



## Everything changes, nothing changes? The likely effect of new health and safety legislation on building and construction organisations

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### Summary

New Zealand has learned to live with the Health and Safety in Employment Act 1992 and, specifically, its effects on building and construction law. However, 2014 is likely to see new legislation based on the Australian Model Act.

- What changes in law and practice might building owners, contractors and occupiers need to prepare for?
- What effects will the recent Institute of Directors/Ministry for Business, Innovation and Employment guidance for directors on their health and safety obligations have?
- What guidance should lawyers give clients?
- The paper will suggest a risk-based approach using international standards and Australian and New Zealand guidance.

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### Health warning!

This paper is written by a non-lawyer for presentation to lawyers. Comments on the law are therefore open to expert criticism. Comments on possible changes in practice are personal opinion based on more than 40 years' professional experience in regulatory, managerial and consultancy roles in the UK and New Zealand.

### Background

In 2010 the Pike River disaster killed 29 men and led to the Pike River Royal Commission, Independent Taskforce On Workplace Health and Safety and Ministry for Business, Innovation and Employment (MBIE) reports (Jager et al, 2013; Panckhurst, Bell, & Henry, 2012; Shanks & Meares, 2013). The numbers were awful and the suffering of the families and friends has been increased by weekly and, at times, nightly TV news. The Government has responded to the Royal Commission report with a series of initiatives covering staff and other resources, legislation, safety representation, etc.

The Shanks & Meares review on the role of the then Department of Labour in the Pike River tragedy found:

*We have concluded that there were actions or (more often) inactions on the part of officials in both agencies that may have contributed to the tragedy. That will likely come as little surprise to those who have read the Royal Commission's Report carefully.*

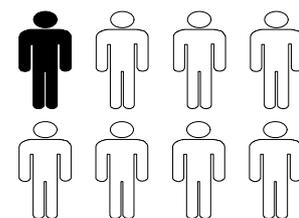
*21. DOL's performance as health and safety regulator of Pike was ineffectual and dysfunctional.*

How far did this ineffectiveness and dysfunction extend to contribute to fatalities and injuries in other high-risk industries, including the five MBIE high-priority areas of construction, agriculture, forestry, manufacturing, and fishing?

The construction industry routinely kills employees and contractors (but "only" one at a time) and contributes to a substantial number of injuries and occupational ill-health leading to ACC claims every year – 16%, or about 1 in 8 in 2010, see Figure 1.

The Independent Taskforce report led to policy papers going to the Government; the proposals have been substantially accepted by the Government and work is now in hand to set out how to implement the agreed changes.

**Figure 1. The construction industry contribution to ACC work-related claims in 2010**





This paper considers some of those changes and their likely long-term impact on the owners of buildings and the construction industry.

## Changes in law and practice

### *The Australian Model Act for workplace health and safety*

The Independent Taskforce proposed and the Government has agreed to adopt the Australian Model Act for workplace health and safety. The Model Act introduces the concept of a “person conducting a business or undertaking” or PCBU and has as a primary duty:

*(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:*

*(a) workers engaged, or caused to be engaged by the person; and*

*(b) workers whose activities in carrying out work are influenced or directed by the person,*

*while the workers are at work in the business or undertaking.*

*(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.*

Thus, the “all practicable steps” test in the Health and Safety in Employment Act 1992 will disappear and be replaced by the “so far as is reasonably practicable” (SFARP) test derived ultimately from the UK Health and Safety at Work Act 1974 and the English common law system.

Officials have claimed the SFARP test is more easily understood than the “all practicable steps” test. This is a reasonable assertion as that test is conditional on matters that are reasonably practicable (ie, a double test). Moving to the SFARP test will align New Zealand with Australian interpretations of the test and a wealth of guidance available from the UK.

Other duties in the Model Act extend to upstream participants in the supply chain (eg, PCBUs that are designers, manufacturers, importers and suppliers of plant, substances, and structures). For example, other sections require:

*The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.*

And

*The person with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person.*

And

*The designer must ensure, so far as is reasonably practicable, that the plant, substance or structure is designed to be without risks to the health and safety of persons ... [who use, handle, store, or carry out any reasonably foreseeable activity at a workplace in relation to ... manufacture, assembly or use of the plant ... or the ... decommissioning, dismantling, demolition or disposal of the plant or structure].*

These duties will apply to “building managers” and “designers” in the broadest sense. They will also require a clear statement of responsibilities in contracts and job descriptions.

*[A PCBU that installs, constructs or commissions plant or a structure that is to be used, or could reasonably be expected to be used, as, or at, a workplace] must ensure, so far as is reasonably practicable, that the way in which the plant or structure is installed, constructed or commissioned ensures that the plant or structure is without risks to the health and safety of any person [who:*

- installs or constructs the plant or structure at a workplace*
- uses the plant or structure at a workplace*
- carries out any reasonably foreseeable activity at a workplace in relation to the proper use, decommissioning, demolition, disposal or dismantling of the plant or structure*



- *or who are at or in the vicinity of a workplace and whose health or safety may be affected by a use or activity referred to above].*

Ignorance on the part of officers and directors will not be acceptable as they must “exercise due diligence to ensure [the PCBU] complies with [any] duty or obligation” under the Model Act.

The definition of due diligence refers to:

- up-to-date knowledge of work health and safety matters
- gaining an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations<sup>1</sup>
- ensuring the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking
- ensuring the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information
- ensuring the PCBU has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act.

## Recent guidance

Recent guidance published jointly by the Ministry for Business, Innovation and Employment and Institute of Directors (MBIE & IoD, 2013) discusses the due diligence requirements of the Model Act. It then gives guidance on policy and planning, delivery (in the form of an occupational health and safety management system), monitoring and review. These are supported by suggested diagnostic questions and actions for directors.

Full implementation of the guidance may require more reporting on health and safety than many companies are accustomed to. Will directors find they need to rely more on reports and professional or expert advice on health and safety? section 138 of the Companies Act allows that:

*... a director of a company, when exercising powers or performing duties as a director, may rely on reports, statements, and financial data and other information prepared or supplied, and on professional or expert advice given, by any of the following persons:*

*(a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned:*

*(b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence:*

*(c) any other director or committee of directors upon which the director did not serve in relation to matters within the director's or committee's designated authority.*

Such reliance only applies if a director acts in good faith, makes proper inquiry where the need for inquiry is indicated by the circumstances, and has no knowledge that such reliance is unwarranted.

## Lawyers and their clients

### **Reliance on reports or advice**

How will a PCBU or director know they can rely on reports and professional or expert advice on health and safety? They may look to lawyers for some guidance. One solution is to look at the professional status of safety advisors and ask questions such as:

What relevant academic or professional qualifications do they hold in the field of interest?

Are they members of a recognised professional body?

Are they required to carry out continuing professional development?

Would you trust this person as an expert witness in court?

<sup>1</sup> Note Principle 6 of the Financial Markets Authority guidance on Corporate Governance In New Zealand requires “Processes to identify, monitor and manage risks are needed so that the board and managers can be properly informed and can implement systems of internal control that are responsive to the identified risks”.



However, other, wider questions will need to be considered such as:

Can an ACC workplace safety management practices (WSMP) audit be relied on beyond its insurance objectives? If not, is a full occupational health and safety audit required? In the construction sector, when should any audit be conducted – before or during a project?

If a full audit is needed, which standard should be used?

When selecting contractors, can the principal to a contract rely on the findings of WSMP or similar audits that were carried out for the contractor?

### ***The value of occupational health and safety in construction***

We face a period of change in legislation and enforcement. Will the new legislation merely be a change leading to the same or increased costs?

In the UK the Construction (Design and Management) Regulations (CONDAM) were introduced to comply with a European Union Directive and to help reduce the rate of harm to workers. The Regulations seem to have driven professionalisation of some parts of the construction industry and led to designers becoming involved earlier in projects than was previously the case (Bennett, 2004).

However, Bennett & Gilbertson (2006) found the economic advantages of implementation of the Regulations were being missed. They argued that “professional added value design in its widest sense as part of the delivery of successful projects is inextricably linked to professional health and safety management”.

Can such self-interest drive improvements here? Several research projects looked at factors that contributed to the London 2012 Olympic Park being delivered on time, on budget and with an exemplary health and safety record. If the lessons learned were followed here the answer might be “yes!”.

Bolt, Haslam, Gibb, & Waterson (2012) found that “human characteristics like respect, trust, clarity, pre-emption, challenge, consistency, collaboration, motivation, empowerment, communication, openness, fairness and assurance” were key to the positive outcomes for the Olympic Park. Bolt et al concluded that many of the findings offer benefits across a wide range of construction projects and for different companies in the construction supply chain.

Other research found the Olympic Park project was characterised by a client and project management system aimed at facilitating communication and safe practice. (Cheyne, Hartley, Gibb, & Finneran, 2012; Finneran, Hartley, Gibb, Cheyne, & Bust, 2012). This led to knowledge transfer into, within and out of the Olympic Park project and subsequent projects. Tyers, Hicks, Baxter, & Gilbert (2012) researched the effectiveness of the occupational health service in the Olympic Park and found it added value by reducing occupational ill-health and changing worker attitudes.

Can a case be made for a New Zealand version of the CONDAM regulations? Perhaps, especially if the sector fails to self-regulate and act with self-interest. A newspaper article is appended showing how Fletcher Building reduced its 12-month rolling average injury frequency rate per million employee and contractor hours from 60 in 2006 to 8 in 2012. The self-interest approach at Fletchers embodied much that is now proposed in the Model Act and has already saved that company “a fortune”.

## **A risk-based approach**

### ***Reasonably practicable***

The Model Act defines “reasonably practicable” as:

*that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters 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; and*



*(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

This definition confuses the terms “hazard” and “risk” (indeed, the Act gives no definitions for the words) and fails to distinguish causes, events and consequences. However, it is clear the Model Act requires consideration of:

- likelihood of occurrence
- the degree of harm
- the current state of knowledge of the risk and how it could be eliminated or minimised
- what is actually available to eliminate or minimise the risk
- the cost of eliminating or minimising the risk and whether that cost is grossly disproportionate to the risk.

The Model Act seems to be based on the leading English Common Law case of *Edwards v NCB 1949* and, under the Model Act, all the above points will need to form part of any assessment of risks that may cause harm to people. However, the learned judges did not have the benefit of current risk management thinking, including the need for an integrated approach to risk. The problem with topic-specific legislation is that it fails to consider related issues. Thus, the Model Act deals only with negative consequences of risks for people. Slightly broader wording would help drive innovation and give better alignment with other legislation such as the Companies Act, Securities Act and Resource Management Act. For many people this would greatly improve and simplify business.

#### ***An effective risk assessment?***

AS/NZS ISO 31000:2009 *Risk management – Principles and guidelines* provides internationally agreed guidance on the management of risk, regardless of the nature of the risk or organisation. It describes how to develop a risk management framework and carry out risk assessments using the risk management process. Risk is defined as the “effect of uncertainty on objectives”, thus showing the need for clearly defined objectives and capturing the range of possible effects.

The overall risk assessment process requires:

- consideration of the context of the project or work activity, including understanding the business objectives
- communication and consultation with stakeholders throughout the whole process
- setting criteria for risk acceptance (eg, cost, safety, time, structure performance)
- risk identification
- risk analysis
- risk evaluation against the criteria
- treatment of risks found to be unacceptable
- monitoring and review of the whole process.

Discussion of a risk-based approach in the policy papers avoids discussion of how a risk assessment should be conducted if it is to be effective.

Bow-tie analysis is a risk assessment technique that is increasing in use. It sets out causes of a specified event, the consequences of the event (including knock-on consequences) and how they might impact on objectives. Controls can be mapped into the bow-tie to show how well a risk is managed. Used as part of workshops, bow-tie analysis can help engage key stakeholders in risk-related decisions in the pre-design stage and on to the demolish/dismantle/dispose stage. The technique may therefore gain more importance as the new legislation comes into force.

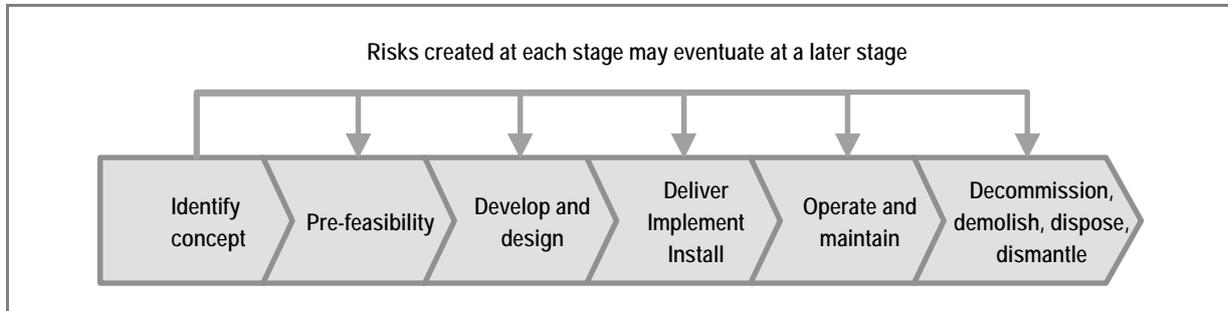
A draft IEC standard IEC 62198 *Managing risk in projects – Application guidelines* parallels the guidance in AS/NZS ISO 31000 and gives guidance on management of project-related risks “from conception to demolition” thus enabling a common approach to construction-related risks.

Figure 2 shows typical phases in a project and shows that risks may be created early in a project that only become evident later in the life-cycle of an asset or service. Examples of two end-of-life-cycle problems follow.



- A high-rise office building designed in the late 1950s and built in the early 1960s is just acceptable under the earthquake code but has openable windows, no air conditioning and no service ducts for cables. What should the owner do with it? If demolish, what is known about the design and construction?
- A single storey industrial building designed and built in the 1960s is clad with corrugated asbestos cement that is disintegrating. What should the owner do with it?

**Figure 2. Phases in a project**



Source: Managing risk in projects (IEC, 2012)

### Levels of risk

The MBIE blueprint for health and safety at work says the focus of the new regulator, Worksafe,

*... will be based on levels of risk. Businesses in high hazard industries, or at risk of acute, chronic, or catastrophic harm will need to do more, but businesses with lower levels of risk will find it easier to comply and will have minimal costs. There will be more focused prevention activity by the government and businesses in higher risk industries*

(MBIE, 2013, p. 21)

This surely will include the construction sector and some activities of commercial and industrial building management as new builds, refits and maintenance can pose high levels of occupational health and safety-related risk.

In some workplace activities in New Zealand, risks can be dominated by adverse health effects. One estimate suggested there are about 500 premature deaths per year due to the use of hazardous substances in New Zealand workplaces. In 2012, the Environmental Protection Authority found 75% of businesses were not complying with key controls for hazardous substances that prevent adverse health effects.

Adopting a risk-based approach should progressively lead to avoidance of some of the worst hazardous substances and better control of the use of others, perhaps through the use of method statements<sup>2</sup>. They may also lead to a reduction in other adverse consequences (eg, fires) and help avoid subsequent problems during demolition or dismantling structures.

### Conclusions

Too many people die in work-related incidents in New Zealand. The law will change, perhaps in 2014, almost certainly with multi-party support. The building and construction sector should start planning for the changes now and lawyers are one group that can influence that planning.

Returning to the title of the paper, "Everything changes, nothing changes?" Change is one certain feature of life. If the changes go as signalled, we may at last have better occupational health and safety legislation and a regulatory agency sufficiently well-resourced and staffed to command the respect of all stakeholders.

The likely effect of such new health and safety legislation on building and construction organisations could be considerable in the next 10-15 years.

<sup>2</sup> A method statement provides a documented sequence for carrying out an identified task to help ensure the safety of people.



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## Appendix 1: Article from Sunday-Star Times

Fletcher Building's outgoing chief executive Jonathan Ling believes the country will achieve its ambition to cut workplace death and injury only if it can get the country's chief executives to make health and safety their number one priority.

The Government has set a target to reduce workplace death and injury rates by 25 per cent by 2020.

But Fletcher has reduced accidents across its constellation of businesses by far more than that in the six years Ling has been in the top seat.

Fletcher's annual report for the year to the end of July 2011 shows the 12-month rolling average injury frequency rate per million employee and contractor hours dropped from 14.09 to 10.57. The rate is now 8, said Ling.

Even more startling, back in June 2006, the rate was over 60.

The independent taskforce on workplace health and safety is seeking ideas from businesses and the public on how to slash New Zealand's poor workplace safety record. A taskforce report released last Sunday revealed it is four times more dangerous to work in New Zealand than in the UK.

About 100 workers die each year, excluding those killed while driving at work.

"It starts with the person at the top and if the chief executive genuinely has it as his first priority, then people soon fall into line," Ling said.

"The question for the taskforce is how do you get every chief executive or general manager of every business unit or company in New Zealand to have health and safety as their number one priority. If you can achieve that, the rest will follow."

Ling's safety focus at Fletcher was in part a personal focus.

After 35 years in manufacturing and industrial businesses, he had seen some dreadful safety practices and fatalities.

So how did he cut those injury rates so dramatically?

At Fletcher 10-20 per cent of his own short-term bonuses depended on improvements in health and safety, as do the bonuses of every manager in the organisation.

"We have 10 board meetings a year and the first half dozen pages in every report to the board are about health and safety - strategy, and plans and the initiatives we have in place," Ling said.

Fletcher Building's health and safety vision, policy and standards are established by an executive-led health and safety council chaired by the chief executive. Each year, the council produces a safety plan, and performance targets are then "cascaded down" to divisions and business units, with operational responsibility for health and safety placed with each business unit.

Clearly there are monetary rewards for success, and recognition through annual safety awards which are a big deal within the company, but there are also penalties for failure.

Ling believes that creating safety "transparency" is vital. All Fletcher enterprises have a common health and safety electronic reporting system.

"If we created a list of the worst safety performers in New Zealand corporate and publicised it a lot of those companies wouldn't stay there for long," he said.

Ling said public league tables for New Zealand would soon bring about a change.

"When you are at the bottom, your first priority is to get off the bottom," he said.

Among the Fletcher leadership team three years ago, a survey revealed that leaders were spending around 20 per cent of their time on health and safety.

"A lot of people were staggered but what we also found was to have good safety you need good housekeeping, structured operating process, discipline in the workforce," Ling said.

In short, good managers in control of their businesses have time to spend on health and safety, and well-controlled businesses make money.

"Good safety is good business," Ling said. "I would argue that reducing our accident rate by 90 per cent has saved us a fortune."

The annual report makes no bones about this.

"The correlation between productivity and improved health and safety and the high human cost of injuries and fatalities, make health and safety a strategic issue."

Ling rejects the argument that smaller companies lack the resources to make a good fist of health and safety, saying there is never an excuse for poor health and safety.

"The general attitude to health and safety in this country is pretty poor."

Ling speculated that it might be the flip side to the Kiwi can-do attitude. Many New Zealand businesses were simply not compliant with the bare minimum requirements of the law but Fletcher has proved a revolution is achievable.

Source: Stock (2012)