

13 May 2022

To

Rebecca Cook
Head of Safety Development
Auckland Transport
Level 6, 20 Viaduct Harbour Avenue
Auckland 1010

From

Sherridan Cook

By Email

Rebecca.Cook@at.govt.nz

Legally privileged and confidential

Dear Rebecca

Auckland Transport – Health and Safety at Work Act 2015 – Officers

1. Thank you for your instructions to advise Auckland Transport (**AT**) on who is likely to be deemed an "officer" under the Health and Safety at Work Act 2015 (**HSWA**) from AT's Board of Directors (**Board**) and Executive Leadership Team (**ELT**) and, if so, what duties they will owe.

2. Executive summary

2.1 In summary, we consider that:

- (a) all members of AT's Board will be officers of AT under the HSWA. But the two council-controlled organisation (**CCO**) liaison councillors will not be officers;
- (b) AT's Chief Executive Officer (**CEO**) and Executive General Managers (**EGM**) will only be deemed to be "officers" if they are able to "*exercise significant influence over the management of [AT's] business or undertaking*". The apparent legislative intent of this extended definition of "officer" was to narrow its application to those who could significantly influence the management of the *whole* of their organisation. However, without any case law on this definition, a wider interpretation is available and conceivable in the context of a large organisation such as AT, and we have adopted this in our advice;
- (c) AT's CEO will be deemed to be an officer of AT (even on a narrow interpretation of the extended definition of "officer");
- (d) based on a wider interpretation of the extended definition of "officer", the three EGMs of Service Delivery, Integrated Networks and Customer Experience will be deemed officers of AT. However, none of the other EGMs are likely to be deemed officers;
- (e) accordingly, AT's Board and CEO must exercise due diligence to ensure that all of AT complies with all of its duties and obligations under the HSWA. However, the due diligence duty of the EGMs of Service Delivery, Integrated Networks and Customer Experience will be mostly limited to their functional areas, having regard to their positions and responsibilities;
- (f) regardless, all of the members of AT's ELT, as "workers" under the HSWA, must take reasonable care that their acts or omissions do not adversely affect the health and safety of

other persons. Given their seniority and corresponding high degree of influence over their functional areas of responsibility, AT's ELT members will be held to a high standard of compliance. Accordingly, we recommend that their day-to-day actions and decisions are consistent with this duty.

3. Who is an "officer"?

- 3.1 As you know, AT is a person conducting a business or undertaking (**PCBU**) and has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of its workers and other persons are not put at risk by its work (s 36, HSWA). Every officer of a PCBU holds a duty of due diligence (discussed below) to ensure that the PCBU complies with its primary duty, as well as all of its other duties and obligations under the HSWA.

Legal framework and application – directors

- 3.2 The definition of an "officer" is set out in s 18 of the HSWA (the full text of which is set out in the Appendix). While AT is not a registered company under the Companies Act 1993, it is deemed to be a body corporate under s 38 of the Local Government (Auckland Council) Act 2009. Accordingly, under s 18(a)(iv) of the HSWA, "*any person occupying a position in the body [corporate] that is comparable with that of a director of a company*" will be an officer for the purposes of the HSWA.
- 3.3 Therefore, all members of AT's Board will be officers.
- 3.4 Section 44(3) of the HSWA is relevant given that AT has two CCO liaison councillors, who are elected members of Auckland Council appointed by the Mayor of Auckland to liaise in various respects between the Council and AT's Board. The section provides that elected members of Auckland Council do not have a duty to exercise due diligence to ensure that any CCO complies with its duties under the HSWA, unless that member is also an officer of that CCO.
- 3.5 However, under Auckland Council Resolution number CCO/2020/3, which provides for the establishment of CCO liaison councillors, "*liaison councillors are not directors, and must not act in a way that they be deemed to be so*". They also are not required to attend all AT Board meetings, do not have any voting powers, and bear no responsibility for the decisions made by AT's Board (see Auckland Council's "*Protocols relating to Liaison Councillor role*"). As a result, we consider that the two CCO liaison councillors will not be officers of AT, and nor do they (or any other elected member of Auckland Council) owe any duty of due diligence to AT.

Legal framework – executives and the extended definition of "officer"

- 3.6 The definition of "officer" under the HSWA also extends to (ss 18(b) and (d)):

... **any other person occupying a position** in relation to the business or undertaking **that allows the person to exercise significant influence over the management of the business** or undertaking (for example, a chief executive);

but to avoid doubt, **does not include a person who merely advises or makes recommendations to [an officer]** (our emphasis).

- 3.7 This raises the possibility of whether AT's CEO and EGMs will also be officers. There is no New Zealand case law on the point, and Australian case law is of limited assistance as the definition of "officer" under the Australian model Work Health and Safety Act (on which the HSWA is based) is different. To assist, we have looked for other guidance on the interpretation of the extended definition of "officer" outlined above.
- 3.8 The legislative history of the HSWA provides some assistance. The current extended definition of an "officer" – being a person who exercises "*significant influence over the management of the business or undertaking*" but does not include someone who merely advises or makes recommendations – was inserted by the Select Committee to narrow the original definition in the Health and Safety at Work Bill. That original definition included anyone who made decisions affecting "*the whole, or a substantial part of, the business*". When commenting on their recommendation to narrow the definition, the Select Committee stated that "*the designation 'officer' should be confined to people in very senior governance roles, such as directors and chief executives*"¹.
- 3.9 WorkSafe New Zealand's (**WorkSafe**) position on [Officers' due diligence](#), and the comments contained in its [HSWA Special guide](#) on this topic, is not binding but also provides some useful guidance, as follows:
- (a) WorkSafe's position on [Officers' due diligence](#) states that those in "*senior governance roles*" will be officers, because such roles "*influence how the organisation is managed (such as a Chief Executive Officer)*". That could be seen to exclude executives in a more junior governance role (such as executives who report to the CEO) or where their governance is restricted to their functional area.
 - (b) The [HSWA Special guide](#) states that: "*Officers have a duty to exercise due diligence because they make policy and investment decisions that can affect workers' health and safety*". This suggests that only those making such decisions will be officers, although it still leaves doubt over the scale of such decisions. The [HSWA Special guide](#) also provides examples of who are not officers, with some real life scenarios. However, in our view, these simply indicate that middle managers (including team leaders, line managers and health and safety managers) will not be officers, and that an employee will not be an officer just because this appears in their job title.
- 3.10 WorkSafe's indication of when it will take enforcement action also suggests that, to be an officer, the individual must have the ability to influence the organisation's systems. WorkSafe's position on [Officers' due diligence](#) states (under "*WorkSafe may consider enforcement action*") that:
- Our focus is on sector-wide HSWA issues. We engage with officers when:
- there is evidence of systemic failure in the PCBU's governance
 - the officer's failure is preventing the PCBU from meeting its duties.

¹ *Health and Safety Reform Bill*, as reported from the Transport and Industrial Relations Committee, p 5.

Examples include failures by a PCBU across multiple sites or a series of incidents over time.

- 3.11 Taken together, the legislative history and WorkSafe's guidance indicates to us that the extended definition of "officer" is likely to be limited to only those very senior executives who make decisions that affect the overall operation of an organisation. In other words, executives whose influence and decisions affect the *whole* of the business, eg decisions about the organisation's resourcing, people, policies, investment, equipment and other things that have a direct (or indirect) impact on the health and safety of workers and the organisation's health and safety compliance. It would follow from this that the definition is intended not to extend to managers who only oversee a part of the business, or whose primary role is to make functional, rather than organisational, decisions.²
- 3.12 Such an interpretation would limit the extended definition of "officer" to the chief executive of an organisation, and beyond that, possibly only to a chief operating officer or a chief financial officer (if either of those two roles had organisational-wide influence). However, the definition has never been tested in the courts, which means that it has never been analysed in the context of an actual large organisation (such as AT). The usual structure of such organisations is to divide the business into functions – each of which may involve significant undertakings, large numbers of people and/or large financial revenues and/or expenditures, and correspondingly significant risks – with a senior executive responsible for each function. While the overall strategy and governance of the organisation will usually sit with the board of directors and the chief executive, each executive manager is usually able to "*exercise significant influence over the management of*" their functional area, even when operating within the organisation's governance structure (including its policies and delegated authorities).
- 3.13 In our view, it would not be stretching the plain and ordinary meaning of the extended definition of "officer" to apply it to an executive manager of a significant part of a large business, as the definition only refers to "*the management of the business*" (and not to the management of *all* of the business). Also, we could envisage a wider interpretation being favoured by the courts when faced with determining whether an executive manager is an officer, and this followed a systemic failure in the functional area that they were responsible for because of the way that they managed that area. However, in our view, even a wider interpretation of "*the management of the business*" will be limited to the executive managers of the operational areas of an organisation, because:
- (a) when the definition of "officer" is considered in the context of the due diligence duty at s 44 of the HSWA, the impression is that their ability to influence must extend to operational areas (eg s 44(4)(b), (c) and (e));
 - (b) the operations of a business define its nature, and are usually where the critical risks are created;

² This approach is also supported by the Australian case *McKie v Muni Al-Hasani, Kenross Contractors Pty Ltd (in liq)* [2015] ACTIC 1. Although not directly relevant in New Zealand (because of our different definition of "officer"), the Magistrate in this case noted that "*...the interpretation of the concept an officer should be viewed through the prism of the organisation as a whole rather than a particular function in which the individual was engaged*" (see at [42]). The Magistrate also drew a distinction between having "operational" rather than "organisational" responsibility (the latter would suggest a person was an "officer"). The defendant in that case (a project manager) was found not to be an officer.

- (c) operational executives are responsible for the implementation of systems and processes at the "front line", such that they have the ability to significantly influence their performance; and
- (d) the functions required to support the operational areas (such as IT, marketing, human resources and even finance), while important, can still be influenced by the operational executive when applied to their areas.

Therefore, in our view, the executive managers of functions that support or complement the operational areas are unlikely to be deemed officers.

3.14 This wider interpretation could be criticised as imposing liability on an executive for an organisation's failures in situations where the failure occurred outside of their functional area. However, under s 44(2) of the HSWA, an officer's due diligence duty is limited to the care, diligence and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation):

- (a) the nature of the business or undertaking; and
- (b) the position of the officer and the nature of the responsibilities undertaken by the officer.

Accordingly, we consider that they could not be held liable for failures in areas of the business that they had no influence over.

3.15 As a final point, it is possible that the extended definition of "officer" is also triggered when senior executives sit together as a group to consider wider matters affecting the organisation (eg as an executive leadership team or as part of a special project group or committee). In such roles, the senior executives may make decisions or exercise significant influence over functional areas outside of their direct responsibility or over the organisation as a whole (unless these are subject to other approvals). However, in our view, determining who is an officer involves considering the executive's individual (rather than collective) influence.

3.16 In summary, we consider that the legislative intent was to narrow the application of the extended definition of "officer" to those influencing the management of the whole of an organisation. However, in the absence of judicial guidance, we have adopted the wider interpretation discussed above, particularly given the relatively significant risk that a court would favour such an interpretation when faced with the realities of the governance and management structures of large organisations.

3.17 We discuss the application of this legal framework to AT's ELT in the next section.

4. Are any members of AT's ELT officers?

CEO

4.1 We consider that AT's CEO will be an officer under the HSWA. This will be the case based on both the narrow and the wider interpretations of the extended definition of "officer" discussed above, as the CEO is able to exercise significant influence over the whole of AT.

4.2 As set out in the CEO's job description, their "*purpose*" is to "*ensure the effective overall operation and performance*" of AT "*by developing and executing core business strategies ..., whilst ensuring*

the functionality and sustainability of the collective organisation". Further, amongst other things, the CEO is responsible for developing a strategic plan (in consultation with the Board), implementing that strategic plan, and leading, prioritising and managing AT's operations and resources. Also, the CEO is expected to "*champion AT's Safety Policy promoting a strong safety culture*" and to "*manage and coordinate implementation of AT's safety management system*".

- 4.3 The CEO also has structural influence and decision-making capability under AT's governance structure. For example, under AT's Delegations Manual, the CEO may approve projects or any single financial transactions of up to \$20,000,000 in any functional area of AT.
- 4.4 In addition, it was apparent from the interviews that we conducted with AT's CEO and five members of the ELT,³ that the CEO has the ability to, and does exercise, significant influence and decision-making power over all of the functions of AT. The CEO appears to operate an inclusive leadership style where most decisions are made unanimously by the ELT. However, the CEO and others also recognised that there are occasions where the CEO will direct the decision-making to the outcome that the CEO prefers, and in rare cases may make the decision where a lack of consensus exists within the ELT.

Other ELT members

- 4.5 We consider that based on the wider interpretation of the extended definition of "officer" above, three of AT's EGMs, being the EGM, Service Delivery; the EGM, Integrated Networks; and the EGM, Customer Experience, will be officers under the HSWA. However, while it is possible that the other seven EGMs could also be deemed officers, we consider that this is unlikely based on the nature of the functional areas that they are responsible for.
- 4.6 We first reviewed the job descriptions for each EGM, and all of them state that the EGM "*act[s] as part of a leadership collective which has prime responsibility for supporting the CEO's role of leading and managing the performance and culture of the organisation*". This suggests that they are not the final decision-maker, rather this is the CEO (or Board) and their role is to advise and recommend. They each have functional responsibilities, eg Service Delivery, Finance, Risk and Assurance, Planning and Investment etc, but none of them are responsible for the management of all of AT or appear to have opportunities to exercise significant influence over the same. They all have "*individual accountability for leading a range of functions based on a cross-organisational mode!*" but this is unlikely to mean that they have significant influence over the management of all of those functions at one time. Also of relevance is that their job descriptions state under "*health and safety*", that the EGM is only to "*manage and coordinate implementation of AT's safety management system*".
- 4.7 This was borne out in the interviews we conducted with five of the EGMs. None of them suggested any organisational-wide influence. Accordingly, they would be unlikely to be deemed officers if a narrow interpretation of the extended definition of "officer" was applied. However, they do have

³ We conducted interviews with Shane Ellison, CEO (12 April 2022); Mark Lambert, EGM, Integrated Networks (5 April and 13 May 2022); Natasha Whiting, EGM, Culture & Transformation and previously, Acting EGM, Safety (2 May 2022); Mark Laing, EGM, Finance (3 May 2022); Andrew Allen, EGM, Service Delivery (9 May 2022); and Vanessa Ellis, EGM, Customer Experience (11 May 2022).

significant influence over the management of each of their functional areas. This is seen in their financial delegated authorities (ranging from \$250,000 to \$20,000,000) but also in their day-to-day implementation and management of projects, third party suppliers and staff in their functional areas.

4.8 But as discussed above, even under a wider interpretation of the extended definition of "officer", we consider officers will be limited to those with operational responsibilities. In AT, these are:

- (a) the **EGM, Service Delivery**, who has responsibility for the Harbourmaster (including maritime safety), Parking operations and the Transport Operations Centre. It was apparent from our interview that while strategy, budgets and major project approvals occur at Board level, this EGM has the ability to significantly influence the setting up of the processes and frameworks for the delivery of those projects, and does so autonomously (albeit within AT's governance and management structures and policies). Accordingly the EGM's influence extends beyond the mere implementation of a set plan or system;
- (b) the **EGM, Integrated Networks**, who has responsibility for public transport, and the building and maintenance of infrastructure. Although these tasks are carried out by third party public transport operators and physical work contractors, and are subject to additional procurement processes and contractual obligations, this EGM's ability to influence the setting up and delivery of the third party's services still appears significant; and
- (c) the **EGM, Customer Experience**, who has responsibility for various front line functions, including call centres, ticketing, digital (social media) and community transport. Again, in a similar manner to the EGM, Service Delivery, it appears that this EGM has the ability to significantly influence the processes and frameworks for the implementation of projects and strategies approved at Board level.

4.9 We also interviewed the EGM, Culture & Transformation⁴ and the EGM, Finance. However, it was not apparent from their interviews that these EGMs would be deemed to be officers. That of course is not to diminish their roles or responsibilities (or that of any of the other EGMs), as they are integral to AT's operations. However, their ability to influence AT's core operations appeared more limited than that of the operational EGMs above. Although we did not interview the remaining five EGMs, being the current EGM, Safety; the EGM, Stakeholder, Communities & Communication; the EGM, Planning & Investment; the EGM, Business Technology; and the EGM, Risk & Assurance, we would expect their ability to influence AT's operational areas to be similar, or possibly less than, the EGMs of Culture & Transformation and Finance.

4.10 While all of the EGMs have collective responsibilities over the entire organisation when sitting as an ELT group or on the various Enterprise Portfolio Steering Groups or Investment Portfolio Steering Groups, in our view, the role of such groups remains one of oversight, direction and delivery of the strategy and projects approved by the Board. Further, their individual influence as executive managers will be the most relevant consideration.

⁴ We were also able to obtain an insight into the role of the EGM, Safety, as the EGM, Culture & Transformation had acted in that capacity for 7-8 months.

- 4.11 Finally, in our experience, if a serious incident occurred, WorkSafe's focus from a due diligence perspective is more likely to be on AT's Board and CEO. Based on our advice above, it is conceivable that this would extend to one of the three operational EGMs, provided the incident occurred in their operational area. We do not consider that any of the other EGMs would be prosecuted as officers. In addition, as above, a prosecution of any officer is only likely if there has been a systemic failure and the officer has a direct responsibility for that or otherwise prevented AT from fulfilling its duties.
- 4.12 But whether or not an ELT member is an "officer" under the HSWA, this should not change their approach to health and safety. The statutory duty of due diligence reflects current good management and governance practices, and is the framework that senior leaders should work within.

5. Duties as "workers"

- 5.1 Added to this is that each ELT member holds a separate duty as a "worker" under s45 of the HSWA to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons (as well as their own health and safety). Given their seniority in the organisation and leadership of functional areas, we consider that this duty is likely to be applied more stringently to all of AT's ELT members. In addition, from a practical perspective, WorkSafe is more likely to prosecute senior managers as workers, as it avoids having to first prove that they are officers.
- 5.2 Therefore, we recommend that all ELT members take a health and safety centric approach in their everyday decision-making and management.

6. Officer's due diligence duty

- 6.1 As indicated, each officer has a positive duty under s 44 of the HSWA to exercise due diligence to make sure that AT complies with its health and safety duties. AT's officers must exercise the care, diligence and skill that a reasonable officer would exercise in the same circumstances, taking into account matters such as (s 44(2)):
- (a) the nature of the business or undertaking, which we consider would include AT's large size and expected sophistication, its provision of services to the public and the increased risk of death or serious injury posed by its transport operations; and
 - (b) the officer's position and nature of their responsibilities. For both AT's Board and its CEO, this will be at the higher end of the scale. For the three EGMs who are likely to be deemed officers, this will be limited for each of them to their functional areas of responsibility.
- 6.2 The HSWA specifies that "*due diligence*" includes taking "*reasonable steps*" to (s 44(4)):
- (a) acquire knowledge about health and safety matters;
 - (b) understand AT's operations, hazards and associated risks;
 - (c) ensure AT has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety;

- (d) ensure AT has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information;
- (e) ensure AT has, and implements, processes for complying with duties; and
- (f) verify the provision and use of resources and processes.

6.3 The duty to perform due diligence is imposed on officers personally, and is separate from the duty imposed on AT within which its officers operate. Officers do not have to ensure the health and safety of AT's workers, but must exercise due diligence to ensure that AT does so. In this way, officers complement and support AT's primary duty of care.

6.4 While not required to be involved in AT's day-to-day management, officers are required to take an active interest in making sure that the organisation (or relevant functional area for each of the EGMs) has appropriate and safe systems of work. In practice, an officer can rely on others (such as senior managers or external advisors). However, the officer must be able to show that it was reasonable to do so, and have enough knowledge to challenge the advice, ask the right questions and obtain the right information. This is key, as an officer is required to understand how the health and safety systems in the organisation work and ensure that those systems are working effectively. It is unlikely to be sufficient for an officer to simply rely on an organisational health and safety policy or a health and safety manager, as this would not constitute "*reasonable steps*".

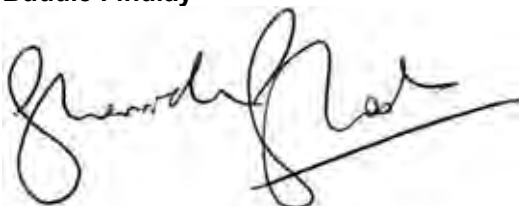
6.5 We have provided separate advice with guidance and practical tips on the actions that officers can take in order to comply with their due diligence duty. The Institute of Directors and WorkSafe's *Health and Safety Guide: Good Governance for Directors* also contains helpful guidance.

7. Conclusion

7.1 Although in our view only AT's Board and CEO, and the EGMs for Service Delivery, Integrated Networks and Customer Experience, will be officers under the HSWA, we recommend that all members of the ELT conduct themselves as such. This does not carry any greater risk of being deemed an officer but will ensure that AT meets all of its health and safety duties, with obvious flow on effects for its staff and the people of Auckland.

7.2 Please let us know if you have any queries or require any further assistance.

Yours faithfully
Buddle Findlay



Sherridan Cook
Partner

DDI • 64 9 357 1858
M • 64 27 545 9768
sherridan.cook@buddlefindlay.com

APPENDIX

Section 18 of the Health and Safety at Work Act 2015 states:

18 Meaning of officer

In this Act, unless the context otherwise requires, **officer**, in relation to a PCBU, —

- (a) means, if the PCBU is —
 - (i) a company, any person occupying the position of a director of the company by whatever name called:
 - (ii) a partnership (other than a limited partnership), any partner:
 - (iii) a limited partnership, any general partner:
 - (iv) a body corporate or an unincorporated body, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company; and
- (b) includes any other person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking (for example, a chief executive); but
- (c) does not include a Minister of the Crown acting in that capacity; and
- (d) to avoid doubt, does not include a person who merely advises or makes recommendations to a person referred to in paragraph (a) or (b).