

Enforcement Decision-making Model

*A FRAMEWORK THAT
GUIDES INSPECTORS
THROUGH THE THOUGHT
PROCESS TO DECIDE ON AN
ENFORCEMENT RESPONSE*

May 2018

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Introduction

Purpose

The Enforcement Decision-making Model (EDM) provides a framework that guides WorkSafe's inspectors through the necessary thought process to decide on an enforcement response appropriate to the circumstances. Capturing the enforcement decision-making process in this way supports inspectors to reach enforcement decisions that are consistent, proportionate, transparent, targeted and accountable.

In particular EDM is designed to:

- promote enforcement consistency by setting out a structured and logical pathway for enforcement decision-making
- promote proportionality and targeting by setting out the criteria against which decisions are made
- provide a transparent and accountable process by setting out the approach inspectors will use when arriving at enforcement decisions.

It will also provide a basis for management and peer review of enforcement decisions.

Background

EDM is also intended to put into effect WorkSafe's *Enforcement* and *Prosecution* policies. *WorkSafe's Enforcement Policy* sets out key principles for enforcing the Health and Safety at Work Act 2015 (the HSWA) and describes the range of enforcement methods available and the factors which will be taken into account in response to non-compliance. *WorkSafe's Prosecution Policy* explains our approach to prosecution action, and sets expectations about the process that will be followed in making prosecution decisions.

The model was originally based on the Enforcement Management Model designed and used by the UK's Health and Safety Executive.

Application and scope

EDM will be used by all WorkSafe Health and Safety inspectors and any person reviewing enforcement decisions made by an inspector on behalf of WorkSafe. EDM is presently applicable to enforcement decisions made under the HSWA and its regulations,¹ although the principles contained in it may be applied to enforcement decisions made under other legislation that WorkSafe administers, for example, the Electricity Act 1992 and the Geothermal Energy Regulations.

In routine situations, EDM may be applied as a thought-process rather than a documented process. However, there are specific circumstances in which WorkSafe requires inspectors to create a formal record of their EDM decision-making process, in an approved EDM record form.

The enforcement options open to an inspector range from *verbal direction* (verbally directing the duty holder what action is needed to comply with the law and recording that direction) through to statutory enforcement measures such as notices and prosecution.

¹ WorkSafe released an earlier version of EDM that will continue to apply to any enforcement decisions made under the Health and Safety in Employment Act 1992.

Inspectors are faced with a number of variables when carrying out assessments, inspections and investigations, including the challenges of identifying and dealing with different duty holders and contractual relationships. So, assessing risk and compliance with the law ranges from being a relatively straightforward process to being extremely complex.

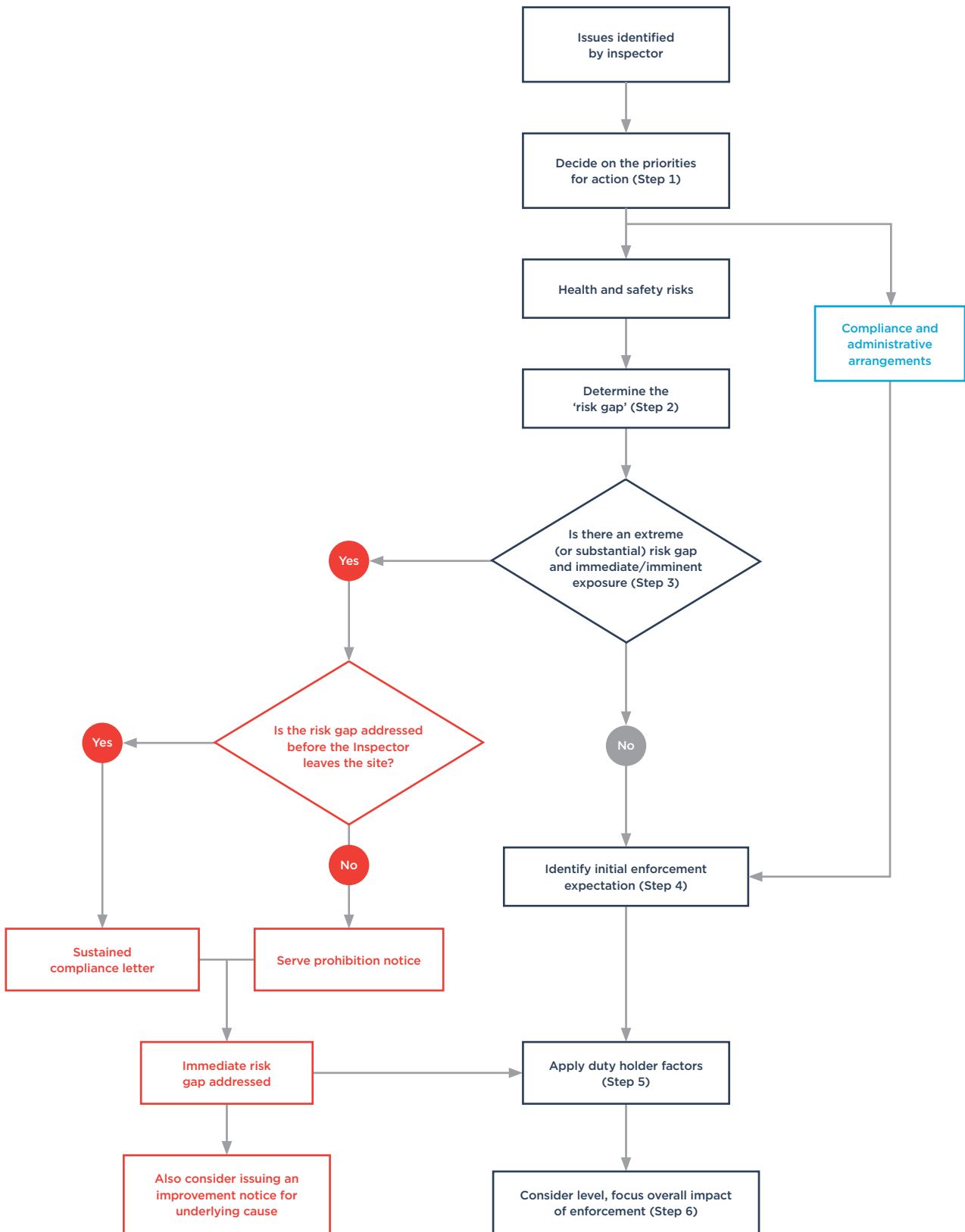
EDM cannot capture all of the complexities and nuances of discretionary decision making and is therefore supported by a review process that also requires inspectors and managers to consider whether the proposed enforcement action meets WorkSafe's *Enforcement Policy*, its *Prosecution Policy* and the *Solicitor-General's Prosecution Guidelines*.

Key messages

1. The objectives of enforcement are set out in WorkSafe's *Enforcement Policy*. They include ensuring that people at work and the public are protected from any risks to their health and safety.
2. EDM supports WorkSafe's aim to be consistent, proportionate, transparent and accountable in its enforcement activities.
3. Inspectors will apply the principles of EDM to their enforcement decisions.
4. A formal record of the way in which the decisions are reached is kept in specified circumstances.
5. Managers and others in WorkSafe use EDM when reviewing enforcement decisions.

Overview of the EDM

FLOWCHART 1: Overview of the EDM process



Step ①

Identifying the priorities for action

IN THIS SECTION:

- 1.1 Risk based or compliance based issues

During an investigation, assessment or inspection, inspectors gather information about the nature of the risk and the level of non-compliance through observation, talking with people and looking at documents.

In reality, there is rarely a single issue to deal with. Inspectors will use their judgement to decide what issues to address, in what order, and the appropriate enforcement responses in the circumstances. From these judgements the inspector decides the priorities for action.

They should take into account:

- 1. the specific hazards, control measures and the level of risk
- 2. any absence of, or failure in, health and safety management
- 3. how best to achieve sustained compliance
- 4. any strategic focus of WorkSafe
- 5. whether any punitive action may be required.

1.1 Risk based or compliance based issues

Identifying the priorities for action also involves determining whether the issue is risk based or not. Risk based issues are those that directly involve or give rise to risk to any person's health or safety. Other issues are likely to be based on non-compliance with other requirements, such as administrative requirements, and are referred to in EDM as 'compliance based'.

Each priority for action is then considered individually by applying EDM steps 2-6 (as relevant). For matters that are risk based, inspectors will next apply step 2 (determine the risk gap). For compliance based matters, it is not appropriate to determine the risk gap, so inspectors next apply step 4 (arriving at an initial enforcement expectation).

Step **2**

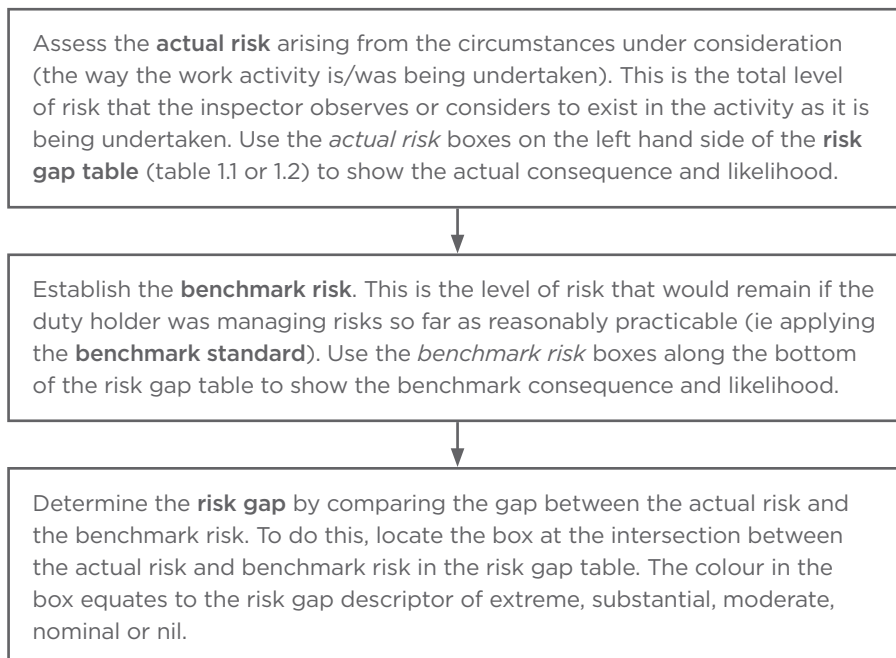
Determining the risk gap

IN THIS SECTION:

- 2.1 Consequence and likelihood
- 2.2 Health risks
- 2.3 Extent and exposure

For risk-based issues the next step is to determine the risk gap. Broadly speaking, the risk gap is determined by comparing where the duty holder is, with where the duty holder would be if they were complying with the law (ie managing risks so far as reasonably practicable). The risk gap is therefore the degree of risk that exists because of the duty holder's non-compliance.

Identifying the risk gap requires the Inspector to follow a three stage process:



To determine the benchmark risk (second stage), inspectors will need to decide what the appropriate **benchmark standard**² is. This is the standard that represents legal compliance (for example, the standard specifying the management of risks that is reasonably practicable in the circumstances). In most cases, this will be a written document though in some cases, where there is no applicable formal standard, it will need to be determined by applying health and safety principles.

For both the actual and benchmark risks (first and second stages), determine the **consequence** first, and then the likelihood that the consequence will occur. Inspectors should always consider the **most credible consequence**. Where the potential consequence is different from the actual consequence that occurred, inspectors should use the most credible *potential* consequence as the measure of actual risk.

2.1 Consequence and likelihood

Risk is often expressed in terms of a combination of the consequences of an event and the associated likelihood of occurrence.³ In EDM:

- consequence is the outcome or potential outcome of the event
- likelihood is the chance of the outcome happening.

Inspectors need to ensure they consider the consequence and likelihood separately when determining the benchmark risk. Some safeguards or precautions address the consequence of an event. For example, a soft landing system will not reduce the likelihood that someone will fall but it will reduce the consequences of the fall.

² See guidance about benchmark standards in section 4.1.

³ AS/NZS ISO 31000:2009.

Other safeguards or precautions address the likelihood of an event. For example, guardrails on a scaffold do not affect the consequence of a fall. A person will suffer the same consequence if they fall from a platform whether it has handrails on it or not. However, the guardrails will reduce the likelihood that the fall will occur.

Some safeguards or precautions address both consequence and likelihood. For example, fitting speed limiters to lift trucks will make it less likely there is a collision and will make the consequences of any collision less severe.

An explanation of the consequence categorisation is set out in Table 7 in the Appendices. Not every consequence can be specified and categorised and the table should be used as a guide rather than a definitive list.

When determining the potential consequence of the benchmark risk, consider whether the nature of the consequence would be changed if the duty holder was managing risks so far as reasonably practicable. For example, isolation or engineering controls will rarely change the nature of the hazard, so, if a person is exposed to the hazard, the benchmark consequence will be unchanged from the actual consequence. Substitution or elimination may, however, result in a different consequence than the actual consequence.

An explanation of likelihood is set out in Table 8 in the Appendices. Inspectors should rely on their judgement, the judgement of their experienced colleagues and any relevant guidance when determining the likelihood for both actual and benchmark risk.

Likelihood is influenced by the hierarchy of controls. In general, isolating a person from the hazard or relying on engineering controls will result in a nil or negligible likelihood that the consequence will be realised. Reliance on administrative controls or PPE may, at best, reduce the likelihood to remote.

2.2 Health risks

EDM should be applied to enforcement decisions for health risks in the same way as safety risks. When considering the consequence of exposure to health risks, and the likelihood that harm may occur, the most credible health effect arising from occupational exposure should be used. No account should be taken of an individual's resistance or susceptibility. The effect of exposure to a health risk should be determined by the likely response of the working population as a whole.

The explanation of consequence in Table 7 gives descriptors with supporting examples for health risks comparable to those used for safety risks. For example, there are defined serious health effects under the category of 'serious personal injury'. These should be used to determine the risk gap for health issues. Specific operational guidance may also provide information to determine actual and benchmark risk.

2.3 Extent of exposure

The extent of the exposure to the risk is taken into account through the use of two risk tables: Table 1.1 for single or small numbers exposed and Table 1.2 for multiple exposures. Inspectors should use the single exposure table even if more than one person is at risk. The multiple exposures table should generally be used where multiple workers are exposed to the risk simultaneously and/or for off-site risks where a number of members of the public may be at risk, for example exposure to Legionella from cooling towers, a scaffold above a public place, an explosion in a chemical factory.

Risk gap table: Single or low casualties or potential casualties

TABLE 1.1: Risk gap table: Single or low casualties or potential casualties

Consequence	Likelihood	Measure of actual risk (where the duty holder is)											
		Severe			Significant			Minor/Nil			Nil/neg		
Nil	Nil	Probable	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	Probable	Possible	Remote	Nil/neg	
Minor	Remote												
	Possible												
	Probable												
Significant	Remote												
	Possible												
	Probable												
Severe	Remote												
	Possible												
	Probable												
Benchmark Likelihood		Severe			Significant			Minor/Nil			Nil/neg		
Benchmark Consequence		Severe			Significant			Minor/Nil			Nil/neg		

Benchmark risk (where the duty holder should be)

Risk gap

- Extreme
- Substantial
- Moderate
- Nominal
- Nil - complies or exceeds legal standards

Risk gap table: Multiple casualties or potential casualties

TABLE 1.2: Risk gap table: Multiple casualties or potential casualties

Consequence	Likelihood	Measure of actual risk (where the duty holder is)														
		Severe			Probable			Possible			Remote					
Nil	Nil															
	Remote															
	Possible															
	Probable															
Minor	Remote															
	Possible															
	Probable															
	Remote															
Significant	Remote															
	Possible															
	Probable															
	Remote															
Severe	Remote															
	Possible															
	Probable															
	Remote															
Benchmark Likelihood		Severe			Probable			Possible			Remote			Nil/neg		
Benchmark Consequence		Severe			Significant			Minor/Nil			Nil/neg					

Benchmark risk (where the duty holder should be)

Risk gap

- Extreme
- Substantial
- Moderate
- Nominal
- Nil - complies or exceeds legal standards

Step **3**
Dealing
with serious
risk from
imminent/
immediate
hazards

Once the risk gap has been determined, the first priority for enforcement is addressing any circumstances that involve a serious risk to health and safety arising from immediate or imminent exposure to a hazard. If the duty holder addresses the serious risk before the inspector leaves the site, the inspector will write to the duty holder to request they ensure ongoing compliance (ie send a sustained compliance letter). Otherwise, the inspector should serve a prohibition notice.

The risk gap tables (Tables 1.1 and 1.2) help inspectors to decide when a Prohibition Notice should be served. An extreme risk gap will indicate that a Prohibition Notice should be served if the risk cannot be immediately addressed. A substantial risk gap will indicate that a Prohibition Notice should be seriously considered in light of all the circumstances. A Prohibition Notice should not be served where there is a moderate or nominal risk gap.

Inspectors should only serve Prohibition Notices where the circumstances which give rise to the risk are ongoing (ie the exposure to the hazard is imminent or immediate) including where the plant or process is not in use but it is foreseeable that it will be used. Equally, inspectors should bear in mind, particularly for health risks, that a serious risk meets the threshold for a prohibition notice where exposure to the hazard is imminent/immediate. Prohibition notices issued under s 105(1)(b) do not explicitly require an imminent/immediate exposure to be established. They still should only be used in circumstances where there is an extreme or substantial risk gap.

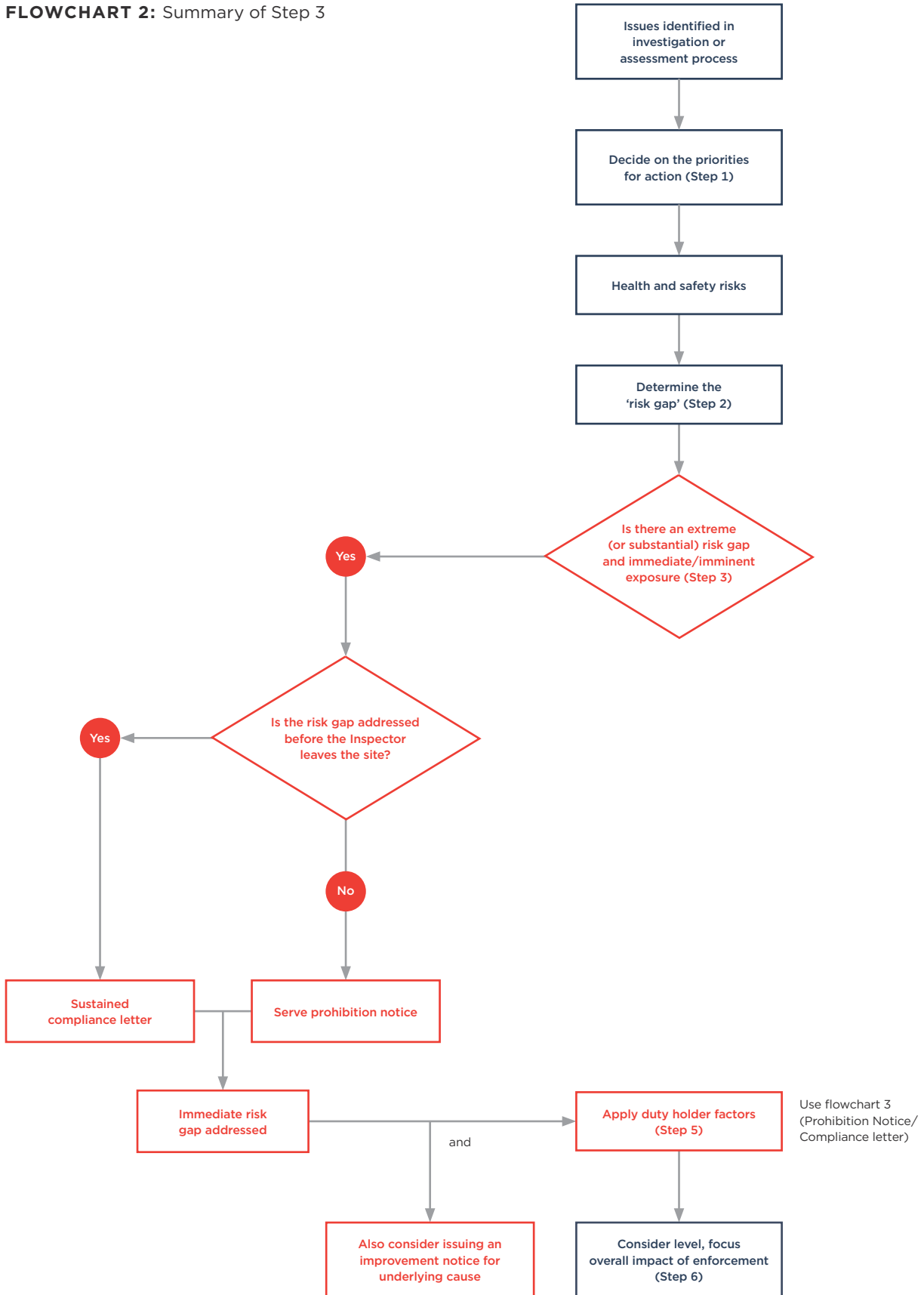
Once the inspector has addressed any serious risk, he/she should consider whether to issue an improvement notice to address any underlying failures that led to the serious risk arising. This will help to secure sustained compliance if similar circumstances occur again.

In addition, inspectors should determine whether punitive action is appropriate by applying the Flowchart 3: Duty holder factors – Prohibition Notice/sustained compliance letter served and then continue onto Step 6.⁴

An overview of this part of the EDM process is set out in the red boxes of Flowchart 2: Summary of Step 3.

⁴ There may also be very exceptional circumstances where prosecution may be considered (subject to meeting the evidential sufficiency and public interest tests set out in the Solicitor-General's Prosecution Guidelines) without applying the duty holder factors. This is restricted to circumstances where the risk gap is extreme and there has been failure to meet an explicit standard that is very well known and obvious. See section 4.4 for general guidance about these circumstances.

FLOWCHART 2: Summary of Step 3



Step 4

Arriving at an Initial Enforcement Expectation (IEE)

IN THIS SECTION:

- 4.1 Benchmark standards
- 4.2 Initial enforcement expectations for risk based matters
- 4.3 Initial enforcement expectations for compliance based matters
- 4.4 Prosecution

Step 4 only applies to:

- risks that do not give rise to serious risk to health and safety from immediate/imminent hazards (at step 3)
- compliance and administrative issues (see below).

At step 4, inspectors should determine the initial enforcement expectation (IEE) relevant to the matter. IEEs incorporate WorkSafe's expectations about the general threshold for each enforcement tool from verbal direction to improvement notice. IEEs represent only initial thresholds – they must then be varied by the inspector taking account of matters specific to the circumstances (duty holder factors) at step 5.

4.1 Benchmark standards

IEEs are determined by considering the risk gap or level of compliance against the status or strength of the benchmark standard that has been applied.

A **benchmark standard** sets out what a duty holder has to do to achieve legal compliance, such as specifying the risk controls that are reasonably practicable in the circumstances. In most situations, benchmark standard will be a written document, although in some situations, where there is no specific guidance, the duty holder and inspector will have to apply the general principles of health and safety management (eg the hierarchy of controls).

A higher level of enforcement is expected where a duty holder has failed to meet benchmark standards that are well known and readily available compared to situations where there is very little information or specific guidance available.

Benchmark standards are divided into three categories to capture their general status in Table 2 below.

TABLE 2: Status of the appropriate standard

What is the status of the benchmark standard?

DESCRIPTOR	DEFINITION
Defined Standard	Minimum standard is specified in Acts, Regulation, Safe Work Instruments, ACOPs or WorkSafe Good Practice Guidelines.
Established standard	Information that is known or accepted in New Zealand and/or in the specific industry, such as: <ul style="list-style-type: none"> - Fact sheets or other material published by WorkSafe - Codes of Practice (other than ACOPs) - material freely available in similar overseas jurisdictions (eg Australia, UK or Canada) - readily available Standards (eg NZS/AS/ISO/ILO/BS/CEN/IEC/API) providing specific advice on health and safety controls - guidance or good practice from industry or other organisations if it is common and well-known.
Interpretative standard	Any other standards, including interpreted from first principles and/or not published or available generally.

Inspectors should choose the benchmark standard that best describes what the duty holder has to do to reduce the level of risk and/or achieve compliance. For example, even though there are regulations on falls from height, in a situation where there is inadequate scaffolding provided inspectors may need to turn to specific industry guidance on scaffolding to find out what needs to be done. The authority would therefore be *established* rather than *defined*.

4.2 Initial enforcement expectations for risk based matters

For risk based matters that do not give rise to a serious risk to health and safety arising from immediate/imminent exposure to a hazard (at step 3), inspectors must determine an IEE by combining the risk gap descriptor from the risk gap table with the status of the benchmark standard using Table 3.1.

TABLE 3.1: Health and safety risks: Initial Enforcement Expectations

Risk gap	Status of the standard	Initial enforcement expectation	Consider prosecution
Extreme	Defined	Improvement Notice	Yes ⁵
	Established	Improvement Notice	Yes ⁵
	Interpretative	Improvement Notice	
Substantial	Defined	Improvement Notice	
	Established	Improvement Notice	
	Interpretative	Improvement Notice	
Moderate	Defined	Improvement Notice	
	Established	Directive letter	
	Interpretative	Directive letter	
Nominal	Defined	Verbal direction	
	Established	Verbal direction	
	Interpretative	Verbal direction	

4.3 Initial enforcement expectations for compliance based matters

As set out in section 1.1, issues inspectors encounter may be either risk-based or compliance-based.

Compliance (or non-risk based) issues are caused by failure to comply with specific requirements including required administrative arrangements or other indirect controls. In practice, many compliance based matters may have an element of risk or risk management. However, inspectors should regard a matter as compliance based where it is not possible to determine a specific consequence or likelihood directly attributable to the failure.

Some examples of HSWA issues that are compliance based include:

- a. failure to preserve a site at which a notifiable event has occurred (section 55 of the HSWA)
- b. failure to ensure notification or keep records of notifiable events (sections 56 and 57 of HSWA)
- c. hindering or obstructing an inspector (section 179 of the HSWA)
- d. non-compliance with worker engagement, participation and representation requirements (Part 3 of HSWA).

⁵ There may be very exceptional circumstances where prosecution may be considered (subject to meeting the evidential sufficiency and public interest tests set out in the Solicitor-General's Prosecution Guidelines) without applying the duty holder factors. This is restricted to circumstances where the risk gap is extreme and there has been failure to meet an explicit standard that is very well known and obvious. See section 4.4 for general guidance about these circumstances.

Compliance and administrative arrangements will also generally include the inadequate provision of welfare facilities, unless the absence of welfare arrangements directly influences the level of risk (eg where there is a lack of hand washing facilities for persons working with lead).

Since the risk gap tables (1.1 and 1.2) are not appropriate for compliance and administrative arrangements that do not directly result in the control of risk, inspectors should use the Compliance and administrative arrangements table below (Table 3.2) to determine what action should be taken.

Compliance and administrative arrangements can be defined by both law and supporting ACOPs and guidelines that expand on the general requirements contained in law. The IEE is determined by combining the level of non-compliance with the status of the benchmark standard (as described in section 4.1) using Table 3.2 below. The descriptors in Table 3.2 are explained in Table 9 in the Appendices.

TABLE 3.2: Compliance and administrative arrangements:
Initial enforcement expectations

Standard	Descriptor	Initial enforcement expectation	Also consider prosecution
Defined	Absent or never	Improvement Notice	Yes ⁶ potentially for offences specified in policy/positions
	Inadequate or occasional	Improvement Notice	
	Minor or short term lapse	Directive letter	
Established	Absent or never	Directive letter	
	Inadequate or occasional	Directive letter	
	Minor or short term lapse	Verbal direction	
Interpretative	Absent or never	Verbal direction	
	Inadequate or occasional	Verbal direction	
	Minor or short term lapse	Verbal direction	

4.4 Prosecution

An IEE may be one of the hierarchy of Improvement Notices, Directive letters or Verbal directions. Generally, these must be varied to obtain final enforcement expectations based on specific (duty holder) factors at step 5. For example, a duty holder's previous compliance history may make it appropriate to also consider prosecution alongside an improvement notice.

However, *Tables 3.1 and 3.2* also identify situations where prosecution may be considered, in exceptional circumstances, subject to meeting the evidential sufficiency and public interest tests set out in the *Solicitor-General's Prosecution Guidelines*. These are matters where an issue is so serious that it is appropriate to consider prosecution as a matter of policy. The decision to prosecute in these circumstances will not necessarily be affected by factors such as the duty holder's previous record or other duty holder factors specific to the case.

⁶ There may be very exceptional circumstances where prosecution may be considered (subject to meeting the evidential sufficiency and public interest tests set out in the *Solicitor-General's Prosecution Guidelines*) without applying the duty holder factors. This is restricted to circumstances where WorkSafe has an explicit policy to immediately consider prosecution due to the seriousness of the situation. See section 4.4 for general guidance about these circumstances.

For risk-based matters, prosecution may only be considered in these circumstances where there is a combination of an extreme risk gap and a failure to meet an explicit standard which is well known and obvious.

For compliance based matters, prosecution may be considered in circumstances where there the level of compliance is 'absent or never', the requirement is well-known and obvious, and the non-compliance is of a nature or seriousness that warrants particular attention/emphasis. Generally, these matters will be explicit in a WorkSafe policy or position statement.

The *WorkSafe New Zealand - Prosecution Policy* identifies some specific circumstances where WorkSafe expects there will be a recommendation to prosecute. These include where:

- death was a result of a breach of the legislation
- there has been a failure to comply with an improvement or prohibition notice
- inspectors have been obstructed in the lawful course of their duties
- offending occurs within an identified focus area for WorkSafe.

Step 5

Taking account of duty holder factors

IN THIS SECTION:

- 5.1 Applying the duty holder factors
- 5.2 Considering prosecution and issuing infringement notices

5.1 Applying the duty holder factors

Duty holder factors are the factors specific to the circumstances and activities of the duty holder. EDM allows these factors to be considered and applied to enforcement decisions in a transparent and consistent way. Considering duty holder factors will either confirm the IEE or vary the IEE. The duty holder factors are:⁷

- the duty holder's compliance history
- where actual harm has occurred, the level of harm
- whether the duty holder has deliberately sought economic advantage
- whether vulnerable people have been put at risk
- the overall standard of health and safety management of the duty holder and
- the inspector's confidence that the duty holder will comply with advice or direction that is not formal statutory enforcement.

The duty holder factors are further explained in Table 10 in the Appendices.

They are applied to the IEE using the relevant flowcharts. These are:

- for an IEE of Improvement Notice (Flowchart 4) – page 23
- for an IEE of Directive letter (Flowchart 5) – page 24
- for an IEE of Verbal direction (Flowchart 6) – page 25.

Where a Prohibition Notice has been issued (or a sustained compliance letter sent), the *Prohibition Notice/Sustained Compliance letter* flowchart (Flowchart 3) on page 22 should be applied.

Not all duty holder factors are given equal weighting and this is reflected in the flowcharts.

As per the operational guidance, where the final enforcement recommendation is an improvement notice, a sustained compliance letter can be used instead if the breach is rectified before the inspector is able to issue the notice.

5.2 Considering prosecution and issuing infringement notices

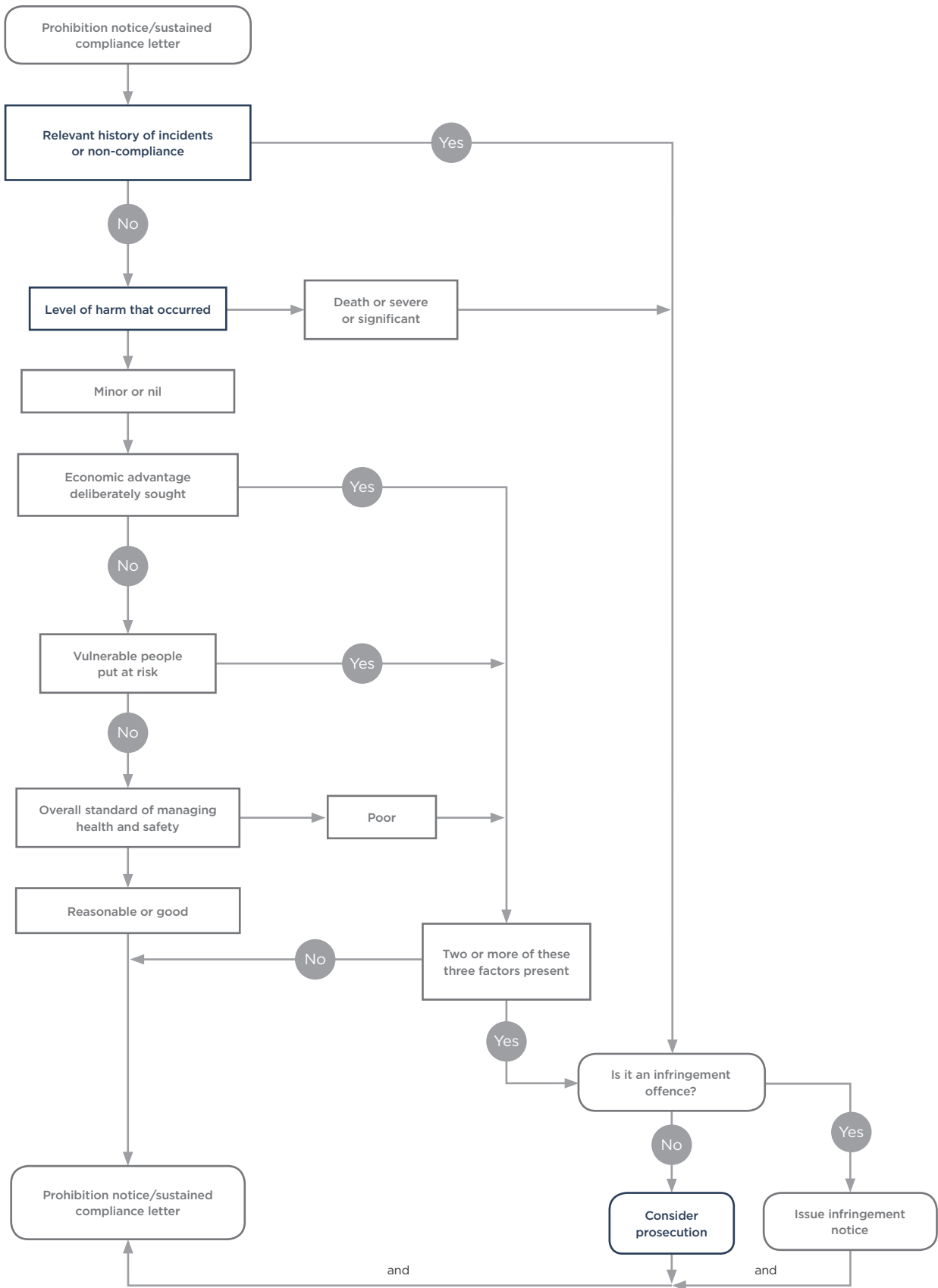
Consideration of duty holder factors may also lead an inspector to additionally consider prosecution or the issue of an Infringement Notice in addition to the IEE (as confirmed or varied).

Guidance may specify what is required for an inspector to have adequately 'considered prosecution'. Further enquiries may be warranted in order to justify a decision to recommend or not recommend prosecution.

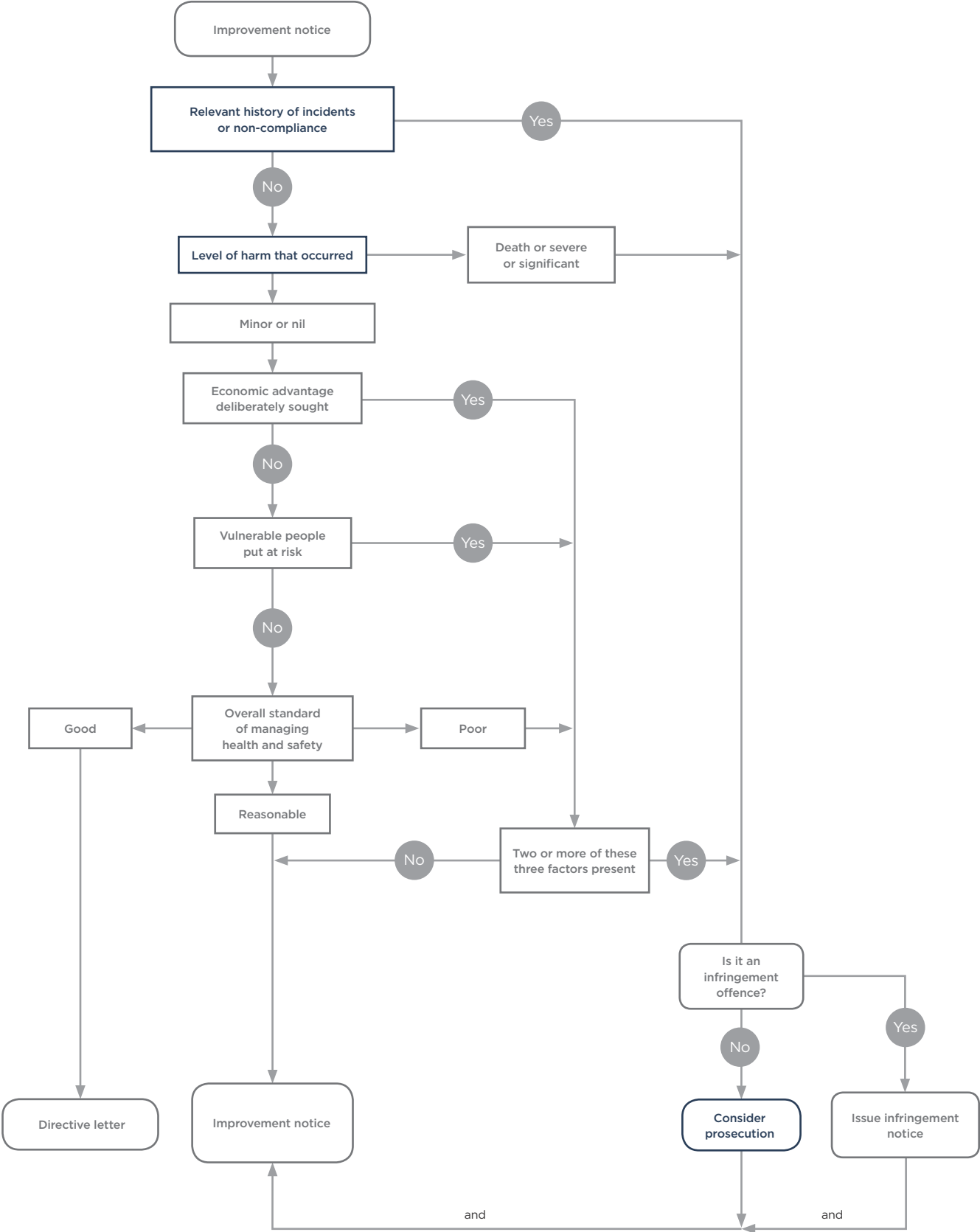
The duty holder factors that lead an inspector to consider issuing an Infringement Notice are the same as those which aggravate a matter to 'consider prosecution', for example, a relevant compliance history. Issuing an Infringement Notice appears as an alternative to 'considering prosecution' to reflect these are alternate means of addressing offending. Issuing an Infringement Notice should be preferred to recommending prosecution if the matter is an Infringement offence, unless there is or may be an investigation, or there is a victim and/or a notification of interest (so as not to infringe their right to private prosecution).

⁷ Note that other relevant factors (including unusual or particular circumstances) that affect the particular situation may still be considered at step 6.

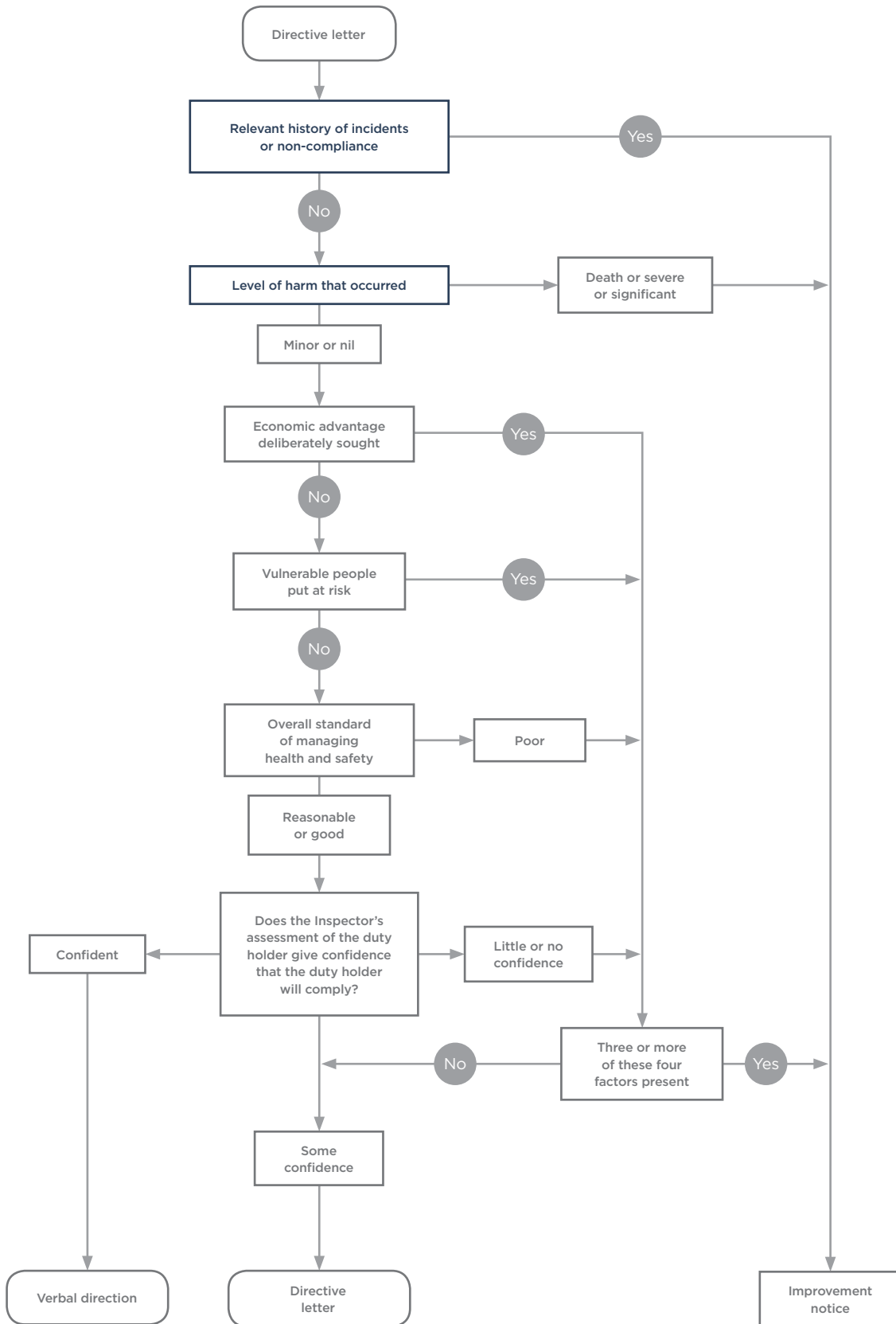
FLOWCHART 3: Duty holder factors - Prohibition notice/sustained compliance letter served



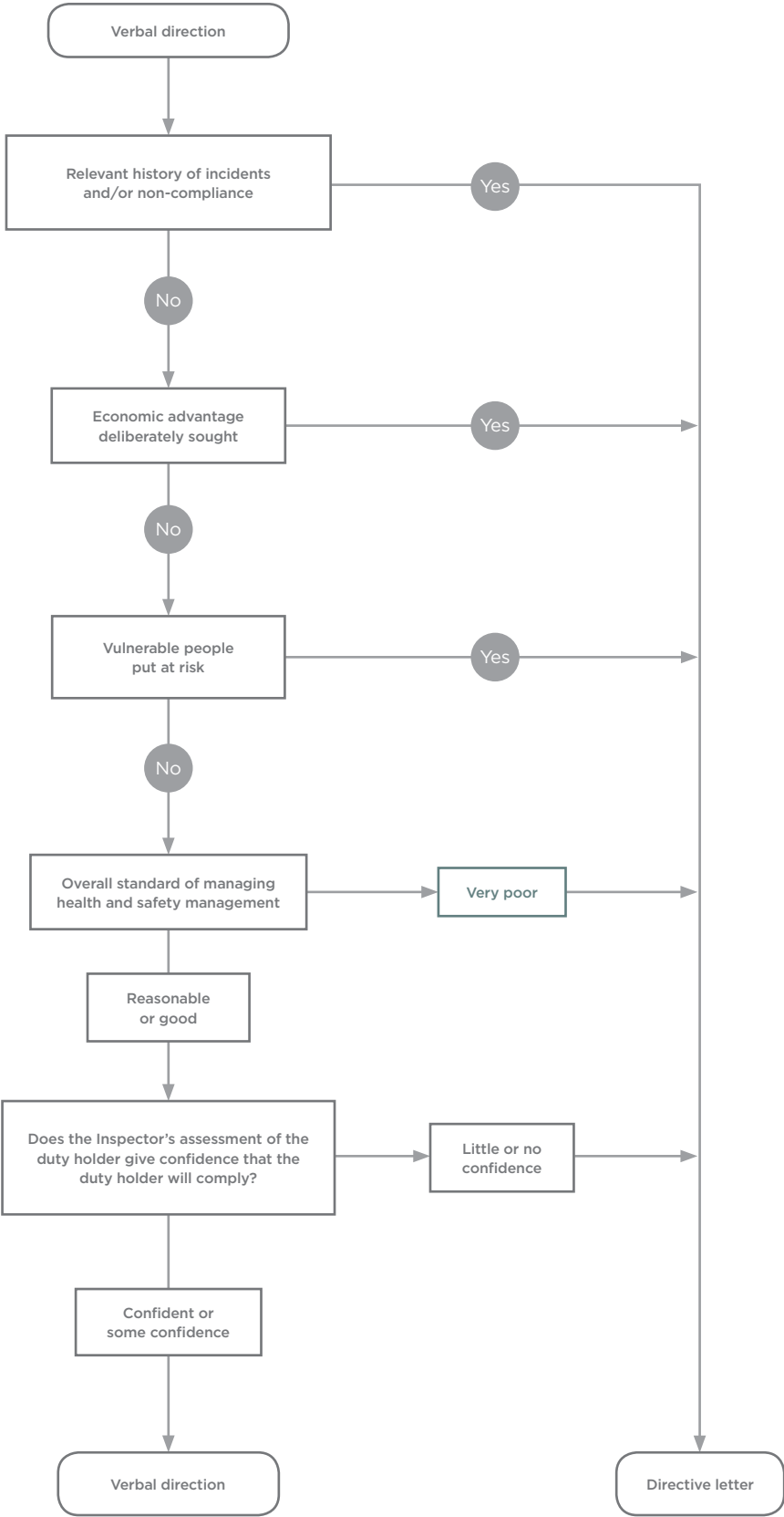
FLOWCHART 4: Duty holder factors - Improvement notice



FLOWCHART 5: Duty holder factors - Directive letter



FLOWCHART 6: Duty holder factors - Verbal direction



Step ⑥

Considering the level, focus and overall impact of enforcement

IN THIS SECTION:

- 6.1 Considering overall enforcement approach
- 6.2 Manager approval
- 6.3 Record keeping
- 6.4 Permissioning

6.1 Considering overall enforcement approach

Step 5 of EDM is used to arrive at a final enforcement expectation for each significant issue identified. Whether there is a single issue, or multiple issues that result in a number of enforcement decisions, the inspector needs to consider the overall impact of the enforcement decisions to check that the level and focus of enforcement is appropriate.

In the first instance, inspectors should consider whether the overall enforcement accords with WorkSafe's *Prosecution Policy* and *Enforcement Policy*. However, while WorkSafe's policies and the EDM are intended to provide guidance to inspectors on how they should apply their discretion, they should not be applied inflexibly to enforcement decisions. Inspectors should always take account of the particular circumstances and should not apply the final enforcement expectation if doing so would be an unfair or otherwise incorrect decision.

In checking the level and focus of enforcement, the inspector should consider whether, in the particular circumstances, the overall enforcement approach:

- takes account of the scale of the failures and provides a proportionate response
- deals with the most serious risks in order of priority and in appropriate time scales
- adequately addresses underlying problems and common causation factors
- secures sustained compliance
- influences and deters other duty holders in the same industry.

If the answer to any of these questions is no or not clear then the inspector should discuss the decision with his/her manager.

6.2 Manager approval

If circumstances permit, managers should approve any statutory enforcement measures proposed where they are not consistent with the final enforcement expectation after considering and applying EDM.

Any manager involvement should be recorded on the EDM Record Form to make it clear how the final decision was reached and who was involved. This is also to ensure that decisions are able to be reviewed independently in the event that an internal or other review is required.

6.3 Record keeping

Inspectors should record any enforcement decision in the WorkSafe approved EDM Record Form where it falls within circumstances required by WorkSafe to be recorded. WorkSafe may vary these circumstances from time to time.

6.4 Permissioning

When dealing with a duty holder that is operating under a permissioning regime, the overall enforcement approach should also involve a review of the permissioning document.

A risk gap analysis is used when considering possible enforcement action if an operator has failed to adhere to conditions set out in the permissioning documents relevant to their activities. The resultant risk gap is then considered in conjunction with the level of deviation from the permissioning document to arrive at an initial enforcement expectation using Table 6.1.

In most circumstances, the risk arising out of the operator's activity cannot be dealt with quickly enough through the permissioning document. In these cases the Table 3.1: Health and safety risks: Initial Enforcement Expectations should be used to indicate the appropriate immediate level of enforcement. Separate action should then be considered in relation to the permissioning document using Table 6.1 Permissioning: additional enforcement expectations.

Table 3.1: Health and safety risks: Initial Enforcement Expectation should also be used where the risk arising out of the duty holder’s activity cannot be dealt with through the permissioning document.

There may also be compliance or administrative matters associated with permissioning, for example the requirement to notify the relevant authority of the permissioned activity. In this situation the Table 3.2: Compliance and administrative arrangements: Initial enforcement expectations can be used where the matter cannot be dealt with adequately through the permissioning regime.

The enforcement action to secure compliance in permissioning regimes is usually achieved through the permissioning document. This may be through modification of the permissioning document including re-issue, its revocation/refusal, or the use of a specific enforcement powers provided by the permissioning regime.

Note that any immediate risk of serious personal injury associated with the permissioning regime will be considered and dealt with in **Step 2**.

The six enforcement expectations used in the table below are:

- **consider prosecution** for the breach of safety case
- **withdraw acceptance/reject** permissioning document
- **vary** the permissioning document to place conditions on the operator
- request that the operator **revises** the permissioning document
- send a **letter** to the operator recording the breach of safety case
- the operator is **verbally** informed of the breach of safety case.

TABLE 6.1: Permissioning: additional enforcement expectations

Deviation from permissioning document			
RISK GAP	MAJOR DEVIATION FROM PERMISSIONING DOCUMENT	MINOR DEVIATION/ FEW SAFETY CASE COMMITMENTS	NONE
Extreme	Withdraw acceptance/reject and consider prosecution	Reject/vary/revise	Revise
Substantial	Withdraw acceptance/reject	Reject/vary/revise	Revise
Moderate	Reject/vary/revise	Vary/revise	Revise
Nominal	Revise	Letter	Letter/verbal direction
Nil/negligable	Revise	Letter/verbal direction	Nil

The descriptor ‘None’ is included in the table as it is possible to have full compliance with the permissioning document and still identify a ‘risk gap’. In this situation it may be necessary to review the permissioning document to prevent a reoccurrence. Similarly, the operator may be deviating from the permissioning document but not be creating a risk gap.

In some circumstances, for example where new applicants, new proposals or modifications are being considered, there is no actual risk because the activity has yet to take place. In such cases, the potential risk should be considered, based upon the information made available to inspectors and compared to the relevant benchmark risk, to calculate the risk gap in the usual way. This can then be used to arrive at an initial enforcement expectation.

Appendices

TABLE 7: Categories of consequence

CONSEQUENCES CATEGORY IN RISK GAP TABLE	GENERAL PRINCIPLE	SPECIFIC EXAMPLES Note these are examples only – inspectors should apply the general principle
Death and severe	<p>It is most credible that a fatality or injury that results in a permanent or irreversible disabling condition could occur.</p> <p>It is most credible that a severe health effect could develop that causes death; or a health effect could develop that results in a permanent, progressive or irreversible condition; or permanent disablement such as a lifelong restriction of work capability or a major reduction in quality of life.</p>	<p>Death</p> <p>Permanent blinding of one or both eyes; serious multiple fractures; head injuries involving permanent brain damage; amputation of hand/arm or foot/leg; burns and scalds covering more than 40% of the surface area of the body; crush injuries leading to permanent internal organ damage, permanent paralysis.</p> <p>Severe health effects due to physical agents such as decompression illness; barotrauma resulting in lung or other organ damage; hand-arm vibration syndrome; noise-induced hearing loss. Severe infections due to biological agents such as Legionella pneumophila and Leptospirosis.</p> <p>Severe conditions due to exposure to hazardous substances such as cancer of a bronchus or lung; primary carcinoma of the lung where there is accompanying evidence of silicosis; cancer of the urinary tract or the bladder; angiosarcoma of the liver; skin cancer; mesothelioma; cancer of the nasal cavity or associated air sinuses; peripheral neuropathy; chrome ulceration of the nose or throat; pneumoconiosis; asbestosis; occupational asthma; allergic contact dermatitis, (eg where SDS contains risk phrase R43/H317/6.5B; may cause sensitisation by skin contact) extrinsic alveolitis (including farmer’s lung).</p>
Significant	<p>It is most credible that an injury could occur to a person that is not permanent, disabling or irreversible but results in that person being unable to perform his/her normal work for more than 7 days.</p> <p>It is most credible that a health effect could develop that is not-permanent, irreversible, or a progressive condition but still results in a temporary disability or restriction of work capability or quality of life.</p>	<p>Burns and scalds covering more than 10%; amputation of a digit past the first joint or more than one digit; head injuries leading to a loss of consciousness; crush injuries leading to temporary internal organ damage; any degree of scalping or de-gloving; asphyxiation; hospitalisation for more than 48 hours; complex fracture or fracture of a long bone.</p> <p>Health effects such as conditions due to physical agents and the physical demands of work eg traumatic inflammation of the tendons of the hand or forearm or of the associated tendon sheaths; carpal tunnel syndrome.</p> <p>Infections due to biological agents such as Salmonella spp (food poisoning) and Campylobacter spp. Conditions due to substances such as chrome ulceration of the skin of the hands or forearm, irritant contact dermatitis (eg where SDS contains risk phrase R38/H315/6.3A; Irritating to skin).</p>
Minor	<p>It is most credible that injuries not included above could occur ie injuries resulting in less than 7 days restriction of work capability and from which there will be recovery without ongoing disablement or impairment.</p> <p>It is most credible that health effects not included above could develop ie effects which there will be recovery and there is no restriction of work capability or quality of life.</p>	<p>Loss of end of single digit to first joint (excluding the thumb), simple fracture of wrist, ankles and digits, health effects not listed above.</p>
Nil	<p>No injury or health effects</p>	

TABLE 8: Explanation of likelihood

DESCRIPTOR	EXPLANATION
Probable	A similar consequence has been realised on repeated occasions in the past in these circumstances and it will probably occur again somewhere. It is not a surprise.
Possible	A similar consequence has been realised infrequently in similar circumstances and it is possible it may happen again in these circumstances. It is not a total surprise.
Remote	A similar consequence hasn't occurred in these circumstances but it has occurred in quite different circumstances, for example in an entirely different industry. It is unexpected.
Nil/negligible	This has not been known to occur. In practice the consequence shouldn't be realised. It is a complete surprise.

TABLE 9: Compliance and administrative arrangements

What is the level of non-compliance with the standard or administrative arrangements?

DESCRIPTOR	DEFINITION	SPECIFIC EXAMPLES
Absent or never	Total absence or no implementation of this specific compliance or administrative arrangement. The duty holder has never complied with the requirement or has made no attempt to comply with the requirement.	Accidents are not notified or recorded; scaffolding over 5 m is never inspected and is not erected by a COC holder; there are no toilets or hand washing facilities; notifiable work is regularly carried out and never notified; no certification of inspection is obtained for an EWP or crane; no testing of electrical equipment. Safety case not submitted, failure to notify, failure to provide information required by permissioning regime, assessment of risk not done.
Inadequate or occasional	Only occasional observance with the standard or inadequate/rudimentary compliance. The duty holder occasionally complies with the requirement.	Very inadequate first aid arrangements; scaffold over 5 m not inspected for a month; occasionally carrying out notifiable work and not notifying; only notifying the most serious of accidents; a certificate of inspection for an EWP or crane has been expired for months, electrical equipment previously tested but out of date for months. Very poor quality submissions supplied for permissioning, key information missing from safety case.
Minor or short term lapse	Any deficiencies or inadequacies are minor, have little material impact and can be remedied easily. The duty holder usually or almost complies with the requirement, but did not comply in this case.	A 5 m scaffold with one missed inspection; certificate of inspection expired for less than a month, testing of electrical equipment recently out of date. Minor defects in the information supplied for permissioning, gaps in the safety case prompting requests for further information.

TABLE 10: Duty holder factors

DESCRIPTOR	DEFINITION
Is there a relevant compliance history?	
Yes	<p>The inspector considers that there is a relevant compliance history because records/evidence indicate that the duty holder has a history of:</p> <ul style="list-style-type: none"> a. related or similar harm and/or b. non-compliance leading to formal (statutory) enforcement that is recent, relevant and/or significant, having regard to the scale and nature of the operation, and the number of previous interactions with WorkSafe. <p>As a rule of thumb, three or more instances of relevant formal (statutory) enforcement in the last three years may be a relevant compliance history for many duty holders. However, this is not a hard and fast rule. For example, for a very large or complex organisation with multiple sites (other than in a high hazard industry) an inspector may consider that three previous notices that have been complied with is not a relevant compliance history. Equally, fewer enforcement actions but within a very short timeframe or that are very serious/significant may represent a relevant compliance history. For example, a single current or recent prosecution or instance of death or severe harm should be regarded as a relevant compliance history.</p> <p>The inspector should also generally consider that prior issues are relevant if they:</p> <ul style="list-style-type: none"> - involved the same/similar conduct - occurred at the same worksite and/or in the same process - involved common systems, plant, processes etc (including across multiple worksites) or - involved aggravated, reckless or negligent wrongdoing.
No	No. There is no compliance history that is relevant, recent or significant.
Are vulnerable people put at risk?	
Yes	The duty holder's actions have harmed or put vulnerable people at risk. (Depending on the circumstances, these may include children, members of public, young workers, pregnant or nursing mothers and migrant workers.)
No	The duty holder's actions have not put vulnerable people at risk.
Is the duty holder deliberately seeking economic advantage?	
Yes	The duty holder is deliberately avoiding minimum legal requirements for commercial gain. This factor is generally only applied where there is evidence to show the commercial gain was sought knowingly by the duty holder.
No	Failure to comply is not commercially motivated.
What's the level of actual harm that occurred in this case?	
Death or Severe or Significant	<p>A severe personal injury or severe health effect or death has occurred as a result of the matter under consideration.</p> <p>Note: WorkSafe may release policy/positions stating that they will treat certain high levels of exposure as actual harm.</p>
Not Death, Severe or Significant	There has been no actual harm or the harm has been no greater than a minor personal injury or health effect.
What is the overall standard of the management of health and safety?	
Poor	The overall standard of managing work-related health and safety is far below what is required by health and safety law and gives rise to other significant risks.
Reasonable	The overall standard of managing work-related health and safety is reasonable with no other significant risks.

DESCRIPTOR	DEFINITION
Good	The overall standard of managing work-related health and safety is good with all other issues addressed.
Does the inspector's assessment of the duty holder give confidence the duty holder can and will comply?⁸	
Confident	It is clear that the duty holder is both fully capable of, and is strongly committed to, compliance with the law through the effective management of health and safety, and can be trusted to put the matter(s) right without formal enforcement measures.
Some confidence	The duty holder demonstrates some capability and commitment to compliance with the law through the effective management of health and safety.
Little or no confidence	There is concern that the duty holder does not have the capability or commitment to comply with the law and ensure the effective management of health and safety.

⁸ This duty holder factor is only applied in flowcharts 5 and 6.

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