

# Health & Safety at Work Act 2015

A summary of the key duties and obligations under the new health and safety legislation



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# Health & Safety at Work Act 2015

## 1. Introduction

New Zealand's poor workplace health and safety record has led to the enactment of the *Health & Safety Work Act 2015* ("Act"). The Act comes into force on 4 April 2016, replacing the existing Health and Safety in Employment Act 1992 ("HSEA").

The Act represents a significant change to the current Health and Safety regime, intended to significantly strengthen health and safety in New Zealand following widespread attention in the aftermath of the Pike River Coal Mine Tragedy.

## 2. Key Changes

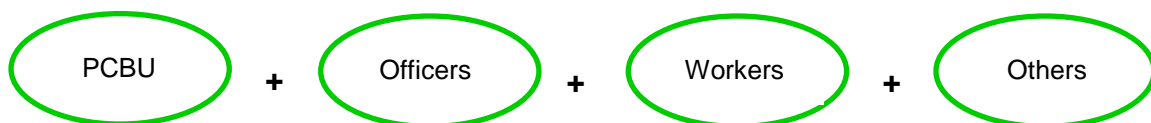
While the overarching duty to manage hazards under the HSEA has been carried through to the Act, the express purpose of the new legislation is to provide workers with the **"highest level of protection"**.

The Act sets about achieving this purpose by imposing comprehensive, overlapping duties and introducing a number of key changes, including:

- A new definition of primary duty holder – "a person conducting a business or undertaking" (**PCBU**);
- A new concept of Officers as duty holders;
- The replacement of the concept of 'place of work' with 'workplace', and the extension of workplace to '*any place where the worker goes, or is likely to be, while at work*';
- Substantially heightened penalties; and
- Increased worker participation.

## 4. Duty Holders and Duties

As part of strengthening the health and safety regime, the Act looks to spread the responsibility for health and safety across more individuals.



### **PCBU**

The primary duty holder under the Act is a "PCBU" or "a person conducting a business or undertaking":

- Whether the person conducts a business or undertaking alone or with others; and
- Whether the business or undertaking is conducted for profit or gain.

A PCBU is a broad concept encompassing employers, but does not include employees or directors of a PCBU (though they may owe duties as "Officers", see below), a volunteer association or occupiers of a home who employ a person to do residential work in their home (i.e. a person who hires a nanny or a person to clear their drains will not be a PCBU).

## **Officer**

The Act places a specific 'due diligence' duty upon 'Officers' to ensure that the PCBU complies with its duties and obligations.

Officers include:

- Directors of companies;
- Partners in a partnership;
- Any person occupying a position comparable to that of a director in body corporates or unincorporated bodies; or
- Any other person occupying a position in a PCBU that allows the person to exercise significant influence over the management of the business (ie. a person with substantial decision making responsibilities such as a chief executive).

As "decision making" is the key criterion for establishing a due diligence duty, it is likely that this criterion will be important for managers in smaller entities who have greater decision making impact.

In Australia, the High Court has focused its examination on the contribution that each person makes to the making of a decision,<sup>1</sup> finding that integral participation in the decision making process (i.e. shaping and proposing key decisions to be made) is sufficient.<sup>2</sup> The Court noted, however, that participation in *any* decision does not make a person an 'officer,' rather the decision must have the significance that the statute prescribes.

## **Worker**

The definition of 'worker' under the Act has been intentionally broadened to ensure the health and safety of those working in the workplace, including contractors and their employees.

Worker means any person who carries out work in any capacity for a PCBU, including work as:

- An employee;
- A contractor or subcontractor and their employees;
- An employee of a labour hire company who has been assigned to work in the business or undertaking;
- An outworker (including a homemaker);
- An apprentice or trainee;
- A person gaining work experience or undertaking a work trial; and
- A volunteer worker.

## **Others**

In contrast to the HSEA, any other person present at a workplace (i.e. a visitor etc) also holds health and safety duties under the Act and may be found liable for breaching those duties.

## **5. Concepts and Tests**

When considering whether a breach has occurred under the Act, the Court is required to consider whether the steps taken were "*reasonably practicable*". This replaces the current test under the HSEA of '*all practicable steps*'.

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<sup>1</sup> *Shafron v ASIC* [2012] HCA 18, at [27]

<sup>2</sup> *Ibid*, at 30

In summary, the phrase “*reasonably practicable*,” means what was ‘reasonably able to be done to ensure health and safety’ at a particular time, and will depend upon:

- The likelihood of the hazard or the risk concerned occurring;
- The degree of harm that might result;
- What the person concerned knows, or ought reasonably to know, about the hazard or risk and ways of eliminating or minimising the risk;
- The availability and suitability of ways to eliminate or minimise the risk; and
- After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

These changes mean that an assessment of cost must only be undertaken after an assessment of risk and risk elimination options, and that cost will only take precedence over safety when the cost of taking a step is “grossly disproportionate” to the risk.

## 6. Duties

### **Duty to Manage Risk**

All persons who have a duty under the Act are required to:

- (a) **Eliminate risks** to health and safety as far as is reasonably practicable; or
- (b) Where it is not reasonably practicable to eliminate risks, to **minimise those risks** as far as reasonably practicable.

The Act goes on to provide that a person is only required to comply with this duty to the extent that the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risk relates. This represents a significant dilution of the general duty as it was originally drafted in the Health and Safety Reform Bill 2014.

### **Duties of PCBU**

The primary duty of a PCBU is to ensure, so far as is reasonably practicable, the health and safety of:

- Workers for the PCBU **while the workers are at work**;
- Workers whose activities are **influenced or directed** by the PCBU **while the workers are carrying out the work**; and
- Other persons, to the extent that **they are put at risk from the work carried out** as part of the business or undertaking.

This duty includes ensuring, so far as is reasonably practicable:

- The provision and maintenance of a work environment that is without risks to health and safety;
- The provision and maintenance of safe plant and structures;
- The provision and maintenance of safe systems of work;
- The safe use, handling and storage of plant, substances and structures;
- The provision of adequate facilities for the workplace welfare of workers including ensuring access to those facilities;

- The provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety; and
- That the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of the workers.

PCBUs also have a duty to consult, co-operate with and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter, in so far as is reasonably practicable. Anyone who contravenes this duty will be deemed to have committed an offence and will be liable for a fine not exceeding \$20,000 for an individual, or \$100,000 for a corporation (or a body of persons, whether corporate or unincorporated).

### Duties of Officers

The Act imposes a pro-active due diligence duty on Officers to ensure that the PCBU complies with its duties under the Act, and Officers may be found liable for a breach of that duty, irrespective of whether the PCBU is held responsible.

In complying with the due diligence duty, Officers must exercise the care, diligence and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation) –

- (a) The nature of the business or undertaking; and
- (b) The position of the Officer and the nature of the responsibilities undertaken by that Officer.

This due diligence duty of Officers is onerous, requiring them 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 and hazards and risks associated with those operations;
- (c) Ensure that the **PCBU has available** and uses **appropriate resources and processes** to eliminate or minimise risks to health and safety;
- (d) Ensure that the PCBU has **appropriate processes for receiving, considering and responding in a timely manner to information** regarding incidents, hazards and risks;
- (e) Ensure that the PCBU has and implements processes for complying with duties under the Act.

The new due diligence duty imposed on Officers represents an extensive change to the duties of directors or officers under the HSEA (under existing HSEA laws, a director or officer can currently only be found liable for a breach where that person directed, authorised, assented to, acquiesced in, or participated in the failure of the corporation to meet its health and safety obligations - in other words, where the officer or director was directly involved in the breach).

In contrast, the new Act imposes a positive duty upon Officers to ensure that a health and safety system with appropriate processes and resources is in place, and to apply their 'personal attention' to these matters. Each Officer will be required to **personally** check, review and monitor health and safety in the workplace.

For more information on how directors can influence health and safety performance within their organisation, see the Institute of Director's *Good Governance Practices Guideline for Managing Health and Safety Risks* (see <https://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/directors-guidelines-on-their-responsibilities>).

## Duties of Workers and Other Persons

Under the Act workers have a duty to:

- (i) Take reasonable care of their own health and safety;
- (ii) Take reasonable care that their acts or omissions do not adversely affect the health and safety of others;
- (iii) Comply, as far as the worker is reasonably able, with any reasonable instruction given by the PCBU; and
- (iv) Co-operate with any reasonable notified policy or procedure of the PCBU relating to health and safety

Other persons at a workplace are required to comply with (i) and (iii) above.

## 7. Offences

In order to strengthen New Zealand's health and safety regime, the Act imposes a three tier system of offences, each with significantly increased penalties:

Offence	Penalty		
	Individual	Officers, or individuals who are not a PCBU	Any other person
Offence of reckless conduct, where a person who owes a health and safety duty, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness	A term of imprisonment not exceeding 5 years and/or a fine not exceeding \$300,000	A term of imprisonment not exceeding 5 years and/or a fine not exceeding \$600,000	A fine not exceeding \$3 million.
Offence of failing to comply with health and safety duty that exposes an individual to the risk of death or serious injury or illness.	A fine not exceeding \$150,000	A fine not exceeding \$300,000	A fine not exceeding \$1.5 million
Offence of failing to comply with a health and safety duty	A fine not exceeding \$50,000	A fine not exceeding \$100,000	A fine not exceeding \$500,000

In comparison, current penalties under the HSEA are:

- Imprisonment up to 2 years, or a fine not exceeding \$500,000 for a person who, knowing that any action is reasonably likely to cause serious harm to any person, takes that action;<sup>3</sup> or
- A fine not exceeding \$250,000 for a failure to comply with a duty under the HSEA.<sup>4</sup>

In addition to the penalties under the Act, Worksafe New Zealand can also apply to the Court for an order requiring an offender to pay a 'just and reasonable' sum towards the costs of the prosecution (including investigation costs).

<sup>3</sup> HSEA, s 49

<sup>4</sup> HSEA, s 50

## 8. Engagement, Worker Participation and Representation

Employee participation was regarded by the Royal Commission on the Pike River Coal Mine Tragedy as essential to ensure worker safety. The Act therefore encourages worker participation in health and safety by increasing the obligation upon employers to involve workers in the development of health and safety policies, and provide them with an opportunity to express their views and contribute to health and safety decisions.

### **Worker Participation**

The Act stipulates that worker engagement is required when:

- Identifying hazards and assessing risks;
- Making decisions about how to eliminate or minimise those risks;
- Making decisions about the adequacy of facilities for the welfare of workers;
- Proposing changes that may affect the health and safety of workers;
- Making decisions about the procedures for –
  - Engaging with workers;
  - Monitoring the health of workers;
  - Monitoring the conditions at any workplace under the management or control of the PCBU;
  - Providing information and training for workers;
- Making decisions about the procedures for resolving health and safety issues in the workplace;
- Developing worker participation practices; and
- Carrying out any other activity proscribed by the regulations.

### **Health and Safety Representatives**

The Act recognises that the ability of an employee to speak out about health and safety risks is constrained by worker reluctance to raise issues or stand up to employers, and seeks to empower employees through representation.

Worker involvement and participation in the development of health and safety is encouraged under the Act by the appointment of health and safety representatives at either the election of workers or the PCBU. The PCBU must consult with the representatives on health and safety matters, allow them two days' paid leave each year to attend health and safety training, provide the time and resources necessary to perform their role and give them access to health and safety information.

The functions of the health and safety representative are not only to represent the workers in health and safety matters, but also to:

- Investigate complaints;
- Monitor the health and safety measures taken by the PCBU;
- Conduct inquiries into any apparent risks;
- Make recommendations;
- Provide feedback to the PCBU about whether the requirements of the Act or regulations are being met; and



- Promote the interests of workers who have been harmed at work, including arrangements for rehabilitation and return to work.

Trained representatives will also be empowered to issue provisional improvement notices if they believe someone is breaching or is likely to breach health and safety. This notice may require a person to:

- Remedy the contravention;
- Prevent a likely contravention from occurring; or
- Remedy the things or activities causing, or likely to cause, a contravention.

Small business with less than twenty workers and that are not in a high risk sector or industry are excluded from the obligation to appoint a representative upon worker request.

### Unsafe Work

Under the HSEA, employees currently have the right to refuse work that is likely to cause serious harm to themselves. The Act extends the right to cease work where the worker believes on **reasonable grounds** that carrying out the work would expose the worker or any other person to a serious risk to health and safety arising from an immediate or imminent exposure to a hazard.

### 9. Notification of Events

The HSEA currently requires employers to record and maintain a register of accidents and serious harm, and to notify WorkSafe of the occurrence of any serious harm or accident 'as soon as possible'.

Under the Act, notifiable events are divided into the following three categories:

Event	Description
Notifiable Incident	An unplanned or uncontrolled incident that exposes a worker or any other person to a serious risk to that person's health or safety arising from immediate or imminent exposure to a number of events, including a spill or leakage, an electric shock, the escape of a pressurised substance and the collapse of a structure.
Notifiable Injury or Illness	Any of the following injuries or illnesses (among others) which require a person to be admitted to hospital, or have immediate treatment for: <ul style="list-style-type: none"> <li>• The amputation of any part of his or her body;</li> <li>• A serious head injury;</li> <li>• A serious eye injury;</li> <li>• A serious burn;</li> <li>• The separation of his or her skin from an underlying tissue;</li> <li>• A spinal injury;</li> <li>• The loss of a bodily function; and</li> <li>• Serious lacerations.</li> </ul> <p>Notifiable injury or illness also includes any injury or illness which requires the person to have medical treatment within 48 hours of exposure to a substance or any infection to which they carrying out of work is a significant contributing factor.</p>
Notifiable Events	Includes the death of a person, a notifiable injury or illness and a notifiable incident.

Upon the occurrence of a notifiable event:

- (i) The PCBU who manages or controls the workplace must take all reasonable steps to ensure that the site is not disturbed until authorised by an inspector (this does not prevent any action to assist an injured person or make the site safe / minimise the risk of a further notifiable event); and
- (ii) A PCBU must notify WorkSafe of a Notifiable Event as soon as possible after becoming aware that a notifiable event has occurred. Notification may be given by telephone or in writing (such as email) and must be given by **the fastest possible means in the circumstances**.

Failure to notify WorkSafe in the appropriate manner may result in a fine not exceeding \$10,000 for an individual or \$50,000 for any other person.

Records of Notifiable Events must contain the particulars prescribed by the regulations, and be kept for at least 5 years. Contravention of this requirement may result in a fine of \$5,000 or \$25,000 respectively.

## 10. Enforcement

The Act includes a number of additional enforcement powers that may be exercised by WorkSafe or other parties. These include:

Notice	Description	Maximum Fine	
		Individual	Others
Improvement Notice Requires a person to remedy or prevent a contravention	Issued where an inspector believes that there is a breach, or likely breach of the Act or regulations	\$50,000	\$250,000
Prohibition Notice Prohibits the carrying on of a matter or activity that is or may involve serious risk arising from immediate or imminent exposure to a hazard	Issued to prevent serious risks to health and safety for an immediate or imminent hazard	\$100,000	\$500,000
Non-disturbance Notice Requires a person to cease an activity which may disturb the site	Issued to a person with management or control of the workplace by an inspector to facilitate his or her compliance power	\$50,000	\$250,000

Where a person is issued with an enforcement notice, an application may be made to WorkSafe for an internal review of the decision, and a further limited right of appeal to the District Court also exists on the basis that the internal review was unreasonable.

The Act also provides for the following additional orders to be imposed at sentencing:

- Adverse publicity orders, requiring an offender to publicise the offence, its consequences and the penalty;
- Restoration orders, requiring an offender to take specified steps to remedy the matter caused by the offence;
- Work health and safety project orders, requiring an offender to undertake a specified project for the general improvement of health and safety;
- Injunctions, requiring an offender to cease any particular conduct or action (with or without conviction);
- Training orders, requiring an offender to undertake a specified course of training; and

- Court ordered enforceable undertakings, adjourning the proceeding for up to two years, during which the offender undertakes to comply with certain undertakings. If at the end of the two year period the Court is satisfied the conditions have been met, the offender must be discharged.

### **Limitation Periods**

Proceedings for offences under the Act must be brought by Worksafe (or similar authority) within the later of:

- (a) 12 months of the date on which the incident, situation or circumstances to which the offence relates first becomes known to Worksafe; or
- (b) 6 months after the date of a coronial report.

Private prosecutions may however be brought by a person other than Worksafe within 2 years of the date of the incident (or within 6 months after the date of a coronial report).

### **11. Going Forward**

The Act will be supported by two phases of regulations, which are expected to be developed prior to commencement of the Act in April 2016.

The precise steps needed to achieve compliance with the incoming health and safety regime for your business and its officers can be unclear and complex. Clendons can assist your business to understand its duties and work with you to achieve the health and safety of your team. For further information or advice on the specific obligations applying to your business, please contact us.

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