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Special Edition for one year anniversary of the new H&S regime

The Health and Safety at Work Act 2015 came fully into force on 4 April 2016 so is now nearing its first birthday. We use this opportunity to look at the early implementation phases, assess progress and project future trends.

WorkSafe observed an informal six month transition period when the new obligations under the Act first came into effect but now expects full compliance.

The objective of the Act is to improve New Zealand's workplace safety culture. Early signs are that some headway is being made. Fatality and injury rates have dropped slightly in the two and a half years since WorkSafe took over from the Department of Labour.

WorkSafe is seeking to use a collaborative model which places great emphasis on engaging with and educating employers in the conduct of their health and safety responsibilities. Even in the enforcement sphere, WorkSafe is demonstrating a desire to work with employers during investigations rather than taking a quasi-inquisitorial approach.

Experience so far is that, when WorkSafe receives notification of an issue, it will advise early – often by phone or email - whether it plans to investigate. If in doubt, it is better to notify as non-notification is an offence and investigation is not inevitable.

Investigation standards are high. From the outset, WorkSafe has sought comprehensive document and information release, and has been rigorous and considered in its approach to interviews. To our knowledge, it has yet to interview an officer in relation to a safety breach. This has confounded the expectation that officers would be interviewed as a matter of course but it would be a mistake to assume that, because it hasn't happened so far, it won't happen. It is just a matter of time.

WorkSafe laid its first charge under the new Act last year but we have not yet had a case come before the courts for sentencing so it remains unclear how the courts will respond to the increased penalties available. Prosecutions taken under the old Act have seen WorkSafe increasing the amounts of reparations sought. We expect that trend to continue.

This special edition looks at cases of interest from here and Australia and the implications to be drawn from them. Case law will be important in determining the fine detail in the Act and our courts will look to Australia for guidance in assessing appropriate sanctions.

Contractors have H&S responsibility over work performed by sub-contractors

This principle has been underscored in four recent decisions.

CASE ONE

The Auckland District Court decision over the workplace death of rubbish collector Jane Devonshire, although under the previous legislation, reinforces the fact that multiple duty holders may be prosecuted for the same offence and that the duty to ensure safety cannot be delegated.

While the court accepted that the Auckland Council was "remote from day-to-day operations and could only monitor things from a relative distance", it still found that it could and should have done more to ensure safety by taking a more active role in the performance of its sub-contractors.

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The court apportioned the reparation payment based on the respective defendants' involvement. Veolia was ordered to contribute the greatest amount as the contractor to the Council, employer of the employees, and operator of the truck.

This judgment serves as an important reminder that businesses at the top of a contractual chain must take an active interest in the safety performance of those with whom they are working and engaging, and that companies cannot delegate their duties to subcontractors.

CASE TWO

An Australian company was fined $37,500 after a Canberra Court found that it had breached its health and safety duty in relation to artwork display panels that collapsed injuring members of the public. The company trusted in the experience of the contractor hired to do the installation and did not itself carry out any risk assessments on the panels' stability and strength before the artwork was hung.

The ACT Work Safety Chief Commissioner Mark McCabe took the opportunity to remind companies that their duties under the law were not delegable.

CASE THREE

Mallon Company Pty Ltd (trading as Frontline) had engaged Terry's Crane Hire Pty Ltd (TCH) to provide crane services in the repair of damage to Frontline's workshop roof. A Terry's employee was injured when he fell through a skylight. Frontline was aware that the skylight was damaged but had taken no steps to mitigate the risk of someone falling through it.

Frontline's liability as principal contractor was assessed at 40% (of a fine totalling $171,000) and the subcontractor's at 60%.

CASE FOUR

John Holland Pty Ltd was fined AU$130,000 for its part in an incident arising out of the actions of a specialist contractor. John Holland Pty Ltd was charged with failing to:

- ensure that a Task Risk Assessment was produced by the contractor in advance of the work being conducted, and
- apply the relevant JV auditing procedures (which, if it had, would have picked up that the subcontractor had failed to identify relevant risks).

TAKE-OUT

PCBUs should conduct due diligence on their subcontractors and have processes in place to monitor and audit their subcontractors' health and safety and maintenance plans and systems.

New Zealand courts do not apportion fines in the same way as the Australian courts, but the Australian experience demonstrates the scope of the principal's responsibility over the activities of subcontractors and other PCBUs involved in a project. In our view, the risk of liability for principals has increased and it is an area of focus for WorkSafe.

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Acting on known risks

The fine recently imposed on Toll Transport Pty Ltd in Australia is a reminder about the need for PCBUs to enforce steps that are in place to eliminate, isolate or minimise hazards after they have been identified.

Toll Transport Pty Ltd was fined $1 million – one of the highest safety fines in Australian history – after a stevedore was run over and killed in the absence of a spotter.

Toll had a system in place to manage the risks associated with loading and unloading its ships but some of its procedures were inadequate and the most critical precaution – having a second pair of eyes on the deck – was not enforced.

Induct, train and supervise

Ensuring workers are inducted, properly trained and supervised is a key element of a PCBU's obligations. Failure to perform these functions can result in heavy fines, as a recent case in Australia demonstrates.

Thermal Electric Elements Pty Ltd was fined $250,000 after a 17-year old work experience student had his hand crushed in a machine. Despite the student's obvious inexperience, Thermal did not provide him with any training or test his competency before allowing him to operate a brake press without supervision.

Harmonisation in health and safety sentencing

A Queensland Court recently took the opportunity to review a number of recent sentencing judgments across Australia so as to form a "harmonised" view of an appropriate fine.

The employer had originally been fined AU$90,000 which the Court on appeal considered was "manifestly inadequate", finding that a sentence in the order of AU$250,000 would have been more appropriate.

The Court compared cases from other Australian states, where small, first time offender companies had been involved in accidents leading to the death or serious injury of an employee and had generally cooperated with the authorities, been remorseful and entered early guilty pleas.

The Court found that in these instances, where the accident had resulted from a foreseeable hazard and where reasonably practicable measures could have been taken to address the risk, the appropriate penalty range was between AU$200,000 to AU$400,000.

While New Zealand has a slightly different sentencing regime, our courts will likely look to Australia for guidance on appropriate sentencing levels – particularly while our own Act is in its infancy.

Breach of duty for failing to address "abrasive manager"

The Victorian Department of Human Services has been found in breach of its obligation to take reasonable steps to ensure the safety of a psychologically vulnerable worker. The woman had been placed under an "abrasive" team leader and had made numerous complaints about her treatment.

The Victorian Court found that the manager was tough and her criticisms/feedback to the worker were not always well delivered but that they were not unwarranted and that the behaviour was not so consistent so as to amount to bullying.

Despite this, the Court went on to find that the Department, being aware of the employee's psychological vulnerability, had breached its duty of care by failing to intervene.

Reasonable interventions might have included:

- initiating a formal inquiry into the reasons behind the break down in the worker-manager relationship and in particular, the "friction" between the employee and her manager

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- counselling both parties about their behaviour and arranging mediation
- training the manager on how to deal with the worker's mental health concerns and on the importance of adopting a caring and supportive approach
- implementing an early-intervention plan for occupational stress, and
- transferring the worker to another manager.

The test applied here is fundamentally the same as under our health and safety law. It is therefore a useful reminder of the need to think more broadly and proactively about the employment relationship and in addressing any behavioural-based complaints.

Enforceable undertakings

An enforceable undertaking is a legally binding agreement provided as an alternative to prosecution. It sets out various corrective measures that the entity must undertake to fix an alleged breach and prevent it happening again. Giving an enforceable undertaking does not require, or amount to, an admission of guilt in relation to the contravention.

Enforceable undertakings accepted by WorkSafe will be published on its website. So far as we are aware, none have been concluded at this stage although WorkSafe has confirmed that it has some in the pipeline.

The challenge, and the opportunity, for companies is WorkSafe's intention that this mechanism should deliver a benefit to "the works or workplace, the wider industry or sector, and/or the community".

This may require some lateral thinking. Benefits provided for under the Australian legislation include health and safety training seminars for a particular industry, and community-wide safety awareness campaigns.

Employment law

Changes from 1 April

From 1 April, all individual employment agreements must comply with minimum standards in relation to parental leave, hours of work, restrictions on secondary employment and shift arrangements.

Employees will be able to bring personal grievance claims for breaches of these minimum requirements and they will be strictly enforced, with significant sanctions being awarded (including employers being publicly named) for serious or repeated offending.

Review your documentation as many employment agreements will need to be amended to comply with these new measures. We can help you with this.

Avoiding the pitfalls with holiday pay

An hours-based approach to calculating holiday pay is relatively common in New Zealand payroll systems although it is not what is envisaged by the Holidays Act 2003, which requires weeks not hours of entitlement.

But, provided employees are not receiving less than they would under a weeks-based calculation, employer payroll systems should be compliant and there should be no come-back from the Labour Inspectorate of the Ministry of Business, Innovation and Employment (*MBIE*).

If you are audited by MBIE, it will carry out a cross checking exercise where leave payments are calculated in hours as against weeks. Ideally, your payroll system will be set up to make this cross check so that you can be confident that you will come through any audit unscathed.

There is a working group of payroll providers consulting with MBIE on these issues, but to date the Government has ruled out any changes to the Holidays Act.

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Regulatory Systems (Workplace Relations) Amendment Act passed

This is an omnibus Act, introducing largely technical amendments. A feature of regulatory systems bills is that the changes they introduce do not merit dedicated legislation but are not so minor that they should escape select committee scrutiny.

Provisions to amend the Parental Leave and Employment Protection Act include:

- allowing employees to take paid leave entitlements (holiday pay and time off in lieu) before commencing any period of government-paid parental leave, and
- clarifying that the ability to recover overpaid parental leave payments applies only to work performed during parental leave (keeping in-touch days).

The parental leave amendments are expected to come into force on 1 June 2017, so as to allow sufficient time for the IRD, MBIE and businesses to made the necessary updates for these changes.

Amendments to the Employment Relations Act include allowing employees on a trial period to take a personal grievance on the extended grounds enacted from 1 April 2016 rather than having to rely upon establishing an unjustified disadvantage. These grounds are adverse treatment for refusing to perform certain work or a prohibited health and safety reason, breach of s92 of the Health and Safety at Work Act (coercion or inducement) or failing to pay compensation in a shift cancellation.

→ ***Link:*** *Legislation*

Legislation of Pay Equity Principles on agenda for this year

The Prime Minister has identified legislation to implement the principles developed by the Joint Working Group on Pay Equity as among the government's priorities for this year.

→ ***Link:*** *Statement to Parliament*

Gender pay gap reflects bias – report

Research undertaken by the Auckland University of Technology for the Ministry for Women has found that "traditional factors" – types of work engaged in, family responsibilities, education and age – account for only 20% of the pay gap between men and women. The rest is "unexplained" and is likely to reflect perceptions about behaviour, attitudes, and assumptions about women – including bias, both conscious and unconscious.

Women's Minister Paula Bennett responded to the findings with a "call to arms", saying: "Those doing the hiring and carrying out pay negotiations should know that it's not about what you can get away with. It's not about how much she's willing to accept. It's about what she's really worth".

→ ***Link:*** *Bennett statement*

Motherhood a wage depressant - Statistics NZ

A Statistics NZ report on the effect of motherhood on pay shows that fathers earn $28.30 an hour compared with $23.40 for mothers – a gap of $4.90 for every hour worked, or 17%.

In contrast, the lag between women and men without dependent children is only 5%. Internationally, the phenomenon is referred to as the 'motherhood penalty'.

→ ***Link:*** *Report*

Workplace Watch

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If you would prefer to receive this newsletter by email, or if you would like to be removed from the mailing list, please send us an email at subscriptions@chapmantripp.com.

Every effort has been made to ensure accuracy in this newsletter. However, the items are necessarily generalised and readers are urged to seek specific advice on particular matters and not rely solely on this text.

Minimum wage increase

The minimum wage will increase by 50c to $15.75 an hour and the starting out rate from $12.20 to $12.60 on 1 April.

→ ***Link:*** *Announcement*

Update on right to exit PG provisions bill

The Private Member's Bill by National MP Scott Simpson to allow employees on over $150,000 a year to choose to contract out of the personal grievance provisions in the Employment Relations Act has been referred to select committee.

Immigration

Tougher penalties for exploiting migrant workers

Employers who have incurred a penalty for breaching minimum employment standards will be banned temporarily from recruiting further workers under measures to take effect from 1 April.

The stand-down periods will range from 6 months to two years, depending on the severity of the offence. The threshold for non-compliance will not include very minor breaches where the employer has entered an enforceable undertaking with the Labour inspectorate to improve his or her processes.

Announcing the package, Immigration Minister Michael Woodhouse said access to the international labour market was a privilege not a right and that there would be "consequences" for those who did not comply with New Zealand worker protections.

→ ***Link:*** *Minister's statement*

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