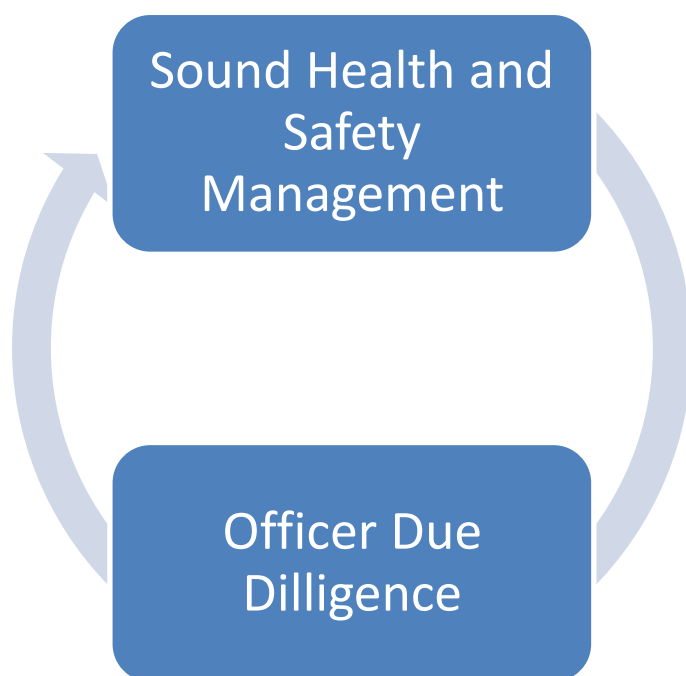


WHS Due Diligence for Officers Guide



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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 Victoria.

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.

2.1. 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).

2.2. 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 Executive Level 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

6. Actions to Demonstrate Due Diligence

The table below outlines “reasonable steps” (based on standardised WHS Management Systems and Regulator Guidance material) that 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 role of the Officers.

Due Diligence Requirement	Reasonable Step	Board	Senior Mgt
1. Acquire and maintain up-to-date knowledge of WHS matters.	Attend/receive briefings/information on: <ul style="list-style-type: none"> • WHS legal requirements. • WHS risk management issues. 	✓	✓
	Complete some formal WHS management training / supervision.		✓

Due Diligence Requirement	Reasonable Step	Board	Senior Mgt
2. Acquire and maintain knowledge of the organisation's main activities and the hazards and risks that emanate from them.	Monitor the organisations key 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 the controls/strategies to manage those risks.	✓	✓
	Participate (as practicable) in Hazard inspections.		✓
	Participate (as practicable) in WHS Committee meetings.		✓
3. Ensure risk controls are in place, monitored and effective.	Monitor that WHS system audits occur as scheduled	✓	
	Oversee that WHS system audits are scheduled and resourced.		✓
	Monitor that WHS risk assessments and reviews occur as planned	✓	
	Oversee that WHS risk assessments are scheduled and resourced.		✓
	Read WHS system audit reports – monitor improvement action as required.	✓	
	Read WHS system Audit reports – oversee improvement action as required.		✓
	Read WHS Risk Review reports - monitor 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.		✓

Due Diligence Requirement	Reasonable Step	Board	Senior Mgt
	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.	<p>Verify that the organisation has:</p> <ul style="list-style-type: none"> a documented WHS incident/injury reporting process in place; and a current documented WHS issue resolution procedure in place. <p>Suggested methods to verify the above include (but are not limited to): reviewing audit reports; reviewing incident/injury data; sighting the process/procedure on the organisation intranet; requesting verification evidence from Senior Management at Board meetings.</p>	✓	
	Oversee that the organisation has a documented WHS incident/injury reporting process in place		✓
	<p>Oversee that the organisation has a documented WHS issue resolution procedure is in place*.</p> <p>*ensure procedure includes easy & quick process for raising urgent issues with decision makers.</p>		✓
6. Ensure the organisation verifies that the health & safety controls (e.g. processes, resources) have been	As per 3	✓	✓

Due Diligence Requirement	Reasonable Step	Board	Senior Mgt
implemented and are effective at managing WHS risks.			

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

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.)

WA Work Health and Safety Bill 2019 (Refer Section 27)
[https://www.parliament.wa.gov.au/Parliament/Bills.nsf/8F320741B83643A8482584BF000CF89B/\\$File/Bill155-2.pdf](https://www.parliament.wa.gov.au/Parliament/Bills.nsf/8F320741B83643A8482584BF000CF89B/$File/Bill155-2.pdf)

Note: this document is a general guide only and is not a substitute for professional advice. The contents of this document were 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

Extract from *WHS Bill 2020*

4A. Meaning of officer

- (1) In this Act —
officer —
 - (a) means —
 - (i) an officer within the meaning of the *Corporations Act 2001* (Commonwealth) section 9 other than a partner in a partnership; or
 - (ii) an officer of the Crown within the meaning of subsection (2); or
 - (iii) an officer of a public corporation within the meaning of subsection (3);
- (2) Each of the following persons is taken to be an officer of the Crown for the purposes of this Act —
 - (a) in relation to the business or undertaking of a body corporate that is an agent of the Crown, any person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking;
 - (b) in relation to the business or undertaking of a Crown agency, the chief executive;
 - (c) in relation to the business or undertaking of a Crown agency, any person (other than the chief executive) —
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking; and
 - (ii) who is, within the organisational structure of the Crown agency, directly responsible to the chief executive.
- (3) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public corporation is taken to be an officer of the public corporation for the purposes of this Act.