

Legal update - Blueprint for workplace health and safety announced

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On Wednesday 7 August 2013, the Government announced a package of reforms that represent the most significant changes to our workplace health and safety system since the Health and Safety in Employment Act 1992 (HSEA) was introduced over 20 years ago.

The key changes include an overhaul of the law, additional funding for health and safety, and better coordination between government agencies. With a new Bill expected in December 2013, it is imperative for employers to learn what these reforms may mean for them.

The reforms are the Government's response to the recommendations issued by the Independent Taskforce on Workplace Health and Safety (Taskforce), referred to in our [July 2013 update](#). With the Royal Commission's report on the Pike River disaster as the catalyst, the Taskforce was set up in April 2012 to advise the Government on ways to achieve its goal – to reduce the rate of workplace fatalities and serious injuries by at least 25 per cent by 2020.

The reform package is described in 'Working Safer: a blueprint for health and safety at work'. It broadly accepts the Taskforce's recommendations and the reforms will largely be led by the soon to be established, stand-alone, workplace health and safety Crown agent, WorkSafe New Zealand.

What was wrong with the HSEA framework?

The Taskforce found that there was no single critical factor that has led to New Zealand's poor workplace health and safety performance and therefore there is no one solution. Instead, there were significant weaknesses across the system and no drivers for improvement. The performance-based, self-management approach that we currently have under the HSEA is still appropriate, but we have not been implementing it in the correct way.

The Government considers that the package of reforms will refresh our approach to health and safety. The vision is to "work smarter, target risk and work together to ultimately work safer" and the different reforms fall under each of these three categories in the blueprint document.

What does the package of reforms include?

- Replace the current HSEA with the Health and Safety at Work Act, based on current Australian law. The new Act and associated regulations are expected to be in place by the end of 2014
- Develop a government-led strategy to reduce workplace harm Target high risk areas through WorkSafe New Zealand, which will be operational from December 2013
- Provide for stronger penalties and court powers, more enforcement tools, and new directors' duties (including the due diligence duty explained below). The Minister of Justice is still considering corporate manslaughter and the corporate liability framework generally
- Increase the focus on occupational harm
- Improve coordination between government agencies, for example WorkSafe New Zealand and ACC will create a shared programme of workplace injury prevention
- Increase worker participation, involvement and consultation
- Increase collaboration between Government, business, workers and experts
- Develop capability and knowledge at all levels.

These changes are intended to deliver:

- Strengthened Government leadership and collaboration between agencies
- A greater focus on addressing acute, chronic and catastrophic harm in high risk sectors and major hazard facilities

- A balanced and proportionate system for small to large, low to high risk businesses
- A well resourced regulator with a firm regulatory stance focused on the areas of most risk
- Robust data, monitoring, reporting, analysis and evaluation of the system.

Key changes for employers

Responsibility

The new law would change the definition of who is responsible for workplace health and safety. Under it, the definition of a duty holder would be changed to "a person conducting a business or undertaking" (PCBU – which in Australia they refer to as "peekaboo"). A PCBU must ensure, so far as is "reasonably practicable", the health and safety of workers and others affected by the work. The "reasonably practicable" test takes account of risks and other circumstances but is intended to be different to the current "all practicable steps" test.

There may be multiple PCBUs involved in work at the same location and they must work together to meet their workplace health and safety obligations. For example, there are many PCBUs involved in a typical construction industry supply chain (construction firm, principal contractor, contractor, sub-contractor, worker) and all of the members of the chain, except the worker, are a PCBU. Each PCBU in the chain must manage the health and safety of those below it, through supervision and monitoring.

Due diligence governance and senior management

Currently, individuals are liable for the failure of a body corporate if they directed, authorised, assented to, acquiesced in, or participated in, the failure.

The new law would extend this and create a positive due diligence duty for "officers" to proactively manage health and safety in the workplace. Increasing personal responsibility and liability is seen as the most effective way of improving New Zealand's health and safety culture and outcomes.

The due diligence duty is likely to extend to directors, chief executives and other senior managers, but won't apply to people acting on a voluntary basis who only receive out-of-pocket expenses (for example, members of a school board of trustees or unpaid company directors).

The duty will be personal, and if an officer has acted with due diligence, he or she will not be held liable for the conduct of other officers or the PCBU. The expectation is that officers will take reasonable steps to understand the PCBU's operations and associated hazards. They will ensure that compliant health and safety processes are in place, sufficiently resourced and implemented, and verify the provision and use of the processes and resources.

The duty will probably also not be dependent on there being an incident or accident. In Australia individuals' and organisations' actions can be investigated at any time, and it is not uncommon for improvement notices to be issued or for prosecutions to be taken if they are found to be falling short of due diligence.

Hazardous substances

Controls will be introduced to manage hazardous substances in the workplace, as the current legislation in this area is seen by many as confusing. In the proposed reforms, businesses using hazardous substances would only have to engage with one agency, WorkSafe New Zealand.

Going forward

While these changes are significant, the philosophies contained in our current legislation, such as the current principled performance-based approach and the requirement to take "all practicable steps", will remain the same. The changes are intended to improve the implementation of those philosophies, and the emphasis on increased leadership and collaboration, expected particularly of government, directors and senior managers, reflects this.

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