HEATH AND SAFETY REFORM BILL

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Background

1. The Health and Safety Reform Bill was introduced in to Parliament on 10 March 2014 and was referred to the Transport and Industrial Relations Committee that day.

2. While the Bill was to have been reported back on 14 September 2014 (and the resulting report was to form a substantial part of this paper), some late submissions, including that of the New Zealand Law Society has meant the Select Committee report has been delayed until 30 March 2015.

3. The Bill is a response to the Pike River tragedy, and draws heavily on the Australian "Model Law" which is regarded as evidencing legislative best practice in this area.

4. The new regime is said to recognise that a well-functioning health and safety system relies on participation, leadership, and accountability by government, business, and workers including:[1]

    4.1 a law that is flexible enough to work appropriately for small and large businesses and high-risk and low-risk sectors, without imposing unnecessary compliance costs:

    4.2 obligations placed on the people in a work environment who create the risk and are best able to manage the risk:

        (a) Officers:

        (b) Those who:

            (i) manage or control workplaces;

            (ii) manage or control fixtures, fittings or plant in a workplace;

            (iii) design, manufacture, import or supply of plant, structures or substances that are, or could be used at a workplace; and

            (iv) install, construct or commission plant or structures that are, or could be used at a workplace.

    4.3 a worker participation model that provides for better levels of participation and helps workers to have the knowledge and accountability to keep their colleagues safe:

[1] Explanatory Note to the Bill

4.4 an appropriate system of regulations and guidance to ensure that people understand their obligations and can comply with them:

4.5 an effective enforcement regime with graduated categories of offences and penalties to provide better guidance to the courts about appropriate fine levels:

4.6 a Workplace Health and Safety Strategy that is approved by the Minister of Labour following development through an open consultative process:

4.7 ensuring that participants in the health and safety regulatory system are able to share information where appropriate.

Scope

5. For the purposes of this paper we will focus on key concepts under the Bill:

5.1 Person Conducting a Business or Undertaking "PCBU";

5.2 Officer and the duty of due diligence; and

5.3 The definition of "Reasonably Practicable".

6. If time permits we will examine the abolition of the privilege against self incrimination against corporates, the new offence categories and the likely Court reaction to the increased penalties under the Bill.

Resources

7. As with the introduction of new legislation, it will take time for resources to be developed for lawyers practicing in this area.

8. The Bill is based on the Australian Model Work Health and Safety Act.[2] That legislation is in force in the Federal jurisdiction and in most Australian states:

Jurisdiction	Legislation	Introduction to Parliament	Date Passed	Date Implementation
Commonwealth	Work Health and Safety Act 2011	6 July 2011	24 November 2011	1 January 2012
Commonwealth	Work Health and Safety Regulations 2011	Made 7 December 2011	Registered 14 December 2011	1 January 2012
Australian Capital Territory	Work Health and Safety Act 2011	23 June 2011	20 September 2011	1 January 2012
Australian Capital Territory	Work Health and Safety Regulations 2011		19 December 2011	1 January 2012

[2] http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/model-whs-act/pages/model-whs-act

Jurisdiction	Legislation	Introduction to Parliament	Date Passed	Date Implementation
New South Wales	Work Health and Safety Act 2011	5 May 2011	27 May 2011	1 January 2012. Laws relating to officers' due diligence duties took effect in June 2011
New South Wales	Work Health and Safety Regulations 2011		16 December 2011	1 January 2012
Northern Territory	Work Health and Safety (National Uniform Legislation) Act 2011	27 October 2011	1 December 2011	1 January 2012
Northern Territory	Work Health and Safety (National Uniform Legislation) Regulations		30 December 2011	1 January 2012
Queensland	Work Health and Safety Act 2011	10 May 2011	26 May 2011	1 January 2012
Queensland	Work Health and Safety Regulations 2011	Approved on 24 November 2011	29 November 2011	1 January 2012
South Australia	Work Health and Safety Act 2012	19 May 2011	1 November 2012	1 January 2013
South Australia	Work Health and Safety Regulations 2012		31 December 2012	1 January 2013
Tasmania	Work Health and Safety Act 2012	18 October 2011	13 March 2012	1 January 2013
Tasmania	Work Health and Safety Regulations 2012		3 December 2012	1 January 2013
Victoria	Not yet introduced			The Victorian Government announced it would delay harmonisation.
Western Australia	Not yet introduced			

9. Guidance on the New Zealand legislation can be found:

   9.1 Explanatory Note to the Bill;[3]

   9.2 Worksafe website;[4]

10. Detailed commentary is available on the Australian laws:

   10.1 Explanatory Memorandum – Model Work Health and Safety Bill:[5]

[3] http://www.legislation.govt.nz/bill/government/2014/0192/latest/DLM5976660.html?src=qs
[4] http://www.business.govt.nz/worksafe/about/reform
[5] Safe Work Australia, Canberra, 2 December 2010, at [77].

10.2 Interpretive Guidelines issued by Safe Work Australia;[6]

10.3 Australian texts:

(a) Work Health and Safety Regulation in Australia (Johnstone and Tooma); and

(b) Annotated Australian Work Health and Safety Legislation (CCH Australia);

10.4 National Review into Model Occupational Health and Safety Laws – First Report to Workplace Relations Ministers Council;[7] and

10.5 National Review into Model Occupational Health and Safety Laws –Second Report to Workplace Relations Ministers Council.[8]

PCBU

11. This is defined in the Bill as follows:

> **13 Meaning of PCBU**
>
> (1) In this Act, unless the context otherwise requires, a person conducting a business or undertaking or PCBU—
> (a) means a person conducting a business or undertaking—
> (i) whether the person conducts a business or undertaking alone or with others; and
> (ii) whether or not the business or undertaking is conducted for profit or gain; but…

12. Under s 29 Interpretation Act 1999 "person" includes a corporation sole, a body corporate, and an unincorporated body.

13. The Interpretive Guidelines define "business" by reference to enterprises usually conducted with a view to making a profit and having a degree of organisation, system and continuity.

14. "Undertakings" may have elements of organisation, systems, and possibly continuity, but are usually not profit-making or commercial in nature.

15. "Business" and "undertakings" are broad concepts used to capture all types of modern working arrangements.[9]

[6] http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/guidance/pages/guidance-material
[7] http://docs.employment.gov.au/documents/national-review-model-occupational-health-and-safety-laws-first-report
[8] http://docs.employment.gov.au/documents/national-review-model-occupational-health-and-safety-laws-second-report
[9] Interpretive Guideline - The Meaning Of 'Person Conducting A Business Or Undertaking'.

16. PCBU is intended to be read broadly and covers businesses and undertakings conducted by employers, principal contractors, head contractors, franchisors and the Crown.[10]

17. The question of whether something is an undertaking is:

> …simply whether the activity in question can be described as a part of the employer's undertaking. In most cases the answer will be obvious.[11]

18. The broad nature of the concept is emphasised in *Whittaker v Delmina Pty Ltd*[12]:

> The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states. It may have been thought that the word "workplace" had a narrower meaning. …The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer… and the word "conduct" refers to the activity or what is done in the course of carrying on and the business or enterprise…The circumstances must be as infinite as they may be variable.

19. The fact of or extent of an undertaking may require an examination of complex business structures.[13]

20. In assessing whether and activity is a business or an undertaking, reference may be had to whether there is a "workplace" as defined by the Bill:

> **15 Meaning of workplace**
>
> (1) In this Act, unless the context otherwise requires, a workplace—
> (a) means a place where work is carried out for a business or undertaking; and
> (b) includes any place where a worker goes, or is likely to be, while at work.
> (2) In subsection (1), place includes—
> (a) a vehicle, vessel, aircraft, ship, or other mobile structure; and
> (b) any waters and any installation on land, on the bed of any waters, or floating on any waters.

21. Regard must also be had to whether "work" is carried out. While not defined, the Interpretive Guidelines[14] provide some guidance as to what will constitute "work":

21.1 the activity involves physical or mental effort by a person or the application of particular skills for the benefit of another person or for themselves (if self-employed), whether or not for profit or payment;

21.2 activities for which the person or other people will ordinarily be paid by someone is likely to be considered to be work;

21.3 activities that are part of an ongoing process or project may all be work if some of the activities are for remuneration;

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[10] Explanatory Memorandum – Model Work Health and Safety Bill.
[11] *R v Associated Octel Co Ltd* [1996] 4 All ER 846.
[12] *Whittaker v Delmina Pty Ltd* [1998] VSC 175.
[13] *Piggot v CSR Emoleum Services Pty Limited* [2003] NSWIRComm 282.
[14] Interpretive Guideline - The Meaning Of 'Person Conducting A Business Or Undertaking'.

21.4 an activity may be more likely to be work where control is exercised over the person carrying out the activity by another person; and

21.5 formal, structured or complex arrangements may be more likely to be considered to be work than ad hoc or unorganised activities.

22. The Second Report[15] noted the following characteristics of "work":

22.1 Carrying on of an occupation, profession or trade;

22.2 A going concern or commercial enterprise;

22.3 The carrying out of work as a whole (rather than as a distinct item of work); and

22.4 A serious pursuit rather than a pastime or hobby.

23. Certain activities are excluded from the definition of PCBU under subclauses (1)(b) and (2):

> **13 Meaning of PCBU**
> …
> (b) does not include—
> (i) a person conducting a business or undertaking to the extent that the person is employed or engaged solely as a worker in, or as an officer of, the business or undertaking:
> (ii) a volunteer association:
> (iii) an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work:
> (iv) a person, or class of persons, that is declared not to be a PCBU for the purposes of this Act or any provision of this Act by regulations.
> (2) In subsection (1)(b)(ii), volunteer association means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

Officer

24. The concept is defined in the Bill:[16]

> **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 an 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; and
> (b) includes any other person who makes decisions that affect the whole, or a substantial part, of the business of the PCBU (for example, the chief executive); but
> (c) does not include a Minister of the Crown acting in that capacity.

25. That can be compared to the Companies Act 1993 definition of "director".[17]

[15] National Review into Model Occupational Health and Safety Laws – Second Report to Workplace Relations Ministers Council.
[16] Clause 12.
[17] Section 126 Companies Act 1993.

26. Under the current draft (and in contrast to the Australian position) partners are not excluded from the definition of officer. A double jeopardy issue arises as they are also personally liable by virtue of being a PCBU.

27. Subclause (b) will present the most difficulty in the application of the provision. It is considered that the definition will encompass at least the following categories of senior staff:

    27.1 Corporate counsel;

    27.2 Chief Financial Officers;

    27.3 Chief Executive Officers;

    27.4 Senior 'advisors';

    27.5 HR Managers; and

    27.6 Health and Safety Managers.

28. As to what is a "substantial part of the business", the Interpretive Guidelines[18] suggest criteria for assessing this aspect:

    28.1 The degree to which the part contributes to the revenue or financial standing of the business.

    28.2 The degree to which the part is significant to the reputation of the entity.

    28.3 Whether the part is considered to be a core part of the business, or ancillary to the core business.

    28.4 The proportion of personnel of the whole business who are engaged in activities within the part.

    28.5 Whether those who manage that part of the business make significant strategic or policy decisions, or whether those decisions are made at a higher level.

29. There does not seem to be an intention for the definition to apply to "middle management"[19] but that appears to be the effect of the provision as currently framed. This is discussed further below.

[18] Interpretive Guideline - The Health And Safety Duty Of An Officer Under Section 27.
[19] National Review into Model Occupational Health and Safety Laws –Second Report to Workplace Relations Ministers Council.

30. Much of the debate on the scope of the provision is based on Australian authority as to the application of the definition of "officer" for the purpose of the Corporations Act 2001, which provides that "officer" means:

> …
> (b) a person:
> i. who makes, or participates in making decisions that affect the whole or a substantial part, of the business of the corporation; or
> ii. who has the capacity to affect significantly the corporation's financial standing;
> iii. in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the persons professional capacity or their business relationship with the directors or the corporation); or
> …

31. That provision has been interpreted broadly to include:

31.1 The director of a parent company in relation to a subsidiary;[20]

31.2 Senior management[21]

32. *ASIC v Adler* followed the HIH Casualty and General Insurance (HIHC) failure. Alder was not a director of HIHC, but was a director of the parent, HIH. The Court's reasoning in relation to the challenged investment by HIHC in its parent, HIH, included:

> 71 There is no evidence from the First Defendant to refute that Mr Adler was other than an active member of the HIH Board, with its group responsibilities, particularly for investment, and was an active member of the Investment Committee, with its investment oversight responsibility. The evidence is clearly to the effect that Mr Adler took a close interest in investment matters participating fully in that category of decision affecting the business of HIHC.
>
> …
>
> 73 Even if it be contended that the Investment Committee did not oversee the HIH Investment Portfolio because, for example, it was subject to the direction and control of the Board of Directors of HIH (and no other basis for disputing that oversight credibly emerges) nonetheless Mr Adler cannot escape the conclusion that he participated in the making of that category of investment decisions in one or other capacity; that is either as board member or committee member, or more likely both. Moreover, that category of decisions, in particular the crucial matter of how funds of the Group were to be invested, clearly affects the whole or a substantial part of the business of HIHC as a member of HIH group. It would be unreal in the extreme to assume that Mr Adler did not participate in making the varied decisions about the Group's investments, which were so obviously a matter of vital interest to him, whether as a member of the Investment Committee or the Board.

33. In *Morely v ASIC* [2010] NSWCA 331 the Court of Appeal noted:

> 897 It is a reality of corporate life that board and other important decisions involve many persons other than the ultimate decision-makers. Just as s 9(b)(ii) of the Law recognised the

[20] *ASIC v Adler* (2002) 41 ACSR 72.
[21] *Commissioner for Corporate Affairs v Bracht* [1989] VLR 821, *ASIC v Citigroup* [2007] FCA 963, *ASIC v Macdonald* [2009] NSWSC 287; *Morely v ASIC* [2010] NSWCA 331 (and on appeal) *Shaffron v ASIC* [2012] HCA 18.

> reality that a person may have "the capacity to affect significantly the corporation's financial standing", that being sufficient for the status of an officer as defined, so s 9(b)(i) recognised the reality of participation in decision-making. But it required participation in making decisions affecting the whole or a substantial part of company's business.

34. That emphasises the nature of the decision making rather than the place of the decision maker in the hierarchy of the company.

35. On appeal in *Shaffron v ASIC*, The High Court of Australia analysed the definition in four propositions:

> 23. Several points should be made about the proper construction and application of par (b)(i) of the definition of "officer". First, the inquiry required by this paragraph of the definition must be directed to what role the person in question plays in the corporation. It is not an inquiry that is confined to the role that the person played in relation to the particular issue in respect of which it is alleged that there was a breach of duty. Thus in this case the inquiry to be made about Mr Shafron's role was not confined to what he did in connection with the separation proposal. Of course, the role he played in connection with the separation proposal may itself demonstrate that he made or participated in making decisions of the requisite character, but that need not be the only material to which attention may be directed.
>
> 24. Second, in a case like the present, where the breaches of duty alleged were omissions to provide advice, it is evident that determining how a reasonable person occupying the same office and having the same responsibilities would exercise the powers and discharge the duties of that office may be assisted by consideration of how the officer in question acted on occasions other than the one which is alleged to give rise to a breach of the duties imposed by s 180(1). It was, therefore, relevant for the Court of Appeal to notice[18] what Mr Shafron had done at JHIL in connection with matters other than the separation proposal and, contrary to Mr Shafron's submission, there was no denial of natural justice in its doing so.
>
> 25. Third, each of the three classes of persons described in par (b) of the definition of "officer" is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition. Persons identified in the other paragraphs of the definition all hold a named office in or in relation to the company; those identified in par (b) do not. Persons identified in the other paragraphs all hold offices for which the legislation prescribes certain duties and functions; those identified in par (b) do not. Persons identified in the other paragraphs of the definition are bound by the legislation to make certain decisions and do certain acts for or on behalf of the corporation; those identified in par (b) are identified by what they do (sub-par (i)), what capacity they have (sub-par (ii)) or what influence on the directors they have had and continue to have (sub-par (iii)). There being these differences between par (b) of the definition and the other paragraphs (especially par (a)), it is not to be supposed that persons falling within par (b)(i) must be in substantially the same position as directors: those to whom the management and direction of the business of the company is usually[19], and in relation to JHIL was, given.
>
> 26. Fourth, sub-par (i) of par (b) distinguishes between making decisions of a particular character and participating in making those decisions. Contrary to Mr Shafron's submissions, participating in making decisions should not be understood as intended primarily, let alone exclusively, to deal with cases where there are joint decision makers. The case of joint decision making would be more accurately described as "making decisions (either alone or with others)" than as one person "participating in making decisions". Rather, as the Court of Appeal rightly held[20], the idea of "participation" directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons. The notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed.

36. There may be some value in considering the pre Model Law provisions in some Australian states where a "lack of influence" defence existed in assessing the liability of a person as an "officer". [22]

37. The concept of "substantial" is not defined in the Bill. It will likely be given its ordinary meaning. Arguably it can be given a broad meaning by reference to the divisions in a large employer's workplace. The middle level manager of a division, region or site will likely be participating in making decisions in relation to that particular division, decisions which affect safety within that part of the business. It would be difficult to see how a branch or a region could not be regarded as "substantial".

38. The Interpretive Guidelines[23] suggests criteria relevant to identifying whether a part of a business is a substantial part :

    38.1 The degree to which the part contributes to the revenue or financial standing of the business;

    38.2 The degree to which the part is significant to the reputation of the entity;

    38.3 Whether the part is considered to be a core part of the business, or ancillary to the core business;

    38.4 The proportion of personnel of the whole business who are engaged in activities within the part; and

    38.5 Whether those who manage that part of the business make significant strategic or policy decisions, or whether those decisions are made at a higher level.

The Due Diligence Obligation

39. The Bill requires the officer to:

    39.1 acquire and keep up-to-date knowledge of work health and safety matters

    (for example, what the Bill requires and the strategies and processes for elimination or minimisation of hazards and risks so far as is reasonably practicable);

    39.2 gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations

    (advice from a suitably qualified person may be required to gain a general understanding of the hazards and risks associated with the operations of the business or undertaking);

[22] For example section 28 Occupational Health and Safety Act 2000 (NSW).
[23] Interpretive Guideline - The Health And Safety Duty Of An Officer Under Section 27.

39.3 ensure that the person conducting the business or undertaking 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

(this requires an understanding of what is needed for health and safety, making decisions about procedures and resources and ensuring that they are used);

39.4 ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;

(this should include the reporting of incidents and emerging hazards and risks, identifying if any further action is required to eliminate or minimise the hazards or risks so far as is reasonably practicable and ensuring steps are taken by the PCBU to take reasonably practicable steps);

39.5 ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Bill;

(this includes reporting notifiable incidents, consulting with workers, ensuring compliance with notices issued under the Bill, ensuring the provision of training and instruction to workers about work health and safety, ensuring that health and safety representatives receive their entitlements to training, ensuring that the PCBU complies with licensing and registration obligations, union right of entry requirements and the duty to consult, co-operate and co-ordinate activities with other duty-holders);

39.6 to verify the provision and use of the resources and processes referred to in paragraphs 39.3 to 39.5

(this makes it clear that 'ensure' means active verification, for example through inspection or auditing processes, that the resources and processes are in place and are being used).[24]

40. The rationale is simple. Leadership by management in health and safety matters is key to ensuring a safe workplace.[25]

Reasonably Practicable

41. This is the preferred formulation of the standard as it is said to be more readily understandable.

42. It is defined thus:

> **17 Meaning of reasonably practicable**
>
> In this Act, unless the context otherwise requires, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was, at a particular time, reasonably able to

[24] Interpretive Guideline - The Health And Safety Duty Of An Officer Under Section 27.
[25] See by way of example *Even Safety Follows the Leader* (1995) 151(2) Safety and Health 38.

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 risk; and
(c) what the person concerned knows, or ought reasonably to know, about—
  (i) the hazard or 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.

43. It is useful to compare the current definition of "all practicable steps":

2A All practicable steps

(1) In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—
  (a) the nature and severity of the harm that may be suffered if the result is not achieved; and
  (b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
  (c) the current state of knowledge about harm of that nature; and
  (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
  (e) the availability and cost of each of those means.
(2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

44. The main difference is the treatment of cost as a factor.

45. While the Court has found the use of the word "all" in relation to practicable steps[26], it is submitted that by reference to the factors in the definition (save for the consideration of cost), there will be no material difference in the nature of the duty to be discharged.

46. The concept of "reasonable practicable" is not novel. In *Edwards v National Coal Board*[27] it was defined thus:

> "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are: (a) What measures are necessary and sufficient to prevent any breach of s. 49? (b) Are these measures reasonably practicable?

47. The High Court of Australia noted in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304:

[26] See by way of example *Utumapu (Health and Safety Inspector) v W Crighton & Son Ltd* DC Palmerston North CRN8031006280, 20 January 2000 per Judge Atkins QC
[27] *Edwards v National Coal Board* [1949] 1 KB 704

> The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:
>
> - the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
> - what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
> - to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.
>
> (footnotes omitted)

48. In the context of Victorian legislation, the Victorian Supreme Court held in *Holmes v R E Spence and Co Pty Ltd*:[28]

> The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment. The courts will best assess the attainment of this end by looking at the facts of each case as practical people would look at them: not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them.

49. New Zealand authorities on “all practicable steps” are to similar effect:

> The requirement to take all reasonably practicable steps is not a counsel of hindsight perfection. It involves, as noted earlier, considerations of "due diligence", "a total absence of fault", of doing what a "reasonable man" would have done under the circumstances, or acting with "all reasonable care".[29]
>
> and
>
> The standard of protection provided to employees by the Health and Safety in Employment Act is … a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of ‘all practicable steps’. What is ‘reasonably practicable’ requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed ... Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight ...[30]

Self Incrimination

50. Section 31(6) HSEA preserves the privilege against self incrimination. This is however inconsistent with Section 60(4) Evidence Act 2006 which provides that the privilege against self incrimination cannot be claimed by a body corporate.

51. Clause 185(5) of the Bill follows the initiative taken in the Health and Safety in Employment Act Amendment No. 2 Bill 2008 (discharged in 2013) and states that

[28] *Holmes v R E Spence and Co Pty Ltd* (1992) VIR 119.
[29] *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112.
[30] *Attorney-General v Gilbert* [2002] 2 NZLR 342.

provides "[n]othing in this section affects the application of section 60 of the Evidence Act 2006".

52. There is a detailed article on the point in issue 849 of Lawtalk at page 22.

New Offence Regime

53. The new offence regime can be summarised shortly:

53.1 Reckless conduct in respect of H&S Duty[31]

(a) Individual 5 years / $300,000

(b) Individual PCBU or officer of PCBU 5 years / $600,000

(c) Body Corporate $3,000,000

53.2 Failure to comply with duty exposing person to risk of death / serious injury

(a) Individual $150,000

(b) Individual PCBU or officer of PCBU $300,000

(c) Body Corporate $1,500,000

53.3 Failing to comply with H&S duty

(a) Individual $50,000

(b) Individual PCBU or officer of PCBU $100,000

(c) Body Corporate $500,000

54. The graduated penalties is suggestive of a return to the former section 50 Health and Safety In Employment Act 1992 which provided for graduated penalties by reference to whether serious harm was caused.

55. The Federal Court has set out the sentencing principles applicable under Australian health and safety law:[32]

> 120 Decisions under the cognate New South Wales Act refer to the following considerations among others:
>
> (i) the penalty must be such as to compel attention to occupational health and safety generally, to ensure that workers whilst at work will not be exposed to risks to their health and safety;

[31] See *Orbit Drilling Pty Ltd v R* [2012] VSCA 82 for a case under the Victorian legislation where it can be inferred that the a substantially greater penalty would have resulted under the harmonised Workplace Health and Safety laws.
[32] *Comcare v Commonwealth* (2007) 163 FCR 207.

(ii) it is a significant aggravating factor that the risk of injury was foreseeable even if the precise cause or circumstances of exposure to the risk were not foreseeable;

(iii) the offence may be further aggravated if the risk of injury is not only foreseeable but actually foreseen and an adequate response to that risk is not taken by the employer;

(iv) the gravity of the consequences of an accident does not of itself dictate the seriousness of the offence or the amount of penalty. However the occurrence of death or serious injury may manifest the degree of the seriousness of the relevant detriment to safety;

(v) a systemic failure by an employer to appropriately address a known or foreseeable risk is likely to be viewed more seriously than a risk to which an employee was exposed because of a combination of inadvertence on the part of an employee and a momentary lapse of supervision;

(vi) general deterrence and specific deterrence are particularly relevant factors in light of the objects and terms of the Act;

(vii) employers are required to take all practicable precautions to ensure safety in the workplace. This implies constant vigilance. Employers must adopt an approach to safety which is proactive and not merely reactive. In view of the scope of those obligations, in most cases it will be necessary to have regard to the need to encourage a sufficient level of diligence by the employer in the future. This is particularly so where the employer conducts a large enterprise which involves inherent risks to safety;

(viii) regard should be had to the levels of maximum penalty set by the legislature as indicative of the seriousness of the breach under consideration;

(xi) the neglect of simple, well-known precautions to deal with an evident and great risk of injury, take a matter towards the worst case category;

(x) the objective seriousness of the offence, without more may call for the imposition of a very substantial penalty to vindicate the social and industrial policies of the legislation and its regime of penalties.

Effect of increased penalties

56. The maximum penalty indicates the seriousness with which the offence is viewed by Parliament.[33] The Court must recognise and give effect to any increase in penalty.

> [T]he Courts must now impose sentences in drug cases which properly reflect the alterations made to maximum penalties by the Misuse of Drugs Amendment Act 1978. The sentence of ten years in the present case is substantially more severe than would have been imposed under the previous legislation. It is indeed a very severe sentence. Nevertheless we consider that it is a sentence which the Judge could properly impose having regard to the policy of Parliament, the degree of involvement of the appellant in dealing in heroin and the widespread public concern regarding the menace of heroin in our community.[34]

[33] Section 8(b)-(d) Sentencing Act 2002.
[34] *R v Spartalis* [1979] 2 NZLR 265.

57. In *R v Curtis*[35] the Court of Appeal the noted effect of an increase in the maximum sentence was to broaden the range of sentences imposed and allow increased sentences where the circumstances, including the need for deterrence required it.

58. *R v McFarlane*[36] also provides useful guidance, emphasising that the legislative amendment does not simply require a factor to be applied to existing sentencing levels.

> …it is less a matter of increasing established sentencing tariffs than of evolving a new tariff to match the change in the Act. Parliament having decided on a stricter policy, the Courts should respond.

59. *R v A*[37] dealt with the impact of the increase in the maximum penalty for sexual violation from 14 to 20 years. The Court of Appeal noted:

> Sentencing is a field in which there is genuine room for differences of informed opinion, but it is well established that the Courts should have regard to a policy of our Parliament evinced by an increase in the maximum penalty for particular offences: *R v Spartalis [1979] 2 NZLR 265* . This is now called for in the field of sentencing for sexual violation.

60. *Gacitua v R*[38] dealt with the increase in penalty for drink drive causing death (section 61 Land Transport Act 1998) where the penalty increased from five to 10 years imprisonment. One aspect is that it allows the Court to address a wider range of circumstances:

> A consequence of the increase in the maximum sentence for serious charges under the Land Transport Act is to permit the court to impose sentences in cases which would not previously have been possible without a charge of manslaughter.

61. The Court of Appeal endorsed the approach of Venning J in the High Court[39]. Venning J by reference to *R v A* noted:

> However, as the Court of Appeal also observed in that case, sentencing is not a purely mathematical exercise. It is not a case of simply doubling what otherwise might have been regarded as the appropriate starting point.

62. As an example of a first instance decision, Judge Zohrab noted (in relation to increased penalties for dangerous driving causing death - 36AA(1)(b) Land Transport Act 1988):

> I think the appropriate way to approach sentencing is to note that there should be an increase in the range of sentencing for this sort of offending, given the doubling of the maximum penalty, but simply observe that it is not simply an arithmetical exercise where I should double it. The

[35] *R v Curtis* [1980] 1 NZLR 406 (CA).
[36] R v McFarlane [1992] 3 NZLR 424 (CA).
[37] *R v A* [1994] 2 NZLR 129 (CA).
[38] *Gacitua v R* [2013] NZCA 234.
[39] *R v Gacitua* [2012] NZHC 2542.

> focus of any sentencer, such as myself, should be on determining the degree of culpability, that is the degree of fault or blameworthiness on your part, and then fix a start point taking into account the earlier cases and the now increased maximum penalty.[40]

63. Reference to the sentencing regime under the Resource Management Act 1991 may also be instructive. Under that legislation, not only penalties increased from that under the Water and Soil Conservation Act 1967, director liability for lack of due diligence was also included.

> An increase of one third in the maximum fine, the inclusion of imprisonment as a sentencing option, and the addition of director's liability signify an evident legislative dissatisfaction with the level of penalties imposed under the 1967 Act. In combination, these changes constitute a clear legislative direction to the Courts to ensure that higher penalties are imposed which will have a significant deterrent quality. If fines are too low, they will be regarded as a minor licence fee for offending and convey the idea that the law may be broken with relative impunity.[41]

64. *Hanham & Philp Contractors Ltd*[42] cannot be overlooked, which dealt with the five fold increase in penalties in 2003. The Court again cautioned that dealing with increased penalties was not simply a mathematical exercise.

65. It has been suggested based on the experience that lead to the appeals in *Hanham & Philp Contractors Ltd* that Judges have historically been reluctant to increase fines imposed for workplace safety breaches following legislative increases until there is specific appellate level guidance.[43]

66. Arguably the first officer or individual to be sentenced under the new regime will avoid imprisonment. In *Ministry of Agriculture & Fisheries v Falconer & Falconer*[44] imprisonment was found to be appropriate but one factor weighing against that was the fact the provision as new, and the case was used to highlight to the sector that the conduct in question could and would lead to imprisonment.

67. Finally, financial capacity of the offender will always be a dominant consideration.[45]

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[40] *R v Teece* [2012] DCR 450.
[41] *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492.
[42] *Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.
[43] P McCarthy "How Courts will apply Health and Safety Reform Bill penalties 'uncertain' " *NZ Lawyer* 31 Mar 2014 http://www.nzlawyermagazine.co.nz/news/opinion-how-courts-will-apply-health-and-safety-reform-bill-penalties-uncertain-185966.aspx
[44] *Ministry of Agriculture & Fisheries v Falconer & Falconer* (DC, Dunedin CRN 2002005200, 28 April 2003, Judge Wolff).
[45] Sections 14, 35 and 40 Sentencing Act 2002 and s 51A(2)(b) HSE Act.