

# Cur Adv Vult

ISSUE 56 • 24 MARCH 2016



OTAGO  
NEW ZEALAND LAW SOCIETY

NZLS EST 1869

## The Health and Safety at Work Act

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THE HEALTH AND SAFETY AT WORK ACT comes into effect next month. There has been a fair amount of publicity regarding this. Employment lawyers, in particular, will be focussed on the text of the Act and the recently enacted Regulations. However, as practitioners, the advice that we may be required to give in relation to this legislation is potentially expansive.

The Act provides Work Safe Inspectors with various powers including powers of entry and inspection; power to take samples; power to require a person to provide their name and residential address and the power to require a person who appears to be in charge of the workplace to provide a statement in any form and manner the Inspector specifies. Section 60 of the Evidence Act still has application so that the right against self-incrimination is protected. However there is no corresponding right for a corporate entity.

The Act details a number of offences carrying significant financial penalties. Notably, the Regulator is able to accept an enforceable undertaking in relation to contraventions. The undertaking does not constitute an admission of guilt. No proceedings may be brought for a contravention, or an alleged contravention, against a person who has completely discharged the enforceable undertaking. This means that if an enforceable undertaking is accepted by the Regulator and obligations pursuant to the undertaking have been discharged, a conviction can be avoided.

The Act also provides for private prosecutions. However where an undertaking has been accepted, no prosecution may be brought for a contravention of the Act.

In sentencing the Court may order payment of the Regulator's costs in bringing a prosecution, including the costs of investigating offending and any associated costs. The Court

is able to make an Adverse Publicity Order requiring an offender to publicise the offence, its consequences, the penalty imposed and any other related matter. Training Orders may also be imposed requiring an offender to undertake, or arrange for one or more workers to undertake, a specified course of training.

The Act provides for civil proceedings in relation to engaging in or inducing adverse or coercive conduct. 'Adverse conduct' is defined and includes 'dismissing a worker; terminating a contract for services; refusing to employ any person; subjecting a worker to any detriment; retiring a worker and either terminating a commercial arrangement or failing to enter into a commercial arrangement.' The conduct amounts to 'adverse conduct' if it is engaged in for a prohibited health and safety reason. Again, 'prohibited health and safety reason' is defined within the Act and includes 'providing information to any person performing a function or exercising a power under the Act'. In addition, the Regulator may commence civil proceedings for non-compliance with notices.

The Act and Regulations provide for specific high risk industries including forestry, coal mining, building and construction. Also of particular note, is personal liability for officers which includes directors and partners. The Act prohibits insurance for fines and prohibits its employment agreements from including indemnities for employees liable to fines. Accordingly, the need for good, sound legal advice is likely to increase. It remains to be seen how vigorously the Regulator will pursue the options available under the Act, but in light of Pike River it is expected that enforcement action will certainly increase.