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# Upstream health and safety duties under HSWA

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In a supply chain, persons conducting a business or undertaking (PCBUs) who are upstream from others (that is, who supply services or products to others) have a duty to ensure, so far as is reasonably practicable, that the work they do or the products they provide to others do not create health and safety risks.

In this guidance, we use the term 'product' specifically to mean plant, substances and structures. In cases where HSWA only identifies one or two types of products, this guidance will specifically list those types that the HSWA identifies.

This guidance explains situations where you have upstream duties and provides examples that can help you carry out those duties.

You might find it useful if you are a person conducting a business or undertaking (PCBU):

- on board a ship
- where ships are places of work
- on New Zealand's 13 major ports

and undertake work in a supply chain that may impact the health and safety of others.

## 1. Meaning of 'PCBU'

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All types of working arrangements that we usually call 'businesses' are PCBUs. Some working arrangements that are not profit-making or commercial in nature are also PCBUs (for example, a yacht club paying one or more people to work for them).

Examples of PCBUs that have upstream duties in the maritime sector include businesses that:

- design or supply fishing equipment or machinery
- manufacture and assemble prefab buildings on a port site
- design machines to harvest mussels
- import mobile cranes and supply them to workplaces such as ports.



## 2. Carry out your upstream duty ‘so far as is reasonably practicable’

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When you have an upstream duty, you must carry that duty out so far as is reasonably practicable. This means that there are particular matters you have to weigh up when you consider whether you must take action, or take a particular action, to eliminate or minimise the likelihood that a risk will cause harm to your own health and safety or that of others. You must think about:

- how likely it is that the risk will cause harm
- how much harm might result from the hazard or risk
- what you know, or ought reasonably to know, about the hazard or risk and ways of eliminating or minimising it
- how available and suitable the ways to eliminate or minimise the risk are.

After weighing up all these things, you can consider the cost associated with available ways of eliminating or minimising the hazard, including whether the cost is grossly disproportionate to the risk of the hazard causing harm.

## 3. Who has upstream duties

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When you are part of a supply chain, the plant, substances or structures that you provide that might be used at workplaces have a chance of introducing risks to the workplaces that use them.

A workplace is a place where work is being carried out, or is customarily carried out, for a business or undertaking. This includes any place where a worker goes or is likely to be while at work. ‘Place’ includes a vehicle, vessel, aircraft, ship or other mobile structure. It includes any waters and any installation on land, on the bed of any waters, or floating on any waters.

You have upstream health and safety duties if your business:

- designs plant, substances or structures that might be used in a workplace – this includes redesign or modification of a design
- manufactures plant, substances or structures that might be used in a workplace
- imports plant, substances or structures that might be used in a workplace
- supplies plant, substances or structures that might be used in a workplace
- installs, constructs or commissions plant or structures as or at a workplace.

## 4. What upstream duty do you have?

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If you are part of a supply chain providing a product, you must ensure that the product is designed and manufactured so it is without risks to the health and safety of people who are using it in the workplace or carrying out any reasonably foreseeable activities with or to it, including inspection, cleaning, maintenance or repair.

Something is foreseeable if a person knows that it can happen or will happen.

## **Examples**

### **Scenario 1**

A PCBU wants to buy a machine to harvest mussels and have it installed on the deck of their vessel.

The company that designs the machine must ensure that the design meets machine safety standards so that workers who operate the machine are not exposed to the risk of harm from the moving parts.

The company that manufactures the machine must ensure that it is produced to the standards specified by the designer and that all guarding is able to operate as intended.

The company that installs the machine must test it to ensure that the guarding and safety measures work, preventing workers from being exposed to any risks posed by the operation of the machine.

A PCBU that buys a machine from overseas, is responsible for making sure that the machine meets safety standards. They can do this by checking that the machine meets or exceeds AS/NZS 4024:2014.

### **Scenario 2**

Bloggs Equipment imports and supplies heavy machinery to workplaces. They sell a conveyor to Nemo Fishing. When they go to install the conveyor, they realise that the guarding has been damaged in transit. Before they complete the installation, they repair the guarding to make sure Nemo workers can safely use the conveyor.

To make sure they meet their duties, they consult the original design plans to check that the repairs meet the machine safety standards the machine was designed to meet or exceed (AS/NZS 4024:2014).

## **Types of products upstream duties relate to**

Upstream duties relate to three types of products: plant, substances and structures.

For plant and structures, you have an upstream duty if the plant or structure is going to be used as or at a workplace, or could reasonably be expected to be used this way. So it applies when the plant or structure is the workplace itself, such as a fishing vessel, or when it is used in the workplace, such as a log stacker on a port.

For substances, you have an upstream duty when these are to be used at a workplace, or could reasonably be expected to be used at a workplace.

These are the definitions given in HSWA of these three types of products.

'Plant' includes:

- a) any machinery, vehicle, vessel, aircraft, equipment (including personal protective equipment), appliance, container, implement, or tool; and
- b) any component of any of those things; and
- c) anything fitted or connected to any of those things.

'Structure':

- a) means anything that is constructed, whether fixed, moveable, temporary, or permanent; and
- b) includes—
  - (i) buildings, masts, towers, frameworks, pipelines, quarries, bridges, and underground works (including shafts or tunnels); and
  - (ii) any component of a structure; and
  - (iii) part of a structure

'Substance':

- a) means any natural or artificial substance in any form (for example, a solid, liquid, gas, or vapour); and
- b) includes a hazardous substance

## PCBUs who design, manufacture, import or supply products

The duties for PCBUs who design, manufacture, import or supply a product are very similar.

PCBUs who design a product must make sure that they design it without risks to the health and safety of people who use it or are nearby.

PCBUs who manufacture a product must produce it to be without risks to the health and safety of people who use it or are nearby.

PCBUs who import or supply a product must make sure it is without risks to the health and safety of people who use it or are nearby.

**Table: How you might carry out your upstream PCBU duties** provides a series of examples that you could apply to your own operation to meet your upstream duties.

The PCBU's duty is to:	An example of a PCBU carrying out the duty
make sure that the product is without risks to the health and safety of persons using the product for the purpose you designed, manufactured, imported or supplied it for	<p>A PCBU that designs a conveyor must design it to be safe to use, for example by including safe guarding in their design.</p> <p>A PCBU that manufactures a conveyor that has guarding in the design must make sure it is manufactured with safe guarding.</p> <p>A PCBU that imports or supplies a conveyor must make sure any guarding that is part of the design and manufacture is present.</p>

The PCBU's duty is to:	An example of a PCBU carrying out the duty
<p>make sure that the product is without risks to the health and safety of persons using the product for the purpose you designed, manufactured, imported or supplied it for</p>	<p>A PCBU that designs a conveyor must design it to be safe to use, for example by including safe guarding in their design.</p> <p>A PCBU that manufactures a conveyor that has guarding in the design must make sure it is manufactured with safe guarding.</p> <p>A PCBU that imports or supplies a conveyor must make sure any guarding that is part of the design and manufacture is present.</p>
<p>make sure a plant or substance is without risks to the health and safety of persons who store it</p>	<p>A PCBU that designs or manufactures a plant or substance must plan and manufacture it so it can be stored safely, and give instructions for how to store it appropriately.</p> <p>A PCBU that imports or distributes plant or a substance must make sure that instructions for how to store it appropriately are included with it.</p>
<p>make sure a structure is without risks to the health and safety of the persons who construct it</p>	<p>A PCBU that designs a structure must design it with adequate structural support so it does not collapse during construction.</p> <p>A PCBU that manufactures a structure must manufacture it with the required structural supports to the required strength so workers constructing it are not in danger from it collapsing.</p> <p>A PCBU that designs, manufactures, imports or distributes a structure must include appropriate instructions for safely constructing it.</p>
<p>make sure people who carry out a reasonably foreseeable activity (such as inspection, cleaning, maintenance, or repair) in relation to the product are without risks to their health and safety.</p> <p><b>Plant</b> – activities include:</p> <ul style="list-style-type: none"> <li>– manufacturing it</li> <li>– assembling it</li> <li>– using it for a purpose it was designed or manufactured for</li> <li>– storing it properly</li> <li>– decommissioning it properly</li> <li>– dismantling it properly</li> <li>– disposing of it properly</li> </ul>	<p><b>Plant</b></p> <p>A PCBU that designs plant must allow for safe access to all parts of the plant that might need to be maintained or repaired.</p> <p>A PCBU that manufactures plant must manufacture it so that access to areas needing to be maintained or repaired is secure and safe for people using it.</p> <p>A PCBU that imports or distributes plant must be sure that all areas that need to be maintained or repaired can be accessed safely.</p>

The PCBU's duty is to:	An example of a PCBU carrying out the duty
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**Substance** – activities include:

- manufacturing it
- using it for a purpose it was designed or manufactured for
- handling it properly
- storing it properly
- disposing of it properly

**Structure** – activities include:

- using it for a purpose it was designed or manufactured for
- proper demolition of it
- disposing of it properly

**Substance**

A PCBU that designs, manufactures, imports or distributes a substance must make sure there is an appropriate safety data sheet.

Any PCBU involved in the commissioning or installation of a refrigeration unit that includes ammonia must make sure that the unit is properly sealed and safe for people to use and, at the end of its life, dispose of properly.

**Structure**

A PCBU that designs a structure must design it so that:

- people performing maintenance or repairs can safely access all parts of the structure that might need to be maintained or repaired
- the walls, roof, etc. are strong enough to support normal uses
- the structure can be decommissioned and demolished without causing risk to the health or safety of people doing the demolition (for example, there is no asbestos in it)
- the structure can be disposed of properly without causing risk to the health or safety of people.

A PCBU that manufactures a structure must make sure it is manufactured so it fulfils all of the conditions listed above.

A PCBU that imports or distributes a structure must make sure that it fulfils all the conditions listed above.

There are specific regulations around scaffolding that you need to understand if you are working with it. WorkSafe has comprehensive guidance about scaffolding, [Scaffolding in New Zealand](#). We strongly recommend you read this guidance if you are working with scaffolding.

make sure people who are in or near the workplace and are exposed to the product or who might be affected by any of the activities listed here are free from risks to their health and safety

See Scenario 3 below.

do any calculations, analysis, testing, or examination necessary to ensure this, or arrange for someone else to carry them out

See Scenario 4 and Scenario 5 below.

provide adequate information to every person the product is provided to so they can safely use the product. Adequate information includes:

See Scenario 6 below.

## The PCBU's duty is to:

## An example of a PCBU carrying out the duty

- each purpose the product was designed for
- the results of any calculations, analysis, testing or examination carried out to ensure that people using it in the ways listed in this section are safe, including any hazardous properties of a substance that has been identified by testing
- any conditions necessary to make sure that the product is without risks to health and safety when people are using it for a purpose it was designed or manufactured for or carrying out any type of activity listed in this section

### **Examples**

#### **Scenario 3**

A construction company is building a new warehouse on a port. To make sure that people who are in or near the area on the port where it is being constructed are not exposed to risks to their health and safety, the construction company builds a fence around the area where the structure is being built. This keeps people at a safe distance and prevents the risk of injuries in case of accident.

#### **Scenario 4**

A PCBU that designs or manufactures a substance must do any calculations, analysis, testing or examination necessary to make sure that the safety data sheet (SDS) contains all the information users might need about the concentration of each hazardous ingredient in the mixture, or arrange for someone else to carry it out.

#### **Scenario 5**

A PCBU that designs or manufactures a prefab building that might be constructed on a worksite must calculate the strength of trusses, cross-braces, beams, etc. to make sure they are strong enough to hold the building up during and after construction or arrange for someone else to carry it out.

#### **Scenario 6**

The importer of a winch must make sure that:

- they provide operating instructions in English
- there is documentation identifying the maintenance requirements.

## Duty of a PCBU who installs, constructs or commissions plant or structures

If you are a PCBU who installs, constructs or commissions plant or structures, you have a duty to make sure that the plant, substance or structure you installed, constructed or commissioned is without risks to the health and safety of people who:

- install or construct it at a workplace
- use it for the purpose it was installed, constructed or commissioned for
- carry out any reasonably foreseeable activity at a workplace in relation to the proper use, decommissioning, or dismantling of the plant or demolition or disposal of the structure
- are at or in the vicinity of a workplace and whose health or safety may be affected by any of the activities listed here.

The plant or structure must also be free of risks to the health and safety of people who are in or near the workplace and are exposed to it or who might be affected by any of the activities listed here.

### ***Examples***

#### ***Scenario 7***

A port decides to commission a structure for protecting passengers disembarking cruise ships from wind and rain. As the PCBU commissioning the structure, they decide to have it installed during the off season so the installation does not present risks to cruise passengers. They required it to be designed in such a way that it will be safe to build and erect, and they discuss that with the designer.

Jones Construction builds the structure. To make sure the construction work does not present risks to port workers, they set up fencing so no unauthorised personnel can get close to the worksite. Other types of barriers that would keep unauthorised personnel away from the worksite, such as safety barriers, would also be acceptable.

## Contact us

If you have any questions about this guidance, please contact our Wellington office.

**Phone:**

New Zealand (toll free) 0508 225 522

**Email:**

[enquiries@maritimenz.govt.nz](mailto:enquiries@maritimenz.govt.nz)



## Disclaimer

This publication provides general guidance on your duties under relevant legislation (including the Maritime Transport Act 1994, Maritime Rules, Marine Protection Rules and the Health and Safety at Work Act 2015).

It is not possible for Maritime New Zealand to address every situation that could occur at work, and you must make sure you are:

- operating according to the latest Maritime Rules, Marine Protection Rules, and other legislation; and
- obtaining legal advice where appropriate.

You need to think about this guidance and how best to apply it to your particular circumstances.

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