



WHS Duties and Obligations

A key part of the Queensland work health and safety legislative framework is the duty of care for different parties to take reasonable steps to protect others from harm. A person conducting a business or undertaking (a PCBU) holds the primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers and other persons.

Where a PCBU has a duty or obligation to comply with the WHS Act, an Officer of the PCBU must exercise due diligence to ensure the PCBU complies with the duty or obligation.

PCBUs also have a duty to notify the Regulator of types of incidents such as fatalities, serious injuries or illnesses and dangerous incidents and a duty to preserve scenes of these incidents.

Other PCBU's with specific duties of care include importers, manufacturers, suppliers and the like.

Workers and other persons also have a specific duty of care.

There are also duties for PCBUs to consult with workers including how and when that consultation should occur.

Primary duty of care

A PCBU has the primary duty of care to ensure, so far as is reasonably practicable, the health and safety of –

- workers engaged, or caused to be engaged by the person; and
- workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking [WHS Act s 19(1)].

A PCBU must also ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking [WHS Act s 19(2)].

Essentially, this means that each PCBU has the main responsibility for ensuring the health and safety of workers and other people influenced by the work of the business or undertaking. For example, for customers, visitors, bystanders, and the general public.



WHS Duties and Obligations

Primary duty of care (continued)

This primary duty of care is a broad duty which encompasses a number of specific duties including –

- (i) providing and maintaining a work environment without risks to health and safety;
- (ii) providing and maintaining safe plant and structures;
- (iii) providing and maintaining safe systems of work;
- (iv) ensuring the safe use, handling and storage of plant, structures and substances;
- (v) ensuring there are adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;
- (vi) providing any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
- (vii) ensuring that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking [WHS Act s 19(3)].

There are a number of other general duties for a PCBU who holds the primary duty of care outlined in the WHS Regulations such as –

- a duty in relation to general workplace facilities such as –
 - the layout of a workplace including entry and exits;
 - work areas and spaces
 - floors and other areas
 - lighting
 - ventilation
 - working in extremes of heat and cold
 - work in relation to or near essential services [WHS Reg s 40(a)-(g)];
- a duty to maintain and provide adequate and accessible facilities [WHS Reg s 41];
- a duty to provide first aid [WHS Reg s 42]; and
- a duty to prepare, maintain and implement an emergency plan [WHS Reg s 43].

Workers' accommodation

A PCBU holds a primary duty of care to maintain premises provided for workers' accommodation which is owned or under the management or control of the PCBU, where the occupancy of those premises is necessary for the purposes of the worker's engagement and where other accommodation is not reasonably available.

This duty of care is to ensure that the premises are maintained, so far as is reasonably practicable, so that any worker occupying those premises is not exposed to risks to their health and safety [WHS Act s 19(4)].



WHS Duties and Obligations

Other persons who hold a duty of care

There are a number of other persons who hold a duty of care including –

- a person with management or control of a workplace;
- a person with management or control of fixtures, fittings or plant at a workplace;
- designers of plant, substances or structures;
- manufacturers of plant, substances or structures;
- importers of plant, substances or structures;
- suppliers of plant, substances or structures;
- PCBU's that install, construct or commission plant or structures [WHS Act ss 20-26].

These duties of care essentially mean that each of these PCBU's has a duty to ensure, so far as is reasonably practicable, that risks to health and safety do not arise in relation to their specific duty. For example, a supplier of substances such as chemicals must ensure, so far as is reasonably practicable, that supplying the chemicals to persons who use, handle, store or carry out activities involving the use of the chemicals, is without risk to the health and safety of those persons [WHS Act s 25].

Officers' duty of care

A person who is an 'officer' has specific duties under the WHS Act.¹ An officer is generally someone who:

makes, or participates in making, significant decisions that affect the whole, or a substantial part, of the business, or

has the capacity to significantly affect the business' financial standing.

For example, an officer of a large corporation may include directors on its Board, the Chief Executive Officer and the Chief Financial Officer. An officer of a small business may be its owner who may also be considered an officer.

Generally, a person is an officer if they make or influence the significant financial or operational decisions of the business.²

Officers have a specific duty to exercise 'due diligence' to ensure that the PCBU meets their duties and obligations under the WHS Act [WHS Act s 27(1)].



WHS Duties and Obligations

Officers' duty of care (continued)

Due diligence means an officer is required to –

- (a) acquire and keep up-to-date knowledge of work health and safety matters;
- (b) gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations;
- (c) ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
- (d) ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
- (e) ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the Act.

Specific examples are provided in the Act of ensuring processes for complying with a duty under the Act, meaning officers must be able to demonstrate they have knowledge and have verified that there are appropriate systems and procedures in place by the PCBU to –

- report notifiable incidents
- consult with workers
- ensure compliance with notices issued by inspectors or PINs issued by Health and Safety Reps
- ensure that training and instruction is provided to workers about work health and safety
- ensure that health and safety representatives receive their entitlements to training [WHS Act s 27(5)].

Workers and other persons duty of care

Workers and other persons also have a duty of care – but not the primary duty of care which resides with the PCBU.

A worker has a duty of care while they are at work to –

- (a) take reasonable care for their own health and safety;
- (b) take reasonable care that their own acts or omissions do not adversely affect the health and safety of other persons; and
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU to allow them to comply with the Act; and
- (d) co-operate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers [WHS Act s 28].

Other persons such as visitors at a workplace also have a duty to –

- (a) take reasonable care for their own health and safety;
- (b) take reasonable care that their own acts or omissions do not adversely affect the health and safety of other persons;
- (c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Act [WHS Act s 29].



WHS Duties and Obligations

Duty to notify of a notifiable incident

A PCBU must ensure that the WHS Regulator is notified immediately after becoming aware that a notifiable incident has occurred arising out of the conduct of the business or undertaking.

The notice can be given by telephone or in writing and a record must be kept of the notifiable incident by the PCBU for at least five (5) years [WHS Act s 38].

A notifiable incident means –

- (1) the death of a person;
- (2) a serious injury or illness of a person; or
- (3) a dangerous incident [WHS Act s 35].

What is a serious injury or illness is outlined in section 36 of the Act, and a dangerous incident in section 37.

Duty to preserve incident sites

A person who has management or control of a workplace where a notifiable incident has occurred must ensure so far as is reasonably practicable, that the site where the incident occurred is not disturbed until an inspector arrives, or at an earlier time where an inspector directs [WHS Act s 39(1)].

A 'site' includes any type of plant, substance, structure or thing associated with the notifiable incident [WHS Act s 39(2)].

Nothing related to this duty prevents a person from taking any action –

- (1) to assist an injured person
- (2) to remove a deceased person
- (3) that is essential to make the site safe or to minimise the risk of a further notifiable incident or that is associated with a police investigation, or
- (4) for which an inspector or the regulator has given permission [WHS Act s 39(3)].

The duty to consult workers

A PCBU 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 work health or safety [WHS Act s 47(1)].

Consultation must be undertaken in accordance with agreed consultation procedures where these exist [WHS Act s 47(2)]. Agreed procedures must be consistent with the Act e.g., consultation must occur with a Health and Safety Rep and with a relevant union where requested by one or more workers.



WHS Duties and Obligations

The duty to consult workers (continued)

The broad definition of a 'worker' under the WHS Act means a PCBU must consult with employees and anyone else who carries out work for the business or undertaking. A PCBU must consult, so far as is reasonably practicable, with contractors and subcontractors and their employees, on-hire workers, outworkers, apprentices, trainees, work experience students, volunteers and other people who are working for the PCBU and who are, or are likely to be, directly affected by a health and safety matter [WHS Act s 7(1) definition of 'worker']].

Workers are entitled to take part in consultations and to be represented in consultations by a health and safety representative who has been elected to represent their work group [WHS Act s 48(2)].

If one or more workers ask the PCBU to consult with their representative (a relevant union), the PCBU must also consult with that representative [WHS Act s 48(3)]. Where the parties agree that consultation will take place at the workplace where the workers are, the PCBU must carry out the consultation with the workers' representative only at the time and place as agreed by the parties [WHS Act s 48(5)].

Consultation with workers is required –

- (a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;
- (b) when making decisions about ways to eliminate or minimise those risks;
- (c) when making decisions about the adequacy of facilities for the welfare of workers;
- (d) when proposing changes that may affect the health or safety of workers;
- (e) when making decisions about the procedures for—
 - (i) consulting with workers; or
 - (ii) resolving work health or safety issues at the workplace; or
 - (iii) monitoring the health of workers; or
 - (iv) monitoring the conditions at any workplace under the management or control of the PCBU; or
 - (v) providing information and training for workers; or
- (f) when carrying out any other activity prescribed under a regulation [WHS Act s 49].

The nature of consultation requires that a PCBU –

- (1) shares all relevant information with workers;
- (2) gives workers a reasonable opportunity to –
 - (i) express their views and to raise WHS issues in relation to the matter, and
 - (ii) to contribute to the decision-making process about the matter;
- (3) takes the views of workers into account;
- (4) advises the workers consulted of the outcome of the consultation in a timely way [WHS Act s 48(1)].



WHS Duties and Obligations

Multiple duty holders and shared duties

There are a number of key points to understanding the duty of care and how it applies to multiple duty holders:

1. a person who holds a duty of care cannot transfer or delegate that duty of care to another person [WHS Act s 14]; and
2. a person can have more than one duty of care under the Act [WHS Act s 15]; and
3. more than one person can have the same duty of care at the same time (concurrently), and each duty holder must comply with that duty to the standard required by the Act even if another duty holder has the same duty [WHS Act s 16].

What does this mean in practice?

Consider a commercial building where there are multiple duty holders.

The owner of the building is a PCBU and has a primary duty of care to any workers at the building or to other person's impacted by the business or undertaking.

The owner may be the person with management or control of the building as an additional duty of care.

There may be multiple other PCBU's in the same building. For example, lessors who run their own businesses from the commercial building.

There may be a manufacturer of plant (i.e., air conditioning) who has a specific duty of care.

Workers in the building will have a duty of care as will other persons such as visitors.

If there are individual workers holding an ABN who work in the building, they are also a PCBU and a worker at the same time.

In practice, this then means that where there are multiple duty holders for the same matter (e.g., the primary duty of care), then each person with that duty (each PCBU in the building) –

- retains responsibility for their duty in relation to the matter; and
- must discharge their duty to the extent to which they have the capacity to influence and control the matter and would have had that capacity but for an agreement or arrangement that purports to limit or remove that capacity [WHS Act s 16(3)].

Where there are multiple duty holders in relation to the same matter, each duty holder (e.g., all of the PCBUs in the building) must comply with their shared duty to, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other persons who have a duty in relation to the same matter (this is known as 'shared duties') [WHS Act s 46].



WHS Duties and Obligations

Multiple duty holders and shared duties (continued)

The Work Health and Safety Consultation, Cooperation and Coordination Code of Practice 2021 (Qld) is an approved Code of Practice under the WHS Act. It provides practical guidance to PCBUs on how to effectively consult with workers who carry out work for the business or undertaking and who are (or are likely to be) directly affected by a health and safety matter. It also includes information on mechanisms to facilitate worker participation and representation, and provides guidance to PCBUs who share responsibility for the same work health and safety matter on how to consult, cooperate and coordinate activities with each other.

Under section 26A of the WHS Act duty holders must comply with an approved Code of Practice (Code) or follow a technical or industry standard, if it provides an equivalent or higher standard of work health and safety than the standard required in the Code.

Because this is a Code about how to consult, cooperate and coordinate with other duty holders, compliance with the Code in most cases would mean a PCBU would achieve compliance with their duty to consult or their shared duties requirements under the Act.

See https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0026/72647/whs-consultation-cooperation-coordination-cop-2021.pdf.

What happens if a person does not comply with their duty?

There are a number of things that can occur if a person who holds a duty does not comply with that duty.

Health and Safety Representatives may issue any person (not necessarily a duty holder) with a Provisional Improvement Notice (a PIN) where they suspect a contravention of the Act has occurred or may reoccur.

A person may be issued with a compliance notice by an inspector of the WHS Regulator, including an improvement notice, a prohibition notice, or a non-disturbance notice. For more minor matters, an inspector may also issue an infringement notice similar to a traffic infringement notice.

A Health and Safety Rep or a relevant union may raise the issue as part of the issue resolution process, or a relevant union may make an application to the commission as part of dispute resolution under the WHS Act to have the matter conciliated, mediated or arbitrated.

An inspector may prosecute a person for a breach of a duty, but only the WHS Prosecutor may initiate a prosecution for a Category 3 offence (see below). The WHS Prosecutor may also elect to offer a PCBU to enter into an enforceable undertaking in lieu of prosecution.



WHS Duties and Obligations

What happens if a person does not comply with their duty? (continued)

There are three offences that may apply for a breach of the Act –

Type of Offence	Elements of the breach	Penalty
Category One Offence	- the person has a health and safety duty; - the person engages, without reasonable excuse, in conduct that exposes an individual to whom a duty is owed to a risk of serious injury or illness or death; and - the person engages in the conduct with negligence or is reckless as to the risk to the individual of serious injury or illness or death.	For an individual who is not a PCBU or an officer of a PCBU – 3,000 penalty units or 5 years imprisonment For an individual who is a PCBU or an officer of a PCBU – 6,000 penalty units or 5 years imprisonment For an offence committed by a body corporate – 30,000 penalty units
Category Two Offence	- The person has a health and safety duty; - The person fails to comply with that duty; and - The failure exposes the individual to the risk of serious injury or illness or death.	For an individual who is not a PCBU or an officer of a PCBU – 1,500 penalty units For an individual who is a PCBU or an officer of a PCBU – 3,000 penalty units For an offence committed by a body corporate – 15,000 penalty units
Category Three Offence	- The person has a health and safety duty; and - The person fails to comply with the duty.	For an individual who is not a PCBU or an officer of a PCBU – 500 penalty units For an individual who is a PCBU or an officer of a PCBU – 1,000 penalty units For an offence committed by a body corporate – 5,000 penalty units