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Fineprint

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The Health and Safety Reform Bill

Be prepared early for significant changes

The Health and Safety Reform Bill heralds the greatest change to health and safety law in over two decades. With the election over, we await the Select Committee Report (due any day) and the continuing passage of the Bill. If you're in business, this article gives you a snapshot of some of the significant proposed changes.

The Bill is due to be enacted by the end of 2014 and to come into effect as early as April 2015, completely replacing the Health & Safety in Employment Act 1992 (HSEA). The Bill's underlying principle is to address New Zealand's poor workplace safety record by providing the *highest* level of protection to workers.

The Bill confirms the government's commitment to reduce death and serious injuries in the workplace by 25% by 2020. It is investing in considerable resources to achieve that goal through the establishment of WorkSafe New Zealand – a separate government entity with the sole mandate of ensuring compliance with health and safety legislation.

There are major changes ahead, not only for business – but also for business owners, senior management and directors. Everyone involved should start preparing for, and familiarising themselves with, the proposed changes. These include:

- Expanding the definition of primary duty holder to a 'person conducting a business or undertaking'
- The introduction of a *reasonably practicable* test in the assessment of a primary duty holder complying with obligations to identify and eliminate 'risks' as well as hazards
- New due diligence obligations for directors and senior managers in business
- A more significant focus on worker engagement in health and safety, and
- Substantially increased penalties and new enforcement tools.

Who owes the duty?

The primary duty holder is much broader than the HSEA's 'person managing or controlling a workplace' and will be owed by 'persons conducting a business or undertaking' (or a PCBU) – a significant change that will include anyone who can contribute to a workplace accident, in any way, including:

- Employers
- Those managing or controlling a work-place (even those with no employees)
- Those managing or controlling fixtures, fittings or plant at workplaces
- Designers, manufacturers, importers and suppliers of plant (e.g. equipment), substances (e.g. chemicals) or structures to other workplaces, and

- Installers, constructors or those commissioning plant or structures (e.g. a company erecting scaffolding).

Reasonable practicability test

The HSEA requires an employer to take 'all practicable steps' to prevent harm to those in their workplace by identifying, eliminating or minimising *hazards* (a situation that has the potential to harm a person).

The Bill goes a step further, requiring a PCBU to ensure workers' health and safety as far as is *reasonably practicable*, by identifying, eliminating and minimising *risks* to health and safety, not just hazards. 'Risk' is a new term and is defined as the possibility that harm might occur when a person is exposed to a hazard.

'Reasonable practicability' balances the likelihood of a risk occurring, against the time, trouble and cost that would be necessary to avert that risk. It takes into account all relevant matters including the potential degree of harm, knowledge as to existence of the risk and the available control measures.

This subtle but significant change in focussing on 'risk' rather than just 'hazards' suggests a much lower threshold, and an obligation on businesses to identify risks including:

- Worker behaviour (e.g. not following directions)
- Stress or fatigue
- Occupational disease
- The way work is undertaken in (and outside) a workplace, and
- Emotional harm arising from bullying behaviour.

Officers' responsibilities

The Bill requires 'officers' of a PCBU to assume a due diligence duty. An 'officer' is a director of a company *and* any other person making decisions affecting the whole, or a substantial part, of the business.

This means that any person making decisions within a business will owe broad duties of due diligence. They will be required to have up-to-date knowledge of health and safety matters, understand the risks and hazards associated with the business, and ensure the PCBU has (and uses) appropriate resources/processes to comply with their duties, which include responding, in a timely way, to information regarding incidents, hazards and risks.

The Bill imposes positive obligations on decision makers, emphasising proactivity in matters of health and safety. This is expected to result in significant changes to the way boards of directors and senior management address health and safety matters. Health and safety should be a permanent agenda item for board meetings, with analysis of incident reports being tabled at least every quarter. Directors and senior managers will need to personally make themselves familiar with the 'ground floor' operations of the business, consider what risks arise from those operations, and how to eliminate those risks. Prosecutions can be brought against 'officers' personally (even where a PCBU is charged separately), with substantial penalties available to be imposed by the court.

Worker engagement

Workers (widely defined to include not just employees – but contractors, subcontractors, apprentices, trainees and even volunteers in some cases) play a far more significant role in health and safety matters and the PCBU must facilitate worker participation.

Under the Bill, if a worker requests a health and safety representative, the business must facilitate election of a representative who is chosen solely by the workers. This representative will have significant responsibility, representing workers on health and safety matters (including rehabilitation and return to work programmes), monitoring the PCBU's compliance with its duties, and making recommendations to the PCBU – which must be adopted unless the PCBU provides a written statement as to why not. This representative will hold a powerful position and can issue notices to a PCBU for contravention (or likely contravention) of the Act.

The representative must be consulted on health and safety matters, allowed time off to perform their role, be provided with information, training, resources, facilities and assistance – and must be remunerated for their time at their usual rate of pay.

Other person/s

The Bill closes the 'loopholes' resulting from the Pike River investigation by imposing a duty on 'other persons' (anyone who is not defined as a PCBU, officer or worker) to take reasonable care for their own health and safety, to ensure acts or omissions don't adversely affect the health and safety of others, and to comply with any reasonable instruction given by a PCBU.

Penalties

The HSEA sets out a maximum penalty of $500,000 and/or two years' imprisonment. Under the Bill, there's a clear message to the courts to impose substantially greater penalties, with three graduated categories of offence:

1. Breaches arising from 'reckless conduct' carry a maximum fine of $3,000,000 for companies and $600,000 and/or five years' imprisonment for an individual (includes a worker and an 'officer' of a PCBU)
2. Breaches exposing a person to a risk of death or serious injury or illness carry a maximum fine of $1,500,000 (company) and $300,000 (individual), and
3. A failure to comply with a health and safety duty that does not fall within the above two categories, will carry a maximum fine of $500,000 (company) and $100,000 (individual).

Additional enforcement tools include *adverse publicity orders* requiring the publication of a PCBU or person's breach, its consequences and the penalty imposed; and an order for contribution toward WorkSafe's costs of investigating and prosecuting a breach, as deemed *'just and reasonable'*.

Next steps for business

- Start to familiarise yourself with the Bill, implement policies, inform 'officers' of their due diligence obligations and start identifying and assessing risks and hazards
- Focus on worker engagement and obligations to consult and collaborate with other duty holders that influence the workplace, and
- Policies alone will not be enough. Training, reviews and reminders should be carried out – with appropriate focus on the risk of employees not following directions or policies.

These proposed changes significantly alter the health and safety landscape for business. If you're at all unsure of your new obligations and responsibilities, please be in touch with us so we can help you prepare. ■

Business Succession Planning

With 40% of business owners looking to retire in the next five years and the average age of New Zealand business owners still rising, many business owners face the challenge of deciding what will happen to their business after they have retired. What is needed is a formal business succession plan.

An effective succession plan enables a smooth transition of business control to the next owner, whether they are a family member, employee or an independent party.

Many business owners don't get around to develop a succession plan for a number of reasons:

- There is no time to stop and think!
- Owners are often afraid or unsure of how to talk to their family or staff about what they intend to happen
- Reluctance to acknowledge they are nearing the end of their business life, and
- Their business partners are not interested in discussing or planning for the future.

If this sounds like you, read on.

Why should you start a business succession plan?

Your key role is to lead your business. For the business to continue into the future, you need to pass on the leadership baton. Effective leaders plan for the business to succeed when they are gone – whether through retirement, death or incapacity.

Involve the right people

In any succession planning exercise a team approach will have the best results. This team should include your lawyer, accountant and banker. It's critical that all these professional advisers are prepared to work together and listen to your wishes.

Family and staff expectations

Your children's expectations need to be considered and managed well. Have your children expressed their views regarding the future of the business and what role (if any) they hope to play? A family meeting as part of your succession planning creates an opportunity for open discussion between all family members.

You may be surprised by who would like the business to be retained as a source of income for the whole family or who would like to be trained to participate in the business.

Staff who play an integral role in the success of the business should also be given the opportunity to have input into the plan. If key staff aren't involved in the process, you risk them resigning, which could harm your ability to increase the value of the business for a potential purchaser.

Is your plan viable?

If you plan to sell to an independent third party then your main goal should be increasing the value and saleability of the business. Some of the value drivers include:

- Enhanced branding
- Improving processes
- Investing in IT
- Focusing on efficiencies, and
- Having sustainable earnings which are not dependent on your own labour input.

If you plan to pass the business to family members or employees then the focus will be on identifying your new management leaders and preparing them. Your successor will need to observe you, be empowered to make decisions and then be given control of important strategic aspects of the business.

You will need to identify the weaknesses in the business and skills that are needed to enable it to succeed beyond your involvement. People with some of the skills that are required may not be in the business yet and you may need to begin recruiting for them.

Your plan needs to realistically address the capital requirements of your successors and the level of debt that's sustainable. The goal must be to ensure success for the next generation or new management as well as ensuring you have the retirement lifestyle you deserve.

You should get professional advice as to what business structures should be established and the legal and taxation implications of your succession plan.

Making it happen

A major issue in succession planning for business people is that it can become too hard and the barriers we outlined above start to appear. Appointing an independent board member will help maintain momentum in developing and implementing the plan. A regular review process involving your team of professional advisors will also ensure your objectives are not forgotten or put aside.

Every business is unique

Every business and family are unique; they have different debt loadings, skill bases and business characteristics as well as different expectations from every family member.

It takes time to develop a successful plan. Don't delay in getting your business succession plan up and running. In the long run, you will be pleased you decided to tackle this now. ■

Good Fences

Significant responsibilities for rural landowners

Robert Frost wrote 'Good fences make good neighbours' which is a great maxim by which you should farm. Issues and accidents arising from wandering, escaped and uncontrolled stock result in many disputes, accidents and deaths in rural New Zealand.

If you are the landowner, it's your responsibility to ensure that your stock is constrained by an adequate fence. The legalities of what constitutes an adequate fence, and the rights and responsibilities of landowners, can be found in the Fencing Act 1978.

The Act provides that an 'adequate fence' is a fence that, as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves or is intended to serve.

Adequate fencing

The legislation details examples of what is adequate in terms of a fence in urban and rural environments. In rural areas an adequate fence includes:

- A substantial 7–8 wire fence, properly strained, battened, with up to 2 strands barbed wire, with durable posts of timber, metal or concrete, evenly spaced and not more than 5 metres apart
- A substantial 9–10 wire fence, properly strained, with or without battens, with durable posts of timber, metal or concrete, evenly spaced and not more than 5 metres apart
- A substantial prefabricated (netting) fence, properly strained, with or without battens, with durable posts of timber, metal or concrete, evenly spaced and not more than 5 metres apart, and
- A close and sufficient live (electrified) fence.

The onus is on the landowner to show that their fence is reasonable for the purposes for which it's being used and the stock that it's containing.

If you're farming or grazing large or boisterous animals it's your responsibility to ensure that the fencing is sufficient for the type of stock you're carrying. For example, deer fences are quite different from fences designed to keep in sheep.

Recent cases

Recent disputes which have arisen over fences include:

- A subdividing land owner claiming that a 2-wire electric fence, with widely spaced posts, was sufficient for the purposes of a boundary fence between a dairy operation and a sheep farm
- The adequacy of an historic fence over which one landowner's heifer calf kept escaping, although it was suitable for the other's grazing sheep, and
- A patch of virtually impassable gorse being viewed by one owner as an adequate boundary fence.

Landowner responsibility

Landowners must be aware of their liabilities and responsibilities. Escaping stock affects not only neighbouring landowners but also the wider community if the escaped stock cause an accident that results in damage or a fatality. Farm owners and lifestyle block owners are well advised to ensure that they hold public liability insurance to protect against the liabilities arising from these risks. Large animals, which are frequently darkly coloured, don't mix well with high speed vehicles travelling on empty dark roads.

The Fencing Act states that in the country, as in town, the cost for an adequate boundary fence is to be shared equally by the two landowners. If, however, one neighbour requires a fence in excess of what is adequate it would be the responsibility of that neighbour to meet the costs above what would be reasonable.

The process for building a new fence would usually be by agreement with your neighbour. You both need to agree on the type of fence and its materials, its location (if the exact location of the boundary is an issue), who is going to do the work and how the costs are to be divided.

If you and your neighbour can't agree or one of you refuses to contribute, the legislation provides that one of you can serve a Fencing Act Notice to the other detailing the requirements and details of the proposed fence and the starting date for construction.

The landowner being served with the notice, in turn, has the right to oppose the proposed fence if they believe the current fence is adequate or, if they disagree with the type of fence proposed, to offer a counter-proposal as to a suitable fence.

If you're proposing to issue, or you receive, a Fencing Act Notice talk with us as if you don't issue a notice correctly the Notice may be void. If you don't respond to a Notice in a timely manner this may result in a default acceptance of the new fence.

If, however, neither of you can reach agreement then there's the option to apply to the court for an order for the construction of a fence. This is a last resort, and a somewhat drastic and expensive outcome for good neighbour relations. If the fence looks like being a problem, get in touch with us early on. ■

Family Dispute Resolution

A new service to help families in conflict

In April the family justice system underwent a number of changes that acknowledged the Family Court is not always the best place to help families resolve family disputes.

These changes were introduced to reduce the stress on families and children by avoiding – wherever possible – delays, conflict and the expense that court proceedings can entail. One of these changes was the introduction of the Family Dispute Resolution Service, also known as FDR.

What is Family Dispute Resolution?

FDR is designed to help families reach agreement on parenting and guardianship matters after separation.

While most parties (sometimes these aren't the parents) can reach agreement on parenting and guardianship matters privately, some people need extra help. FDR is a mediation service that helps parties discuss their parenting arrangements and other guardianship matters with the aim of helping them reach agreement without the need to go to court. Mediators work with both parties so that a practical agreement can be reached.

FDR is a compulsory step for parties who are commencing proceedings in the Family Court.

It's easy to locate a mediator in your area. You can either visit www.justice.govt.nz/family-justice or telephone 0800 224 733.

How much does it cost?

If you are on a low income you may qualify for fully funded mediation services. If you don't qualify for the full funding you can still access mediation services at a set price from a government provider. To find out if you are eligible for funding visit www.justice.govt.nz/family-justice and search for the Funding Eligibility tool.

FDR mediation

When you contact an approved FDR mediator you'll be asked to provide details of the other parties involved in the dispute. Generally this will be your partner but it can be another family member depending on the family dispute. This service is free if you qualify for government funding.

Not all disputes are suitable for FDR so the mediator will assess a number of matters. A mediator will look at whether:

- There have been incidents of domestic violence
- You can fully take part in FDR. You and the other party may not be able to take part if one of you is in prison, overseas, or if either of you doesn't wish to participate, and
- You may benefit from counselling before attending FDR. You may not be in a position to think clearly about your children's care or contact. Separation and family disputes are difficult and counselling may help you. Counselling may be offered to you alone, or together with the other party.

What if agreement can't be reached?

If you can't make an agreement or you agree on some things but not others, the mediator will record that. You may then decide to apply to the Family Court for your agreement to be finalised; if no agreement is made you can apply for further directions from the court.

A separation is always difficult for families. With the introduction of FDR, now there's an easier way to resolve any disputes you may have. ■

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Postscript

90-day trial period

Still a challenge for employers: The processes around the 90-day trial period are still causing some headaches for employers. In late September a senior construction worker won a $40,000 payout for an unjustified dismissal due to his 90-day trial being invalid. In a nutshell, the employee did not sign the employment contract until after he had started work with his employer. Due to a variety of reasons, his employer wanted to terminate his employment using the 90-day trial provision. New employees must sign their employment contracts before they turn up for work on their first day, otherwise the 90-day trial period provision is invalid.

The case is expected to be appealed to the Employment Court.

90-day trial used by 59% of employers: A study undertaken by the Ministry of Business, Innovation and Employment earlier this year has found that 59% of employers have used the 90-day trial period for employees. The 90-day trial provisions were introduced in 2009 for employers with fewer than 20 workers, and it was extended in April 2011 to include all employers. The report shows that extending the use of trial periods to all employers has resulted in more employment opportunities, with one third of employers surveyed saying the provision has led to them hiring people they otherwise wouldn't have.

The survey also evaluated the impact of changes to the Holiday Act, unions' access to workplaces and also changes to streamline the resolution of employment disputes.

The changes were designed to improve the operation of the labour market by achieving lower compliance costs for employers, faster problem resolution, greater clarity and more choice and flexibility for employers and employees. ■

New drink driving limits introduced in time for Christmas

Lower breath and blood alcohol limits for drivers come into effect on 1 December 2014. For adult drivers, the current breath alcohol limit of 400 micrograms (mcg) per litre of breath will be cut to 250 mcg. The blood alcohol limit reduces from 80 mg of alcohol per 100ml of blood, to 50 mg.

Drivers who fail an evidential breath test with a reading of between 251 and 400 mcg of alcohol per litre of breath will receive an infringement notice with a $200 fine and 50 demerit points. Refusing to undertake, or failing to undergo, an evidential breath test, will set you back $700 as well as 50 demerit points.

Drivers who fail an evidential breath test with a reading of over 400 mcg of alcohol per litre of breath may choose to have an evidential blood test, and will also end up facing criminal charges.

So how much can you drink and stay under the limit? Our advice is not to drink and drive at all. If, however, you'd like to have a drink and still drive home safely the Institute of Environmental Science and Research (ESR) says that (dependent on your gender, body type/weight and so on) most people can have two standard drinks over the course of two hours. A standard drink is: 330 ml of 4% alcohol beer, 100ml of 13% alcohol wine or 32ml of 40% alcohol spirits. Stay safe this summer please. ■

Relationship property update

In our Autumn 2014 edition we reported on a case of economic disparity under the Property (Relationships) Act 1976 where the Family Court had ruled an asset split of 70:30 in favour of the wife. This was a significant shift from the equal sharing regime. The husband appealed to the High Court (*Jack v Jack* (2014) NZHC 1495 [1 July 2014]). His appeal was dismissed and Justice Goddard upheld the 70:30 division. ■

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