



Health & Safety at Work Act 2015 - Part 2 - Officers and Penalties

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Introduction

Following on from last month's Advocate, in this edition we cover the obligations of officers and the potential penalties under the Health and Safety at Work Act 2015 (the "Act").

Officers Obligations

One of the more significant changes to New Zealand's health and safety regime is the due diligence obligation on those in governance.

Section 44 of the Act sets out that officers owe a specific duty of due diligence and will be subject to an increased penalty regime. The new due diligence duty will require those in governance roles to proactively manage workplace health and safety and imposes a positive duty on company officers to exercise due diligence to ensure the person carrying on a business or undertaking ("PCBU") complies with its health and safety obligations.

Section 44(1) imposes a positive duty that "an officer of the PCBU must exercise due diligence to ensure that the PCBU complies" with its duties or obligations under the Act. This was a significant shift in the law; under the Act directors and officers have a stringent duty in relation to health and safety. The health and safety framework supports the positive duty as:

- a. directors and senior management set the direction and provide leadership in health and safety for their organisation, including making resourcing decision;
- b. the language of due diligence is also familiar and consistent with their governance role and their other duties as a director;
- c. the due diligence duty clarifies that the responsibility for the health and safety of workers is part of good governance and cannot be outsourced; and
- d. while health and safety management tasks can be delegated, overall responsibility cannot be. Consequently, directors will no longer be able to turn a blind eye to health and safety information and avoid liability under the new regime.

The duty will only apply to persons who occupy a position in a PCBU that allows them to exercise significant influence over the management of the PCBU. This will normally capture such roles as a chief executive, general manager and operations managers. However, irrespective of the title, the duty will only be imposed on actual rather than perceived control.

Some guidance is provided from Australia in *Brett McKie V Munir Al-Hasani & Kenoss Contractors Pty Ltd (In Liq)* [2015] ACTIC 1 which was heard in Industrial Court of the Australian Capital Territory. Mr Al-Hasani was the Project Manager employed by Kenoss and was charged for breaching his duty as an officer. At first glance, it would appear the role of Project Manager may have had the degree of control necessary to hold Mr Al-Hasani accountable. The Court found that in determining whether Mr Al-Hasani was an officer who was required to exercise due diligence, it had to consider his influence over Kenoss as a whole, rather than the "role in respect to the particular matter in which it was alleged there was a breach of duty" (see paragraphs 38 to 42). The Court concluded that while Mr Al-Hasani had a senior role, there was no evidence that he made or participated in decisions which affected the whole, or a substantial part, of the business (see paragraphs 49 to 51). Accordingly, Mr Al-Hasani was acquitted.

Further assistance is available in the "Good Governance Practices Guideline for Managing Health and Safety Risks", released by the New Zealand Institute of Directors and the Ministry of Business, Innovation and Employment. This Guideline, provides advice and tools for directors to better influence their organisation's health and safety systems through their leadership, strategic decision-making and allocation of resources.

While the Guideline is not a statutory document, indication is it will be taken into account by WorkSafe and the courts in any health and safety enforcement action against directors or officers. Compliance with the Guideline will also increase the likelihood that an organisation and its directors will be seen to have complied with the Act

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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Recommendations are outlined in the Guideline in terms of four key elements:

- a. **Policy and Planning** – includes a recommendation for a board to have a charter setting out its role in leading health and safety within the PCBU, as well as the role of the individual directors;
- b. **Delivery** – it is recommended that directors confirm a clear expectation for the PCBU to have a fit for purpose health and safety management system, and ensure that sufficient resources are available for the development, implementation and maintenance of the system;
- c. **Monitoring** – directors are advised to monitor the health and safety performance of the PCBU and outline clear expectations on what should be reported to the board in recommended timeframes; and
- d. **Review** – director responsibilities include ensuring the board conducts a periodic formal review of health and safety to determine the effectiveness of the system and whether any changes are required and, where needed, directors should ensure the board considers whether an external review is required for an independent opinion.

Boards and directors have had to move beyond a mere "compliance" attitude and adopt a "best practice" approach where health and safety duties are taken seriously and are not a begrudging 'tick in the box' exercise.

Under the due diligence duty, directors and officers are required to:

- a. acquire and keep up-to-date knowledge of work health and safety matters;
- b. gain an understanding of the nature of the operations of the business or undertaking of the PCBU, and generally of the hazards and risks associated with those operations and the controls in place to manage those hazards and risks;
- c. ensure that the PCBU has available for use, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking and verify that they are used; and
- d. ensure that the PCBU has and implements appropriate processes for receiving and responding to information regarding incidents, hazards and risks in a timely way.

During the progress of the Bill into law, it was clarified that in exercising the duty of due diligence, an officer of a PCBU must exercise the care, diligence and skill that a reasonable officer would exercise in the same circumstances. Without limiting the obligation, when assessing the level of care, consideration will be given to the nature of the business or undertaking and the position of the officer and the nature of the responsibilities undertaken by the officer.

Under the Act, directors are required to take a more active and inquisitive role in the planning and implementation of health and safety initiatives to meet their obligations. Directors do not necessarily need to be involved in the implementation of health and safety directives, but they will need to consider what appropriate measures need to be taken by the PCBU and make decisions to verify that those steps are taken. In order to be in a position to make the right decisions, directors will need to keep informed on health and safety matters through reporting from managers and independent experts, where necessary. The definition of "due diligence" shows that the Act contemplates "hands on" involvement from directors and officers. Directors and officers should be able to verify through paperwork that they have complied with their duty of due diligence.

If a director or officer exercises due diligence according to the Act, they will not be liable regardless of the conduct of the PCBU or other officers. However, a failure to comply with this due diligence duty could result in prosecution and a fine, the maximum level of which would be determined by whether or not the failure to exercise this duty exposed a person to a risk of death or serious injury or illness.

A director or officer can face a term of imprisonment. However, this will only be in circumstances where he or she was found to have been reckless as to the risk of death or serious injury or illness. This requires the director or officer to have foreseen the dangerous consequences that could have happened, accompanied with an intention to continue the unsafe conduct or practice regardless.

Penalties

The Act provides for more refined and tailored penalties for actual breaches of the Act through:

- a. a tiered liability regime that significantly increases the maximum penalty levels to a potential maximum of \$3 million for corporates and \$600,000 for individuals;
- b. an increase in the maximum terms of imprisonment from 2 to 5 years, with a higher possibility of imprisonment for officers; and
- c. smaller individualised fines for other specific offences.

Conclusion

Overall, the new Act made significant changes to the law from what was provided under the Health and Safety Act 1992.

It is perhaps trite to say that the Act sought to change a mind-set of viewing health and safety as a compliance issue, to one of good practice and encouraging a culture of safety from workers to officers. It appears however that since the Pike River disaster and the issues that have arisen as a result of the Canterbury earthquakes, PCBU's and workers were already moving towards this goal.

The above provides a brief summary of some of the key changes and we are happy to advise further.