

CONTACT US

Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869

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DUTIES AND LIABILITIES OF MANAGERS/OWNERS OR PERSONS WHO CONTROL WORKPLACES

The Victorian Government passed the *Occupational Health and Safety Act 2004* ("the Act") to replace the *Occupational Health and Safety Act 1985*. The aim of the Act was to provide a broad framework for improving standards of workplace health and safety to reduce work-related injury and illness. The framework includes setting down duties not only upon employers, but also upon employees, owners, and managers of workplaces.

This synopsis presents an overview of the duties under the Act owed by owners and managers of workplaces.

GENERAL DUTIES IN THE WORKPLACE

A person who has, to any extent, the management or control of a workplace have the following duties in the workplace under the *Occupational Health and Safety Act 2004*:

I. THE PERSON MUST ENSURE THAT THE WORKPLACE AND THE MEANS OF ENTERING AND LEAVING THE WORKPLACE ARE, SO FAR AS IS REASONABLY PRACTICABLE, SAFE AND WITHOUT RISKS TO HEALTH.

This duty is set out in section 26 and extends only to matters that the person has control of. If the person is the owner of a building in which a workplace is situated, the owner will have the duty to ensure that the means of entering and leaving the workplace are safe. If the person is the designer of the building which is to be used as a workplace, he or she must ensure, so far as is reasonably practicable, that the building is designed to be safe for those who will use it as a workplace (see section 28).

The words "so far as is reasonably practicable" are words of limitation which must be determined objectively according to the situation. The person owing the duty must do what a reasonable person would do in the particular circumstances by putting in place "reasonably practicable" measures.

The following will be taken into account in determining what is "reasonably practicable":

- The likelihood of a hazard or risk occurring;

- The degree of harm that would result if the hazard or risk occurred;
- What the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing that hazard or risk;
- The availability and suitability of ways to eliminate or reduce the hazard or risk; and
- The cost of eliminating or reducing the hazard or risk.

Section 21 sets out what are included in maintaining a safe working environment, which include providing adequate facilities, information, and training to the employees, as well as ensuring that the workplace environment and any equipment are safe and without risks to health.

Contravening the first duty is an indictable offence, although it may be tried and heard summarily^[i]. The penalty for contravening the first duty will expose the person to a fine of up to 1800 penalty units for a natural person, and 9000 penalty units^[ii] for a body corporate.

II. THE PERSON MUST NOT, WITHOUT LAWFUL EXCUSE, RECKLESSLY ENGAGE IN CONDUCT THAT PLACES OR MAY PLACE ANOTHER PERSON AT THE WORKPLACE IN DANGER OF SERIOUS INJURY.

The duty to ensure that nobody in the workplace is placed in danger of serious injury is set out in section 32. Going against this duty is an indictable offence although it may be tried and heard summarily. The penalty for contravening this duty will expose the person to either:

- (a) For a natural person, imprisonment not exceeding 5 years or a fine not exceeding 1800 penalty units or both; or
- (b) For a body corporate, a fine not exceeding 9000 penalty units.

III. THE PERSON MUST NOT USE A PLANT OR SUBSTANCE, OR CARRY OUT AN ACTIVITY, IF CARRYING OUT THE PARTICULAR ACTIVITY OR USING THE PLANT OR SUBSTANCE REQUIRES SOMEONE WITH A LICENCE TO DO SO.

A "plant" is defined under the Act as including any machinery, equipment, appliance, implement and tool, or any component of any of those things. It also includes

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03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869



LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

anything fitted, connected, or related to any of the machinery, equipment, appliance, implement or tool.

A “substance” is defined as any natural or artificial substance whether in the form of a solid, liquid, gas or vapour.

The duty not to use a plant or substance, or carry out an activity without the licence is set out in section 40 of the Act. Contravening the section will result in a fine of up to 100 penalty units for a natural person, and 500 penalty units for a body corporate.

IV. THE PERSON MUST TRY TO RESOLVE HEALTH OR SAFETY ISSUES USING AGREED INTERNAL PROCEDURES OR THOSE SPECIFIED BY THE REGULATIONS

The duty to resolve health or safety issues is set out in section 73 of the Act. If the parties cannot resolve a health and safety issue in a reasonable time, either party can ask the Victorian Workcover Authority to arrange for an Inspector to attend the workplace to enquire into the issue. The Inspector is empowered to exercise any powers necessary in the circumstances to resolve the issue.

DUTIES ON INSPECTION

Inspectors and Authorised Representatives may inspect a workplace for the purposes of ensuring that the workplace and the persons involved in the workplace comply with the Act.

Authorised Representatives are persons who are members of unions or registered employee organizations granted entry permits by the Magistrates Court to enter workplaces. The permits expire 3 years after issue, when the permit-holder ceases to be an officer or a permanent employee of the organization, or if the organization is no longer a registered employee organization.

Inspectors, on the other hand, are officers or employees of the Victorian Workcover Authority who are appointed to the position. Inspectors may enter any workplace and exercise any of the following powers at any workplace:

- Make enquiries;
- Inspect and examine the workplace and anything in the workplace;

- Bring with them any equipment or materials that may be required;
- Seize anything that may provide evidence of an offence;
- Seize anything that needs to be taken off site for further testing;
- Take photographs or measurements, or make sketches or recordings;
- Exercise any powers available to them under the Act or regulations; and
- Do anything that is reasonably necessary to perform their functions.

Inspectors must identify themselves upon entering a workplace unless the occupier of the premises or the Health and Safety Representative has been notified of the visit.

I. THE PERSON MUST NOT REFUSE ENTRY TO AUTHORISED REPRESENTATIVES OR TO THE ASSISTANTS OF THE INSPECTOR

Inspectors are entitled to bring assistants with them to assist in the carrying out of the inspector’s role. The duty on the occupier to allow entry to the assistants is set out in section 122(2) of the Act. The duty to allow entry to Authorised Representatives is set out in section 93 of the Act.

Failing to allow entry to either the assistants or the Authorised Representative will result in a fine of up to 60 penalty units for a natural person or 300 penalty units for a body corporate.

II. THE PERSON MUST NOT INTENTIONALLY OBSTRUCT THE INSPECTION

Section 125 and 93 sets out conduct which a person must not do during an inspection:

- (a) hinder or obstruct an Inspector or Authorised Representative, or seek to have others to do so;
- (b) conceal anything from an Inspector; or
- (c) attempt to prevent anyone else from assisting an Inspector;
- (d) threaten or intimidate an Authorised Representative while on a workplace visit.

Engaging in the above conduct will expose the person to a fine of up to 60 penalty units for a natural person or 300



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penalty units for a body corporate.

Assaulting, threatening or intimidating an Inspector or a person assisting the Inspector is considered an offence under section 125 of the Act and can result in the following penalties:

- For a natural person, 2 years imprisonment or 240 penalty units or both;
- For a body corporate, 1200 penalty units.

III. THE PERSON MUST NOT IMPERSONATE HIMSELF OR HERSELF AS BEING AN AUTHORISED REPRESENTATIVE OR A PERSON HOLDING AN ENTRY PERMIT

The duty is set out in section 94. The penalty for impersonation is a fine of up to 60 penalty units.

IV. THE PERSON MUST COMPLY WITH THE INSPECTOR'S REQUESTS

A person must do the following when asked by the Inspector to do so:

- produce documents for examination and answer questions (see sections 100, 123 and 124)
- provide his or her correct name and address (see section 119)
- provide assistance unless there is a reasonable excuse for not assisting (see section 121).

Failure to comply with the inspector's requests will result in a fine of up to 60 penalty units for a natural person and 300 penalty units for a body corporate.

DIRECTIONS AND NOTICES

Inspectors are empowered to issue Directions under section 120 of the Act to any person in the workplace if the Inspector believes it is necessary because of an immediate risk to anyone's health or safety.

Inspectors are also empowered to issue Notices once he or she has entered a workplace to help enforce compliance with the Act and improve health and safety.

The Notices include:

(a) Non-Disturbance Notices.

Non-disturbance Notices require the occupier or apparent occupier to stop using, moving, disturbing or interfering with any specified plant, substance, thing, or the area in which these are located. Non-disturbance notices remain in force for up to 7 days.

(b) Improvement Notices.

Improvement Notices are generally issued when the Inspector believes that someone at the workplace has contravened the Act or regulations. The Improvement Notice may include directions about how to remedy a breach, which may include interim conditions necessary to minimize the risks to health or safety, and directions to cease activities to which the notice relates if they are not remedied.

(c) Prohibition Notices.

Prohibition Notices are issued when the Inspector believes there is an activity which may be an immediate risk to health or safety. The Notice is issued to the person carrying out an activity which the Notice prohibits from continuing. The Prohibition Notice remains in place until the Inspector has certified that the risk has been remedied.

Failing to comply with either Directions or Notices is an indictable offence (although it may be heard and tried summarily). The penalties for non-compliance are 500 penalty units for a natural person, or 2500 penalty units for a body corporate.

ADDITIONAL DUTIES IF THE MANAGER/OWNER IS ALSO A SELF-EMPLOYED PERSON

In addition to the above duties, self-employed persons are bound by the Act to do the following:

I. THE SELF-EMPLOYED PERSON MUST ENSURE, SO FAR AS IS REASONABLY PRACTICABLE, THAT PERSONS ARE NOT EXPOSED TO RISKS TO THEIR HEALTH OR SAFETY ARISING FROM THE CONDUCT OF THE UNDERTAKING OF THE SELF-EMPLOYED PERSON

The duty to ensure safety is set out in section 24 of the Act. Contravening the section is an indictable offence although it may be tried and heard summarily. Penalty for contravening the section can result in a fine of up to 1800 penalty units.



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II. THE SELF-EMPLOYED PERSON MUST NOT UNDERTAKE BUSINESS ACTIVITIES UNLESS THEY ARE LICENSED TO DO SO

The duty to hold the necessary licences and registration to undertake particular business activities is set out in section 40. Contravening this section is an indictable offence although it may be heard and tried summarily. The penalties for contravention are 500 penalty units for a natural person, and 2500 penalty units for a body corporate.

III. THE SELF-EMPLOYED PERSON MUST NOTIFY THE AUTHORITY AFTER BECOMING AWARE OF A SERIOUS INCIDENT THAT HAS OCCURRED AT A WORKPLACE

Incidents that must be notified to the Authority immediately are incidents that:

- (a) result in death; or
- (b) result in a person requiring medical treatment as a result of being exposed to particular substances or injuries; or
- (c) expose persons in the immediate vicinity to an immediate risk of the person's health or safety through the collapse, overturning, failure or malfunction of an equipment, implosion or explosion or fire, etc.

The self-employed person need not notify the Authority if the self-employed person is the only person injured or harmed.

IV. THE SELF-EMPLOYED PERSON MUST PROVIDE A WRITTEN RECORD OF THE INCIDENT WITHIN 48 HOURS OF NOTIFYING THE AUTHORITY.

Section 38 sets out the duty to provide a written record of the incident within 48 hours of notifying the Authority. The written record must be kept for at least 5 years.

Contravening the section will result in a fine of up to 60 penalty units for a natural person, or 300 penalty units for a body corporate.

V. THE SELF-EMPLOYED PERSON MUST ENSURE THAT THE SITE IN WHICH THE INCIDENT OCCURRED IS NOT DISTURBED

Section 39 sets out that a self-employed person must ensure that a site in which an incident has occurred is not disturbed until an Inspector arrives at the site or such other time as an Inspector directs.

The site may however be disturbed for the purpose of protecting the health or safety of a person, or aiding an injured person involved in an incident, or taking essential action to make the site safe or to prevent a further occurrence of an incident.

Penalties for disturbing the site are 60 penalty units for a natural person and 300 penalty units for a body corporate.

^[i] Summary offences are dealt with by a judge in the Magistrates' Court. They include less serious offences, such as traffic violations.

Indictable offences are more serious. They can carry a maximum term of imprisonment of five years or more or a fine of \$60,000 or more can be imposed. These offences can be heard in a higher court (the county Court or Supreme Court) by a judge and jury.

Most indictable offences are 'triable summarily', which means they can be heard in the Magistrates' Court instead of by a judge and jury.

^[ii] One penalty unit is \$116.82 in the 2009–10 financial year (1 July 2009 to 30 June 2010). The rate for penalty units is indexed annually, so that it is raised in line with inflation.

For more information on Employment and IR Law, please contact John Perry

Phone: (03) 9600 3522 | Fax: (03) 9600 3544 | Email:

johnp@llcc.com.au

Click [here](#) to view John's CV

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