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Te Kāhui Ture o Aotearoa

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Health and Safety Policy
Ministry of Business, Innovation and Employment

By email: HSWHaveYourSay@mbie.govt.nz

Consultation on work health and safety

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on MBIE's consultation document on work health and safety (**consultation document**).

1.2 This submission has been prepared with comments from the Law Society's Employment Law Committee,[1] as well as a member of the profession.[2]

1.3 This submission provides feedback through an employment law lens, and only responds to the questions in the consultation document which seek feedback on workability and improvements to the Health and Safety at Work Act 2015 (**HSWA**) and the wider work health and safety system. We have not responded to questions which seek input from businesses about their health and safety obligations and experiences in their workplaces.

2 Question 13 – examples of how health and safety laws balance flexibility with certainty, and requirements which are either working well, or are causing problems

2.1 The HSWA prescribes a range of duties, which are, in many cases, underpinned by the concept of what is 'reasonably practicable'. This is an inherently flexible and fact-specific concept. While it is appropriate for the HSWA to take a broad approach in this way to enable its application to a range of different workplace contexts, this lack of detail can create uncertainty and complexity for duty-holders in terms of whether they have taken sufficient measures to satisfy their duties.

2.2 By way of example only, we discuss below some aspects of the HSWA which give rise to uncertainty:

Meaning of 'officer'

2.3 Persons who are 'officers' must be able to identify as such, given the significant duties imposed on them under the HSWA. However, the broad 'catch-all' in section 18(b) of the

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1 More information about this Committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/employment-law-committee/.

2 We received comments from a member of the profession who is currently practising as an in-house lawyer in a relevant sector.

HSWA causes uncertainty – for example, it is unclear whether or not senior managers who are not the CEO of a business are considered 'officers'.

Due diligence duties of officers

2.4 It also is unclear how section 44 of the HSWA, which imposes a due diligence duty on officers, ought to apply in the context of large corporate groups with multiple companies and directors.

The interface with the Building Act 2004

2.5 The interface between the HSWA and Building Act in relation to earthquake-prone buildings lacks clarity. We note WorkSafe New Zealand (**WorkSafe**) has issued guidance on dealing with earthquake-related health and safety risks ,which seeks to clarify the interface between these two statutes;[3] however that guidance is not binding.

The 'reasonably practicable' concept

2.6 Application of the 'reasonably practicable' concept is inherently uncertain. Although this term is defined in section 22 of the HSWA, that definition is broad and inclusive, and requires consideration of what is or was "at a particular time, reasonably able to be done in relation to ensuring health and safety". While there is a list of matters that are said to be relevant to that analysis, that list is inclusive, and not exhaustive.

2.7 When attempting to apply this concept in practice, it can result in significant uncertainty for duty-holders. Although there is some guidance available from WorkSafe and in regulations as to the application of this concept to certain duties or duty-holders, this is not extensive and may result in persons conducting a business or undertaking (**PCBU**) to take an overly cautious approach to health and safety. However, we also acknowledge that there may be circumstances where a cautious approach is entirely appropriate given the potential health and safety harm arising from the relevant activity under consideration.

2.8 Our Employment Law Committee has also observed that WorkSafe inspectors may not take a uniform or consistent approach when considering what is or was 'reasonably practicable', with some inspectors taking a more lenient approach than others. This inconsistency:

(a) may reflect the inherent judgment call required under the 'reasonably practicable' concept, as well as the reasonably limited guidance available about how that concept is applied in specific contexts or work scenarios;

(b) may result in different enforcement outcomes for investigations with similar fact scenarios; and

(c) may make it difficult for duty-holders to predict outcomes when participating in any investigation or regulatory process, and could cause a loss of confidence in the fairness of that process.

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[3] WorkSafe New Zealand *Information for PCBUs and building owners: Dealing with earthquake-related health and safety risks* (June 2018).

'Managing and controlling the workplace'

2.9 The HSWA does not specify how to determine which PCBU 'manages or controls' the workplace in situations where there is more than one PCBU. In workplaces with, for example, a 'passive' landlord, a Project Manager, as well as a tenant who has oversight of the work being undertaken, it is unclear which of these PCBUs would be the 'PCBU who manages or controls the workplace'.

2.10 The issue of which PCBU manages and controls a workplace was recently considered by the District Court in *WorkSafe New Zealand v Whakaari Management Limited*.[4] Whakaari Management Limited had argued it was only a 'passive landowner' and, therefore, did not 'manage or control' Whakaari (White Island). However, the Court held Whakaari was a workplace for the purposes of the HSWA, and Whakaari Management Limited 'managed and controlled' Whakaari. The outcome of this decision could have far-reaching implications for many PCBUs (for example, landowners who only provide individuals with walking or cycling access on their property).

The requirement to ensure the health and safety of 'other persons'

2.11 There needs to be more clarity around the concept of 'other persons' in section 36(2) of the HSWA, including those who are likely to be considered 'other persons'. The recent *Whakaari* cases have put the concept of 'other persons' into contention – these cases draw a distinction between work activity and work product and suggest a PCBU must have its own workers at the workplace (or workers whose activities are influenced or directed by the PCBU) before section 36(2) could apply.[5] We understand that the position under the HSWA differs (or has been interpreted differently) to the position under the equivalent Australian legislation.

2.12 Clarity in relation to the intended scope of this duty would be helpful so PCBUs can more easily identify the persons to whom a duty may be owed under the HSWA.

Ceasing work due to health and safety risks

2.13 Section 83(4) of the HSWA requires a worker who has ceased work to notify the PCBU that they have done so. However, the HSWA does not clarify the process for notifying a PCBU, or the steps a PCBU must take upon receiving such a notice (for example, attempting to resolve the health and safety issue in question, as required under section 98 of the HSWA). Some clarity on these matters would be helpful.

2.14 While most PCBUs are likely to have internal notification processes and policies which address these matters, workers may be hesitant to follow those processes and policies if they lack transparency, impose burdensome requirements, or prevent workers from meaningfully participating in the assessment and resolution of the health and safety issue they have raised.

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[4] *WorkSafe New Zealand v Whakaari Management Ltd* [2023] NZDC 23224.

[5] See, for example, *WorkSafe New Zealand v Whakaari Management Ltd* [2023] NZDC 23224 at [80]. That decision noted that other considerations had to be taken into account, but ultimately concluded that s 36(2) still did not apply because those concerns were "met" by a finding that the defendant had a duty under s 37.

The requirement to comply with 'reasonable instructions'

2.15 Section 45 of the HSWA requires workers to comply with 'reasonable instructions' given by PCBUs. The term 'reasonable instructions' is not defined in the Act. As a result, it is unclear whether verbal instructions would come within the meaning of 'reasonable instructions', and whether workers would be required to comply with such instructions.

2.16 In practice, difficulties may also arise where:

(a) verbal instructions conflict with instructions in written policies (for example, where a process that is set out in a policy document is modified by a verbal instruction);

(b) workers are unable to keep accessing and referring to verbal instructions in order to ensure compliance; and

(c) there is no record of when a verbal instruction was issued, and to whom (particularly where such instructions conflict with, or modify existing policies or processes).

2.17 These concerns also extend to section 46 of the HSWA, which imposes a similar requirement on other persons at a workplace to comply with 'reasonable instructions'.

3 Question 16 – difficulties complying with legal requirements because of the overlap between work health and safety legislation and other requirements

3.1 There is significant overlap between work health and safety legislation and regulation, and employment law. For example, bullying, harassment, burnout, and other mental health risks or psychosocial hazards are issues which could give rise to complaints to WorkSafe (as a work health and safety matter), as well as a personal grievance or breach of contract claim in the employment law jurisdiction. This can create complexity for employers in managing overlapping claims which relate to the same subject matter.

3.2 In addition, managing a WorkSafe health and safety related investigation alongside a potential employment investigation or disciplinary process can present other challenges. For example, various employment process and natural justice requirements do not apply to WorkSafe health and safety investigations (and this may, for example, potentially result in employees providing statements that they would not have otherwise made during an employment investigation). Likewise, a health and safety investigation could potentially undermine the procedural fairness of an employment investigation (for example, if employees provide statements to WorkSafe 'on the record' before being involved in a relevant employment investigations).

3.3 Difficulties can also arise because provisions in the HSWA do not recognise the requirement under the Employment Relations Act 2000 to act in good faith. For example, the protections for workers and prospective workers in Part 3, Subpart 5 of the HSWA do not extend to circumstances where a PCBU has failed to communicate all relevant health and safety requirements and policies to its workers, and those workers have relied on incorrect and/or outdated policies and requirements in good faith.

3.4 While this good faith duty would not apply to all categories of person within the 'worker' definition in HSWA, the interface between good faith and the HSWA worker engagement duties in relation to "employees" could be clarified.

4 Question 25 – other feedback about the work health and safety system

WorkSafe investigations

4.1 Our Employment Law Committee has noted it is difficult to know whether a particular notifiable event will or will not result in more detailed investigation by WorkSafe. As a result, some serious events are not subject to further WorkSafe investigation while more minor events are investigated further. There does not seem to be any particular rationale for this ad-hoc approach.

The need for more guidance

4.2 While regulators such as WorkSafe and the Civil Aviation Authority issue guidance about various aspects of the work health and safety system, these are not frequently reviewed and revised to ensure they remain up-to-date.

4.3 There also appear to be gaps in the guidance that is available – for example, there does not appear to be any guidance about:

(a) the resolution of work health and safety issues under Part 3, Subpart 6 of the HSWA; or

(b) the provisions which protect workers from adverse conduct for prohibited health and safety reasons.

4.4 Clear, accessible, and current guidance about key aspects of the HSWA would benefit all duty-holders, including employers and employees who participate in the workplace health and safety system.

5 Next steps

5.1 We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz), if you have any questions, or wish to discuss this feedback further.

Nāku noa, nā

Jesse Savage
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