



Trade &
Investment
Mine Safety

INTERPRETIVE GUIDELINE - WORK HEALTH AND SAFETY ACT

THE HEALTH AND SAFETY DUTY OF AN OFFICER

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INTERPRETIVE GUIDELINE—MODEL WORK HEALTH AND SAFETY ACT
THE HEALTH AND SAFETY DUTY OF AN OFFICER UNDER SECTION 27

This document provides guidance on the interpretation and application of section 27 of the *Work Health and Safety* (WHS) Act, including who will be an officer and what it will mean for them.

Why place a due diligence requirement on an officer?

A ‘person conducting a business or undertaking’ (PCBU) has health and safety duties under the WHS Act. The PCBU may be a corporation, partnership, unincorporated association, a self employed person or a sole trader.

The Crown is also a PCBU for the purposes of the WHS Act. The Crown conducts a business or undertaking through its departments and statutory agencies.

A business or undertaking is operated (governed) by individuals who, through their decision making, influence the specific activities and behaviours that determine the success or failure of health and safety initiatives and compliance by the PCBU with WHS laws. These individuals through their decisions and behaviour strongly influence the culture of the business or undertaking and accountability within it. They make important decisions on the resources that will be made available for the purposes of work health and safety and the policies that will be developed to support compliance.

Section 27 of the model WHS Act accordingly places a duty to exercise due diligence on these individuals, who are described as officers, to require them to take reasonable steps that will support a health and safety culture, accountability, the allocation of resources and development of appropriate policies. These due diligence requirements enable an officer to ensure that the PCBU uses and applies appropriate resources, policies, procedures and health and safety practices in the conduct of a business or undertaking. If an officer fails to exercise due diligence requirements, they can be held personally liable.

Who is an ‘officer’?

Section 4 of the model WHS Act adopts as the definition of an officer for a corporation, partnership (with a variation noted below) or unincorporated association, the definition of that term in Section 9 of the Commonwealth *Corporations Act 2001*.

Under section 9 of the *Corporations Act 2001* an “officer” of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
 - i. who makes, or participates in making decisions that affect the whole or a substantial part, of the business of the corporation; or
 - ii. who has the capacity to affect significantly the corporation's financial standing;
 - iii. in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the persons professional capacity or their business relationship with the directors or the corporation);or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or

- (f) a liquidator of the corporation.

The *Corporations Act* definition provides similar categories for an officer of a partnership or an unincorporated association.

Exclusion of a partner in partnerships

Section 4 of the model WHS Act excludes a partner in a partnership from being an officer of a PCBU. This is to avoid double liability for the partners as they are individually and collectively a PCBU and would owe duties under the Act and have the potential liabilities of a PCBU.

Officers of the Crown or a public authority

An officer of the Crown, or of a public authority that is a corporation, is defined only as a person who makes, or participates in making decisions that affect the whole or a substantial part, of a business or undertaking of the Crown or public authority.

The first step in identifying who is an officer of the Crown will be to identify the relevant business or undertaking of the Crown. This will be determined on the particular facts, including the way in which the relevant department or agency is organised and administered.

The business or undertaking will generally be clear in the case of a public authority that is a corporation. In the case of a department, a business or undertaking could be conducted by the whole department or an identifiable part or agency within the department. This is important when considering compliance by the PCBU that must be ensured by the officer.

A State, Territory or Commonwealth Minister of the Crown and an elected member of a local authority (councillor) are not officers of a PCBU.

Officers of the Crown and public authorities, and people who meet the section 9 definition of an officer under the *Corporations Act*, are deemed to have a level of influence in the business or undertaking that allows them to provide for and sustain the resources and procedures necessary for effective management of WHS. They have the ability to determine the boundaries within which the PCBU operates and the overall approach of the PCBU in relation to the management of work health and safety.

By way of contrast, a manager or supervisor in an area of the business or undertaking will not be an officer, as they do not make the key decisions on how the PCBU operates but instead assists the decision making by providing information and advice and implements the decisions.

What is meant by ‘participate in making decisions’?

A person may be an officer even though they do not make the relevant decisions or have the authority to do so, if they participate in the making of those decisions. What this means is that the person is actively involved in the process through which the decisions are made and occupies a role that may directly contribute to, promote or affect the decisions.

For example, courts have found that corporate counsel, chief financial officers and other senior ‘advisors’ within a corporation may be officers if they are present and involved in discussions when the decisions are made, but are not officers if they simply provide advice for the consideration of the decision makers or are only involved in administration of a process.

A person may be considered to participate in the making of decisions where they have an ongoing or repeated involvement in the process through which decisions are made.

The decisions need not be directly related to work health and safety. Decisions may affect work health and safety indirectly. How an organisation is structured, what areas of business it is involved in, and what resources are allocated to particular parts of a business may all affect how work health and safety is managed.

What is a ‘substantial’ part of the business or undertaking?

A person may be an officer even if they only participate in decision making that affects a substantial part, but not the whole, of an organisation.

The courts have not provided clear guidance on what is a substantial part of a business and that will need to be determined on the facts of each case, with reference to the structure and activities of the organisation. A corporation that operates nationally may have regional divisions (e.g. northern division incorporating the Northern Territory and Queensland, and southern division incorporating New South Wales, Victoria and Tasmania). A business may have various, defined divisions based on product or service categories. Each of the divisions may each be a substantial part of the business depending on their role within the organisation as a whole.

Some or all of the following criteria are relevant in identifying whether a part of a business is a substantial part:

1. The degree to which the part contributes to the revenue or financial standing of the business
2. The degree to which the part is significant to the reputation of the entity
3. Whether the part is considered to be a core part of the business, or ancillary to the core business
4. The proportion of personnel of the whole business who are engaged in activities within the part
5. Whether those who manage that part of the business make significant strategic or policy decisions, or whether those decisions are made at a higher level.

These and other relevant factors should be considered together, and the significance of any element will depend on the circumstances of the particular case.

In the case of a government department, a definable part or agency within the department may be regarded as a substantial part of the business or undertaking of the department.

What is meant by capacity to affect significantly the corporation's financial standing?

A person may have the capacity to affect significantly the financial standing of a company where they are involved in the financial management of it (for example, a chief financial officer) or are involved in decisions relating to significant investments or projects. A court has held, however, that a person whose role it was to trade in shares was not an officer even though the amount of money they were authorised to deal in was very large.

Volunteer officers will have the duty but cannot be liable for a breach

A volunteer is a person who is not working for reward, although they may receive reimbursement of expenses incurred by them. A volunteer may be an officer of a PCBU. For example, a person may be a voluntary member of a committee of a not-for-profit association that is conducting an undertaking.

A volunteer who is an officer will have a duty to exercise due diligence provided by section 27 of the WHS Act, but cannot be prosecuted for failing to comply with that duty (see section 34(1)).

A volunteer officer will be expected to comply with the officers' duty and the regulator can compel compliance with that duty by issuing an improvement notice.

What must an officer do?

The health and safety duty of an officer requires them to exercise due diligence to ensure compliance by the PCBU with its health and safety obligations.

An officer must ensure that the PCBU has in place appropriate systems of work and must actively monitor and evaluate health and safety management. An officer's duty is aimed at achieving and sustaining compliance by the PCBU, which may not occur without the active involvement of its officers.

Section 27(5) provides that due diligence requires an officer to take reasonable steps:

1. to acquire and keep up-to-date knowledge of work health and safety matters
(for example, what the WHS Act requires and the strategies and processes for elimination or minimisation of hazards and risks so far as is reasonably practicable);
2. to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations
(advice from a suitably qualified person may be required to gain a general understanding of the hazards and risks associated with the operations of the business or undertaking)
3. to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking
(this requires an understanding of what is needed for health and safety, making decisions about procedures and resources and ensuring that they are used);

4. to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
(this should include the reporting of incidents and emerging hazards and risks, identifying if any further action is required to eliminate or minimise the hazards or risks so far as is reasonably practicable and ensuring steps are taken by the PCBU to take reasonably practicable steps);
5. to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act;
(the section provides examples which are noted below – other examples include that the PCBU complies with licensing and registration obligations, union right of entry requirements and the duty to consult, co-operate and co-ordinate activities with other duty-holders);
6. to verify the provision and use of the resources and processes referred to in paragraphs 3 to 5
(this makes it clear that ‘ensure’ means active verification, for example through inspection or auditing processes, that the resources and processes are in place and are being used).

Examples of a PCBU's duties or obligations which are specified in section 27(5)(e) of the WHS Act for paragraph 5 above are:

- o reporting notifiable incidents;
- o consulting with workers;
- o ensuring compliance with notices issued under the WHS Act;
- o ensuring the provision of training and instruction to workers about work health and safety; and
- o ensuring that health and safety representatives receive their entitlements to training.

This list is not meant to be exhaustive. There may be other things required for an officer to show that they have exercised due diligence in the particular circumstances. For example, an officer could not be said to be exercising due diligence to ensure compliance by the PCBU with its duties under the WHS Act, if the officer did not take action to ensure that significant issues with the health and safety performance of a contractor, of which they were aware, were properly addressed.

What is meant by ‘reasonable steps’ by an officer?

Officers will only be required to take reasonable steps to ensure that they have the relevant knowledge and understanding or take the relevant decision or action. What is reasonable will depend on the particular circumstances, including the role and influence able to be exercised by the individual officer.

Officers may meet the due diligence requirements in some respects by proper reliance on information from and the activities of others, while having more direct involvement in health and safety management and governance in other aspects.

To the extent to which an officer will seek to rely on others, the officer must be able to demonstrate the reasonableness of that reliance, which may be demonstrated through the receipt of credible information and advice from appropriate people.

What will be needed to comply with the definition of due diligence?

An officer can only comply with their duty by taking an active and inquisitive role in the planning and actioning of health and safety initiatives. While an officer need not be involved directly in implementation, they must make the decisions that allow for the appropriate measures to be taken by the PCBU and take reasonable steps to ensure that they are taken.

An officer must have knowledge of the relevant matters before they are able to make decisions and verify the use of resources and processes. That knowledge will be technical (knowledge of work health and safety and legal obligations of duty-holders within the PCBU), situational (what is happening and what that means) and strategic (what should the PCBU be doing and why).

That knowledge may need to come from senior managers, subject matter experts and managers and supervisors involved in the operations. Information will need to be gathered, analysed and reported and advice given from different levels of the business or undertaking.

To enable an officer to satisfy the requirements of due diligence, the PCBU should have:

1. an appropriate governance structure with the right people in place, who are appropriately authorised and accountable, to enable WHS to be properly attended to.
Note: a formal structure may not be needed in a small business, where the officers will be involved in the day to day activities and have easy access to the relevant information; and
2. information gathering and reporting processes to facilitate the flow of WHS information (including effective worker consultation and participation arrangements) and advice to the officers, with the type of information that allows the officers to understand the hazards and risks, obligations and performance of the organisation, and to make appropriate decisions.
3. a written register or other record of decisions made in the business or undertakings that are likely to affect the whole or a substantial part of such a business or undertaking including:
 - a description of the relevant business or undertaking
 - the subject matter and purpose of the decision
 - the reasons for the decision
 - why the decision is thought to affect the whole or a substantial part of the business or undertaking
 - who made the decision and why
 - who participated in making the decision and the basis of that participation
 - other matters considered in reaching the decision.

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.