

# A summary of the new workplace safety regime

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09 May 2014

The much awaited Health and Safety Reform Bill has now been introduced into Parliament. The Bill is part of the package of changes that have been introduced following the Pike River Coal Mine Tragedy and various subsequent reviews which have observed a poor health and safety record in New Zealand. The Bill is before the Transport and Industrial Relations Select Committee and submissions close today, 9 May.

The Bill is based on the Australian Model Work Health and Safety Act 2011 with some modifications for the New Zealand context. So what are the key changes proposed by the Bill, and what will be the likely impact of those changes in practice?

## New defined terms

### **Person Conducting a Business or Undertaking**

A key aspect of the Bill is the creation of a new duty holder, known as a Person Conducting a Business or Undertaking (PCBU). A PCBU means a person conducting a business or undertaking:

- whether the person conducts a business or undertaking alone or with others; and
- whether or not the business or undertaking is conducted for profit or gain.

The PCBU is a broad concept, which will encompass the existing duty holder categories (such as employers, principals, and persons in control of a place of work) under the Health and Safety in Employment Act 1992 (HSE Act). A PCBU *does not* include employees or directors of PCBUs (directors are covered as officers – see below), volunteer associations, and occupiers of a home who employ or engage another person solely to do residential work.

### **Worker**

A “worker” is defined as a person who carries out work in any capacity for a PCBU, including work as an employee, a contractor or subcontractor, an employee of a contractor or subcontractor or an employee of a labour hire

company who has been assigned to work for the PCBU, an outworker, an apprentice or trainee, a person gaining work experience or undertaking a work trial, a volunteer or a person of a prescribed class.

The Bill's definition is broad, and like the PCBU definition is designed to encompass a number of relationships that are typical in a work environment (such as employees, contractors, subcontractors, employees of contractors or subcontractors, volunteers and trainees).

## Reasonably Practicable

The Bill will replace the current standard under the HSE Act ("All Practicable Steps") with a new "reasonably practicable" standard. "Reasonably practicable" is defined as: "...that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including:

- the likelihood of the hazard or the risk concerned occurring;
- the degree of harm that might result from the hazard or risk;
- what the person concerned knows, or ought reasonably to know, about
  - the hazard or risk; and
  - ways of eliminating or minimising the risk;
- the availability and suitability of ways to eliminate or minimise the risk; and
- after assessing the extent of the risk and available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

The new standard is broadly similar to the existing concept of "All Practicable Steps", except that the assessment of costs must only be taken after the assessment of the risk and the ways to eliminate that risk. This means that costs will only take precedence over safety when the cost of taking a step is "grossly disproportionate" to the risk.

## New duties

### Primary Duty to Ensure Safety

The Bill introduces a new general duty on all PCBUs to ensure, so far as reasonably practicable, the health and safety of:

- workers employed or engaged, or caused to be employed or engaged, by the PCBU while the workers are at work in the business or undertaking; and
- workers whose activities in carrying out work are influenced or directed by the PCBU while the workers are carrying out the work.

PCBUs must also ensure, so far as reasonably practicable, that the health and safety of other people is not put at risk from work carried out by the PCBU.

There are also specific duties imposed on PCBUs in respect of:

- the management and control of fixtures, fittings, and plant in the workplace;
- the design and manufacture of plant to be used in a workplace; and
- the supply, importation and installation of plant to be used in a workplace.

## Officers

The Bill introduces a positive duty on officers to exercise *due diligence* to ensure that the PCBU complies with that duty or obligation. This is a key change from the HSE Act, where directors of a company can only be held liable where they have directly participated in, contributed to, or acquiesced in their company's failure. Under the Bill, officers may be convicted for a breach of due diligence regardless of whether the PCBU has been convicted of an offence.

Due diligence includes taking reasonable steps to:

- acquire, and keep up-to-date, knowledge of work health and safety matters;
- gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations;
- ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety;
- ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information;

- ensure that the PCBU has, and implements, a process for complying with any duty or obligation of the PCBU under the Act; and
- verify the provision and use of resources and processes.

## Offences

The Bill creates three offence tiers relating to breaches of the health and safety duties. The offences and the respective maximum penalties can be summarised as follows:

- **Reckless Conduct** (has a duty and exposes any person to whom the duty is owed to risk of death or serious injury/illness and is reckless as to that risk) – fines up to \$3 million (or \$600,000 and/or up to five years' imprisonment for individuals).
- **Failure to comply with a Duty** (with exposure to risk of death or serious injury/illness) – fines up to \$1.5 million (or \$300,000 for individuals).
- **Failure to comply with a Duty** (no exposure to death or serious injury/illness) – fines up to \$500,000 (or \$100,000 for individuals).

In addition to the fines and imprisonment that may be imposed, the Bill provides for new orders which the court may impose at sentencing:

- **Adverse publicity orders** – requiring the offender to publicise in a particular manner the offence, its consequences, and the penalty imposed.
- **Restoration orders** – requiring an offender to take specified steps to remedy any matter caused by the offence.
- **H&S project orders** – requiring an offender to undertake a specific project for the general improvement of work health and safety.
- **Court-ordered enforceable undertakings** – adjourning the proceeding for up to two years, during which the offender undertakes to comply with certain conditions.

## Where to next?

Progress of the Bill through to legislation is already well under way. The Government has indicated that the Bill will be passed into law by the end of 2014, with an expected start date of 1 April 2015. Regulations necessary to support the new legislation will also be released for consultation this year.

The implementation of the new regime will see more onus placed on managers and company directors to proactively manage workplace health

and safety. Together with stronger penalties, and wider enforcement tools for non-compliance, it is hoped that this regime will see improvement to New Zealand's poor health and safety record.

From the New Zealand Law society, 9 May 2014