



## The due diligence duty of officers in New Zealand: origins and implementation

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### Abstract

Officers are directors, chief executives and others who have “significant influence over the management of a business” and who must apply use “reasonable steps: as part of due diligence to ensure the business complies with any duty under the New Zealand Health and Safety at Work Act.

The origins of the due diligence duty for workplace health and safety of “officers” in New Zealand is briefly described. Then, based on a literature review and engagement with New Zealand health and safety professionals, a wide range of “reasonable steps” that workplace health and safety professionals might enable available to such officers is reported. The work suggests that due diligence should form part of normal corporate governance.

### Key words

due diligence; directors; reasonable step; corporate governance; duty of care; occupational health and safety management system; Australia; New Zealand

Opinions about the law in this article are from of a health and safety academic/professional perspective and are not legal opinions.

### Introduction

On 19 November 2010 a methane gas explosion in the Pike River mine on the west coast of the South Island of New Zealand (NZ) killed 29 men (Macfie, 2021), leading to several official enquiries (especially Jager et al., 2013) and then a change in workplace health and safety (WHS) law to the Health and Safety at Work Act (HSWA, 2015)<sup>1</sup>. A new duty in the Act was section 44, introducing the requirement that officers of a “person conducting a business or undertaking” (PCBU, the replacement duty holder for employer) take reasonable steps to show how they had used due diligence to ensure that the PCBU complied with its WHS duties. “Officer” includes directors and “any other person occupying a position ... that allows the person to exercise significant influence over the management of the business ... (for example, a chief executive” (section 18, HSWA).

The HSWA came into force in April 2016. Later that year, a discussion about regulatory action in an online chatroom led to this author exploring the origins of section 44 and how health and safety practitioners might help officers meet their due diligence obligations (Peace et al., 2017).

In 2024 Maritime NZ, one of the regulatory agencies for the HSWA, successfully prosecuted Mr Gibson for an alleged breach of section 44 of the Act. He had been the chief executive of the Ports of Auckland Ltd (POAL) at a time when fatalities and serious injuries had happened, leading to prosecutions of POAL.

In the Gibson case, Judge Bonnar wrote a 146-page decision based on law and facts showing the reasonable steps he believed Mr Gibson should have taken to ensure that POAL complied with its duty of care (*Maritime NZ v Anthony Michael Gibson*, 2024)<sup>2</sup>. The conviction resulted in an

<sup>1</sup> In this report, unless otherwise stated, reference is to the NZ HSWA 2015, not the Australian or British statutes

<sup>2</sup> The case name is abbreviated to MNZ v Gibson in this report

unsuccessful appeal to the High Court (*Anthony Michael Gibson v Maritime NZ*, 2026) and considerable debate in New Zealand and Australia (where there is similar legislation).

That debate led to these research questions:

What material research about due diligence has been published since 2017?

How have the courts in Australia and NZ interpreted due diligence duties?

How can health and safety practitioners and professionals help officers comply with their due diligence duty?

This article reports on the research and expands on earlier work by Peace et al (2017) and helps inform health and safety practitioners about this applied research. It will be of interest in NZ and Australia, and other countries seeking to hold directors and executive managers accountable for WHS.

The article is organised as follows. Firstly, the research methodology is described. The literature review results (including relevant legislation) is then briefly discussed. Comment from *MNZ v Gibson* and anonymised contributions during six webinars, and survey results, are tabulated and presented. The research results are discussed and scope for further work identified.

## **Methodology**

### **Data gathering from health and safety professionals**

This research was self-funded so interviewing stakeholders face-to-face or conducting in-person, representative focus groups was not plausible as respondents would need to be from diverse regions and sectors in NZ. An alternative was to present a series of six webinars in 2025 to members of the New Zealand Institute of Safety Management (NZISM), anticipating that attendees would be from a range of sectors with varying experiences. The webinars were recorded and made available to members who could not attend real-time. Attendance was attractive to members as the webinars were a form of continuing professional development.

Each webinar explored one of the six “reasonable steps” an officer might take (section 44(4), HSWA) and included relevant aspects of a literature review showing the origins of the duty and a range of supporting evidence. At the end of each webinar attendees were invited to anonymously identify how support for officers was being given or could be given to help officers discharge the reasonable step under consideration.

Webinar attendees were “groups of people who share a passion for something they do and learn to do it better as they interact regularly” (Wenger, 2000). Attendees were “thinking together” to develop their “community of practice” (Jackson et al., 2025; Pyrko et al., 2017), a form of work-integrated learning (Zegwaard & Pretti, 2023), that has formed part of their continuing professional development.

The results of the webinars were thematically analysed (Braun & Clarke, 2022) using the six reasonable steps set out in section 44(4)a-f, HSWA as major themes and mapped against the Ebbevi et al. (2020) framework.

The research and development of this article were reported in two further webinars to NZISM members in October and November 2025.

### **Online survey of officers, managers and health and safety professionals**

In parallel, an anonymous online survey was run to gather data about how officers, managers and health and safety professionals contribute to management of the section 44 duty. The analysis will be reported in a separate article.

## **Activities to demonstrate compliance with section 44**

### **Management systems including ISO45001**

Early research in the USA by Cohen (1977) identified seven critical success factors for successful safety management systems, including “strong management commitment to safety as defined by various actions reflecting management’s support and involvement in safety activities”.

From about 1990, research led to the development of safety management systems. In BS8800 (1996), an early occupational health and safety management system standard (OHSMS), appendix

B.5.3 required training be provided on “the roles and responsibilities of directors and senior managers for ensuring that the OH&S management system functions as necessary to control risks and minimise ill-health, injury and other losses to the organization”.

In common with other International Standards Organization management system standards, ISO45001 *Occupational health and safety management systems* (2018) defines “top management” as the “person or group of people who directs and controls an organization at the highest level”. The standard then assigns to top management responsibility to “demonstrate leadership and commitment with respect to the OH&S management system ...” (5.1), “establish, implement and maintain an OH&S policy ...” (5.2), “ensure that the responsibilities and authorities for relevant roles within the OH&S management system ...” are established (5.3).

These standards can therefore be seen as being aligned with the HSWA due diligence requirements.

### Reasonable steps an officer could take

Research by Boardman and Lyon (2006) defined best practice for occupational health and safety (OHS) governance and formed the framework used in a scoping study by Ebbevi et al. (2020) to examine the influences of directors on OHS. Table 1 compares the reasonable steps in section 44(4) with the Boardman & Lyon framework and the categories used by Ebbevi et al, and suggests focus areas for implementation of each reasonable step.

**Table 1. Comparison of HSWA s.44 with Boardman & Lyons (2006) and Ebbevi et al (2020)**

| B & L (2006), E (2020) ↓          | HSWA section 44(4) |    |    |    |    |    |
|-----------------------------------|--------------------|----|----|----|----|----|
|                                   | 4a                 | 4b | 4c | 4d | 4e | 4f |
| Director competence               | X                  | X  |    |    |    |    |
| Director roles & responsibilities |                    |    | X  | X  | X  | X  |
| Culture, standards & values       |                    |    | X  | X  | X  | X  |
| Strategic implications            | X                  | X  | X  | X  | X  | X  |
| Performance management            |                    |    |    | X  |    | X  |
| Internal controls                 |                    |    | X  |    |    | X  |

Based on Table 1, activities an officer might use as “reasonable steps” (HSWA, section 44(4) a-f) are listed in Tables 3-8. In each of these tables, the reasonable steps were adapted from the following sources.

- Options identified by Peace et al. (2017) and identified in column A; these include suggestions from Boardman and Lyon (2006, pp. 3–4) and (Ebbevi et al., 2020).
- Written comments by Judge Bonnar in the MNZ v Gibson case and options from other due diligence cases are identified in column B.
- Options suggested by NZISM members in each of six webinars March-August 2025 are identified in column C.
- Requirements set out in ISO45001 (2018, clause 5.1) are identified in column D.
- Options set out in an International Council on Mining and Metals (2015, p. 59) report are identified in column F.

Quotations in the following text are anonymised contributions from webinar participants unless otherwise stated.

### Section 44(4)(a) Knowledge of WHS matters

Clause 44(4)(a) requires officers to “acquire, and keep up to date, knowledge of work health and safety matters”.

Activities an officer might use are listed in Table 2.

For Mr Gibson, the requirement to acquire knowledge of the nature of the business influenced, and was influenced by, the nature of his responsibilities (paragraph 46, MNZ v Gibson). Judge Bonnar asked himself: “in those circumstances [the nature of the business], what steps would a reasonably careful, diligent and skilful officer take to ensure the business complied with its primary duty of care? Did he fail to take those steps?”

**Table 2. Activities for reasonable steps, section 44(4)(a)**

| Activity                                                                                                                                                                                                                                                   | A                                 | B            | C                   | D        | E    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|--------------|---------------------|----------|------|
|                                                                                                                                                                                                                                                            | Peace et al/ B&L/<br>Ebbevi et al | Judge Bonnar | Webinar<br>comments | ISO45001 | ICMM |
| Officer understands WHS issues and continually develops skills and knowledge, sets the “tone from the top”. ISO45001, clause 6.1.3                                                                                                                         | X                                 | X            | X                   | X        |      |
| Officer respects their legal responsibilities and understands their role, including duty to stakeholders and risks WHS may pose                                                                                                                            | X                                 |              | X                   | X        |      |
| All directors should have a clear understanding of the key OHS issues for their business and be continually developing their skills and knowledge                                                                                                          | X                                 |              |                     |          |      |
| 80(e) The officer must personally acquire and maintain sufficient knowledge to satisfy them that the PCBU is complying with its duties                                                                                                                     |                                   | X            |                     |          |      |
| Induction, training and education of directors in relevant legislation (the Act, regulations, etc) to help achieve competency                                                                                                                              | X                                 |              | X                   | X        |      |
| Attendance of officers at conferences and seminars covering matters relevant to the PCBU                                                                                                                                                                   | X                                 |              |                     |          |      |
| Maintenance of officer training records, either by the officer, or by the PCBU, or both                                                                                                                                                                    | X                                 |              |                     |          |      |
| Reporting on significant WH&S-related achievements of workers                                                                                                                                                                                              | X                                 |              |                     |          |      |
| Regular reports on PCBU operations, activities, hazards, and risks                                                                                                                                                                                         | X                                 |              |                     |          |      |
| Reports and presentations from major contractors to the PCBU                                                                                                                                                                                               | X                                 |              |                     |          |      |
| Detailed reports on risk assessments of “major risks”                                                                                                                                                                                                      | X                                 |              |                     |          |      |
| Officer tours of sites to acquire and maintain knowledge of the operations of the PCBU and the work actually carried out “on the shop floor” to adequately identify and address actual workplace hazards and risks                                         | X                                 | X            | X                   | X        | X    |
| At least one nominated director (which could be the chairperson or preferably one of the independent non-executive directors, where they exist) should have the additional role of overseeing and challenging the OHS governance process [Boardman & Lyon] | X                                 |              |                     |          |      |
| As part of the Due Diligence Guide, a Site Visit Report Template to help guide the officers on what to record as part of their due diligence                                                                                                               |                                   |              | X                   |          |      |
| Development of an officers’ handbook, revised annually                                                                                                                                                                                                     |                                   |              | X                   |          |      |
| Encourage all directors to do a basic health and safety course                                                                                                                                                                                             |                                   |              | X                   |          |      |
| Provide officers with basic education so they understand things like what a critical risk is, etc                                                                                                                                                          |                                   |              | X                   |          |      |
| Attend WHS governance meetings                                                                                                                                                                                                                             |                                   | X            | X                   |          |      |
| Leadership and commitment (see ISO45001 clause 5.1 a-m and clause 5.2 a-f)                                                                                                                                                                                 |                                   |              |                     | X        |      |

### Leadership and competence

Drawing on Australian experience, Van der Stap (2025, p. 71) argued that “managers need a sound knowledge of OSH laws that apply to their operations, and, where applicable, this includes accountabilities that apply to them as an officer”.

In an NZISM webinar one participant commented that, even 10 years after the HSWA became law:

*Many directors / trustees probably have a “where to even start with the right questions?” position to keep afloat of their due diligence. Yes IOD [Institute of Directors] have guidance,*

*however if not affiliated to IOD, what should a good organisation provide to assist with induction and what is a good approach from the board to be heads and not hands in?*

Competence requires training and experience – something many webinar attendees commented on the need for “training of boards, periodic upskilling” of directors individually and as boards. A PCBU could “encourage all directors to do basic H&S courses” and perhaps the “IOSH managing safety needs to come to NZ” (<https://iosh.com/>). Such competence might require “formal individual terms of reference, covering as a minimum setting OHS policy and strategy development, setting standards, performance monitoring and internal control” (Boardman & Lyon, 2006).

Webinar participants named resources including ““relevant industry articles”, Institute of Directors (2024) publications (“a great source”), “WorkSafe Officer's Handbook”, “relevant industry articles”, “articles relevant to our PCBUs”, and “in-house newsletters”. A webinar participant reported:

*H&S colleague and I were invited to speak to LT [leadership team] on what makes an effective site visit. Positive response*

Other professionals have an important place in educating officers: “we had our lawyers round to discuss due diligence. I highlighted what we are doing to meet those duties”. However officer training and induction is delivered, it should be “officer level workshops on duties” and “provide basic education so they understand things like what a critical risk is, etc”. It might include “upskilling officers on how to access relevant internal resources”. Another webinar participant suggested that “boards should know and understand the information in their Health & Safety Management System”.

“Such guidance must be written in a vocabulary that directors will understand; cover the issues that really matter and put the guidance in the language of the board: the language of risk, opportunity, efficiency, market vision and shareholder value – the language of corporate governance” (Boardman & Lyon, 2006).

Larger PCBUs or organisations may run WHS-related meetings where knowledge is shared.

pushed for membership of Business Leaders Health and Safety Forum

After the Gibson case CE [chief executive] should attend any HSW Governance meetings

Several needs were identified by webinar participants, including:

*learn from events across different organisations*

*share insights into incident data*

*give/receive industry*

Several webinar participants made comments such as:

*I find extremely frustrating that in NZ anyone can set up business and employ workers. With absolutely no checks that the individual understands their responsibilities.*

Could health and safety professionals help officers from small businesses? A participant asked:

*what about local community-based workshops esp for small businesses?*

Finally, in relation to knowledge of workplace health and safety matters, one wrote:

*I will be showing the directors this [webinar] recording!*

## Section 44(4)(b) Understanding of PCBU and hazards and risks

Section 44(4)(b) requires an officer “to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations”. Activities an officer might use are listed in Table 3.

**Table 3. Activities for reasonable steps, section 44(4)(b)**

| Activity                                                                                                                                                                                                           | A                           | B            | C                   | D        | E    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|--------------|---------------------|----------|------|
|                                                                                                                                                                                                                    | Peace et al/<br>B&L/ Ebbevi | Judge Bonnar | Webinar<br>comments | ISO45001 | ICMM |
| Regular reports (eg, weekly, monthly, quarterly) on PCBU operations, activities, hazards, and risks, the risk profile                                                                                              | X                           |              | X                   |          |      |
| Reports and presentations from major contractors to the PCBU                                                                                                                                                       | X                           |              | X                   |          |      |
| Consideration of other PCBUs in the supply chain and their safety management system                                                                                                                                | X                           |              | X                   |          |      |
| Detailed reports on risk assessments of “critical” risks; deep dives                                                                                                                                               | X                           |              | X                   |          |      |
| Officer tours of sites to acquire and maintain knowledge of the operations of the PCBU and the work actually carried out “on the shop floor” to adequately identify and address actual workplace hazards and risks | X                           | X            | X                   |          | X    |
| Contractor management; ISO45001, clause 8.1.4                                                                                                                                                                      |                             |              | X                   | X        |      |
| Make informal “visits” to see how critical controls and verification activities work in practice                                                                                                                   |                             |              |                     |          | X    |
| ISO45001, clause 6.1.2 Hazard identification & risk assessment                                                                                                                                                     |                             |              |                     | X        | X    |
| Expect their own support staff to establish monitoring and reporting systems to assist them to actively monitor the effectiveness of critical controls and verification activities                                 |                             |              |                     |          | X    |
| Critical risk and critical control reports, including work-as-imagined (WAI) and work-as-done (WAD)                                                                                                                |                             |              | X                   |          | X    |
| Actively seek evidence about the functioning and effectiveness of critical controls and verification activities                                                                                                    |                             |              |                     |          | X    |

Reports on assessments of critical risks and controls were mentioned frequently. See page 12 for further discussion.

“Monthly deep dive on critical hazards/controls” and provision of “a monthly dashboard - a small step toward organisation maturity of officers they requested new information - more data and insights driven” would help officers comply (but did not address the amount of work required to make such reports”).

Health and safety professionals might report to officers on a “field leadership programme involving safe work interactions, Critical control verifications, targeted task observations. Quality checked by site HS team and KPI on all leadership”.

Many NZISM members work as consultants, and one wrote:

*As consultants we regularly review the policies, procedures, SOPS, SWPs that we provide to our clients against recently updated changes in legislation, standards, industry best practice, COPs and WorkSafe guidance. Our GM is also a member of the Institute of Directors and is undertaking relevant training on governance.*

## Section 44(4)(c) resources

Section 44(4)(c) requires an officer “to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking”.

Activities an officer might use are listed in Table 4.

**Table 4. Activities for reasonable steps, section 44(4)(c) resources**

| Activity                                                                                                                                                                                                           | A                           | B               | C                   | D        | E    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|-----------------|---------------------|----------|------|
|                                                                                                                                                                                                                    | Peace et al/<br>B&L/ Ebbevi | Judge<br>Bonnar | Webinar<br>comments | ISO45001 | ICMM |
| Progress with the health and safety plan and related topics                                                                                                                                                        | X                           |                 |                     |          |      |
| Reports from managers on progress with their health and safety objectives                                                                                                                                          | X                           |                 |                     |          |      |
| Business cases show resources for health and safety and how they will be maintained                                                                                                                                | X                           |                 |                     |          |      |
| New significant hazards reported for the reporting period with commentary on each                                                                                                                                  | X                           |                 |                     |          |      |
| Data on worker training, first aid courses (new and refresher), etc for the month                                                                                                                                  | X                           |                 |                     |          |      |
| Officer tours of sites to acquire and maintain knowledge of the operations of the PCBU and the work actually carried out “on the shop floor” to adequately identify and address actual workplace hazards and risks | X                           | X               | X                   |          | X    |
| ISO45001, clause 10 Improvement [of the OHS management system]                                                                                                                                                     |                             |                 | X                   | X        |      |
| Actively seek evidence about the functioning and effectiveness of critical controls and verification activities                                                                                                    |                             | X               | X                   |          | X    |
| Conduct formal meetings to see how critical controls and verification activities work in practice                                                                                                                  |                             |                 |                     |          | X    |
| Focus feedback to people (positive or negative recognition) to show critical controls are working in the field                                                                                                     |                             |                 |                     |          | X    |
| Critical risk and critical control reports, including WAI and WAD                                                                                                                                                  |                             |                 | X                   |          | X    |
| Upskilling officers on how to access relevant internal resources                                                                                                                                                   |                             |                 | X                   |          |      |

Boardman and Lyon (2006) reported that “the board should ensure that OHS risks are managed and controlled adequately and that a framework to ensure compliance with the core standards is established”. This might include occupational health and safety management system development. Webinar participants suggested a “process to verify that controls are being used and maintained effectively”, “critical risk reviews and control owner meetings”, “critical control compliance reporting and related incidents reported monthly” and a “change management process”.

Risk and control reporting should include “advancements in technology and practices within similar industries or as advertised by suppliers”, “Innovative improvements”, and “Directorate risk profiles – including relevant controls and current gaps”.

A webinar participant noted “Advocating for early involvement of HSW professional and/or specialists around changes to work, processes and work equipment” but another reported “health and safety advisors are also expected to work in HR”, diluting their effectiveness.

## Section 44(4)(d) processes for receiving and acting on information

Section 44(4)(d) requires an officer “to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely manner to that information”. Activities an officer might use are listed in Table 5.

**Table 5. Activities for reasonable steps, section 44(4)(d)**

| Activity                                                                                                                                                                                                           | A                           | B               | C                   | D        | E    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|-----------------|---------------------|----------|------|
|                                                                                                                                                                                                                    | Peace et al/<br>B&L/ Ebbevi | Judge<br>Bonnar | Webinar<br>comments | ISO45001 | ICMM |
| Officer tours of sites to acquire and maintain knowledge of the operations of the PCBU and the work actually carried out “on the shop floor” to adequately identify and address actual workplace hazards and risks | X                           | X               | X                   |          | X    |
| Indicators, with a strong emphasis on leading and then lagging indicators                                                                                                                                          | X                           | X               | X                   |          |      |
| Trends and patterns in:                                                                                                                                                                                            | X                           |                 |                     |          |      |
| • serious harm incidents for the period with commentary on each                                                                                                                                                    | X                           |                 |                     |          |      |
| • number of injured workers on a gradual, return-to-work (RTW) plan following work incidents                                                                                                                       | X                           |                 |                     |          |      |
| • number of injured workers a gradual, RTW plan following non-work incidents                                                                                                                                       | X                           |                 |                     |          |      |
| • number of RTW plans completed, with workers back at work full time                                                                                                                                               | X                           |                 |                     |          |      |
| • sickness absence costs and statistics                                                                                                                                                                            | X                           |                 |                     |          |      |
| • employee assistance programme data                                                                                                                                                                               | X                           |                 |                     |          |      |
| • significant event reports                                                                                                                                                                                        | X                           |                 |                     |          |      |
| • costs of incidents or events                                                                                                                                                                                     | X                           |                 |                     |          |      |
| • customer feedback reports or complaints                                                                                                                                                                          | X                           |                 |                     |          |      |
| • current ACC experience rating                                                                                                                                                                                    | X                           |                 |                     |          |      |
| • total ACC claims affecting PCBU rating                                                                                                                                                                           | X                           |                 |                     |          |      |
| Serious harm incidents for the period with commentary on each                                                                                                                                                      | X                           |                 |                     |          |      |
| Support in clause 7.4, ISO45001                                                                                                                                                                                    |                             |                 |                     | X        |      |
| Officers welcome information that indicates monitoring and reporting systems are not working as well as they should and use this information to continually improve the management of the material unwanted event  |                             |                 |                     |          | X    |
| Officers recognise the receipt of information on inadequate critical controls as an opportunity to improve control of material unwanted events                                                                     |                             |                 |                     |          | X    |
| Learning from investigations and what has changed as a result                                                                                                                                                      |                             |                 | X                   |          |      |
| Standards of practice, policies                                                                                                                                                                                    |                             | X               |                     |          |      |
| Systems and standard operating procedures                                                                                                                                                                          |                             | X               |                     |          |      |

In *MNZ v Gibson* Judge Bonnar wrote:

*[95] Systems are the means by which a business translates its policies and objectives into reality. Policies are statements of intent. They express the standards of practice and behaviours that are required of people who work for the organisation.*

...

*[97] A system is a framework that orders and sequences activity within an organisation to achieve a purpose, within a band of tolerance and variance that is acceptable to the owner of the system. Examples of systems in the health and safety context include incident*

*management systems, standard operating procedure management systems, critical risk management systems and operator performance management systems.*

## **WHS indicators and metrics**

In the Maritime NZ case Judge Bonnar wrote:

*[98] For a system to be effective there must be an ability to monitor and measure the performance of the system. Common metrics which act as indicators of the effectiveness of the system's functions as designed include the use of leading and lagging indicators, performance measures and data analysis. Any effective system should also incorporate regular review and audit processes.*

Such processes must include “effective reporting lines and systems” (para 80i, MNZ v Gibson) which might be “indicators providing information, with a strong emphasis on leading and then lagging indicators”. A PCBU might use a selection of indicators catalogued by the Government Health and Safety Lead (GHSL, 2019) – but not including total recordable injury frequency rates, now well known to be misleading (Hallowell et al., 2021). Other open access sources for indicators are available (eg, Amick & Saunders, 2013; HSE, 2006; International Council on Mining and Metals, 2012). A different approach to metrics was given by Van der Stap (2025, p. 228) who suggested that “board members, executive and senior managers [ie, officers] should be given metrics for site visits to ensure they get an understanding of the operational reality of the business.”

For a listed company or a business seeking investments, health and safety indicators for institutional investors (Mansley, 2002) might be used. These might include annual reports directed to external stakeholders (see, for example, GRI, 2021) and signed off by the board.

Many of the comments in webinar 4 also related to other areas but the main themes were “learning from investigations and what has changed as a result” – “incident and investigation data insights”. Are “supervisory staff ... also doing their reporting, investigating incidents and ensuring in-depth reporting happens”. Do “current reporting statistics [match reports] from workers”?

## **Section 44(4)(e) Compliance systems**

Section 44(4)(e) requires officers “to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act”. Activities an officer might use are listed in Table 6.

Areas that might require specific compliance systems included the general duty held by all PCBUs (HSWA section 36). Specific mention was made of “training provision to workers, managers and executive teams” leading to “adequately trained workers for the task at hand”.

Section 56 HSWA requires notification of specified events to the regulator. Two options were suggested: “notifiable events reported on [to officers] until completed/closed out” and a “process for notifiable events and preserving scene eg who does what, by when”. One participant presumably worked for a PCBU that was subject to an Enforceable Undertaking (HSWA sections 123-129) and advocated “reporting on EU and other orders progress monthly until closed out”.

The design of work as imagined was again mentioned: the “design of work ie, procedures & processes” and “safety by design workshops and registers” (Australian Institute of Health and Safety, 2019; Safe Work Australia, 2014; WorkSafe NZ, 2018).

Participants anticipated proposed law changes, with one asking if “managers responsible for day-to-day H&S will ... have to be trained in H&S?” Another participant wrote:

*How workers will be trained, in what, to what standard and what level of supervision is required? What is the process for determining competence so supervision is no longer required? Process may include assessments for example.*

Other duties in the Act imply a “process for procurement that includes the consideration and factors around the safety of plant design, supply and installation, commissioning or procurement of substances” and what “approval processes” might be required. Judge Bonnar wrote:

*127. Whereas a director in a large company will largely have a supervisory or oversight role that may limit their obligations of due diligence to the type of requirements set out in subsection 4, many businesses will be much smaller and officers will have a much more hands on role with direct involvement in the PCBUs operations and day-to-day work.*

**Table 6. Activities for reasonable steps, section 44(4)(e)**

| Activity                                                                                                                        | A                           | B               | C                   | D        | E    |
|---------------------------------------------------------------------------------------------------------------------------------|-----------------------------|-----------------|---------------------|----------|------|
|                                                                                                                                 | Peace et al/<br>B&L/ Ebbevi | Judge<br>Bonnar | Webinar<br>comments | ISO45001 | ICMM |
| Officer respects their legal responsibilities and understands their role, including duty to stakeholders and risks WHS may pose | X                           |                 |                     |          |      |
| Analysis of "as is" and where we should be "so far as is reasonably practicable"                                                |                             |                 | X                   |          |      |
| Regular review of policies and reports on activities                                                                            | X                           |                 |                     |          |      |
| Reasons for non-compliance with legislation                                                                                     | X                           |                 |                     |          |      |
| Changes in legislation and implications for the organisation                                                                    | X                           |                 |                     |          |      |
| ISO45001, clause 6.1.3 Legal compliance                                                                                         |                             |                 |                     | X        |      |
| Hazard identification & risk assessment                                                                                         |                             |                 |                     | X        |      |
| 6.1.4 Planning action                                                                                                           |                             |                 |                     | X        |      |
| Compliance register with key dates (Millar et al., 2019)                                                                        |                             | X               |                     |          |      |
| Officer level workshops on duties                                                                                               |                             |                 | X                   |          |      |
| Management of change process                                                                                                    |                             | X               | X                   | X        |      |
| Regular updates on legislation, enforceable undertakings and District Court decisions                                           |                             |                 | X                   |          |      |
| Regular workshops on duties and obligations                                                                                     |                             |                 | X                   | X        |      |

**Section 44(4)(f) Verification**

Section 44(4)(f) requires an officer “to verify the provision and use of resources and processes referred to in paragraphs (c) to (e)” and during the sixth webinar this led to many suggestions. Activities an officer might use are listed in Table 7. Some have been reported in other tables.

Officer tours were again mentioned: “verification and assurance should include officers in field for monitoring and verification”, they need to put “boots on ground”. “To truly verify, the MD [managing director] needs to get out to sites unannounced to see what ‘work [as] done’ looks like”. Significant WHS developments should be reported to officers: “currently going through stage 2 ISO45001 audit - providing reports to board regularly on progress / challenges etc”.

Officers should receive reports on “safety audit results and improvements” such as “ACC workplace safety management practices and corrective actions, current experience rating, total claims affecting our rating”. Such reports might be based on an ISO45001 or SafePlus system and include “the results and the improvement from the last audit and any actions required from the audit”. Reports provided to officers might include “other audits relevant to WHS” such as quality assurance and environmental management system audits. In *MNZ v Gibson* Judge Bonnar wrote:

*[166] I accept that the ACC audits were not designed to “drill down into the organisation to determine what the systems, standards and procedures are actually translating to in terms of worker behaviours and engineering controls directed at managing risk”. Mr Marriott accepted that the ACC audits would have only told Mr Gibson that “on paper, the safety system, management system looked solid”.*

If in doubt about the effectiveness of systems or processes, officers should proactively ask for “external reviews on system performance” to help with “digging into what good looks like”.

The assurance framework should include “critical risk controls and critical core processes”, enabling officers to ask for “critical risk reviews and control owner meetings”, perhaps via “monthly deep dive on critical hazards/controls”. They might be provided with reports specifically on “risk control effectiveness and bow tie updates” and should “ensure regular reviews and updates”. Other

suggestions included “I always feel doing a gap analysis is useful” and “sharing lessons learnt to industry” to enable officers to probe weaknesses in their PCBU.

**Table 7. Activities for reasonable steps, section 44(4)(f)**

| Activity                                                                                                                                                                                                           | A                           | B            | C                   | D        | E    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|--------------|---------------------|----------|------|
|                                                                                                                                                                                                                    | Peace et al/<br>B&L/ Ebbevi | Judge Bonnar | Webinar<br>comments | ISO45001 | ICMM |
| Officer ensures operative risks are managed and controlled and that there is compliance to core standards, as well as enabling auditing or whistleblower functions                                                 | X                           |              |                     |          |      |
| ACC workplace safety management practices status and corrective actions, current experience rating, total claims affecting our rating                                                                              | X                           |              |                     |          |      |
| Other audits relevant to WH&S                                                                                                                                                                                      | X                           |              |                     |          |      |
| Corrective actions from audits, managers reports, etc that have been completed                                                                                                                                     | X                           |              |                     |          |      |
| 9.1 Performance evaluation                                                                                                                                                                                         |                             |              |                     | X        |      |
| Management reviews                                                                                                                                                                                                 |                             |              |                     | X        |      |
| 80(j) and (k) Proactively arrange effective verification activities and monitor, verify and interrogate the information they receive                                                                               |                             | X            |                     |          |      |
| Officers actively seek evidence about the functioning and effectiveness of critical controls and verification activities                                                                                           |                             |              |                     |          | X    |
| Officers conduct formal meetings to see how critical controls and verification activities work in practice                                                                                                         |                             |              |                     |          | X    |
| Officer tours of sites to acquire and maintain knowledge of the operations of the PCBU and the work actually carried out “on the shop floor” to adequately identify and address actual workplace hazards and risks | X                           | X            | X                   |          | X    |
| Officers make informal “visits” to see how critical controls and verification activities work in practice                                                                                                          |                             |              |                     |          | X    |
| Officers focus feedback to people (positive or negative recognition) on how critical controls are working in the field                                                                                             |                             |              |                     |          | X    |
| Officers expect their own support staff to establish monitoring and reporting systems to assist them to actively monitor the effectiveness of critical controls and verification activities                        |                             |              |                     |          | X    |
| Officers welcome information that indicates monitoring and reporting systems are not working as well as they should                                                                                                |                             |              |                     |          | X    |
| Officers use this information to continually improve the management of material unwanted events                                                                                                                    |                             |              |                     |          | X    |
| Officers recognise the receipt of information on inadequate critical controls as an opportunity to improve control of material unwanted events                                                                     |                             |              |                     |          | X    |
| Officers ask to see the evidence when advised that all is well with a material unwanted event or that a critical control is working well (ie, expect verifiable evidence)                                          |                             |              |                     |          | X    |
| Management committee minutes as evidence of work in progress and completed                                                                                                                                         |                             | X            |                     |          |      |
| Ensure that entrenched and adequate systemic processes are put in place to ensure that the PCBU complies with its duties                                                                                           |                             | X            |                     |          |      |

## Matters arising from this research

### Linking corporate governance and workplace health and safety

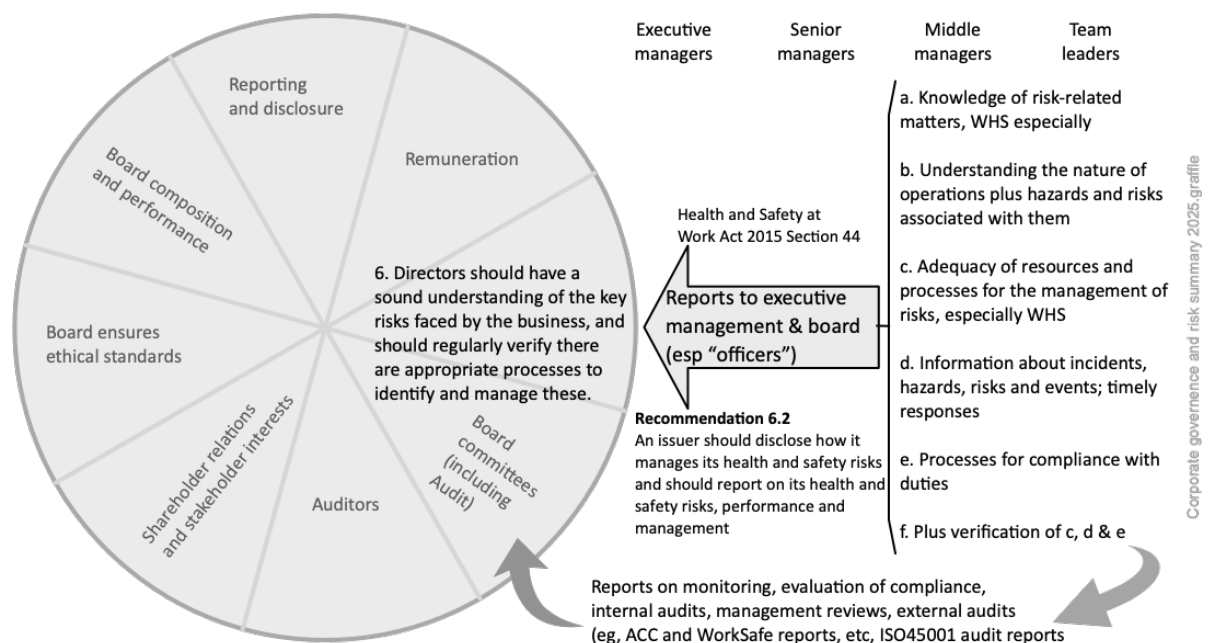
In their report on corporate occupational health and safety governance Boardman and Lyon (2006) argued:

*It is important that the governance structures enable management systems, actions and levels of performance to be challenged. This process should utilise, where possible, existing internal control and audit structures and be reviewed by the audit committee*

In NZ, PCBU's should draw on the NZ Financial Markets Authority (FMA) requirements for companies that are not listed on the New Zealand Stock Exchange (Financial Markets Authority, 2018). These are essentially the same as the New Zealand Stock Exchange Code for Corporate Governance (New Zealand Stock Exchange, 2025) requirements for listed companies. The principles in both codes are summarised in the circle in Figure 1 with principle 6, the risk management requirements, emphasised.

Feeding into that requirement are reports on risk management with specific reference to due diligence. Verification (section 44(4)(f)) is represented as internal audit and other reports to board audit committees. While this diagram represents larger PCBU's it can be scaled to smaller businesses.

**Figure 1. Overview of governance and due diligence compliance requirements**



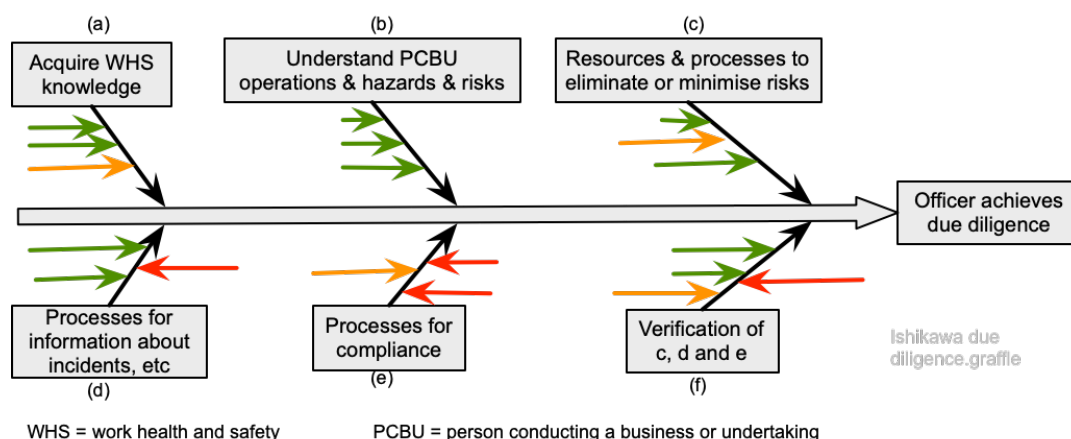
Sources: Companies Act S137-138; IoD and MBIE/IoD guidance; Health and Safety at Work Act 2015 S44; Financial Markets Authority "Corporate Governance in New Zealand" 2018; NZX Listing Rules 2023

## Reporting on due diligence

### Possible board report on due diligence enhancements

Figure 2 suggests how an Ishikawa or fishbone diagram with six ribs might be used to illustrate how each of the six reasonable steps in section 44(4) HSWA are being achieved. In the diagram, the green arrows represent positive actions already implemented, orange arrows represent work-in-progress, and red arrows represent actions agreed but not started. The diagram can be periodically revised to show changes from agreed to work-in-progress and to complete.

**Figure 2. Ishikawa diagram showing how due diligence might be achieved**



Source: author

### Due diligence report framework for critical risks

One webinar participant suggested officers should ask: “is there an assurance framework for critical risk controls and critical core processes”. Another asked “Would be keen to know what the monthly critical risk report would look like – what would be the highlight of the report”: an outline report is suggested in Table 8, including the use of bow tie analyses to enhance critical control management in process safety management (Anato & Morar, 2025).

**Table 8. Outline of a possible monthly critical risk report**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>A one-page plain English summary that sets out the following:</p> <ul style="list-style-type: none"> <li>the name of the activity having the potential to cause a serious injury or fatality</li> <li>the name of the “owner” of the activity</li> <li>who was engaged (ie, consulted) in the assessment</li> <li>the key background papers or sources of information</li> <li>key contextual issues found from a PESTLE analysis (Proctor, 2019)</li> <li>the current SWOT analysis (Proctor, 2019) issues relevant to the effects of uncertainty</li> <li>major effects of uncertainty on key objectives (ie, the critical risk)</li> <li>the critical or key controls and their <i>effectiveness</i></li> <li>what else is being done to modify the uncertainties so their effects on objectives will be made more acceptable</li> <li>three sets of “traffic lights” showing the level of uncertainty with no controls, with current controls (at their known <i>effectiveness</i>), and after any further modification.</li> </ul> <p><b>Bow tie analysis</b></p> <p>A one-page bow tie analysis showing:</p> <ul style="list-style-type: none"> <li>the key causal factors of an <i>event</i> and the <i>consequences</i></li> <li>the controls currently in place</li> <li>the planned or “work in progress” risk modifications.</li> </ul> <p><b>Appendices</b></p> <p>Appendices summarising the background information that enabled the one-page summary and bowtie analysis. These need not be given to top management but should be available on request. They should be kept up-to-date and available for regulatory people to read.</p> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Source: consultancy and teaching material developed by the author

Personal experience suggests that 10 critical risk reports per year should be presented to officers (avoiding major holidays) to allow for “critical risk reviews and control owner meetings” and enable a “deep dive” into the results. Engagement might take the form of “Senior leader observations for critical risks, scheduled throughout the year to different work groups to ensure everyone reviews all critical risks over a period of time”.

Such work might require “[development of] critical risk training packages to outline processes”, “developing bow ties and critical risk verifications, supporting officers to completed critical risk verifications”, and “measurement and reporting on the efficacy of critical risks and controls”.

### **The credibility of New Zealand Health and safety professionals**

Judge Bonnar raised concerns about health and safety practitioners and others.

*55. An officer cannot comply with his or her diligence obligations by simply relying upon those with specific responsibilities for health and safety in the management chain below them or by assuming, without proper enquiry, that the organisation's systems are adequately addressing health and safety risks.*

Strong opinions were expressed about the competence of health and safety professionals in one webinar, including “You can't be an accountant, doctor, nurse, lawyer etc without proving your competence. Anybody can do H&S without proving anything”.

Other participants wrote, “there is no official definition of ‘professional’ in NZ H&S currently”, and “this is reinforced by our own profession, by some people within the industry not taking it seriously and not treating it like a profession, ie, regular CPD [continuing professional development], and other professional development”. “PCBUs need to invest in experienced H&S practitioners” and their training and CPD.

A director under the NZ Companies Act (1993) is, by definition, an officer under the HSWA. Section 138(1)(a) and (b) of the Companies Act (see below) might be taken to refer to a health and safety professional working as a worker within a PCBU or as a consultant to a PCBU.

#### **138 Use of information and advice**

*(1) Subject to subsection (2), a director of a company, when exercising powers or performing duties as a director, may rely on reports, statements, and financial data and other information prepared or supplied, and on professional or expert advice given, by any of the following persons:*

*(a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned:*

*(b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence:*

*(c) any other director or committee of directors upon which the director did not serve in relation to matters within the director's or committee's designated authority.*

*(2) Subsection (1) applies to a director only if the director—*

*(a) acts in good faith; and*

*(b) makes proper inquiry where the need for inquiry is indicated by the circumstances; and*

*(c) has no knowledge that such reliance is unwarranted.*

Following the MNZ v Gibson case, it is argued that:

- an officer of a PCBU require evidence that a health and safety adviser is “reliable and competent in relation to the matters concerned” (section 138(1)(a) or “within the person's professional or expert competence” (section 138(1)(b))
- section 138(2)(b) can be interpreted to require that a director “makes proper inquiry [of health and safety professionals] where the need for inquiry is indicated by the circumstances”, perhaps by enquiring about the qualifications, experience and expertise in relation to “the matters concerned”?

Judge Bonnar emphasised this need in MNZ v Gibson:

*80(f) Where there are others within the PCBU with assigned health and safety obligations or roles, or who may have more specialised skills or experience in the work carried out, an*

*officer must ensure that such persons have the necessary skills and experience to properly execute their roles and must adequately and regularly monitor their performance to ensure that they are properly discharging their functions in ensuring the PCBU's compliance with its duties.*

Should an officer make proper enquiry about the competence of a health and safety professional to be satisfied that they are in receipt of advice that is “reliable and competent in relation to the matters concerned” (Companies Act, section 138). Dreyfus (2004) suggested a five-stage model of adult skill acquisition showing how an individual might develop from: novice, to advanced beginner, to competent, to proficient, to expert. Might proficient or expert require 10 years’ experience and a relevant tertiary qualification?

## Discussion

This research has found many ways that officers could be helped to demonstrate the “reasonable steps” they had taken to achieve necessary due diligence. Those steps include comments by Judge Bonnar that show at least some expectations of the courts. A management system such as ISO45001 might be tailored to help officers achieve reasonable steps. For some businesses, other management system standards might provide a more appropriate framework. Trade or sector organisations may also provide complementary guidance to members.

Business-specific reasonable steps should be designed to complement or enhance the existing corporate governance arrangements in each PCBU. This will help make them feel familiar to officers and avoid additional steps being a burden.

Each officer may bring their own reasonable steps to a PCBU. That store of knowledge may prove invaluable and should be considered as additional or alternative options.

Health and safety professionals may provide inhouse or consultancy services to PCBUs. They will need to gain and apply wider knowledge of corporate governance when working with officers to develop reasonable steps that improve business WHS performance. This is an important area for continuing professional development.

This research has not drawn on guidance on due diligence published by the Institute of Directors. This gap can be filled by further research.

Following the MNZ v Gibson case and this research it is no longer possible for an officer to plead “I didn’t know, I didn’t know, I didn’t know” (Berkahn, 2012).

## Submission declarations

This article has not been published elsewhere and will not be published elsewhere in the same or any other form in English or another language without the written consent of the New Zealand Journal of Health and Safety Practice.

Artificial intelligence was not used to help research, write or proof this article.

The work was self-funded, and I have no known conflict of interest.

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