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**“Occupational Health and Safety” Corporate
Liability and the Regulation of Officers: *New
Zealand Reform***

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Abstract

This paper examines the concept of corporate liability in the context of occupational health and safety in New Zealand. In particular it looks at the new duty of officers proposed in the Health and Safety Reform Bill 2014. New Zealand's occupational health and safety framework has experienced a regulatory breakdown, stemming from its incomplete implementation of the Robens Model for health and safety regulation. That breakdown involves many flaws and gaps, especially as far as corporate liability is concerned, while the modern world of work has created new challenges to health and safety regulation. This setting demands a new regulatory tool to create effective corporate liability and increase the compliance of companies'. This article examines the new world of work and the inherent clash between OHS regulation and the corporate world to reveal two main conclusions; the major barrier to company compliance is a lack of effective inducement; and there is a desperate need to create health and safety leaders within companies, in order to create a positive health and safety culture. These two conclusions promote the main proposition of this paper, that the proposed duty of officers will be instrumental in improving the state of workplace health and safety. This paper examines the duty, as drafted, to emphasise its potential and to highlight certain flaws which may limit that potential.

Word length

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Subjects and Topics

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I Introduction

At 3:45 pm on 19 November 19 2010 a disastrous methane explosion ripped through the Pike River underground mine in the West Coast region of New Zealand. The tragedy resulted in the death of 29 workers and is the country's most devastating workplace accident in almost a century.¹ The Pike River disaster received extensive media coverage,² which served to increase public attention, spurring widespread public outcry. The disaster awakened the people of New Zealand to the shameful state of their nation's workplace health and safety regulation. In this way, it acted as a catalyst to the reform of New Zealand's workplace health and safety framework.³

In the wake of the Pike River tragedy the New Zealand government established two bodies to assess the state of occupational health and safety (OHS). The government first established the Royal Commission on the Pike River Coal Mine Tragedy, just days after the explosion.⁴ The Commission had a broad mandate to discover what happened at Pike River, why, and identify how to avoid it happening again.⁵ A year and a half

¹ (06 November 2012) 685 NZPD 6273.

² See generally, "Latest on the Pike River coal mine disaster" Stuff <<http://www.stuff.co.nz/national/pike-river-mine-disaster>>, see also; "Mine explosion gets worldwide coverage" The New Zealand Herald (online ed, 19 November 2010, at <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10688829>).

³ Simon Bridges "Speech to EMA Occupational Health and Safety Conference" (Auckland, 17 April 2013); See generally, Kate Chapman and Deidre Mussen "Pike River report: Learn from tragedy – Minister" Stuff (online ed, 11 April 2013, at <<http://www.stuff.co.nz/national/politics/8536948/Pike-River-report-Learn-from-tragedy-Minister>>) on how the experience of the tragedy demands we learn and change, the approach of the government was to emphasise the opportunity to learn, in this way the tragedy acted as a catalyst for change. See also, Deidre Mussen "Training facility in memory of Pike River" Stuff (online ed, 03 November 2013, at <<http://www.stuff.co.nz/national/9357520/Training-facility-in-memory-of-Pike-River>>).

⁴ "Royal Commission on the Pike River Coal Mine Tragedy" (16 December 2010) 173 *New Zealand Gazette* 4261, (hereinafter, the Royal Commission).

⁵ "About the Pike River Royal Commission" (29 November 2010) Pike River Royal Commission <<http://pikeriver.royalcommission.govt.nz/About-the-Commission>>. And see "Royal Commission on the Pike River Coal Mine

later on 16 April 2012 the Cabinet agreed to the establishment of the Independent Taskforce on Workplace Health and Safety.⁶ The Taskforce's terms of reference were broader still, requiring that it; identify whether the health and safety system as a whole is fit for purpose, and recommend a package of measures that will result in a 25 per cent reduction in the rate of fatalities and serious injuries by 2020.⁷

Each inquiry identified a multitude of flaws in New Zealand's health and safety framework,⁸ and that those failings have resulted in widespread noncompliance. Each body urged for immediate and drastic action.

The Government responded with a proposal for extensive reform, the biggest reform of health and safety regulation in over twenty years, in the form of the Health and Safety Reform Bill 2014.⁹ The proposed Health and Safety in Reform Bill (the Bill) is explicitly based on the Model Work Health and Safety Act 2011 (the Model Act) promulgated in Australia only a few years earlier,¹⁰ allowing New Zealand to capitalise on the extensive research and planning that went in to the Australian reform.¹¹

Tragedy" (16 December 2010) 173 *New Zealand Gazette* 4261, for detailed Terms of Reference.

⁶ Cabinet Minutes "Terms of Reference for the Independent Taskforce undertaking the Strategic review of the Workplace Health and Safety System" (16 April 2012) CAB Min (12) 12/14, (hereinafter the Taskforce).

⁷ Cabinet Minutes, above note 6, at [2] and [4].

⁸ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report* (Ministry of Business Innovation and Employment, April 2013), at [20].

⁹ Health and Safety Reform Bill (2014) (192-1) (hereinafter the Bill). The Bill was introduced into Parliament at the time of writing this paper, in March 2014, and the Select Committee is not due to report until September 13th 2014 (well after the completion of this paper). Thus, the paper cannot comment on any suggestions or alteration made during the Select Committee process or from any debates at the various readings. The Bill is not set to be passed until 2015.

¹⁰ Model Work Health and Safety Act 2011 (Aus), (hereinafter *the Model Act*).

¹¹ See Generally; Susy Frankel and John Yeabsley "Features of the Uniqueness of New Zealand and their Role in Regulation" Regulatory Reform Toolkit

<<http://www.regulatorytoolkit.ac.nz/resources/papers/book-3/chapter-1-features-of-the-uniqueness-of-new-zealand-and-their-role-in-regulation>>

The reform heeds the warnings of each inquiry, and proposes various tools to address them. To analyse the Bill in its entirety is far beyond the scope of this paper. Rather, this paper's focus is the issue of corporate liability, and in particular, one aspect of the reform central to that issue, the regulation of senior managers, directors and high-ranking officers. The Bill includes a new 'duty of officers',¹² which for the first time, will demand that decision makers within firms actively participate in health and safety matters. Section 39 places a personal duty on officers to exercise due diligence to ensure the primary duty holders within their firms comply with their duties.

Reform, even extensive reform, does not guarantee positive transformation, or even positive change. This paper concentrates on the personal duty placed officers because, as a singular piece of the reform, it stands out as useful, effective and potentially pivotal in the effort to secure safe workplaces for new Zealanders.

For too long, workplace health and safety duties have been framed in entity centric language and those with decision making, culture setting and leadership powers have bore almost none of the legal burden of protecting workers. This paper aims to cast a light on the importance of the role of senior managers. As Lord Cullen observed in the inquiry into the loss of the Piper Alpha oil platform that resulted in 167 fatalities:¹³

No amount of detailed regulations for safety improvements could make up for deficiencies in the way that safety is *managed* by operators.

There are several important external elements in play that highlight the need for and importance of the officer duty. The first element is the general regulatory breakdown that has occurred in New Zealand, highlighted by both the Taskforce and Royal Commission. Secondly, the new world of work acts as a

¹² Health and Safety Reform Bill, at s 49.

¹³ Cullen WD *The public inquiry into the Piper Alpha Disaster*. London HMSO, at [301], (emphasis added). As cited in; R Flin and S Yule "Leadership for safety: industrial experience" (2004) 13 Qual Saf Health Care ii45 at [ii45].

double-edged sword that makes old regulatory measures particularly unsuitable, and simultaneously brings new challenges for regulators.

Two features are frequently cited as fundamental to the success of OHS regulation, one feature being leadership, another being effective inducement in a commercial setting. The personal due diligence duty placed on officers will go lengths to addressing both. By targeting those in control, the duty will create occupational health and safety leaders in every enterprise in one clean stroke, while the personal nature of the duty, combined with increased penalties, should provide the incentives for compliance the current framework is desperately lacking. The officers' duty is a personal duty requiring proactivity in health and safety. The public expects high-ranking officers to be active in protecting those below them and to take responsibility for their role and control, and the officer duty is the first legislative move towards delivering on that expectation.

The new due diligence duty has great potential, and could effect great positive change in New Zealand's health and safety framework. This paper explains that potential, with the aim that once its importance is clear, the duty itself will not be permitted to be encumbered by avoidable flaws or ambiguities.

Part II of this paper will discuss certain aspects of OHS regulation theory and the regulatory breakdown that has occurred in New Zealand that inform a discussion of the proposed officer duty. Part III will outline the relationship between OHS and the commercial world, to highlight the barriers regulators face in ensuring corporate compliance. Part IV turns to the new world of work and emphasises those features that increase the need for the new officer duty. Part V will discuss the ability of the new duty to create effective inducement for corporate compliance, and part VI will examine how the duty creates health and safety leaders, who are well positioned to create a positive health and safety culture. Finally, part VII examines the duty, as drafted, to emphasise its potential and to highlight certain flaws which risk limiting that potential.

II Regulatory Breakdown

Workplace health and safety is an area that unquestionably requires governmental regulatory intervention. Experience has shown that when enforcement wanes the market alone does not deliver safe workplaces.¹⁴ When left to their own devices, industry players such as companies will often not ensure the health and safety of their workers. Rather, it is up to the regulators to demand and facilitate worker protection. Hence, given that it is human health and safety at stake, it is imperative that the regulation is fit for purpose and effective. Unfortunately, this has not been the case in New Zealand's recent history.

A Workplace Health and Safety Regulation – Setting the Scene

Occupational health and safety is a challenging and paradoxical area to regulate.¹⁵ OHS policy makers are faced with the challenge of finding a balance between many interests – as enterprises and business owners desire minimal governmental intrusion while the labour force demands better protection. Adding to the complexity is the inherent imbalance in OHS that the risk (of noncompliance) is borne by the workers, while the cost (of compliance) is borne by the employer, or enterprise. Successful workplace health and safety regulation requires balance. An effective regulatory approach will strike equilibrium between the various interested parties to ensure industry buy-in while always protecting the weaker party, the workers. Over the years, New Zealand has failed to achieve that balance.

¹⁴ Orly Lobel “Interlocking Regulatory and Industrial Relations: the Governance of Workplace Safety” (2005) 57 Administrative Law Review 1071, (hereinafter Lobel, *Interlocking*), at [1097]. See also, *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, on New Zealand's regulatory breakdown and resulting levels of compliance, revealing that the private sector does not self-organise.

¹⁵ Lobel, *Interlocking*, above note 14 at [1077].

B Regulatory Breakdown – A History

New Zealand’s workplace health and safety is currently suffering a widespread regulatory breakdown, the methods adopted are proving ineffectual and the systems in place are failing to perform. The following section will explain how OHS regulation has evolved and changed over the years in New Zealand, and ultimately where it stands today. Understanding both the current state of regulation, and the decisions and underlying theories and ideologies that lead to that state, is essential to any analysis of reform proposals and their ability to perform.

1 “New” governance

Currently, the leading approach to health and safety regulation in most developed economies is ‘new governance’. New governance is a response to the flaws of command and control regulation, or, old governance. The theory itself has been built from the shared experiences of practitioners and scholars across a wide variety of diverse policy domains.¹⁶ While the concept is far from settled there are several fundamental features that have been grouped to form the core of the distinct theory of governance. Those features include voluntary performance standards, and less rigid less prescriptive regulation, that is less committed to uniform processes and outcomes.

New governance style regulation is dedicated to the achievement of results that are broadly in line with the overall goal of a policy. A new governance approach “[aims to] steer corporate governance or management systems in socially desirable directions – other than by simply commanding them to behave in a prescribed way.”¹⁷ That approach capitalises on the experience and expertise of those being regulated, by enlisting *them* to develop the most efficient and effective ways of

¹⁶ Gráinne De Búrca and Joanna Scott :Introduction: New Governance, Law and Constitutionalism” in Gráinne De Búrca and Joanna Scott (eds) *Law and New Governance in the EU and the US* (Hart Publisher, Portland, OR, 2006) 1-14, at [3].

¹⁷ Tucker *Old Lessons for New Governance*, above note 20 at [15].

achieving a set policy outcome, rather than the traditional approach of enforcing strict top-down rules across the board.

When it comes to workplace health and safety regulation, new governance is not so aptly described as *new*. New governance regulation was first introduced to OHS by the report of the Robens Committee on health and safety in 1972, commonly called the Robens Report.¹⁸ Its mission was to review the health and safety system in the United Kingdom and consider what changes were needed. The Report recommended a major reform including, a shift from prescriptive to flexible performance-based or ‘goal-setting’ standards, a complete overhaul to simplify and consolidate health and safety legislation, and a resolute move to a self-regulating system involving strong active involvement by both employers and workers.

The Robens Report introduced the world of health and safety to new governance style regulation, and its formula spread to most developed economies across the world. New Zealand was one of the last countries to make the regulatory change in 1992.

2 Old governance in New Zealand – pre Robens

Prior to 1992, New Zealand had an old governance or, ‘traditional’, model of health and safety regulation. Until the 1980s the New Zealand approach to health and safety was a rather disorganised ‘plethora’ of dogmatic, sector-specific Acts that were too complex to facilitate compliance.¹⁹ The OHS

¹⁸ Alfred Robens *Safety and Health at Work, Report of the Committee* (HMSO, Cmnd 5034, 1972)

¹⁹ These included the Petroleum Act 1937, Bush Workers Act 1945, Geothermal Energy Act 1953, Health Act 1956, Construction Act 1959, Shearers Act 1962, Mining Act 1971, Agricultural Workers Act 1977 and the Coal Mines Act 1979. Other pieces of legislation passed in the 1980s were the Factories and Commercial Premises Act 1981, the Quarries and Tunnels Act 1982 and the Transport Service Licensing Act 1989, as listed in National Occupational Health and Safety Advisory Committee *Occupational Health and Safety in New Zealand: NOHSAC: Technical Report 7* (Allen and Clarke, Wellington, 2006), at [12].

legislative framework relied on highly prescriptive solutions,²⁰ and was “underpinned by a paternalistic policy of government intervention, where the government was considered to be responsible for ensuring the achievement of good occupational health and safety outcomes.”²¹ In many ways, the OHS system at that time exemplified many of the flaws and weaknesses that had plagued the United Kingdom pre-Robens Report.

As can be expected, that traditional style of governance failed, just as it had in other jurisdictions. Due to the narrow prescriptive nature of the regulations much of it had become unfit for purpose, and its inflexibility meant it would never adapt. The world of work is simply too diverse for strict command and control regulation that can easily become out-dated. Governments lack the resources to inspect and enforce a mass of detailed Acts, and businesses struggle with the complexity – negatively impacting on their understanding and compliance.

3 Robens in New Zealand

The Health and Safety in Employment Act 1992 was introduced as New Zealand’s first single catch-all health and safety act.²² The 1992 Act introduced the performance based standards of the Robens Model, requiring that duty holders “take all practicable steps to ensure the safety of employees,”²³ offering a new level of flexibility to duty-holders for meeting their obligations.

Unfortunately, New Zealand failed to properly implement a Robens model, and that failure has caused lasting problems.²⁴ The Royal Commission on the Pike River Mine tragedy found that to this day, New Zealand’s implementation of the Robens approach has been incomplete, particularly in relation to the

²⁰ National Occupational Health and Safety Advisory Committee *Occupational Health and Safety in New Zealand: NOHSAC: Technical Report 7*, above note 19, at [12].

²¹ Ibid.

²² Health and Safety in Employment Act 1992 (NZ).

²³ Health and Safety in Employment Act 1992, s 6.

²⁴ *The Report of the Independent Taskforce on Workplace Health and Safety: Executive Report* (Ministry of Business Innovation and Employment, April 2013) at [11].

relative lack of regulations, approved codes of practice or guidance necessary to make the broad natured Act as effective as intended.²⁵ When New Zealand introduced a Robens model it failed to achieve balance. Regrettably, it removed prescription where prescription was warranted,²⁶ and an overly prescriptive, complex regime was replaced with one that overcompensated, resulting in insufficient guidance and legal bite.

New Governance and the Robens model, *as implemented in New Zealand*, have not been sufficiently effective and have not protected workers to the degree desired or required. The political and cultural environment at the time of New Zealand's reform meant the governments introduced a much lighter version of the Robens model than many other countries.²⁷ Resource constraints, changing attitudes towards the roles of government and business, and a decline in support for worker participation all contributed to the light version of the model that resulted.²⁸

New Zealand's experience with a new governance style health and safety system exemplifies the very things commentators have warned of as being the crucial dangers of new governance. It has been cautioned that new governance approaches can risk paving the way for neoliberalism and, because of the increased role of business, are prone to regulatory capture. Leading commentators such as Lobel, Estlund and Tucker, all warn that a move to new governance style regulation may allow for the dominance of interested parties, and ultimately, may fail those it is meant to protect; the workers.²⁹ Tucker has advised that strong worker activism and provision

²⁵ Ministry of Business Innovation and Employment *Health and Safety Reform Bill Exposure Draft (Parts 1 to 3)* (Wellington, MBIE, October 2013) (hereinafter *Exposure Draft Commentary*), at [3].

²⁶ *The Report of the Independent Taskforce on Workplace Health and Safety: Executive Report*, above note 24, at [11].

²⁷ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [20].

²⁸ *The Report of the Independent Taskforce on Workplace Health and Safety: Executive Report*, above note 24, at [21]-[22].

²⁹ Eric Tucker "Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom" (2012) 08 Osgoode CLPE 2, at [13], [17] and [25] on each commentators warning.

for worker participation is essential for the success of any Robens model, and is absolutely necessary.³⁰

... to prevent the regime from degrading into a neoliberal regime, in which health and safety would be constructed according to management perspectives on what was reasonable given the cost constraints under which management operates.

In New Zealand, the 1992 Act was introduced with the *intention* that it would facilitate business self-regulation. Its very aim was to enhance the role of the private sector in managing health and safety, and reduce the role of the regulator. While that aim is directly in line with the intentions of the Robens Report itself, the Robens model was predicated on strong worker participation and stressed the importance of worker involvement. The Report recommended that:³¹

... there should be a statutory duty on every employer to consult with his employees or their representatives at the workplace on measures for promoting safety and health at work. And to provide arrangements for the participation of employees in the development of such measures.

The Robens Report was released during a time of strong unions and strong union membership. However, by the time New Zealand promulgated its first Robens style framework, union membership was in decline and a culture of anti worker-participation had taken hold. The 1992 Act introduced a self-regulatory approach within a system not adequately set up for it. Even today, over twenty years later, the penalties are significantly inadequate, incentives are too low, the clarity and certainty required for self-regulation is absent, and most importantly, the ultimate safeguard of worker participation, which would balance out the broadly drafted, self-regulatory system is lacking. The Act removed what worker participation had existed before it, and it was brought back only weakly in the

³⁰ Tucker *Old Lessons for New Governance*, above note 29, at [13], Tucker discusses the need for worker participation through the case study of Ontario.

³¹ Robens Report, above note 18, at [22].

early 2000's.³² The light Robens model introduced in New Zealand was destined to fail.

C Current State of Affairs – Regulatory Failure

In such a setting, compliance has been low, and workplace injury prevention and health protection efforts have been shameful. Taskforce statistics revealed disgraceful injury rates twice that of Australia and almost six times that of the United Kingdom,³³ “more than 100 people each year are killed in the workplace and around one in 10 workers are harmed.”³⁴ A further estimated 600-900 New Zealanders die prematurely each year from occupational illness.³⁵ To put the gravity of workplace health and safety in perspective, in the world at large, more people die at work than in wars.³⁶ The importance of securing healthy and safe workplaces cannot be overstated, and the regulatory framework in New Zealand has failed to deliver.

In summary, the state of regulation today is a closed loop of hurdles. Traditional command and control regulation fails because it is too complex and inflexible and because there are insufficient funds to support oversight and enforcement of a strict top-down scheme. The Robens model attempts to capitalise on industry expertise and instil in employers a self-starter approach to OHS through a self-regulatory model made up of adaptable, flexible, performance standards. However, when a Robens model is introduced in conjunction with the depletion of

³² By the Health and Safety in Employment Amendment Act 2002 (NZ).

³³ Andrew Stevens “Urgent step change needed on safety” (19 August 2013) The New Zealand Herald < http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10913270>[according to stats provided by the taskforce]

³⁴ Ibid.

³⁵ “Major reform of workplace health and safety” (online ed, 7 August 2013, at < <http://www.scoop.co.nz/stories/PA1308/S00096/major-reform-of-workplace-health-and-safety.htm>>)

³⁶ Department of Communication “World Day for Safety and Health at Work – two million work deaths a year: A preventable tragedy” (28 April 2004) International Labour Organisation < http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_075605/lang--en/index.htm>

And See; Lobel, *Interlocking*, above note 14, at [1079], see Lobel *Interlocking* at [1079]-[1080] for more statistics on the cost of occupational injury, specifically in the United States.

worker participation, weaker unions, and a pull back of governmental oversight, as was the case in New Zealand, there is insufficient incentive for employers to actively regulate themselves. Put simply, New Zealand’s existing self regulatory model “fails precisely because receding oversight and enforcement risks render their *inducements* too weak to ensure genuine self regulation.”³⁷

Regrettably, this framework has allowed for widespread non-compliance, which ultimately led to the Pike River tragedy of 2010. The crisis became a catalyst for change, and New Zealand moved to re-examine its regulatory framework.

D The Move to Reform

Despite its failures in New Zealand, a Robens model remains the preferred approach for regulating workplace health and safety across many commonwealth jurisdictions.³⁸ After recent reviews, the United Kingdom and Australia have both confirmed their Robens based frameworks,³⁹ and after careful consideration by the Taskforce, Royal Commission and the government, New Zealand has decided to follow suit and reinvent, but still retain, a Robens model. The all-encompassing general duties of a Robens model do not date quickly, they support innovation, and provide flexibility.⁴⁰ Now, more than ever, a Robens model is the best equipped to deal with the increasingly complex world of work,⁴¹ which, will be discussed in part IV.

The flaws in New Zealand’s current health and safety system are innumerable. The Taskforce found no single critical factor behind the poor performance, rather they found

³⁷ Timothy P. Glynn “Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations” (2012) 32 Berkeley Journal of Employment & Labor Law 279, at [279] (emphasis added).

³⁸ Exposure Draft *Commentary*, above note 25, at [3].

³⁹ Ibid.

⁴⁰ Exposure Draft *Commentary*, above note 25 at [3]

⁴¹ See, for example, Tucker *Old Lessons for New Governance*, above note 29, at [14].

“significant weaknesses across the full range of workplace health and safety system components, coupled with the absence of a single strong element or set of elements to drive major improvements or to raise expectations.”⁴² There is, of course, no one measure to fix all the problems, and the proposed reform is a large-scale overhaul that touches on almost every aspect of the workplace health and safety framework. While it is beyond the scope of this paper to analyse every aspect of the reform, it is useful to outline, in brief, some of the major features.

1 Features of the proposed reform

The reform includes new definitions for duty holders, rights holders and workplaces, which modernise and expand the application of health and safety measures. The concept of a workplace is given a very broad definition under the Bill,⁴³ which was taken directly from the Australian Model Act.⁴⁴ While the definition of workplace is not going to be a transformational feature of the new scheme, it will ensure the Act has the broadest reach possible and will adapt to the ever-evolving ‘workplace’. The Model Act also directly inspires the framing of the principal duty holder under the Bill. The term ‘employer’ is removed and is replaced with the broader notion of ‘a person conducting a business or undertaking’ (PCBU).⁴⁵ The adoption of the new PCBU term recognises that the traditional concept of the employer-employee relationship is only one arrangement in the modern world of work.⁴⁶ The number of arrangements involving contractors, subcontractors, franchisors, and labour hire has been on the rise, while health and safety legislation and its concept of ‘employer’ has failed to keep up. Similarly, the term ‘employee’ is removed and replaced by the

⁴² *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [20].

⁴³ Health and Safety Reform Bill, at s 15; compare with definition of ‘place of work’ in s 2 of the Health and Safety in Employment Act.

⁴⁴ Model Work Health and Safety Act 2011 (Aus) at s 8

⁴⁵ Health and Safety Reform Bill, at s 13; compare with definition of employer in s 2 of the Health and Safety in Employment Act 1992.

⁴⁶ *The Report of the Independent Taskforce on Workplace Health and Safety: Executive Report*, above note 24, at [20].

notion of ‘worker’.⁴⁷ Again, worker is defined very broadly to “recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers.”⁴⁸

Aside from definitional changes, the reform also includes a refuelled commitment to worker participation.⁴⁹ Provisions for worker participation, input and representatives are significantly enhanced under the Bill, which will be of momentous value considering a general Robens approach is retained. In a similar vein, the protection of representatives, inspectors and whistle-blowers is increased, a welcome acknowledgement of the part those safeguards play in ensuring compliance, and of the power inequality present in many relationships within the workplace.⁵⁰

This paper’s focus however is corporate liability, and in particular the new duty of officers.⁵¹ The duty of officers is closely tied to the primary duty of care, which has been broadened and simplified, and the standard of care has been raised. The primary duty is laid out in s 30, which provides that all PCBU’s have a duty to ensure, so far as reasonably practicable, the health and safety of workers engaged, or caused to be engaged, by the PCBU or whose activities in carrying out work are influenced or directed by the PCBU.⁵² The officer duty is outlined in section 39, which provides that where any PCBU has a duty or obligation under the Act, all officers of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.

⁴⁷ See, Health and Safety in Reform Bill s 14; compare with definition of employee in s 2 of the Health and Safety in Employment Act 1992 (NZ). See also; Model Act, above note 10, s 7.

⁴⁸ Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: the Model Act* (The Federation Press, Sydney, 2012), at [28]. See also, Exposure Draft *Commentary*, above note 25, at [7] “the key concept of the worker definition is that it is broader than employee and captures contractors and others”.

⁴⁹ Health and Safety Reform Bill, Part 3 and s 40.

⁵⁰ Health and Safety Reform Bill, Parts 3 and 4.

⁵¹ Health and Safety Reform Bill, s 39.

⁵² Health and Safety Reform Bill 2014, s 30.

The next section analyses the commercial world and its relationship with OHS regulation, revealing an inherent clash between the two that plagues the ability of the regulator to implement effective corporate liability.

III OHS and Corporate Liability – the Fundamentals

A The Business Case

The cost of workplace death, injury and illness is great not only morally, but also economically. Statistics gathered by the Taskforce estimate the economic and social costs of workplace injury at around \$3.5 billion a year, with the cost of occupational illness even greater.⁵³ The Taskforce confidently concluded that New Zealand must devote more resources to prevent ill health, injury and death – “and the returns will come in greater quality of life for New Zealanders, higher productivity and reduced medical costs.”⁵⁴ In light of this, it is easy, at a national level, to make the business case for devoting time and effort to securing safe and healthy workplaces.

Unfortunately, despite the moral and financial benefits being clear, stimulating *firm-level* compliance has proved to be a great challenge. The central underlying issue is the competitive commercial world in which the regulated companies are set. While the business case for a country’s economy is easily made, the business case for compliance for each individual company is less convincing. Capitalism affords a relentless requirement to produce for profit, and to privilege profit over all other objectives, including safety.⁵⁵ Eric Tucker recently examined the capitalist paradigm and found, that although “[t]his drive does

⁵³ Andrew Stevens “Urgent step change needed on safety” (19 August 2013) The New Zealand Herald <
http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10913270> And see, *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [12].

⁵⁴ *The Report of the Independent Taskforce on Workplace Health and Safety: Executive Report*, above note 24, at [3].

⁵⁵ Tucker *Old Lessons for New Governance*, above note 29, at [18].

not always lead to the creation of hazardous working conditions, historically it often has, and presently it often does.”⁵⁶

The inherent clash between OHS regulation and company law makes regulating companies in OHS particularly complex, and means the effectiveness of corporate liability provisions is essential to securing compliance. Given the proliferation of incorporated companies in New Zealand,⁵⁷ and around the world, it has become increasingly important to create effective mechanisms aimed specifically at incentivising *companies’* actions, and company *decision makers’* actions. The duty of officers can go some lengths to achieving that goal.

B Company Law and Occupational Health and Safety Regulation

In order to ensure the proposed reform, specifically the duty of officers, can motivate companies and company decision makers to comply, the question ‘what are the drivers of corporate behaviour’ must be asked. Only once those drivers are identified can the ability of the duty to influence corporate behaviour be assessed.

1 Company law and directors duties

The definitive and undeniable driver of corporate behaviour is profit. It is the role of all company directors to maximise shareholder wealth. Corporate law itself prescribes that role. While directors duties are technically owed to the company,⁵⁸ because a companies interests are defined by the interests of its members, namely, its shareholders, in practice, directors discharge their duties by serving the interests (wealth

⁵⁶ Tucker *Old Lessons for New Governance*, above note 29, at [18]-[19].

⁵⁷ In 1989 there were only 160, 988 companies on the register, as per Bob White (ed) *The New Zealand Official 1990 Year Book* (94th ed Department of Statistics, Wellington, 1990), now there are almost 600 000 registered companies, as per Companies Office “Statistics” (14 October 2013) Companies Office < <http://www.business.govt.nz/companies/about-us/statistics>>

⁵⁸ Companies Act 1993 (NZ), for example s 131 Duty of directors to act in good faith and in the best interests of company

maximisation) of the shareholders as a whole.⁵⁹ At the risk of over simplification, given that the driver of corporate behaviour is profit, a breach of regulation, that does not adversely affect the firm's surplus, will not amount to a breach of director's duties under corporate law, or at a minimum, will not equal a harm to the firm.⁶⁰ Moreover, when it comes to publicly listed, or 'code', companies the threat of takeover is ever present, and takeover rules largely prevent defensive action.⁶¹ Even if directors or managers care about OHS personally, the threat of takeover and resulting job loss is a powerful motivator to prioritise profit, as the market cares about returns and not much else.

In summary, "directors, elected by shareholders to manage the affairs of the corporation, have no independent duty to ensure firm compliance with work law standards." Rather, it is up to health and safety regulation alone to create rules and incentives to alter corporate behaviour and facilitate compliance.

2 Personal drivers within the corporate set-up

In addition to the operation of directors' duties under company law, directors and managers are usually *personally* incentivised to increase the firm's surplus. Managers and decision makers may have largely unchecked and un-counteracted "incentives and behavioural and normative commitments to maximise the firm's surplus by ignoring possible work-law violations."⁶² Internal structures of firms often see that managers are personally compensated,⁶³ whether through promotion, bonuses or other

⁵⁹ *Percival v Wright* [1902] 2 Ch 421. This landmark case found that directors only owe fiduciary duties to the company and not to *individual* shareholders, however as a collective, the group of shareholders as a whole, make up the company and so we have the view of *shareholder primacy*.

⁶⁰ Glynn *Taking Self-Regulation Seriously*, above note 37, at [326].

⁶¹ Takeovers Code Approval Order 2000 (NZ); and See generally; Takovers Panel "A Basic Guide for Shareholders about the Takeovers Code" (November 2013) < <http://www.takeovers.govt.nz/assets/Assets-2/Shareholders-Basic-Guide-and-Fact-Sheets/4931-Takeovers-BG-booklet-online-P7FA-HighRes.pdf>>.

⁶² Glynn *Taking Self Regulation Seriously*, above note 37, at [323]

⁶³ Glynn *Taking Self Regulation Seriously*, above note 37, at [314]. See generally, Kimberly Krawiec "Organizational Misconduct: Beyond the Principal-Agent Model" (2005) 32 Fla St U L Rev 573 at [599]-[601].

means, for the financial success of the enterprise. Those same internal incentives to perform are, more often than not, not applicable to non-financial success. Managers face a very real, and personal, performance - versus - compliance conflict, which very well may cut the other way in work law, that is, towards minimal or noncompliance.⁶⁴

C Companies and Occupational Health and Safety – in light of corporate drivers

1 The cost benefit equation

Given that the driver of corporate behaviour and decision-making is shareholder wealth maximisation, it is clear how firms will approach the task of regulatory compliance. Corporate actors will adopt a cost-benefit analysis:⁶⁵

Straightforward economic models predict that with regard to OHS liability, a firm calculates the risk of inspection multiplied by the cost of an expected fine, resulting in the cost of noncompliance.

If a firm is unlikely to be inspected and fined, then the cost of noncompliance is low, and there is little incentive to comply.

Under the current framework, the threat of inspection does not hold great value in the equation because of the weakness of the regulator. In his recent work on corporate compliance and behaviour, Langevoort confirmed that firms have incentives to implement less than effective systems of internal controls when society under-enforces the law.⁶⁶ It was the intention of the 1992 reform to shift the compliance burden to the private sector, and to lower both external inspection and internal pressure (from workers and unions). The Taskforce reported that currently the

⁶⁴ Glynn *Taking Self Regulation Seriously*, above note 37, at [322]. See also; Doinald C Langevoort “Monitoring: the Behavioural Economics of Corporate Compliance with Law” (2002) 71 Colum. Bus. L. Rev. 79.

⁶⁵ Lobel, *Interlocking* above note 14 at [1097].

⁶⁶ Donald C Langevoort, above note 64, at [80].

regulator is under resourced and ultimately ineffective.⁶⁷ Today, most firms can expect a very low probability of inspection, followed by low penalties, rather low media backlash and therefore low reputational damage (unless the breach caused a major occupational safety tragedy, such as Pike River). Hence, under New Zealand's current framework, firm-level deterrence is severely lacking.

2 Analysing the cost benefit equation

(a) Other factors in play

Admittedly, immediate profit is not the only corporate motivator, and some companies' and decision makers' default position may be in favour of compliance. Additionally, there are other factors in play in the equation, such as company reputation and the productivity and morale of workers which all benefit from OHS investment. In fact, according to a 2011 European Commission study, for every euro or dollar spent, the ratio of pay-off to investment ranges from 1.29 to 2.89 depending on the project.⁶⁸

However, if those numbers actually informed the decisions of company officers, compliance levels would be much higher than they are today. Logic dictates that in practice, companies often view health and safety efforts as a cost not an investment. For example, the Royal Commission found that the board of Pike River Coal Mine Ltd prioritised production over safety.⁶⁹ In its final report, the Commission stated:⁷⁰

In the drive towards coal production the directors and executive managers paid insufficient attention to health

⁶⁷ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [22] and [39]. And see, *Exposure Draft Commentary*, above note 25, at [296].

⁶⁸ László Andor, European Commissioner responsible for Employment, Social Affairs and Inclusion "EU policy on health and safety at work: myths and facts" (London, Institute of Occupational Safety and Health Conference, 26 February 2013).

⁶⁹ Royal Commission on the Pike River Coal Mine Tragedy *Final Report* (Department of Internal Affairs, Wellington, October 2012), at [12], [15]-[22].

⁷⁰ At [12] and [19] (emphasis added).

and safety and exposed the company's workers to unacceptable risks. ... [A]t the executive manager level there was a culture of production *before* safety.

In the long run the government and regulators must strive to alter that misconception, and change the culture of companies towards OHS. In the meantime, however, a more immediate remedy to induce compliance is necessary.

(b) Competition

In the corporate world, capitalist competition is a force to be reckoned with, and when it comes to health and safety compliance, it has problematic ramifications. Where compliance is far from compulsory in the practical sense, decision makers cannot be certain that their competitors will comply. That uncertainty causes a ratchet-down effect, where all companies, driven by a fear of falling behind the competition, will opt for cheaper, and likely less safe, processes.

(c) Immediate benefits

Finally, the benefits to be gained from noncompliance are often far more clear, tangible and immediate than those of compliance. The cost saving from noncompliance are usually easily identifiable, both in terms of profit and other benefits to those in charge, while any benefit from compliance will often be long-term, contingent, or even speculative.⁷¹ This factor has a large role in the context of takeovers, as a takeover will not be defeated by the possibility of long-term future gains, rather they are assessed on the quarterly financial reports.

3 *The new governance argument*

Many new governance theorists attempt to argue a business case for safe workplaces. Generally, the argument claims; if compliance is made easier, clearer and more fit for purpose, decision makers are likely to comply because the clash in interests between compliance and profit is not that great, and, in any event, 'virtue will triumph over profit.'⁷² This line of

⁷¹ See generally, Glynn *Taking Self Regulation Seriously*, above note 37, at [313]-[318].

⁷² See, Lobel, *Interlocking* above note 14 at [1103]-[1104].

thinking relies on the idea that corporate law is structured so that directors and officers have broad discretion in determining how they run an enterprise, and, for a host of reasons: public relations, a personal sense of ethics or risk aversion, firm decision makers may seek to promote compliance to a greater extent than a cold cost-benefit analysis might predict.⁷³

However, empirical evidence supporting shared interests between companies and workers, or supporting the business case is found wanting.⁷⁴ The reality is that there will be many occasions when “hazards ... are integral to the production process and serve the employers bottom line” and that often “health and safety improvements come with a significant price tag.”⁷⁵ Ultimately.⁷⁶

There is a limit to the extent that managers can indulge their personal sense of altruism and/or worker friendliness and still be true to their real task.” And that real task, as corporate law scholars will tell you, is maximization of shareholder value, with all it entails.

D The Fundamental Issue – and How to Counter It

The above clash was succinctly summarised by Tucker when discussing the theory of Nichols and Armstrong:⁷⁷

The fundamental point is that there is a systematic pressure within capitalist economies to privilege profit seeking over all other objectives, including OHS, whenever those objectives impose a barrier to the

⁷³ Glynn *Taking Self Regulation Seriously*, above note 37, at [305].

⁷⁴ Tucker *Old Lessons for New Governance*, above note 29, at [22].

⁷⁵ Cynthia Estlund *Regoverning the Workplace* (New Haven, Yale University Press, 2010), at [178].

⁷⁶ Harry Glasbeek “Book Review: Varieties of Capitalism, Corporate Governance and Employees” (2008) 22 *Austl Jnl of Corp Law* 293, at [303]; and see also Tucker *Old Lessons for New Governance*, above note 29, at [20]-[26].

⁷⁷ Tucker *Old Lessons for New Governance*, above note 29, at [19] discussing Theo Nichols and Pete Armstrong *Safety or Profit: Industrial Accidents & the Conventional Wisdom* (Falling Wall Press, Bristol, 1973), (hereinafter *Nichols and Armstrong*).

circulation and expansion of capital. The development of regulation for the benefit of working people involves the imposition of limits on the freedom of owners and managers of capital to engage in profit seeking at the expense of safety.

And so, given that the firm's bottom line usually is the bottom line, where the costs of compliance are high, as is the case in health and safety, legal sanctions for violations must be both stiff and probable.⁷⁸

For sanctions to be probable *enough*, enforcement through inspection must be frequent. That solution requires government resources, resources that are not available. That barrier will persist in perpetuity. And so there exists a need for additional tools to protect the labour force. Nichols and Armstrong offered a solution that shifted power over production to workers on the shop floor.⁷⁹ The solution proposed in this paper, and arguably by the proposed reform package, is to shift responsibility from what is now an abstract 'employer' to those in charge day-to-day, those who make the decisions.

IV The New World of Work

In addition to the structure of duties under corporate law and the drivers of corporate behaviour, another major challenge for workplace health and safety regulation is the world of work itself. For several decades the New Zealand labour force, along with other western economies, has been undergoing extensive transformation. The industrial era when factories and manufacturing dominated the working world is gone, with the influx of the service industry and information age filling the gap.

A Regulating the New World of Work

⁷⁸ Glynn *Taking Self Regulation Seriously*, above note 37, at [318].

⁷⁹ Tucker *Old Lessons for New Governance*, above note 29 at [3] in reference to the theory of Nichols and Armstrong above note 57.

The post-industrial era has brought a whole new *world* of work that acts as a double-edged sword for health and safety regulation. It brings fresh challenges such as new forms of harm and new work arrangements, and makes old regulatory measures particularly unsuitable. The modern world of work upsets and distorts the very workings and design of regulatory measures and demands methods tailored to its specific features, if that regulation is to successfully influence behaviour. This challenge is true for New Zealand OHS and many other nations. The Occupational Safety and Health Administration of the United States has expressly recognised changes in the workforce and that those changes require new approaches.⁸⁰

... these demographic and workplace trends complicate the implementation of occupational safety and health programs and argue for enforcement, training, and delivery systems that are different from those that have been relied upon to date.

“There is a need to clarify the responsibilities of all parties with real control and influence over OHS” in this new setting.⁸¹ The concept of ‘employer’ for example has become out-dated, and the new definition of PCBU will prove very useful in ensuring those with power and control bear the responsibility. However, where the PCBU is a company it is the officers that hold the real power, for they make the decisions. Hence, the new duty of officers is uniquely positioned to help counter several challenges posed by the modern economy and labour market.

⁸⁰ Occupational Safety & Health Administration *OSHA 2003-2008 Strategic Management Plan* (United States Department of Labor, Washington DC, May 2003).

⁸¹ Liz Bluff, Neil Gunningham and Richard Johnstone (eds) *OHS Regulation for a Changing World of Work* (The Federation Press, Sydney, 2004), (hereinafter Bluff et al *OHS Regulation*) at [16].

B New Elements of a New World of Work – and the Officer Duty

1 New harm

The dominance of the service sector in the post-industrial economy has brought with it a “myriad of new risks”.⁸² Increased automation and computation account for an increase in musculoskeletal injury, repetitive trauma and stress related injury.⁸³ Mental and physical harm caused by work related stress is also on the rise, as is workplace bullying. New forms of harm are now so prevalent in the workplace that work-related stress was officially included in the definition of harm in s 2 of the Health and Safety in Employment Act 1992 by the Amendment Act 2002.^{84 85}

These forms of harm demand a risk management approach to health and safety.⁸⁶ The first most important step is that the new forms of harm are acknowledged as real and preventable harms of the workplace. Society’s view of ‘occupational injury’ needs to extend beyond accidents common to the manufacturing and agricultural industries and disasters that hit the headlines. New training for decision makers and labour is required to transform to a positive, less risk tolerant, health and safety culture is needed.

⁸² Lobel *Interlocking*, above note 14, at [1095].

⁸³ Ibid; See also, European Agency for Safety and Health at Work *Economic incentives to improve occupational safety and health: a review from the European perspective* (Luxembourg: Publications Office of the European Union, 2010), at [95]-[97], [144], [157] and [170].

⁸⁴ Health and Safety in Employment Act 1992; Health and Safety in Employment Amendment Act 2002.

⁸⁵ Note, the inclusion of stress and fatigue does not mean that inherently stressful work can no longer be performed. Nor does it mean that fatigued workers must not work. Rather, it highlights that employer needs to manage stress and fatigue by taking account of and addressing these matters. As per CCH *Stress and Fatigue in the Workplace* (15 October 2009) [34-360] at <[http://intelliconnect.wkasiapacific.com/scion/secure/ctx_library_victoria_ac_nz_library_resources_online_redirect_100122_html/index.jsp?cpid=WKAP-TAL-IC#page\[6\]](http://intelliconnect.wkasiapacific.com/scion/secure/ctx_library_victoria_ac_nz_library_resources_online_redirect_100122_html/index.jsp?cpid=WKAP-TAL-IC#page[6])>.

⁸⁶ See, Health and Safety Reform Bill, s 22.

Changing the safety culture of a nation requires leadership, not only from the government but also from *within* each enterprise. Officers and senior managers are in the best leadership position to create that culture change. Their position involves enough seniority to demand compliance and enough day-to-day involvement to effect actual change. As Bluff et al explained, “Responsibility properly lies with those who control the generation of risks and who are in a position to eliminate or minimise them.”⁸⁷ The importance of leadership and culture in health and safety is explored in more detail in part VI.

2 New work arrangements

Another development of the modern economy is a growth in more flexible and precarious working arrangements. Businesses increasingly “*seek* to employ part time, temporary, leased and subcontracted day labourers and seasonal workers.”⁸⁸ Certain features of these working arrangements cause problems for health and safety regulation. Firstly, heightened job insecurity weakens labour voice and bargaining powers. It also threatens worker whistle-blower functions, thereby removing an important safeguard (a loss especially intolerable in a Robens system).

Secondly, the increase in precarious and flexible work arrangements inherently involves an increase in lengthy and complex production chains.⁸⁹ The arrangements themselves are often “connected by multiple contractual and subsidy links” often involving labour hire companies or the like.⁹⁰ These complex chains create confusion over who is the employer in the traditional sense. They create confusion about *who* is responsible for the safety of *whom* by dividing responsibility, and consequently they reduce the likelihood of active compliance efforts.

Uncertainty about responsibilities has proved fatal to health and safety efforts in New Zealand. In health and safety law duties are often contested through the ambiguities of

⁸⁷ Bluff et al *OHS Regulation*, above note 81, at [14].

⁸⁸ Lobel *Interlocking* above note 14 at [1094] (emphasis added).

⁸⁹ Lobel *Interlocking*, above note 14, at [1094].

⁹⁰ *Ibid*

employer/employee legal definitions.⁹¹ Those ambiguities are exacerbated in the new setting of temporary employment and complex contractual chains. The new definitions of PCBU and worker help ensure all PCBU's know they are *all* responsible for the health and safety of *all* those below them in the chain. The duty of officers is an invaluable addition to that framework. The personal nature of the duty will increase proactivity in OHS, while framing the duty as one to 'exercise due diligence' will bring organisation and structure to the risk management process.

3 *Modern pace*

The commercial world has always been a competitive one, demanding prudent, commercially savvy decisions and development. Nonetheless, as a direct result of the globalised market, corporate players today are faced with *increased* competition, which in turn requires increased ingenuity. Moreover, the information age means technological and production methods change quickly. The accelerated pace and growing diversity of work demands flexible work-law standards, as Lobel put it, "In a time of radicalized modernity and just-in-time production, the law must recognise market demands of rapid change and adaptability."⁹² Traditional, detailed, top-down enforcement lacks the adaptability necessary in today's economy as substantive standards can quickly become outdated. A major reason to retain a Robens model even now is that the flexible performance-based standards suit the fast paced market, as industry can adapt and change much faster than governmental regulation and guidelines.

Performance based standards also put the onus of the substance of compliance on to the private sector, which is better positioned to flesh out the details and tools for safe production methods. The due diligence duty places the burden of responsible decision making on high ranking officers best positioned and best equipped to lead change. The PCBU and

⁹¹ See Orly Lobel "The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy" (2003) 10 Tex Wesleyan L Rev 109, at [115]-[116].

⁹² Lobel *Interlocking*, above note 14, at [1093].

officer performance standards capitalise on the inventiveness that commerce creates in its participants, by ensuring those high up in the competition are responsible for OHS.

4 Decline in union density

A final significant feature of the new world of work for our purposes is the decline in union density, mentioned earlier. Union density has been in decline for half a century and in New Zealand it reached an all time low in 2013 of 16.6 per cent.⁹³ The reduction, or in most cases absence, of unions from the workplace not only weakens already weak employee bargaining power, but it also removes a key safeguard. Unions were once an important supplement to governmental efforts to enforce work-law standards, and the loss of a labour-force watchdog further weakens already insufficient enforcement.

The decline in union density necessitates the introduction of a new safeguard; a new measure that encourages and demands active compliance. The duty of officers can help fill this gap. Under the proposed reform it is the express duty of officers to act as a watchdog, their task is to monitor and help PCBU's comply with their primary duty. The role of officers as a safeguard under the new duty is discussed further in part VII (B).

V The Need for Effective Inducement

The inescapable conclusion drawn from assessing the regulatory failure in New Zealand, the new world of work, and, in particular, the drivers of corporate behaviour, is that what is desperately needed is actual and effective inducement; a tool that creates real incentive for compliance. As explained above, when companies engage in a cost benefit analysis of health and safety compliance, the equation is as follows; the cost of

⁹³ According to Companies Office records as cited in Rebecca Stevenson "Are unions a good deal for workers?" Stuff (online ed, 08 February 2014, at < <http://www.stuff.co.nz/business/money/9696643/Are-unions-a-good-deal-for-workers>>).

genuine compliance minus the benefits of compliance, such as positive reputation, and the cost of sanctions for non-compliance, *discounted by the probability of enforcement*.⁹⁴ Where the risk of enforcement is too low, the cost of compliance will almost invariably be greater than the cost of non-compliance, and the drivers of corporate decision-making remain unaltered.⁹⁵ The risk of enforcement *is* too low in New Zealand, by cause of the regulatory breakdown.

Consequently, a new tool that alters norms at the top of the decisional hierarchy is needed. The question is; how can the government change the result of the above equation, what tools are available to make the cost of compliance for companies lower than the cost of noncompliance, or at least to make risk taking less appealing? Increasing maximum penalties for violations can have a certain impact. However, higher penalties alone cannot wholly transform the equation because the threat will only be real if inspection and ultimately penalty is made much more likely. That can only happen at great expense to the government, through the dedication of many resources to inspection and enforcement. The Department of Labour, as it then was, acknowledged that the amount of funding provided to prevent workplace harm is significantly less than what is actually required.⁹⁶ More recently, the Taskforce also highlighted the need for higher resource allocation.⁹⁷ While the Government has heeded this advice, and more funding will be dedicated to OHS under the reform, it alone will not increase inspections enough to tip the balance and alter the equation. The best results in OHS regulation will be delivered by a varied system. No single approach to public policy can capture the complexities of workplace risk, the roles of participants and the

⁹⁴ Glynn *Taking Self Regulation Seriously*, above note 37, at [316], (emphasis added).

⁹⁵ Glynn *Taking Self Regulation Seriously*, above note 37, at [303].

⁹⁶ National Occupational Health and Safety Advisory Committee *Occupational Health and Safety in New Zealand: NOHSAC: Technical Report 7*, above note 19, at [Executive Summary].

⁹⁷ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [96], [120], [123], [130]; See also, Royal Commission on the Pike River Coal Mine Tragedy *Final Report*, above note 69, Chapter 18 at [250] on ‘resources available to regulator’, and at [283]-[285].

elements that drive their behaviour.⁹⁸ Hence, the success of the corporate liability reform depends on its being a multifaceted one, where increased penalties play their part a long side other measures.

There are of course various motivating levers, as the Taskforce describes them, available to governments to incentivise compliance beyond increasing penalties.⁹⁹ Those levers include both carrots and sticks and range from the provision of information, to ACC deductions, to business opportunities through procurement.¹⁰⁰ Yet the goal for every measure is the same, to increase compliance, whether through encouragement or compulsion. When looking at the various levers available it helps to break up the role of incentive tools. Incentives can be targeted at the company itself, the workers, or the decision makers. Targeting workers may succeed on occasion, however heightened job insecurity and the sheer power of corporations limit this options success by weakening worker voice. As discussed, existing regulatory approaches have also failed to adequately incentivise the company itself, or in traditional terms, the ‘employer’, and in the absence of sufficient firm level sanction, the decision makers are also not incentivised; their drivers remain tied to those of the firm.¹⁰¹

Hence, the only way to further induce the compliance of companies is to target the decision makers themselves. In light of this, one of the most important functions of the duty of officers is its role as an incentive creator. Put simply, “where noncompliance incentives cannot be addressed adequately or reliably at the enterprise level, compliance still can be achieved by altering incentives of the firm’s primary decision makers.”¹⁰² OHS regulation must move away from its near exclusive reliance on enterprise or employer liability and turn to simultaneously incentivise and target officers themselves. This is accomplished

⁹⁸ Lobel, *Interlocking*, above note 14, at [1141].

⁹⁹ See generally, *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, on ‘Motivating Levers’ at [75].

¹⁰⁰ *Ibid.*

¹⁰¹ Glynn *Taking Self Regulation Seriously*, above note 37, at [283].

¹⁰² Glynn *Taking Self Regulation Seriously*, above note 37, at [323].

through the officer due diligence duty and the recalibrated penalty provisions, which make corporate officers *personally* accountable, with threat of increased sanction, for health and safety systems.

A A Personal Duty with Personal Incentives

The personal nature of the duty of officers ensures it fulfils its inducement role. Directing legal bite at decision makers personally is arguably enough to motivate compliance in and of itself, regardless of increased penalties or the like. The risk taking behaviour that has defined so many companies' response to health and safety compliance would be less appealing to those in charge if they personally were to bare the cost of the fine. As Glynn noted, principal decision makers within firms "would approach compliance with far greater vigour if they were bound personally to do so."¹⁰³ There is merit in that logic, and the proposed penalty provisions, outlined below, add to its impact.

B Fines and Penalties

Sections 42, 43 and 44 of the Bill provide that the new increased penalties apply to all duties under subpart 1 or 2 of the Act, which includes the officer due diligence duty. A breach by an officer that exposes an individual to risk of death or serious injury and involves *reckless conduct* receives the highest penalty under the bill; a term of imprisonment not exceeding 5 years or a fine not exceeding \$600,000 or both.¹⁰⁴ A lesser fine of \$150,000 may be imposed for a failure to comply with the due diligence duty, where that failure exposes an individual to risk of death or serious injury,¹⁰⁵ while a fine not exceeding \$50,000 may be imposed for a simple failure to comply with the duty.¹⁰⁶

¹⁰³ Glynn *Taking Self Regulation Seriously*, above note 37, at [345].

¹⁰⁴ Health and Safety Reform Bill 2014, s 42

¹⁰⁵ Section 43.

¹⁰⁶ Section 44.

Section 24 provides that the duty is not transferable,¹⁰⁷ and s 29 states that officers cannot contract out of their duty.¹⁰⁸

Under the current framework fines imposed for breaches of OHS are shockingly low. The Exposure Draft commentary identified low penalties as a major flaw in the New Zealand framework.¹⁰⁹ The penalties in the Act itself and especially as applied by the courts have been too low to incentivise compliance. The commentary revealed that 55 per cent of all fines imposed are less than \$30,000 and 92 per cent are less than \$50,000.¹¹⁰ These low fine levels undermine the general deterrent effect and send signals that offences in health and safety are less serious. The three-tiered system of offences and the corresponding graduated (and increased) penalties will provide better guidance to courts about appropriate fine levels.¹¹¹

Lastly, financial penalties are not always effective in punishing and incentivising companies. Companies can pass on monetary penalties to consumers or contractors through elevated prices. The personal nature of the officer duty addresses this problem with the traditional employer-centric approach, as officers cannot pass on their loss and are precluded from insuring themselves against financial liability.¹¹²

¹⁰⁷ Section 24.

¹⁰⁸ Section 29.

¹⁰⁹ Exposure Draft *Commentary*, above note 25, at [4].

¹¹⁰ At [12].

¹¹¹ *Ibid.*

¹¹² The Health and Safety Reform Bill has retained a provision from the Health and Safety in Employment Act 1992, which precludes insurance against fines imposed under the Act. That provision can now be found in section 178 of the Bill. It is of note that this important provision was retained as no such provision exists in the Australian Model Act 2011 from which New Zealand has borrowed so extensively. Australia's lack of an anti-indemnification provision has caused problems in health and safety cases, as where indemnification is allowed, the coercive effect of the threat of penalty is completely undermined, See *Hillman v Ferro Con (SA) Pty Ltd and Anor* [2013] SAIRC 22, see also Neil Foster "You can't do that! Directors insuring against criminal WHS penalties" (2012) 23 Insurance Law Journal 109.

VI The Importance of Leadership and Culture Setting

The importance of leadership in workplace health and safety cannot be overstated. It is essential that there is perceivable dedication to health and safety affairs, right from the upper echelons of each corporation, if there is any hope of that dedication filtering through the corporate hierarchy right down to the workers on the shop floor.¹¹³ Firm-level compliance is heavily reliant on the attitude and actions of high-ranking officers towards health and safety matters. As Michael Tooma has observed, “[w]here there is no safety leadership from senior employees, the system is almost set up to fail.”¹¹⁴

A Culture Setting – The Role of Officers’

The most important form of leadership in health and safety is not leadership by the government, but rather the leadership *within* each enterprise, because that is the leadership that can alter the culture of the firm. In 2004 the International Labour Organization announced that the key component for injury prevention at work is developing a *culture of safety*.¹¹⁵ Similarly, the Taskforce re-affirmed in the New Zealand context that “leadership is vital to creating a workplace culture in which health and safety automatically comes first.”¹¹⁶ The health and safety culture in New Zealand was singled out by the Taskforce as one of the greatest challenges to improving the country’s

¹¹³ See, R Flin and S Yule, above note 13, at [ii45] “Senior managers have a prime influence on the organisation’s safety culture. They need to continuously demonstrate a visible commitment to safety.”

¹¹⁴ Michael Tooma “Lessons for Australian PCBUS from the Pike River coal mine royal commission” (19 December 2012) Norton Rose Fulbright

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<http://www.nortonrosefulbright.com/knowledge/publications/73659/lessons-for-australian-pcbus-from-the-pike-river-coal-mine-royal-commission>>.

¹¹⁵ International Labour Organisation “The ILO Report for World Day for Safety and Health at Work 2004” (28 April 2004) ILO

<http://www.ilo.org/legacy/english/protection/safework/worldday/products04/report04_eng.pdf>, at [24]-[25]. See also Lobel, *Interlocking* above note 14 at [1103].

¹¹⁶ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [40].

health and safety record.¹¹⁷ The Chair of the Taskforce declared that if New Zealand is to improve its record, it will require a seismic shift in attitude and a fundamental change to the prevailing ‘she’ll be right’ culture.¹¹⁸ By creating health and safety leaders, the duty of officers will be fundamental to achieving that shift. As a positive duty, placed on decision makers personally, it charges each of them with the task of “providing leadership in health and safety for their organisation,”¹¹⁹ thereby ensuring a culture shift is initiated at the top of each company.

B Creating a Health and Safety Leader

Flin and Yule studied the importance of leadership in creating healthy and safe workplaces.¹²⁰ Through the case study of the healthcare sector, they concluded leadership has a significant impact on safety compliance and that the best results come from participatory and communicative leadership, rather than instructive top down efforts.¹²¹ The proposed duty facilitates this role perfectly, by requiring officers to be *continuously* active in health and safety.¹²² The duty does not simply require that officers give top down instructions, or that they create strategies ‘on paper’, rather it demands more participatory active monitoring and continuous understanding of day-to-day health and safety issues.¹²³ Here, the proposed duty addresses the concerns of the Royal Commission about active participation of leaders. The Commission severely criticised the board of Pike River Coal Mine Ltd, finding that “the board did not provide effective health and safety leadership to protect the workforce

¹¹⁷ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8 at [31-32].

¹¹⁸ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [5] and [31].

¹¹⁹ Exposure Draft *Commentary* above, note 25, at [12].

¹²⁰ R Flin and S Yule, above note 13.

¹²¹ See generally, R Flin and S Yule, above note 13.

¹²² Health and Safety Reform Bill, s 39, in particular section 39(2)(f).

¹²³ Neil Foster “Recent Developments in personal Liability of Company Officers for Workplace Safety Breaches – Austrian and UK decisions” (paper presented to the Seventh National OHS regulatory research Colloquium, Canberra, February 2009; NRCOHSR WP No 63), at [31].

from harm,”¹²⁴ a factor the Commission saw as instrumental to many health and safety failures of the company. In conclusion, the Commission found that “it is essential that directors and those in equivalent positions rigorously review and monitor their organisation’s compliance with health and safety law and best practices.”¹²⁵

1 High-ranking officers in particular

In order for the officer duty to make a health and safety leader of each officer, the duty must target high-ranking officers in particular. High-ranking officers frequently wield the most de facto power in a business enterprise.¹²⁶ While the Board may technically be at the top of the hierarchy, shareholders, the public, and most importantly for the purposes of health and safety, the workers, see officers as the firm’s top leadership. Moreover, as the day-to-day decision makers, senior managers generally set the direction of firm policy. Their decisions affect the priorities, attitudes and behaviours of *all* those further down the hierarchy, including both lower level managers and workers.¹²⁷

Of utmost importance is the fact that decision makers at higher levels have the authority to commit resources to health and safety matters. In fact, it is an express aspect of the concept of due diligence under the Bill that officers ensure appropriate resources are available for use in health and safety compliance, and to verify that use.¹²⁸ The resource allocation role is important of several levels. Obviously, it is important in and of itself that resources are dedicated to compliance efforts, as risks would be unmanageable without sufficient funds, time and people. However a less apparent significance is that the very dedication of those resources is an indication to all members of the company that health and safety compliance is considered a

¹²⁴ Royal Commission *Final Report*, above note 69, at [18].

¹²⁵ Royal Commission *Final Report*, above note 69, at [33].

¹²⁶ Glynn *Taking Self Regulation Seriously*, above note 37, at [326].

¹²⁷ See Flin and Yule, above note 13, at [ii46] ‘higher level managers may have a greater degree of influence on workers’ safety behavior than supervisors.’

¹²⁸ Health and Safety Reform Bill, s 39(2)(c) and (f).

legitimate and imperative undertaking.¹²⁹ In the corporate world money talks, and the very allocation of resources to compliance efforts gives health and safety a status within the firm, which will encourage a positive health and safety culture.

At the moment, the New Zealand framework suffers from inadequate leadership from a large number of people who have influence in the workplace,¹³⁰ all the while the common theme in the literature is that effective internal compliance requires genuine buy-in by managers at top levels.¹³¹ The proposed officer duty is the first sign that New Zealand is heeding that advice, and attempting to address the gaping leadership hole in its health and safety regulation.

VII The Officer Duty

The due diligence duty placed on officers has the opportunity to be uniquely helpful, far beyond creating a leadership role and producing real and effective incentive. The duty, whether intentionally or not, specifically addresses several of the flaws identified as significantly contributing to New Zealand's regulatory failure. This paper proposes that the officer duty has the singular most transformational capacity of all the individual features of the reform. In light of its potential, the next part of the paper will analyse the duty itself, as proposed and drafted, to evaluate its potential and also to highlight its flaws with the aim that once isolated, those flaws can be removed or addressed.

¹²⁹R Flin and S Yule, above note 13, at [48]-[49]. And see, Great Britain *Reducing error and influencing behaviour* (Suffolk, HSE Books, 1999).

¹³⁰ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [25].

¹³¹ Glynn *Taking Self Regulation Seriously*, above note 37, [331] See for example; Kimberly Krawiec "Organizational Misconduct: Beyond the Principal-Agent Model" (2005) 32 Fla St U L Rev 573, at [577] (citing numerous studies); Doinald C Langevoort "Monitoring: the Behavioural Economics of Corporate Compliance with Law" (2002) 71 Colum. Bus. L. Rev. 79, at [108-09] and [110] (discussing agents' need to perceive senior management's commitment on integrity-based matters).

A The Traditional Approach to Regulating Officers

Corporate law generally ignores the role of officers except in their capacity as directors or when they exert direct influence over board members. Substantive corporate law does not impose any meaningful duty on supervisory personnel to prevent, detect or correct violations of work law standards.¹³² Health and safety law's approach to officers is arguably worse, not only are they largely overlooked, but when the role of officers is considered in legislation, that legislation has utterly failed to incentivise at all.

The Health and Safety in Employment Act 1992, in force today, only targets officers in a conditional way. Under s 56 the law holds directors and officers of bodies corporate liable only when they direct, authorise, assent to, acquiesce in, or participate in a health and safety failure.¹³³ Under this provision, officers have no independent duty to actively ensure health and safety standards are adhered to, nor do they have a duty to monitor for or prevent illegal conduct within the enterprise. Rather, as a direct result of the framing of s 56, officers and directors are incentivised to ignore health and safety matters, as they are better protected from liability by removing themselves altogether.¹³⁴ The proposed duty requires officers to be involved and proactive in ensuring their PCBUS comply with OHS standards,¹³⁵ and is a deliberate shift away from accessorial or attributed liability.¹³⁶ Under the new provision, ignorance of risks or violations will not help officers avoid liability.

B The Officer Duty

The duty of officers is set out in s 39, pt 2, subpt 2, of the Health and Safety Reform Bill. The section states that if any PCBU has a

¹³² Glynn *Taking Self Regulation Seriously*, above note 37, at [325].

¹³³ Health and Safety in Employment Act, s 56.

¹³⁴ For example, *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App Rep 72.

¹³⁵ Cherie Holland and Donald Charrett "Work health and safety in Australia – the current state of play" (2013) Australian Construction Law Bulletin 46, at [49].

¹³⁶ Work Health and Safety Bill 2011 Explanatory Memorandum 2010-1011 (Australia), at [21].

duty or obligation under the Act, then officers of that PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.¹³⁷ The provision goes on to establish that, for the purposes of the Act, due diligence involves:¹³⁸

- (a) having up to date knowledge of OHS matters;
- (b) understanding the nature of operations of the business of the PCBU and of the hazards and risks associated with those operations;
- (c) ensuring the PCBU has available for use and uses appropriate resources and processes to eliminate or minimise those risks;
- (d) ensuring the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks, and for responding to that information in a timely way;
- (e) ensuring that PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the Act; and
- (f) verifying the provision and use of the resources and processes referred to in (c) to (e).

1 Due Diligence

By framing the duty as a duty to exercise *due diligence*, the Act charges officers with a monitoring role. Their function in health and safety is to *facilitate* the compliance *of the person conducting a business or undertaking*. With regard to the primary duty of care, set out in s 30, the officers duty is to exercise due diligence to ensure the PCBU is able to - and is in fact – ensuring, so far as reasonably practicable, the health and safety of workers. In this way, officers are not under a personal duty to protect the health and safety of workers. Rather, their duty is to actively and continuously oversee and facilitate compliance and ensure the health and safety affairs of the business are in order.¹³⁹

¹³⁷ Health and Safety Reform Bill, s 39(1).

¹³⁸ Section 39(2), paraphrased.

¹³⁹ See *Insp Kumar v Ritchie* [2006] NSWIRComm 323, in particular at [177] where Haylen J outlines the continuous active nature of due diligence as ‘lay[ing] down a proper system to provide [compliance] ... and provid[ing] adequate supervision to ensure that the system [is] properly carried out’ (emphasis added). In that case the provision in question was section 26 of the

Corporate officers and directors are no strangers to the concept of due diligence or the responsibilities it entails. Although various phrasing is used, many pieces of legislation that govern the activities of directors and senior managers require due diligence.¹⁴⁰ ¹⁴¹ As directors and senior managers already owe duties of due diligence, the health and safety element can easily be conceived of as an extension of their existing due diligence duties.

It is universally agreed that the current framework of duties is confusing.¹⁴² It fails to make expectations clear and duty holders have difficulty knowing what to do in order to meet their obligations.¹⁴³ That uncertainty has proved lethal, making compliance more complex and in turn less likely.¹⁴⁴ The due diligence duty of officers is an ideal measure to counter an uncertain past. Managers and directors, already well acquainted with the requirements and processes of due diligence, will know and understand what is expected of them.

A final point with regard to the due diligence aspect of the duty is the fact that the concept of due diligence itself has been defined. When a list like the one in s 39(2) is created there is always a danger that matters that have been omitted from the list may be excluded from consideration down the line.¹⁴⁵ However, the definition is an inclusive one, and courts generally refrain from limiting a concept unless the legislature has shown an

Occupational Health and Safety Act 2000 (NSW) which provided officers with a defence to liability if they had exercised due diligence.

¹⁴⁰ For example, the Financial Markets Conduct Act 2013, Securities Markets Act 1988, and Companies Act 1993.

¹⁴¹ See for example, Companies Act s 137 ‘duty to exercise care and diligence’ and s 128 ‘duty to manage the affairs of the company’. The statutory duties undeniably combine to require due diligence.

¹⁴² *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [21]-[23].

¹⁴³ *Exposure Draft Commentary*, above note 25, at [3].

¹⁴⁴ *The Report of the Independent Taskforce on Workplace Health and Safety: Main Report*, above note 8, at [22]-[25] and [48].

¹⁴⁵ Neil Foster “Leading the Safety Conversation as a Manager: Exercising Due Diligence in Workplace Safety on the Frontline” (paper presented to the Comcare National Conference, 19-21 September 2012), (hereinafter Foster *Leading the Safety Conversation*), (no pinpoint available).

express intention to do so. Additionally, in the past Australian courts have taken a broad approach to interpreting duties, requiring “vigilance and a proactive, structured and systematic approach to identifying and controlling hazards in all aspects of their operations”.¹⁴⁶ Thus, it is likely that where an action is sensibly one that should be taken in the exercising of due diligence, if New Zealand courts follow the approach of Australian courts, that action will be considered a necessary aspect of due diligence.

2 A Negligence Based Standard

The standard required for the officer’s duty is akin to a negligence standard. While their duty is to exercise due diligence to *ensure* the PCBU complies with their duties under the Act, due diligence itself involves only *taking reasonable steps*.¹⁴⁷ Perfect legal compliance is unachievable, and to require more than ‘reasonable steps to ensure’ would create great confusion. Demanding an impossible standard would undermine the entire duty by making it impracticable and subject to great alteration by the courts. The adopted negligence based standard will be beneficial to the operation of the duty in numerous ways, some of which are outlined below.

(a) Capitalising on the ability of officers

As discussed in Part IV, a performance based standard like that in s 39 capitalises on the know-how, competitive, and inventive environment of the corporate world. The broad based duty avoids the inefficiencies of an externally mandated internal control system, and allows each company’s officers to determine their own firm specific structures. A prescriptive standard would not only lack the flexibility necessary for a duty that applies to a multitude of officers, in various roles within diverse companies,

¹⁴⁶ Richard Johnstone, Michael Quinlan and David Walters “Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market” (2005) 47 The Journal of Industrial Relations 93, at [97]. See *WorkCover Authority of NSW (Inspector Egan) v Atco Controls Pty Ltd* [1998] 82 IR 80, at [85]; *WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd* [2002] NSWIRComm 316, at [78], *Inspector Ching v Bros Bins Systems Pty Ltd*; *Inspector Ching v Expo Pty Ltd t/as Tibby Rose Auto* [2004] NSWIRComm 197 at [32].

¹⁴⁷ Health and Safety Reform Bill, s 39(2).

but it would also fail to exploit the ingenuity of corporate actors. Officers operate in an ever-competitive setting, and are well practiced in facilitating and encouraging cost-efficiency. By simultaneously allowing officers to develop their own systems, and incentivising them to do so, those systems are likely to be fit for purpose, efficient and effective.

Moreover, Timothy Glynn proposes that a duty of this kind will “facilitate the migration towards industry best practices as officers, concerned about sanctions but incentivised to perform, will seek to follow industry leaders in developing genuinely effective but also cost efficient internal controls and cultures.” Creating best practices through guidelines would usually be the task of government regulators, however through the officer’s duty, industry itself will take on the role, saving regulators valuable time and money.

(b) No scienter requirement

A scienter requirement may make the novel duty more acceptable, or less controversial, to the high-powered players to whom it applies, however it would diminish its efficacy considerably. Violations tend to occur at lower levels of companies, for that is where the action is, and the masses are. Establishing knowledge on the part of high-ranking officers in these situations would be difficult, not to mention requiring scienter would likely produce the same undesirable incentives that the traditional approach to officer liability has.¹⁴⁸ If an officer cannot be liable without knowledge, they will be deterred from discovering violations or even incentivised to “[create] layers of bureaucracy to shield officers from knowledge of underlying violations.”¹⁴⁹ The objective standard proposed in s 39 will not have this perverse effect, because officers will be accountable wherever reasonable steps could have been taken that were not. Cases will be tested according to the objective standard, and subjective knowledge, or lack thereof, will not offer protection from liability.

¹⁴⁸ See, ‘Traditional Approach to Regulating Officers’ page 31.

¹⁴⁹ Glynn *Taking Self Regulation Seriously*, above note 37, at [335].

(c) Not Strict Liability

A strict liability standard would also be less effective than the proposed negligence based standard. While strict liability would certainly induce officers to ensure the PCBU has systems in place to prevent misconduct, it would not induce them to encourage systems that find and correct existing violations. Rather, strict liability would induce officers to hide violations ex post,¹⁵⁰ and would likely foster a culture of covering and underreporting health and safety problems. Such a practice would eliminate the learning opportunities that are the only upside of accidents.

The duty will not, and should not be expected, to create perfect compliance. Rather, it will force all officers to ensure their companies have up-to-date well-resourced systems and pro-active measures in place to manage the risks of their specific workplaces.

3 The duty to monitor – a new (private-sector funded) safeguard

High-ranking officers are well positioned to supervise a companies' health and safety performance, which is exactly what the due diligence duty requires. The personal due diligence duty essentially requires that officers actively monitor compliance.¹⁵¹ The duty facilitates oversight where oversight might otherwise be lacking. As mentioned above, inspection and enforcement is not sufficiently high to compel compliance, and resource constraints mean that insufficiency is not easily solved. Moreover, as the decline in union density and increasing job insecurity has removed non-governmental safeguards, today more than ever OHS is in dire need of a new safeguard. The due diligence duty placed on officers creates a monitor who has a personal interest in performing the function, without draining precious resources.

If the duty were constricted to applying to top-level directors alone, the monitoring and oversight function would be lost in mid and large sized firms. While top-level directors are

¹⁵⁰ Ibid.

¹⁵¹ Health and Safety Reform Bill, s 39(2).

integral to setting the health and safety culture, they are often far removed from the day-to-day running of the firm and are thus ill suited to *monitor* activities. Glynn notes that mid and lower level managers may sometimes be better situated to detect unlawful conduct because they are closer to the action and are able to devote more time to monitoring.¹⁵² However, these employees are too low in the hierarchy to perform the leadership function, and are lacking in decision-making, resource allocation and culture setting areas.

Finally, there is a hidden danger in failing, as New Zealand has, to motivate officers. In the absence of the officer duty or a similar provision, directors and officers are likely to view monitors and whistle-blowers as potential adversaries. When officers are left unmotivated the basic incentive of corporate decision-making, maximising the firm's surplus, remains the central driver, and any whistle-blower is an obstacle to the core mission of making money.

C Limits of the Duty as Drafted

The officer duty is by no means a saviour provision, to fix every flaw in New Zealand's health and safety regulatory framework. There are challenges to OHS regulation that the officer duty can never be expected to address, where other aspects of the reform will be more important. However, there are also flaws in the drafting of the officer duty that require attention before the Bill is given royal assent, or that at least must be addressed in an interpretation guide, so as to ensure the duty fulfils its true potential.

The Taskforce emphasised that in order for the regulatory system to function it is imperative that duty holders are absolutely clear about their obligations. As previously discussed,¹⁵³ the fact that the duty has been framed as a duty to exercise due diligence provides clarity, because officers are

¹⁵² Glynn *Taking Self Regulation Seriously*, above note 37, at [329].

¹⁵³ See 'Due Diligence' from page 32.

familiar with the due diligence concept. However, uncertainty and ambiguities persist in the duty as drafted.

1 Definitions

- (a) Who is an Officer and when will they be liable? The concept of relative control:

Obviously, the duty applies to ‘officers’ of the PCBU, what is less clear, is *who* exactly will qualify as an officer and in what circumstances they will be liable. Section 12 of the Bill defines an officer as:¹⁵⁴

- (a) If the PCBU is
- (i) a company, any person occupying the position of a director of the company, by whatever name called;
 - (ii) [not a company], any person occupying a position that is comparable with that of a director of a company
- (b) includes any person who makes decisions that affect the whole, or a substantial part, of the business of the PCBU.

At first instance, the definition seems rather comprehensive, however real ambiguities exist which endanger the usefulness of the duty. The phrase in (b) ‘decisions that affect the whole, or a substantial part, of the business of the PCBU’ is inherently vague. In the health and safety context, that phrase has its origins in the judicial interpretation of s 26 of the New South Wales Occupational Health and Safety Act 2000 (since repealed), which placed liability on directors and those ‘concerned in the management’ of the corporation.¹⁵⁵ The phrase in (b) was taken

¹⁵⁴ Health and Safety Reform Bill, s 12 definition of ‘officer’.

¹⁵⁵ Occupational Health and Safety Act 2000 (NSW) (Aus), section 26. Section 26 placed liability on directors and those ‘concerned in the management’ of the corporation. The phrase ‘decisions that affect the whole or a substantial part of the business’ comes directly from court decisions considering the meaning of ‘concerned in the management’ from the section 26 definition. See for example, *Commissioner for Corporate Affairs v Bracht* [1989] VR 821. See generally Neil Foster “Leading the Safety Conversation as a Manager: Exercising Due Diligence in Workplace Safety on the Frontline” (paper presented to the Comcare National Conference, 19-21 September 2012).

from court decisions considering the meaning of the expression ‘concerned in the management’.¹⁵⁶ In *McMartin v Newcastle Wallsend Coal Company* Staunton J summarised the judicial approach to ‘concerned in the management’ and concluded that it focuses on a person’s decision-making powers, which must be able to “affect the whole or a substantial part of the corporation”.¹⁵⁷ Her Honour went on to specify that “the person’s decision making powers must be such as to directly influence the corporation *in relation to the act or omission that constituted the offence* of the corporation”.¹⁵⁸ That line of thinking introduces the idea of relative control to the officer duty.

The problem is that introducing the concept of control to the question of liability under s 39 could have far-reaching implications, it may result in an officers’ liability being restricted by the specific area or department over which they reside. For example, will chief executive officers, chief financial officers, operations managers and human resources managers all be equally responsible for all areas of health and safety?¹⁵⁹ Or, will different kinds of officers have different responsibilities relative to their degree of control? The point here is; does the judicial history of the definition open the door to a common law ‘defence’, where an officer may avoid liability by arguing their lack of influence or control *in relation to the breach*? To put such a defence into perspective, in the broadest sense it could be argued that no officer had sufficient influence *in relation to a violation* other than the companies’ *appointed health and safety officer*. While it is very unlikely that such a broad-based defence would ever be developed, the ambiguity here gives reason for concern.¹⁶⁰

¹⁵⁶ *Commissioner for Corporate Affairs v Bracht* [1989] VR 821, at [830].

¹⁵⁷ *McMartin v Newcastle Wallsend Coal Company Pty Ltd and ors* [2004] NSWIRComm 202, at [885].

¹⁵⁸ *Ibid*, emphasis added.

¹⁵⁹ See generally, Queensland Government “Submission to the National OHS Review: A National OHS System for the Modern World” (2008).

¹⁶⁰ Note: who qualifies as a ‘director’ is also far from settled, however, that uncertainty is almost impossible to avoid in this context. See for example *Fatupaito v Bates* [2001] 3 NZLR 386; (2001) 9 NZCLC 262,583 (HC); *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, *Re Tasbin Ltd* (No

What is clear, at least, is that many people may owe the same duty under the Act and that each of them individually must still comply with that duty to the standard required, as outlined in s 26,¹⁶¹ and that each of those people must consult and co-ordinate their activities.¹⁶²

(b) Ambiguities and the relationship between provisions

A concerning feature of the Bill in general is the complex chain of relationships between the various provisions and duties, and the explicated definitions therein. The officer duty is a duty to 'ensure' PCBU's comply with their duty.¹⁶³ The PCBU's primary duty is a duty to 'ensure' the health and safety of workers, so far as reasonably practicable.¹⁶⁴ Section 22 defines the PCBU duty to ensure health and safety, as requiring a person to 'eliminate risks so far as reasonably practicable, and if it is not reasonably practicable to eliminate the risks, then to minimise those risks, so far as reasonably practicable'.¹⁶⁵

Thus, when all the provisions are put together, the duty of an officer is to 'exercise due diligence to ensure' that the PCBU 'ensures so far as reasonably practicable' the health and safety of workers by 'eliminating risks so far as reasonably practicable', and when 'not reasonably practicable, to minimise risks so far as reasonably practicable'.

'Reasonably practicable' is also defined,¹⁶⁶ as requiring duty holders to weigh up relevant matters, such as the likelihood of the hazard or risk, the degree of potential harm, knowledge of the risk, available ways to minimise risk (and knowledge of those ways) and the cost associated with minimising the risk,

3) [1992] CA, *Gilles Bakery Ltd v Gillespie* [2013] NZHC 1608; *Aquaheat New Zealand Ltd v Hi Seat Ltd* (in liq and rec) [2013] NZGC 1438; and *Delegat v Norman* [2012] NZHC 2358.

¹⁶¹ Health and Safety Reform Bill, s 26.

¹⁶² Health and Safety Reform Bill, s 27 (risk of \$20,000 fine).

¹⁶³ Health and Safety Reform Bill, s 39.

¹⁶⁴ Health and Safety Reform Bill, s 30.

¹⁶⁵ Health and Safety Reform Bill, s 22.

¹⁶⁶ Health and Safety reform Bill, s 17.

including whether the cost is grossly disproportionate to the risk.¹⁶⁷

In his examination of this relationship Neil Foster focused on the word ‘ensure’.¹⁶⁸ Foster found that, while appearing to define the PCBU primary duty, or ‘risk management’, s 22 in fact defines the word ‘ensure’. He proposes that the effect of the s 22 definition is to water down the word ‘ensure’ to mean only ‘reasonable care’, opening the door for PCBU’s to argue that they “did their best”.¹⁶⁹ Because the primary duty and the officer duty are inherently linked, any watering-down of the former has a similar effect on the latter. Put another way, if the PCBU’s duty is reduced to ‘doing one’s best in health and safety’ then the officer’s duty becomes a duty to exercise due diligence (to do their best) to see that the PCBU was doing its best. Ultimately, Foster warns:¹⁷⁰

There is a danger that the word ‘ensure’ will be, in an Orwellian transformation, now denuded of meaning and comes to mean effectively “we gave it a go so long as it was not too expensive” or “it appeared on the agenda”.

Foster concedes that this may overstate the problem, however a problem exists nonetheless. Watering down the word ensure has a flow on effect throughout the Bill of reducing the level of commitment to health and safety required to pass legal muster.

In the art of statutory interpretation, any ambiguities are an opportunity to twist the law in your favour.¹⁷¹ The effect of this concatenation of ‘reasonable practicabilities’ cannot be known

¹⁶⁷ Health and Safety Reform Bill, s 17(a)-(e).

¹⁶⁸ While Neil Foster examined the relationship in the Australian context, the provisions of the Australian Model Act interrelate in the exact same way as the provisions of the New Zealand Bill. See; Model Act 2011, ss 17 (‘management of risks’), 18 (‘reasonably practicable’), 19 (‘primary duty’), and 27 (‘duty of officers’).

¹⁶⁹ Foster *Leading the Safety Conversation*, above note 144, (no pinpoint available).

¹⁷⁰ Ibid.

¹⁷¹ See generally Quintin Johnstone “An Evaluation of the Rules of Statutory Interpretation” (1954) 3 Kansas L Rev 1.

until the matter is considered by a court.¹⁷² What is certain is that at each step in the lengthy chain of provisions there are a number of exculpatory factors which officers may rely upon to avoid liability,¹⁷³ especially considering each element must be proved by the prosecution to the criminal standard of ‘beyond reasonable doubt’.¹⁷⁴

Because the duty is so intertwined with other provisions in the Bill many ambiguities exist that may ultimately limit the duty’s potential. Given that the Bill has been based so closely on the Model Act of Australia, it is unlikely that substantive changes will be made as the Bill passes through the approval process. Nevertheless, the uncertainty that persists in the meanings and relationships of provisions should at least be addressed in an interpretation guide, before cases are tried and precedents are set.

VIII Conclusion

The proposed duty of officers has the potential to be uniquely helpful in improving New Zealand’s health and safety record. The Ministry of Business Innovation and Employment has openly stated that a major flaw in New Zealand’s current framework is that “it does not explicitly require positive action by directors and senior managers of duty holders, [and] effectively rewards directors who avoid involvement in matters affecting health and safety.”¹⁷⁵ The international trend in health and safety regulation has been towards placing personal liability on high-ranking officers. The proposed duty of officers is New Zealand’s first positive step in line with that trend. It is a welcome acknowledgement of the gap in the country’s health and safety framework, and will go lengths to improving New Zealand’s health and safety record. Challenges brought by the new world of work, and the inherent clash between OHS

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ *Baiada Poultry Pty Ltd v R* (2012) 286 ALR 421; 86 ALJR 459; [2012] HCA 14.

¹⁷⁵ Exposure Draft *Commentary*, above note 25, at [3].

regulation and the corporate world, generate a dire need for a new approach to corporate liability. The duty of officers will be a transformational measure that will create health and safety leaders within every enterprise and will provide effective inducement for corporate compliance. Unfortunately, ambiguities persist in the duty as drafted, which may limit its potential. In order to avoid that result, those ambiguities should be addressed in an interpretive guide.

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