

Health & Safety Reform Bill 2014

Summary and Practical Guidelines for Senior Management

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A little history

- Pike River Tragedy
- Forestry Industry
- Union Pressure
- ACC
- Employers seen to treat Health and Safety as a “box-ticking exercise”

Current Status

- Based on the Australian legislation
- First reading
- Currently Before a Select Committee
- Expected to be passed in late 2015 and in force thereafter

Employers vs PCBUs – Section 13

- A key feature of the new regime is the very legal sounding “Person Conducting a Business or Undertaking” or PCBU.
- A person, group or company will be a PCBU whether the person conducts a business or undertaking alone or with others, regardless of whether or not the business or undertaking is conducted for profit or gain.
- A PCBU does not include workers, a volunteer association without employees or a homeowner employing people to do residential work.
- Management companies will certainly be a PCBU.

Employers vs PCBU's ctd.

- But what does it actually mean?
- Wide ranging new coverage – more than just “employers”.
- Examples:
 - Employers;
 - Those who manage or control a workplace;
 - Those who design, manufacture or supply plant, substances or structures
 - Contractors;
 - Trusts;
 - Partnerships;
 - Self employed people;

Employees vs Workers – Section 14

- “Workers” carry out work in any capacity for a PCBU, including:
 - Employees;
 - Contractors or subcontractors;
 - Employees of contractors or subcontractors;
 - Temporary labour;
 - Apprentices or trainees;
 - Volunteers
- Workers also have duties under the new law – to take reasonable care for their health and safety and that of others. They must also cooperate and comply with the PCBU’s reasonable instructions and policies.

Core Duties

- PCBU's must ensure, so far as is reasonably practicable, that the health and safety of workers and any other persons is not put at risk from work carried out as part of the conduct of the PCBU's business.
- Reasonably practicability requires weighing up a number of factors including:
 - The likelihood of a hazard or risk eventuating;
 - The degree of harm that might result;
 - What the PCBU's knows or ought reasonably to know about hazards and risks which exist;
 - The availability and suitability of ways to eliminate or minimise the risks; and
 - The cost of the controls.
- Rule of Thumb - The more dangerous/likely the hazard or risk is, the more effort/cost you need to put in to deal with it.
- Duty to notify Worksafe of certain events by the fastest means possible in the circumstances.

Duty to Manage Risk

Under the Bill a duty imposed on a person to ensure health and safety requires the person –

- To eliminate risks to health and safety, so far as is reasonably practicable; and
- If it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

Duty to engage

- There are much wider duties requiring PCBUs to engage with workers.
- The list of occasions where engagement is required is sizeable. A helpful rule of thumb – if you are making a decision about health and safety, hazards, or an incident occurs, then you should be engaging with all your affected employees. Examples of engagement include:
 - Providing employees with information about Hazard Identification and taking account of feedback relating to decisions about eliminating or minimising risk;
 - Engaging with employees when developing health & safety policies;
 - Engaging with employees when you upgrade/add any facilities;
 - Providing information to employees if an injury/near-miss occurs.
- Employees can engage through a representative, or request that the PCBU establish a working group for more effective discussion.

Practical Steps – Worker Engagement

- A good Health and Safety programme will have processes which govern how and when a PCBU will engage with workers. It will also set out a clear structure and pathways for workers to provide feedback. This is critical to avoid the time and expense incurred in taking an ad hoc approach.
- Many employers have shown concern about the increased role and powers of “Health and Safety Representatives”. For large employers, dealing with just one person, rather than the entire staff, can be a helpful time-saving mechanism. Your Engagement Process can be tailored to the individual needs of the PCBU.

Personal Liability - Officers

- Officers of a PCBU have a legal requirement to undertake due diligence to ensure that the PCBU is complying with its duties.
- An 'officer' if the PCBU is a company means a director or person occupying the position of a director. The term also includes any other person who makes decisions affecting the whole or a substantial part of the business e.g a CEO.
- If the PCBU is a body corporate or an unincorporated body, an officer is "any person occupying a position in the body that is comparable with that of a director of a company".
- Practically, meeting this duty includes:
 - a) keeping up-to-date with knowledge of work health and safety matters; and
 - b) understanding the hazards and risks associated with the business; and
 - c) ensuring that **appropriate resources** and **processes** are available and used to eliminate or minimise risks to health and safety; and
 - d) ensuring 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; and
 - e) ensuring that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
 - f) verifying the provision and use of the resources and processes referred to in paragraphs (c) to (e).

This may require:

- Regular site visits by directors and senior managers
- Training in health and safety laws
- Ensuring regular reporting on health and safety matters
- Ensuring the PCBU has a fit-for-purpose and effective Health and Safety programme.
- Health and safety being an agenda item for Board/Management meetings and possibly having presentations to the Board's Health and Safety representatives.

Penalties

- One way for the Government to show that they are serious about raising the standard of New Zealand's Health & Safety record is to give the new provisions some real teeth.
- Tiered system of Penalties with significant increase in maximum liability.
- For most serious offending (reckless breaches of the duties):
 - Corporate liability up to **\$3,000,000**
 - Individual liability up to **\$600,000** and/or **5 years imprisonment**
- The burden of proof is on the PCBU or officer to show that obligations were met – a good incentive to keep good records.

Cases – Corporate and Personal Penalties

- Naturally, as this amendment is yet to come into force, New Zealand does not yet have any cases demonstrating its coverage.
- Recent Australian cases:
 - Barro Group Pty Ltd was fined \$650,000 after a contractor was fatally injured while conducting routine maintenance on a rock-crusher.
 - Orbit Drilling Pty Ltd was fined \$750,000 when an employee truck driver died after losing control of his vehicle on a steep slope;
 - Kevin Andrews was personally fined \$50,000 and to pay a further \$50,000 in costs after bullying and verbally abusing staff over a 2 year period.
 - Alex Del Brocco was the director and had control of the site of a laundry company which inadequately guarded its machines leading to the death of an employee. He was personally fined \$65,000. The company was fined \$750,000.

Body Corporate Liability

- In a situation with Owners, Management Companies and a Body Corporate – who owes the duties?
- In Australia there are exceptions for Bodies Corporate which manage units for residential use only, and which do not employ any workers.
- In New Zealand there are no such exceptions (yet).
- Currently, both the Body Corporate and the Owners owe duties in respect of the maintenance and repair of various building elements which takes into account Health and Safety Issues (ss 80 and 138 Unit Titles Act 2010).
- Where workers are engaged to carry out maintenance , cleaning or administrative work, the Body Corporate engaging those workers will owe duties to those workers and people affected by their actions.
- The contractor too will be a PCBU and owe duties to its workers. The duties owed by both PCBU's are concurrent.
- The chair and Committee members of the Body Corporate are likely to be officers and have a “due diligence” duty.

Timeshare Managers

- A resort or collection of time share units used as managed accommodation will be a business making a management company a PCBU;
- Individual unit owners participating in a pooling agreement might also be considered PCBU's;
- Managers of corporate resort management companies will be “officers” and have due diligence duties;

Resort managers will have:

- A duty to ensure the health and safety of workers engaged by it;
- A duty to ensure so far as reasonably practicable that other persons are not put at risk from work carried out as part of the resort management business eg users of the resort

Issues to consider - Timeshares

Section 27 of the Bill requires parties with a duty in relation to the same matter to so far as reasonably practicable:

- Consult;
- Co-operate with; and
- Co-ordinate activities with all other persons with the same duty.

In practice

Management Company will need its own health & safety programme to identify and control hazards associated with its operation.

Management Company will need to be aware of the controls of other PCBU's in place for hazards that the other PCBU has a duty to control eg Body Corporate's health & safety risk control policy and procedures.

Issues to consider - Timeshares continued

Management Company will need to:

- be aware of controls in place under Body Corporate procedures
- assess adequacy of these
- If reasonably practicable, ensure compliance by Body Corporate and its staff/contractors

Management Company hiring in contractors will need to:

- (a) induct any contractors regarding its health & safety procedures to ensure knowledge of hazards and the controls to manage these
- (b) Ensure the contractor has its own effective health & safety policies.

So how do we comply?

- Body Corporates and Management Companies will need in place a programme that so far as reasonably practicable ensures the health and safety of workers at a resort and people using the resort
- We can provide a programme which contains systems that will go a long way to ensuring compliance. However, each PCBU is unique and will require different steps as a result.
- Compliance requires engagement with workers and consultation with other duty holders on the same site. Only you know the idiosyncrasies of your business and what areas are likely to require formal policies and procedures. Examples include:
 - Emergency procedures;
 - Procedures to ensure safety of buildings, services to units and fixtures, furniture and equipment in units;
 - Policies and procedures for safe condition and use of pools and other facilities;
 - Bullying Policy;
 - Stress Policy;
 - Workplace Visitor Policy.
- The potential for written policies is endless. While “more is better” as far as compliance goes, we can assist you with tailored advice as to whether a particular area needs special attention.

Questions?

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Disclaimer

The information contained in these slides and the presentation is of a general nature and is not intended as legal advice. Some of the laws mentioned above are yet to be enacted and may change. It is important that you seek legal advice that is specific to your circumstances.