



Australian Government

Comcare

OVERSEAS WORKERS—HOW SHOULD I IDENTIFY AND MANAGE THE RISKS?

Under the *Work Health and Safety Act 2011* (WHS Act) and *Work Health and Safety Regulations 2011* (WHS Regulations), the duties of a person conducting a business or undertaking (PCBU) and an officer's due diligence obligations in respect to managing workers overseas are identical to those onshore. 'Workers' are defined broadly under section 7 of the WHS Act to include employees, contractors and volunteers. A 'workplace' is defined under section 8 to be a place where work is carried out for a PCBU and includes any place where a worker goes, or is likely to be, while at work. A workplace can include a place of residence.

Comcare understands that achieving the Australian Government's objectives often requires national capacity-building measures and local contractors or volunteers to undertake or participate in local projects.

Under section 19 of the WHS Act, a PCBU must do what is reasonably practicable to ensure a worker's health and safety. The level of influence or direction a PCBU has over a worker will affect what they can practically do to meet this duty of care in any given situation. In addition, a PCBU must ensure that work carried out as part of the business or undertaking does not put other people at risk.

Due to the nature of government operations overseas, a PCBU may be more likely to operate alongside other Australian Government agencies. Under section 16 of the WHS Act, more than one person can have a duty in relation to the same matter. This duty must be discharged to the extent to which a person has the capacity to influence and control the matter. Comcare expects that a PCBU consider, take reasonably practicable steps, and document those steps to address the health and safety risks of managing overseas projects. Risk management involves considering all relevant facts and identifying everything that may be relevant to the hazards, risks and means of eliminating or minimising those risks.

Further information on international deployment, contractors, officers, due diligence, and the Code of Practice titled *How to Manage Work Health and Safety Risk* can be found at <https://www.comcare.gov.au/scheme-legislation/whs-act>.

WHAT DOES 'REASONABLY PRACTICABLE' MEAN?

The term 'reasonably practicable' is used as the legislatively required work health and safety standard for duty holders to meet in WHS jurisdictions.

The term 'reasonably practicable' is defined in the WHS Act (section 18) to mean that which is—or was reasonably able to be done—taking into account and weighing up all matters relevant to the circumstances in which the risk was considered, including:

- > the likelihood of the relevant hazards or risk occurring
- > the degree of harm that might result from the hazard or risk
- > what the person knows about the hazard or risk and the ways of eliminating or minimising the risk
- > the availability and suitability of ways to eliminate or minimise the risk.

After assessing the extent of the risk and the ways to eliminate or minimise the risk, duty holders must also consider whether the cost is grossly disproportionate to the risk.

CASE STUDY 1

Australian worker X has been tasked by PCBU Y to engage local contractors for an Australian Government funded project in a developing country. Contractors within the developing country do not to operate to Australian standards.

To meet its obligations under the WHS Act and WHS Regulations to workers, the legislated standard is one of reasonably practicable. For each activity or task associated with the project, Comcare recommends PCBUs should:

- > discuss with workers, and direct as required, how the task will be completed
- > undertake a hazard identification
- > undertake a risk assessment
- > undertake an assessment of control measures
- > undertake associated activities (e.g. where practicable develop new work procedures and training, organise additional staff, and import appropriate skills and equipment)
- > be satisfied that the control measures are in place, that the controls have eliminated or minimised the risk, and that no additional risks have arisen before commencing the work
- > as a last consideration, determine the cost of eliminating or minimising the risk noting that there is a clear presumption in favour of safety ahead of cost—it must be grossly disproportionate to the risk in order to be a relevant consideration (a cost will rarely be grossly disproportionate to a risk of serious harm given the social and medical costs associated with serious harm).

Comcare is aware that it may not be reasonably practicable in certain circumstances to require and/or train local workers to meet Australian work health and safety standards in a developing country. Applying the above risk management process may mean that PCBU Y cannot comply with all aspects of the WHS Regulations. In such circumstances, it is essential that PCBU Y documents the risk management process and subsequent management actions appropriately in order to justify that they have met their health and safety duties.

CASE STUDY 2

Worker X has been posted to a workplace overseas. The relevant PCBU/s understand that the same WHS obligations apply to X as would onshore. However, the PCBU/s are unsure how their obligations extend to the worker's spouse and children.

Under the WHS Act, the PCBU/s duty of care extends beyond their workers to cover all other persons affected by the work. It requires the PCBU/s to ensure—so far as is reasonably practicable—that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking [see section 19(2)]. 'Other persons' include third parties such as X's spouse and children. This duty might be partly discharged by providing information and instruction to ensure X's family are aware of the risks tied to work activities, and how those risks might be mitigated or avoided. Note that while at the workplace, X's family can be reminded they have duties under section 29 of the WHS Act.

Section 19(4) of the WHS Act outlines the duty in relation to accommodation provided by the PCBU/s. The accommodation provided to X must be maintained—as far as is reasonably practicable—so that X is not exposed to risks to health and safety. This duty only applies in relation to accommodation that is owned by or under the management or control of the PCBU/s or the occupancy is necessary for X's engagement because other accommodation is not reasonably practicable. A risk management process such as that outlined in case study one should be applied. Considerations may include safety and security, physical infrastructure and access to communications. As X's spouse and children are living at accommodation to which section 19(4) of the WHS Act applies, section 19(2) also applies.

CASE STUDY 3

A cyclone has struck and devastated a South Pacific island. Two Australian agencies are jointly tasked by the Australian Government to provide assistance. To meet their obligations under the WHS Act and WHS Regulations to their workers engaged in providing assistance, the legislated standard is one of reasonably practicable. Section 16 of the WHS Act identifies that more than one PCBU can have a duty for the same matter. The PCBU has a duty to ensure the health and safety of its workers—regardless of whether another PCBU has a similar duty—to the extent to which the PCBU has the capacity to influence and control the matter [see section 16(3)]. In respect to each activity or task associated with the work, Comcare recommends PCBUs should:

- > consult with any other PCBU to ensure coordination of activities as required
- > undertake a hazard identification
- > undertake a risk assessment
- > undertake an assessment of control measures
- > undertake associated activities (e.g. where practicable develop new work procedures and training, organise additional staff, and import appropriate skills and equipment)
- > be satisfied that the control measures are in place, that the controls have eliminated or minimised the risk, and that no additional risks have arisen before commencing the work
- > as a last consideration, determine the cost of eliminating or minimising the risk noting that there is a clear presumption in favour of safety ahead of cost—it must be grossly disproportionate to the risk in order to be a relevant consideration (a cost will rarely be grossly disproportionate to a risk of serious harm given the social and medical costs associated with serious harm).

All identification and management actions needs to be appropriately documented.

It is a legislative requirement under section 46 of the WHS Act that where more than one PCBU has a duty in relation to the same matter, each PCBU must, so far as practicable, consult, cooperate and coordinate their activities with the other PCBU. In the circumstances of this scenario, Comcare expects, to the extent practicable, that both PCBUs would consult, cooperate and coordinate in respect to their concurrent duties. This consultation process will ensure both agencies are clear about what they need to do to protect the health and safety of their workers while providing aid support.