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ANNOTATED WORK HEALTH AND SAFETY ACT 2011

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DIVISION 4:
DUTY OF OFFICERS, WORKERS AND
OTHER PERSONS

SECOND EDITION

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DIVISION 4 – DUTY OF OFFICERS, WORKERS AND OTHER PERSONS

27 Duty of officers

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

(2) Subject to subsection (3), the maximum penalty applicable under Division 5 of this Part for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence.

(3) Despite anything to the contrary in section 33, if the duty or obligation of a person conducting a business or undertaking was imposed under a provision other than a provision of Division 2 or 3 of this Part or this Division, the maximum penalty under section 33 for an offence by an officer under section 33

in relation to the duty or obligation is the maximum penalty fixed under the provision creating the duty or obligation for an individual who fails to comply with the duty or obligation.

(4) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation.

(5) In this section, *due diligence* includes taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) 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, and
- (c) 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, and
- (d) 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, and
- (e) 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, and

Example. For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- reporting notifiable incidents,
- consulting with workers,
- ensuring compliance with notices issued under this Act,
- ensuring the provision of training and instruction to workers about work health and safety,
- ensuring that health and safety representatives receive their entitlements to training.

- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) – (e).

Application of provisions

[27.20] Section 27 applies to officers of persons conducting a business or undertaking. Section 4 of the Act defines “officer” with reference to s 9 of the *Corporations Act 2001* (Cth) for the private sector and an adapted definition in ss 247 and 252 of the Act for the public sector.

Only officers of a PCBU

Importantly, the duty is imposed on officers of persons conducting a business or undertaking. As broad as that definition is, officers will only be caught by the

provisions to the extent that they are officers of a person conducting a business or undertaking. By operation of certain exclusion provisions in the Regulation (cl 7) certain classes of persons conducting a business or undertaking are excluded from the operation of the Act (such as a body corporate in strata schemes). The duty will not apply to officers of such bodies.

Officers of corporations

Under s 9 of the *Corporations Act 2001* (Cth), “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; or
 - (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 person’s professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver 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; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

That is, officers include directors, shadow directors, company secretaries, insolvency practitioners (exercising the role of receivers, receiver managers, administrators, liquidators and trustees of a company arrangement or compromise made with creditors), chief financial officers (in their capacity to influence the financial standing of a company), chief operating officers and general counsel (in their respective capacity as persons making or participating in making decisions that affect the whole or substantial part of the business or the corporation).

The reach of the officer definition will be determined on a case-by-case basis based on the organisational structure and custom and practice of the relevant company or entity. The boundaries of that definition are likely to be expanded as new cases are brought and decisions are handed down with the frontier defined at its broadest by the determination of whether a person participates in making decisions that affect a substantial part of the business of the company or entity.

There has been some debate as to whether the adoption of the definition of “officer” represented a significant departure from “a person, by whatever name called and whether or not a director of the body or entity, who is concerned, or takes part, in the management of the body or entity” which was the previous definition of “executive officer”. Notably, this is also the language used in s 26

of the *Occupational Health and Safety Act 2000* (NSW) prior to the *Occupational Health and Safety Amendment Act 2001* (NSW) and s 167 of the *Workplace Health and Safety Act 1995* (Qld). That is, if the shift from the definition of “executive officer” to the new definition of “officer” was remarkable at law in the corporations law sense, there would be equivalent implications to the coverage of health and safety laws also. However, as Spigelman CJ, Beazley and Giles JJA observed in *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331, “[b]eing concerned or taking part in management may not reach the heights of decisions affecting the whole or a substantial part of the company’s business”: *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 at [886].

Officers are involved in policy making and decisions that affect the whole or a substantial part of the business of the corporation: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited (No 4)* [2007] FCA 963 at [490]. *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287, Gzell J held that to participate in making decisions that affect the whole or a substantial part of the business of a company is the same as taking part in the relevant process: *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287 at [377]–[385].

In *Commissioner for Corporate Affairs (Vic) v Bracht* [1989] VR 821, Ormiston J held in relation to the predecessor of the s 9 definition of officer that “take part in” connotes the active participation of the person in the management of a corporation. Such participation would have to be “real and direct”, but not necessarily in a role in “which ultimate control is exercised”, although it would have to be “more than the administrative carrying out of the orders of others responsible for a company’s management”: *Commissioner for Corporate Affairs (Vic) v Bracht* [1989] VR 821 at 831. In *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 the NSW Court of Appeal agreed with the proposition that the making and participating in decisions affecting the whole or a substantial part of the business of the corporation need be restricted to persons who have ultimate control: *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 [887].

In *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 the NSW Court of Appeal observed at [897] that:

It is a reality of corporate life that board and other important decisions involve many persons other than the ultimate decision-makers. Just as s 9(b)(ii) of the Law recognised the reality that a person may have “the capacity to affect significantly the corporation’s financial standing”, that being sufficient for the status of an officer as defined, so s 9(b)(i) recognised the reality of participation in decision-making. But it required participation in making decisions affecting the whole or a substantial part of company’s business.

On appeal to the High Court of Australia, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Shafron v Australian Securities and Investments Commission* [2012] HCA 18 set out the following principles at [23]–[26] for determining whether a person is an officer under s 9(b)(i):

First, the inquiry required by this paragraph of the definition must be directed to what role the person in question plays in the corporation. It is not an inquiry that is confined to the role that the person played in relation to the particular issue in respect of which it is alleged that there was a breach of duty. ...

Second, in a case like the present, where the breaches of duty alleged were omissions to provide advice, it is evident that determining how a reasonable person occupying the same office and having the same responsibilities would exercise the powers and discharge the duties of that office may be assisted by consideration of how the officer in question acted on occasions other than the one which is alleged to give rise to a breach of the duties imposed by s 180(1). ...

Third, each of the three classes of persons described in par (b) of the definition of “officer” is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition. ...

Fourth, sub-par (i) of par (b) distinguishes between *making* decisions of a particular character and *participating* in making those decisions. Contrary to [the appellant’s] submissions, participating in making decisions should not be understood as intended primarily, let alone exclusively, to deal with cases where there are joint decision makers. The case of joint decision making would be more accurately described as “making decisions (either alone or with others)” than as one person “participating in making decisions”. Rather, as the Court of Appeal rightly held, the idea of “participation” directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons. The notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed.

McKie v Al-Hassani [2015] ACTIC 1 was the first decision to consider the application of the officer definition in the context of the work health and safety legislation. The case arose from a fatal incident in the ACT involving a construction project performed by Kenoss Contractors. Kenoss contracted with the ACT Government for road resurfacing works. The accident occurred when a truck driver’s bucket came into contact with or came too close to an overhead low voltage wire at the defendant’s site. Kenoss had at the relevant time only one director, Mrs Beverly Brendas. Her husband, Mr Spiros Brendas, was employed as the General Manager. Their son, Mr Dimitri Brendas, was employed as the safety officer. He had no experience or qualification in safety systems. Mr Al-Hasani, an engineer, was employed as Project Manager, managing a number of projects for the company. Kenoss was prosecuted in relation to the incident. Mr Al-Hasani was prosecuted as an officer of Kenoss. In considering the position of Mr Al-Hassani, her Honour, Chief Industrial Magistrate Walker observed at [31]–[33]:

The issues in respect to Mr Al-Hasani, whilst overlapping with those relevant to Kenoss, are different in a material way. The offence relies on establishing whether Mr Al-Hasani was an “officer” of Kenoss as defined, and, if so, whether he acquitted his safety duty by the positive exercise of due diligence as required by s 27(5) of the Act.

In the text “*Understanding The Model Work Health And Safety Act*”, Barry Sheriff and Michael Tooma, leading authorities in this area, noted: “*One of the most important reforms of the model work health and safety act is the introduction of a duty of care on officers of companies and other organisations. The introduction of a*

position duty is new to the workplace health and safety regulatory framework.... In all jurisdictions, officers are merely attributed liability to conduct that is committed by the company, rather than being allocated to duty in their own right". They continue: "The approach taken by the model WHS Act, however, emphasises the corporate governance responsibilities of officers. The personal liability in that context reflects the culpability of company officers in failing to meet the corporate governance responsibilities by preventing the corporate misconduct. Consistent with this rationale, officers under the model laws will have a duty to ensure due diligence. Thus, their attributed liability is transformed into a positive duty to ensure corporate compliance through sound corporate governance."

Her Honour went on at [42] to discuss the application of that duty to Mr Al-Hassani and observed that "the interpretation of the concept of an officer should to be viewed through the prism of the organisation as a whole rather than a particular function in which the individual was engaged". In relation to Mr Al-Hassani, her Honour held that he was not a person who made or participated in making decisions affecting the whole or substantial part of the business of Kenoss Contractors. In that regard, Mr Al-Hasani gave evidence at the trial regarding his role within the overall structure where he referred to Mr Spiros Brendas as "El Supremo" and stated that he reported up to Mr Spiros Brendas and Ms Beverly Brendas. He also gave evidence that he "could not tell Mr so and so to pay Mr so and so" nor could he "hire Mr so and so without people in the accounting department and the administration department".

Her Honour held at [50]:

The prosecution has not established that Mr Al-Hasani had control or [was] responsible for the business or undertakings of the company; rather he had operational responsibility for delivery of specific contracts which had been entered into. His role was to implement these projects. The limited evidence before me establishes that Kenoss was essentially a "family business", with a husband and wife director and general manager and a relatively flat management structure. In it, Mr Al-Hasani sat close to the top of that structure but there is no evidence that he made, or participated in making, decisions which affected the whole, or a substantial part of the business of the corporation... He could identify potential employees but was not responsible for hiring and firing them. His evidence was that he could not commit corporate funds. There is no evidence that he had direction over the type, or the specific contracts, which were to be pursued by Kenoss. He did prepare tenders for particular work but he did not sign off on them... What is established is that Mr Al-Hasani's participation in the business process was operational; whether it went beyond that to being organisational is speculative. It is not clear that he made decisions, or participated in making decisions, that affected either the whole or a substantial part of Kenoss' business

Crucially, her Honour observed at [51] that Mr Al-Hasani had responsibility as an employee but he was not charged in that capacity. It is interesting to speculate what her Honour may have held had he have been so charged.

Director

Director of a company is also defined in s 9 of the *Corporations Act 2001* to mean “a person who is appointed to the position of a director” or “is appointed to the position of an alternate director and is acting in that capacity”, regardless of the name that is given to their position: s 9(a) of the *Corporations Act 2001* (Cth).

A person who is not validly appointed as a director is still a director if they act in the position of a director or the directors of the company or body are accustomed to act in accordance with the person’s instructions or wishes: s 9(b) of the *Corporations Act 2001*. The same conclusion was reached in interpreting “director” for the purpose of s 26 of the *Occupational Health and Safety Act 2000* (NSW) in *Inspector James v Ryan (No 3)* [2010] NSWIRComm 127. Those provisions do not apply merely because the directors act on advice given by a person in their professional capacity or business relationship with the directors or the company.

Persons who make or participate in making decisions affecting the whole or substantial part of the company

The definition of officer, and particularly the test of making or participating in making decisions that affect the whole or substantial part of the business of the company, was considered in *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331. That case was an appeal from a decision of Gzell J finding Mr Shafron and Mr Morley in breach of his officer’s duties under the *Corporations Act 2001* in relation to dealings regarding the separation of James Hardie Industries from the compensation fund created for the benefit of asbestos victims. The fund later proved to be insufficient to cover the liabilities. Mr Shafron was a joint secretary and general counsel of James Hardie Industries at the time that the proposal being considered. At first instance Gzell J held that Mr Shafron was relevantly an officer on the basis of his role as joint company secretary and because he participated in making decisions affecting the whole or substantial part of James Hardie Industries’ business. Mr Shafron accepted that the separation proposal was relevantly a decision affecting the whole or a substantial part of the business of the company. However, he argued that his involvement in that decision was in his capacity as general counsel and therefore did not meet the threshold test of “participation” for the purpose of the definition.

In relation to the question whether Mr Shafron was relevantly an officer, their Honours Spigelman CJ, Beazley and Giles JJA held in *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 at [887]–[894]:

It is necessary to focus on the statutory text and cases on differently expressed predecessor provisions must be approached with care ... Mr Shafron was the second or third most senior executive of JHIL, reporting directly to Mr Macdonald ... The definition refers to participation in making decisions of a particular character. It does not prescribe that the decisions are made by the board, and it may be that a management decision to present a highly significant proposal will suffice; but wherever the decisions be found, the test is participation in their making. Participation is more than administrative arrangement, and there must be a real

contribution from the postulated participation to the making of the decisions, but beyond that it is a question of fact. Even by the touchstone suggested by Mr Shafron, we think he participated in decisions of the requisite character.

Their Honours observed that Mr Shafron was part of the project team putting forward the separation proposal. Significant announcements required his approval.

Relevantly their honours held that participation in decisions may involve some “frequency or repetition”: *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331 at [894].

The NSW Court of Appeal rejected the submission that an expansive interpretation of the participation in decisions element of the definition would open upon the floodgates. Their Honours observed at [896]:

[I]t should not be forgotten that satisfaction of the definition only gives statutory status. It may be that a person participates in making decisions even if counselling against them; but if so, the participation will only satisfy the status of an officer as defined, and the person’s dissent is likely to mean that he or she is not in breach.

No requirement to be employed by PCBU

There is nothing in s 9 of the *Corporations Act 2001* requiring the would-be officer to be an executive or otherwise employed by the company. In *Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72; [2002] NSWSC 171, one of the proceedings arising from the collapse of HIH, a non-executive director of a parent company was held to be a relevant officer of a subsidiary because through his position on the parent company board and investment committee was in a position to make or participate in making decisions affecting the whole or substantial part of the business of the subsidiary, namely investment decisions. The case related to an investment of \$10 m by HIH Casualty and General Insurance Ltd indirectly into the shares of the parent company, HIH Insurance Limited. Mr Rodney Adler was not a director of HIHC and had therefore argued that he was not a relevant duty holder in relation to the investment. Stantow J rejected that submission. In relation to Mr Adler’s involvement, Santow J relevantly observed at [71]–[73]:

There is no evidence from the First Defendant to refute that Mr Adler was other than an active member of the HIH Board, with its group responsibilities, particularly for investment, and was an active member of the Investment Committee, with its investment oversight responsibility. The evidence is clearly to the effect that Mr Adler took a close interest in investment matters participating fully in that category of decision affecting the business of HIHC. ... the HIH group of companies had as a whole an investment portfolio comprising, inter alia, both internally and externally managed equities ... Mr Adler was a member of the HIH Investment Committee as well as the HIH Board ... Even if it be contended that the Investment Committee did not oversee the HIH Investment Portfolio because, for example, it was subject to the direction and control of the Board of Directors of HIH (and no other basis for disputing that oversight credibly emerges) nonetheless Mr Adler cannot escape the conclusion that he participated in the making of that category of investment decisions in one or other capacity; that is either as board member or committee member, or more likely both. Moreover, that category of decisions, in particular the crucial matter of how funds of the Group were to be invested, clearly affects the whole or a

substantial part of the business of HIHC as a member of HIH group. It would be unreal in the extreme to assume that Mr Adler did not participate in making the varied decisions about the Group's investments, which were so obviously a matter of vital interest to him, whether as a member of the Investment Committee or the Board.

Santow J held that Mr Adler was at the relevant time a person who made or participated in making decisions that affect the whole, or a substantial part, of the business of HIHC namely investment decisions and in any event was, as a director of the parent company, HIH, a person who had “the capacity to affect significantly HIHC’s financial standing”: *Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72; [2002] NSWSC 171 at [774]. The appeal was largely dismissed: see *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504.

Public sector definition

For the purpose of the public sector, an officer is defined in s 247 to mean a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Crown. See also s 252 for a definition of officer of public authority.



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