



# fact sheet

## Work Health & Safety

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### Officer's duty

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This fact sheet provides a summary of the health and safety duties of 'officers' of the Commonwealth and its public authorities under the new WHS laws which come into effect on 1 January 2012.

#### THE NEW WORK HEALTH & SAFETY LAWS

The States, Territories and the Commonwealth have committed to enacting new work health and safety laws based on the Model Work Health and Safety Bill. The Commonwealth Work Health and Safety Bill 2011 (the WHS law) was passed on 24 November 2011.

#### Persons conducting a business or undertaking (PCBU)

The main health and safety duties under the WHS law apply to PCBUs.

The primary health and safety duties of a PCBU are so far as is reasonably practicable:

- to ensure the health and safety of their workers while they are at work in the business or undertaking
- to ensure that the health and safety of others is not put at risk from work carried out as part of the business or undertaking.

There are other specific duties for particular types of PCBUs.

#### Who is the PCBU?

For agencies that are legally part of the Commonwealth (which is most FMA Act agencies), the PCBU is the Commonwealth.

For bodies that are 'public authorities', the relevant body will be the PCBU. 'Public authorities' include:

- a body corporate established for a public purpose by or under a law of the Commonwealth
- a Commonwealth company within the meaning of the *Commonwealth Authorities and Companies Act 1997*.

#### Officer duties

Officers have a duty to exercise 'due diligence' to ensure that their PCBU complies with its duties and obligations.

Officers may also have the general duties of workers such as the duty to take reasonable care for their own health and safety and that their acts or omissions do not adversely affect the health and safety of other persons.

The WHS law provides a number of examples of what 'due diligence' would involve in this context. Officers will be required to take reasonable steps to:

- acquire and keep up-to-date knowledge of work health and safety matters
- gain an understanding of the nature of the operations of the business or undertaking and generally of the hazards and risks associated with those operations
- ensure that the PCBU has available for use and uses appropriate resources and processes to eliminate or minimise risks to health and safety
- ensure that the PCBU has appropriate processes for receiving and considering information in relation to incidents, hazards and risks, and responding in a timely way
- ensure that the PCBU has, and implements, processes for complying with any duty or obligation
- verify the above.

This is not an exhaustive list.

The Explanatory Memorandum to the WHS law states that the officer must have a high yet attainable standard of due diligence. The standard should relate to the position and influence of the officer within the PCBU. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

### **Who is an officer?**

An 'officer' of a PCBU is defined in the WHS law as either:

- an officer within the meaning of section 9 of the *Corporations Act 2001* other than a partner in a partnership
- an officer of the Commonwealth (as defined)
- an officer of a public authority (as defined).

#### *Officer of the Commonwealth*

An 'officer of the Commonwealth' 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 Commonwealth'. Ministers are not officers merely by virtue of being Ministers.

#### *Officer of a public authority*

For those public authorities which are Corporations Act companies, officers will include those who are officers for the purposes of the Corporations Act.

In addition, for all public authorities, a person is taken to be an 'officer of a public authority' if the person makes, or participates in making, decisions that affect the whole or a substantial part of the business or undertaking of the public authority.

#### *Who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking?*

It is likely that the Chief Executive of an FMA Act Agency would be regarded as an officer for this purpose as would the Chief Executive of a public authority.

Whether other senior decision-makers or advisers would be regarded as officers will depend on the circumstances including how the agency is structured.

If you require advice about who in your agency might be an officer, please contact one of AGS's specialist WHS advisors.

## Consequences for breach of duty

Officers and others will be liable to prosecution for a criminal offence if they fail to comply with their health and safety duties. The penalties for such offences vary depending on the seriousness of the conduct. Penalties may include a term of imprisonment.

A Category 1 offence is committed if a person has a health and safety duty and:

- without reasonable excuse, engages in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury or illness
- is reckless to that risk.

A Category 2 offence is committed if a person has a health and safety duty and:

- fails to comply with that duty
- failure to comply with that duty exposed an individual to a risk of death or serious injury or illness.

A Category 3 offence is committed if a person has a health and safety duty and fails to comply with that duty.

The penalty for a Category 1 offence includes up to 5 years imprisonment.

In addition to the criminal penalty regime there are a range of other compliance measures that Comcare Inspectors may use in enforcing the WHS law. For example:

- improvement notices requiring a person to remedy or prevent a contravention within a specified period
- infringement notices requiring a person to pay a specified amount as an alternative to prosecution
- enforceable undertakings in relation to conduct that an Inspector reasonably believes to be 'unsafe'.

## More information

If you require further information about work health and safety please contact:

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