

13 January 2015

CIRCULAR NO 1347

To: The Secretary all Totalisator Clubs and Kindred Bodies
From: Edward Rennell, Chief Executive
Subject: **HEALTH AND SAFETY REFORM BILL – PROJECT UPDATE – JANUARY 2015**

Following is a Health and Safety Reform Bill Project Update which has been prepared by Project Manager, Stu Cashen.

Health and Safety Policy

The Racing Industry is committed to the Health and Safety of their participants and stakeholders and we will realise this aim by:

- Ensuring that there is strong safety leadership throughout the industry;
- Recognising safety as an important part of industry planning and resource allocation;
- Establishing and maintaining a strong safety culture;
- Providing training and induction for all participants;
- Maintaining a safe working environment;
- Consulting with all employees, contractors and stakeholders to ensure that health and safety plans are robust.

Project Progress

The Industry Health and Safety project has now moved into the Implementation Phase and a list of 14 key recommendations to ensure Industry compliance with the Health and Safety Reform Bill requirements has been circulated to the Code Boards and senior management for approval.

These recommendations and associated documentation will be discussed by an industry working group meeting scheduled for Friday 23 January.

Industry workshops will be arranged on a regional basis prior to 1 August 2015 once the bill is finalised, these meetings will include:

- A summary of the Bill and the clubs' responsibilities arising from this (WorkSafe presentation);
- Licensing, rule and policy changes from 1 August 2015. These changes will take place even though the new Bill will not be in place till later in 2015;
- Compliance package of documentation with an explanation of how to tailor it to an individual club;
- Overview of minimum signage and instructions required;
- Presentation on website resource;
- Explanation of code responsibility and ongoing compliance audits.

Below is an update from WorkSafe that covers the delay in the Health & Safety Reform Bill and reiterates some of the changes.

Health & Safety Reform Bill will be delayed

The Health and Safety Reform Bill is now likely to become law toward the end of 2015. The Transport and Industrial Relations Select Committee was originally due to report back to the House on the draft Bill in September this year, however, this was delayed due to the General Election. The Committee has reportedly only heard about half of the oral submissions due to be presented. The due date has therefore been revised, and the Committee will only report back to the House in March 2015.

Additional delay is expected while WorkSafe drafts detailed Regulations to support the Bill, as well as Approved Codes of Practice and other guidance material. The regulations are being drafted in consultation with Safe Work Australia, practitioners and industry experts and will come into force at the same time as the principal Act. The Regulations will cover the following five areas:

- general risk and worker management;
- worker participation and representation;
- hazardous substances;
- major hazard facilities;
- Asbestos.

As a result of the delay, the Bill is not expected to pass into law any earlier than late 2015. There is also likely to be a transitional period before the provisions of the Act come into force, in order to allow businesses to prepare for the changes.

The Racing Industry will still target 1 August 2015 to start their compliance program.

What the Bill is setting out to achieve

No one goes to work expecting to get hurt, sick or killed. But in New Zealand, far too many people do.

On average, 75 people per year die on the job, 1 in 10 is harmed and 600 - 900 die from work-related diseases - all coming at a cost of \$3.5 billion per year. And that's doesn't count the social and psychological costs on the friends, family, loved ones and co-workers of those people hurt on the job.

In 2013, Government announced its Working Safer reform package, aimed at bringing down New Zealand's workplace injury and death toll by 25 per cent by 2020. Perhaps the most important part of this is the new Health and Safety Reform Bill, which will make every workplace responsible for the health and safety of all workers.

How will the Bill affect liability

The main duty of care for Health and Safety is held by the company (the person conducting the business or undertaking or "PCBU").

Officers do not have to directly ensure the health and safety of the PCBU's workers. Their role is to exercise due diligence to ensure that the PCBU meets its health and safety obligations.

The main duty of care is held by the company (the person conducting the business or undertaking or "PCBU"). While officers will have a duty to exercise due diligence to ensure the company is fulfilling its obligations to keep its workers and others safe, the main duty remains with the PCBU. Officers' due diligence duty supports the PCBU's primary duty of care - it does not replace it.

The duties of officers and the PCBU are independent of each other. This means that a PCBU can fail to meet its duty, whether or not the officers have exercised due diligence. Should this happen and the officers have exercised due diligence, the officers would not be personally liable for any health and safety failings and the focus would be on the PCBU.

Who is an “officer” under the Bill?

Directors are officers under the Bill. In addition, a person is an officer if he or she makes decisions that affect the whole or substantial part of the business of the PCBU (for example a chief executive):

- For a PCBU that is a **company**, its directors are officers;
- For a PCBU that is a **partnership**, its partners are officers (in limited partnerships, only general partners are officers);
- For **other types of business structures or undertakings**, people who hold a position comparable to a Director of a company will be an officer (such as a Board Member).

In addition, a person who makes decisions that affect the whole, or a substantial part of the business of the PCBU is an officer. These are the most senior people who are the guiding mind and will of the organisation.

Once the Bill has been finalised we will be providing guidance on who the officers are at each level of the Racing Industry to ensure that everyone understands their responsibility without having to wade through a lot of legislation.

What does “due diligence” mean?

Due diligence means that officers must take reasonable steps to ensure that the PCBU complies with its health and safety obligations. This includes staying up to date on health and safety issues, understanding the nature of the operations and the hazards and risks that come with them, and making sure that there are appropriate resources and processes to eliminate or minimise those risks.

Due diligence as it is defined in the Bill is broadly the same as the concept of due diligence that directors already know in a wider business sense (for example, managing financial risk or business objectives).

The Bill defines due diligence as including taking reasonable steps:

- a) to acquire, and keep up-to-date, knowledge of work health and safety matters; and
- b) to gain 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; and
- c) to ensure that 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; and
- d) to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information; and
- e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
- f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

How does the Bill change officers' potential risk of liability?

The Bill is fairer to officers than the current law and more consistent with their governance role. It encourages officers to pro-actively undertake due diligence to ensure that health and safety is a priority for their organisation, because this will remove their risk of liability (see *"What does "due diligence" mean in the context of the Bill?"* above).

Under existing law, officers are incentivised to avoid inquiring into health and safety matters because the risk of liability is reduced if they are **not** involved. Right now, officers are liable for any health and safety failure by the company if they authorised, sanctioned, agreed to or participated in that failure – whether or not the company is charged.

Under the Bill, officers will only be liable if it is proved that they failed to carry out proper due diligence as part of the governance role. Further, because it is their responsibility to be pro-active (known as a "positive duty"), any failure to exercise due diligence must be proven beyond reasonable doubt.

This makes the Bill more consistent with officers' governance role, as it is simply broadening the concept of due diligence that all directors already know in a wider business sense to include health and safety.

Are officers responsible for what goes on in another business if there are overlapping duties?

Not directly. An officer's duty is to exercise due diligence for their own PCBU, to ensure that it is meeting its health and safety duties.

When two or more PCBUs work together, they may have overlapping duties. Each PCBU has an obligation to collaborate and consult with the others to make sure that the environment is safe and that no worker is left unprotected. In this situation, the officers' duty still lies at the governance level—to take reasonable steps to ensure the PCBU has and implements processes to collaborate and consult with the other PCBUs.

Each raceday will see many differing PCBU's working together and it will be essential to ensure that each PCBU understands their responsibilities to ensure that no one is exposed to any safety risks.

Do the officer duties in the Bill also apply to senior management?

Yes, but only to the most senior executives. The chief executive and potentially other senior executives with significant decision-making responsibilities will have the same due diligence duty as the directors and board members. In the current version of the Bill, an officer is defined to include any person who makes decisions that affect the whole or a substantial part of the business (for example the chief executive). This definition is intentionally narrower than the one used in Australia, which includes persons who participate in decisions.

The due diligence duty only applies to officers and senior managers who exercise governance functions, because they are the only ones who can reasonably carry out due diligence as specified in the Bill (see *"What does "due diligence" mean?"* above).

Managers (including human resource managers), supervisors and work health safety advisers do not generally make key decisions on how the PCBU operates. Instead, they provide information and advice to help the PCBU make its decisions and then carry them out. Therefore, they are workers, not officers.

All workers, including senior and mid-level managers, have a duty to take reasonable care with their own health and safety and that of others.

How does the Bill change penalties for officers?

The most likely charge against an officer is that officer has failed to meet its due diligence duty. The maximum penalty for this charge has decreased significantly, from \$250,000 to \$100,000.

Should a failure to meet the due diligence duty be proven to have exposed an individual to a risk of death or serious injury, the penalty has been slightly increased, from \$250,000 to \$300,000.

The maximum penalties for reckless conduct have significantly increased for both individuals and PCBUs, but prosecutions for this charge are likely to be very rare. This is because the burden of proof is very high, and also because other charges may be more appropriate in the circumstances (such conduct would likely overlap with offences under the Crimes Act).

There are three categories of offence:

Category 1 Reckless conduct—applies to a person who has a Health and Safety duty and, without reasonable excuse, engages in conduct that exposes an individual to a risk of death or serious injury or illness, and is reckless as to the risk. The maximum penalty for an officer is \$600,000, five years' imprisonment, or both.

Category 2 Failure exposing to serious risk—applies to a person who fails to comply with their Health and Safety duty, and the failure exposes an individual to a risk of death or serious injury or illness. The maximum fine for an officer is \$300,000.

Category 3 Failure--applies to a person who fails to comply with their health and safety duty. The maximum fine for an officer is \$100,000.

Currently, the offence broadly equivalent to category 1 carries a maximum fine of \$500,000, 2 years imprisonment or both. Conduct that could be charged under category 2 or 3 carries a maximum fine of \$250,000.

Any questions, don't hesitate to contact myself or Stu Cashen (cashen@actrix.co.nz).



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