

THE HEALTH AND SAFETY DUTY OF AN OFFICER

Section 27 of the model Work Health and Safety (WHS) Act places a duty on an officer of a person conducting a business or undertaking (PCBU) to exercise due diligence to ensure that the PCBU complies with their duties or obligations under the model WHS Act. This document sets out who is an officer and what the officer duty requires of them.

1. Who is an officer?

An 'officer' is defined by reference to the definition of 'officer' in section 9 of the Commonwealth *Corporations Act 2001* (the Corporations Act). It also includes officers of a business or undertaking of the Crown (the Commonwealth, a state or territory) and officers of a public authority.

1.1. Officer under the Corporations Act

1.1.1. *Officers of corporations*

Under the Corporations Act an officer of a corporation means:

- a director or secretary of the corporation; or
- a person:
 - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation¹; or
 - who has the capacity to affect significantly the corporation's financial standing; or
 - 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 person's professional capacity or their business relationship with the directors or the corporation); or
- specified persons, such as administrators, liquidators and receivers of a corporation.

1.1.2. *Officers of other entities*

Under the Corporations Act an officer of an entity that is neither an individual nor a corporation relevantly includes:

- an office holder of an unincorporated association; or
- a person:
 - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity²; or
 - who has the capacity to affect significantly the entity's financial standing.

A partner in a partnership is not an officer under the model WHS Act as each partner is a PCBU. Excluding partners from the definition of officer avoids partners having duties both as a PCBU and an officer of a PCBU.

¹ Further information about how to identify who is a person who makes or participates in making decisions that affect the whole, or a substantial part, of the business of the corporation is set out in part 1.3 of this guide.

² Further information about how to identify who is a person who makes or participates in making decisions that affect the whole, or a substantial part, of the business of an entity is set out in part 1.3 of this guide.

1.2. Officers of the Crown or a public authority

An officer of the Crown is 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 (see section 247 of the model WHS Act).³

Identifying the business or undertaking of the Crown will depend on the particular facts in each case. In general, a business or undertaking of the Crown is carried out by a department or agency. However, depending on how the department or agency is organised and administered, parts of a department or agency may carry out different businesses or undertakings.

A Minister of a state, territory or the Commonwealth is not an officer of the Crown when they are acting in their official capacity.

An officer of a public authority is a person who makes or participates in making decisions that affect the whole, or a substantial part, of a business or undertaking of a public authority (see section 252 of the model WHS Act).

Who is the business or undertaking will generally be clear in the case of a public authority that is a body corporate.

1.3. Identifying a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking

The information in this section applies to determining who is a person that makes, or participates in making, decisions that affect the whole, or a substantial part of a corporation (or other entity), of the Crown or of a public authority.

1.3.1. What kinds of decisions affect the whole, or a substantial part, of a business or undertaking?

Whether decisions can be said to affect the whole, or a substantial part, of a business or undertaking will depend on the facts of each case. In general such decisions:

- are higher level decisions that are organisational and strategic in nature rather than operational decisions concerned with day-to-day work or project management.
- must involve more than just carrying out administrative functions, following orders, implementing policy or responding to requests for information or advice.
- do not necessarily have to be significant financial decisions⁴
- do not have to specifically involve WHS issues. A person will not be an officer simply because they make, or participate in making, decisions about WHS issues.

The following are examples of decisions affecting the whole or a substantial part of a business or undertaking:

- formation of policies or strategies with significant bearing on how the business or undertaking is conducted and its overall financial health

³ Further information about how to identify who is a person who makes or participates in making decisions that affect the whole, or a substantial part, of a business or undertaking is set out in part 1.3 of this guide.

⁴ A person who has the capacity to affect significantly a corporation's or other entity's financial standing is an officer under section 9 of the Corporations Act.

- governance, management or administration of the business or undertaking as a whole or a large part of the business or undertaking
- setting investment or financial management strategies and initiating investment transactions
- control over the drive or future direction of the business or undertaking
- control over budgets, resource allocation, significant capital expenditure or selling assets.

1.3.2. What is a 'substantial part' of the business or undertaking?

A person may be an officer because they participate in making decisions that affect a substantial part, even if not the whole, of a business or undertaking. Whether a decision affects a substantial part of a business or undertaking must be assessed on a case by case basis, with reference to the structure and activities of the business or undertaking.

A business or undertaking 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). Or a business or undertaking may have various, defined divisions based on product or service categories. Each of the divisions may each be a substantial part of the business or undertaking, depending on their role within the business or undertaking as a whole.

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

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

These and any other relevant factors should be considered together.

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

1.3.3. What is meant by 'participate in making decisions'?

A person may be an officer because they participate in the decision making process, even where they do not actually make a decision. The overall role the person plays in, and their contribution to, the decision-making process will determine whether that person participates in the decision making process. A person who is:

- actively involved in the decision making process and
- occupies a role that directly contributes to, promotes or affects the decision

will be an officer under the model WHS Act.

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.

For example, corporate counsel, chief financial officers and other senior advisors within a corporation may be officers if they are involved in discussions when decisions are being made, but

may not be officers if they simply provide advice for the consideration of the decision makers, or are only involved in administration of a decision-making process.

A person will not be an officer if they only have operational responsibilities, with no ability to influence or affect decisions at an organisational level, such as engagement of staff, commitment of corporate funds or direction over the work carried out by the business or undertaking.

1.4. Identifying a person who has the capacity to affect significantly the financial standing of a corporation or other entity

The information in this section applies to determining who is a person that has the capacity to significantly affect the financial standing of a corporation or other entity.

A person has capacity to significantly affect the financial standing of a corporation or entity if they are involved:

- in the financial management of the corporation or entity (for example, a chief financial officer), or
- decisions relating to significant investments or projects.

A person who makes high value financial transactions as part of their role in a corporation or entity is not necessarily an officer under the model WHS Act. It will depend on the circumstances, including whether the value of the transaction is significant in the context of the business or undertaking and the person's other responsibilities for financial management of the corporation or entity.

For example, an employee who has authority to approve or make financial transactions that are of a high dollar value may not be an officer if the value of those transactions is not significant to the overall business of the corporation or entity, the transactions are carried out under the supervision and direction of a manager, and the employee does not have any other financial management responsibilities.

1.5. Volunteers can be officers

A volunteer is a person acting on a voluntary basis without payment or financial reward, although they may receive reimbursement for expenses incurred by them.

A volunteer may be an officer if they:

- sit on a board or committee of an organisation;
- are in a role where they make, or participate in making, decisions that affect the whole, or a substantial part of the organisation in which they volunteer; or
- are in a position where they have the capacity to significantly affect the financial standing of an organisation in which they volunteer

A volunteer who is an officer has a duty to exercise due diligence, but cannot be prosecuted for failing to comply with that duty (see section 34(1) of the model WHS Act). A volunteer can be prosecuted if they fail to comply with their duties as a 'worker'.

1.6. An elected member of a local authority is not an officer

An elected member of a local authority (such as a municipal council) is also not an officer under the model WHS Act, when they are acting in that capacity.

2. What does the officer duty require?

An officer's duty is to exercise 'due diligence' to ensure their PCBU meets its duties to protect workers and other persons against harm to health and safety. Amongst other things, this means an officer must ensure that the PCBU has in place appropriate systems of work and must actively monitor and evaluate WHS management.

2.1. Why is there an officer duty?

The officer duty recognises that officers have corporate governance responsibilities and, through their decisions and behaviour, strongly influence the culture and accountability of the business or undertaking. They can influence important decisions on the resources that will be made available for the purposes of WHS, and the policies that will be developed to support compliance by the PCBU with the model WHS laws.

Each of the elements of due diligence set out in section 27(5) of the model WHS Act, and below, support accountability, allocation of resources, and development and implementation of appropriate policies for a healthy and safe work culture.

An officer (other than a volunteer officer) may be prosecuted for failing to meet their duty, whether or not their PCBU has also been convicted or found guilty of an offence. This means the failure of an officer does not need to be tied to any failure or breach of the PCBU in order for the officer to be prosecuted.

2.2. Due diligence

Section 27(5) of the model WHS Act clarifies that due diligence involves taking reasonable steps:

1. to acquire and keep up-to-date knowledge of WHS matters
(for example, knowledge of WHS laws, approved Codes of Practice relevant to the business or undertaking, the principles of managing WHS risks, industry standards and practice, and the possible strategies and processes for elimination or minimisation of hazards and risks relevant to the work being carried out);
2. to gain an understanding of the nature of the operations of the business or undertaking of the PCBU 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 PCBU 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 to manage health and safety risks associated with work being undertaken by the PCBU, making decisions about procedures and resources and ensuring that they are used);
4. to ensure that the PCBU 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 do so);
5. to ensure that the PCBU has, and implements, processes for complying with any duty or obligation the PCBU has under the WHS Act
(the model WHS Act provides examples of the relevant duties or obligations of the PCBU—reporting notifiable incidents, consulting with workers, ensuring compliance with WHS

notices, ensuring the provision of training and instruction to workers about WHS, and ensuring that health and safety representatives receive their entitlements to training. 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); and

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).

An officer must take reasonable steps in relation to the matters in this list. What steps are reasonable will depend on the circumstances, including the role and influence of the individual officer.

The list of due diligence requirements in section 27(5) of the model WHS Act is not 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 would not be exercising due diligence to ensure compliance by their PCBU with its duties under the model WHS Act, if they were aware of, but did not take action to ensure that, significant issues with the WHS performance of a contractor performing work for the PCBU were properly addressed.

2.3. Complying with the officer duty

An officer can only comply with their duty by taking an active and inquisitive role in WHS.

One aspect of due diligence relates to the officer's knowledge and understanding of WHS matters, so they are able to make informed decisions in the discharge of their duty, and verify the use of resources and processes by the PCBU. That knowledge will be technical (for example, the legal obligations of the PCBU and other duty-holders), situational (for example, the nature of the work being undertaken, what it involves and what that means for WHS) and strategic (for example, what the PCBU should be doing and why).

The knowledge may come from others, such as 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. However, reliance on information from others must be reasonable, for example, based on the knowledge, skills, training or expertise of the advisor.

The other aspects of due diligence are ensuring that the PCBU has in place the resources, processes and procedures needed for compliance with PCBU's duties and obligations, such as:

- an appropriate governance structure with the right people in place, who are appropriately authorised and accountable, to enable WHS to be attended to properly. Note: a formal structure may not be needed in a small business, where the officers are involved in the day to day activities and have easy access to relevant information; and
- 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 business or undertaking, and to make appropriate decisions.
- a written register or other record of decisions made in the business or undertaking 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.

While an officer need not be involved directly in implementation and day-to-day management, they must take reasonable steps to verify that those resources, processes and procedures are provided and used.

Note: this document is a general guideline only and is not a substitute for professional legal advice. To the best of our knowledge, 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.