

**INTERPRETATIVE GUIDELINE – MODEL WORK HEALTH AND SAFETY ACT
DISCRIMINATORY, COERCIVE OR MISLEADING CONDUCT**

This document provides guidance on the interpretation and application of specific terms and concepts used in the provisions of the model *Work Health and Safety* (WHS) Act to prohibit discriminatory, coercive or misleading conduct.

Discriminatory Conduct

The model WHS Act prohibits unlawful discrimination based on WHS roles or activities

Section 104 of the model WHS Act prohibits a person from engaging in *discriminatory conduct* for a *prohibited reason*. In summary, the prohibition is aimed at allowing workers, prospective workers and others to perform legitimate safety-related functions or activities and to raise health and safety issues or concerns under the model WHS Act without fear of reprisal.

Who is to be protected by the prohibition?

People who are ‘workers’ or who are ‘prospective workers’ are protected by the prohibition on discriminatory conduct.

A worker is defined broadly to mean any person who carries out work for a person conducting a business or undertaking (PCBU), in any capacity, and includes contractors, labour hire personnel and volunteers. A prospective worker is someone who is seeking to be engaged to carry out work.

The prohibition also applies to commercial arrangements, protecting a person from being refused a contract or from having a contract terminated because of their legitimate safety-related activities.

What conduct does the model WHS Act identify as discriminatory?

‘Discriminatory conduct’ is defined in Part 6 of the model WHS Act (s. 105). The types of conduct that are discriminatory involve treating someone to their disadvantage in their position, prospective position or work arrangements. The specific conduct identified as discriminatory in the section is:

- a. dismissing a worker; or
- b. terminating a contract for services with a worker; or
- c. putting a worker to their detriment in their engagement or altering the position of a worker to their detriment (discussed further below); or
- d. refusing or failing to engage a prospective worker or treating a prospective worker less favourably in the terms of engagement that are offered to them; or
- e. terminating a commercial arrangement or refusing or failing to enter into a commercial arrangement with a person.

Organising or threatening to organise or take such action is also discriminatory conduct. In addition, actions such as requesting, instructing, inducing, encouraging, authorising or assisting someone else to engage in discriminatory conduct is prohibited.

What is meant by ‘altering the position of a worker to the worker’s detriment’ and ‘putting a worker to his or her detriment in the engagement of the worker’?

What amounts to a person ‘altering the position of a worker to the worker’s detriment’, ‘putting a worker to his or her detriment in the engagement of the worker’, or threatening to do those things, requires an objective assessment of all the facts.

‘Altering the position of a worker to the worker’s detriment’ may include any adverse effect on or deterioration in the worker’s conditions during the engagement.

‘Putting a worker to his or her detriment in the engagement of the worker’ has a similar meaning but relates to the worker’s conditions at the commencement of the engagement, which may include the terms of engagement offered to a prospective worker.

Some examples of such detriment may be:

- demotion;
- allocation of work below skill/classification level (leading to a reduction in classification or employability);
- less flexible work hours, less favourable shifts or rosters, less overtime or less prospect of overtime earnings;
- repeated changes to shifts, rosters or working hours;
- lower salary, increments or bonuses;
- reduction in allowances;
- restrictions in maintaining competency levels;
- fewer training opportunities;
- refusing promotion or advancement;
- job transfer;
- standing down on full pay and being singled out for this purpose;
- denial of wage increase and being singled out for this purpose;
- reneging on an agreement to pay a wage increase;
- withdrawing a promise of secure engagement in a position for an agreed term or an offer of promotion or advancement;
- denying access to existing resources such as information technology;
- verbal abuse, humiliation, denigration or ridicule;
- isolation or exclusion from organisational activities;
- denying access to a fair process before taking disciplinary action;
- taking disciplinary action;
- counselling and issuing a warning letter where the effect is to make the job less secure; or
- making decisions about redundancies on the basis of a discriminatory reason(s).

Depending on the circumstances of each case, some of these actions or conduct may be legitimate for operational and/or procedural reasons. However, a person cannot undertake such actions or conduct towards a worker where the dominant or substantial reason for doing so is a prohibited reason.

What are the prohibited reasons for discriminatory conduct?

What makes engaging in conduct of the kind described unlawful, is that the worker (or prospective worker) is treated in that way for a *prohibited reason*, being that the worker:

1. is, has been or proposes to be, an elected health and safety representative (HSR) or to undertake another role under the model WHS Act (for example a management representative, a member of a health and safety committee, or a person assisting a HSR); or
2. exercises, has exercised or intends to exercise powers or perform functions under the model WHS Act (for example, a HSR issuing a provisional improvement notice) at all or in a particular way (for example, what they put in the notice) or as a member of a health and safety committee; or
3. refrains, has refrained or intends to refrain from exercising a power or performing a function under the model WHS Act, at all or in a particular way; or
4. assists, has assisted or intends to assist a person exercising a power under the model WHS Act, including providing information to them (for example, providing information to a HSR or an inspector investigating an incident or for the purposes of issuing a notice); or
5. raises, has raised or proposes to raise an issue or concern about work health and safety with:
 - a PCBU; or
 - an inspector; or
 - a WHS entry permit holder (union official with the right to enter a workplace); or
 - a HSR or health and safety committee member or another worker; or
 - any other person who has a duty under the model WHS Act in relation to the particular matter, or who is exercising a power or performing a function under the model WHS Act; or
 - a person who is, or has been, or intends to be involved in resolving a WHS issue under the model WHS Act; or
 - a person who is taking, or has taken, or proposes to take action to seek compliance with the model WHS Act (for example, a contractor or labour hire supplier who is trying to persuade another PCBU to consult, co-operate and co-ordinate activities with them as required by s. 46 of the model WHS Act).

If the prohibited reason is the ‘dominant reason’ for the conduct, that can lead to criminal action and penalties

Discriminatory conduct may be prosecuted as a criminal offence if it can be proved, to the appropriate standard, that the prohibited reason for the conduct was the *dominant reason* for the conduct (s. 104(2)). The High Court has said that ‘dominant’ means ‘ruling, prevailing or most influential’. The dominant reason for a person’s conduct is assessed objectively based on all available and relevant information and circumstances. The ‘dominant reason’ for a person’s conduct or action may not be the reason stated by the person or the reason which initially appears to be dominant.

When considering whether a prohibited reason was the dominant reason for a person's conduct, the regulator will consider whether the role or activities noted above were, more than any other reason, why the person acted as they did.

For an offence to have been committed, the prohibited reason must have been the dominant reason why the person acted as they did. For example, a court has found that re-organising the duties of a worker to enable operations to continue efficiently while allowing a HSR to carry out the functions of a HSR was not unlawful, as the reason for the conduct was to meet legitimate operational requirements, rather than because of the activities of the HSR. The re-organisation of the worker's duties would have been unlawful however, if undertaken to the detriment of the HSR because the HSR had exercised a power or performed a function as such (for example, meeting with an inspector to raise a safety concern).

If the prohibited reason is a 'substantial reason' for the conduct, that can lead to civil proceedings

Discriminatory conduct may also be pursued against a person in civil proceedings if it can be proved, to the appropriate standard, that the prohibited reason for the conduct was a *substantial reason* for the conduct (s. 112(4)). A substantial reason for conduct must have some substance and although it need not be the dominant or only reason, it is not sufficient to establish that it was simply one of a number of reasons.

It is a defence to civil proceedings (under s. 112(2)) if the defendant proves that the conduct was reasonable in the circumstances and that a substantial reason for the conduct was to comply with the requirements of the model WHS Act or Regulations or a corresponding WHS law (s. 113(3)).

The alleged discriminator has the burden of proving a prohibited reason was not the dominant or substantial reason

Under s. 110 of the model WHS Act, if a criminal prosecution goes to court, the defendant has the onus of proving on the balance of probabilities that the alleged prohibited reason was **not** the dominant reason for the defendant's conduct.

Similarly, s. 113 requires the defendant in civil proceedings to prove on the balance of probabilities that the alleged prohibited reason was not a substantial reason for the defendant's conduct.

Coercion or inducement

Section 108 of the model WHS Act further prohibits various forms of coercive action taken, or threatened to be taken intentionally to intimidate, force or cause a person to act or fail to act in relation to a health and safety power of function.

Specifically, s. 108(1) provides that a person must not take, organise to take, or threaten any action against another person with the intent to coerce or induce them or someone else:

- a. to exercise or not exercise a power under the Act, at all or in a particular way; or
- b. to perform or not perform a function under the Act; or
- c. to refrain from seeking a role under the Act or continuing to undertake a role under the Act.

Coercion is action taken to compel or force someone to do or refrain from doing something. The courts have found that the term 'coercion' means something like the use of force, or at least the threat of harm to the interests of another. To prove the 'intent to coerce' requires that

it be shown that it was intended that pressure be exerted which, in a practical sense, negates choice.

Inducement is action taken to encourage a person to do or refrain from doing something through a promise of a benefit or promise to relieve them from a detriment. The courts have found that there must be a causal connection between the action taken by the inducer and the subsequent reaction of the inducee.

An example of an offence under section 108 might be to threaten to terminate a HSR's employment or contract if they issue a provisional improvement notice to remedy an identified contravention of health and safety laws. (Such conduct may also constitute discriminatory conduct under ss. 104 and 105).

Section 108(3) of the model WHS Act makes it clear however, that in circumstances where an emergency services worker gives a reasonable direction to a person to exercise or not exercise a power or perform a function in an emergency, this will *not* be an action with intent to coerce or induce. An example might be where an emergency services worker directs a person to give them assistance to operate equipment at a workplace to make the area safe, rather than permit that person to exercise their HSR powers to direct a cessation of work (s. 85).

Misrepresentation

Section 109 of the model WHS Act makes it an offence for a person to knowingly or recklessly make a false or misleading representation to another person about the other person's:

- a. rights or obligations under the Act (for example, the right to cease work); or
- b. ability to initiate, or participate in, a process or proceedings under the Act (for example the right to request the election of a HSR or the right of a majority of workers of a work group to remove a HSR elected by them); or
- c. ability to make a complaint or inquiry to a person or body empowered under the Act to seek compliance with the Act (for example, asserting that the circumstances do not allow an inspector to be called in to resolve an issue under s. 82).

A person will not breach this section if they do not know that their representation is false and do not recklessly fail to determine whether their representation is accurate. An example may be where a person misinterprets a provision of the Act, or acts on inaccurate advice that they have been given as to what the Act provides for. However, a person may recklessly make a misrepresentation if they fail to look at the relevant provisions in the Act before making the misrepresentation about what the Act allows or requires.

This section does not apply however, where the person to whom the representation is made would not be expected to rely on it. This may occur for example, where a WHS inspector is told by a PCBU or their representative that they do not have the power to enter a workplace where a safety incident has taken place, as an inspector would clearly be aware that they can exercise such a power. Another example might be where a PCBU informs a HSR that they have no power to issue a provisional improvement notice when the HSR has recently undertaken training that informed the HSR of their power to do so.

This might also occur where a PCBU with control or management of a workplace, knowingly refuses a union official (and authorised entry permit holder) entry to a workplace for the purposes of inquiring into a suspected contravention of the Act, on the basis that that the permit holder does not have a right of entry. Such misrepresentation is also prohibited by

s.146 of the model WHS Act which makes express provision for civil penalties where such a contravention is made out.

Note: this document is a general guideline only and is not a substitute for professional legal advice. The contents of this document are correct at the time of writing. However, there may be subsequent decisions of courts or tribunals on the matter covered by this guide which mean that the contents are no longer accurate.