



# Express law

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## First decision on who is an 'officer' under the model work health and safety legislation

In [Brett McKie v Munir Al-Hasani & Kenoss Contractors Pty Ltd \(In Liq\) \[2015\] ACTIC 1](#), the ACT Industrial Magistrates Court considered who is an 'officer' under the *Work Health and Safety Act 2011* (ACT). This is the first case considering this issue for the model work health and safety legislation.

### **Background**

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The employee of a sub-contractor was electrocuted and died while delivering materials to a storage site managed by Kenoss Contractors Pty Ltd (Kenoss). The electrocution occurred when overhead powerlines made contact with the sub-contractor's truck.

Kenoss was charged as a corporate defendant for failing to comply with a health and safety duty under s 32 of the Act. Mr Muni Al-Hasani, the project manager, was charged in his personal capacity as an officer of Kenoss under s 27(5) of the Act for failing to exercise due diligence in safety compliance.

### **ACT Industrial Magistrates Court decision**

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The ACT Industrial Magistrates Court held that Kenoss had breached s 32 of the Act by failing to comply with the duty of care it owed to the sub-contractor and its employees. However, the Court held that Mr Al-Hasani was not liable because he was not an 'officer' of Kenoss within the meaning of s 27 of the Act.

### **Kenoss Contractors Pty Ltd**

The Court accepted that Kenoss had formal control of the site at the time of the incident ([25]).

The Court held that Kenoss owed a duty of care to all those who visited its sites, including the employees of sub-contractors ([28]). This duty had been breached because Kenoss had failed to take adequate measures to mitigate the risk associated with the powerlines – for example, by limiting access to the site or turning off the power to the site for deliveries ([23], [29]). Therefore, Kenoss had breached s 32 of the Act.

### **Mr Muni Al-Hasani**

The Court found that Mr Al-Hasani had not exercised due diligence because he had failed to ensure safety compliance on the site ([35]). However, the Court held that Mr Al-Hasani was not an 'officer' of Kenoss, so the duty in s 27(5) did not apply to him. In reaching this conclusion, the Court applied the meaning of 'officer' from s 9(b) of the *Corporations Act 2001*. Under that section an 'officer' includes a person who participates in decision-making that affects the whole, or a substantial part, of the business of the corporation (s 9(b)(i)).

The Court followed the decision in *Shafron v Australian Securities and Investment Commission* [2012] HCA 18, [23]–[26] (Shafron), holding that consideration should be given

to Mr Al-Hasani's role in Kenoss as a whole rather than to his specific role in the incident that gave rise to the alleged breach ([38]–[42]). In this regard, although Mr Al-Hasani conceded that he participated in decision-making within Kenoss, the Court found that there was insufficient evidence that he had a level of control or responsibility in Kenoss that would make him an 'officer' within the meaning of s 27 of the Act ([49]–[50]). In the Court's view, Mr Al-Hasani possessed only 'operational responsibility' for particular contracts but was not part of the decision-making process in Kenoss more generally ([50]).

### ***Implications and significance of the decision***

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This case is important because the Court applied the High Court's decision in *Shafron* to s 27 of the Act to determine who is an 'officer' under the Act. A distinction is to be drawn between operational involvement, which falls short of the threshold of participation required under s 27 of the Act, and organisational involvement. The decision confirms that, under the harmonised work health and safety laws, which operate in all States and Territories except Victoria and Western Australia, individuals will be considered an 'officer' of a person conducting a business or undertaking (a 'PCBU') where they participate in decision-making that affects the organisational aspects of the business.

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