HEALTH AND SAFETY REFORM BILL: ARE YOU READY?

Introduction

New Zealand has particularly high rates of workplace health and safety fatalities and serious harm injuries, which are abnormally disproportionate, when considering the size of our workforce compared too many other countries.

The Health and Safety Reform Bill (the Bill), introduced last month, is a significant part of the Government’s health and safety reform package designed to help achieve a significant reduction in the above unwanted statistics.

The Bill will replace the Health and Safety in Employment Act 1992 (the Act) and it is expected to be introduced into Parliament at the end of this year and to come into force at the end of 2014.

Background

Health and safety in the workplace has always been a significant part of employment law in New Zealand. Health and safety has recently gained widespread attention in the wake of the Pike River Tragedy. The Royal Commission’s Report on the tragedy was damning of Pike River’s high level officials and the public demanded accountability.

Since the release of the Royal Commission Report in October 2012, the Government has acted quickly and released a number of legal instruments as part of the reform health and safety package. Recently, the Government was forced to take action and introduced a reform package called ‘Working Safer: a blueprint for health and safety at work’.

The Bill is the most recent legal instrument to be released as a part of the reform package. As anticipated, the structure and content of the exposure draft closely follows the Australian Model Work Health and Safety Act and regulations (Model Law). This is a Federal Law to which all but two Australian states have opted into.

The Model law is attractive to New Zealand because it is simply drafted and a modern reflection of health and safety issues and practice (being only finalised in 2011 after a lot of national consultation and international review). New Zealand will be able to draw on the knowledge and jurisprudence developed by Australia in interpreting and applying the Bill.

The Ministry of Business, Innovation and Employment (MBIE) released an exposure draft of the Bill, outlining its key provisions and seeking initial feedback. The exposure draft outlines the first half of the Bill and is divided into three Parts. This article will outline the significant features and changes under each Part.

Part 1 – Preliminary provisions

Purpose

The Bill states the purpose of the new legislation in positive terms, through identifying that workers are to receive the ‘highest level of protection’. This ensures that the safety of workers is to take primacy in interpreting and applying the Bill.
**Duty holders**

A core concept in the Bill is that of ‘a person conducting a business or undertaking’ (PCBU). The PCBU will be the primary duty holder, whose duties will replace those of employers, principals and persons in control and the like under the Act. The definition of PCBU is intentionally wide in order to reflect the wide array of modern working arrangements. The Bill expressly provides that a PCBU will not include workers, volunteer associations or residential workers.

The Bill introduces the concept of ‘Officers’. Officers will include directors, people occupying a position comparable to directors in a body corporate or unincorporated body, and other persons with substantial decision making responsibilities in business. Officers are considered to include Senior Advisors under the Australian Model Law. This is essentially a catch all category imposing a duty on any person involved in making significant decisions. Here, care must be taken to differentiate between a person who is involved in making a decision vs. a person who purely advises on a decision.

**Concepts and Test**

The concept of ‘employee’ in the Act is replaced by ‘worker’ in the Bill. This is a broader concept, which includes contractors, subcontractors and others. Worker was the term used in earlier industrial legislation and it is interesting that the Government has decided to revert back to this concept.

The concept of ‘place of work’ in the Act is replaced by ‘workplace’ in the Bill. The current concept under the Act has led to a lot of litigation and the Bill addresses some of the issues raised by simplifying and broadening the concept. Under the Bill, PCBU’s have an all encompassing obligation to ensure that workers are safe at ‘any place where the worker goes, or is likely to be, while at work’.

The test for duty-holders under the Act, of ‘all practicable steps’, is replaced in the Bill with ‘so far as is reasonably practicable’. The test is framed differently, but encompasses many of the same elements under the Act. The Bill defines that what is ‘reasonably practicable’ will depend on risk, cost and other relevant circumstances. Importantly, the costs involved in eliminating or minimising (but not isolating) the risk must be ‘grossly disproportionate’ to the risk for such measures not to be taken. This places an obligation on PCBU’s to prioritise money for risk elimination and minimisation.

The Act only requires notification of health and safety incidents where there is an accident or ‘serious harm’. The concepts of ‘notifiable injury or illness’, ‘notifiable incident’ and ‘notifiable event’ are defined in the Bill:

- A notifiable injury or illness is where a worker suffers an infection, occupational illness or injury/illness requiring treatment. Importantly, work must be a significant contributing factor to such an injury or illness but it is not exclusively defined under the Bill. As a result, it is unclear what level of injury or illness requires notification.

- A notifiable incident is widely defined in that it is where a person is exposed to ‘serious risk’.

- A notifiable event is a notifiable injury or illness, a notifiable incident or death.

**Part 2 – Health and safety duties**

Part 2 covers duties of care, incident notifications, authorisations and penalties.

**Duties**

The core duty of a PCBU is that they protect the health and safety, so far as is reasonably practicable, of:

- Workers engaged, or caused to be engaged, by the PCBU; and

- Workers whose activities are influenced or directed by the PCBU.
PCBU’s also have a duty to ensure, so far as is reasonably practicable, that the health and safety of others is not put at risk from work carried out. Importantly, the Bill makes it clear that PCBU’s are responsible for workers whose activities are influenced by the PCBU. This is a useful clarification, particularly where there is multiple PCBU’s involved in work on the same project or the same location. In such a situation, each PCBU has to manage and monitor the health and safety performance of the parties beneath them in the chain of work. This demonstrates that more than one PCBU can have the same duty and creates a duty on PCBU’s to consult other PCBU’s. Failure to consult may expose the PCBU to a fine.

Workers and ‘other persons at workplaces’ are also subject to duties under the Bill. The Bill introduces a positive statutory obligation on workers to comply with their PCBU’s instructions and co-operate with their PCBU’s health and safety policies or procedures. Other persons at workplaces are presumed to provide for the health and safety of visitors and the Bill states that such persons must take reasonable care for their own health and safety and comply with the PCBU’s instructions. These duties demonstrate the all encompassing nature of the Bill and ensure that workers, and others alike, must also take responsibility for their own health and safety.

The Bill requires Officers to exercise a duty of due diligence to ensure the PCBU complies with its duties. Officers may be held primarily responsible for a breach of health and safety even if the PCBU is not going to be held responsible. This aims to ensure that those in governance positions will proactively manage health and safety and provides for some much needed accountability. Due diligence requires, among other things, an understanding of the nature of operations, hazards and risks and ensuring that the PCBU implements processes for complying with their duties. Under the Bill, Officers should also be able to verify, i.e. through paperwork, that they have complied with their duty of due diligence.

### Offences and Penalties

The Bill significantly increases the category of offences, with a three-tiered hierarchy being introduced, along with a range of other offending provisions. The Bill then imposes across all three tiers a six-fold increase in fines from the Act.

A summary of the offences and penalties follows:

- **Recklessness**
  - Corporate - $3 million fine;
  - Officer - $600,000.00 fine and/or five years imprisonment;
  - Individual - $300,000.00 fine and/or five years imprisonment.

- **Risk of death/serious injury/illness**
  - Corporate - $1.5 million fine;
  - Officer - $300,000.00 fine;
  - Individual - $150,000.00 fine.

- **Breach of health and safety duty**
  - Corporate - $500,000.00 fine;
  - Officer - $100,000.00 fine;
  - Individual - $50,000.00 fine.
Part 3 – Consultation, Representation and Participation

Part 3 contains worker participation, health and safety representatives and discriminatory, coercive and misleading conduct.

Worker participation practices

The Bill places a heavy emphasis on providing information and consultation. The Bill allows for increased worker participation in health and safety by requiring all PCBU’s to have worker participation practices.

Health and safety representatives

The PCBU may facilitate elections to appoint health and safety representatives. The PCBU must consult these representatives on all health and safety matters, allow them paid time off for training, provide the time and resources necessary to perform their role and give them access to health and safety information. Trained representatives will be empowered to issue provisional improvement notices if they believe someone is breaching health and safety.

Health and safety committees

The Bill requires that workers are to make up at least half of any workplace health and safety committee.

Unsafe work

Employees currently have the right to refuse work that is likely to cause serious harm to themselves. The Bill extends this right to refuse work where it may expose themselves or another to a ‘serious health and safety risk’.

Conclusion

The Bill is a welcome modernisation of health and safety law in New Zealand. It is refreshing in that it is drafted in simple, plain language. It inserts some much needed clarification of concepts that have proven problematic under the Act.

The Bill; however, also provides more onerous duties and greater penalties, which are intended to motivate and ensure that PCBU’s take health and safety seriously, specifically from the top down.

This Bill should result in safer workplaces in New Zealand, something which we would all benefit from.

WORKPLACE LAW TEAM

If you have any queries in respect of the above, or any other workplace law issues, please contact a member of Lane Neave’s Workplace Law Team:

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