishing or varying a work group any person who is a party to the negotiations can request an inspector to assist in deciding the matter (or if the matter involves multiple businesses, to assist the negotiations).

### **Powers and functions of HSRs (sections 68-69)**

HSRs:

- represent their work group members in matters relating to work health and safety at the workplace
- monitor risk control measures put into place at the workplace to protect their work group members
- investigate complaints from their work group members relating to work health and safety
- inquire into anything that appears to be a risk to the health or safety of work group members.

In limited circumstances, HSRs may represent another work group or work group member for the business or undertaking, or work groups in other PCBUs at the workplace if:

- there is a serious risk to the health or safety of other workers from an immediate hazard, or
- a worker in another work group asks for their assistance and the HSR for that other work group is not available.

Each HSR must be allowed to spend such time as is reasonably necessary to exercise their powers or perform their functions under the WHS Act. This must be paid time based on the rate they would have otherwise been paid at the time.

In exercising their powers or functions, an HSR can:

- inspect the workplace or any area where work is carried out by a worker in the work group
  - at any time after giving relevant notice, or
  - at any time without notice in the event of an incident or any situation involving a serious risk to health or safety emanating from an immediate or imminent exposure to a hazard
- accompany an inspector during an inspection of an area where a work group member works
- be present at an interview with a worker that the HSR represents (with their consent) and the PCBU or an inspector about work health and safety issues – if the interview involves more than one worker, only the consent of one of the HSR's work group members is required
- receive information about work health and safety of work group members— but not any personal or medical information that directly or indirectly identifies a worker without the worker's consent
- request a health and safety committee be established
- issue a provisional improvement notice (PIN) or direct a person to cease unsafe work in certain circumstances, but only if they have completed the approved training.

*Note: Workers may also cease work in certain circumstances without direction from an HSR.*



Whenever necessary, an HSR may request the assistance of any person. The PCBU is not required to meet the associated costs. Where an HSR's assistant requires access to the workplace to provide assistance to the HSR, the HSR is required to give at least 24 hours' notice, but not more than 14 days' notice, of the assistant's proposed access. This information must be given to the PCBU and the person with management or control of the workplace. Access to the workplace by the HSR's assistant may be refused by the PCBU on reasonable grounds, in which case the regulator may be asked to appoint an inspector to resolve the access issue (see sections 70(1)(g), 71(3) and 71(6)).

An HSR is not personally liable for anything done or not done in good faith while carrying out their role.

### **Election and eligibility of HSRs (sections 50, 60-67)**

The members of a work group elect their own HSR. All members are entitled to vote in an election. To be eligible for election as an HSR a person must be a member of the work group and not be disqualified from acting as an HSR.

A deputy HSR may also be elected for a work group to take on the HSR role if the HSR for that work group ceases to hold office or is unable (because of absence or any other reason) to exercise the powers or perform the functions of an HSR.

The PCBU must provide any resources, facilities and assistance that are reasonably necessary to carry out the election. Members of a work group decide how the election will be conducted. The election may be conducted with the assistance of a union or other person or organisation, if supported by a majority of work group members.

Elections for a deputy HSR are carried out in the same way as for an HSR.

Elections are not needed when the number of candidates is the same as the number of vacancies.

The term of office for an HSR or deputy HSR is three years. They cease to hold office if:

- they leave the work group
- they are disqualified from being an HSR
- they resign as an HSR by written notice, or
- the majority of members of the group agree the person should no longer represent them and they are removed from office in accordance with the WHS Regulations.

HSRs and deputy HSRs can be re-elected.

Any person adversely affected by a decision or action of an HSR can apply to have them disqualified in circumstances where an HSR has exercised powers or performed functions improperly or where an HSR has used or disclosed information for purposes not related to their role as an HSR.

### **Training (section 72)**

If requested, a PCBU must allow HSRs and deputy HSRs to attend a work health and safety course or training approved by the Work Health and Safety Commission (approved course) and chosen by the HSR or deputy HSR. The PCBU cannot refuse to allow an HSR to attend an approved course.

As soon as practicable and within three months of the request, the PCBU must give the HSR paid time off to attend the course. The PCBU must pay the course costs plus reasonable expenses.

In some circumstances, costs associated with the course selected by the HSR, including course fees, may be significantly higher than other courses that are conveniently available to the HSR (for example, if the HSR chooses to attend a course requiring air travel and accommodation when a similar course is provided locally). The PCBU is only required to pay reasonable costs for the course.

If an agreement cannot be reached on the course timing and costs, either party may ask the regulator to appoint an inspector to decide the matters in dispute. The parties will be bound by the inspector's determination, and non-compliance by the PCBU would constitute an offence.

An obligation to share costs applies if multiple PCBUs are involved. Timely consultation between all relevant PCBUs should be arranged to ensure responsibilities are clear.

HSRs must complete the approved training before they can issue a provisional improvement notice (PIN) or direct a person to cease unsafe work.

Whether or not the HSR has undergone training, the PCBU must provide the HSR with the resources, facilities and assistance that are reasonably necessary to enable them to carry out their functions.

### **Provisional improvement notices (sections 90-102)**

A PIN is a written notice issued by an HSR requiring a contravention against the WHS Act or Regulations to be remedied within a certain period or a likely contravention to be prevented. Only an HSR who has completed the approved training may exercise this power.

Before issuing a PIN, the HSR must first consult with the person who is to receive the proposed notice. This could be the PCBU or a worker, if the PIN is proposed to be issued to a worker.

If consultation is unsuccessful, a PIN may be issued in writing. It must state:

- that the HSR believes that a provision of the WHS Act or Regulations is being contravened or has been contravened in circumstances that make it likely that the contravention will continue or be repeated
- the section of the WHS Act or Regulations considered to have been contravened and how the section is being or has been contravened
- the date (at least eight days from the issue date) by which the contravention must be remedied.

A PIN may also include recommendations that may be taken to remedy a contravention. These recommendations may refer to a code of practice and offer the person a choice of solutions. It is not an offence to fail to comply with any recommendations in a PIN as a PIN can be complied with by taking alternative actions to those recommended in the PIN to remedy the contravention.

However, the PIN must be complied with within the time specified in the notice.

A PIN cannot be issued to override an inspector's decision on a matter (subsection 90(5)).

A person issued with a PIN must display it in a prominent place in the workplace, or part of the workplace, at which work is being carried out that is affected by the notice. It is an offence to intentionally remove, destroy, damage or deface the notice, while it is in force.

Within seven days of being issued with a PIN, the affected person (including the PCBU if the person issued with the PIN is a worker) can ask the regulator to have the notice reviewed by an inspector. If no review is sought, the PIN must be complied with — that is, the contravention must be remedied within the time allowed or prevented from occurring in the first place (whichever applies).

If a request is made to review the PIN it ceases to have effect until the inspector makes a decision on the review. The inspector must either confirm the PIN (with or without changes) or cancel it. A review may still occur even if the time specified for compliance with the PIN has expired. A confirmed PIN (with or without changes) must be complied with.

The inspector will give a copy of their decision to the person who applied for the review and the HSR who issued the notice.

A provisional improvement notice that is confirmed (with or without changes) by an inspector is taken to be an improvement notice issued by the inspector under the Act.

### **Worker's right to cease unsafe work (sections 84-89A)**

If a worker has a reasonable concern about a serious risk to their health or safety from immediate or imminent exposure to a hazard, or the health and safety of any other person, they may cease or refuse to carry out work that would expose them, or any other person, to that hazard.

An exception is provided in section 84(2) for police officers, where the refusal to carry out work could adversely affect a covert or dangerous operation. This exclusion does not relieve WA Police of any other duties under the WHS Act.

A worker who ceases work must notify the PCBU as soon as practicable. Workers can be redirected to suitable alternative work at their workplace or at another site until they can resume normal duties.

An affected person including the PCBU, HSR or worker may request an inspector to attend the workplace to assist in resolving an issue relating to the cessation of work.

A worker cannot be discriminated against in their engagement (for example, have pay deducted) for exercising their right to cease unsafe work under the WHS Act. Issues arising in relation to the continuity of engagement of a worker may be referred to the Work Health and Safety Tribunal for resolution, regardless of whether or not an inspector was appointed to resolve the matter.

### **Direct workers to cease unsafe work (sections 85-89A)**

An HSR who has completed the approved training may direct that unsafe work cease in circumstances where they have a reasonable concern that to continue to carry out the work would expose a work group member to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

An HSR cannot direct a police officer to cease unsafe work if the request could adversely affect a covert or dangerous operation.

Before issuing a direction however the HSR must first attempt to resolve the matter with the relevant PCBU. This does not have to happen if the risk is so serious and immediate or imminent that it is not reasonable to consult first. In this case the HSR must consult the PCBU as soon as practicable after giving the direction.

The HSR must inform the relevant PCBU of any direction given by them to workers under the WHS Act. Workers do not need to separately notify the PCBU of the cessation of work in these circumstances. Workers can be redirected to suitable alternative work at their workplace or at another site until they can resume normal duties.

Any affected person may request an inspector to attend the workplace to assist in resolving an issue relating to the cessation of work.

A worker cannot be discriminated against in their engagement (for example, have pay deducted) for exercising their rights to cease unsafe work or direct that unsafe work cease under the WHS Act. Issues arising in relation to the continuity of engagement of a worker may be referred to the Work Health and Safety Tribunal for resolution, regardless of whether or not an inspector was appointed to resolve the matter.

## Health and safety committees (sections 75-79)

A health and safety committee (HSC) is a formal committee established under the WHS Act to facilitate cooperation between a PCBU and workers in developing and carrying out measures to ensure health and safety at work. This includes health and safety standards, rules and procedures for the workplace.

A PCBU at a workplace must set up an HSC for the workplace within two months of being requested to do so by an HSR for the workplace, or by five or more workers at the workplace.

A PCBU can also establish an HSC on their own initiative.

The constitution of the HSC is determined by agreement between the PCBU and workers at the workplace although some minimum requirements apply.

At least half of the members of an HSC must be workers that have not been nominated by the PCBU. An HSR for the workplace can join the committee if they wish and, if a workplace has more than one HSR, they can choose one or more HSRs to join the committee (if they consent).

At least one member of the HSC must be a representative of the PCBU with sufficient authority to ensure compliance with the duties under section 79, including taking action to ensure a decision of the committee is implemented without unreasonable delay. If the PCBU is an individual, that individual must be a member of the HSC.

If agreement cannot be reached on how the HSC should be constituted, any party can ask the regulator to appoint an inspector to decide the matter. An inspector may decide the constitution of the HSC or that the HSC should not be established.

An HSC must meet at least once every three months and at any reasonable time at the request of at least half of the members of the committee.

No formal training requirements apply for committee members.

Each committee member must be allowed to spend such time as is reasonably necessary to attend meetings of the committee or carry out functions as a member of the committee. This must be paid time based on the rate they would have otherwise been paid at the time.

## Issue resolution (sections 80-82A)

Issue resolution procedures apply under the WHS Act if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussions between parties.

If the matter is not resolved, the relevant parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with an agreed procedure or the default procedure set out in the WHS Regulations.

Relevant parties are:

- the PCBU or their representative
- each PCBU or their representative if the issue involves more than one PCBU
- the HSR for a work group or their representative – if the worker(s) affected by the issue are in a work group
- the worker(s) or their representative – if the worker(s) affected by the issue are not in a work group.

The PCBU's representative must not be an HSR and must have an appropriate level of seniority and be sufficiently competent to act as the person's representative.

A worker's representative may enter the workplace for the purpose of attending discussions with a view to resolving the issue.

If the issue remains unresolved, any party may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the issue. The regulator may refuse the request to appoint an inspector, if the parties making the request have not made reasonable efforts to resolve the issue.

While this process is underway, workers may still exercise their right to cease unsafe work and HSRs who have completed the approved training may continue to exercise their powers to issue a PIN or direct that unsafe work cease.

Inspectors will not undertake conciliation or mediation to resolve the issue but may exercise any of their compliance powers under the WHS Act to resolve any underlying work health or safety issues.

No later than two days after the day on which the request is made, an inspector must make a decision resolving the issue. If this time is insufficient, the regulator may apply to the Work Health and Safety Tribunal for an extension of the deadline. The Tribunal will provide any affected parties the opportunity to make submissions before setting a new deadline.

## **Discriminatory, coercive or misleading conduct (sections 104-115)**

Anti-discrimination provisions protect workers, prospective workers and others who perform safety-related functions or activities under the WHS Act, or raise health and safety issues or concerns at the workplace.

It is an offence for a person to engage in discriminatory conduct for a prohibited reason in the course of work. A person only commits an offence if the prohibited reason was the dominant reason for the discriminatory conduct.

Discriminatory conduct includes dismissing or refusing to engage a worker, terminating a contract for services with a worker, detrimentally altering the position of a worker or otherwise injuring them in their engagement (for example, by demoting them, or reducing their overtime or ordinary hours of work) because they:

- are, have been, or propose to be an HSR or member of an HSC
- exercise a right or perform a function as an HSR or HSC member
- undertake, have undertaken or propose to undertake a role under the Act
- exercise, have exercised or propose to exercise (or refrain from exercising) a power under the Act
- assist, have assisted or propose to assist a person to exercise a power or perform a function under the Act

- raise, have raised or propose to raise an issue or concern about work health and safety
- are involved in, have been involved in or propose to be involved in resolving a work health and safety issue, or
- made a complaint or taken other action to get another person to comply with their duties or obligations under the Act.

It is also unlawful to terminate or refuse to enter into a commercial arrangement with another person for any of these reasons.

It is unlawful to engage in, threaten or organise to take any of the above actions, or to ask, authorise, assist or encourage another person to do this.

It is unlawful to organise or take, or threaten to organise or take, any action against another person with intent to coerce or induce the person, or a third person to exercise their rights under the WHS Act in a particular way.

It is unlawful for a person to knowingly or recklessly make a false or misleading representation to another person about their:

- rights or obligations under the Act
- ability to initiate, or participate in, a process or proceeding under the Act, or
- ability to make a complaint or inquiry to a person or body empowered under the Act to seek compliance with the Act.

Offences may be prosecuted by the regulator or alternatively an affected person or their representative may apply to the Work Health and Safety Tribunal for a civil remedy.

In civil proceedings a person may be found to have engaged in discriminatory conduct for a prohibited reason only if the reason was a substantial reason for the conduct.

Civil proceedings relating to alleged discriminatory conduct must be lodged within a year after the date on which the applicant knew or ought to have known that the cause of action accrued.

A broad range of remedies is available, including imposing a penalty or reinstatement.

A person may not initiate multiple actions in relation to the same matter under two or more laws of that jurisdiction.

# The regulator

## Role of the regulator (sections 152-154)

The WorkSafe Commissioner is the regulator under the WHS Act.

The WorkSafe Commissioner will be responsible to the Minister for Industrial Relations for the administration of the WHS Act and any other law relating to work health and safety administered by the Minister.

The regulator has a broad range of functions, including:

- monitoring and enforcing compliance with the WHS Act (and regulations)
- investigating and reporting on matters relating to work health and safety, including particular types of hazards and matters relating to particular industries or particular businesses or undertakings
- providing advice and information on work health and safety to duty holders and the community
- collecting, analysing and publishing statistics relating to work health and safety
- fostering a cooperative, consultative relationship between duty holders and the people to whom they owe work health and safety duties, and their representatives
- promoting and supporting education and training on matters relating to work health and safety
- engaging in, promoting and coordinating the sharing of information to achieve the object of the WHS Act, including the sharing of information with other work health and safety regulators
- conducting and defending legal proceedings under the WHS Act.

## Power of the regulator to require documents and information (sections 155-155B)

The regulator has powers to obtain information by written notice if it reasonably believes a person is capable of giving information, providing documents or giving evidence:

- in relation to a possible contravention of the WHS Act, or
- that will assist in monitoring or compliance.

The written notice must be served on the person, requiring them to do one or more of the following:

- provide a signed statement on the required matters within the time and in the manner specified in the notice
- produce the required documents, including to request a copy or reproduction of documents that are stored in an electronic format
- appear before a person appointed by the regulator at a reasonable time and place determined by that person and specified in the notice, and provide the required evidence orally, in writing or provide the documents.

The regulator may only require a person to appear in person after taking all reasonable steps to obtain the required information by other means.

The regulator may also, by written notice, require a PCBU to provide an independent report on WHS matters at a workplace.

It is an offence to refuse or fail to comply with a request without reasonable excuse. However, a person may refuse to produce a document or information that is subject to legal professional privilege.

While the regulator may compel answers, self-incriminating answers to questions or information provided cannot be used as evidence against an individual in proceedings, other than proceedings arising out of the false or misleading nature of the answer, information or document.

## **Powers to copy and retain documents (section 155C)**

Documents provided to, or obtained by the regulator, may be retained for the period considered necessary by the regulator. The regulator may also take extracts, and make copies or reproductions of documents.



# Securing compliance

The Department of Mines, Industry Regulation and Safety is the WHS department that will assist the regulator in the administration of the WHS Act, including the provision of inspectors and other staff to secure compliance with the legislation.

## Functions and powers of inspectors (sections 160-162, 171, 172)

Inspectors have general functions and powers to:

- provide information and advice about how to comply with the WHS Act and regulations
- help resolve work health and safety issues at workplaces
- review disputed PINs
- require compliance with the WHS Act by issuing notices
- investigate contraventions and assist to prosecute offences
- investigate and report on matters relating to WHS, including particular types of hazards and matters relating to particular industries or particular businesses or undertakings.

Inspectors are subject to the regulator's directions in the exercise of their compliance powers.

In performing their functions and exercising powers, an inspector at a workplace may require a person to answer their questions, submit to an interview or produce documents or information. The information must be provided in a form that is capable of being understood by the inspector, particularly in relation to electronically stored documents.

The inspector may make copies of or take extracts from a document given to them or keep the document for the period the inspector considers necessary. While in the inspector's custody it must be made available to the person who produced the document, the document's owner, or a representative of either, at all reasonable times.

It is an offence for a person to refuse or fail to comply with the inspector's request without reasonable excuse. However the person may refuse to produce a document or information that is subject to legal professional privilege.

While inspectors may compel answers, self-incriminating answers to questions or information provided cannot be used as evidence against an individual in proceedings, other than proceedings arising out of the false or misleading nature of the answer, information or document.

## Warning to be given (section 173)

An inspector may obtain and use information voluntarily given to them in their official capacity by any person.

If a person is however required to answer a question or provide information or a document as explained above, the inspector must first:

- identify themselves to the person as an inspector by producing their inspector's identity card or in some other way
- warn the person that failure to comply with the requirement or to answer the question, without reasonable excuse, would constitute an offence
- warn the person that they are not excused from answering a question or providing information or a document on the ground that they may incriminate themselves
- advise the person that legal professional privilege may be claimed.

It is not an offence for a person to refuse to cooperate on grounds that they may incriminate themselves if the inspector has not first given them the required warning.

## Power to require name and address (section 185)

An inspector may require a person to provide their name and residential address if:

- the inspector finds them committing an offence against the WHS Act
- the inspector finds them in circumstances that leads the inspector to reasonably believe they have committed an offence against the WHS Act, or
- the inspector reasonably believes that the person may be able to assist in the investigation of an offence against the WHS Act.

In making the request the inspector must explain the reasons for the requirement and warn the person that it is an offence to refuse or fail to comply without reasonable excuse.

If the inspector reasonably believes that the name or residential address is false, they may require the person to provide further evidence as to its correctness.

It is an offence for a person to fail to comply with these requirements without reasonable excuse.

## Powers of entry for inspectors (sections 163-166)

In performing their functions and exercising powers, an inspector may enter a workplace or a suspected workplace at any time without prior notice, with or without the consent of the person with management or control. If it is not a workplace, then they must leave immediately unless they are authorised by an entry warrant to be there or the person with management or control consents. They may also pass through places used for residential purposes at a reasonable time if it is the only known way to access a workplace.

An inspector must identify themselves on request, by showing their identity card or by another way, prescribed in the WHS regulations, such as a departmental letter or email, or confirmation with the department by telephone.

An inspector must take all reasonable steps to advise the relevant PCBU, person with management or control of the workplace and any relevant HSRs they have entered the workplace as soon as practicable. This is not needed if it would defeat the purpose of entry or cause unreasonable delay.

An inspector entering a workplace can:

- inspect, examine and make inquiries
- inspect, examine and seize anything, including documents, and may analyse or test a seized thing or arrange for another person to do so
- bring and use any equipment or materials they may need
- take measurements, conduct tests, and make sketches or recordings (for example, photographs, films, audio and video)
- take and remove samples for analysis.

An inspector can require a person at a workplace to give them reasonable help to do these things. A person asked to assist must not, without reasonable excuse, refuse or fail to comply. This may include the supply of transport (for example, flights to/from the workplace being inspected), accommodation and meals.

Inspectors may be accompanied by other persons including an interpreter to assist them, if this is considered to be necessary.

## **Entry warrants (sections 166A-169)**

An inspector may apply to a Justice of the Peace (JP) for an entry warrant. An entry warrant may be issued if:

- there are reasonable grounds for suspecting that there is a thing or activity at the place that may be evidence of an offence against the WHS Act, or may enable access to evidence of an offence against the WHS Act
- the warrant is reasonably necessary to enable an inspector to exercise compliance powers.

An entry warrant may be executed by any inspector, but the inspector must produce the warrant, or a copy of it.

# Enforcement measures

## Improvement notices (sections 191-194)

An improvement notice is a written notice issued by an inspector requiring a contravention against the WHS Act or Regulations to be remedied within a certain period or a likely contravention to be prevented (that is, if there are circumstances that make it likely that a contravention will continue or be repeated).

An inspector may issue an improvement notice requiring a person to remedy the contravention, prevent a likely contravention from happening or remedy the things or operations causing the contravention or likely contravention.

The notice must state the inspector's belief about the contravention or likely contravention, identify the provision the inspector believes is being or has been contravened, how the provision is being or has been contravened and a reasonable date by which to fix the contravention.

An improvement notice may also include directions and/or recommendations about how to fix or prevent a contravention.

A person issued with an improvement notice must comply with the notice.

A person issued with an improvement notice may seek to extend the compliance period for the notice, but only if the period has not ended.

## Prohibition notices (sections 195-197)

A prohibition notice is a notice issued by an inspector prohibiting an activity at a workplace from continuing or being carried out in a specific way.

An inspector may issue a prohibition notice if they reasonably believe the activity involves a serious risk to a person's health or safety from an immediate or imminent exposure to a hazard.

The notice is issued to the person with control over the activity. It may include directions on how to remedy the risk and remains in place until an inspector is satisfied the risk has been fixed.

At first the notice may be given orally but must be confirmed by written notice issued to the person as soon as practicable.

A person issued with a prohibition notice must comply with the notice (including any notice given orally). It remains in force until an inspector is satisfied the underlying risk has been fixed — see also the section on reviews.

An inspector cannot give a direction if compliance with the direction would adversely affect a covert or dangerous operation of the WA Police.

## Non-disturbance notices (sections 198-201)

A non-disturbance notice is a written notice issued by an inspector requiring a person with management or control of a workplace to preserve a 'notifiable incident' site or prevent disturbance of a particular site (including the operation of plant) in certain circumstances. It may only be issued if the inspector reasonably believes that it is necessary to do so to facilitate the exercise of their compliance powers.

A notice may require the person to preserve the site or prevent disturbance for up to seven days, and must include the measures to be taken to do so.

One or more subsequent non-disturbance notices may be issued to a person if an inspector considers this necessary.

A non-disturbance notice does not prevent any action required to protect a person's health or safety, help someone who is injured or make the site safe.

A person issued with a non-disturbance notice must comply with the notice unless they have a reasonable excuse for not doing so.

## Display of notices (section 210)

A person issued with a notice must as soon as possible display a copy of the notice in a prominent place at or near the workplace where work affected by the notice is being carried out.

It is an offence to intentionally remove, destroy, damage or deface a notice that is required to be displayed while the notice is in force.

Note that the operation of the notice may be stayed if the decision to issue the notice is under formal review (see below).

## Remedial action (sections 211-213)

The regulator may take any reasonable remedial action to make a workplace or situation safe if a person fails to take reasonable steps to comply with a prohibition notice. To do so it must give written notice to the person of the regulator's intention and information about the owner's or person's liability for the costs of that action.

The regulator may also take remedial action if a prohibition notice cannot be issued because the person with management or control of the workplace cannot be found.

Costs of remedial action may be charged to the person who was issued with the initial prohibition notice or would have been, had they been found.

## WHS undertakings (sections 216-222)

A person may give the regulator an undertaking about a contravention or alleged contravention by the person, other than industrial manslaughter or a Category 1 offence.

If accepted, no enforcement proceedings may be brought (or continued) against a person in relation to a matter covered in a WHS undertaking, providing the WHS undertaking has been completely discharged.

The giving of a WHS undertaking is not considered to be an admission of guilt. The regulator must consider any undertaking, taking into account guidelines published on the acceptance of WHS undertakings, and provide the person with a written notice of its decision to accept or reject it (including reasons).

A WHS undertaking takes effect and becomes enforceable when the regulator's decision to accept it is given to the person or as specified in the decision.

A person who has made a WHS undertaking may withdraw or vary the undertaking with the written agreement of the regulator.

If a WHS undertaking is contravened, the regulator may apply to the Magistrate's Court for a remedy. In addition to imposing a penalty, the court may make orders directing compliance with the WHS undertaking or discharging the undertaking altogether. Additionally the court may order the person to pay the costs of the proceedings plus the regulator's reasonable costs of monitoring compliance with the WHS undertaking in the future.

If a WHS undertaking is contravened, the regulator may also seek to prosecute the underlying contravention or alleged contravention of the Act to which the WHS undertaking relates.

## **Review of decisions (sections 223-229B)**

Certain decisions made by inspectors and the regulator can be reviewed. The WHS Act outlines which decisions can be reviewed and who can apply to have them reviewed.

These are decisions that relate to:

- the failure to commence negotiations for work groups
- training of health and safety representatives
- PINs issued by HSRs
- forfeiture and return of goods or things
- issue of improvement, prohibition or non-disturbance notices and subsequent notices
- variation or cancellation of notices
- extension of time to comply with improvement notices.

A union may apply for a review of a decision on behalf of a union member or members, without identifying the union member or members, and without providing evidence of their authority to act on their behalf.

### **Internal review**

Inspectors' decisions are initially subject to internal review by the regulator. Applications must be brought within the time allowed or a longer period permitted by the regulator.

The time allowed is:

- in relation to a decision to issue an improvement notice – the period specified in the notice for compliance or 14 days, whichever is the lesser, or
- in any other case, 14 days.

The internal reviewer cannot be the person responsible for the initial decision. The internal reviewer must make a decision within 14 days after receiving a valid application, although additional time is allowed if further information is required.

The internal reviewer must confirm the initial decision, vary it, or set it aside in favour of another course of action. A written decision must be sent to the applicant as soon as practicable.

The initial decision is taken to be confirmed if the internal reviewer does not make a review decision in the time allowed, or the applicant fails to provide any additional information required by the reviewer within time.

## **External review**

If a person is dissatisfied with the internal review decision, they may apply to the Work Health and Safety Tribunal for an external review of that decision within the time allowed.

Prescribed decisions made under the WHS Act by the regulator are also externally reviewable.

The application must be made:

- if the decision was to forfeit a thing – within 28 days of the day the decision first came to the applicant's notice
- in any other case – within 14 days after the day the decision first came to the applicant's notice, or
- if the regulator is required by the external review body to give the applicant a statement of reasons – within 14 days after the day the statement is provided.

In general, the Work Health and Safety Tribunal's practices and procedures will apply to the external review.

The Work Health and Safety Tribunal is required to:

- review a decision (unless the application is withdrawn)
- conduct the review with a 'hearing de novo' (approaching the decision afresh), and may consider material not available to the internal review
- confirm, vary or substitute another decision.

## **Stays of reviewable decisions**

If an application for review is made, this generally imposes a stay on the operation of the decision until there is an outcome.

However, there is no automatic stay of a decision to issue a prohibition notice or a non-disturbance notice. In this case, the reviewer may stay the decision on its own initiative or upon application. The reviewer must make the decision on an application for a stay within one working day after receiving the application, otherwise the application is taken to have been granted.

A stay of a decision pending internal review operates until the time allowed for making an external review expires or an application for external review is made, whichever is earlier.

If an application is made for an external review of a decision, the Work Health and Safety Tribunal may stay the operation of a decision, cancel, or vary the stay.

# Offences and penalties

## Health and safety duty offences (sections 30A-33)

The WHS Act provides for the following categories of offences for breach of health and safety duties. The maximum penalties are different depending on the category of the offence and whether the offender is an individual (e.g. a worker, or a PCBU), an officer (as defined) or a body corporate.

**Industrial manslaughter** – applies to those with a WHS duty where their conduct in failing to comply with that duty caused a death. Only PCBUs and their officers can be charged with industrial manslaughter. The prosecution must establish, beyond reasonable doubt, that the person knew their conduct was likely to cause the death of, or serious harm to, an individual and they acted in disregard of that likelihood.

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

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

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

## Maximum penalties for breach of health and safety duty offences

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

*Note: Where a penalty provides for a fine or term of imprisonment, the Court may impose a sentence that includes either or both penalties.*

## Exceptions (section 34)

Volunteers are not liable for a failure to comply with a health and safety duty except in their capacity as a worker (section 28) or other person at a workplace (section 29).

An unincorporated association is not liable for prosecution although its officers (except volunteers) may be prosecuted for a failure to comply with an officer's duty (section 27). Its members may owe duties in their capacities as workers (section 28) or other persons at a workplace (section 29).



## Alternative penalty options

In addition to imposing a penalty, courts may impose alternative remedies including:

- adverse publicity orders
- restoration orders
- work health and safety project orders
- court-ordered WHS undertakings
- training orders.

## Other offences

There are a number of other offences under the WHS Act that relate to specific requirements and carry their own individual penalties.

### Offences in relation to incident notification (sections 38, 39)

It is an offence to:

- fail to notify the regulator of a 'notifiable incident' (section 38)
- fail to keep a record of a 'notifiable incident' for the prescribed period (section 38)
- fail to preserve an incident site until an inspector arrives (section 39).

### Offences in relation to authorisations (sections 41-45)

It is an offence to:

- carry on a business or undertaking at an unauthorised workplace, if it is required to be authorised (section 41)
- use unauthorised plant, equipment and substances at a workplace, if there is a requirement that it be authorised (section 42)
- carry out work without the required licence, permit or authorisation (section 43)
- carry out work without the required prescribed qualifications or experience, or carry out unsupervised work where supervision by a person with prescribed qualifications or experience is required (section 44)
- not comply with the conditions of any licence, permit or authorisation (section 45).

### Offences in relation to consultation (sections 46, 47)

It is an offence to:

- not consult with other duty holders on work health and safety matters as required (section 46)
- not consult with workers on work health and safety matters as required (section 47).

### Offences in relation to the establishment of work groups (sections 52, 53, 56, 57)

It is an offence to:

- fail to negotiate with workers or their representative regarding the formation of work groups at a workplace (sections 52, 56)
- fail to notify workers of the outcome of negotiations regarding the formation of work groups at a workplace (sections 53, 57).

## **Offences in relation to health and safety representatives (sections 61, 70, 71, 72, 74, 97, 99)**

It is an offence to:

- fail to consult with an HSR on work health and safety matters as required (section 70)
- fail to provide an HSR with access to information the person has relating to hazards affecting their work group members and work health and safety of work group members (section 70)
- fail to allow an HSR to attend interviews that they are entitled to attend as representatives (section 70)
- fail to provide resources, facilities and assistance that are reasonably necessary for the election of HSRs or to allow HSRs to carry out their health and safety duties (sections 61, 70)
- prevent an HSR from accompanying an inspector during an inspection of a place that affects work health and safety of work group members (section 70)
- deny a person assisting an HSR access to the workplace in accordance with entitlements (section 70)
- fail to allow an HSR time off with pay that is reasonably necessary to attend to their health and safety duties (section 70)
- allow an HSR to have access to any personal or medical information concerning a worker without the worker's consent, unless the information does not identify the worker (section 71)
- refuse to allow an HSR to attend an approved training course they are entitled to attend (section 72)
- fail to keep an up-to-date list of HSRs at the workplace and ensure it is readily accessible to all workers (section 74)
- fail to display a PIN (section 97)
- contravene a PIN (section 99).

## **Offences in relation to health and safety committees (sections 75, 79)**

It is an offence to:

- fail to establish an HSC within two months of being requested to do so (section 75)
- fail to allow members of the committee time off with pay that is reasonably necessary to attend committee meetings and carry out functions as a committee member (section 79).
- fail to provide an HSC with access to information the person has relating to hazards affecting their workplace and the work health and safety of workers at the workplace (section 79)
- allow an HSC to have access to any personal or medical information concerning a worker without the worker's consent, unless the information does not identify the worker (section 79)
- fail to or unreasonably delay considering any recommendation or other decision made by the HSC within the scope of the HSC's functions that requires the person's agreement if it is to be implemented (section 79)
- fail to or unreasonably delay providing a response to the HSC stating the extent to which the person agrees to the implementation of the recommendation or other decision (section 79)
- fail to or unreasonably delay taking any agreed action required to be taken for the purposes of the implementation of a recommendation or decision (section 79)
- unreasonably withhold agreement to the implementation of a recommendation or other decision (wholly or partly) (section 79).

## **Offences in relation to discriminatory, coercive or misleading conduct (sections 104-108)**

It is an offence to:

- engage in discriminatory conduct for a reason prohibited under the WHS Act (section 104)
- request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct (section 107)
- organise or take, or threaten to organise or take, any action against another person with intent to coerce or induce that person, or a third person, to exercise or not exercise a power or perform or not perform a function under the WHS Act (section 108)
- knowingly or recklessly make a false or misleading representation to another person regarding their rights, obligations or abilities under the WHS Act (section 109).

Part 6 of the WHS Act also enables a person affected by discriminatory, coercive or misleading conduct to initiate civil proceedings for a civil remedy.

## **Offences in relation to the regulator and inspectors (sections 155-190)**

It is an offence to:

- refuse or fail to answer questions and provide information and documentation requested by the regulator without reasonable excuse (section 155)
- refuse or fail to assist an inspector in the performance of their compliance powers without reasonable excuse (section 165)
- refuse or fail to comply with an inspector's request to answer questions, verify those answers by statutory declaration, submit to an interview, record an interview, or produce a document without reasonable excuse (section 171)
- tamper with a thing the access to which has been restricted by an inspector or fail to comply with an inspector's request to take it to a stated place within a stated time or remain in control of it at the stated place (section 177)
- refuse or fail to comply with a direction from an inspector, including refusing to provide one's name and address (section 185)
- intentionally hinder or obstruct an inspector while they are carrying out their duties, or to induce or attempt to induce another person to do so (section 188)
- impersonate an inspector (section 189)
- assault, threaten or intimidate an inspector or a person assisting an inspector (section 190)
- fail to comply with an improvement notice (section 193)
- fail to comply with a prohibition notice (section 197)
- fail to comply with a non-disturbance notice (section 200)
- intentionally remove, destroy, damage or deface a notice required to be displayed (section 210)
- fail to comply with a WHS undertaking (section 219)
- fail to comply with a court order (section 242)
- give false or misleading information in complying or purportedly complying with the WHS Act (section 268)
- disclose confidential information obtained while exercising a power or function under the WHS Act (section 271)

- enter into, or offer to enter into, an insurance policy or indemnify a person that seeks to cover WHS Legislation fines imposed under the WHS Act (section 272A)
- impose a levy or charge on a worker for anything done or provided in relation to work health and safety (section 273).

## **Prosecutions (section 229C-232A)**

Proceedings for an offence against the WHS Act can only be brought by the regulator or public service officer working in the Department of Mines, Industry Regulation and Safety.

Industrial manslaughter offences under section 30A may only be prosecuted by the Director of Public Prosecutions.

The department will publish on its website general guidelines about the prosecution of offences against the WHS Act and the acceptance of WHS undertakings.

## **Procedure if prosecution is not brought (section 231)**

If an individual (complainant) considers an industrial manslaughter, Category 1 or Category 2 offence has occurred but no prosecution has been brought in the period six to twelve months after the alleged offence, they can make a written request to the regulator to bring a prosecution.

The regulator must respond to the request within three months after receiving the request. It must advise on the status of the investigation and, if complete, whether a prosecution has been or will be brought, including reasons. The regulator must also notify the alleged offender of these matters.

## **Limitation period for prosecutions (section 232)**

Proceedings for an offence must be commenced:

- within two years after the offence first came to the regulator's attention
- within one year after a finding in a coronial or other official inquiry that the offence has occurred
- within six months of a WHS undertaking being contravened, or when the regulator becomes aware of a contravention or agrees to withdraw the undertaking.

After the standard limitation period, proceedings may commence for Category 1 offences if fresh evidence is discovered and the court is satisfied the evidence could not reasonably have been discovered within the relevant limitation period.

There is no limitation period for industrial manslaughter. If the Director of Public Prosecutions decides not to bring proceedings for industrial manslaughter, proceedings for another offence may be brought by the regulator within six months of the Director's decision.

## **Admission of evidence obtained unlawfully (section 232A)**

Under some circumstances, a court may consider admitting evidence into proceedings that was obtained as a result of unlawful conduct. This might occur, for example, where an inspector inadvertently exceeds the parameters of an entry warrant.

# Authorisations

Authorisations (for example, licences, permits, registrations) are required for the use of some plant and substances, and certain types of work.

## **Plant and substances (section 42)**

A PCBU must not direct or allow a worker to use plant or a substance if the WHS regulations require it, or its design, to be authorised and it is not.

The WHS regulations will list the items of plant requiring registration of their design.

The WHS regulations will list the items of plant and equipment required to be registered.

## **Work (section 43)**

A PCBU must not direct or allow a worker to carry out work if it is required to be done by an authorised person and the worker is not authorised.

The WHS regulations will list certain high risk work that must only be performed by people who have been authorised (for example, licensed) to carry out that type of work.

## **Prescribed qualification and experience (section 44)**

The WHS regulations will require certain types of work to be carried out only by, or supervised by, a person with prescribed qualifications or experience.

*Note: Other non-WHS legislation may include licensing, registration or similar requirements for some occupations.*

# Statutory offices and bodies

## Functions and committees (section 12A)

The WHS Act makes provision for the establishment of the:

- WorkSafe Commissioner
- Chief Inspector of Mines
- Chief Inspector Petroleum Safety
- Work Health and Safety Commission (WHSC)
- Mining and Petroleum Advisory Committee (MAPAC)
- Work Health and Safety Tribunal.

# Transitional provisions

In general, transitional arrangements will be put in place where duties are new or substantially changed from existing requirements. The approach taken will be broadly consistent with the transition principles agreed by Safe Work Australia.



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Department of **Mines, Industry Regulation and Safety**

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