

Directors' duties and liabilities under the Health and Safety at Work Act 2015, 23 March 2016

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Since the Health and Safety at Work Act 2015 (HSWA) will come into force on 4 April 2016, directors should be aware that they have new duties under the legislation and can be personally liable for breaches of these duties. The penalties available for breaches of these duties include not only significant fines but also imprisonment of up to five years. The summary below of the new law with respect to directors' duties is followed by some practical guidelines for how directors can comply with these duties.

Background

In comparison with Australia and the United Kingdom, New Zealand's workplace health and safety record is poor. Every year, 52 people die at work, hundreds more are seriously injured and 600 to 900 die from work-related illnesses. The New Zealand government has recognised the need for action and has implemented a significant reform of New Zealand's health and safety legislation. The HSWA is central to this reform package which is intended to reduce work-related injuries and deaths by at least 25% by 2020.

The primary purpose of the HSWA is to provide for a balanced framework to secure the health and safety of workers and workplaces. As was the case with the Health and Safety in Employment Act 1992 (HSEA), the HSWA is a performance-based, non-prescriptive statute, which means it relies on broad legal tests rather than prescribing a certain set of actions.

The HSWA has introduced new classes of duty holders, extended duties and increased penalties for breaches of these duties. The duty holders under the HSWA are "persons conducting a business or undertaking" (PCBU), officers and workers. Each of these duty holders has a corresponding duty with specific penalties for breaching these duties. Each person with a duty under the HSWA is required to eliminate risks to health and safety so far as is reasonably practicable, or where it is not reasonably practicable to do so to minimise those risks, so far as is reasonably practicable. The extent of this requirement will depend on the level of influence and control the person has over the matter to which the risks relate.

Directors owe a duty as officers

Directors have new duties under the HSWA because they fall within the definition of an "officer". For the purposes of the HSWA, an officer is defined as a director of a company, a partner in a standard partnership, a general partner in a limited partnership or any other person who is able to "exercise significant influence over the management of the business or undertaking (eg a chief executive)." An officer does not include Ministers of the Crown or a person who merely advises or makes recommendations to an officer.

Certain officers, whilst still owing officers' duties, are exempt from prosecution. These officers include:

- members of a governing body of a territorial authority or regional council, a local board or a community board elected or appointed under the Local Electoral Act 2001
- a trustee of a board of a school appointed or elected under the Education Act 2001, and
- volunteers.

Directors, along with other officers under the HSWA, have inherited extended duties under the legislative scheme because of their unique position to influence the health and safety management of the PCBU. As the Royal Commission on the Pike River Coal Mine Tragedy explained:

The board and directors are best placed to ensure that the company effectively manages health and safety. They should provide the necessary leadership and are responsible for the major decisions that must influence health and safety: the strategic direction, securing and allocating resources and ensuring the company has appropriate people, systems and equipment.

This new focus on director responsibility with regard to health and safety is captured by the duty of "due diligence" in the HSWA.

The duty of due diligence

All directors now have a positive duty under the HSWA. Broadly, this duty requires officers to exercise due diligence to ensure that the PCBU complies with its duty or obligation under the Act. This means that directors need to be proactive, actively engaged and informed about health and safety issues. More specifically, the duty of due diligence requires a director to take reasonable steps to:

- acquire, and keep up to date, knowledge of health and safety matters
- gain an understanding of the nature of the operations of the business and the associated risks of these operations
- ensure the PCBU has appropriate resources and process to eliminate or minimise risks to health and safety
- ensure the PCBU has appropriate processes for dealing with information regarding incidents, hazards and risks
- ensure the PCBU has processes for complying with its duties, and
- verify the provision and use of the resources and processes.

The introduction of this positive duty on directors is intended to ensure that those with the ability to impact on health and safety compliance are incentivised to do so.

Penalties for breach of the duty

The HSWA provides for significantly increased penalties for breaches of health and safety obligations. The penalties for directors under the HSWA are as follows:

- Where a director has breached the duty of due diligence and has been reckless as to the risk to an individual of death, serious illness or serious injury, the penalty is imprisonment of up to five years and/or a fine of up to \$600,000.
- Where a director has breached the duty of due diligence and has not been reckless but nevertheless exposes any individual to a risk of death, serious illness or serious injury, the penalty is a fine of up to \$300,000.
- Where a director has breached the duty of due diligence in any other circumstances the maximum penalty is a fine of up to \$100,000.

As was the case under the HSEA, it is unlawful to indemnify or insure against fines for breach of duties. The penalty for entering into such an arrangement is a fine of up to \$250,000.

PCBU's primary duty of care

Given that it is a director's duty to ensure that the PCBU is complying with its duties and obligations, all directors need to have an understanding of the PCBU's duties. Although directors have increased duties under the new legislative scheme, the primary duty of care lies with the PCBU. A PCBU will in most cases

be a company or organisation unless the person is a sole-trader. A PCBU has the primary obligation to ensure, so far as is reasonably practicable, the health and safety of workers. This duty applies to all employees, contractors and other people on the work site and is applicable anywhere the worker is working. In determining what is reasonably practicable, the following factors will be taken into account:

- the likelihood of the hazard or the risk concerned occurring
- the degree of harm that might result from the hazard or risk
- what the person concerned knows, or ought to have known, about the hazard or risk
- the availability of ways to eliminate or minimise the risk, and
- cost.

It is important to note that whereas under the HSEA cost was an equal factor in assessing practicability, under the HSWA cost is a less significant factor and can only be considered after taking all other factors into account.

Worker engagement and participation

PCBUs also have a duty to engage with workers and to ensure that there are practices in place which provide workers with a reasonable opportunity to participate in health and safety matters. The concept of worker engagement and participation is central to the new health and safety scheme. This is due to recognition that workers are often best placed in respect of expertise and workplace knowledge to maintain a safe workplace.

All PCBUs are required to elect a health and safety representative (HSR), if requested, unless the PCBU has fewer than 20 workers and is not a high risk sector. However, any PCBU can decide to elect an HSR as this is a well-established way to support worker participation. In addition, a PCBU will also need to consider electing a health and safety committee, if requested, unless the PCBU has fewer than 20 workers and is not a high risk sector.

Practical guidelines for directors

Directors need to remember that health and safety governance is as important as any other aspect of governance as it is a fundamental part of a company's overall risk management. The HSWA makes it clear that all directors need to take an active role in the health and safety matters of the business or organisation and there is no room for the so-called "sleeping" director anymore.

The following guidelines are intended to provide directors with some practical steps they could take to ensure they comply with the duty of due diligence. However, it will remain to be seen how the new Act is going to be applied and interpreted by the courts. Those working in health and safety therefore need to stay abreast with developments in how the Act is applied in practice in the upcoming years in order to determine more specifically what is required to meet the new duties.

Directors must ensure that the company has adequate structures and policies in place to provide for an effective health and safety culture in the workplace.

This may include, but is not limited to, requiring directors to:

- Determine how the board is going to lead and determine health and safety issues. This could involve delegating a person with the relevant expertise to take the lead role in health and safety issues. However, all directors will still have a duty to verify any health and safety information and issues.
- Determine the company's high level health and safety vision, beliefs and policy.
- Specify realistic targets to enable the company to track its health and safety performance.

Directors must ensure that the company has a robust and fit for purpose health and safety policy.

This may include, but is not limited to, requiring directors to:

- Be informed about the requirements of a robust, best-practice, health and safety policy.

If directors do not feel they have an adequate understanding they should undertake training.

- Ensure that the policy is being effectively implemented and that the company is not restrained by a lack of resources.
- Ensure that the policy is being periodically reviewed and improved where necessary.

This should include internal reviews, which involve worker participation, and external reviews which will require commissioning an external audit.

- Ensure the company is encouraging workers to engage and participate in health and safety matters.

This could be through simply asking management questions such as “what do the workers say about this issue?” Another simple and effective way of ensuring engagement and participation is through establishing health and safety representatives and a committee at the company’s own initiative.

Directors must monitor the company’s performance with regard to health and safety.

This may include, but is not limited to, requiring directors to:

- Have an understanding of the nature of the operations of the company in order to assess the associated hazards and risks of the industry.

This may involve visiting work sites.

- Ensure the company has adequate systems in place for identifying, assessing and managing incidents, hazards and risks.
- Ensure the company has an adequate system in place for reporting incidents, hazards and risks.

Directors should have an understanding of this system and ensure that it is periodically reviewed. Directors should outline their expectations of what should be reported.

- Ensure the company has an adequate computer-based system in place for collecting data regarding identified and reported incidents, hazards and risks.
- Review reports on incidents, hazards and risks in order to determine whether any action is required.

Directors must conduct periodic formal reviews of the company’s health and safety policy and regime in order to determine its effectiveness.

This may include, but is not limited to, requiring directors to:

- Ensure the company conducts internal reviews of health and safety matters periodically.

This could involve worker participation through the use of health and safety questionnaires.

- Ensure the company considers whether an external review is required in order to obtain an expert and independent opinion.
- Consider any recommendations that are made after a review is complete.

Where these recommendations are considered to likely improve the company’s health and safety regime they should be implemented.

- Never turn a blind eye to any undesirable information that is revealed following a review.

If a director becomes aware of anything that suggests the company’s health and safety requirements are not being met, they must take immediate and decisive action.

The above is intended to provide some general guidelines only. Legal advice should be sought if directors have any specific queries with regard to the Act.