BUDDLE FINDLAY

# Fall protection by regulation – does the law do enough?

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For some time, working at height and preventing falls has been identified as a serious area of concern in New Zealand. In 2011 it became a priority for MBIE, who started the Preventing Falls from Height Project to raise awareness about working safely at height and to reduce the effects of falls.

According to MBIE, in 2012 falls from height cost the construction sector an estimated $24 million, not to mention the significant physical and emotional impact on the victims and their families. The project was accompanied by targeted enforcement, which resulted in over 1,000 enforcement steps being taken in 2012 for non-compliance while working at heights (in the form of written warnings and improvement, infringement and prohibition notices).

While the statistics supported the need for such a project, it may be questioned why the regulatory regime had not prevented the situation from becoming so bad. As outlined below, the legal responsibilities on employers and workers to prevent falls are non-specific, and simply stem from an employer's duty to take all practicable steps to provide a safe workplace and an employee's corresponding duty to ensure their own safety. This raises the question whether more regulation in this area would result in fewer falls. As New Zealand is shortly to follow the Australian Model Law, we suggest that a similar degree of prescription in New Zealand to that in Australia is likely to reduce the injury toll.

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## What is working at heights?

Working at height is defined in MBIE's *Best Practices Guidelines for Working at Height in New Zealand* as:

Working at a place, above or below ground level, where a person could be injured if they fell from that place – that is, falling from one level to another…. Work at height does not include a fall at the same level, such as falling or slipping on ground level.

It spans many different industries, including construction, forestry, domestic tradesman and aerial and satellite dish installers. However, the extent of the risk of working at height can vary greatly depending upon many different factors, such as the height worked at, the surface worked on (including its pitch), the duration of the work (which could be as short as a few minutes) and weather conditions. These factors need to be balanced against the cost, convenience and practicability of providing fall elimination or prevention controls.

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## What are the current legal obligations?

Somewhat surprisingly given the prevalence of working at heights across many different industries, the current regulatory regime contains little prescription over working at heights.

**HSEA**

The Health and Safety in Employment Act 1992 (HSEA) contains the basic obligation on employers to take all practicable steps to provide a safe place of work and ensure safe work practice. Undoubtedly this duty, together with the other general duties on persons in control of a place of work, self-employed persons, principals and contractors, includes ensuring the safety of workers working at height and exposed to the risk of a fall. The hazards created from working at height also fall to be identified, and then eliminated, minimised or isolated, as part of an employer's usual hazard management processes. However, neither the HSEA nor the regulations made under it prescribe how this might occur.

Of course, employees are also under a duty to take all practicable steps to ensure their own safety while at work, including using the protective equipment provided, and that they cause no harm to others. However, it is still primarily the employer's responsibility to ensure that appropriate systems and procedures are developed and implemented for protecting people from the hazards associated with working at height.

**Regulations**

Beyond the Act, only the Health and Safety in Employment Regulations 1995 (Regulations) refer expressly to working at heights. But the Regulations are only concerned with heights of more than three metres, suggesting that this limit has some "magic" to it when it does not. Regulation 21 states that every employer shall take all practicable steps to ensure that where any employee may fall more than three metres, there are means provided to prevent the employee from falling and that those means are suitable for the purpose for which they are to be used. This regulation has been described as "odd" by at least one Judge who held that employers in all cases, regardless of height, must assess whether it is reasonable to provide fall protection (see *Dept of Labour v Hassett t/a Hassett Builders* [2009] DCR 398).

The only other relevant rule is regulation 22. This provides that if construction work cannot be carried out safely without scaffolding, then scaffolding that is suitable, properly constructed, adequately strong and of sufficient amount must be provided.

The dearth of regulation means that duty holders must themselves interpret and apply their general obligations when working at heights, which unfortunately has contributed to the development of varying practices across different industries, and sometimes within them.

**Guidelines**

Perhaps as an attempt to address the lack of specific regulation, in 2012, MBIE (as part of the Height Project) released the *Best Practice Guidelines for Working at Height* as well as the *Best Practice Guidelines for Working on Roofs*. These are to be read with more tailored information for specific industries available on WorkSafe NZ's website.

While the uninitiated may find it difficult to navigate all of these guidelines, brochures and factsheets, they do provide some much needed detailed assistance when working at heights and abiding by them will assist with compliance and in defending any enforcement action taken by WorkSafe NZ. But, like any guidelines, they are not binding on duty holders and they may choose not to follow them. In addition, the courts may also deviate from them, for example, if the expert evidence is to the contrary.

**Offences and penalties**

Under the HSEA, if a person acts (or fails to act) knowing that serious harm is reasonably likely to result, then they are liable on conviction and imprisonment of up to two years and/or a fine of up to $500,000. However, given this high threshold, prosecutions are usually brought under the lesser offence of a failure to comply with a duty, which carries a fine of up to $250,000. Criminal liability may also be imposed on directors, officers and employees who directed, acquiesced or participated in an organisation's failure.

A prosecution may be brought even though no accident has occurred, which will be seen increasing often as part of WorkSafe NZ's reinvigorated approach. For example, in July 2014, a roofing company was convicted and fined $15,000 for failing to ensure it had adequate measures in place (such as scaffolding and edge protection) to protect its workers from the risk of falling from a second-storey roof.

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## The position over the ditch

Compared to our Regulations, the Australian Model Regulations are more comprehensive. Falls are identified as "hazardous work" and specific control measures must be adopted, where these are reasonably practicable.

The Australian regulations require the duty holder to manage the risks of a fall from one level to another that is reasonably likely to cause injury. This includes the risk of a fall in or on an elevated workplace, near an opening or an edge, on a surface, or any other place from which a person could fall. To avoid or eliminate the risk, the duty holder must ensure, so far as is reasonably practicable, that any work involving that risk is carried out on the ground or on "solid construction", which means an area that has:

- A surface structurally capable of supporting people or things located or placed on it
- Barriers around its perimeter and any openings to prevent a fall
- An even and readily negotiable surface and gradient
- A safe means of entry and exit.

However, the Australian regulations prescribe that if the risk cannot be eliminated, it must be minimised by providing adequate protection from falls, such as by providing fall prevention devices, work positioning systems or fall arrest systems. Definitions and explanations of these terms are also included. Fall prevention devices include secure fences, edge protection, working platforms and covers. Work positioning systems enable a person to be positioned and safely supported at a location for the duration of the work being carried out. Examples of fall arrest systems include industrial safety nets, catch platforms and safety harness systems (other than a system that relies entirely on a restraint technique system).

Specific criminal offences and fines are prescribed for breaches of each of the Australian regulations, which further enhance their importance and enforceability.

## Where to from here?

While some may balk at this level of prescription, the inadequacies in New Zealand's health and safety regulation have been laid all too bare by Pike River. The thinking underlying the current reforms is that more comprehensive regulation is more likely to result in compliance and better behaviours by duty-holders. Assuming that is right, more prescriptive regulation of working at heights should result in fewer falls. Therefore, we are likely to see a similar degree of prescription in New Zealand as in Australia when our corresponding "hazardous work" regulations come into force in April 2017 (as currently planned).

In October 2013, SafeWork Australia said that after a comparison with figures from 20 years ago, the number of workers who die each year due to a fall from height had halved. Hopefully New Zealand will soon be able to boast similar statistics.

*This article was written by Sherridan Cook for the ISN Magazine (September/October 2014 Issue).*

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