

Health and Safety Reform Bill and the Health and Safety at Work Act 2015

1. On 4 April 2016, the Health and Safety at Work Act 2015 will come into force. It provides a significant change to New Zealand's current health and safety legislation, and is a response to the scrutiny placed on our health and safety practices following the Pike River tragedy.

New terminology under the Act

Reasonably Practicable

2. When considering whether a breach has occurred, the Act requires the Court to consider whether steps taken were "reasonably practicable". This replaces the current "all practicable steps" test. Whether the introduction of the word "reasonable" will result in a different approach to the test remains to be seen. "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:
 - a. the likelihood of the hazard or the risk concerned occurring;
 - b. the degree of harm that might result from the hazard or risk;
 - c. what the person concerned knows, or ought reasonably to know, about the hazard risk and ways of eliminating the risk;
 - d. the availability and suitability of ways to eliminate/minimise the risk; and
 - e. cost associated with available ways of eliminating or minimising the risk."

Persons Conducting a Business or Undertaking

3. The key new term introduced by the Act is 'PCBU', or "Person Conducting a Business or Undertaking". It is a broad concept, and encompasses employers, those who manage workplaces, manufacturers, importers and suppliers. Individuals (excepting workers) can be PCBUs.

Duties of a PCBU

4. A PCBU must ensure, so far as is reasonably practicable, the health and safety of all workers who work for the PCBU, while the workers are at work in the business or undertaking, as well as workers whose activities in carrying out work are influenced or directed by the PCBU.
5. A PCBU must also, so far as is reasonably practicable, provide and maintain a work environment that is without risk to health and safety.
6. There are also specific duties imposed on PCBUs to so far as is reasonably practicable:
 - a. provide and maintain safe plant and structures and safe systems at work;
 - b. ensure safe handling and storage of plant, substances and structures,
 - c. provide adequate facilities for the welfare of workers at work as well as provide all information, training, instruction and supervision that is necessary to protect all persons from risks to their health and safety; and

- d. monitor the health of workers and conditions of the workplace for the purpose of preventing injury and illness of workers arising from the conduct of the business or undertaking.

Directors and Officers – due diligence

7. Another significant change to the current legislation is the specific duty placed on those holding governance, or senior management, roles to assume a due diligence duty. That due diligence duty is imposed on "Officers" of the PCBU, who are defined as:
 - a. directors of companies;
 - b. partners in a partnership,
 - c. any general partner in a limited partnership,
 - d. any person in a position comparable with that of a director in a body corporate or unincorporated body; or
 - e. any other person occupying a position in a PCBU that allows the person to exercise significant influence over the management of the business (i.e. a chief executive).

8. The duty of due diligence imposed on Officers is onerous, and requires them to:
 - a. acquire, and keep up-to-date, knowledge of work health and safety matters;
 - b. gain an understanding of the risks and hazards associated to the business;
 - c. ensure the PCBU has and uses appropriate resources to eliminate and minimise risks;
 - d. ensure that the PCBU has appropriate resources and processes to respond to information regarding incidents and hazards in a timely manner; and
 - e. ensure that the PCBU has and implements processes for complying with duties under the Act.

9. While the current legislation has the ability to hold a director liable for health and safety breaches, in practice this has only applied where they are closely involved with operational decisions made by the business. This has meant that directors of large entities, who may have little or no practical involvement in a business, have avoided scrutiny. The "due diligence" obligation changes this.

Health and Safety Representatives

10. The Act heightens obligations on employers to involve employees in the development of health and safety policies and to provide a significant voice for employees in health and safety matters.

11. The Act enables a worker to request the election of a health and safety representative, or this may be done on the PCBU's own initiative. Once a health and safety representative has been elected, the PCBU must determine requirements of a working group (for instance, number and composition of working groups, number of health and safety representatives and deputy health and safety representatives to be elected, if any).

12. The PCBU has significant obligations to the health and safety representative, for instance to consult about health and safety matters, confer with the representative when requested, allow the representative time off to perform functions and an obligation to supply the representative with the necessary resources to carry out their role.
13. The health and safety representative is tasked with representing workers in the group on matters relating to health and safety, which can extend to investigating complaints from workers, attending meetings, monitoring actions by the PCBU and making recommendations relating to health and safety. The health and safety representative has increased powers under the Act, and is able to enter and inspect workplaces, and request a PCBU to supply any information necessary to perform their functions.

Exceptions

14. Small businesses with less than 20 workers not in a high risk sector or industry (as defined in regulations still to be promulgated) are excluded from the obligation to have a health and safety representative when requested by workers. However, these smaller businesses may still choose to elect a health and safety representative.

Higher penalties

15. Penalties increase significantly. There is a three tier system to penalties following an established breach:
 - a. offences of reckless conduct, where a person under a health and safety duty without reasonable excuse engages in conduct that exposes any individual to whom a health and safety duty is owed to a risk of death or serious injury or illness;
 - i. a person committing an offence of reckless conduct will be liable on conviction up to \$300,000 or a term of imprisonment not exceeding 5 years for an individual, or up to \$600,000 or a term of imprisonment not exceeding 5 years for a PCBU or an Officer;
 - b. offence of failing to comply with health and safety duty that exposes an individual to the risk of death or serious injury or illness;
 - i. a person committing this offence will be liable on conviction up to \$150,000 for an individual, or up to \$300,000 for a PCBU or an Officer;
 - c. offence of failing to comply with health and safety duty;
 - i. a person committing this offence will be liable on conviction up to \$50,000 for an individual, or up to \$100,000 for a PCBU or an Officer.
16. In addition to the above penalties, the Act provides for new orders which may be imposed at sentencing, such as:
 - a. adverse publicity orders, requiring the offender to publicise in a particular manner the offence, its consequences, and the penalty imposed;
 - b. restoration orders, requiring an offender to take specified steps to remedy any matter caused by the offence;
 - c. project orders, requiring an offender to undertake a specific project for the general improvement of work health and safety; and

- d. court-ordered enforceable undertakings, adjourning the proceeding for up to two years, during which the offender undertakes to comply with certain conditions.

Limitation periods

17. Proceedings for offences under the Act may be brought by WorkSafe (or other designated authority) within 12 months of the date of the incident to which the offence relates, or within 6 months of a coronial report.
18. However, private prosecutions brought by a person other than WorkSafe may be brought within 2 years after the incident to which the offence relates.

Issues for contracting parties

19. Under the Act it is not permissible to pass on or contract out of responsibility for health and safety. If a business is contracting others to do work, that business will have a responsibility to eliminate and minimise risks for all parties, so far as reasonably practicable. Accordingly, a duty imposed by the Act may not be transferred to another person.
20. More than one person may also have the same duty imposed under the Act at the same time. Additionally, if more than 1 PCBU has a duty in relation to the same matter, then so far as reasonably practicable, each of those PCBU's must consult and cooperate with each other.

Issues for landlords and tenants

21. Landlord will be a PCBU so must ensure that the workplace, the entry and exit to the workplace, the fixtures, fittings and plant do not put a person's health and safety at risk.
22. A tenant business will also be a PCBU, so also assumes duties to ensure the workplace does not put a person's health and safety at risk.
23. Property owners would be well-advised to consider where such responsibilities lie when leasing commercial property, and ensure the leases are drafted appropriately.
24. Health and safety issues should also be considered when proposing to undertake strengthening works. A key issue will often be whether tenants can (or should) continue to occupy buildings requiring remedial work. This, in turn, raises the question of when rent must continue to be paid under the lease.