

LIABILITY FOR WORKPLACE HEALTH AND SAFETY IN THE AUSTRALIAN FITNESS INDUSTRY



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Table Of Contents

[1.0] Introduction to the system of Australian workplace health & safety law	1-2
[2.0] Who owes a duty?	2
[3.0] The PCBU's duty	3-4
[3.1] No delegation or transfer	5
[3.2] WHS offences are criminal offences	5
[4.0] The nature of the duty of care to workers under WHS law generally	5-6
[4.1] The primary duty of care – liability for what?	6
[4.2] The primary duty of care – fulfilling the duty	6
[4.3] The definition of 'reasonably practicable'	6-7
[4.4] What is 'reasonably practicable' is an objective test	7-8
[4.5] How to define what is reasonable practicable – the process	8-9
[5.0] The duty of those who control workplaces	9-10
[6.0] The duty of workers	10
[7.0] The duties of officers	10-13
[7.1] An officer must take 'reasonable steps'	13-15
[8.0] Duty to consult	15
[8.1] When consultation is required	15-16
[9.0] WHS issues in the Australian Fitness industry – some observations	16-17

[1.0] Introduction to the system of Australian workplace health and safety law

During the years 2012-2013 Australia saw a process of the 'harmonisation' of workplace health and safety ('WHS') laws. This process saw the Commonwealth introduce a model *Workplace Health and Safety Act*¹ and model set of regulations². The Act and regulations were adopted (on January 1 2012) with only very minor variations, by NSW³, Queensland⁴, the Commonwealth itself, and the ACT⁵ and NT⁶. Tasmania⁷ and South Australia⁸ subsequently adopted the Act and regulations on 1 January 2013. Western Australia and Victoria have yet to adopt the new harmonised regime, maintaining their pre-existing system⁹.

Despite some differences between the 'pre-existing' and the model harmonised systems, the basic principles across all Australian jurisdictions are very similar. These will be discussed in detail below, but in order to simplify explanation, reference will be made only to provisions of the harmonised Acts.¹⁰

In addition to Acts and regulations, the Australian system relies upon 'Codes of Practice' to set out more detailed, prescriptive guidance in relation to workplace health and safety. There is a national harmonised set of Codes of Practice, most of which have been adopted (or are in the process of being adopted) by each harmonised jurisdiction. In a transitional period (of up to two years) there remain some 'old' Codes of Practice that have not yet been transitioned out.¹¹

¹ *Work Health and Safety Act 2011* (Cth).

² *Work Health and Safety Regulations 2011* (Cth).

³ *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2011* (NSW).

⁴ *Work Health and Safety Act 2011* (Qld) and *Work Health and Safety Regulation 2011* (Qld).

⁵ *Work Health and Safety Act 2011* (ACT) and *Work Health and Safety Regulation 2011* (ACT).

⁶ *Work Health and Safety (National Uniform Legislation) Act 2011* and *Work Health and Safety (National Uniform Legislation) Regulations (2011)*.

⁷ *Work Health and Safety Act 2012* (Tas) and *Work Health and Safety Regulations 2012* (Tas).

⁸ *Work Health and Safety Act 2012* (SA) and *Work Health and Safety Regulations 2012* (SA).

⁹ In Western Australia the *Occupational Safety and Health Act 1984* (WA) and *Occupational Health and Safety Regulation 1996* (WA) and in Victoria the *Occupational Health and Safety Act 2004* (Vic) and *Occupational Health and Safety Regulation 2007* (Vic).

¹⁰ The numbering of sections across the harmonised jurisdictions in both the Act and Regulations are consistent, barring only minor variations.

¹¹ But it is expected they will be eventually, leaving each harmonised jurisdiction with an identical set of Codes.

Generally speaking, all duty holders under the Act are *required* to comply with the duties imposed by the Act and Regulation in their jurisdiction. Duty holders are not required by law to comply with Codes of Practice, but non-compliance with the requirements of a Code of Practice can be used in a prosecution to show that the duty holder has not met the requisite duty of care in relation to a certain health and safety practice. In short, the general principle is that duty holders *should* adhere to the requirements of a Code of Practice *unless* they can show that another means of compliance with a general duty was more appropriate than the one suggested by the Code.¹²

Most Codes of Practice ('CoPs') apply to specific work processes or situations not relevant to the fitness industry (such as the 'Spray painting and powder coating' or 'Welding processes' CoPs) but other more general Codes are relevant (such as the 'How to Manage Work Health and Safety Risks' CoP or the 'First Aid' CoP) whereas some others are technically relevant, but probably not particularly helpful in a fitness industry context. An example of this latter CoP would be the 'Managing Risks of Plant in the Workplace' CoP. Although, for instance, gym equipment would undoubtedly be classified as 'plant' for the purposes of work health and safety law, this Code generally addresses plant in a more industrial context (referring to industrial machinery and forklifts, for instance). Although this is the case, the general principles of managing 'plant' safely would be relevant to fitness industry operators.

[2.0] Who owes a duty?

The primary duty of care under the harmonised laws falls upon 'persons conducting a business or enterprise' ('PCBUs'). However, WHS law also imposes duties on a range of other persons, including, relevantly, those who control workplaces¹³, and those who operate 'fixtures, fittings or plant'¹⁴. Law also imposes duties on **directors and officers**¹⁵, on **workers**¹⁶ and on **'others in a workplace'**¹⁷.

¹² In Victoria, compliance with a Compliance Code (the Victorian terminology for a Code of Practice) is sufficient to show a duty holder *has* met their duty of care in relation to a specific practice mandated by a Code.

¹³ *WHS Act* s 20.

¹⁴ *Ibid* s 21.

¹⁵ *Ibid* s 27.

¹⁶ *Ibid* s 28.

¹⁷ *Ibid* s 29.

[3.0] The PCBU's duty

A 'person who conducts a business or undertaking' is a new concept in the harmonised Act and it is a very central one. However, even though the PCBU concept itself is new, generally speaking most 'people' (including companies) who had duties under the old Acts still have largely identical duties under the harmonised Act and fall under the category 'PCBU'¹⁸.

The *Work Health and Safety Act 2011* defines a PCBU in section five.

A person conducts a business or undertaking¹⁹:

Whether the person conducts the business or undertaking alone or with others; and
Whether or not the business or undertaking is conducted for profit or gain.

Safe Work Australia's²⁰ *Interpretive Guideline – Model Work Health and Safety Act – the meaning of 'person conducting a business or undertaking'* states that 'PCBU' is a broad concept intended 'to capture all types of modern working arrangements'.

The intended beneficiaries of the duty of care owed by the PCBU are not only to employees as 'workers' but anyone who may be put at a risk to their health and safety by the conduct of the business or undertaking.

In other words, the primary focus of the duties of care is the undertaking of the work and what contributes to its being done, rather than merely the spatial limits of a workplace.²¹ However, the definition would include duties in relation to the actual physical workplace itself, such as ensuring the safe condition of the workplace, fixtures, fittings and plant within it.

¹⁸ For particularly useful guidance on who is a PCBU see Safe Work Australia's *Interpretive Guideline – Model Work Health and Safety Act – the meaning of 'person conducting a business or undertaking'*. Where Safe Work Australia has published such a guide it should be considered the best available guidance on a term, concept or duty etc until such time as that term, duty etc has received judicial interpretation.

¹⁹ For discussion of this idea see *R v Associated Octel Co Ltd* [1994] 4 All ER 1051 at 1061-2; *Victorian WorkCover Authority v Horsham Rural City Council* [2008] VSC 404. Although these cases predated the harmonised Acts the principles of persons 'conducting a business or operation' are clearly discussed.

²⁰ Safe Work Australia is the Commonwealth government agency responsible for overseeing compliance with the Act. There are similar government agencies in all Australian States and Territories.

²¹ Section 8 of the Act defines 'workplace' as 'a place where work is carried out for a business or undertaking and includes any place where a worker goes or is likely to be, while at work.' Section 8(2) defines 'place' to include vehicles, vessels, other mobile structures on water and any installation on land, on the bed of any waters or floating on any waters.

In the context of the fitness industry, the term 'PCBU' should be taken to have a very broad application. Any person running any business *providing fitness services*, whether in the context of a business structure (whether an incorporated company, as a franchisee, or as a sole trader) would be considered a 'PCBU' for the purposes of the Act. Where services are provided through a company, the company itself would be considered a PCBU – not the owners or directors of the company, and it would be the company – as PCBU – which would be responsible for any breach of the Act or regulations. However, note that the owners or directors may be liable under other provisions of the Act (see below).

In addition, for instance, a gym operator who has other providers, such as personal trainers, providing services on their premises directly to the clients of the personal trainer, will still, in most cases²², be considered a PCBU in relation to the health and safety of those personal trainers or (non-employees of whatever status) as well as in relation to the clients of the independent contractors.

Employees of a fitness provider would not be considered PCBU's, but in the case where the operator of a fitness provider engages third parties (such as fitness instructors, or yoga teachers etc) or facilitates their operation on the provider's premises, it is probable that *both* the fitness provider *and* the individual instructor operate as PCBUs. The Australian WHS system has long anticipated that multiple persons can owe a duty in relation to the same person or operation. To use another similar illustration, if a gym operator were to facilitate the provision of fitness training by a fitness trainer in the capacity as an independent contractor, to a client of the gym, both the trainer and the gym operator would owe a WHS duty to that client. This will be despite the fact that all of the training is provided by the trainer and the gym's involvement may amount only to the provision of the facilities used in the training. Simply because the gym has no further involvement in how the client is trained, does not diminish their duty towards that person.

²² It is not possible to anticipate all possible business arrangements that parties may enter into, but the presumption should be that, as the parliament has intended 'PCBU' to have broad application, it is likely to cover most arrangements.

[3.1] No delegation or transfer

It is important to note that, in no circumstance can the gym as PCBU in anyway delegate its duty to its employees, to independent contractors, or to clients, nor is it in any way able, for instance, to seek a waiver or guarantee from the trainer in relation to the client's safety in relation to any potential breach of the Act: WHS duties are, simply, non-delegable.²³

[3.2] WHS offences are criminal offences

Work health and safety offences amount to criminal offences. As such, persons convicted of WHS offences can face jail time (in addition to considerable fines) for the more serious categories of offence. This is one of the main reasons why PCBU duties are non-delegable – one cannot delegate out of criminal responsibility for wrongful acts.

[4.0] *The nature of the duty of care to workers under WHS law generally*

As noted above, the primary duty of care²⁴ under Australian WHS law requires that a PCBU must ensure, so far as is reasonably practicable, the health and safety of both (1) workers *engaged, or caused to be engaged* by the person and (2) workers whose activities in carrying out work are *influenced or directed* by the person, while the workers are at work in the business or undertaking²⁵. As also noted, this is a non-delegable duty. It is appropriate therefore to examine the **scope and content** of this duty.²⁶ 'Workers' include employees, volunteers, contractors and contractors' workers.²⁷

²³ See *WHS Act* s 14 that states simply: 'A duty cannot be transferred to another person.'

²⁴As it is referred to in the harmonised jurisdictions of NSW, the ACT, the Commonwealth, the NT and Queensland, and from January 1 2013 Tasmania and SA. Other jurisdictions use different terminology, but the content of the primary duty is consistent.

²⁵ See, for instance, *Work Health and Safety Act 2011* (Cth) s 19.

²⁶ Note that there are a myriad of other duties that are expected of all PCBUs – for instance, to report certain incidents, to not engage in any discriminatory act against any worker who brings to the attention of the PCBU any WHS issue – there are so many such duties that they are beyond the scope of this paper.

²⁷ The section states that the duty is towards 'workers engaged or caused to be engaged' by the person and 'workers whose activities in carrying out work are influenced or directed by the person.' The first category could easily include labour hire workers, while the second could, for instance, include a supplier's worker who is on the persons premises to offload a delivery. See *R v ACR Roofing Pty Ltd* (2004) 11 VR 187 at [1], [49-57]; *Moore v Fielders Steel Roofing Pty Ltd* [2003] 5 AILR 75. The section says that the duty towards workers is owed 'while the workers are at work in the business or undertaking'. The extent to which workers are 'at work' can be contentious. For instance, is the worker at work when on a lunch break or when walking to their car after their shift has finished? There are literally scores of cases dealing with these and other situations. See for instance *Bolton Metropolitan Borough Council v Malrod Insulations Ltd* [1993] ICR 358; *Rech v FM Hire* (1998) 83 IR 293.

In the context of the discussion above, therefore, PCBUs (whether corporations or individuals) owe a duty of care to any worker who is likely to be affected by the work undertaken by the PCBU. This includes any person who is undertaking work for or with the PCBU as well as for employees.

[4.1] The primary duty of care – liability for what?

The 'health and safety' of a person should not be thought to refer only to the physical or bodily integrity of that person. It has been stated that the phrase 'safe and without risks to health' is a 'compendious' phrase to cover all risks both of direct physical injury and any subsequent illness, infection, disease or significant physical or mental handicap or disability caused or shown to be a likely cause of the conditions of the workplace.²⁸

The question of whether a thing or situation or condition is in fact a risk to health or safety does not rely upon there having been an actual accident or incident that has resulted in an injury. It just must be that such an injury *could* occur: this is why it is the *risk* to health or safety that is the object of the law.²⁹

[4.2] The primary duty of care – fulfilling the duty

A PCBU does not have an 'absolute' duty to ensure the health and safety of those who may be affected by their work or workplace.³⁰ Instead, they must do *all that is reasonably practicable* to ensure the health and safety of those who may be effected.

[4.3] The definition of 'reasonably practicable'

The interpretive Guideline on what is *reasonably practicable* defines the term to mean that which is, or was at a particular time, reasonably able to be done to ensure health and safety, taking into account and weighing up all relevant matters including:

1. The likelihood of the hazard or the risk concerned occurring;
2. The degree of harm that might result from the hazard or the risk;

²⁸ Asche J in *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255 at 267.

²⁹ See generally *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 at [13-14]; *WorkCover Authority of NSW (Inspector Byer) v Cleary Brothers (Bombo) Pty Ltd* (2001) 110 IR 182 at 201; *Arrowcrest Group Pty Ltd v Stevenson* (1990) SAIRC 368 at 373-4; *R v Australian Char Pty Ltd* (1995) 5 VIR 600 at 612; *Haynes v C&I Manufacturing Pty Ltd* (1995) 60 IR 149 at 157-9.

³⁰ In this section, extensive reference is made to Work Safe Australia's *Interpretive Guideline – model Work Health and Safety Act – the meaning of 'reasonably practicable'*.

3. What the person concerned knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating or minimising the risk;
4. The availability and suitability of ways to eliminate or minimise the risk, and;
5. After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[4.4] What is 'reasonably practicable' is an objective test

According to Work Safe Australia's *Interpretative Guideline – 'What is reasonably practicable?'* 'reasonably practicable' is determined objectively. This means that a duty-holder must meet 'the standard of behaviour expected of a reasonable person' in the duty-holder's position and who is required to comply with the same duty. In other words, what is reasonable is what a reasonable person would do. But this begs the question, what is a 'reasonable person'?

According, again, to the Guideline, there are two elements to what is 'reasonably practicable'. A duty-holder must first consider *what can be done* – that is, what is possible in the circumstances for ensuring health and safety. They must then consider whether it is *reasonable, in the circumstances* to do all that is possible.

This means that what can be done should be done unless it is reasonable in the circumstances for the duty-holder to do something less. Again, the Guideline does not give a definition of reasonable, so the duty holder is left to fall back on common sense as to what constitutes reasonable. The next part of the Guideline attempts to provide a fuller description, but again provides a circular reference to 'reasonableness' as a guide.³¹

³¹ For judicial discussion of what is 'reasonably practicable' see *Edwards v National Coal Board* [1949] 1 KB 704; *R v Associated Octel Ltd* [1994] 4 All ER 1051; *Slivak v Lurgi (Australia) Pty Ltd* [2001] ALR 585; *Holmes v RE Spence & Co Pty Ltd* [1992] 5 VIR 119 at 122-7; *R v ACR Roofing Pty Ltd* [2004] 11 VR 187; *R v Australian Char Pty Ltd* [1999] 3 VR 834 at 844-9; *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84; *WorkCover Authority of NSW v Cleary Bros (Bombo) Pty Ltd* [2001] 110 IR 182; *Austin Rover v Inspector of Factories* [1989] 1 WLR 520 at 524-5; *WorkCover Authority of NSW (Inspector Glass) v Kellog (Aust) Pty Ltd* (2000) 101 IR 239 at 260; *WorkCover Authority of NSW (Inspector Patton) v Fletcher Constructions Australia Ltd* (2002) 123 IR 121.

This approach is consistent with the objects of the WHS Act which include the aim of ensuring that workers and others are provided with the highest level of protection that is reasonably practicable.

[4.5] How to determine what is reasonably practicable – the process

According to the Guideline, to identify what is or was reasonably practicable, all of the 'relevant matters' must be taken into account and weighed up and a balance achieved that will provide the highest level of protection that is both possible and reasonable in the circumstances. According to the Guide, some matters may be relevant to what *can* be done, while others may be relevant to what is *reasonable* to do.

No single matter determines what is (or was at a particular time) reasonably practicable to be done for ensuring health and safety. Although section 18 of the Act sets out specific considerations, they are not the only things that may be relevant and other things may also need to be considered.

For example:

There may be other legislation that requires or prohibits certain activities and limits what a duty-holder can do and the duty-holder must do what they reasonably are able to while complying with that other legislation; and

Whether a duty-holder can control or influence a particular thing or the actions of another person, or any limits on their ability to control or influence, may be relevant to what the duty holder *can* do, or what they may *reasonably* be expected to do. The WHS Act makes it clear, however, that a duty-holder cannot avoid responsibility by a contract giving control to someone else and through that attempting to contract out of their obligations.

The duty-holder should consider all of the facts and identify and consider everything that may be relevant to the hazards, risks or means of eliminating or minimising the risks.

The matters that *must always* be taken into account and weighed up are the following:³²

³² There is now a recognised and comprehensive risk management process that is expected to be implemented by Australian duty holders, but this is out of the scope of this paper.

1. The likelihood of the hazard or the risk concerned occurring;
2. Degree of harm that may result if the hazard or risk eventuated;
3. What the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or minimising the risk.

According to the Guide it *is* reasonably practicable for a duty-holder to:

Proactively take steps to identify hazards within their business or undertaking before they cause an incident, injury or illness. This should be done before the activity is undertaken or the circumstances occur that result in the risk. This obligation existed in each jurisdiction prior to the introduction of the harmonised Act. PCBUs, in other words, have an obligation to undertake a risk analysis.³³

Understand the nature and degree of any harm that an identified hazard may cause, how the harm could occur, and the likelihood of the harm occurring (emphasis added).

It is also reasonably practicable for a duty-holder to consider and understand, within the available state of knowledge, how the following may cause or increase hazards and risks:

- Potential failure of plant, equipment, systems of work or safety measures;
- Human error or misuse, spontaneity, panic, fatigue or stress, and;
- Interaction between multiple hazards that may, together, cause different risks.

It is only where a PCBU can show they did all that was reasonably practicable in the circumstances, that they can avoid a liability for WHS breaches.

[5.0] The duty of those who control workplaces

Any place where work is carried out can constitute a 'workplace' for the purposes of the Act. This means that the 'workplace' is not limited to the main premises where fitness services may be offered to clients, but could also be any place where fitness services are delivered. This can include public spaces such as parks where training is undertaken.

³³ A risk assessment consists, in the first instance, of 'a rigorous process of gathering information about potential risks and hazards': See *Mainbrace Constructions Pty Ltd v WorkCover Authority of NSW (Inspector Charles)* [2000] NSWIRComm 239; *Inspector Ch'ng v Bros Bins Systems; Inspector Ch'ng v Exo Pty Ltd t/as Tibby Rose Auto* [2004] NSWIRComm 197.

The duty is owed to anyone who could be affected by work carried out at the workplace. This would probably extend liability to anyone who was affected by training exercises carried out in a public place – whether an employee of a fitness provider, the client of a fitness provider, or a member of the public who is affected by the training carried out in the public area. For instance, if a member of the public was knocked over and injured during the provision of boot camp training, this could render the PCBU responsible for the training to be liable for the injury.

[6.0] The duty of workers

Workers³⁴ – whether employees or other workers – have a responsibility to ensure their own health and safety at a workplace and the health and safety of others in a workplace. However, the failure of a worker to ensure their own health and safety will not release a PCBU or other duty holder from liability under the Act. In other words, even if an employee or other worker (eg the independent contractor fitness trainer used as an example above) is liable for a breach of the Act, this will not release the PCBU from liability for what effectively constitutes the same Act. This is even the case in instances of negligence on the part of the worker. The Australian WHS regime has long anticipated that workers may be negligent, foolhardy or careless in undertaking their work. Since this can be anticipated by a PCBU, it should be in their consideration when they plan and implement their WHS system. It is only in the case of very gross negligence, or a worker causing malicious harm, that a PCBU may escape liability, since it is not generally considered that it is reasonably foreseeable that an employee would act in such a way.

[7.0] The duties of officers

Understanding who is an ‘officer’ of a company is important because Officers have duties under the Act in addition to PCBUs³⁵. In most jurisdictions, prior to the introduction of the harmonised act, similar duties were imposed on officers as under the new harmonised act. In certain circumstances an officer can be guilty of an offence as a result of a PCBU having been found guilty. The pre-harmonisation Acts imposed very similar duties.

³⁴ *Work Health and Safety Act s 28.*

³⁵ *The material in this section is largely based on Safe Work Australia’s Interpretive Guideline – Model Work Health and Safety Act – the health and safety duty of an officer under section 27.*

The model WHS Act³⁶ adopts, as the definition of an officer, for a corporation, partnership (with a variation noted below) or unincorporated association, the definition of that term in Section 9 of the Commonwealth *Corporations Act 2001*.

Under section 9 of the Commonwealth *Corporations Act 2001* 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;
 - 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 persons 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.

The *Corporations Act* definition provides similar categories for an officer of a partnership or an unincorporated association.³⁷

³⁶ *WHS Act* s 4.

³⁷ For judicial discussion see, for example, *Buzzle Operations Pty Ltd (in liq) v Apple Computers Australia Pty Ltd* [2010] NSWSC 233 at [126], [243], [247-9]; *Harris v S* (1976) 2 ACLR 51 at 64. In what might be considered an odd anomaly, a corporation itself can be an officer where it is, for example, a holding company or franchisor in the case where the directors of the subsidiary or franchisee customarily act in accordance with the corporation's (the holding company or franchisor) wishes. See *Standard Chartered Bank of Australia v Antico* (1995) 38 NSWLR 290 at 327-8; *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129 at [94]-[99].

The health and safety duty of an officer³⁸ requires them to exercise due diligence³⁹ to ensure compliance by the PCBU with its health and safety obligations.

An officer must ensure that the PCBU has in place appropriate systems of work and must actively⁴⁰ monitor and evaluate health and safety management. An officer's duty is aimed at achieving and sustaining compliance by the PCBU, which may not occur without the active involvement of its officers.

The Act provides that due diligence requires an officer to take reasonable steps⁴¹:

1. To acquire and keep up-to-date knowledge of work health and safety matters (for example, what the WHS Act requires and the strategies and processes for elimination or minimisation of hazards and risks so far as is reasonably practicable);
2. To gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations (advice from a suitably qualified person may be required to gain a general understanding of the hazards and risks associated with the operations of the business or undertaking);
3. To ensure that 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 from work carried out as part of the conduct of the business or undertaking (this requires an understanding of what is needed for health and safety, making decisions about procedures and resources and ensuring that they are used);

³⁸ The material in this section is based largely on Safe Work Australia's *Interpretive Guideline – model Work Health and Safety Act – the health and safety duty of an officer under section 27*.

³⁹ See *Ken Kumar v David Alymer Ritchie* [2006] NSWIRComm 323; *WorkCover Authority of NSW (Inspector Dowling) v Barry John Coster* [1997] NSWIRComm 154.

⁴⁰ It is quite clear that Officers must be proactive in meeting their WHS duties. It has been said that in determining whether due diligence has been exercised, a court will ask 'whether a defendant took the precautions that ought to have been taken.' This question is 'always a question of fact... objectively according to the standard of a reasonable [person] in the circumstances. It would be no answer for such a person to say he did his best given his particular abilities, resources and circumstances. See *State Pollution Control Commission v Kelly* (1991) 5 ASCR 607 at 609; *Telecaster (Qld) Ltd v Guthrie* (1978) 18 ALR 532 at 534.

⁴¹ *WHS Acts* 27(5).

4. To ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information (this should include the reporting of incidents and emerging hazards and risks, identifying if any further action is required to eliminate or minimise the hazards or risks so far as is reasonably practicable and ensuring steps are taken by the PCBU to take reasonably practicable steps);
5. To ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act (the section provides examples which are noted below – other examples include that the PCBU complies with licensing and registration obligations, union right of entry requirements and the duty to consult, co-operate and co-ordinate activities with other duty-holders);
6. To verify the provision and use of the resources and processes referred to in paragraphs 3 to 5 (this makes it clear that ‘ensure’ means active verification, for example through inspection or auditing processes, that the resources and processes are in place and are being used).

[7.1] An officer must take ‘reasonable steps’

Officers will only be required to take *reasonable* steps to ensure that they have the relevant knowledge and understanding or take the relevant decision or action. What is reasonable will depend on the particular circumstances, including the role and influence able to be exercised by the individual officer.

Officers may meet the due diligence requirements in some respects by proper reliance on information from and the activities of others, while having more direct involvement in health and safety management and governance in other aspects.

To the extent to which an officer will seek to rely on others, the officer must be able to demonstrate the reasonableness of that reliance, which may be demonstrated through the receipt of credible information and advice from appropriate people.

According to the Guideline an officer can only comply with their duty by taking an *active and inquisitive role* in the planning and actioning of health and safety initiatives. While an officer need not be involved directly in implementation, they must make the decisions that allow for the appropriate measures to be taken by the PCBU and take reasonable steps to ensure that they are taken.

An officer must have *knowledge* of the relevant matters before they are able to make decisions and verify the use of resources and processes. That knowledge will be *technical* (knowledge of work health and safety and legal obligations of duty-holders within the PCBU), *situational* (what is happening and what that means) and *strategic* (what should the PCBU be doing and why).

That knowledge may need to come from senior managers, subject matter experts and managers and supervisors involved in the operations. Information will need to be gathered, analysed and reported and advice given from different levels of the business or undertaking.

To enable an officer to satisfy the requirements of due diligence, the PCBU should have⁴²:

1. An appropriate governance structure with the right people in place, who are appropriately authorised and accountable, to enable WHS to be properly attended to. Note: a formal structure may not be needed in a small business, where the officers will be involved in the day to day activities and have easy access to the relevant information; and
2. Information gathering and reporting processes to facilitate the flow of WHS information (including effective worker consultation and participation arrangements) and advice to the officers, with the type of information that allows the officers to understand the hazards and risks, obligations and performance of the organisation, and to make appropriate decisions.
3. A written register or other record of decisions made in the business or undertakings that are likely to affect the whole or a substantial part of such a business or undertaking including:

⁴² And given that a PCBU should have these things, it may clearly be inferred that the relevant officers of a PCBU has a duty to ensure the PCBU has these things.

- a description of the relevant business or undertaking;
- the subject matter and purpose of the decision;
- the reasons for the decision;
- why the decision is thought to affect the whole or a substantial part of the business or undertaking;
- who made the decision and why;
- who participated in making the decision and the basis of that participation;
- other matters considered in reaching the decision.

[8.0] Duty to consult

The WHS Acts impose on all PCBU's a duty to consult with workers.⁴³ The fines that can be imposed for a failure to do so are steep – up to \$20,000 for an individual and \$100,000 for a corporation.⁴⁴ The Act sets out a complex process for consultation which can include health and safety representatives, and health and safety work groups and committees. These are usually formed and elected at the workers initiative. If the workers fail to request the formation of work groups, committees or the election of representatives, the PCBU is nonetheless required to undertake consultation anyway.

The purpose of worker participation in a consultation process with the PCBU is to maximise health and safety outcomes in a workplace, since it is now presumed that workers will have useful insight into WHS issues in workplaces and in relation to work practices.

[8.1] When consultation is required

The Act sets out certain times when consultation is mandatory:

'Consultation under this Division is required in relation to the following health and safety matters:

- (a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;

⁴³ See generally Part 5 of the Act.

⁴⁴ See *WHS Act* s 47: 'The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety.'

- (b) when making decisions about ways to eliminate or minimise those risks;
- (c) when making decisions about the adequacy of facilities for the welfare of workers;
- (d) when proposing changes that may affect the health or safety of workers;
- (e) when making decisions about the procedures for:
 - i. consulting with workers; or
 - ii. resolving work health or safety issues at the workplace; or
 - iii. monitoring the health of workers; or
 - iv. monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or
 - v. providing information and training for workers;
- (f) when carrying out any other activity prescribed by the regulations for the purposes of this section.⁴⁵

It is a breach of the Act to fail to carry out consultation at those times.

There is also a duty under the Act that where there are multiple PCBUs who have duties in relation to the same issue, that these PCBUs will engage in consultation with each other.⁴⁶

[9.0] WHS issues in the Australian Fitness industry – some observations

- Awareness of the extensive obligations under WHS Acts is lowest among small to medium businesses.
- Awareness of WHS obligations is lower among part time and casual employees and consultation with part time and casual employees is usually conducted more poorly than with these categories of employee. Only 53% of fitness industry employees are full time⁴⁷ with most being part-time or casual. There is no research available that indicates the level of participation in consultation by employees in this industry. It could be expected that

⁴⁵ *WHS Act* s 49.

⁴⁶ *WHS Act* s 46 states 'If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.'

⁴⁷ Fitness Australia, *Fitness Industry 2010-2020; Summary April 2012*, p 2.

awareness of and implementation of consultation requirements in the industry is low.

- The fitness industry traditionally has a younger workforce and has a high turnover of employees each year.⁴⁸ These are two factors that tend to indicate a lower awareness of WHS requirements and a culture that tends to mitigate against embedding WHS values in an organisation. However, there is no research available that bears out these predictions for the fitness industry specifically.
- Many fitness services are provided by individuals on an independent-contractor' or similar basis. Very small businesses such as these tend to struggle with legal compliance in areas such as Work Health and Safety. Again, there is no specific research into the Australian fitness industry that bears this out, but it can be predicted that it is very unlikely that there is a high awareness of compliance requirements. It could be expected also that there would be considerable resistance to participation in, for example, extended consultation processes when many fitness industry workers are independent contractors, or minimum wage workers, and where such consultation would reduce income earning time.

At the time of writing, the author is not aware of any Australian prosecutions of fitness providers for serious breaches of a Work Health and Safety Act. However, there is an increasing community awareness – and expectation – in relation to the provision of a safe workplace, and there is also increasing administrative oversight – including increasing numbers of prosecutions – in relation to WHS compliance. It can be expected that the fitness industry will come, along with all other sectors, under increasing scrutiny in relation to its compliance in the future. Indeed, it could also be expected that there will be a heightened expectation that the fitness industry – with its emphasis on well-being and health – will be expected to be an exemplar of such practices.

⁴⁸ Ibid, pp 1, 6.