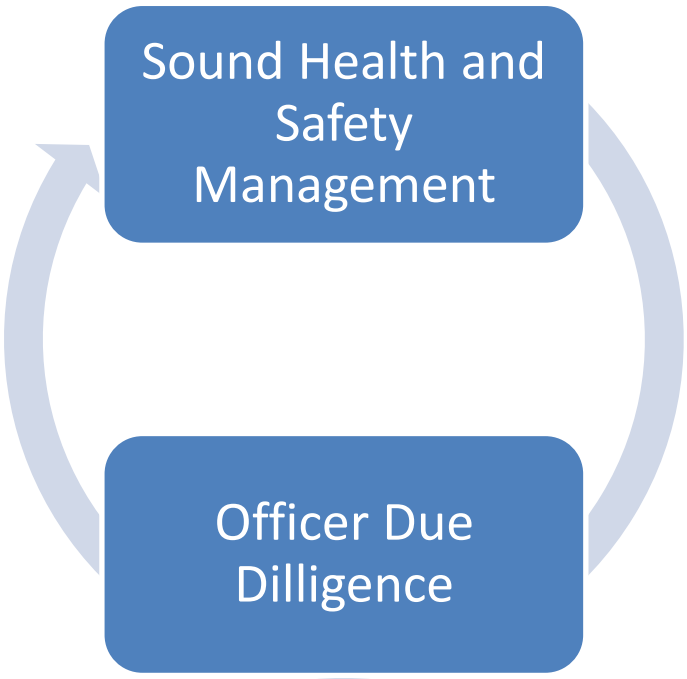
WHS Due Diligence for Officers Guide



Contents

1. Introduction 2
2. The Person Conducting the Business or Undertaking (PCBU) 3
1.1 Who is the "person" referred to in the term PCBU? 3
1.2 What is a "business" or "undertaking"? 3
3. Why place a Due Diligence Obligation on an Individual (i.e. an Officer)? 3
4. Who is an "Officer"? 4
5. The Positive Due Diligence Obligation 4
6. Actions to Demonstrate Due Diligence 5
7. How to Prepare for the Due Diligence Obligation 8
8. References 9
9. Appendix A - Definition of an Officer 10
10. Appendix B - Penalty Regime for Reckless Conduct and Failure to Comply with WHS Duty 11

1. Introduction

In July 2008 the Council of Australian Governments (COAG) formally committed to harmonising Australia's health and safety laws, instead of having differing health and safety laws through all states, territories and the commonwealth.

Since then, the new Work Health and Safety (WHS) legislation has been adopted by all states and territories across Australia except WA and Victoria.

In July 2017 the WA State Government announced that they will proceed with replacing the current OSH legislation with the WHS legislation. The legislation is planned to come in to effect in 2019.

The WHS legislation includes a provision being referred to as the "Positive Due Diligence" obligation for Officers. This provision is new in WA, and it has significant implications for Boards and Senior Management. This document provides guidance on the interpretation and application of the "Positive Due Diligence" obligation.

2. The Person Conducting the Business or Undertaking (PCBU)

The Person Conducting the Business or Undertaking (PCBU) is a key concept in the WHS legislation. The PCBU has the Primary Duty of Care. It is vital to understand what the PCBU is to understand the Due Diligence obligation for Officers.

1.1 Who is the "person" referred to in the term PCBU?

The "person" may be an organisation or an individual.

The WHS Act considers the organisation to be the "person" when the business or undertaking is a:

- Body Corporate (Corporation)
- Unincorporated Body or Association
- Government Department or Statutory Agency (i.e. the Crown is the PCBU)
- Partnership

The WHS Act considers the individual to be the PCBU when the business or undertaking is a:

- Sole trader
- Self-employed person
- Partnership

NOTE: The individuals in a Partnership are individually and collectively a PCBU. They are excluded from being Officers (this has been done to avoid double liability).

1.2 What is a "business" or "undertaking"?

The WHS Act does not define the terms "business" or "undertaking". As such the terms are to be given their ordinary meanings. However for the WHS legislation to be applicable, the business or undertaking must be associated with "work". Work can be paid or unpaid, but it does not include activities of a purely domestic, recreational or social nature.

3. Why place a Due Diligence Obligation on an Individual (i.e. an Officer)?

The PCBU may be an organisation or an individual (Refer 2), however a business or undertaking is always operated and governed by individuals (e.g. Board/Senior Management). These individuals, through their decisions, strongly influence health and safety management and the compliance of the PCBU with WHS laws.

4. Who is an "Officer"?

The definition of Officer is effectively any individual who participates (or has the authority to participate) in making decisions that affect whole or substantial parts of a business or undertaking. This generally includes the Board and Senior Management. Individuals who simply provide advice to inform decisions, are not "Officers". (refer Appendix 1 for the full definition of Officer).

5. The Positive Due Diligence Obligation

Any individual within a business or undertaking who is considered an Officer will have the "positive due diligence obligation" (Section 27) placed upon them.

Section 27 of the model WHS Act outlines what is required of Officers to exercise WHS due diligence. It takes what has long been considered good health and safety management practice and makes it a legislative requirement. Essentially, persons who are considered Officers must ensure workplace hazards and risks are identified and managed within the organisation AND pro-actively take steps to inform themselves on WHS matters to facilitate sound decision making. Should an Officer fail to demonstrate due diligence, they can be held personally liable for this and expose both themselves and the organisation to prosecution.

A volunteer Officer:

- must exercise due diligence to ensure that the organisation complies with its health and safety duties;
- A volunteer Officer cannot be prosecuted for failing to comply with their Officer duties under WHS law. This immunity for volunteer officers is designed to ensure that voluntary participation at the Officer level is not discouraged. However, Regulator action can be taken against the organisation (e.g. Improvement Notice) if the volunteer fails to comply with their Officer duties AND a volunteer Officer can be prosecuted in their capacity as a worker if they do not take reasonable care as a worker

A new penalty regime for the organisation, officer and individual will apply (see Appendix B).

6. Actions to Demonstrate Due Diligence

The table below provides suggested actions an Officer may take to meet their due diligence obligations.

For organisations where the structure does not include a Board, the actions outlined in both columns should be considered, and taken on as appropriate to the roles of the Officers.

Steps of Due Diligence	Board	Senior Management
1. Acquire and maintain up-to-date knowledge of WHS matters.	Attend/receive briefings on WHS legal requirements. Attend/receive briefings on industry WHS risk management issues.	Attend/receive briefings on WHS legal requirements. Attend/receive briefings on industry WHS risk management issues. Subscribe to email services providing alerts/information on: • WHS legal issues; and • Industry relevant risk management issues. Complete some formal WHS manager training.
2. Acquire and maintain knowledge of the organisation's main activities and the hazards and risks that emanate from them.	Monitor the organisations Strategic Level WHS Risks (may be part of the General Risk Register). Receive and review WHS Performance Reports (e.g. Quarterly). Ensure reports contain information on key operational risks including outcomes AND key	Participate (as practicable) in Hazard inspections. Participate (as practicable) in WHS Committee meetings. Monitor the organisations Strategic Level WHS Risks (may be part of the General Risk Register). Monitor the organisations Operational Level WHS Risk Register. E.g. via direct

Steps of Due Diligence	Board	Senior Management
	controls/strategies to manage those risks.	monitoring; Quarterly WHS Risk Management Reports; Reports following risk reviews etc. Receive and review WHS Performance Reports. Ensure reports contain information on key operational risks including control implementation performance.
3. Ensure risk controls are in place, monitored and effective.	Monitor that WHS system audits occur as planned Monitor that WHS risk assessments and reviews occur as planned Read WHS system audit reports – monitor improvement action as required. Read WHS Risk Review reports - monitor improvement action as required. + as per 2	Oversee that WHS system audits are scheduled and resourced. Oversee that WHS risk assessments are scheduled and resourced. Read WHS system Audit reports – oversee improvement action as required. Read WHS Risk Review reports - oversee improvement action as required. +as per 2
4. Ensure adequate resources are provided to manage health and safety.	Monitor WHS budget existence and expenditure via Financial Reports (Request this information is included as standard).	Appoint a competent person (e.g. Health and Safety Advisor/Consultant) to coordinate the management of Health and Safety.

Steps of Due Diligence	Board	Senior Management
		Oversee that necessary health and safety roles and responsibilities are outlined in job descriptions/ procedures. Allocate a budget to cover reasonable health and safety resources/actions (e.g. provision for training, audits, facility maintenance and testing programs etc) Ensure staffing levels are adequate to support required business delivery being done safely.
5. Ensure appropriate processes are in place for reporting WHS issues and responding in a timely manner.	Verify that the organisation has: • a documented WHS incident/injury reporting process in place; and • a current documented WHS issue resolution procedure in place. Suggested methods to verify the above include (but are not limited to): by reviewing audit reports; by reviewing incident/injury data; by sighting the process/procedure on the organisation intranet; by requesting verification evidence from Senior	Oversee that the organisation has: • a documented WHS incident/injury reporting process in place; and • a documented WHS issue resolution procedure is in place*. *ensure procedure includes easy & quick process for raising urgent issues with decision makers.

Steps of Due Diligence	Board	Senior Management
	Management at Board meetings.	
6. Ensure the organisation verifies that the health and safety controls (e.g. processes, resources) have been implemented and are effective at managing WHS risks.	As per 3	As per 3

7. How to Prepare for the Due Diligence Obligation

- Identify which roles/individuals are likely to be considered Officers in your organisation e.g. Board/Senior Management (Refer 4).
- Provide those likely to be considered Officers with information (e.g. briefing sessions) to ensure they understand what the due diligence obligation means.
- Review your governance and WHS performance reporting structures, ask the question – "Are the current processes equal to or better than what has been outlined above? (Refer 6)"

For support contact Franklyn Work Safety – admin@franklynws.com.au or M: 0422 480 697

8. References

Duties - Queensland WorkSafe https://www.worksafe.qld.gov.au/laws-and-compliance/electrical-safety-laws/duties

The Essential Guide to Work Health and Safety for Volunteers, Safe Work Australia https://www.safeworkaustralia.gov.au/system/files/documents/1703/volunteers_guide.pdf

Guidance for Officers in Exercising Due Diligence, Comcare https://www.comcare.gov.au/__data/assets/pdf_file/0020/102566/Guidance_for_officers_in_exercising_due_diligence.pdf

Interpretive Guideline - model Work Health and Safety Act - the health and safety duty of an officer under section 27 – Safe Work Australia https://www.safeworkaustralia.gov.au/doc/interpretive-guideline-model-work-health-and-safety-act-health-and-safety-duty-officer-under

Interpretive Guideline - model Work Health and Safety Act - the meaning of 'person conducting a business or undertaking', Safe Work Australia https://www.safeworkaustralia.gov.au/doc/interpretive-guideline-model-work-health-and-safety-act-meaning-person-conducting-business-or

Measuring and Reporting on Work Health and Safety 2017, Safe Work Australia https://www.safeworkaustralia.gov.au/system/files/documents/1802/measuring-and-reporting-on-work-health-and-safety.pdf

Reporting Performance: Guidance on Including Health and Safety in Annual Reports 2015, IOSH https://www.iosh.co.uk/News/Guidance-on-including-health-and-safety-performance-in-annual-reports.aspx

Reporting to the Board Fact Sheet, CPA Australia, https://www.cpaaustralia.com.au/~/media/corporate/allfiles/document/professional-resources/business/reporting-to-the-board.pdf?la=en

SA/SNZ HB 205:2017 Handbook - Managing health-and-safety-related risk (NOTE: the purpose of this Handbook is to provide guidance on the application of AS/NZS ISO 31000:2009 for the effective management of health-and-safety-related risk.)

Work Health and Safety Bill 2014, WA State Government (Refer Section 27) https://www.commerce.wa.gov.au/sites/default/files/atoms/files/work_health_and_safety_bill_2014.pdf

Note: this document is a general guide only and is not a substitute for professional legal advice. The contents of this document considered correct based on Regulator Guidance material available at the time of publication. However, there may be subsequent Regulator Guidance, decisions of courts or tribunals on the matter covered by this guide which mean that the contents require updating. Always check the FWS Guides and Resources Page to make sure you have the most recent Version (indicated in Footer).

9. Appendix A - Definition of an Officer

The model Work Health and Safety Act (s 4)

Officer means:

(a) an officer within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth (see below), other than a partner in a partnership; or

(b) an officer of the Crown within the meaning of section 247; or

(c) an officer of a public authority within the meaning of section 252, other than an elected member of a local authority acting in that capacity.

The definition of 'officers' in the *Corporations Act 2001* is:

***Corporations Act, 2001* (s 9)**

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; or

(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 person's 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; or

(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

10. Appendix B - Penalty Regime for Reckless Conduct and Failure to Comply with WHS Duty

Table adapted from WHS Bill 2014 - Division 5

Category	Description	New Penalties	Current WA Penalties
1	Reckless or gross negligence by a Duty Holder causing death, serious injury or illness to a person or a risk of such harm	• Body Corporate – $3 million • Individual as a PCBU or an Officer - $600k +/ 5 yrs prison • Individual who is not a PCBU or Officer (e.g. a worker) - $300k +/ 5 yrs prison	• Employers - $625k (gross negligence) • Managers /Supervisors $312,500 • 2 years imprisonment
2	Failure by Duty Holder to comply with Duty which exposes an individual to a risk of death or serious injury or illness	• Body Corporate - $1.5 million • Individual as a PCBU or an Officer - $300k • Individual who is not a PCBU or Officer (e.g. a worker) - $150k	Nil equivalent under current legislation
3	Failure by Duty Holder to comply with Duty	• Body Corporate - $500k • Individual as a PCBU or an Officer - $100k • Individual who is not a PCBU or Officer (e.g. a worker) - $50k	Nil equivalent under current legislation

S. 34. Exceptions

(1) A volunteer does not commit an offence under this Division for a failure to comply with a health and safety duty, except a duty under section 29 (*Duties of other persons at the workplace*).

(2) An unincorporated association does not commit an offence under this Act for a failure to comply with a duty or obligation imposed on the unincorporated association under this Act.

(3) However:

(a) an officer of an unincorporated association (other than a volunteer) may be liable for a failure to comply with a duty under section 27 (*Duty of Officers*); and

(b) a member of an unincorporated association may be liable for failure to comply with a duty under section 28 (*Duties of workers*) or 29 (*Duties of other persons at the workplace*).