

Work health and safety under the OEI Act framework

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1. Background

The Offshore Infrastructure Regulator (OIR) is provided with functions and powers under the *Offshore Electricity Infrastructure Act 2021* (OEI Act). The OIR is responsible for regulating work health and safety, **infrastructure integrity**¹ and environmental management of **offshore infrastructure activities**² in the **Commonwealth offshore area**³.

The OEI Act framework has a strong focus on the protection of the workforce and addresses workplace health and safety through modified application the *Work Health and Safety Act 2011* (WHS Act) and the Work Health and Safety Regulations 2011 (WHS Regulations) (collectively, the applied work health and safety provisions).

The OEI Act and Offshore Electricity Infrastructure Regulations 2022 (OEI Regulations) amend some existing provisions and include a number of additional provisions which address the specific nature of **offshore infrastructure projects**⁴.

2. Purpose

The purpose of this document is to provide licence holders, persons conducting a business or undertaking (PCBUs) contractors, workers and workforce representatives with information about the applied work health and safety provisions under the OEI Act framework.

3. Scope

This document is relevant to licence holders, PCBUs, workers and other duty holders who may have work health and safety obligations under the OEI Act framework including the applied work health and safety provisions.

4. Disclaimer

This document is not a legal instrument and does not override or amend the requirements of the OEI Act, the OEI Regulations. It is provided to inform stakeholders and does not limit the discretion of the OIR to take any action it considers appropriate under relevant legislation. It reflects the current position of the OIR, which may change from time to time. All changes will be notified publicly.

5. Relevant legislation

The following Commonwealth legislation gives direction to the OIR and provides the legal framework to manage work health and safety for offshore infrastructure projects:

- *Offshore Electricity Infrastructure Act 2021* (OEI Act)

¹ See section 8 of the OEI Act

² Ibid

³ Ibid

⁴ Ibid

- Offshore Electricity Infrastructure Regulations 2022 (OEI Regulations)
- *Work Health and Safety Act 2011* (Cth) (WHS Act) as applied under the OEI Act
- Work Health and Safety Regulations 2011 (Cth) (WHS Regulations) as applied under the OEI Regulations
- *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).

This document does not cover legislative requirements beyond the scope of the OEI Act framework and the applied WHS provisions listed above. The reader should be aware of and comply with all other Commonwealth and State and Territory legislative requirements that may apply to their activities.

6. Work health and safety under the OEI framework

The OEI Act and OEI Regulations enable licence holders to undertake offshore infrastructure activities in the Commonwealth offshore area.

Chapter 6 Part 1 of the OEI Act applies the WHS Act with some modifications to ensure the OEI framework is fit for purpose for hazardous and high risk remote offshore worksites. Application of the WHS Act, also provides consistency with other harmonised WHS laws and the automatic application of any future amendments to the WHS Act unless specifically excluded.

The OEI Regulations apply the WHS Regulations with some modifications to ensure the WHS Regulations can operate appropriately in the OEI context. These technical modifications have been made to address a range of matters that are unique for offshore infrastructure activities such as:

- the introduction of a design notification scheme to address selection and design of ***offshore renewable energy infrastructure***⁵ and ***offshore electricity transmission infrastructure***⁶
- the requirement for an OEI management plan which sets out the licence holders management systems and arrangements for ensuring that the licence holder, and any contractors and subcontractors, have appropriate mechanisms to ensure that WHS obligations are being met
- the roles, responsibilities and duties set out for licence holders
- the interface with compliance and enforcement provisions in the OEI Act and the Regulatory Powers Act
- the interactions with other regulatory regimes relevant to work health and safety matters in the Commonwealth offshore area.

⁵ See section 10 of the OEI Act

⁶ See section 11 of the OEI Act



Figure 1. WHS under the OEI Act framework

6.1. Codes of practice

The OEI Regulations prescribe codes of practice in relation to work health and safety matters. Such codes are approved under the WHS Act by the responsible Commonwealth Minister. The codes prescribed under the OEI regulations are taken to be an approved code of practice for the purpose of the OEI Act. The codes of practice are available at legislation.gov.au. Licence holders should ensure they have understood which codes are applicable to the regulated offshore activities being undertaken and consider these codes in determining how to manage hazards and risks associated with their projects.⁷

⁷ See Clause 28 OEI Regs as modified by the Schedule of modifications

6.2. Regulated offshore activities

OEI Act Section 228

regulated offshore activities means any of the following carried out in the Commonwealth offshore area:

(a) work in the nature of offshore infrastructure activities (within the meaning of the Offshore Electricity Infrastructure Act 2021)

(b) any other work carried out, or purportedly carried out, under a licence in force under the Offshore Electricity Infrastructure Act 2021, and

(c) any other work carried out, or purportedly carried out, in accordance with a requirement under the Offshore Electricity Infrastructure Act 2021 or regulations made for the purposes of that Act.

The OEI Act provides clarification on regulated offshore activities and WHS in relation to multiple jurisdictions, as it specifies that the WHS Act does not apply in relation to work carried out on, or from, a vehicle, vessel, aircraft or other mobile structure either:

- before it arrives at a site, where it is to be used for regulated offshore activities, and any activities necessary to make it operational at the site have begun; or
- after regulated offshore activities cease, and the vehicle, vessel, aircraft or other mobile structure is returned to a form in which it can be moved to another place.⁸

For the purposes of this definition, it should be noted that the term 'site' is not synonymous with worksite under the WHS Act. Rather, in this context the 'site' is taken to be licence area. Examples of the types of activities regulated under the OEI Act framework is provided in **Table 1** below.

⁸ See section 230 (9B) of the OEI Act

Table 1 – Examples of regulated offshore activities

Application	Type of activity
✓	A vessel anchored in the licence area which is preparing to conduct work on offshore infrastructure
✓	A vessel installing a wind turbine foundation or wind turbine components
✓	Workers laying transmission cables on the sea floor in preparation for connection to the offshore substation
✓	A worker who is on a wind turbine conducting maintenance work
✓	A crane operator working on a vessel which is installing the turbine foundation
✗	A vessel travelling through the licence area on a journey for its own purposes
✗	A vessel which has finished the installation of a wind turbine, has weighed anchor and is preparing to return to port
✗	A vessel travelling over transmission cables which have been installed on the seabed
✗	A helicopter and passengers flying to a wind turbine to conduct maintenance
✗	A crane operator who is working on a vessel and is loading supplies for the operation of the vessel ^{9 10}

7. Work health and safety duties

7.1. Duties of person conducting business or undertaking

7.1.1. Primary duty of care

The applied work health and safety provisions require 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.

This primary duty of care requires licence holders to ensure so far as is reasonably practicable risks to health and safety are eliminated. 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.¹¹

⁹ See sections 226-231 of the OEI Act

¹⁰ See section 12A (2) of the WHS Act

¹¹ See section 19 of the WHS Act

7.1.2. Primary duties of the PCBU in relation to other parties

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

- the provision and maintenance of a work environment that is without risk to health and safety
- the provision and maintenance of plant, structures and systems of work that are safe and do not pose health risks (for example provision of sufficient lifting equipment)
- the safe use, handling storage and transport of plant, structures, and substances (for example, turbine components and cables)
- the provision of adequate facilities for the welfare of workers at work (for example, access to appropriate accommodation facilities while working on offshore facilities)
- the provision of information, instruction and training or supervision of workers needed for them to work without risk 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.¹²

7.2. OEI requirements for PCBUs

The OEI Act provides further duties in relation to PCBUs and states that the WHS Act applies to a person in relation to a workplace in the Commonwealth offshore area, whether or not the person is in the Commonwealth offshore area.

For example, an officer of a company may hold work health and safety duties in relation to an offshore workplace regardless of whether they are at that workplace or at an onshore premises such as an office or a control centre.¹³

In all cases the OEI Act licence holder will be a PCBU and as such the primary duty of care under section 19 of the WHS Act will apply in relation to all workers who are carrying out work in any capacity for the licence holder as represented in **Figure 2**.

¹² See section 19 of the WHS Act

¹³ See section 232 of the OEI Act

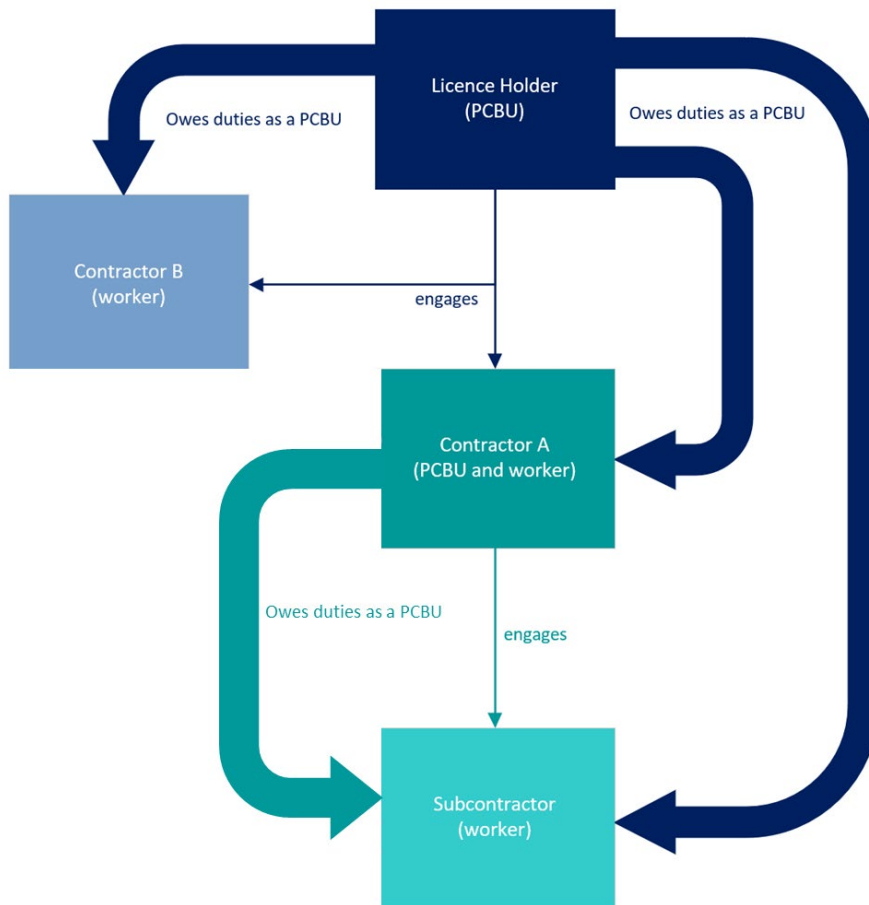


Figure 2. OEI licence holders as PCBUs

7.3. Duties of PCBUs with management or control of workplaces

A PCBU with management or control of a workplace must ensure, as far as is reasonably practicable, that the workplace and anything arising from the workplace does not put at risk the health and safety of any person.¹⁴

7.4. Duty of PCBU with management control of fixtures, fittings or plant at a workplace

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.

¹⁴ See section 20 of the WHS Act

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 risk to health and safety.¹⁵

Further duties of other PCBUs are defined in **Table 2** below.¹⁶

Table 2 – Further duties of PCBUs

Duty holder	Duty to health and safety in the workplace	Duty to test	Duty to provide information
Designers of plant, structures, or substances	A PCBU who is a designer of plant, substances or structures that are 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 purposes.	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. Information must also be provided, so far as reasonably practicable, to other end users at a workplace upon request.
Manufacturers of plant, structures, or substances	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 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.

¹⁵ See section 21 of the WHS Act

¹⁶ See sections 21-26 of the WHS Act

Duty holder	Duty to health and safety in the workplace	Duty to test	Duty to provide information
Importers of plant, substances, or structures	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.	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. Alternatively, importers must ensure that these tests and examinations have been carried out.	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. Current relevant information must also be provided, so far as is reasonably practicable, to other end users at a workplace upon request.
Suppliers of plant, substances, or structures	A PCBU who is a supplier 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 included its handling, storage and disposal or dismantling is, so far as is reasonably practicable without risk to health and safety when used for its intended purpose	Suppliers must carry out or arrange tests and examinations sufficient to ensure that the supplied plant, substance, or structure meets work health and safety requirements when used for its intended purpose. Alternatively, suppliers must ensure that these tests and examinations have been carried out.	Adequate information must be given to any person who the supplier supplies with the plant, substances or structures about its intended purpose, test results and any conditions necessary to ensure that it is safe without risks to health and safety. Current relevant information must also be provided, so far as reasonably practicable, to other end users at workplace upon request.
People installing, constructing, or commissioning plant or structures	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 risk to health or safety.	Not required	Not required

Duty holder	Duty to health and safety in the workplace	Duty to test	Duty to provide information
WHS service providers	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 or person at the workplace.	Not required	Not required

7.5. Duties of officers

Officers of corporations and other organisations are those individuals who make, or participate in, making decisions that affect the whole, or a substantial part, of the business or corporation. For example, an officer may make decisions regarding the management of corporate risks, including work health and safety risks.

Under the applied work health and safety provisions an officer of a PCBU must exercise due diligence to ensure the PCBU complies with its health and safety duties. These duties relate to the strategic, structural, policy and key resourcing decisions in the workplace.

Due diligence includes taking reasonable steps to:

- acquire and keep up to date knowledge on work health and safety matters
- gaining an understanding of 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 operation and maintenance 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 relevant resources and processes.

An officer may be charged with an offence whether or not the PCBU has been convicted or found guilty of an offence under the applied work health and safety provisions.¹⁷

¹⁷ See section 27 of the WHS Act

7.6. Duties of workers

While at work, a worker must:

- take reasonable care for their own health and safety
- take reasonable care that their actions or omissions do not adversely affect the health and safety of other persons.

They must also:

- comply, so far as they are reasonably able, with any reasonable instructions given by the PCBU to allow the PCBU to comply with the applied work health and safety provisions
- cooperate with any reasonable policy or procedure of the PCBU relating to health and safety at the workplace that has been notified to the workers.¹⁸

7.7. Duties of other persons at the workplace

Similar duties apply to other persons at the workplace. Any person at the workplace, including 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.¹⁹

7.8. Shared duties

More than one person can concurrently have the same duty for health and safety in the workplace. Each of these duty holders must comply with that duty to the standard required by the applied work health and safety provisions even if another duty holder has the same duty.

If more than one person has a duty for the same matter, then each person retains the responsibility for the person's duty in relation to the matter and must discharge their duty to the extent to which the person has the capacity to influence and control the matter. This prevents any attempts to 'contract out' their responsibilities.²⁰

An example of shared duties can be where an OEI licence holder takes a multi contracting approach and awards individual contracts for the installation and operations and maintenance of an offshore wind farm as represented in **Figure 3**.

In this case, the licence holder will perform the project management and owners engineer role and each contractor must demonstrate that the delivery of their scope of work complies to the standards required by the applied work health and safety provisions.

¹⁸ See section 28 of the WHS Act

¹⁹ See section 29 of the WHS Act

²⁰ See section 16 of the WHS Act

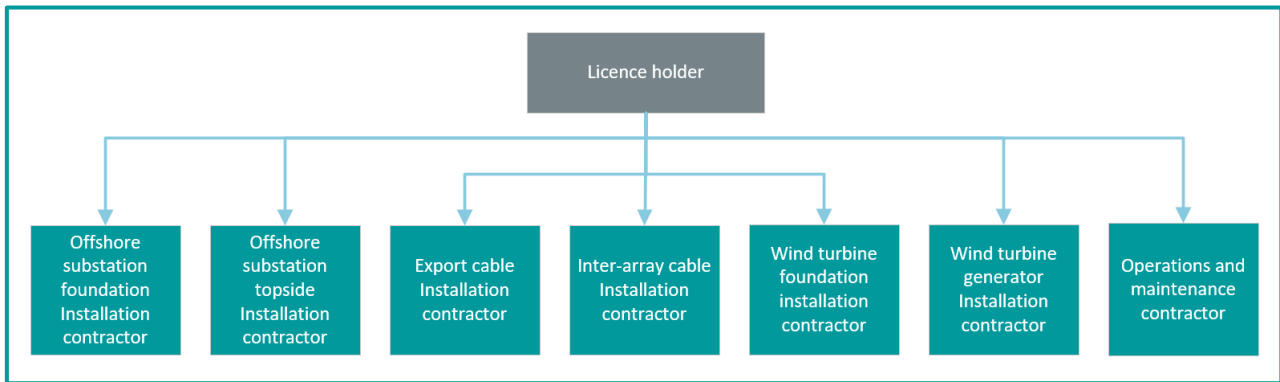


Figure 3. Multi contracting approach and shared duty holders

7.9. Principal contractors

The WHS Regulations define a principal contractor as a PCBU that commissions a construction project²¹.

If the principal contractor, engages another PCBU as principal contractor for the construction project and authorises the person to have management or control of the workplace and to discharge the duties of a principal contractor, then the person engaged is the principal contractor for the project.

A construction project has only one principal contractor at any specific time.

In all cases, the duties of a principal contractor for the project are additional to the duties imposed on a PCBU under section 20 of the WHS Act. In other words, a principal contractor must fulfill the duties of a PCBU and the additional duties of a principal contractor.

The principal contractor is responsible for:

- the review of safe operating procedures in relation to high-risk construction work (HRCW)
- the review of WHS management plans for HRCW.

The principal contractor must also ensure that the WHS management plan includes:

- the names, positions and health and safety roles and responsibilities of all relevant parties
- the arrangements in place between any PCBUs regarding consultation, cooperation and the coordination of activities in relating to their WHS duties
- the arrangements for management of WHS incidents
- any site specific WHS rules and the communication of these rules
- the arrangements for the collection, assessment, monitoring and review of safe work method statements for the project.²²

²¹ See WHS Reg 293 and Clause 20 Reg 293A of the OEI Regs

²² See Chapter 6 of the WHS Regulations

8. Workforce representation and engagement

Workforce representation and engagement is an important aspect of the OEI Act framework. The ongoing exchange of information and consultation with workers may be carried out directly with the broader workforce or via a representative of the workforce. These workers may be informal representatives, or they may be formally elected Health and Safety Representatives (HSRs) under the OEI Act framework.

Workers are entitled to:

- elect a HSR if they wish to be represented by one
- request the formation of a health and safety committee
- cease unsafe work in certain circumstances
- 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 concerns.

8.1. Health and safety representatives

HSRs contribute to improving the safety of the workforce by representing their fellow workers, understanding their health and safety concerns and assisting them to participate in decisions that affect them. Any worker can ask the PCBU to aid in the election of HSR's for the workplace.

A HSR is elected to represent the health and safety interests of a work group and must be part of that work group. There must be consultation and agreement between workers on the number of HSR's and deputy HSR's within a work group.

The PCBU must maintain a current list of all HSR's and deputy HSR's for the workplace and display this list within the workplace.²³

8.1.1. Work groups

Work groups include a group of workers who share similar work situations or activities. Within the offshore renewables sector, a work group might include an installation team for constructing offshore infrastructure. Work groups may include contractors, labour hire staff and apprentices.

If a worker requests the election of HSR's, the PCBU must commence the election process within 14 days to determine the following:

- the number and makeup of individual work groups
- the workplaces to which the work groups apply
- the number of HSR's and deputy HSR's.

²³ See Part 5 Division 3 of the WHS Act

The size and number of work groups may be renegotiated and changed at any time.²⁴

8.1.2. HSR powers and functions

Health and safety representatives can:

- represent their work group in matters relating to health and safety
- monitor risk control measures which have been put in place to protect workers
- 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 and safety of work group members.

HSR's may also represent another work group or work group member for the business or undertaking 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 as their HSR is unavailable.

When exercising their powers or functions, a HSR can:

- spend as much time as necessary to exercise their powers or to perform their functions
- inspect the workplace at any time after giving relevant notice, or at any time without notice in the event of an incident or when there is a serious and imminent risk to safety and health
- accompany an inspector during an inspection of an area where a work group member works
- be present at an interview with a worker that they represent and a PCBU or an inspector
- receive information about work health and safety of work group members which has been deidentified of personal information
- request a health and safety committee be established
- request assistance from any other worker
- issue a provisional improvement notice (PIN)
- direct a person to cease unsafe work in certain circumstances.

It should be noted an HSR is not personally liable for anything done or not done in good faith while carrying out their roles.²⁵

8.1.3. Provisional improvement notices (PIN)

A HSR may issue a provisional improvement notice as a part of their core powers and functions under the WHS Act.

A PIN is a written notice issued by a HSR requiring a contravention against the WHS Act or Regulations to be remedied within a certain period or a likely contravention to be prevented.

²⁴ See Part 5 Division 3 Subdivision 2 of the WHS Act

²⁵ See Part 5 Division 3 of the WHS Act

Under section 90 of the WHS Act a provisional improvement notice can be issued if a HSR reasonably believes that a person:

- is contravening a provision of the WHS Act, or
- has contravened a provision of the WHS Act in circumstances that make it likely that the contravention will continue or be repeated.²⁶

Under the OEI Act, the provisions under which a HSR can issue a PIN are expanded further and state that a HSR can issue a PIN if they reasonably believe that a person:

- is contravening a requirement of a management plan, or has contravened a requirement of a management plan in circumstances that make it likely that the contravention will continue or be repeated, and either:
 - the requirement is in connection with the health and safety of any person, or
 - the contravention involves a risk to the health and safety of any person.

8.1.4. Eligibility and election of HSRs

The members of a work group elect their own HSR, and all members of the work group are entitled to vote in the election.

To be eligible for election as a HSR, a person must be a member of the work group and not be disqualified from acting as a HSR.

A deputy HSR may also be elected for a work group to take on the HSR role, if the HSR for the work group ceases to hold office or is unable to exercise their powers or perform their functions.

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

An election is not needed when the number of candidates is the same as the number of vacancies.²⁷

The term of office for a HSR or deputy HSR is three years. A HSR ceases to hold office if:

- they leave the work group
- they are disqualified from being a HSR
- they resign as a HSR by written notice
- 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 OEI Regulations.

²⁶ See section 90 of the WHS Act

²⁷ See section 60 of the WHS Act

HSR's and deputy HSR's can be re-elected.

Where a person is adversely affected by a decision or an action of a HSR, they may be disqualified in circumstances where a HSR has exercised powers or performed functions improperly or where a HSR has used or disclosed information.²⁸

8.1.5. HSR training

If requested, a PCBU must allow a HSR and deputy HSR's to attend a work health and safety course or training which has been approved by the OIR. A PCBU cannot refuse to allow a HSR to attend an approved course.

A PCBU must as soon as practicable, allow a HSR to attend an approved training program with paid time off from their role.²⁹

8.2. Health and safety committees

A health and safety committee (HSC) is a formal committee established under the OEI Act framework 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 a 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 a HSC must be workers that have not been nominated by the PCBU.

A 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 HSR's to join the committee (if they consent).

At least one member of the HSC must be a PCBU with sufficient authority to ensure compliance with the duties, 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 OIR to appoint an inspector to decide the matter.

An OEI inspector may decide the constitution of the HSC or that the HSC should not be established. A 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.

²⁸ See sections 60-67 of the WHS Act

²⁹ See section 72 WHS Act and Regulation 21 of the WHS Regulations

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.³⁰

8.3. Right to cease work

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. 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 OEI 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 exercising their right to cease unsafe work under the OEI 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 an inspector was appointed to resolve the matter.³¹

8.4. Resolution of issues

Issue resolution procedures apply under the applied work health and safety provisions 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 applied 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.

³⁰ See Part 5 Division 4 of the WHS Act

³¹ See Part 5 Division 6 of the WHS Act

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 OIR to appoint an inspector to attend the workplace to assist in resolving the issue.

The OIR 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 OEI Act framework 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 OIR 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.³²

9. WHS risk management for OEI activities

Robust hazard identification and risk assessment are essential for preventing dangerous incidents.

9.1. Safety in design of offshore infrastructure projects

The OEI Act framework makes provision for licence holders to prepare and submit design notifications to the OIR in relation to offshore infrastructure projects under a commercial licence or a transmission and infrastructure licence.

The purpose of the design notification scheme is to ensure that design aspects critical to the management of safety are considered early in the lifecycle of offshore infrastructure projects and that design decisions are made taking safety considerations into account.

Further information on the requirements for a design notification can be found in our guidance on the design notification scheme.³³

9.2. Risk assessments

As detailed in section 6 of this guideline, the applied WHS provisions require PCBU's to eliminate risks to health and safety, or if this is not possible to minimise those risks so far as is reasonably practicable³⁴. The

³² See Part 5 Division 5 of the WHS Act 2011

³³ See section 114 (2) (d) of the OEI Act

³⁴ See section 17 of the WHS Act

applied WHS regulations place further obligations on PCBU's to identify hazards, manage risks to health and safety, apply control measures in accordance with a structured hierarchy and maintain and review those control measures³⁵.

Licence holders and other PCBU's should ensure that appropriate risk assessment and management processes are in place which comply with these obligations, and which allow for the effective management of risks to health and safety.

9.3. Risk minimisation – what is reasonably practicable?

An overarching object of the WHS Act is to secure the health and safety of workers and workplaces through the elimination and minimisation of risks arising from work, so far as is reasonably practicable³⁶.

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 degree of harm that might result from the hazard or risk
- what the person concerned knows, or ought to reasonably know, about the hazard or risk as well as the ways of eliminating or minimising that risk
- 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 is reasonably practicable for a duty holder to do unless it can be shown to be 'grossly disproportionate' to the risk.

10. WHS management system

An organisational level WHS management system (WHSMS) is a risk-based and systematic approach to managing work health and safety that is integrated with a PCBU's established business practices and procedures to ensure effective implementation of risk controls. The level of detail of a WHSMS should reflect the risk profile and complexity of the activities being undertaken.

When developing a WHSMS, consultation with the workforce is essential to gain a full understanding of the work environment and the specific nature of tasks and the associated hazards in the workplace. This consultation should also be ongoing as individual components of the management system are reviewed and improved.

³⁵ Chapter 3 part 3.1 of the WHS regulations

³⁶ Part 2 Division 1 WHS Act

A WHSMS may form part of a broader management system for an offshore infrastructure project. For example, a management system for an offshore infrastructure project may cover the management of other risks that arise from the project including in relation to infrastructure integrity, environmental management and other matters.

10.1. OEI Act management plans

OEI Act licence holders must have a management plan approved by the OIR before activities involving the construction, installation, commissioning, operation, maintenance or decommissioning of offshore renewable energy or offshore electricity transmission infrastructure can commence. The management plan approach under the OEI framework provides for the whole-of-project oversight by the licence holder for the range of activities and interactions across their project.

The OEI Act and Regulations require each licence holder to develop an OEI management plan which outlines the licence holder's systems and processes for managing WHS, infrastructure integrity and environmental management for the project.

Management plans will detail how offshore infrastructure activities are proposed to be carried out and plans will vary according to the licence and type of project. The management plan provides a basis for the OIR to monitor and enforce compliance against relevant requirements and obligations as described in the management plan and in accordance with relevant legislation.

Further guidance on the requirements for an OEI Act management plan can be found in our guidance on management plan.

10.2. Consultation, cooperation and coordination

A safe workplace is more easily achieved when everyone involved in the work communicates with each other to identify hazards and risks, talks about health and safety concerns, and works together to find solutions. This includes cooperation between the licence holder and external parties engaged by the licence holder (PCBUs) who manage or control the work and those who carry out the work or who are affected by the work.

While PCBU's have clear duties and responsibilities regarding work health and safety, they do not always have a comprehensive understanding of the work environment, or the hazards that may be present in the workplace. It is therefore essential, that each PCBU consult and communicate with the workforce about any changes they intend to make in the workplace and provide workers with an opportunity to discuss potential hazards that may be present in the workplace.³⁷

The applied WHS provisions require duty holders with shared responsibilities to work together effectively. This means duty holders need to ensure that there is effective consultation, cooperation, and coordination between all parties.³⁸

³⁷ See section 47 of the WHS Act

³⁸ See section 48 of the WHS Act

Each PCBU must, so far as is reasonably practicable, consult with workers and health and safety representatives (HSRs) (if there are any in place) about matters that directly affect them³⁹. 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, and apprentices.

The duty to 'consult' does not require total agreement, as each duty holder retains responsibility for discharging their obligations under the applied WHS provisions.

A PCBU must consult with workers 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 relevant legislation.

They must also consult when making decisions about:

- ways to eliminate or minimise risks
- the adequacy of facilities or worker's 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.

It may also be necessary to consult workers about matters that are not listed above, for example when conducting investigations into incidents or 'near-misses'.

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, however in all cases communication of outcomes should be transparent, clear and accessible to workers.⁴⁰

The OEI Act and Regulations also contain requirements for the licence holder to consult with the workforce when preparing an initial management plan in relation to the health and safety of workers. If a workforce is not yet in place when the management plan is being developed, the licence holder must consult with each union that is entitled to represent the industrial interests of workers whose health and safety might be directly affected by the activity.⁴¹

11. Incident notifications

Requirements for incident notification are contained in both the OEI Regulations and the applied WHS legislation.

³⁹ See section 70 of the WHS Act

⁴⁰ See section 49 of the WHS Act

⁴¹ See section 49 of the OEI Act and OEI Regs 15A and 15B

Under the OEI Regulations the licence holder must notify the OIR of an incident as soon as practicable after the licence holder becomes aware that an event of the types of incidents specified in section 161 of the OEI regulations has occurred.

Under the applied work health and safety provisions, a PCBU has a duty to ensure the OIR are notified of notifiable incidents specified in the Section 35 of the WHS Act

Further information on incident notification can be found in the OIR's Notification and reporting of incidents, events and occurrences guideline.

12. WHS Authorisations

12.1. Work

The WHS Regulations list certain types of high-risk work that must only be performed by people who have been authorised by a high-risk work licence to carry out that type of work.

A PCBU must not direct or allow a worker to carry out work requiring authorisations to be carried out without authorisation.⁴²

Further information about how to apply for high-risk work licences is listed on the OIR webpage.

12.2. Prescribed qualifications and experience

The applied WHS regulations require that certain types of work are to be carried out only by, or supervised by, a person with the prescribed qualifications or experience.⁴³

12.3. Recognition of authorisations from corresponding regulators

The applied WHS regulations clearly outline the requirement to recognise the authorisations of corresponding regulators in other jurisdictions, states and territories. This may include the recognition of licences for asbestos assessment and removal⁴⁴, high risk work activities⁴⁵, construction induction training cards⁴⁶

The OIR will also recognise training for entry permit holders such as union officials that has been conducted in other jurisdictions but is subsequently approved by the OIR.

Safety and health representative training program criteria will be determined by the OIR in conjunction with the appropriate Jobs Skills Councils and will be formally approved by the OIR in line with the requirements of the WHS legislation.

⁴² See section 43 of the WHS Act

⁴³ See section 44 of the WHS Act

⁴⁴ See regulation 488 of the WHS Regulations

⁴⁵ See regulation 83 of the WHS Regulations

⁴⁶ See regulation 318 of the WHS Regulations

13. Diving work

Offshore commercial diving may be undertaken at any point throughout the lifecycle of an offshore infrastructure project from supporting its construction, to carrying out inspections and repairs, and installing and removing equipment.

Diving work is inherently dangerous, requiring its workforce to operate specialised equipment in an underwater environment that does not support human life. To protect the health and safety of the diving workforce, the OEI Regulations provide specific provisions for offshore commercial diving operations. These diving provisions apply generally to any relevant PCBU and have the following key features.

For further information on diving requirements please refer to our guidance on diving work.

14. WHS entry permit holders

A WHS entry permit holder is a person who holds a WHS entry permit under the WHS Act.

Under the applied WHS provisions, a WHS entry permit holder may enter related onshore premises for the purpose of inquiring into a suspected contravention or breach of the OEI Act and the applied work health and safety provisions in relation to particular regulated offshore activities and that relates to a relevant worker.⁴⁷

A relevant worker is defined within section 237 of the OEI Act as a worker:

- who is a member, or is eligible to be a member, of a relevant union
- whose industrial interests the relevant union is entitled to represent
- who works at a workplace in the Commonwealth offshore area where the regulated offshore activities are carried out.⁴⁸

Under the applied WHS provisions, an entry permit holder may enter related onshore premises to:

- inquire into a suspected contravention of the OEI Act and the applied work health and safety provisions that relates to or affects a relevant worker
- inspect employee records or other documents relating to the suspected contravention held by another person; and
- consult or advise relevant workers on work health and safety matters.

A WHS entry permit can be issued to a union official who has completed an approved training course and holds a valid and current entry permit under the Commonwealth *Fair Work Act 2009* or the relevant state or territory workplace legislation (whichever applies).

⁴⁷ See section 117 of the WHS Act

⁴⁸ See section 237 of the OEI Act

A WHS entry permit holder may exercise a right of entry only during the usual working hours at the workplace. There is no right to enter any part of a workplace that is used only for residential purposes.

While exercising the right of entry a WHS entry permit holder must comply with any reasonable request to comply with any work health and safety requirements or any other legal requirement that may apply at the workplaces.

WHS entry permit holder must not contravene a condition of their WHS entry permit. Permits are valid for three years from the date of issue or cease when the permit holder ceases to be a union official for the relevant union or their permit under the Fair Work Act or a state/territory workplace law expires. A permit must be returned to the Fair Work Commission within 14 days of expiry.

WHS entry permit holders must show their WHS entry permit and photographic identification upon request to any person.⁴⁹

14.1. Suspected breaches of the applied work health and safety provisions

Before entering a workplace, a WHS entry permit holder must give at least 24 hours' notice but no more than 14 days' notice to the relevant PCBU and the person with management or control of the workplace about the proposed entry and the suspected contravention of the applied work health and safety provisions.

While at the workplace the WHS entry permit holder may exercise a number of powers including:

- inspecting any work system, plant substance or structure relevant to the suspected contravention
- consulting with the relevant PCBU and workers in relation to the suspected contravention
- requiring the relevant PCBU to allow the WHS permit holder to inspect and make copies of any document that is relevant to the suspected contravention, if the document is held at the workplace or is accessible from a computer at the workplace.⁵⁰

The PCBU must not, without reasonable excuse, refuse or fail to comply with this request. A PCBU is not required to allow inspection or copying of documents if this would contravene a law (for example a law relating to privacy) of the Commonwealth, state or territory (whichever applies).

The WHS entry permit holder may also warn any person they believe to be exposed to a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard.⁵¹

14.2. Inspecting employee records or information

An entry permit notice must include the following:

- so far as is practicable, the particulars of the suspected contravention to which the notice relates

⁴⁹ See sections 125-128, 136-137 of the WHS Act

⁵⁰ See sections 118 and 122 of the WHS Act

⁵¹ See sections 144-148 of the WHS Act

- a description of the ‘employee records’ and other documents, or of the classes of records and documents, directly relevant to the suspected contravention, that are proposed to be inspected
- a declaration stating the prescribed matters.⁵²

14.3. General requirements

A person must not without reasonable excuse:

- refuse or unduly delay a permit holder’s entry to a workplace under the WHS Act
- intentionally and unreasonably obstruct them from exercising any rights under the WHS Act.

Similarly, a WHS permit holder exercising their rights must not intentionally and unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace, or otherwise act in an improper manner.

A person must not do something with the intention of giving the impression—or be reckless as to whether the impression is given—that they can do something under the laws which they cannot.

A person must not use or disclose information, or a document obtained in an inquiry into a suspected contravention for a purpose that is not related to the inquiry or rectifying the suspected contravention except in a limited number of circumstances. Disclosure is permitted for example to report concerns to the relevant authorities, assist any subsequent investigation or to lessen or prevent a serious risk to a person’s health or safety or a serious threat to public health or safety.⁵³

14.4. Disputes

Any party to a dispute about a right of entry may ask the OIR to appoint an inspector to attend the workplace to assist in resolving the dispute.

Alternatively, the dispute may be dealt with by the authority that issued the WHS entry permit. An application to have the dispute resolved may be brought by an affected person or the OIR. The authority may also initiate proceedings itself. The authority may deal with a dispute in any way it determines including mediation, conciliation or arbitration.⁵⁴

14.5. Revoking a permit

A WHS entry permit may be revoked by the authorising authority for certain reasons including if the permit holder no longer meets the eligibility criteria for holding the permit, contravenes permit conditions or engages in improper behaviour. Upon application the authorising authority can impose additional conditions on the permit or suspend or revoke the permit.⁵⁵

⁵² See sections 117-120 of the WHS Act

⁵³ See sections 144-148 of the WHS Act

⁵⁴ See sections 141-143 of the WHS Act

⁵⁵ See section 138 of the WHS Act

15. Enforcement, offences and penalties

15.1. WHS enforcement

The OIR is responsible for monitoring and enforcing compliance with of the OEI framework (including the applied WHS provisions) and has access to a range of graduated enforcement tools. These tools include notices, infringements, enforceable undertakings, and the ability to seek prosecutions for offences against legislative requirements.

15.2. OEI inspectors

OEI inspectors appointed have a range of functions and powers that can be exercised to monitor and enforce compliance with the requirements of the OEI framework. Specific to WHS, section 244 of the OEI Act inserts additional functions and powers for inspectors as below:

- to assist in the resolution of work health and safety issues at workplaces within the meaning of the applied WHS provisions
- to assist in the resolution of issues related to access to a workplace by an assistant to a health and safety representative
- to review disputed provisional improvement notices.⁵⁶

15.3. WHS offences and penalties

The applied work health and safety provisions set out three categories of offences for breach of the work health and safety duties. The maximum penalties differ 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.

Category 1 – applies to those with a WHS Duty where their conduct is 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.

The legislation sets out the maximum penalties for a breach of the health and safety duties.

15.4. Alternative penalty options

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

- work health and safety project orders
- release on the giving of a court-ordered work health and safety undertaking

⁵⁶ See section 244 of the OEI Act

- adverse publicity orders
- orders for restoration
- injunctions
- training orders.⁵⁷

15.5. Industrial manslaughter

The offence of industrial manslaughter is included in the WHS Act as a category 1 penalty and may be applied to PCBUs and their officers. The prosecution must establish, that the PCBU or their officer has:

- a health and safety duty
- the person intentionally engages in conduct
- the conduct breaches the health and safety duty
- the conduct causes the death of an individual
- the person was reckless, or negligent, as to whether the conduct would cause the death of an individual.

A person's conduct causes a death if the conduct substantially contributes to the death⁵⁸.

16. Monitoring

This guideline is to be reviewed periodically by the OIR. Further reviews will be undertaken as a result of changes to legislation, through feedback elicitation or as a result of accumulated experience.

17. Related documents

N-04401-PL2048 - Assessment - OIR

N-04403-GL2084 - Management plan content – OIR

⁵⁷ See sections 236 – 241 of the WHS Act

⁵⁸ See sections 30A WHS Act