

# The meaning of ‘person conducting a business or undertaking’

A person conducting a business or undertaking (PCBU) has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers. A PCBU owes a primary duty of care to workers if it:

- engages or causes the engagement of workers to carry out work, or
- directs or influences workers carrying out work while the workers are at work in the business or undertaking.

A PCBU also has a primary duty of care to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. A PCBU may also have further duties if it:

- manages or controls workplaces, or fixtures, fittings or plant at workplaces
- designs, manufactures, imports or supplies plant, substances or structures used in work, or
- installs constructs or commissions plant or structures used in work.

PCBU is a broad concept that extends beyond the traditional employer/employee relationship to include all types of modern working arrangements.

This document sets out who may be a PCBU. For further information about a PCBU's primary duty of care to manage risks to health and safety see [Duties of a PCBU](#).

## A person may be an organisation or an individual

A ‘person’ can include a body corporate (company), unincorporated body or association or a partnership.



An individual is also a ‘person’ but will only be a PCBU where that individual is conducting a business in their own right. For example, 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.

## What is a ‘business’ or ‘undertaking’?

The model 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:

<b>Business</b>		enterprises usually conducted with a view to making a profit and have a degree of organisation, system and continuity
<b>Undertaking</b>		may have elements of organisation, systems, and possibly continuity, but are usually not profit-making or commercial in nature

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.

### Performance of work

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.

As ‘work’ is not defined in the model WHS Act, it has its ordinary meaning. The following criteria may help determine if an activity is work for the purposes of the model WHS Act:

- 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
- activities for which the person or other people will ordinarily be paid by someone is likely to be considered to be work
- activities that are part of an ongoing process or project may all be work if some of the activities are for remuneration
- an activity may be more likely to be work where control is exercised over the person carrying out the activity by another person, and
- formal, structured or complex arrangements may be more likely to be considered to be work than ad hoc or unorganised activities.

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

An activity that is domestic, recreational or social in nature may also be work. However, a person is unlikely to be conducting a business or undertaking if the activities form part of running a household or a person’s ordinary daily life. See below under ‘Who is not a person conducting a business or undertaking’.

## **Other factors that may determine if there is a business or undertaking being conducted**

The performance of work itself is not the only factor in determining whether a person is conducting a business or undertaking. All of the circumstances must be considered in determining whether there is a business or undertaking being conducted in which the 'work' is being carried out.

Relevant factors for consideration include:

- if there are elements of organisation, system and continuity associated with the performance of work
- if there are elements of control over the place where work is to be performed, the manner in which work is carried out or the worker performing the work
- if a person employs one or more employees.

For information on who is an employee, you can visit the Fair Work Ombudsman's website at [www.fairwork.gov.au](http://www.fairwork.gov.au)

## **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, including a householder if they operate a business or undertaking from home
- 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)
- A not-for-profit organisation that engages and pays administrative staff
- A clothing manufacturer employing outworkers.

## **Application to the Crown**

The model 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'.

## Multiple PCBUs at one location

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.

## Who is not a person conducting a business or undertaking?

The model WHS Act and Regulations identify specific organisations that are not considered to be a PCBU for the purposes of the model WHS Act. These are:

- Volunteer associations except if they (or its members on behalf of the association) employ a worker. For more information see the [volunteer topic page](#).
- A worker (such as an employee) and an officer (such as an executive manager) in that capacity alone.
- Elected members of local authorities, who are acting in that capacity.
- 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 (see the model WHS Regulations).

In addition, the Explanatory Memorandum to the model WHS Act provides the following kinds of persons running a household are not intended to be PCBUs, depending on the facts:

- Individuals who carry out domestic work in and around their own home for themselves or organise one-off events such as dinner parties, garage sales, lemonade stalls.
- Individuals who engage a worker to carry out ad hoc home maintenance and repairs or other domestic work, e.g. casual babysitters, tradesperson to undertake repairs.

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