DUE DILIGENCE DUTY "TO KNOW"

The Australian Model law imposes a positive obligation on directors and officers "to know". Directors will have to ensure there is an effective link between the health and safety gaols of the organisation and the actions and priorities of management.

The audit requirements of Australian Model Law mean that directors are likely to need to audit independently to ensure that systems are adequate. Indeed, boards may need formal health and safety subcommittees to address these issues.

It's likely there'll be a requirement to ensure the organisation meets best practice industry standards and that health and safety policies and procedures are fit for purpose.

INDIVIDUAL DUTY AND NO EXCUSE

Under the Australian Model Law the due diligence duty is an individual duty and an officer can face prosecution for a failure to comply, whether or not there has been a health or safety incident. This means senior management cannot plead ignorance, lack of time, lack of skill or make any other excuse. They are obliged to comply with the law.

They cannot nominate someone else to take care of health and safety for them either: it is their obligation, and nobody else's. As the Australian Model Law extends to "persons conducting a business or undertaking", which encompasses both commercial and not-for-profit organisations, except pure "volunteers", all directors and officers cannot afford to be complacent.

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SUMMIT SYSTEMS LIMITED

News & views from Summit – February 2014

THE IMPORTANCE OF MAKING PREPARATIONS DURING THE OCCUPATIONAL SAFETY HIATUS PERIOD

We wish to advise all clients that in recent months we have experienced a hiatus. This is commonly known as the strike between two themes or jurisdictions or major events. It commonly happens when there is an election of a new Government or Local Body. During this event, the Town Clerk or Clerk of the House becomes the Government (along with the Governor General) until the new Government or Council is sworn in. In this case we have the old OSH fading away and the new WORKSAFE NZ coming into force.

NZ Parliament passed laws in the middle of 2013 to provide for the coming into force of Worksafe NZ in December 2013. This has now happened.

At the present time the final round of amending legislation is being enacted and should be completed by 28 February 2014. This will provide for the new fines and new laws to come into force in December 2014. A copy of the amendment Act can be found at the following internet link. http://www.mbie..govt.nz/pdf-library/about-us/consultations/hs-reform-bill-exposure-draft/exposure-draft.pdf

The main issues to be aware of and to plan for are as follows:

1. The scope of the Act will be dramatically widened to include all parties involved in Business. They will be called PCBUs or Person in Control of a Business Unit. To emphasise the point, it means that taxi drivers, accountants, designers, directors, engineers and a range of professional people will become liable for their actions in relationship to others. This means for example that the designers of buildings now have strict liability and cannot rely on the Local Body to make them immune to prosecution for design failure. It means that the taxi driver must be responsible for the operation of his car or vehicle and that operating on the road now becomes the place of work. It means that the Safety Manager or Construction Supervisor now shares in liability along with the Principal Contractor, the Designer and Architect.
2. The Role of the Safety Representative is substantially expanded. The Safety Rep now assumes liability for proper performance much like a novice OSH Inspector with limited powers. The law does not spell out the matter of Safety Rep liabilities in relationship to the duties / powers as this could be seen to frighten away those persons who might otherwise take on the role.

3. The fines will be increased so that the new maximum fine for an organisation becomes $3 million and for an individual $600k. Both provide for up to five years imprisonment in addition to the fines.
4. Amending Regulations in relationship to ACC mean that the experience rating bonus is to be increased from 50% to 75%. The three year "tail" will continue to enure (exist) and this means that you cannot "switch off" the penalties without paying off the dues that have been accrued in recent years.

IMPLICATIONS

1. Make sure that all persons in relationship to your business are aware of the implications and that they cannot now escape under the "ignorance is bliss" pretences of the past. For example, it is not now an option for the Boating club in Tombaru to say that they require all of the people who use their equipment on the lake to sign a form of indemnity.
2. Safety Reps need to be properly trained and qualified and made aware of their duties, roles and liabilities.
3. Make sure that you have proper systems and procedures in place. We are offering an OSHMAN at half price to clients who missed out on regular visits and updates due to the Christchurch earthquakes.
4. Set goals and targets to go for the maximum discounts and bonuses under the new ACC regime. The maximum possible is not 20% discount plus another 75%. It is 75% of the remainder which together comes to about 80% in total. This however is a very attractive target and it is worthwhile setting a goal of 20% in year one, 40% in year two, 60% in year three and 80% in year four. Make sure that you discuss these goals with your local Consultant/s. Start now to go for annual training courses in Injury Prevention for all workers. Plan now to have all Safety Officers go through refresher courses every two years. Make sure that you have the Company Doctor scheme in place and working properly. Finally, always contact us regarding serious harms and correspondence from ACC that could easily leave you "holding the baby" relating to accidents for which you may have zero liability when all factors are examined and the ACC determinations are professionally challenged.

HIGH COURT DECISION IN RELATIONSHIP TO CASE RELATING TO SOUTHROADS LTD AND DENNIS INDUSTRIES LTD

This case was appealed to the High Court. The outcome was that if you are a principal in a contracting situation, while you will remain responsible for overall control and management of the project, including the monitoring of general health and safety on site, you are not required, "to be an insurer in respect of compliance with statutory obligations by sub-contractors" Instead it will be a question of fact and degree as to whether delegating responsibility for a particular safety issue to a contractor is appropriate, or, whether you should look to retain some responsibility for that issue.

HEALTH AND SAFETY OVERHAUL FOR PROFESSIONALS

Company Secretaries and CFOs (Chief Financial Officers) need to take immediate note and action. Now is the time to do very thorough due diligence on Health and Safety in your Organisation. New legislation was enacted in December 2013 and is expected to be in force by December 2014.

The Government has endorsed the majority of the recommendations of the Independent Taskforce on Workplace Health and Safety, which took place against the backdrop of the Pike River tragedy, the CTV building collapse and other serious health and safety incidents.

This reflected a public groundswell for NZ law to change so that direct responsibility for safety in an organisation lies with its leaders, who establish its culture and priorities, and also allocate resources. It signals a major departure from the "laissez faire" (leave alone) approach of the 1990s and beyond.

The new Health and Safety at Work Act, which will replace the existing Health and Safety in Employment Act 2000 (HSE Act) will be based on the Australian Model Work Health and Safety Law (Australian Model Law); the changes will place considerable demands on companies, their management and directors. Under the Australian Model Law there is a proactive duty for directors and senior officers who have the ability to influence or control risks in the workplace to undertake "due diligence" in respect of health and safety requirements. Included in these obligations, officers must:

- Actively acquire safety knowledge and keep up to date with workplace health and safety matters
- Understand the nature of the company's operations and their associated hazards and health and safety risks
- Provide adequate and available resources to identify, eliminate, minimise or control risks
- Ensure resources are available to receive and consider business incidents, hazards and risks and respond in a timely manner
- Ensure that the company has in place, and implements and monitors, processes to ensures legal compliance
- Audit and review health and safety processes and use of the resources.

Significantly, too, the Australian Model Law captures both directors who are formally appointed and those who are NOT appointed, but on whose instructions and directions other directors are accustomed to act (i.e. shadow directors).

Judges will be given power to compel organisations found guilty of serious workplace safety offences to publish advertisements in newspapers and send letters to shareholders disclosing their failures.

Body Corporate and crown organisation directors, officers or agents have criminal liability under section 56 of the HSE Act or the Crimes Act 1961.