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The New Health & Safety At Work Act – What
it may mean for the ESI

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Synopsis

The Government is expected to enact the new Health and Safety legislation contained in the Health and Safety Reform Bill by the end of 2014, to come into effect on the 1st April 2015. The proposed Health and Safety at Work Act is the result of a recommendation from the Independent Taskforce on Workplace Health & Safety, which recommended that Government enact a new workplace health and safety Act based on the Australian Model Law.

The H&S Reform Bill was introduced into Parliament in mid March, and revealed the Government's detailed legislative intent on H&S reform. A discussion paper was also expected to have been released to address the development of five key sets of regulation to be enacted at the same time as the H&S at Work Act. This paper is not yet available. The regulations are for;

- *General Risk and Workplace Management*
- *Worker Representation and Participation*
- *Major Hazard Facilities*
- *Hazardous Substances*
- *Asbestos.*

The new legislation has a number of new terms, additional duties for persons, and places emphasis on risk rather than hazard. The paper describes the essential requirements of the proposed H&S at Work Act. A significant emphasis in the H&S at Work Act will be the duties of officers, including directors of companies.

1. Introduction

The Government has proposed major, system wide, changes to New Zealand's workplace health and safety regulatory framework, following work undertaken by the Independent Taskforce on Workplace Health and Safety. The major changes focus on:

- introducing a new law - the Health and Safety at Work Act – to provide clear, consistent information for business, workers, and government about what they need to do to keep workers and others safe. It is to be based on the Australian model law.
- developing a clear and transparent government-led strategy to reduce workplace harm, with measurable targets.
- targeting risk areas by the regulator WorkSafe New Zealand. WorkSafe will focus on the major areas of harm including high risk sectors (based on numbers of fatalities and serious injuries) and major hazard facilities which have the potential for one-off catastrophic events.
- stronger penalties, more enforcement tools, stronger court powers, new directors' duties.
- occupational health - the government has indicated that this area has previously received little government, media or business attention although they believe that occupational illnesses have significantly worse human and financial impacts than acute-harm incidents. Occupational health impacts arise from a broad range of poorly managed hazards in the workplace. These result in gradual impairment or chronic harm conditions such as cancers and musculoskeletal disorders, and acute harms related to hazardous substance exposures such as poisoning from solvents and pesticides.

- better coordination between government agencies that regulate workplace health and safety. For example ACC and WorkSafe will create a shared programme of workplace injury prevention.
- enhanced worker participation so workers are involved in and consulted on health and safety matters.
- stronger collaboration between government, business, workers and experts - there will be input from business, health and safety professionals and improved worker participation.
- developing capability and knowledge at all levels of the system – workers, managers, health and safety professionals, and WorkSafe, including through the establishment of a new Health and Safety professional body, and a workforce development plan.

The new legislation has been introduced (in mid March) as the Health and Safety Reform Bill. The Health and Safety at Work Act will replace the Health and Safety in Employment Act 1992 from the 1st April 2015. It is based on the Australian Model Work Health and Safety Act and modified where appropriate for the New Zealand context. Australia undertook a thorough process to develop its legislation and New Zealand has taken the opportunity to take advantage of that and to align itself with Australia, the advantages being seen to include:

- it is modern and regarded as robust
- those best placed to manage health and safety in the workplace are tasked with carrying out the duties
- it will facilitate drafting the new legislation and provide guidance for New Zealand in relation to its interpretation
- simplifying workplace health and safety for trans-Tasman business.

The Health and Safety Reform Bill also contains amendments to:

- Accident Compensation Act
- Hazardous Substances and New Organisms Act
- Employment Relations Act
- WorkSafe NZ Act

The Government intends the new law and supporting regulations to be in place by the end of 2014 and to come into force on 1st April 2015.

The Government proposals are intended to achieve a 10% reduction by 2016 (and a 25% reduction by 2020) in work-related fatalities, serious non-fatal injuries and ACC claims requiring more than a week away from work. The government seeks to encourage a culture which believes that health and safety results in increased productivity for businesses because it protects staff, thereby increasing staff reliability and engagement.

This paper uses the Health and Safety Reform Bill (the Bill), presently before the Select Committee, as the reference source for the legislative requirements. In addition, relevant Australian guidance from the Safe Work Australia website has been used.

2. Background to the Reforms

The 19 November 2010 explosion at the Pike River Coal Mine, which resulted in the deaths of 29 workers, highlighted serious weaknesses in New Zealand's workplace health and safety system and indicated ways that the system could be improved to prevent future tragedies.

The government subsequently established a Royal Commission on the Pike River Coal Mine Tragedy (the Royal Commission).

The recommendations of the Royal Commission are applicable not only to the mining industry, but also to the wider health and safety system. They are being implemented by the government, including the establishment of the new Crown Agency, WorkSafe, and a new regulatory regime for mining in New Zealand.

An Independent Taskforce on Workplace Health and Safety (Taskforce) was then established to, among other things, research and evaluate the workplace health and safety system and to recommend a package of measures to achieve a 25% reduction in serious workplace injuries and fatalities by 2020. On 30 April 2013, the Taskforce presented its report to Government.

3. Overview of Key Changes in the Health & Safety Reforms

New levels of responsibility

There are three levels of responsibility under the reforms:

- WorkSafe.
- Company directors and officers, who will have a new, proactive duty of due diligence.
- At a workplace, a person conducting a business or undertaking (PCBU) who will be responsible for the health and safety of workers at the workplace and others affected by the work, so far as is reasonably practicable. This is reviewed in more detail under Specific Changes (section 4.1 below).

Different, broader, approach

There is to be a change from a hazard-based approach to health and safety to a broader risk based approach that has a presumption in favour of safety. This is reviewed in more detail under Specific Changes (section 4.2 below).

Change to standards

The current HSE Act requirement for duty holders to take “all practicable steps” has been changed to a duty to ensure health and safety, so far as is “reasonably practicable”. This is reviewed in more detail under Specific Changes (section 4.3 below).

New duty holders and new duty of due diligence for directors and officers

Directors and officers will be required to take an active interest in health and safety matters and make enquiries as to compliance. This is reviewed in more detail under Specific Changes (section 4.4 below).

Stronger Enforcement and Increased Penalties

The enforcement and offence provisions provide WorkSafe inspectors and the courts with some new and stronger powers to enforce the legislation. Maximum fines and imprisonment durations are increased. Both are reviewed in more detail under Specific Changes (section 4.5 below).

Increased worker participation

There will be more opportunities for workers to participate in health and safety and a framework introduced which supports this. This is reviewed in more detail under Specific Changes (section 4.6 below).

WorkSafe to manage hazardous substances

Regulation of workplace hazardous substances use will be carried out by WorkSafe and will be governed by the Health and Safety at Work Act. This is reviewed in more detail under Specific Changes (section 4.7 below).

4. Specific Changes

4.1 PCBUs/Workers

The intention under the Bill is to allocate duties to those people who are in the best position to control risks to health and safety, as appropriate to their role in the workplace.

The main duty holder under the Bill is a "person conducting a business or undertaking" (PCBU). Whether a person conducts a business or undertaking is a question of fact to be determined in the circumstances of each case. It is a broad concept and is meant to cover a broad range of modern working arrangements, including relationships between those in control and those who are affected by that control.

A PCBU may conduct a business or undertaking alone or with others. The business or undertaking can operate for profit or not-for-profit. There may be multiple businesses or undertakings, and therefore multiple PCBUs, involved in or carrying out work at the same location or on the same project. A PCBU can be a corporation, an association, a partnership or sole trader.

The definition of a PCBU focuses on the work arrangements and the relationships to carry out the work. So, duties of a PCBU will extend to contractors, subcontractors, employees and volunteers. Each PCBU must supervise and monitor the health and safety performance of the parties beneath them in the chain. Under the Bill, the PCBU also owes a duty to other people affected by the work being done. Some examples of a PCBU's duties or obligations which are specified in the Bill are:

- duty to manage risk;
- duty to consult other duty holders;
- duty of care;
- reporting notifiable incidents;
- consulting with workers;
- ensuring compliance with notices issued;
- ensuring the provision of training and instruction to workers about work health and safety; and
- ensuring that health and safety representatives receive their entitlements for training.

The Bill defines and uses the term 'worker'. A worker includes anyone who carries out work for a PCBU, such as:

- an employee
- a contractor or sub-contractor
- an employee of a contractor or sub-contractor
- an employee of a labour hire company assigned to work for the PCBU
- an apprentice or trainee
- a student gaining work experience
- an outworker
- a volunteer.

Note that a person can be a PCBU **and** a worker if that person carries out work for another PCBU.

4.2 Risk-Based Approach

While the Independent Taskforce suggested that there may be little difference in practice between risk-based and hazard-based approaches as hazards give rise to risk, and those risks should be controlled to as low a level as is reasonably practicable, the key difference in approach appears to be that in making risk-mitigation decisions, regard should be given to the likelihood and consequences of an adverse event occurring, and both the benefits and costs of mitigation. The HSE Act has an approach to health and safety which focuses on “hazards” and taking steps to identify hazards, and control and manage significant hazards in the workplace.

The Independent Taskforce recommended that the regulatory framework should be made explicitly risk based. So, while it recognised that a test like the existing ‘all practicable steps’ should be retained, it should provide maximum certainty and it should also incorporate the concept of reasonableness based on a risk assessment and cost-benefit analysis. The Taskforce believes that this will create a presumption in favour of the highest level of protecting against harm.

The Bill has a “risk-based” approach, with emphasis on eliminating risk, and if not reasonably practicable to do so, then to minimise the risk. Obviously for there to be a risk, there has to be a hazard, and if the hazard is eliminated then the risk is eliminated. Should this not be feasible then the likelihood and consequence must be minimised. Note that this is similar to ‘minimise’ under the HSE Act, but the emphasis is on the risk, and PPE is not specifically referred to.

The cost of further controlling the risk takes precedence only when the cost of that control is ‘grossly disproportionate’ to the risk.

The risk management process typically includes the following steps:

- Identifying the hazards
- Identifying the associated risk (i.e. the potential of the hazard to cause harm or serious harm)
- Assessment of the risk, including the likelihood and consequences and giving each a priority for rectifying it
- Controlling the risk using probably similar measures to those that currently exist under the Health and Safety in Employment Act, e.g. elimination, substitution, isolation and the use of specific types of controls, such as engineering controls, administrative controls, using PPE
- Considering why the next level of risk control is not used, including an assessment of the cost of using it
- Documenting the process followed to provide surety that the measures selected are being implemented, as well as being implemented as envisaged. It may also assist at some future stage to demonstrate to the regulator or court that an organisation has actively sought to manage risks and ensure safety at the workplace, especially if the records show the hazards, associated risks and what controls the organisation has put in place.

- Monitoring and review are important as a means of evaluating the effect and effectiveness of the selected control and any changes necessary as a result.

4.3 Change to Standard of “reasonably practicable”

One of the purposes of the Bill is to “secure” workplace safety (i.e. achieving it or ensuring it is achieved), rather than simply “promoting” it (i.e. encouraging it), as in the HSE Act.

The Bill prescribes a standard requiring duty holders to ensure health and safety “as far as reasonably practicable” to secure a safe workplace. The Bill contains a definition of “reasonably practicable” and has a mandatory list of factors (including cost-related factors) to take into account. A guiding principle of the Bill is that all people are given the highest level of protection against harm to their health, safety and welfare arising from hazards and risks arising from work, so far as is reasonably practicable.

The term ‘reasonably practicable’ is an objective standard¹ and defined as what could reasonably be done at a particular time to ensure health and safety measures are in place. There is a requirement to weigh up all relevant matters including:

- the likelihood of a hazard or risk occurring (in essence the probability of a person being exposed to harm)
- the degree of harm that might result if the hazard or risk occurred (the potential seriousness of injury or harm)
- what the person concerned knows, or ought to reasonably know, about the hazard or risk and ways of eliminating or minimising it
- 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 the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

‘As far as reasonably practicable’ is broadly similar to ‘all practicable steps’, but a duty holder must first consider what can be done—that is, what is possible in the circumstances for ensuring health and safety. They must then consider whether it is reasonable in the circumstances to do all that is possible.

To identify what would be reasonably practicable to do in any given situation, all of the relevant matters must be taken into account and a balance achieved that will provide the highest level of protection that is both possible and reasonable in the circumstances. No single matter determines what is or was at a particular time reasonably practicable to be done to ensure health and safety. Further, the degree of control of the duty holder is also taken into account, so that compliance is to the extent that the duty holder has the capacity to influence and control relevant matters.

The Australian fact sheet and guide to the Act states that a risk management process helps to determine what is reasonably practicable. (Available at

¹ “Reasonably practicable” is determined objectively so that a duty holder must meet the standard of behaviour expected of a reasonable person in the duty holder’s position and who is required to comply with the same duty. Courts will look at what was reasonably foreseeable by someone in the position of the duty holder at the particular time.

With respect to the matter of cost, the Bill does not indicate whether the cost is limited to that borne by the duty holder, or whether it includes that borne by third parties, e.g. the cost of loss of electricity supply.

4.4 New duty holders and new due diligence duty and liability

(a) New Duty Holders:

A new focus is placed on corporate governance and those in senior positions who make decisions and influence an organisation's policies, finances, systems and activities. Directors and officers health and safety responsibilities will reflect their statutory responsibilities for good governance, and be similar to existing fiduciary duties which directors and officers have to other stakeholders. The expectations are that directors and officers must take active steps to manage health and safety in the organisation, including the following:

- be sufficiently familiar with the operations of the business to be able to actively govern health and safety matters
- ensure that the organisation has an appropriate health and safety management plan
- ensure that the plan is satisfactory and reviewed regularly
- provide adequate resources and time for the plan to be put in place
- obtain external, independent, audit of the effectiveness of that plan.

Directors and officers should familiarise themselves with what they will have to do under the proposed Act. It is worth noting, in this respect, the *Good Governance Practices Guideline for Managing Health and Safety Risks*² (**Guideline**) which was developed jointly by MBIE and the Institute of Directors with input from employer and employee groups. The Guideline applies not only to directors of a company but to all members of governing bodies including directors, trustees and councillors of organisations of all types and sizes - and includes voluntary organisations. The Guideline sets out both directors' and management responsibilities and contains a checklist of recommended actions for directors.

Whilst the Guideline has no statutory effect and is not mandatory, it is expected that it is likely to be used by the regulator and courts as evidence of good practices.

(b) New Due Diligence Duty

The Bill provides a new due diligence duty, which means that those in governance roles must proactively manage workplace health and safety. An officer will be required to take reasonable steps to understand the business health and safety risks and hazards, and ensure that adequate resources and information, compliance and verification processes are in place.

² The purpose of this Guideline is to provide advice on health and safety governance and to:

- a. Demonstrate how directors can influence health and safety performance
- b. Provide a framework for how directors can lead, plan, review and improve health and safety
- c. Assist directors to identify whether their health and safety management systems are of a standard and quality that is effective in minimising risk
- d. Encourage directors to create strong, objective lines of reporting and communication to and from the board.

The due diligence duty will be owed by directors, chief executives and others in governance roles (essentially the company officers).

The due diligence duty will be commensurate with the designated role. So, for directors, it is likely to include at least some of those recommended actions in the Guideline. Accordingly, the director or person with the designated role must take reasonable steps to familiarise themselves with the business and its activities, operations and associated risks and hazards and ensure that the business complies with its duties.

(c) Liability changes

Under the HSE Act, directors, officers and agents are liable only if they have participated in, contributed to, or acquiesced in any failure of the company to comply with the Act. This position changes under the Bill, so that the due diligence duty is individual to the officer and the officer cannot be held personally liable if it has exercised its due diligence duty, regardless of the conduct of the PCBU or other officers.

However, non-compliance with the due diligence duty could result in prosecution and exposure to a fine and imprisonment if convicted.

4.5 Stronger Enforcement and Increased Penalties³

The Bill contains significant maximum penalty level increases⁴, and provides:

- for reckless conduct offences, the maximum penalty for a PCBU or an officer of a PCBU is \$600,000 or five years' imprisonment, or both. For a body corporate, it is \$3 million;
- for failure to comply with health and safety duties exposing an individual to serious risk offences, the maximum fine for a PCBU or an officer of a PCBU is \$300,000, and for a body corporate is \$1.5 million; and
- for general failure to comply with health and safety duties, the maximum fine for a PCBU or an officer of a PCBU is \$100,000, and for a body corporate is \$500,000.

As well as imposing a penalty, courts may impose alternative remedies such as:

- adverse publicity orders
- restoration orders
- work health and safety project orders
- court-ordered enforceable undertakings
- injunctions
- training orders.

³ The government is still considering the Taskforce recommendation to extend the corporate manslaughter offence and the general corporate liability framework.

⁴ The Health and Safety in Employment Act currently provides: an offence generally equivalent to category 1 carries a maximum fine of \$500,000 and 2 years' imprisonment or both. Conduct contravening categories 2 or 3 carries a maximum fine of \$250,000. These fines apply to both individuals and companies.

4.6 Worker Participation

A number of measures are introduced in the Bill to support worker participation, including:

- specific obligations on employers
- expanded powers and responsibilities for H&S representatives
- protections for workers who raise H&S issues, and
- a requirement that all workplaces must have worker participation systems appropriate to their size.

The Bill;

- requires PCBUs to engage with workers on matters relating to work health and safety:
- requires PCBUs to have practices that provide reasonable opportunities for workers to participate in improving work health and safety:
- requires the election of health and safety representatives and the establishment of health and safety committees, but only if—
 - workers request it; or
 - a PCBU initiates it:
- specifies the functions and powers of health and safety representatives and functions of health and safety committees:
- allows trained health and safety representatives to issue provisional improvement notices:
- provides the right for a worker to cease unsafe work and the right of trained health and safety representatives to direct the cessation of unsafe work:
- prohibits adverse, coercive, or misleading conduct in respect of work health and safety, and provides for offences and civil actions in respect of such conduct:
- specifies how issues relating to work health and safety must be dealt with by the parties to the issue.

In relation to all places of work:

- workers may have health and safety representatives if they wish and the duty holder must consult with them, provide time off for training, pay for training and to undertake their role, and give them information
- powers and functions for representatives and committees are specified, including the powers for trained health and safety representatives to direct unsafe work to cease and issue provisional improvement notices to an employer requiring them to address any health and safety issue
- workers may have a health and safety committee, the PCBU must consult the committee, allow the committee time to perform its role, and give the committee information.

4.7 Management of Hazardous Substances (HSNO)

The Taskforce indicated that the HSNO regime is complex and confusing for users of hazardous substances and for regulatory decision-makers, the legislation is confusing and difficult to apply, and keeping up-to-date with the requirements is difficult. The HSNO legislation is very technical and complex and the regulations have not been kept up-to-date. Accordingly, there are a number of overlapping, redundant and out of date provisions.

The Taskforce proposed that responsibility for regulation concerning the use of hazardous substances that affect health and safety in the workplace move to the new Act and be enforced by WorkSafe, and the Bill contains provisions for this. Other matters relating to hazardous substances (e.g. approving their importation and manufacture, classification) will continue under the Hazardous Substances and New Organisms Act 1996 (HSNO Act).

Changes are also to be made to simplify and improve the HSNO regime for hazardous substances, make it clearer and easier for business to comply, and include simplified controls to improve existing communication of safety requirements to users.

Businesses introducing hazardous substances will continue to work under the HSNO regime and deal with the Environmental Protection Authority for approval of and compliance with the requirements.

5. Issues

Issues of concern with the Bill include the following. These matters were raised with the Select Committee considering the Bill.

5.1 Definition of Workplace

The definition of a workplace is that it is a place where work is carried out. The guidance referred to for interpreting the Bill advises that the intent is that there is no time criteria applicable to the workplace, i.e. the place can be a workplace even when work is not being carried out.

The application of this meaning to ESI assets in public places needs careful consideration and clarification, as it is possible that once a place is a workplace it is always a workplace. This interpretation would cause difficulty for ESI assets located in public places such as poles, towers, roadways etc.

5.2 Definition of Risk

The Bill defines the term 'risk', whereas the Australian Model Act does not. In the Bill the term is frequently used, but in a range of contexts, with only one context defined.

6. Regulations

A discussion paper outlining the requirements of five sets of regulations was due to be released at the same time as the Bill was introduced but this was not achieved. The paper is expected in late May and will cover;

- General Risk and Workplace Management
- Worker Representation and Participation
- Major Hazard Facilities
- Hazardous Substances
- Asbestos.

The above regulations are also expected to be in force on 1st April 2015.

Other regulations currently existing under the HSE Act will become regulations under the H&S at Work Act, and will then be reviewed as time allows.

7. Conclusions

The new Health and Safety at Work Act will be in force from the 1st April 2015, along with amendments to key legislation, including the HSNO Act. The new Act will establish a more detailed and potentially more onerous health and safety regime, although those who are managing health and safety at best practice levels should not find much difference.

References:

This paper is a review of the paper titled *Overview of Proposals for Reform of NZ's Health and Safety Regulatory Framework* presented to the EEA Safety Workshop Sept 2013.

Safe Work Australia website (www.safeworkaustralia.gov.au/sites/SWA) provides guidance on the application of the Model WHS law.