

INTERPRETIVE GUIDELINE—MODEL WORK HEALTH AND SAFETY ACT
THE MEANING OF ‘PERSON CONDUCTING A BUSINESS OR UNDERTAKING’

This document provides guidance on the interpretation and application of the concept of a ‘person conducting a business or undertaking’ used in the *Work Health and Safety (WHS) Act and Regulations*.

The WHS Act places the primary duty of care and various other duties and obligations on a ‘person conducting a business or undertaking’ (**PCBU**). The meaning of a PCBU is set out in section 5 of the WHS Act.

This is a broad concept used to capture all types of modern working arrangements.

A ‘person’ may be an organisation or an individual

A ‘person’ is defined in laws dealing with interpretation of legislation to include a body corporate (company), unincorporated body or association and a partnership.

An individual is also a ‘person’, but will only be a PCBU where that individual is conducting the business in their own right (as a sole trader or self-employed person). Individuals who are in a partnership that is conducting a business will individually and collectively be a PCBU.



Section 5 (4) of the WHS Act makes it clear that an individual is not a PCBU if they are involved in the business or undertaking only as a worker or officer of the business or undertaking.

The Crown is also a person for the purposes of the WHS Act. The Crown may conduct a business or undertaking through its departments and statutory agencies.

What is a ‘business’ or ‘undertaking’?

The WHS Act does not define a ‘business’ or ‘undertaking’.

Whether a person conducts a business or undertaking is a question of fact to be determined in the circumstances of each case. The following table identifies the usual meaning of these terms:

Businesses		enterprises usually conducted with a view to making a profit and have a degree of organisation, system and continuity
Undertakings		may have elements of organisation, systems, and possibly continuity, but are usually not profit-making or commercial in nature

The WHS Act states that a person conducts a business or undertaking whether it is conducted alone or together with others, and whether or not it is conducted for profit or gain.

The concept of ‘work’ is relevant to identifying what is a business or undertaking

The duties of a PCBU are all associated with the carrying out of work. The definition of a ‘workplace’ is 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. The definition of a ‘worker’ is a person who carries out work in any capacity for a person conducting a business or undertaking.

The WHS Act also places duties on PCBUs who carry out the following activities associated with work or workplaces:

- Section 20 – management or control of a workplace
- Section 21 – management or control of fixtures, fittings or plant at a workplace
- Sections 22-25 – design, manufacture, import or supply of plant, structures or substances that are, or could be used at a workplace
- Section 26 – install, construct or commission plant or structures that are, or could be used at a workplace

What is work for the purposes of the model WHS Act?

What is 'work' is not defined in the WHS Act and must be given its ordinary meaning. The following criteria may assist in determining if an activity is work for the purposes of the WHS Act:

1. the activity involves physical or mental effort by a person or the application of particular skills for the benefit of another person or for themselves (if self-employed), whether or not for profit or payment;
2. activities for which the person or other people will ordinarily be paid by someone is likely to be considered to be work;
3. activities that are part of an ongoing process or project may all be work if some of the activities are for remuneration;
4. an activity may be more likely to be work where control is exercised over the person carrying out the activity by another person; and
5. formal, structured or complex arrangements may be more likely to be considered to be work than ad hoc or unorganised activities.

The activity may be work even though one or more of the criteria are absent or minor.

Work does not include activities of a purely domestic, recreational or social nature. Organisations who also do things other than of a social, domestic or recreational nature would be PCBUs but would only owe duties in relation to 'work' and only so far as is reasonably practicable.

Examples of a business or undertaking

- A retailer
 - A wholesale business
 - A manufacturing business
 - An importer that is on-selling the imported goods
 - An owner-driver of their own transport or courier business
 - A fast food franchisor and the operator of the fast food outlet (the franchisee)
 - A self employed person operating their own business
 - A government department or government agency
 - A local council
 - A school
 - Partnerships and unincorporated joint ventures. Where the partnership or joint venture is unincorporated, each partner is a person conducting the business or undertaking of the partnership or joint venture.
 - A builder (including principal contractors and sub-contractors)
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- A not-for-profit organisation that engages and pays administrative staff
- A clothing manufacturer employing outworkers

There may be multiple businesses or undertakings and therefore multiple PCBUs involved in work at the same location. For example:

- The owner of a multi-tenanted shopping centre, the manager of the shopping centre, each of the businesses operating from shops in the shopping centre and those carrying out ancillary activities such as cleaning, security and shopping trolley collection.
- The principal contractor on a construction site, sub-contractors engaged by the principal contractor, sub-contractors engaged by the sub-contractors (including self-employed contractors), along with the client engaging the principal contractor.
- A service station owner, the service station operator (if different from the owner), the mechanic (if running a separate business), the PCBU carrying out the supply of gas cylinders to the public at the service station and the operator of an attached fast-food outlet.

A single business or undertaking may also operate at multiple locations.

Where work requires approval from the relevant building regulator an owner-builder may be a PCBU and owe duties to any workers or other persons at the workplace. In some circumstances where a landlord is carrying out work on an investment property that creates a risk to health and safety to other persons at the property they could also be a PCBU.

What is not a 'business' or 'undertaking'

The WHS Act and Regulations identify specific organisations that are not considered to be a PCBU for the purposes of the WHS Act. For example, the model Act provides that a volunteer association does not conduct a business or undertaking. (For further information in relation to volunteer organisations, refer to the Safe Work Australia volunteer fact sheets and frequently asked questions).

Section 5(4) of the WHS Act excludes a worker (such as an employee) and an officer (such as an executive manager) from being a PCBU in that capacity alone.

Also, elected members of local authorities, who are acting in that capacity, do not conduct businesses or undertakings.

The WHS Act allows further exclusions to be made by regulation. At this stage, the WHS Regulations exclude '*strata title bodies corporate that are responsible for common areas used only for residential purposes*', unless the strata title body corporate engages one or more workers as an employee.

Private or domestic purposes

The regulators consider that the intent of the legislation is that the following kinds of persons should **not** be taken to be PCBUs:

- Individuals who carry out domestic work in and around their own home (e.g. domestic chores etc).
 - Individuals such as home-based foster carers who care for foster children.
 - Individual householders who organise one-off events such as dinner parties, garage sales, lemonade stalls etc.
 - Individual householders who engage persons to carry out ad hoc home maintenance and repairs or other domestic work, e.g. casual babysitters; tradespeople to undertake repairs. It is important to note that a tradesperson will either be a worker for a business or undertaking, or a business or undertaking in their own right if the tradesperson is self-employed.
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An individual householder *may* have the duties of a PCBU if they *engage* a worker, for example, employing a nanny to care for children in the householder's home. While the householder is not employing the worker as part of a business, employing the worker to carry out certain duties at the home is regarded as an 'undertaking'. Consequently, the householder has a duty of care as a PCBU and the person employed by the householder has the worker's duty of care under the WHS Act.

A householder may also be a PCBU if 'work' is carried out by or for them that is not purely domestic, but is part of a business or undertaking conducted by them (e.g. a business is operated from home). The householder may then be a PCBU involving the management or control of the workplace, and have duties as such. If the person is undertaking 'work' for the householder, as part of the conduct of a business or undertaking by the householder, then the householder will have the primary duty in relation to that person.

A householder who is a foster parent is not a PCBU or worker. This is because the activities of a home-based foster parent in caring for a foster child are not regarded as work. The organisation or agency that arranges and monitors the foster care, would however be doing so as a PCBU, and its activities would be regarded as work. This means that organisations will have obligations to volunteer foster parents in so far as they can be affected by the PCBU's business or undertaking.

All of the facts will determine if in the particular circumstances there is a business or undertaking being conducted (in which 'work' is being carried out) or if the activities are of a private or domestic nature.

Application to the Crown

The WHS Act applies to businesses or undertakings conducted by the Crown in each jurisdiction. The Crown operates through government departments and agencies which differ in size and complexity. In some jurisdictions the Crown may have responsibility for separate businesses or undertakings. In determining whether a department or agency conducts a business or undertaking on behalf of the Crown, matters such as any legislation establishing or administered by the organisation, as well as organisational structure, governance and decision making will be considered.

Where a department operates through various agencies, the Crown will be the PCBU but the department or agency may be named in any proceedings or notices as the 'responsible agency'.

Note: this document is a general guideline only and should not be used as a substitute for seeking professional legal advice for your specific circumstances. The contents of this document are correct and based on available information at the time of writing. However, there may be subsequent decisions of courts or tribunals on the matter covered by this guide which mean that the contents are no longer accurate.