



INTERPRETIVE GUIDELINE

Duty of persons conducting business or undertakings that provide services relating to work health and safety

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Introduction

Section 26A of the *Work Health and Safety Act 2020* (WHS Act) places a duty on a person conducting a business or undertaking (PCBU) that provides work health and safety (WHS) services to ensure, so far as is reasonably practicable, that those services do not impose a risk to persons at the workplace.

What is a WHS service?

WHS services are:

Any services that relate to work health and safety including any products or things provided as part of those services.

A WHS service involves an activity that assists or enhances the ability of another PCBU to meet their WHS duties.

To be considered a WHS service, the activity will have all of the following characteristics:

- it must relate to work health and safety
- it must be intended to address the elimination of a hazard or control of a risk
- it is provided by a PCBU (the WHS service provider) to another PCBU (the recipient)
- it is provided in relation to a specific workplace or workplaces.

The WHS service could be providing any of the following that relate to work health and safety:

- recommendations or other advice
- testing or analysis
- information or documents including a report, plan, programme, strategy, guideline or manual
- training or other educational course.

For a WHS service to be provided there must be an agreement between the WHS service provider and the recipient. This can be verbal or written. A written contractual arrangement between the WHS service provider and the WHS service recipient may assist in determining the precise parameters of the WHS service, and the relevant use to which it is intended to be applied.

Services that are provided internally by a PCBU, such as site specific induction training provided by a supervisor, are not WHS services.

Services provided by unions or professional associations directly to their members are not WHS services as they are provided to workers directly rather than by an arrangement with the PCBU.

The recipient of the WHS service is entitled to rely on the expertise of a specialist or technical expert. However, an arrangement to acquire a WHS service does not alleviate the recipient of their health and safety duties. The recipient still carries some responsibility for ensuring the requirements of the WHS Act are met. This might involve ensuring the WHS service provider has the necessary expertise to carry out the activity, and reviewing the implementation of the WHS service afterwards to ensure it did not impose any new hazards or risks.

The more specific the advice becomes, the more likely it will be considered a WHS service. The regulator will need to consider the facts and circumstances of each case to determine if a contravention has occurred and prove beyond reasonable doubt there was a clear causal link between the WHS service and the imposition of a hazard or risk.

Relevant use

The following are examples of cases in which a relevant use of WHS services might put at risk the health and safety of persons who are at a workplace:

- a recommendation that is made on how to eliminate risks to health and safety at a workplace is inadequate for that purpose so that when the recommendation is implemented at the workplace the risks are not eliminated
- the testing of plant at a workplace for risks to health and safety fails to identify existing risks so that, when the plant is subsequently operated in reliance on the testing, workers at the workplace are exposed to those existing risks
- a training course for workers about how they can avoid being exposed to risks to their health and safety is inadequate for that purpose so that, when the workers put their training into practice at their workplaces, they are still exposed to the risks.

A WHS service provider does not commit an offence if the WHS service is not used by the recipient for the intended purpose. For example, if an engineer provides a start up checklist for a specific item of plant and the PCBU then applies it to another item of plant, the WHS service is not being used for the purpose for which it was provided.

What is not a WHS service?

While the WHS Act is deliberately broad in its definition of a WHS service, it is specific as to what does not constitute a WHS service. These are:

- services provided by a WHS authority, a health and safety representative (HSR) or deputy HSR, or a health and safety committee
- emergency services provided by police officers or other emergency services personnel in situations where there is a serious risk to the health and safety of any individual
- services that are subject to legal professional privilege even where that privilege has been waived.

Where the service has the character of a WHS service, but also meets the above exclusions, it is not a WHS service.

Services provided by industry groups or associations

General advice provided by an industry group or association is unlikely to constitute a WHS service if it is not tailored to a specific PCBU or workplace or intended to provide a substitute for a risk assessment by a PCBU. Examples include:

- training an HSR in their role and responsibilities under the WHS Act
- provision of information to PCBUs about the methodology for conducting risk assessments
- distribution of a newsletter advising workers of recent incidents at workplaces
- safety alerts regarding an emerging hazard for plant used widely in an industry sector including information on the various control measures that might be contemplated by a PCBU in that sector
- the provision of a list of risks that workers might face in a particular industry.