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BARRISTERS AND SOLICITORS

Employment Update

Winter 2014

New legislation set to significantly overhaul current health and safety system

The long awaited Health and Safety Reform Bill has passed its first reading and been referred to the Transport and Industrial Relations Select Committee for consideration. This Bill is the Government's response to the recommendations of the Independent Taskforce on Workplace Health and Safety delivered early last year. The Taskforce found New Zealand's current health and safety system *"is not fit for purpose"*.

The Bill is aimed at improving workplace health and safety across all sectors in New Zealand with the intention of reducing the workplace injury and death toll by 25% by 2020.

The Bill, if passed, will create the Health and Safety at Work Act which is set to replace the Health and Safety in Employment Act 1992 and the Machinery Act 1950. The Bill introduces a number of changes and to a large extent is modelled on the current Australian health and safety system.

A number of significant changes to the current law proposed under the Bill include:

- Changes to the definition of who is responsible for workplace safety from employers, principals and suppliers to persons conducting a business or undertaking (PCBU). This extends the requirements under the Act to all modern business arrangements where a person is responsible for others. Home and residential workers are excluded from this definition.

- Personal obligations of due diligence on *"officers"*, being directors, partners, or any person who makes decisions affecting the whole or a substantial part of the business of the PCBU. Officers will be required to ensure the PCBU complies with its health and safety duties and obligations. Failure to comply with the due diligence requirements could result in criminal prosecutions, convictions and significant fines.

- Clarification of the duties of PCBUs in requiring them to ensure the health and safety of workers by taking all steps reasonably practicable. Clause 17 of the Bill outlines relevant considerations as to whether a PCBU has taken all reasonably practicable steps, including:

  a. *"the likelihood of the hazard or the risk concerned occurring; and*

  b. *the degree of harm that might result from the hazard or the risk; and*

  c. *what the person concerned knows, or ought reasonably to know, about —*
     i. *the hazard or the risk; and*
     ii. *ways of eliminating or minimising the risk; and*

  d. *the availability and suitability of ways to eliminate or minimise the risk, including whether the cost is grossly disproportionate to the risk."*

- A tiered penalty regime establishing larger financial deterrents against those who breach their obligations under the legislation. Commentary released by the Ministry of Business, Innovation and Employment notes that under the existing law 55% of all fines imposed by the courts are less than $30,000 (12% of the maximum) and 92% are less than $50,000 (20% of the maximum). The Bill increases the maximum penalty to $3 million for body corporates and $600,000 or imprisonment for a term not exceeding five years for an individual.

- Extension of worker participation practices (such as health and safety representatives or committees) to all workplaces. Under the current legislation only employers with 30 or more employees are required to *"develop, agree, implement, and maintain"* a system of engagement in conjunction with employees.

- Further extension of the right of employees to cease work if they consider the working environment unsafe. Under the current law, employees who suspect that they are at risk of serious harm can withdraw from their workplace. The Bill extends this right to employees if they suspect that they or another person may be exposed to a risk of harm, effectively lowering that assessment.

- The right that no one is to be disadvantaged for raising concerns of health and safety matters. The Bill formalises the right of any such person to bring criminal and/or civil proceedings.

The Health and Safety Reform Bill is separate from, but consistent with, the Health and Safety (Pike River Implementation) Bill also before Parliament. The Health and Safety (Pike River

Implementation) Bill will implement recommendations of the Royal Commission on the Pike River Coal Mine tragedy. Together these two Bills will represent the largest health and safety reform in over twenty years creating a much safer working environment for all those involved.

Submissions to the select committee closed on the 9th of May, with their report due to be released on the 13th of September 2014. The Government has indicated that the Bill will pass into law prior to the 2014 elections with it to take effect from April 2015.

Recent announcement of health and safety regulations

On 22 May 2014 the Labour Minister released a discussion document outlining proposals for new health and safety regulations.

The regulations will assist workplaces to comply with the duties and obligations that will arise under the new Health and Safety at Work Act. The proposals cover five key areas: general risk and workplace management, worker participation, engagement and representation, work involving asbestos, work involving hazardous substances and major hazard facilities.

The regulations will sit under the Health and Safety at Work Act when it comes into force and will help workplaces avoid unnecessary compliance costs.

Submissions on the proposed regulations close on Friday 18 July 2014.

Best practice guidelines on preventing and responding to workplace bullying

Earlier this year, Worksafe, the new Crown agency responsible for health and safety, released its guidelines on the ways in which to prevent and respond to workplace bullying. Bullying is considered a hazard within the workplace as it can affect people physically and mentally. It can lead to increased levels of stress, decreased levels of emotional wellbeing, reduced coping mechanisms and ultimately lower workplace productivity – all of which are unfavourable for employers.

The guidelines define bullying as *"repeated and unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety".* In particular, the guidelines state that:

- Repeated behaviour is persistent and can involve a range of actions over time; and
- Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.

The guidelines also divide bullying behaviours into two main categories – attacks that are direct and personal, or indirect and task-related. For example, indirect bullying could include setting unachievable targets, giving meaningless tasks, scapegoating, sabotaging, inappropriate monitoring and/or engaging in constant criticism of work.

Employers have an obligation to prevent and address allegations of workplace bullying. Otherwise, they are at risk of breaching the Health and Safety in Employment Act 1992, Employment Relations Act 2000, Human Rights Act 1993 and/or Harassment Act 1997.

The guidelines confirm that employers should respond to any complaint of workplace bullying as soon as possible by commencing an investigation into the alleged behaviour, notifying the alleged bully in writing of the details of the complaint and providing a timeframe for the investigation. The investigation should be conducted by an independent (preferably external) unbiased and experienced investigator.

Summary dismissal for out of work conduct

In 2010 Mr Hallwright, a senior investment analyst at Forsyth Barr Limited (FBL), was summarily dismissed after receiving a conviction for seriously injuring a motorist whilst driving. The incident which led to his conviction and subsequent dismissal occurred during his own time whilst transporting his daughter to an appointment.

Mr Hallwright's criminal trial process generated a considerable amount of media coverage, much of which drew attention to the fact that he was a senior employee at FBL and characterised his offending as a case of *"road rage"* and a *"hit and run"*. The District Court Judge imposed a combined sentence of 250 hours of community service, $20,000 reparation and 18 months' disqualification from holding or obtaining a driver's licence.

Mr Hallwright's employment agreement contained two relevant terms; namely, a (non-exclusive) definition of serious misconduct which included "*conduct bringing [FBL] into disrepute*" and an obligation not to "*engage in any activity that is likely to compromise [his] ability to carry out [his] duties*". Following Mr Hallwright's sentencing, FBL found that his conduct fell within both of these provisions and he was summarily dismissed for serious misconduct. The Authority found that FBL had justifiably dismissed Mr Hallwright. He brought a de novo challenge to the Authority's determination.

The Employment Court found that there was a sufficient connection between Mr Hallwright's conduct and his employment, irrespective of the fact that the conduct occurred outside the workplace. The Court decided that given the considerable amount of negative publicity that repeatedly linked him to FBL, it was reasonable for FBL to be concerned about the impact of this on its reputation both within the marketplace and its client base.

The Court rejected the submission that it was incumbent upon FBL to demonstrate actual loss or damage to its reputation. The Court stated: *"if [Mr Hallwright] is right, no pre-emptive action could be taken by [FBL] until actual damage had occurred, after the horse had bolted. That cannot have been the intention of the parties, particularly in relation to reputational damage which is notoriously difficult to prove".*

Even if wrong on this point the Court was satisfied that FBL did sustain damage to its reputation. In this regard the Court said that FBL's *"genuinely held view that [its] reputation had been damaged ... was a view reasonably open to [it] having regard to the circumstances at the time".* For example, FBL received negative feedback from clients, staff and members of the public about Mr Hallwright's conduct. The Court also took into account Mr Hallwright's high profile, trusted senior position within FBL, FBL's dependence on its reputation for integrity and sound judgment and the *"traditional nature"* of some of FBL's clientele.

The Court was satisfied that an integral part of Mr Hallwright's role involved *"extensive media engagement"* through providing comment on topical issues and that "*implicit in his role was the need to show sound judgement".* The Court accepted the FBL held genuine and reasonable concerns about the difficulties that would likely arise should Mr Hallwright continue to undertake his role with FBL against the backdrop of the criminal conviction and the media coverage that had occurred.

Counsel for Mr Hallwright submitted that the fact he continued to work for FBL during an approximate two year period after the driving incident undermined FBL's argument that his ability to perform his role moving forward was compromised. The Court rejected this submission. FBL had made it clear that it was reserving judgment and allowing the criminal process to run before reaching a concluded view or taking any disciplinary action. FBL wore the *"collateral damage"* to its reputation in the interim, giving Mr Hallwright the presumption of innocence. The position changed when Mr Hallwright was convicted.

The Court held that it was open to FBL to conclude that Mr Hallwright had engaged in serious misconduct and that the decision to dismiss, and how the defendant acted, was what a fair and reasonable employer could have done in all the circumstances.

Mr Hallwright's dismissal was found to be justified and it followed that he was not entitled to any of the remedies he sought, including reinstatement.

Even if the Court had found Mr Hallwright's dismissal to be unjustified the Court said it would not have ordered reinstatement because it was clear that there had been an irretrievable breakdown in the parties' relationship – for example, Mr Hallwright had secretly recorded a conversation between him and the decision-maker and described him in an email to a colleague in *"pejorative terms".*

The Court also observed that it would not have granted the extent of damages sought by Mr Hallwright because he had failed to adequately take steps to mitigate his loss in looking for alternative employment.

Immigration and work – compliance, risk and *"VisaView"*

The Immigration Act 2009 imposes significant obligations on employers to ensure that its employees are eligible to work in New Zealand. It is an offence under the Immigration Act to allow, or continue to allow, any person who is not entitled to work in New Zealand to undertake work. The Immigration Act has a broad definition of *"work"* and it includes any activity undertaken for gain or reward.

Employers must ensure that they have adequate systems in place to confirm an employee's eligibility to work. If an employer allows or continues to allow an employee to undertake work when they are ineligible to do so an employer can be fined a maximum of $50,000 where that employer has knowledge that an employee is ineligible to undertake work and a maximum fine of $10,000 in the absence of such knowledge.

Immigration New Zealand has recently launched VisaView which, if utilised by employers, provides a valuable and easily accessible information system to avoid breaching the Immigration Act.

VisaView allows employers to check whether or not an employee can work in New Zealand for that employer. It also enables registered employers to confirm New Zealand passport information provided by an intended employee, and therefore confirm an employee's entitlement to work. Registration for VisaView is free and it is recommended that employers use it as part of its pre-employment processes and as an ongoing mechanism to ensure employees remain eligible to work for any employer.

We regularly advise employers and highly skilled individuals, senior executives, investors, and business entrepreneurs on a range of immigration applications and associated issues, including compliance. We are committed to providing sound, practical immigration advice with a corporate focus. Please do not hesitate to contact us for an audit of immigration systems and risks.

LAWASIA - Law Association for Asia and the Pacific

Bernard Banks has been actively involved in various roles with LAWASIA and is currently Chair of LAWASIA's Employment Law Committee. The Employment Law Committee enjoys active participation from across the Asia Pacific Region.

Since its inception in 1966, LAWASIA has built an enviable reputation among lawyers, business people and governments, both within and outside the Asia Pacific region. It is known for its collegiality among practicing lawyers, lawyers in government, corporate counsel, academics and the judiciary. LAWASIA's range of sections and committees focus on most areas of legal practice and interest.

Bernard Banks, the Brisbane-based LAWASIA Secretariat and the Employment Law Committee, with support from LAWASIA President Malathi Das, hosted LAWASIA's 8th Employment Law Committee Conference in Siem Reap, Cambodia on 24 and 25 May 2013.

The Siem Reap Conference was an intensive, focused and participatory conference and addressed issues that proved topical with lawyers from across the region. For example, the business sessions covered outsourced labour, restraints of trade, employment consequences of mergers and acquisitions, and the personal/ workplace interface, with a focus on the employment implications of social media. Lawyers from 17 countries and territories participated, including LAWASIA President Elect Mr Isomi Suzuki (Japan) and speakers, chairs and facilitators from Malaysia, Indonesia, USA, China, Australia, Hong Kong SAR, Turkey, India, Japan, Pakistan and Vietnam. There were also many other contributions made by lawyers from the Philippines, Cambodia, Singapore and New Zealand.

The Migrant Labour Session featured a case-study scenario with a New Zealand - China focus. This session was led by Dr Jiang Junlu (a Partner at King & Wood Mallesons, Beijing). Bernard Banks was a contributing speaker, and there were substantial comparative contributions from lawyers from Australia, Hong Kong SAR and India.

Following the conference, the committee is continuing to focus on a potential publication of writings on outsourced labour which is a major issue region–wide, and is also developing possible model clauses for selected terms of employment, to be proposed for use across the region.

Staff Update

Scott Worthy
Solicitor

Scott worked as a Judges' Clerk at the Employment Court in Wellington and Auckland before joining KTC. He was admitted as a barrister and solicitor of the High Court in March 2012. Scott studied at the University of Auckland, completing his law degree in 2010 and prior to that graduating with an MA(Hons) in history. He maintains his connection with the Auckland Law School through presenting guest seminars on employment law.

Scott's experience in the Employment Court has given him insight into all aspects of employment litigation, settlement conferences, mediation and the current direction of employment law. Scott's practice involves advice on personal grievances, contractual disputes, restructuring, redundancy and privacy law. He provides timely and commercially attuned advice to ensure pragmatic solutions for his clients.

Kathryn McKinney
Consultant

Kathryn specialised as an employment lawyer for over 10 years in the UK before joining KTC in September. She is admitted as a solicitor in both England & Wales and Northern Ireland and brings international experience to the team, having worked for leading firms in both London and Belfast.

Kathryn provides sound practical advice on the full spectrum of employment law and related areas including corporate restructuring, restraints of trade, disciplinary investigations, personal grievance disputes and compliance issues. Her focus is on building strong client relationships and understanding client needs. She has also worked in-house for clients on specific projects and transactions.

Kathryn brings a strong commercial awareness, having practised employment law in multi-national commercial teams. She has advised employers in many different areas, including in the information technology, pharmaceutical and energy business sectors.

KIELY | THOMPSON | CAISLEY

BARRISTERS AND SOLICITORS

Auckland

Level 10, 188 Quay Street
PwC Tower, Auckland 1010

PO Box 7359
Auckland 1141

Phone: +64 9 366 5111

Wellington

Level 16, 157 Lambton Quay
Vodafone on the Quay, Wellington 6011

PO Box 3
Wellington 6140

Phone: +64 4 471 2299