



March 2015

CIRCULAR NO 1348

To: The Secretary all Totalisator Clubs and Kindred Bodies

From: Edward Rennell, Chief Executive

Subject: **HEALTH AND SAFETY REFORM BILL – PROJECT UPDATE – FEBRUARY/MARCH 2015**

HRNZ and NZTR are running a Health and Safety compliance project to ensure that the Racing Industry is in a position to be fully compliant with the changes that will be introduced when the Health and Safety Reform Bill is passed into law later this year.

Most of you will be aware of the Bill and the project from newsletters and presentations that have been circulated. However because of the impact the Bill will have on the workplace, it is critical that your committee and senior staff fully understand their responsibilities.

HRNZ and NZTR will be providing full support to assist your club becoming compliant by providing assistance as detailed below and holding regional Health and Safety Seminars during August and September 2015, all clubs will be required to attend these seminars.

Assistance to Clubs

The project outcome will deliver:

- A legal interpretation of the Bill on what impacts your club including licensing, Rules of Racing and the Racing Integrity Unit Service Level Agreement;
- Template for documentation requirements and assistance to meet these requirements;
- Template for PCBU relationships on the racetrack;
- Presentation to club executive and Board/Committee if required;
- Assistance and guidance with Board reporting requirements;
- Industry H&S training courses ;
- Liaison with WorkSafe NZ and MBIE;
- Web Site resources to assist clubs:
 - ✓ Can be adapted as a club resource;
 - ✓ Provides required reporting and documentation outlines;
 - ✓ Can be used for notifiable incidents;
 - ✓ Provide training and educational material;
 - ✓ Provide WorkSafe advice and updates;
 - ✓ Database of contractor engagement and accreditation documents.

Club responsibilities will include:

- Health and Safety documentation for your areas of responsibility;
- Implement formal Board/Committee/Senior management reporting;
- Implement work force requirements for Health and Safety representation and arrange regular Health and Safety meetings;
- Have detailed documentation that meets the required standards;
- Arrange Health and Safety audits if required;
- Training of staff and inclusion of Health and safety in all induction programmes.

Background to Bill

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 at the designated workplace.

The Bill is described as the most significant workplace reform since 1992 and will have an impact on most New Zealand employers and employees.

Progress of the legislation

The Bill is currently before parliament. The select committee has a report back date of March 30 2015 and then the Bill will continue its progression through the parliamentary process. It is likely that the Bill will come into force in the fourth quarter of 2015.

There will be adequate time of some months between when the Bill is passed and when it comes into force, to make sure duty holders are aware of their responsibilities under the new law.

Key points from the Bill are:

- The PCBU concept is the key element within the Health and Safety Reform Bill from which most duties and responsibilities flow;
- A PCBU is a Person Conducting a Business or Undertaking and is a broad concept that reflects modern working arrangements. It captures the current duty holders of employer, self-employed, principals to contracts, person controlling a place of work;
- PCBUs are in the best position to control risk to work health and safety as they are the ones carrying out the business or undertaking;
- Widening the duty of care to PCBUs also creates overlaps of responsibilities whereby there can be multiple PCBUs with shared duties;
- It emphasises that work health and safety is everyone's responsibility, not just the employer to the employee.

Who aren't PCBUs:

- Workers;
- Officers (Executives/Directors/Board and Committee persons);
- House holders employing someone to do residential work;
- A volunteer association (A volunteer association is one that employs no staff);
- Despite its name, a PCBU will usually be a business entity such as a company rather than an individual person, unless they're operating a business as a sole trader or self-employed person;

- An important point that catches many – a PCBU doesn't have to be an actual person. If you take the example of a racetrack, the club holding the meeting is a PCBU. The RIU is a PCBU, the principal security and catering contractors are PCBU's and the NZRB is a PCBU;
- Trainers, Jockeys and drivers will also be PCBU's although some apprentices and junior drivers will not be as they will be employees.

The Bill increases the responsibilities of directors and/or Board and Committee members and requires them to:

- Acquire & keep up-to-date knowledge of health and safety matters for the PCBU;
- Understand the nature of the PCBU's operations;
- Ensure the PCBU has appropriate resources & systems;
- Monitor the PCBU's performance;
- Ensure the PCBU complies with its obligations;
- Verify the PCBU's performance through reviews and audits.

Directors/Committee members must:

- Be aware of hazards with the PCBU's operations and how they are managed;
- Understand the PCBU's contractor selection process and contractor management system;
- Set clear reporting expectations for management;
- Receive, discuss and test reports on health and safety matters;
- Ensure sufficient resources are available to develop and maintain the entity's Health & Safety Plan;
- Seek independent advice on any issue the entity is unsure about in regard to Health & Safety matters;
- Consider health and safety implications of governance decisions.

More detailed information on the Bill can be found in Appendix One

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 Board's and senior management for approval.

These recommendations and associated documentation were discussed and agreed by an Industry working group meeting on Friday, January 23.

Compulsory regional Health & Safety Seminars will be arranged during August and September. All clubs will be required to attend these seminars.

These workshops will include:

- A summary of the Bill and the club's responsibilities arising from this (WorkSafe presentation);
- Licensing, rule and policy changes from August 1, 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 web site resource;
- Explanation of code responsibility and ongoing compliance audits.

The project team will continue with regular newsletter updates and will contact clubs once dates for the regional Health & Safety seminars are finalised.

In the meantime if you have any queries about the Reform Bill don't hesitate to contact either myself or:

Stuart Cashen
cashen@actrix.co.nz
027 223 6726

Yours sincerely

A handwritten signature in black ink, appearing to read 'E. Rennell', written in a cursive style.

Edward Rennell
Chief Executive

APPENDIX ONE

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

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 or killed 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 lies 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 to:

- (a) acquire, and keep up-to-date, knowledge of work health and safety matters;
- (b) 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;
- (c) 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;
- (d) 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;
- (e) ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act;
- (f) 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 personal risk of liability (see “How will the Bill affect liability?” and “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 race day 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.