

# R B STEWART QC

Barrister

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Richard Sharp  
Head of Regulatory and Pricing  
Vector Limited  
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Email: [richard.sharp@vector.co.nz](mailto:richard.sharp@vector.co.nz)

Dear Richard

## Default Price-Quality Path – Change Event

1. You have previously asked for my advice on whether the enactment of the Health and Safety at Work Act 2015 (**HSW Act**) is a “change event” for the purposes of the Electricity Distribution Services Input Methodologies Determination 2012 (the **IM Determination**). A change event is defined in clause 4.5.2 of the IM Determination as a changed or new legislative or regulatory requirement applying to the relevant Electricity Distribution Business (**EDB**).
2. My view, as set out in my letter of 29 March 2018, is that the HSW Act represents a new legislative and regulatory requirement applying to Vector and therefore a change event.
3. The Commerce Commission has obtained advice from Paul Wicks QC, who takes a different view. In Mr Wicks’ opinion, the duties imposed on Vector under health and safety law have not changed materially between the HSW Act and the earlier Health and Safety in Employment Act 1992 (**HSE Act**).
4. You have asked me to review Mr Wicks’ opinion and to reconsider my own views in light of it. As before, I have prepared this advice with Stephen Hunter of Shortland Chambers.

### Mr Wicks’ approach

5. In his opinion dated 22 August 2018, Mr Wicks compares certain operative provisions of the HSW Act with their counterparts in the HSE Act. In particular, Mr Wicks comments that the overarching standard has changed from taking “all practicable steps to ensure the safety of workers” (s 6 of the HSE Act) to taking “reasonably practicable steps to eliminate risks to health and safety” (the duty under s 30 of the HSW Act is to “to eliminate risks to health and safety, so far as is reasonably practicable”).
6. Mr Wicks comments that “while there have been definitional and technical changes in terms of duties and applicable standards, in reality, these are subtle.” Mr Wicks concludes that the “overarching approach to health and safety is not really significantly different under the HSW Act to what it was under the HSE Act.” Mr Wicks acknowledges that the “HSW Act was intended to have an improved effect on compliance with health and safety law”. However, his fundamental view — and the key to his opinion — is that there has been no real change in regime.

## Approach to statutory interpretation

### *The legislative background*

7. Before analysing the specific provisions of the two statutes, it is important to consider the legislative background and purpose against which the new Act must be interpreted. The HSW Act arose from the recommendations of the Royal Commission on the Pike River Coal Mine Tragedy and the Independent Taskforce on Workplace Health and Safety. These reports found significant inadequacies in New Zealand's existing workplace health and safety regime and recommended major change.
8. One of the key recommendations of the Independent Taskforce on Workplace Health and Safety was replacing the then-current "all practicable steps" test with the Australian "reasonably practicable" test.<sup>1</sup> "Reasonably practicable" is defined in s 22 of the HSW Act with a prospective focus on things that are or may become risks to workers' safety. This, the Taskforce said, would "improve certainty, clarify that risk-based decision-making is required, and create a presumption in favour of health and safety."<sup>2</sup>
9. The new "reasonably practicable" test is an important part of the shift to a risk-based approach. The Taskforce recommended that this should be combined with a new purpose — referred to as an "Object" — in the following terms:

"The new Object should be to secure the health and safety of workers and workplaces. It should state clearly that "workers and other persons" will be protected "through the elimination or minimisation of risks arising from work". The new Object should include a principle to inform duty holders and regulators on the level of health and safety being sought. The principle is that "workers should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work [or from specified types of substance or plant] as is reasonably practicable"."

10. As discussed below, these recommendations were carried forward into the new legislation.

### *The stated purpose of the HSW Act*

11. The purpose of the new Act is highly relevant to its interpretation. Section 5(1) of the Interpretation Act 1999 states that the "meaning of an enactment must be ascertained from its text and in the light of its purpose." This section underscores the modern purposive approach to statutory interpretation.
12. The words of a statute cannot be read in isolation. In *Commerce Commission v Fonterra* the Supreme Court stated that "[e]ven if a meaning of any text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5."<sup>3</sup>
13. Many modern statutes contain an express "purpose" section, recording the purpose against which the balance of the statute must be interpreted.<sup>4</sup> This is the case with the HSW Act, which has a detailed statement of purpose in s 3.

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<sup>1</sup> Independent Taskforce on Workplace Health and Safety, Executive Report, April 2013, page 4.

<sup>2</sup> Independent Taskforce on Workplace Health and Safety, Executive Report, April 2013, page 20.

<sup>3</sup> *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

<sup>4</sup> As to the importance of the purpose section, see Burrows and Carter, *Statute Law in New Zealand* (5th ed, 2015) at 263.

14. Section 3(1) of the HSW Act provides that the “main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces”. It then goes on to set out a number of specific objectives. The first of these, in s 3(1)(a), is “protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant”. This approach is further emphasised in s 3(2), which states that “workers and other persons should be given the highest level of protection against harm... as far as reasonably practical.”
15. This contrasts with the HSE Act, which had no purpose section and a bland long title stating: “An Act to reform the law relating to the health and safety of employees, and other people at work or affected by the work of other people”.

#### *Statements in Parliament*

16. In addition to considering the stated purpose of legislation, the Court may conduct a further cross check against statements made in Parliament during the passage of the Act.<sup>5</sup> The correct interpretation of a statute is unlikely to be at odds with the expressed intentions of the legislators enacting it. As set out in my earlier opinion, in the case of the HSW Act there were repeated statements in the House to the effect that the Act was intended to bring about a major reform in health and safety law. For example at its first reading in Parliament, the then Minister of Labour (Hon Simon Bridges) described the Act as “*the most significant law reform in this area for 20 years*”.<sup>6</sup>

#### *Summary*

17. In summary:
  - a. although the language of the two statutes is superficially similar, it is clear from the legislative background that the change from “all practicable steps” to the “reasonably practicable” test was intended as part of a significant shift to a risk-based approach;
  - b. the HSW Act must be interpreted in light of its purpose — spelled out in s 3 — that workers and other persons should be given the highest level of protection against harm, as far as reasonably practical;
  - c. the politicians who enacted the HSW Act considered they were making a major change to the law, not a subtle and technical one.

#### **Provisions of the HSW Act**

18. The provisions of the HSW Act — when properly considered in light of the Act’s background and purpose — in my view give rise to significant new legislative obligations on Vector.
19. First, as noted above, the Act places a duty on Vector “to eliminate risks to health and safety, so far as is reasonably practicable”. “Reasonably practicable” is defined in s 22 with a prospective focus on things that are or may become risks to workers’ safety. Further, s 22(e) provides that the cost of eliminating or minimising a risk should only be taken into account after the risk has been considered; the consideration is then whether the cost is “grossly disproportionate to the risk.”

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<sup>5</sup> Glazebrook, “Statutory Interpretation in the Supreme Court”  
[www.courtsofnz.govt.nz/speechpapers/HJG3.pdf/at\\_download/file](http://www.courtsofnz.govt.nz/speechpapers/HJG3.pdf/at_download/file)

<sup>6</sup> Hansard: Volume 697; page 16705.

20. This contrasts with s 2A(1)(e) of the HSE Act, which simply listed “the availability and costs” of means to reduce harm as another factor to be considered equally and at the same time as safety considerations.
21. Second, the HSW Act has introduced the concept of “duty holders”. Primary responsibility for health and safety rests with “the person conducting a business or undertaking” or **PCBU**. Next are officers of the PCBU, being persons in a position to exercise significant influence over the management of the business or undertaking. Finally, duties are owed by workers carrying out work for a PCBU.
22. A Full Court of the High Court recently referred to this classification of duty holders as a “significant change” introduced by the new Act.<sup>7</sup> The decision, *Stumpmaster v Worksafe New Zealand*, is now the leading authority on sentencing for health and safety offences. It is noteworthy that when approaching the new legislation, the High Court began by commenting that the Act “followed a series of inquiries and reports” and that a “catalyst for the change was the disaster at the Pike River Coal Mine”.<sup>8</sup>
23. Third, the HSW Act significantly increases the penalties for non-compliance. In its submissions in *Stumpmaster*, Worksafe emphasised “the full legislative history in support of a submission that the purpose of the increase is to denounce and deter, and thereby effect significant improvements in worker safety.”<sup>9</sup> The High Court commented that penalties had been increased by “a very significant amount”.<sup>10</sup> The Court referred to certain penalties as “a significant deterrent that reflects the statutory purposes” and noted that for many businesses the penalty level “will be onerous, as the legislation intends it to be”.<sup>11</sup>

#### **Contrast with Mr Wicks’ approach**

24. It follows from what I have said above that I do not agree with Mr Wicks that the HSW Act has introduced merely “subtle” or “technical” changes. The legislation:
  - a. was intended as a significant reform and to bring about a major improvement in New Zealand’s health and safety culture in light of the Pike River disaster;
  - b. adopts new language drawn from Australian legislation to introduce a risk-based approach to health and safety;
  - c. introduces categories of “duty holders”, which the High Court has referred to as a “significant change” from the former legislation;
  - d. contains a statement of purpose that emphasises Parliament’s intentions and informs the approach to the operative provisions; and
  - e. is being interpreted by the Courts in light of its history and purpose to impose more rigorous requirements on businesses and more onerous penalties in the event of breach.

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<sup>7</sup> *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 at [15].

<sup>8</sup> At [13].

<sup>9</sup> At [33].

<sup>10</sup> At [47].

<sup>11</sup> At [54].

25. Vector's response to the new legislation in adopting its live lines policy is entirely appropriate. As I noted in my earlier opinion, Vector's approach is consistent with the District Court's decision in *Worksafe New Zealand v Dimac Contractors Limited*.<sup>12</sup> The Judge commented that the effect of the HSW Act was to require the contractor "to give its workers, so far as reasonably practicable, the highest level of protection available from the risk of exposure to live electricity".<sup>13</sup>
26. Adopting a risk-based approach and considering the degree of harm that might result from the hazard or risk, Vector's decision to cease most live line work is a reasonably practicable measure. The cost is not grossly disproportional to the risk.

### **Conclusion**

27. My review remains that if this matter is tested, a Court will have little difficulty in concluding that the HSW Act is a "changed or new legislative requirement" applying to Vector's business.

Yours sincerely

A handwritten signature in blue ink, appearing to read "R B Stewart".

**R B Stewart QC**

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<sup>12</sup> [2017] NZDC 26648.

<sup>13</sup> At [28].