



## Who is an “Officer” - The First Court Case

### The Background

A very recent court case may help to guide Managers on whether they are, or are not, a duty holder called Officer as defined in the WHS Act, section 4. You can find our infographic on the definition of Officer in our article *Who is an Officer*.

Many Managers have given serious consideration to this question in their workplace. Are they an Officer? It is very important to get it right. An Officer’s duty of “due diligence” and the penalty for not exercising due diligence are considerable. See our article *Officers: Due Diligence & Penalties*

### The Case

The case involved a fatality on a construction site in the ACT. The PCBU went into liquidation.

WorkSafe ACT prosecuted the Project Manager in late February 2015. They claimed that he was an Officer of his PCBU and that he had failed to exercise the due diligence required by the WHS Act.

The case centered on the definition of an Officer in section 4 of the WHS Act. WorkSafe had to prove that the Project Manager was a person who;  
“makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation or entity”

In court, the Industrial Magistrate focused on determining the Project Manager’s role in the PCBU’s business.

The Industrial Magistrate concluded that she was *not satisfied beyond reasonable doubt* that the Project Manager’s role involved making or participating in making decisions that affected all or a substantial part of the PCBU’s business. Therefore he was not an Officer. The case was dismissed.

### Useful Facts and Conclusions for Manager’s Consideration

The following facts considered, and conclusions made, when deciding the Project Manager was not an Officer of his PCBU, are from the Industrial Magistrate’s *Reasons for Judgment*, 3 August 2015:

- He could identify potential employees but was not responsible for hiring or firing them
- He could not commit corporate funds without approval
- There was no evidence that he had direction over the type, or the specific contracts that were to be pursued by his PCBU
- He did not sign off on tenders for projects
- There was no evidence that he attended board meetings, met any of the PCBU's legal obligations such as ASIC returns or establishing quality assurance compliance
- There was no evidence that he determined corporate structure, established company policy, the type of business to be pursued or which projects should be entered into
- He undertook all of the work one would expect of a Project Manager
- The prosecution did not establish that the Project Manager had control or responsibility 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. It would be speculative to say it went beyond that to be organisational.
- The Project Manager managed large projects on behalf of his PCBU but that role was not so significant when compared to the whole structure of the PCBU's business
- He was involved in making decisions that affected the PCBU's business but there were clear limitations to his decision making power. And it was not clear that he did make decisions that affected either the whole or a substantial part of the PCBU's business

You can obtain a PDF copy of The Industrial Magistrate's *Reasons for Decision* in this case, (B McKie v Muni Al-Hasani, Kenos Contractors Pty Ltd (in liq), at this link to the ACT Industrial Court: <http://www.courts.act.gov.au/magistrates/judgment/view/8939/title/mckie-v-al-hasani-and-kenoss>.