



# Overview

## **Part I: Background**

- Royal Commission on the Pike River Coal Mine Tragedy
- The Report of the Independent Taskforce on Workplace Health and Safety

## **Part II: A new approach**

- Health and Safety Reform Bill
- Guideline for Managing Health and Safety Risks



# Overview

## Part III: Sleepovers

- Employment Court decision  
*Victoria Law & Ors v Board of Trustees of Woodford House & Ors*
- Salaried staff entitled to minimum wage for sleepovers



# Part I: Background



# Overview

- Pike River
  - Royal Commission
- Independent Task Force
  - Key findings and recommendations to Government
- WorkSafe NZ
  - New regulator
  - Sole focus on Health and Safety
- Health and Safety Reform Bill
  - Overhaul of the law



# Royal Commission on Pike River Coal Mine Tragedy

- Royal Commission reported to the Governor-General on 30 October 2012 on what happened and how to prevent similar tragedies occurring
- 16 recommendations, 3 key themes:
  1. Increased regulation
  2. Statutory duties for directors/influencers
  3. Improved regulatory framework for mining



# Royal Commission cont'd

- The Royal Commission reached the following conclusions about Pike River's **corporate** governance:
  - The Board's focus on meeting production targets set the tone for executive managers and their subordinates
  - The Board needed to satisfy itself that executive managers were ensuring workers were being protected
  - An alert Board would have ensured that these things had been done properly
  - The Chairman's attitude was that things were under control unless told otherwise



# The Report of the Independent Taskforce

- Current workplace health and safety laws “not fit for purpose”
- Key weaknesses
  - confusing regulation
  - weak regulator
  - poor worker engagement
  - inadequate leadership
  - lack of management capability
  - insufficient knowledge of risks and requirements
  - ineffective deterrents to drive compliance (low likelihood of inspector visits and prosecution)





# Package of Change

- Overhaul of the law
- Creation of WorkSafe New Zealand
- Stronger penalties, enforcement tools and court powers
- New legislative framework modelled on Australian Model Law
- Adopt duty holder concept of “persons conducting a business or undertaking” (**PCBU**)



# Part II: New approach

## It's radically different



# Introduction to new approach

- Duties of care and obligations not pigeon-holed
- Shift in focus away from employer to employee duties to workers and workplaces
- Focus on cause and effect
- **All** involved in work will have a duty of care
- Positive duty on officers
  - All duties are concurrent and non-delegable



# Health & Safety Reform Bill

- Released 10 March 2014
- Adopts Australian Model Law – only in place since 2011
- Submissions on the Bill were due 9 May 2014
- Report from Committee expected as early as July 2014



# Key changes

- PCBU
- Officers – due diligence & duties
- Worker – broad definition
- Graduated enforcement
- Consultation – horizontal and vertical
- Worker protections & engagement
- Increased regulator powers
- Higher penalties



# Reasonably practicable (clause 17)

- Relates to duties under the Bill
- That which is, or was, reasonably able to be done
  - Likelihood
  - Degree of harm
  - What know or reasonably ought to know
  - Eliminate or minimise
  - Cost – grossly disproportionate



# Standards of Care for Duty Holders

Activity	Duty Holder	Relevant Standard
Operation of the business	Person conducting the business of undertaking (PCBU)	Reasonably practicable
Decision making and governance for the organisation	Officers' duty of care	Due diligence
Work activities	Workers' duty of care	Reasonable care
Circumstantial attendance at the workplace (i.e. visitors)	Others' duty of care (i.e. at a workplace)	Reasonable care



# PCBU

person controlling a business or  
undertaking





# Meaning of PCBU (clause 13)

- Catch-all for work/business
- Move away from employer/employee centric focus
- Reflects new ways of doing business
- Excludes officers and workers



# PCBU – big shift

- PCBU multiplies, not divides, the responsibility
- The term 'PCBU' is like a fishing net - it catches as much as it can in work/business places
- Not just employers who hold responsibility anymore



# Duties of PCBUs

(clauses 30, 32, 33, 34, 35, 36, 37 & 38)

- **Primary duty of care** is to ensure so far as is reasonably practicable the health and safety of
  - workers employed or engaged or caused to be employed or engaged while the workers are at work
  - workers whose activities are influenced or directed by the PCBU
  - other persons



# Duty to consult with other duty holders (clause 27)

- Where more than 1 person is a duty holder
- Over lapping duties
- So far as is reasonably practicable, consult, co-operate with, and co-ordinate activities with all other persons who have a duty in relation to the same matter



# PCBU: other obligations

So far as is reasonably practicable:

- entry and exit of the workplace and anything arising from the workplace
- fixtures, fittings, plant
- provision and maintenance of work environment
- safe plant, substances and structures



# Duty to notify notifiable event (clause 51)

- PCBU has a duty to notify regulator immediately after becoming aware that a notifiable event has occurred (clause 51)
- Notifiable event includes:
  - Death of a person; or
  - Notifiable injury or illness (clause 18); or
  - A notifiable incident (clause 19)



# Meaning of Notifiable Incident (clause 19)

- Notification of a “near miss”:
  - “notifiable incident” defined as an incident in relation to a workplace that exposes a worker or any other person to a **serious risk to that person's health or safety** arising from an immediate or imminent exposure to:
    - 13 incidents listed including:
      - an escape, spillage, or leakage of a substance; or
      - an implosion, explosion, or fire



# Officer





# Current H&S Liability of Directors

- **Section 56:**

Where a Body Corporate fails to comply with the provision of this Act, any of its officers, directors, or agents who directed, authorised, assented to, acquiesced in, or participated in, the failure is a party to and guilty of the failure and is liable on conviction to the punishment provided for the offence.

- **Courts have interpreted this provision narrowly**



# Meaning of Officer (clause 12)

**Officer**, in relation to a PCBU,-

- (a) means, if the PCBU is-
  - (i) a company, any person occupying the position of a director of the company by whatever name called:
  - (ii) a partnership (other than a limited partnership), any partner:
  - (iii) a limited partnership, any general partner:
  - (iv) a body corporate or unincorporated body, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company:
- (b) includes any other person, who makes ~~or participates in making~~, decisions that affect the whole, or a substantial part, of the business of the PCBU (for example, the chief executive ~~or a chief financial officer~~): but
- (c) does not include a Minister of the Crown acting in that capacity



# School boards & trustees exempted (clause 47)

- Some office holders do not commit offences for failure to comply with duties of officers
- s47(2)(d) - a trustee of board of a school appointed or elected under the Education Act 1989
- s47(3) - board and trustee, in relation to a school, have the same meanings as in section 92(1) of the Education Act 1989



# Duties of officers (clause 39)

- Proactive duties imposed
- Exercise due diligence to ensure PCBU complies with duty or obligation
- Personal liability not new for directors but duties are
- Duty is personal & cannot be discharged to others
- Proactive – failure even if no incident



# Due Diligence Obligations (clause 39)

1. Keep **up-to-date** with health and safety matters

2. Ensure the person running the business has **appropriate resources and processes** to manage risks to health and safety

3. **Understand** the nature of the business and its hazards and risks

4. Ensure there are appropriate **reporting and investigation** processes in place

5. Put in place **monitoring** regimes to ensure that the above matters are effective

6. Verify



# Good Governance Practices Guideline

- Good Governance Practices Guideline for Managing Health and Safety Risks (IOD and MBIE) – May 2013
- Is not a policy statement or a statutory document
- Advice to governing bodies on how to influence health and safety performance and compliance
- Aims to set out support in world of increased scrutiny
- Includes substantial management obligations



# Guideline cont'd

- Principles apply to all members of governing bodies including directors, trustees and councillors
- Due diligence requirement on directors
- Framework on how to lead, plan, review and improve health and safety
- Create strong, objective lines of reporting and communication



# Guidelines for Directors

- Practical tool – sets out actions and recommended practices to reflect best practice
- Pre-Bill – add in additional step - verify
- Divides the role of directors into four elements and outlines responsibilities under each
  - Policy and planning
  - Delivery
  - Monitor
  - Review





# Policy and Planning

- Create a charter setting out the board's role in leading health and safety
- Publish a safety vision and beliefs statement
- Establish health and safety targets for the organisation
- Ensure there is an effective linkage between health and safety goals and the actions and priorities of senior management



# Delivery

- Ensure effective implementation of a fit-for-purpose health and safety management system
- Ensure management have staffed the organisation with sufficient personnel with the right skill mix and support
- Provide sufficient funding for the effective implementation and maintenance of the system and improvement programmes



# Monitor

- Review serious incidents including serious non-compliance and near misses, and be personally satisfied with the adequacy of management actions in response
- Specify clear requirements for the regular reporting of health and safety performance results, and review these reports for indications of trends, system breakdowns and improvement needs



# Review

- Conduct a formal review of the organisation's health and safety performance on a periodic basis to consider whether the policy and system are being effectively implemented and are still fit for purpose
- Ensure the review includes internal and external audits to seek independent and objective assurance
- Ensure that actions identified in the review are communicated and effectively implemented



# Officers are liable

- An officer may be charged with an offence whether or not the PCBU has been convicted or found guilty of an offence under the Act
- Important to know if you are caught by the duties for officers and/or have to manage PCBU duties



# Consequences of breaches of duties

Clause	Notes	Liability
42	Offence of reckless conduct – most serious Breach duty and exposes individual to risk of death or serious injury or illness & is reckless as to the risk	<u>Individual who is not a PCBU or officer</u> 5 years' imprisonment &/or fine not exceeding \$300,000 <u>PCBU or OFFICERS</u> 5 years' imprisonment &/or fine not exceeding \$600,000 <u>Corporation</u> Fine not exceeding \$3million
43	Failure to comply & exposes person to risk of death or serious injury or illness	<u>Individual who is not a PCBU or officer</u> Fine not exceeding \$150,000 <u>PCBU or OFFICERS</u> Fine not exceeding \$300,000 <u>Corporation</u> Fine not exceeding \$1.5million
44	Failing to comply with duty	<u>Individual who is not a PCBU or officer</u> Fine not exceeding \$50,000 <u>PCBU or OFFICERS</u> Fine not exceeding \$100,000 <u>Corporation</u> Fine not exceeding \$500,000



# Workers



# Meaning of Worker (clause 14)

In this Act, unless the context otherwise requires, a **worker** means, a person who carries out work in any capacity for a PCBU, including work as-

- (a) an employee; or
- (b) a contractor or subcontractor; or
- (c) an employee of a contractor or subcontractor; or
- (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- (e) a ~~homeworker~~ outworker (including a homeworker); or
- (f) an apprentice or trainee; or
- (g) a person gaining work experience (~~for example,~~ or undertaking a work trial; or
- (h) a volunteer; or
- (i) a person of a prescribed class.





# Duties of workers (clause 40)

- Only have to take reasonable care
- For their own safety and towards others
- Comply as far as reasonably able with instructions
- Co-operate with policies and procedures that have been notified



# Worker Engagement

- PCBU have a duty so far as is reasonably practicable to engage with workers (clause 61):
  - who carry out work for the PCBU; and
  - who are likely to be directly affected by the matter relating to their health and safety
- Nature of engagement outlined (clause 62) and includes:
  - relevant information shared with workers
  - reasonable opportunity afforded to workers to express their views and contribute to decision making



# Health and Safety Representatives

- Health and safety representatives
  - Elected by workers (clause 65)
  - Functions (clause 69):
    - represent workers and promote their interests
    - monitor actions taken by PCBU
  - Broad powers (clauses 70 – 75, 80, 89 etc)



# H&S Rep Powers cont'd

- issue provisional improvement notices (clause 92) if trained to do so (clause 93)
- direct worker to cease unsafe work if trained to do so (clause 107)
- No personal duty of care (clause 83)
- Indemnified against civil or criminal liability if acting in good faith (clause 84)
- Removal only by WorkSafe (clause 85)



# Conclusion



# Conclusion

- Need to establish who perform duties for the PCBU
  - Who are the officers?
  - Who is the “board”?
  - Who are workers?
  - Who has to be consulted with?
- Ensure there are effective procedures are in place?
- This will be one of the first places WorkSafe look if things go wrong
  - WorkSafe want to see that connection to management
- Keep on top of reporting
- Advisors
  - Training
  - ACOPs



# Key Messages

- Major overhaul
- Take time to understand the changes
- Be prepared
- Action needs to be taken



# Sleepover update





# *Law v The Board of Trustees of Woodford House and The Trustees of Iona College*

- Applied and built on *Idea Services Limited v Dickson*
- Key points:
  - MWA applies to salaried employees
  - Averaging cannot be used to assess compliance with MWA



## *Idea Services* – recap

- “Work” under MWA?
  - Impact sleepover had on freedom of worker to otherwise do as they pleased
  - Nature and extent of responsibilities of worker
  - Importance of sleepover to worker
- Averaging
  - Does not comply with MWA
  - **But** facts related to waged employee, not salaried



# *Law v BOT of Woodford House & or*

- “Work”?
  - Applied *Idea Services*, employees working for purpose of MWA
  - Personal activities were significantly constrained during the relevant sleepovers and they were generally not able to enjoy either an uninterrupted period of sleep, or to pursue any recreational activities



# Rejection of averaging approach

- As in *Idea Services*, applied strict wording of MWA and relevant Minimum Wage Order
  - Payment should be made for, and identified with, each period of work
  - Under MWO, relevant periods of work are: hourly, daily, weekly, **not** yearly
  - Cannot average over more than a week in assessing whether MWA complied with



# Minimum Wage Order 2013, cl 4

The following rates are the minimum rates of wages payable to an adult worker:

- (a) for an adult worker paid by the hour or by piecework, \$13.75 per hour:
- (b) for an adult worker paid by the day,—
  - (i) \$110 per day; and
  - (ii) \$13.75 per hour for each hour exceeding 8 hours worked by a worker on a day:
- (c) in all other cases,—**
  - (i) \$550 per week; and**
  - (ii) \$13.75 per hour for each hour exceeding 40 hours worked by a worker in a week.**

(\$14.25 from 1 April 2014)



# Rejection of averaging approach

- Discounted argument that because employees did no work for 10 weeks of the year (school holidays), should deduct 10 weeks from averaging figure
- Held was “*additional, albeit generous leave*”
- Could still be called in to work during school holidays
- Still came back to fact that cannot average over more than a week



# Impact

- Potential claims in a wide-ranging number of fields, for example:
  - where sleeping on site may be part of employment, eg ships, armed forces, hospitals; or
  - where the balance of hours and salary may be heavily imbalanced;
- Back pay up to 6 years





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