

## New Zealand Health and Safety Reform: impact when working overseas

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Substantial reform in the health and safety space is currently underway in New Zealand, with the Health and Safety Reform Bill (**Reform Bill**) likely to be enacted and in force before the end of 2015. This overhaul of New Zealand's workplace health and safety system comes after years of review, a Royal Commission on the Pike River Coal Mine Tragedy and an Independent Taskforce on Workplace Health and Safety.

Currently, the primary piece of legislation governing health and safety in New Zealand is the Health and Safety in Employment Act 1992 (**HSEA**). Once the Reform Bill is enacted, the HSEA will be repealed in its entirety.

The Reform Bill has a strong emphasis on prevention and accountability. It follows on from other reforms in the health and safety arena such as the introduction of WorkSafe New Zealand, the new health and safety regulator, which is seeking to take a proactive approach to enforcement.

Directors and officers will be personally responsible for ensuring due diligence is undertaken and harsher penalties will be introduced including fines of up to \$3 million for companies and \$600,000 for individuals, and up to five years imprisonment for individuals.

Given this, it is important for employers to take steps to ensure health and safety systems are appropriate and robust. Directors and officers should be considering what they need to do to comply with the new legislation when it comes into force. Practicable steps include reviewing and updating existing internal policies and processes, and considering whether your business is doing all it can or should be doing with respect to workers travelling for business.

### The Health and Safety Reform Bill: Duties and key changes

In 2014, the Minister of Labour introduced the Health and Safety Reform Bill (**Reform Bill**) to Parliament. The Reform Bill will overhaul New Zealand's workplace health and safety system to reflect many of the recommendations made by

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the Royal Commission into the Pike River Coal Mine Tragedy and the Independent Taskforce on Workplace Health and Safety.

The Reform Bill is based on the Australian model Work Health and Safety Act. It will replace the Health and Safety in Employment Act and the Machinery Act and amend the Hazardous Substances and New Organisms Act. The Reform Bill is expected to take effect sometime in 2015 and will become the Health and Safety at Work Act.

Under the current drafting of the Reform Bill, the duties presently owed by employers, principals, suppliers, self-employed people and people in control of places of work will be replaced by a new duty category that will encompass all those roles entitled “persons conducting a business or undertaking” (**PCBUs**).

PCBUs are defined as a person conducting a business or undertaking, whether the person conducts the business or undertaking alone or with others and irrespective of whether the business or undertaking is conducted for profit or gain. The definition of PCBU does not include people engaged as workers, voluntary associations, or people who engage others to do residential work in their home.

The Reform Bill also removes the distinction between employees, contractors and other workers. All of these categories will be combined into a single category known as workers. It is envisaged that all PCBUs will owe all the current obligations imposed on employers, principals, people in control of a place of work and self-employed people, as well as additional, more onerous duties.

The Reform Bill will replace the current requirement to take “all practicable steps” with a new requirement to take “reasonably practicable steps” to ensure the safety of workers carrying out work for the PCBU and workers who are influenced or directed by the PCBU. However, it is apparent from the Reform Bill that the new requirement to take “reasonably practicable steps” will require largely the same balancing act as that currently imposed by the Health and Safety in Employment Act 1992 (**HSEA**).

The Reform Bill also introduces a new and comprehensive duty on directors and officers to exercise due diligence to ensure that the PCBU complies with its duties. A duty imposed on a person under the Reform Bill to ensure health and safety will require the person:

- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

#### Key changes

- Introduction of a single duty category entitled “persons conducting a business or undertaking” broadening the current definitions
- Removal of the distinction between employees, contractors and other workers
- Requirement to take “reasonably practicable steps” to ensure the safety of workers
- Introduction of a new and comprehensive duty on directors and officers to exercise due diligence

## Duties of PCBUs

The Reform Bill imposes primary obligations on PCBUs, replacing the existing categories of duties owed by employers, principals, persons in control of a place of work and self-employed people.

There is a new obligation to take “reasonably practicable” steps to ensure the safety of workers carrying out work for the PCBU and workers who are influenced or directed by the PCBU. The duty of care owed by PCBUs extends to all other people who are affected by the work carried out for the business or undertaking. Moreover, unlike the present legislation, the Reform Bill does not treat cost as an equivalent factor to other considerations when deciding what is “reasonably practicable”.

Instead, the question of whether a step is reasonably practicable requires consideration of the likelihood of a hazard or risk occurring, the degree of harm that might result from that hazard or risk, what the PCBU knows or ought reasonably to know about the hazard or risk and the availability and suitability of ways to eliminate or minimise the risk. Only after those factors have been considered can the cost of eliminating or minimising the risk be considered by asking whether the cost

is “grossly disproportionate to the risk” (see clause 17 of the Reform Bill). The table below illustrates the difference between the current HSEA “all practicable steps” test and the prospective “reasonably practicable steps” standard:

HSEA: all practicable steps	Reform Bill: reasonably practicable steps
<b>Nature and severity of harm.</b>	Likelihood of the hazard or risk occurring.
<b>Current state of knowledge about the harm and the likelihood of harm.</b>	Degree of harm that might result.
<b>Current state of knowledge about the means available to mitigate the harm.</b>	What the person knows or ought to know about the hazard or risk and means of eliminating or minimising it.
<b>Availability and cost of those means.</b>	The availability and suitability of ways to eliminate or minimise the risk.  After assessing the extent of the risk and the available ways of eliminating or minimising it, the cost associated with available ways of eliminating the risk, including whether it is grossly disproportionate to the risk.

The Reform Bill also enhances the obligations relating to worker participation and consultation, including:

- (a) a requirement that PCBUs engage with workers on matters relating to work health and safety;
- (b) a requirement that PCBUs have practices that provide reasonable opportunities for workers to participate in improving work health and safety;
- (c) the election of health and safety representatives and the establishment of health and safety committees if requested by workers or initiated by a PCBU;
- (d) trained health and safety representatives being empowered to issue provisional improvement notices to the PCBU and entitled to request information from the PCBU and to accompany an inspector who enters the workplace;
- (e) the right for a worker to stop unsafe work and for trained health and safety representatives to direct workers to stop unsafe work; and
- (f) a prohibition against penalising a worker who participates in a health and safety committee, acts as a health and safety representative or raises an issue concerning health and safety with the PCBU, regulator, another worker or a health and safety representative.

Detailed definitions of the terms “notifiable injury or illness” (clause 18) and “notifiable incident” (clause 19) have been included in the Reform Bill, which are intended to address existing confusion as to the meaning of “serious harm” in the current legislation. Changes are also expected in relation to reporting and notification of accidents, incidents and serious harm.

The Reform Bill also introduces specific duties on PCBUs involved in the management or control of a workplace, or fixtures, fittings and plant at a workplace and on PCBUs that design, manufacture, import, supply, install, construct or commission plant, substances or structures. In this respect, all parties involved in matters relating to a workplace (including upstream suppliers) will be subject to health and safety obligations. One specific duty on PCBUs is outlined briefly below.

## Duty of PCBU who manages or controls the workplace

A PCBU with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace (including the entering, exiting, and anything arising from the workplace) is without risks to the health and safety of any person.

The definition of “workplace” has been simplified to mean a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

Unfortunately the Reform Bill does not define “management or control” and therefore creates some uncertainty. In our view, the addition of the word “management” to the Reform Bill is highly likely to broaden the application of the duty to not only those with a proprietary interest in the work place (as under the HSEA) but to those who simply manage the workplace.

## Duties of officers – due diligence

Under the Reform Bill, directors and officers will owe a positive duty to exercise due diligence to ensure that the PCBU complies with its duties and obligations imposed by the Bill. “Due diligence”, under the Reform Bill, will require directors and officers to:

- (a) acquire and keep up-to-date knowledge of work health and safety matters;
- (b) gain an understanding of the operations of the organisation and the hazards and risks generally associated with those operations;
- (c) ensure the PCBU has appropriate resources and processes to eliminate or minimise those risks;
- (d) ensure the PCBU has appropriate processes for receiving information about incidents, hazards and risks, and for responding to that information;
- (e) ensure there are processes for complying with any duty, and that these are implemented; and
- (f) verify that these resources and process are in place and being used.

An officers’ duty is not the same as that of a PCBU. Officers do not have to ensure the health and safety of the PCBU’s workers directly. Rather, the officer must exercise due diligence to ensure that the PCBU is meeting its legal obligations under the Reform Bill. The due diligence duty complements and supports the primary duty of care of the PCBU – it does not replace it.

However, the due diligence duty places a positive duty on people at the governance level of an organisation to actively engage in health and safety matters, reinforcing that health and safety is everyone’s responsibility. In doing this, the Reform Bill emphasises an increased focus on the role of directors and officers in relation to health and safety. Very few employees have faced prosecutions under the HSEA, and the majority of prosecutions of individuals for breach of that legislation have been managing directors of closely-held companies.

The role of officer is not defined by the HSEA and, to date, no officer has been successfully prosecuted for breaching the HSEA. The Reform Bill’s definition of ‘officer’ includes:

*any person who makes business decisions that affect the whole, or a substantial part, of the business of the PCBU (for example, the chief executive).*

The regulator has signalled (informally) that, under the Reform Bill, it will also focus on the role of senior managers who make financial decisions that can affect health and safety when considering the liability of officers. It is therefore highly likely that a broader group of individuals will be subject to the due diligence obligation imposed by the Bill than the current group of individuals who could face liability for breaching the HSEA.

In 2013 the Institute of Directors and the Ministry of Business, Innovation and Employment (**MBIE**) issued the Good Governance Practices Guideline for Managing Health and Safety Risks (**Guideline**). The Guideline, which is expected to become an approved code of practice under the Reform Bill (once it is enacted), details the steps that directors and managers should be taking to ensure compliance with their health and safety obligations. While the Guideline records that “it is important to distinguish between the governance and management of an organisation,” many of the recommended steps for directors contained in the Guideline might traditionally have been regarded as management tasks.

The Guideline imposes onerous obligations on directors and managers to understand the organisation’s health and safety system and to make inquiries to ensure the system is operating effectively.

When making decisions about the allocation of resources or operational strategy, a prudent board or management team will consider the health and safety implications of such decisions and record that they have factored health and safety into

their decision-making. Depending on the nature of the decision, the board may want to consider whether to protect such records with legal privilege (which can be waived by the board at a later stage).

The board minutes should reflect the board's discussions about health and safety and questions asked of senior managers. The board should also make inquiries of appropriate senior executives other than the CEO about the company's health and safety performance (or the health and safety implications of an operational matter overseen by a particular manager) to enable free and frank reporting. It may be most effective to implement a rotating reporting system whereby different managers attend the board meeting with the CEO each month to answer questions about particular operational matters that could affect health and safety.

In measuring health and safety performance across the organisation, both lead indicators (preventative or process safety information) and lag indicators (incidents and injury rates) should be considered. The Guideline recommends that consideration be given to statistics which might indicate a health and safety concern (such as workforce absence rates, progression with the implementation of management plans and data on trends including routine exposure to risks that are potentially harmful to health).

It also recommends that the board receive data on all incidents, including near misses and occupational illness and reports on internal and external audits. The Guideline recommends that the board conduct an annual formal review of health and safety and consider whether it should obtain an independent opinion from an external reviewer. It may be appropriate to obtain independent expert advice on a 'broad-brush' review of the organisation's health and safety or on specific aspects of the organisation (such as new or particularly hazardous operations, for example).

## Contemporaneous and overlapping duties

As with the HSEA, under the Reform Bill:

- (a) a single entity may have more than one duty; and
- (b) two or more different entities may concurrently owe duties in respect of the same situation (and each retains responsibility for its own duty).

In addition, the Reform Bill expressly requires entities that have a duty in relation to the same matter to, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with other duty holders.

This is a separate, additional, duty to the duty to consult with workers. This duty is aimed at ensuring that duty holders work together to make sure that the required steps are taken.

Where duties overlap, PCBUs should make reasonable arrangements and coordinate responsibilities with the other PCBU to fulfil their duty – so far as is reasonably practicable. The PCBUs should also monitor each other to ensure everyone is doing what they agreed.

Duties imposed under the Reform Bill are non transferrable and cannot be contracted out of.

## Expected events and time frames for implementation

The Reform Bill is currently before the Transport and Industrial Relations Select Committee and is expected to be passed and to come into effect before the end of 2015.

Earlier in the year MBIE issued a discussion document outlining proposals for new health and safety regulations. The discussion document sought feedback on the first of two phases that are planned for implementing new workplace health and safety regulations. The first phase involves the development of regulations across five areas:

- (a) general risk and workplace management;
- (b) worker participation, engagement and representation;
- (c) work involving asbestos;
- (d) work involving hazardous substances; and
- (e) major hazard facilities

As part of this first phase, MBIE has now published exposure drafts of certain regulations which are open for public consultation until 15 May 2015.

The second phase of regulations will be developed within two years of the Reform Bill coming into effect. As part of this phase, the regulations that were transferred from the current regime will be replaced by new regulations that will address:

- (a) hazardous work;
- (b) plant and structures;
- (c) geothermal operations; and
- (d) quarries

MBIE will also review the Hazardous Substances and New Organisms (**HSNO**) provisions that will be transferred to the work health and safety regime and consider whether any further industry-specific regulations (such as regulations for the construction industry) will be required.

## Offences and penalties

### Under the current legislation

Under the current health and safety regime, a person who, knowing that any action or omission is reasonably likely to cause serious harm to any person, takes the action, and the action is contrary to a provision of the HSEA is liable on conviction to imprisonment for a term of not more than two years and/or a fine of not more than \$500,000.

The maximum fine for failing to comply with the requirements of Part 2 of the HSEA (duties relating to health and safety in employment) is \$250,000.

It is also important to note that any fines or infringement fees cannot be insured against – any such insurance policy or indemnity is unlawful and of no effect. It is, however, possible to take out insurance cover for the costs of defending any health and safety prosecution and/or for any award of reparation.

### Under the Reform Bill

Under the proposed new regime, there will be a new tiered liability regime and overall, a significant increase in the maximum penalty levels, with the objective of sanctioning and deterring duty holders from breaching their workplace health and safety duties. The use of graduated categories of offences and penalties are intended to provide better guidance to the Courts about appropriate fine levels.

There will be a three-tiered hierarchy of offences for failure to comply with the Reform Bill, with penalties including fines of up to \$3 million for companies and \$600,000 for individuals, and up to five years imprisonment for individuals. The three categories are:

- (a) Offence of reckless conduct in respect of health and safety duty. A person who commits this offence is liable on conviction:
  - (i) for an individual who is not a PCBU or an officer of a PCBU ie a worker, to a term of imprisonment not exceeding 5 years or a fine not exceeding \$300,000, or both;
  - (ii) for an individual who is a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding \$600,000, or both; or
  - (iii) for any other person, to a fine not exceeding \$3 million.
- (b) Offence of failing to comply with health and safety duty that exposes individual to risk of death or serious injury or illness. A person who commits this offence is liable on conviction:
  - (i) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$150,000;
  - (ii) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$300,000; or
  - (iii) for any other person, to a fine not exceeding \$1.5 million.
- (c) Offence of failing to comply with health and safety duty. A person who commits this offence is liable on conviction:
  - (i) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$50,000;
  - (ii) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$100,000; or
  - (iii) for any other person, to a fine not exceeding \$500,000.

As is the case with the HSEA, fines imposed under the Reform Bill cannot be insured against.

There are new enforcement powers that enable inspectors to issue improvement notices, prohibition notices, non-disturbance notices, suspension notices and to bring prosecutions or issue infringement notices. Inspectors will also be empowered to apply to the District Court for an order requiring a person to comply with a notice or preventing them from not complying with a notice.

The Reform Bill also provides for various additional functions to be exercised by the new health and safety regulator, WorkSafe New Zealand, which has been operational since December 2013. Under the Reform Bill:

- (a) WorkSafe and the Minister of Labour will be required to publish a health and safety at work strategy within 12 months of the Reform Bill being enacted. The strategy will identify issues relating to capacity or capability in the work health and safety system and take account of ACC's injury prevention priorities.
- (b) WorkSafe and ACC must enter into written agreements about injury prevention measures to be undertaken jointly by the two agencies or undertaken by WorkSafe and partly or wholly funded by ACC.
- (c) WorkSafe will be empowered to share information with other regulatory agencies.
- (d) If requested by the Coroner, WorkSafe will provide a report on the circumstances of any fatal accident that occurs at a workplace.

WorkSafe will be able to obtain a written enforceable undertaking relating to an alleged breach of the Reform Bill. Non-compliance with an enforceable undertaking will be an offence.

In addition, new provisions will allow the Courts to order payment of WorkSafe's costs in prosecutions, to make adverse publicity orders, to make orders to remedy any matter caused by committing an offence, or to undertake a specified project for the general improvement of work health and safety, to issue injunctions and to make training orders.

## Application of the Health and Safety Reform Bill overseas

There are some express extra-territorial provisions in the Reform Bill, but these are limited to specific locations i.e. to aircraft operating outside of New Zealand where workers are engaged under New Zealand contracts; a New Zealand ship wherever it is located; and workplaces situated in New Zealand's exclusive economic zone and continental shelf. However, there are no general express extra-territorial provisions which explicitly state that the duties and obligations of PCBUs and officers extend broadly to cover workers located overseas. In light of this, there is a presumption under New Zealand law that the Reform Bill, once enacted, will have no general extra-territorial effect. However, we still consider it prudent for employers to take steps to protect employees who are travelling for business overseas for the following reasons.

First, it is good business sense for employers to prioritise health and safety in the workplace. This is because a safer and healthier workplace will often translate into increased engagement and productivity from workers and result in a corresponding increase in profits for the business. The direct benefits to an employer in implementing sound health and safety practices include reduced sick pay costs and medical compensation claims, fewer production delays and improved worker productivity. Moreover, the indirect benefits to businesses extend to reduced staff absenteeism and turnover, improved corporate reputation and an improvement in worker job satisfaction.

Second, although the Reform Bill's duties and obligations do not necessarily apply to overseas workplaces, there are nevertheless steps which employers can take within New Zealand to protect workers who are about to travel overseas. Because these steps are undertaken within New Zealand, employers may be subject to the jurisdiction of the Reform Bill in such cases.

Finally, employers are likely to have broader legal obligations towards employees on health and safety matters which are distinct to those specifically provided for in the Reform Bill (these are often found in their employment agreements).

## Practicable steps to comply with the Health and Safety Reform Bill

It is important for individuals, especially directors and officers, to understand that they will have a personal obligation to exercise due diligence and keep people safe, and they may be personally liable if they do not.

Below are some practicable steps which entities should take between now and the enactment of the Reform Bill to ensure they are in the best position possible to achieve compliance with the new health and safety regime.

### **Carry out an assessment of your current health and safety management scheme**

Businesses should take the opportunity to assess whether their health and safety systems are still fit for purpose in light of the changes under the Reform Bill.

An assessment should include an evaluation into whether:

- (a) There are any gaps in the existing policies or systems that need to be remedied;
- (b) Individuals who are directors or officers are aware of their duties and have the sufficient knowledge and skills to fulfil their obligations;
- (c) risk and hazard assessments are carried out periodically;
- (d) there are appropriate resources (such as checklists, guidelines and information sheets) available to workers and whether these workers know how and where to find them (including workers located overseas);
- (e) there is a culture where health and safety is supported and promoted through enabling worker participation, resources being allocated to health and safety initiatives and training and information being provided about specific health and safety risks;
- (f) there are mechanisms in place to track health and safety performance through lead and lag indicators; and
- (g) investigation reports are being written up as incidents arise, with legal advice being taken as to both potential liability, but also lessons which can be learned as part of a culture of continuous improvement.

Businesses should also consider their relationships with other stakeholders and enhance co-ordination between them to ensure that the duties under the Reform Bill are being complied with. It will be important to consider whether current consultation arrangements are adequate to allow for consultation with all 'workers' to whom a duty is owed about the risks associated with their work overseas.

Systems should also be in place to identify other PCBUs with whom a duty may be shared and ensure consultation occurs with those other duty-holders (such as host employers overseas) to achieve a co-ordinated approach to managing safety risks applicable to workers based or travelling overseas.

### **Implement or update your business travel policy**

If you engage workers to travel and work in locations overseas, it is best practice to ensure that you have a comprehensive business travel policy which is easily accessible to workers. Specifically, this policy should outline the health and safety obligations that workers and the employing entity owe to each other. Particular attention may need to be paid to:

- **Hazard identification and control procedures:** among other things, these should contemplate risks to workers that are likely to arise when they are travelling or based in overseas jurisdictions (e.g. security, immunisation etc).
- **Training Procedures:** these should be targeted at ensuring the provision of necessary information, instruction and training for workers to understand the particular risks associated with their work, especially if they are required to travel overseas, and the control measures in place to enable them to perform their work safely and in safe conditions.
- **Welfare facilities:** arrangements should be in place to ensure that workers in remote areas or travelling overseas have access to adequate facilities (including access to drinking water, washing and eating facilities).
- **Emergency plans:** should be reviewed to ensure that the business can respond to emergencies involving workers who are not based in the main office or may travel nationally or internationally for work



purposes. This will include evacuation procedures and processes for ensuring access to appropriate medical assistance as required.

- *Procedure for isolated workers:* arrangements should be in place to ensure that workers in locations remote from access to medical assistance are provided with effective means of communication.

A business travel policy should include details around an employer's obligation to book sound accommodation and flights for workers and provide appropriate travel insurance. This policy should also state who the employer's provider is to deliver pre-travel advice and emergency assistance abroad for workers.

Equally, a worker's own health and safety obligations should be set out in this policy. It should be clear to the worker what the employing entity's expectations are regarding their conduct at work while overseas.

We consider that a critical element for managing staff overseas is that the employer makes it clear to workers that they can make their own calls on health and safety matters and the employer will support these decisions so long as they are reasonable.

Overall, understanding the changes in the Reform Bill and implementing them will mean some initial costs to businesses. As with any regulatory change, businesses need to understand the changes and if necessary, adapt their systems. Over time however, the regulatory and system changes are intended to create greater certainty and reduce on-going compliance costs for small and large low-risk businesses, and even make it easier to comply for high risk businesses.

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