

RESPONSIBILITY AND RISK UNDER THE NEW HEALTH AND SAFETY REGIME

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Abstract: The new Health and Safety at Work Act is expected to come into force in the second half of this year. It will apply to all organisations that employ people – regardless of whether they are commercial or not-for-profit, and regardless of how few employees they have or whether they are full or part-time.

This is the case with the current law so there will be no change of status in that respect. The difference lies in the changes that the new Act will implement. The Government's instructions to the architects of the new framework were that it should be capable of achieving a 25% reduction in New Zealand's workplace fatality and serious injury rate within five years.

It will seek to do this through a mix of stronger governance duties, greater worker participation, harsher penalties and more intense enforcement. But while some nervousness about the Act is only natural, there is a lot of excellent advice on the WorkSafe New Zealand website which should give you confidence that you will be able to operate in the new regime within an appropriate and acceptable level of risk.

At the heart of the new system stands the PCBU – the Person Conducting a Business or Undertaking. Despite the use of the word "person" in the acronym, the PCBU will generally be an entity rather than an individual except for sole traders and self-employed persons who do not have any employees and do not employ any contractors on site.

So the PCBU will be the employing organisation or the company or the business or the owner of the dance studio (even where that person is a dance teacher who employs other dance teachers).

The PCBU's responsibilities will be to employees and to contractors, without distinction. But, while the main duty of care will sit with the organisation, the organisation's "officers" – meaning the board members, directors and senior management - will be responsible for ensuring that the organisation is fulfilling its obligations to keep its workers and others (contractors, visitors and customers) safe.

These two duties – of care and of "due diligence" – are independent of each other so that, where a PCBU is found to be in breach but the officers have been diligent, the PCBU rather than the officers will be held to account.

Indeed, WorkSafe considers that the new Act will be fairer to officers than the current system and more consistent with their governance role. This is because the incentives under the two regimes work in opposite directions.

Under existing law, the incentive on board members or directors is **not** to enquire too closely into health and safety matters because liability is incurred only for those failures which the officer or director directly authorised, sanctioned, agreed to or participated in and knew were unsafe.

Under the new Act, officers (board members or directors) will only be liable if it is proved beyond reasonable doubt that they failed to carry out proper due diligence; meaning that they did not take reasonable steps to:

- maintain an up-to-date knowledge of workplace health and safety matters
- understand the nature of the operations of the business and any associated risks and hazards, and
- ensure and verify that the PCBU has access to and uses the resources, information and processes needed to eliminate or, if elimination is not possible, to minimise safety risks.

WorkSafe is specific about the division in roles saying: "Officers provide governance, managers manage. Officers are leaders, and they make the major decisions that influence health and safety. These include strategic direction, securing and allocating resources and ensuring that the company has the right people, systems and equipment in place to eliminate or minimise workplace risks."

Although much is made of the increased sanctions in the Bill, WorkSafe considers that the most likely practical effect for officers of the proposed new penalty regime will be for lighter penalties.

Yes, the maximum fine for a failure to exercise due diligence which results in an individual being exposed to a risk of death or serious injury has been increased slightly from \$250,000 to \$300,000. But for offences involving lesser risk, it has been reduced significantly - from \$250,000 to \$100,000.

And although reckless conduct, which is the Category 1 offence in the Bill, can attract a fine of up to \$600,000 and five years' imprisonment, or both; WorkSafe notes that prosecutions are likely to be "very rare" because of the high burden of proof required and because other charges under the Crimes Act will often be more appropriate.