



WHS, Officers and Due Diligence in the Public Sector

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Overview

What will this session cover?

1. Who will be an Officer?

Who will (or should) be considered an Officer?

2. What is Due Diligence?

What is due diligence? Why is it so important?

3. Due Diligence in Practice

Practical tips to help meet your obligations as an Officer.

Why does being an Officer matter?

Why Does Being an Officer Matter?

1. Logical that those with the responsibility and ability to influence safety have an obligation to do so. With power comes responsibility.*
2. The law deems who will be an Officer – not the PCBU. No more sole responsible officer under former OHS Act.
3. Responsibility spread across one or more senior employees.

**Credit: Uncle Peter/Stan Lee, Spiderman (and likely Franklin D. Roosevelt)*

Why does being an Officer matter? (Cont)

Why Does Being an Officer Matter?

4. The WHS Act places new and important WHS obligations on Officers. Primary obligation relates to **due diligence**.
5. Officers are individuals or natural persons. They are separate from the PCBU. Unable to hide behind the 'corporate shield'.
6. Penalties for breach are against the individual. Jail and significant fines are a possibility. Criminal record if convicted.

Who will be an Officer?

The Legal Test: Do you make, or participate in making, decisions that affect the whole, or a substantial part, of your business or undertaking?

- Very similar definition to that in Corporations Act (relevant for private sector).
- Raises a number of questions:
 - does 'participating' in mean having the final call?
 - does a 'substantial part' mean at least 50% of staff?
 - does 'decision making ability' refer to safety decision, or more?

Who will be an Officer? (Cont)

General Advice – Who will (and should) be considered an Officer?

- CEO (or comparable head of department/agency/division) will almost always be an Officer.
- Executives reporting directly to CEO could be deemed an Officer. Best practice to assume will be.
- Managers below 'executive team' unlikely to be Officers, even if they have relevant expertise in HR or WHS. However, best practice (particularly for training purposes) to provide all Managers and HR and WHS professionals with 'Officer Training'.

Who will be an Officer? (Cont)

The test is still a bit vague...what have the Courts said?

- South Australian Courts yet to consider (in WHS context).
- Due to objects of WHS Act, limit to extent we can rely on decisions on 'Officer' definition in other contexts (e.g. *Corporations Law*).
- Very few decisions interstate. One of the few available is that of *Chevalley v Industrial Court of NSW* [2011] NSWCA 357 which confirmed:

It is a matter of fact whether the director or person concerned in management [that] has been charged was in a position to influence the conduct of the corporation in relation to the [WHS] contravention.

Who Will Be an Officer? (Cont)

Although WHS Act not clear, you will likely be deemed an Officer:

- If your decision making power (or area of responsibility) relates to safety, particularly if it extends across a large part of the PCBU.
- If your decision making power (or area of responsibility) relates to finances, particularly if it involves approving (or rejecting) request for monies for a safety initiative or review (controlling the purse strings).
- You have the final say on a particular matter, whether 'on paper' (the CEO) or in practice (CEO defers entirely to your judgement).

So You Think You're an Officer?

So I Might be an Officer - What Does This Mean in Practice?

- Two (important) words: Due diligence.
- Sound scary? It's not.
- (Very) loosely translated due diligence means taking reasonable, proactive steps to ensure your PCBU complies with the WHS Act.
- Let's look at what due diligence means in practice.....

Due Diligence: General Considerations

Due Diligence: General Principles to Keep in Mind

1. Whether you have exercised due diligence (to the 'reasonable extent' required) is an objective test.
2. Due diligence (and what it requires of you) will vary between PCBUs. A 'one size fits all' approach is not without risk. Consider obtaining specific advice.
3. The duty is not transferable. It is not enough to only rely on the expertise of others. If in doubt, must make your own enquiries.
4. The duty requires actual positive action. Very important. Head in sand won't cut it.

What Does Due Diligence Mean? General Considerations

What is Due Diligence (Continued)

5. Each Officer retains primary duty – discharge to extent of capacity to influence or control.
6. Where overlapping duties whether you have ability or capacity to control becomes directly relevant.
7. Officer must also consult, cooperate and coordinate their activities with other Officers.

What is Due Diligence in detail?

The Detail in the WHS Act

What does the WHS Act say?

Due diligence is defined in section 27(5) as taking **reasonable steps** to address six key areas:

1. Acquire and keep **up-to-date knowledge** of work health and safety matters.
2. Gain an **understanding** of the nature of **your operations** and the **hazards** and **risks** associated with those operations.
3. 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 PCBU.

What is Due Diligence?

Detail in the WHS Act (Continued)

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.
5. To ensure that PCBU has, and implements, **processes for complying** with any duty or obligation of the PCBU under the Act. The section gives specific examples such as reporting notifiable incidents, consulting with workers and ensuring compliance with notices.
6. To **verify the provision and use** of the resources and processes referred to in paragraphs 3, 4 and 5 above.

Due Diligence in Practice - Part 1

Current WHS Knowledge

How do I acquire and keep WHS knowledge up to date?

1. Annual WHS training. Ensure targeted to PCBU.
2. Be across changes to the Act, Regulations and Codes of Practice.
3. Be across (relevant) Codes of Practice at all times in particular:
 - How to Manage Work Health and Safety Risks
 - Hazardous Manual Tasks
 - Work Health and Safety Consultation Cooperation and Coordination
 - First Aid in the Workplace

Due Diligence in Practice - Part 1

Current WHS Knowledge (Cont)

4. Create a WHS mailing list. Keep information circulating by email. This should include newsletters, updates from internal WHS staff, Safework SA publications and training sessions.
5. Keep a WHS Officer file. Ensure it contains a record of your attendance at training sessions and information relating to your workplace.
6. Ensure you remain briefed on WHS by the SMEs within your PCBU.

Due Diligence in Practice - Part 2

Understand Operations, Hazards and Risks

How do I ensure hazards and risks are identified?

1. Know the actual or practical risks. Look beyond the policies. Consider actual reported safety incidents, near misses and workers compensation claims (being mindful of confidentiality).
2. Be across risk assessments. Ensure those assessments focus on the activities of the PCBU in question. Ensure you remain well briefed on WHS activities by those in the know (such as WHS Co-ordinator).
3. Avoid ivory tower syndrome. Consult with employees on the ground doing the actual work. WHS surveys are quick, easy and often yield surprising results.

Due Diligence in Practice - Part 2

Understand Operations, Hazards and Risks (Cont)

4. Learn from the past. Consider history of any injuries, near misses or legal claims in your PCBU.
5. Be aware of common injuries, or injury trends, in comparable workplaces, such as back and repetitive strain injuries.
6. Do not forget the less 'traditional' risk areas which can lead to psychiatric injury such as unreasonable administrative action or bullying.

Due Diligence in Practice - Part 3

Processes and Resources

Processes and Resources

1. Ensure you know what your 'processes' are. Be across all WHS policies, procedures and the applicable Codes of Practice.
2. Ensure adequate resources for WHS particularly in the context of time (staffing levels) dollars (budget) and expertise (in house experts).
3. If a proposed safety initiative is rejected, ensure you clearly document and justify why it was not necessary or reasonable. Obtain advice if in doubt.

Due Diligence in Practice - Part 4

Responding to Information

Information Sharing

1. Policies and procedures (and related training) are vital to ensure information gets where it needs to be. Staff need to know what to do.
2. Ensure your workplace has formal reporting requirements for WHS, particularly where it relates to an incident, hazard or risk.
3. Ensure your procedures make clear what happens after information is received. Ensure they clearly state who is responsible for actioning what, and when. Never assume something has been attended to.

Due Diligence in Practice - Part 5

Ensuring Compliance

Ensuring Compliance

1. Ensure your PCBU has a legal and/or SME audit every two years (or substantial change in law).
2. Ensure PCBU specific training always occurs, particularly for new workers and Officers.
3. Officer/senior manager training particularly important so aware of PCBU obligations relating to consultation, HSR, prohibition and improvement notices, notifiable incidents and the like.

Due Diligence in Practice - Part 6

Verifying Compliance

Verifying Compliance

1. This is essentially self-audit. It means ensuring the processes and procedures are actually being used and your PCBU is complying with them.
2. As an Officer, frequent briefings are vital to ensure this is occurring. Can occur by way of monthly reports, or ensuring WHS is an agenda item for all meetings.
3. Training registers (particularly as it relates to WHS policies and procedures) are vital to show that employees have the requisite knowledge.

General Tips - Part 1

Know Your Codes of Practice

Read the Codes of Practice

- Currently 23 Codes (including 5 Codes mentioned earlier). Consider list available at www.safework.sa.gov.au.
- Practical guidance on how to meet standards in WHS Act and Regulations.
- Very useful tool to assist PCBU and Officers comply with obligations.
- Codes are admissible in Court proceedings as evidence of whether PCBU has complied with its duties.

General Tips - Part 2

The Right Against Self Incrimination

The Right Against Self Incrimination

- An individual person (as opposed to a PCBU or entity) is excused from answering a question or providing information on the ground that the information or response may tend to incriminate them.
- Before an Inspector requires a person to answer a question or provide information they must advise the person of the effect of section 172 (above).
- Extremely important if questioned to clarify whether answering in your personal capacity as an Officer, or if you are speaking on behalf of the PCBU (when protection will not apply).

Due Diligence: The Top 8 'Practical' Tips

Take Home Points

1. Most of these obligations are not new.
2. You are not expected to be a WHS expert. But, as a decision maker, you need to be proactive in taking reasonable steps to exercise due diligence.
3. Create a WHS mailing list that circulates critical WHS information to all executives, in particular Officers. Critical information will likely include hazard or incident reports, injury claims and relevant publications from Safework SA.

Due Diligence: The Top 8 'Practical' Tips

Take Home Points

4. Consult with employees 'on the ground'. Ask what they see as day-to-day risks and whether enough is being done to address those risks
5. Create a safety culture. Walk the talk. Ensure WHS is an agenda item at all levels. Encourage discussion. Emphasise the importance of training.
6. Both vertical and 'horizontal' consultation are critical. Do not forget overlapping duty holders (such as contractors). Review documentation (such as service agreements) with other PCBUs you work with.

Due Diligence: The Top 8 'Practical' Tips

Take Home Points

7. Be across what is 'reasonable' in a given context. It can be a difficult question to answer, particularly when required to balance so many considerations. If in doubt, obtain privileged legal advice.
8. Do not forget 'non-traditional' areas of risk such as anxiety or stress and associated mental illness.

Morning Tea, and....

While you are enjoying that biscuit, have you considered holding a tailored WHS Session for your agency?

All workplaces are unique. There is significant benefit in holding an in-agency WHS session which is specifically tailored to your workplace. Benefits include practical examples directly applicable to your workplace, including common risks, hazards and responsibilities. Importantly, a tailored session is able to address your department specific WHS policies and procedures, and assist with identifying who will (or should be) considered Officers within your organisational structure.

Please contact IPAA for further information on 8212 7555 or nadiac@sa.ipaa.org.au.