

6 December 2011

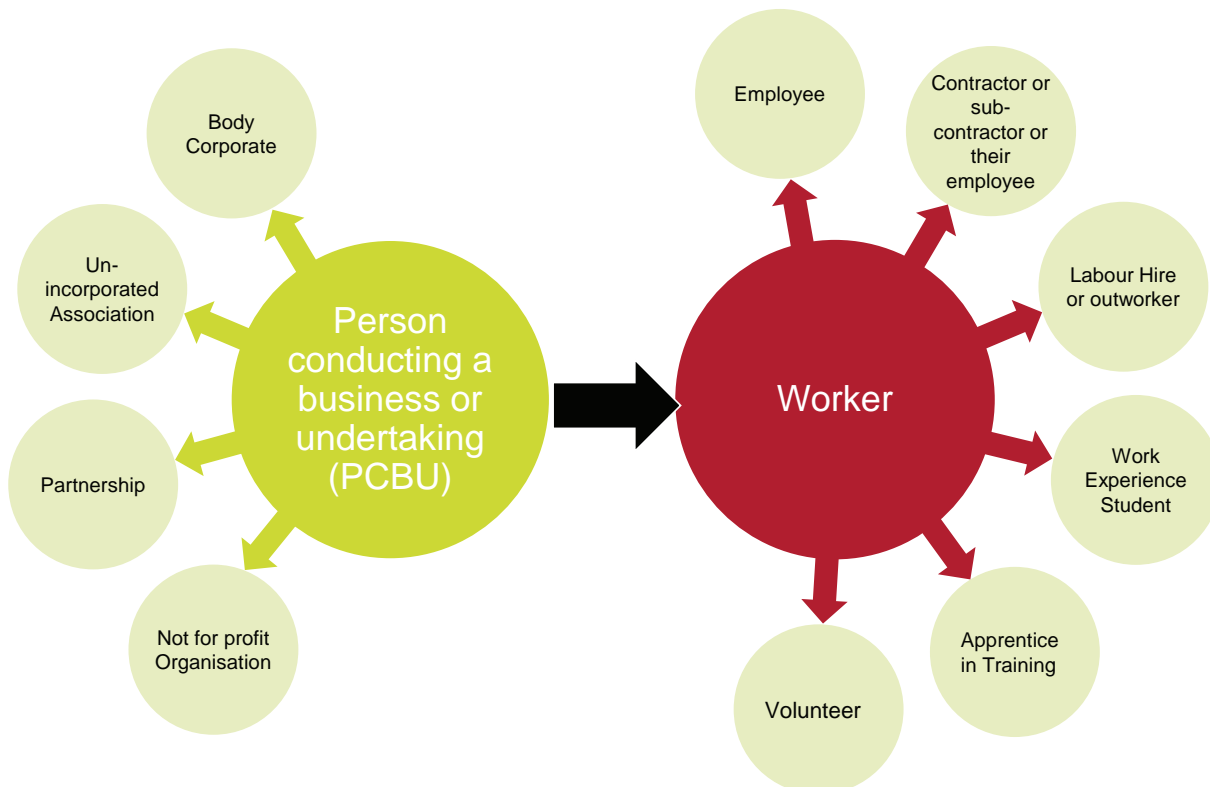
Not-for-profit e-alert

Work Health Safety (WHS): no longer just for employers to worry about

What does this mean for you?

The new Work Health Safety Act 2011 is uniform legislation designed to apply to all Australian states and territories from 1 January 2012, replacing the various state's and territories OH&S legislation such as the Occupational Health and Safety Act 2000 (NSW). As well as making work health safety law consistent across the whole country, it is designed to have a broader reach, as the diagram below shows, drawing NFPs and charities into the type of organisations affected, and volunteers into the definition of "worker".

Work Health and Safety Act 2011 Primary Duty of Care



The main object of the Act

The aim is to protect the health, safety and welfare of workers and other persons by eliminating or minimising risks arising from work. This is based on the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare arising from hazards and risks at work, as is reasonably practicable (refer section 3 of the Act). That is, a person conducting the business or undertaking owes them a statutory primary duty of care in this regard, so far as is reasonably practicable. A failure in that duty can be prosecuted as a criminal offence attracting a maximum of a \$600,000 fine or 5 years imprisonment or both as a director or officer, and a fine of up to \$3,000,000 for a company (refer section 31 of the Act – Reckless conduct – Category 1).

What does “reasonably practicable” mean?

The Act contains a definition of “reasonably practicable” which states it is that which was reasonably able to be done, given:

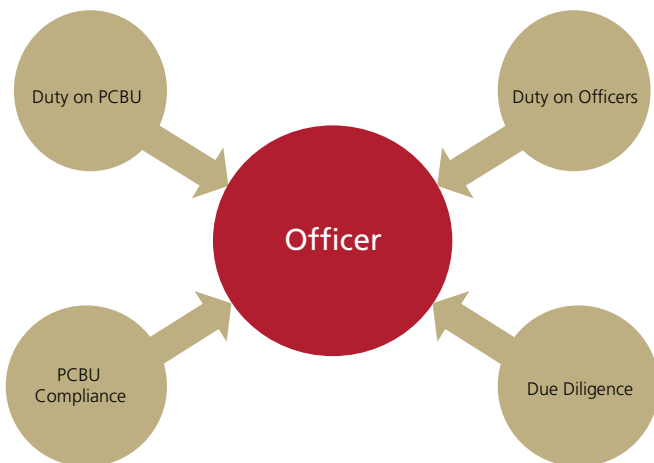
- » the likelihood of the hazard or the risk concerned occurring
- » the degree of harm that might result from the hazard or the risk
- » what the person knew or ought reasonably to have known, about the hazard or the risk and ways of eliminating or minimising the hazard or the risk
- » the availability and suitability of ways to eliminate or minimise the risk; and
- » after assessing the risk and the available ways of eliminating or minimising the risk, the costs associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk (refer section 18 of the Act).

To succeed in a prosecution under the Act, the prosecutor must prove that the defendant did **not** do everything reasonably practicable in the circumstances of the case.

Duty on Officers

Section 27 of the Act provides if a corporation has a duty or obligation under a relevant provision, an officer of the corporation must exercise due diligence to ensure the corporation complies with that duty or obligation.

Duties and Connections



Officers



What does Due Diligence Mean?

Section 27(5) of the Act includes taking reasonable steps to:

- » acquire and keep up to day knowledge of work, health and safety matters.
- » understand the business or undertaking and the hazards and risks associated with those operations.
- » ensure 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.
- » ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding the incidents, hazards, and risks and responds in a timely way.
- » ensure the person conducting the business or undertaking has and implements processes for complying with any duty or obligation under the act.

Are you bound by the primary duty of care if you are a volunteer director/officer?

Section 34 of the Act provides that volunteers will be exempt from duties other than any duties they may have as a worker (section 28) or as another person at the workplace (section 29).

What should you be doing?

As far as non-volunteer directors and senior management are concerned, we suggest you should ask yourselves:

- » Do I receive sufficient information on OH&S/WHM matters?
- » Do I fully understand the operational hazards and risks?
- » What approach do we take to risk management?
- » What reporting systems do we have in place?
- » How do we respond to incidents, hazards and risks?
- » Am I confident in our expertise in safety for our operations?
- » What direct engagement with our operations do I have?
- » What approach do we have to compliance?
- » What verification procedures do we have in place?

We have a number of third sector clients, and also many years experience in advising employers in relation to their obligations in the area of work health safety and defending prosecutions.

Please contact us if you need help or advice in understanding your obligations under this new law.

Contact us

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