

Introduction – brief legislative overview:

The Act introduced in 2015 followed the report of the Royal Commission on the Pike River tragedy and the recommendations of the Independent Taskforce and which largely followed the (model) Australian legislation.

The Act can be found at:

http://www.legislation.govt.nz/act/public/2015/0070/latest/DLM5977215.html?search=ts_act%40bill%40regulation%40deemedreg_health+and+safety_resel_25_a&p=1

Included in the Act was the adoption of the concepts of the ‘Person Conducting the Business or Undertaking’ (PCBU), identifying the business entity and those of Officers and Workers with the concomitant meanings, responsibilities and liabilities being identified in Part 1: Subpart 3 and Part 2: Subpart 2.

One of those concepts was that of the Duty of Care on the PCBU to workers and others including PCBU to PCBU where there is an overlap, with such duties being reciprocal having regard to due diligence and practicability with those terms being defined.

Section 33 of the Act identifies that more than one person (officer or worker) may have the same duty stating that each Duty Holder retains that responsibility and must discharge that duty to the extent that the person has the ability to influence and control the matter.

The Act provided, primarily in Section 211, for the development of regulations relating to health and safety including in particular the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016:

http://www.legislation.govt.nz/regulation/public/2016/0013/latest/DLM6727530.html?search=ts_act%40bill%40regulation%40deemedreg_health+and+safety_resel_25_a&p=1

The regulations place particular emphasis in Part 3 on the duty to monitor the health of workers.

In Section 212 the Act allowed for the development of regulations relating to the management of hazardous substances resulting in the Health and Safety at Work (Hazardous Substances) Regulations 2017.

<http://www.legislation.govt.nz/regulation/public/2017/0131/latest/DLM7309401.html?src=qs>

The legislation falls within the responsibilities of the Ministry of Workplace Relations and Safety through the department of the Ministry of Business, Innovation and Employment (MBIE), the government’s lead business-facing agency.

The enforcement of the legislative suite is undertaken by WorkSafe New Zealand, with that agency’s website being the primary source of information on workplace safety at:

<https://worksafe.govt.nz/topic-and-industry/hazardous-substances/>

A primary focus for the Duty Holder, as promoted by WorkSafe NZ, is that of managing risk. Their advice bears repeating (the reference to ‘you’ in the guides is a reference to the PCBU):

‘We want you to better manage risk by thinking more broadly about risk, not just spotting work related hazards. This means thinking about the root cause of any harmful event, the likelihood it will occur and the consequences if it does. You should think about anything that may help you manage risk, including improved business practices and training, and adequate communication with workers.’

With respect to hazardous substances the substance classifications represent the hazard – flammable, oxidising, toxic, corrosive etc. ‘Risk’ is the likelihood of it all going wrong. That depends very much on the context, the elements to be assessed, such as; what, where, how much, how used, by whom, and in what sort of process. And from there to the consequences. There are numerous accepted methodologies for arriving at the consequences and likelihood, some requiring detailed calculations, but the result depends very much on the expertise, knowledge and qualifications of the assessors and is essentially in the end only a considered professional opinion.

It is in the communication of that information and its understanding and acceptance by the PCBU, the Board, (the insurers), CEO and from there to the workers that the success; the adoption of safer practices, relies.

To use one of the better communications tools; Bow Tie Analysis, each of the potential ‘top events’ to use the method’s terminology, is examined in terms of causal factors with barriers identified to prevent disaster. One of the concepts developed for ‘Performance’ legislation as opposed to ‘Prescriptive’ was to ensure there are at least three protections in place between the hazard and the event. This is in essence a simplified Fault Tree Analysis. Should disaster happen despite the protections or barriers to the event, the risk assessment process then evolves into a simplified Event Tree Analysis identifying mitigations that can be identified to reduce the magnitude of the event.

The business culture WorkSafe NZ are trying to inculcate is one where all work practices are evaluated from a safety perspective, and this starts at the level of Job Safety Analysis and similar processes. Where previously this may have been done via casual toolbox meetings, the critical part of the process is that now such instructions on safe work practices must be recorded. If it is not written down, it never happened, and that is very difficult to prove in court or to an insurer after the event.

A major change to the legislation is a reduced emphasis on the supervision of staff by HSNO Approved Handlers previously certified for almost the full range of classes and lifecycle phases. Since 1st June 2018 there is a requirement for all staff to be trained to the requirements of Regulation 4.5 in the physicochemical and health hazards associated with any substances the worker uses or are in the workers’ work area. It is only for the serious toxics that personnel certification still applies; Classes 6.1A and 6.1B. All workers must know the procedures for handling the chemicals and any equipment including PPE, plus must know their obligations under the regulations and actions to take in an emergency.

While during training or where appropriate there remains an obligation on the PCBU to provide appropriate supervision including where necessary direct supervision.