

9 May 2022

To

Rebecca Cook
Head of Safety Development
Auckland Transport
Level 6, 20 Viaduct Harbour Avenue
Auckland 1010

From

Sherridan Cook

By Email

Rebecca.Cook@at.govt.nz

Legally privileged and confidential

Dear Rebecca

Proposed Health, Safety and Wellbeing Dashboard

1. Thank you for your instructions to advise Auckland Transport (**AT**) on the proposed Health, Safety and Wellbeing Dashboard developed by Deloitte (**Dashboard**), specifically, whether the Dashboard:
 - (a) covers those health and safety matters that we would expect to be reported to AT's Board of Directors (**Board**); and
 - (b) will meet AT's director and officers' (together, **Officers**) due diligence obligations under the Health and Safety at Work Act 2015 (**HSWA**) and, if not, what else would be required in order to comply.
2. **Executive summary**
 - 2.1 In summary, we consider that:
 - (a) while the Dashboard still needs to be fully populated, it appears that it will include the matters that we would expect to be reported to the Board. However, additional information should be considered for inclusion in the Dashboard (if it is not intended to be included already), including information on the controls of Critical Risks and their effectiveness; worker engagement and participation practices; emergency response plans; new hazards or risks reported by staff; absenteeism; additional information on serious incidents and near misses; occupational ill-health; details of ACC claims; bullying and harassment complaints; site visits and inspections; and audit reports and health and safety system reviews;
 - (b) whilst receiving the Dashboard will assist with compliance, it will not, in and of itself, cause AT's Officers to satisfy their due diligence duty. Obtaining relevant health and safety information and monitoring health and safety performance is only one aspect of compliance with this duty. Each Officer will need to take additional reasonable steps in order to be personally satisfied that AT is meeting all of its health and safety obligations. We have set out below a number of additional actions that AT's Officers should undertake in this regard.

3. Health and safety matters reported to AT's Board

3.1 As discussed in the next section, obtaining and reviewing quality health and safety information about AT's operations is a core aspect of the duty of due diligence. We consider the information proposed to be included in the Dashboard and provided to the Board generally aligns with what we would expect would be included. The split focus between AT's People and its Physical Work Contractors and Public Transport Operators is appropriate given the different levels of influence and control by AT. As is the proposed reporting on:

- (a) key highlights, initiatives and risks, and also the serious incident reporting (in the Executive Summary);
- (b) Critical Risk identification and reporting, with risk profiles to be developed for all business units across AT (which we assume will result in separate Risk Profiles, and possibly Performance Scorecards, for each business unit);
- (c) both positive and negative indicators and measures in the Performance Scorecard. Positive measures (eg under Culture, Behaviour and Engagement) are important, as a sole focus on negative indicators of performance (eg lost-time injuries) can lead to perverse behaviour by workers; and
- (d) the detail underlying these indicators and measures in the "Drill Down" slides that follow.

3.2 However, we suggest that AT also consider including the following information in the Dashboard (we acknowledge that you may already intend to include some of this information in the fully populated version of the Dashboard):

- (a) alongside the summary of Critical Risks for each business unit, details of the controls in place to manage each of those risks and their effectiveness;
- (b) reporting on worker engagement and participation practices, including with health and safety representatives and committees, such as consultations with staff, feedback sessions and other opportunities for direct worker input into health and safety decision-making;
- (c) as part of the detailed dashboards:
 - (i) testing and updating of emergency response plans;
 - (ii) details of any new hazards or risks identified by staff;
 - (iii) data on absenteeism and sick leave (this may be used to indicate issues such as stress and fatigue);
 - (iv) in addition to the number of incidents and near misses, information about them (eg how they were caused, when they occurred, what steps have been taken subsequently, key learnings etc);
 - (v) information regarding occupational health/work-related ill-health, and data on compliance with health monitoring programmes;
 - (vi) details of the ACC claims; and

- (vii) the number of bullying and harassment complaints, and details of any investigations regarding the same;
 - (d) as part of the detailed dashboard for AT's People, details of the notifiable, serious and high potential incidents (rather than just the numbers), similar to what we expect will be contained in the table on the detailed dashboards for the Physical Work Contractors and Public Transport Operators;
 - (e) as part of the Key Insights & Actions Required for AT's Physical Work Contractors and Public Transport Operators, information outlining how they will be held accountable for poor health and safety performance;
 - (f) data on any site visits or workplace inspections; and
 - (g) planned internal and external audits and system reviews, and the reports/details of any completed audits or reviews.
- 3.3 Given its nature, the information contained in a dashboard is always presented in a summarised form. In addition, the format of the Dashboard (as slides in PowerPoint) restricts the level of detail that can be included. As a result, we recommend that the Dashboard contains hyperlinks to any more detailed underlying information (or this is otherwise made available), so that Board members can drill deeper if they wish.

4. Due diligence duty

- 4.1 While the primary duty of care under the HSWA rests with the person conducting a business or undertaking (**PCBU**), which is AT, each "officer" has a positive duty under s 44 of the HSWA (set out in full in the Appendix) to exercise due diligence to make sure that AT complies with its health and safety obligations under the HSWA. Based on our previous advice, all members of AT's Board and AT's CEO will be officers under the HSWA. Accordingly, they must exercise the care, diligence and skill that a reasonable officer would exercise in the same circumstances, taking into account:
- (a) the nature of the business or undertaking (eg AT's large size and expected sophistication, its provision of services to the public and the increased risk of death or serious injury posed by its transport operations); and
 - (b) the position of the officer and the nature of the responsibilities undertaken by the officer (which for the Board and AT's CEO will be at the higher end of the scale).
- 4.2 An officer's duty is separate to the duties imposed on the PCBU. If a PCBU fails to meet any of its duties, this does not necessarily mean that the officer(s) have failed to exercise due diligence. Conversely, an officer may be found guilty of an offence for failing to discharge their due diligence duty whether or not the PCBU has been found liable. This means that each Officer at AT needs to be able to demonstrate that they have each exercised the skill and care expected of them in discharging the due diligence duty.
- 4.3 There are six elements of the due diligence duty (s 44(4)), which fall into three sets of duties, as follows:

Enabling duties:

- (a) **knowledge:** AT's Officers must acquire and keep up-to-date knowledge of work health and safety matters, in order for them to make informed decisions in relation to such matters. Officers should be familiar with the law, relevant codes of practice, guidance material and any New Zealand or international standards;
- (b) **understanding:** having acquired and maintained a base knowledge in relation to work health and safety matters, officers are required to contextualise that knowledge in relation to AT's business. Therefore, as part of the due diligence duty, AT's Officers must take reasonable steps to gain an understanding of the nature of the operations of the business and the hazards and risks associated with those operations. Officers should understand the business well enough, so as to ensure that they can be personally satisfied as to the effectiveness of its health and safety systems;

Resourcing duties:

- (c) **allocate resources and processes:** AT's Officers have a duty to take reasonable steps to ensure that the PCBU has available for use, and uses, appropriate resources (financial and human resources) and processes (management systems and procedures) to eliminate or minimise risks to health and safety from work and operations carried out as part of the conduct of the business;
- (d) **information and escalation:** Officers must ensure the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks, and for responding in a timely way to that information. Accordingly, Officers need to receive appropriate information via effective processes and systems, which inform them of events and result in an efficient and targeted response; and

Accountability duties:

- (e) **reporting/compliance:** AT's Officers must ensure that AT has, and implements, processes for complying with AT's duties and obligations under the HSWA. Officers must report on hazards and risks, and ensure this is a regular agenda item; and
- (f) **verification:** officers need to verify that the systems, resources and processes are fit for purpose, have been implemented and deliver the desired health and safety performance. This goes beyond receiving information on AT's performance, but includes audits and reviews (by internal and external subject matter experts) on the systems and processes underlying that performance.

4.4 Critically, the due diligence duty requires AT's Officers to be proactive, engaged and informed about AT's health and safety matters. Simply attending periodic meetings and relying on a health and safety policy or health and safety team, is unlikely to be sufficient. Instead, in taking reasonable steps, all of AT's Officers need to be engaged and positioned to challenge any information presented to them. Therefore, they must understand the nature of all of AT's operations and the risks created by them, and how AT's health and safety systems control and manage those risks.

AT's Officers who do not have hands-on involvement in the operation of the business (such as the Board) will nevertheless need to ensure that they are familiar with these matters, which can be achieved not only by reviewing such information, but also by conducting site visits and engaging directly with workers from time to time.

- 4.5 While the duty must not be delegated or ignored, AT's Officers may seek health and safety advice from experts or others within AT, such as managers. They may also seek external assistance, which is recommended in order to test the status quo. However, where AT's Officers choose to rely on advice, they must be able to show that it was reasonable to do so, and they should each have obtained enough prior health and safety knowledge in order to challenge the advice, ask the right questions, obtain the correct information and verify the advice relied upon.
- 4.6 Therefore, while receiving the health and safety information and data/metrics contained in the Dashboard is helpful, in our view, it will not be enough to satisfy AT's Officers' due diligence duties. This is because it only assists in fulfilling one aspect of the duty, being the monitoring of AT's health and safety performance within its current health and safety systems. The Board also needs to be able to show that it has taken steps to comply with all of the duties above (ie each Officer must have enough knowledge to analyse the information in the Dashboard and oversee corrective actions and be confident in their effectiveness).

5. Additional steps

- 5.1 In addition to receiving the Dashboard, we consider there are other steps that AT's officers need to undertake in order to comply with the obligation of due diligence. As set out below, we have split these into those related to using the Dashboard; other documents the Board could produce and use; and other steps that AT's Officers should engage in to ensure their duty is satisfied.

Using the Dashboard

- 5.2 Although it may go without saying, it is crucial that each director of the Board carefully reviews the Dashboard and is personally satisfied with the information presented and that they query any areas they do not understand or where they consider further action is required. To do this, each director needs to be competent enough to properly understand and evaluate the information they are presented with, including having the ability to identify issues and trends. To assist with this, we recommend that explanatory notes be provided with the first version of the Dashboard and a training session be held on how the Dashboard is compiled.
- 5.3 On an ongoing basis, we consider that AT's Officers should consider the information set out in the Dashboard and:
- (a) query the data in order to establish patterns and forecast trends;
 - (b) revisit risk controls and consider whether these are sufficient and working effectively;
 - (c) require a thorough review of any serious incidents and high potential near-misses in order to determine root causes and appropriate measures to prevent them from happening again;

- (d) require further reports on the completion of actions/implementation of new measures in order to be satisfied that the implementation of actions/measures arising from incidents are effective and timely;
- (e) commission/review reports to determine whether intervention is required; and
- (f) regularly look for gaps in the information provided in the Dashboard and ensure this is addressed.

Other Officer documents

5.4 Alongside the Dashboard, unless it has done so already, we recommend the Board also consider:

- (a) developing a charter (or similar document) outlining the Board's vision for health and safety and its governance responsibilities and expectations in respect of health and safety at AT (including for individual directors);
- (b) producing a table or calendar of activities that the Board and individual directors will undertake, eg each month the Board examines a critical risk, an aspect of AT's health and system, and conducts a learning or training; and
- (c) encouraging each director to maintain a log of due diligence activities, which includes, for example, details of any training, site visits and safety engagements.

Further steps by reference to the three duties

5.5 By reference to the three sets of duties above, we have set out a number of practical steps that AT's Officers should take in order to satisfy their duty of due diligence. Some of these will likely be achieved through the Dashboard but others can only be achieved by stepping outside the Boardroom.

5.6 Relevant to the "enabling duties" above, AT's Officers should:

- (a) before making decisions and verifying the use of resources or processes, obtain knowledge of all relevant matters. Knowledge can be:
 - (i) technical – knowledge of health and safety obligations of duty holders;
 - (ii) situational – what is happening in the organisation and what that means; and
 - (iii) strategic – what should AT, as the PCBU, be doing.

A competency-based assessment of the knowledge acquired by each Officer may illustrate whether this part of the duty has been complied with;

- (b) obtain (through reading and training sessions) knowledge of the HSWA, other relevant subordinate legislation, case law, guidance and standards, in order to ensure informed decision-making;
- (c) undertake trainings and briefings, and attend regular professional development courses, in governance and health and safety;

- (d) contextualise that health and safety knowledge in relation to AT's operations, including by actively seeking information on AT's risks and systems, and understanding this information in order to determine whether the controls and systems are appropriate;
- (e) understand the responsibilities of management and other individuals/committees who manage or influence health and safety matters;
- (f) undertake site visits and engage with AT's managers and wider staff on health and safety issues – ask them about the hazards they face and what they do to keep themselves safe;
- (g) lead/be present during AT health and safety workshops or staff training sessions;
- (h) receive training in incident investigation methodology, in order to properly assess serious incidents, near-misses or non-compliance, and the adequacy of AT's response;
- (i) maintain an active interest in any industry developments and the potential impact on AT's operations. Also, consider any changes, developments or incidents (in New Zealand or overseas) from which key learnings can be gleaned;
- (j) discuss health and safety with other PCBUs – eg meet with Boards/CEOs of other CCOs and/or AT's contractor/supplier companies;
- (k) understand how AT's policies and procedures work in practice, and assess whether these are working well;
- (l) take an active and inquisitive role in the planning and actioning of health and safety initiatives and plans, and ensure workers are involved in the development of these; and
- (m) commission reports on critical or high risk matters.

5.7 To satisfy the above "resourcing duties", AT's Officers should:

- (a) carefully consider and be personally satisfied as to the information reported in the Dashboard (as described above), and ensure that health and safety is a regular Board agenda item at meetings;
- (b) consider health and safety as part of all resourcing decisions, including budgets, new initiatives or developments, and allocate appropriate budgets for health and safety;
- (c) consider health and safety as part of all major-decision making, including any financial decisions. For instance, if funding is cut, first consider the impact this might have on health and safety;
- (d) ensure sufficient and adequate staffing levels are maintained, including in respect of health and safety personnel, but also across all of AT;
- (e) carefully consider whether AT's health and safety management systems and processes are fit-for-purpose, accessible, meet best practice and ensure appropriately qualified staff are engaged to eliminate or minimise risks;
- (f) ensure the periodic review and updating of health and safety policies and procedures;

- (g) ensure that systems identify, consult, cooperate and coordinate with other PCBUs with whom AT may share duties;
- (h) ensure the appropriate escalation processes are in place, and strictly followed, to ensure that all relevant information is put before the Board;
- (i) consider whether worker engagement and participation practices are effective and adhered to by holding regular meetings with staff and any health and safety representatives or committees;
- (j) hear directly from workers as to their involvement in health and safety matters;
- (k) ensure that workers have access to, and use, appropriate equipment and plant, and are trained for use. Verify they are being used;
- (l) ensure there are mechanisms in place for confidential reporting of concerns (eg health and safety concerns but also bullying and harassment complaints); and
- (m) drive a positive and open health and safety culture through proactive leadership.

5.8 In order to meet the "accountability duties", AT's Officers should:

- (a) periodically review AT's governance structure and determine whether the right people are in place and properly authorised and accountable, to enable adherence to the HSWA;
- (b) ensure annual reviews of the performance of managers and workers are undertaken in order to determine whether:
 - (i) the right health and safety principles have been embedded within AT's culture;
 - (ii) the system has been effectively implemented; and
 - (iii) the system remains fit-for-purpose;
- (c) include health and safety measures as key performance indicators for the CEO (and other ELT members), and conduct periodic reviews of the CEO's performance;
- (d) engage in discussion about the risk management processes within AT, especially in regard to critical risks. In doing so, Officers should question whether:
 - (i) there is access to competent advice;
 - (ii) the controls are reflective of industry best practice; and
 - (iii) the existing controls are monitored to ensure that they are effective;
- (e) commission and monitor periodic safety and compliance audits and reviews (both internal and external, in order to challenge and provide objectivity), to ensure that the standards and systems established are being adhered to and subject to ongoing review. Following any review, ensure any recommended actions are implemented;
- (f) ensure processes are effective at capturing non-compliance, and that workers are empowered to speak up and raise any health and safety issues;

- (g) review safety management systems against legislation, codes of practice, regulations and case law to ensure the system meets all legal requirements. Simply providing the systems is not enough, rather, personal oversight of those systems is required;
- (h) require executives, senior managers and contractors/suppliers to review and sign any health and safety plans or policies annually or when updated;
- (i) keep a written register or other record of the decisions made within AT that are likely to affect the whole or a substantial part of it, including the reasons for those decisions; and
- (j) ensure all records or minutes from any health and safety and/or Board or ELT meetings contain sufficient detail to demonstrate that reasonable enquiries have been made.

5.9 While the examples discussed above and prescribed in s 44(4) are non-exhaustive, it is evident there are various ways in which AT's Officers can discharge their duty of due diligence, and we recommend that these be considered alongside the use of the Dashboard.

6. Conclusion

6.1 Ultimately, the duty of an officer is not limited to giving attention to the affairs of AT's Board at periodic meetings, or simply reviewing the information contained in the Dashboard. In our view, the reporting and reviewing of relevant health and safety information is only one of several elements that need to be satisfied in order to ensure compliance with the duty.

6.2 Despite this, the Dashboard is a valuable resource, and once finalised, we anticipate that it will be routinely provided to the Board for its consideration (possibly in real time), and that it is reviewed on a regular basis moving forward. However, it is critical that each Board member acquires and maintains sufficient knowledge in order to be able to interpret the information contained within the Dashboard and ensure that AT's response, and any steps taken or processes implemented in response to that information, are effective, meaningful and ensure AT's compliance with its health and safety obligations.

6.3 Please let us know if you have any queries or require any further assistance.

Yours sincerely



Sherridan Cook
Partner

DDI • 64 9 357 1858
M • 64 27 545 9768
sherridan.cook@buddlefindlay.com

APPENDIX A

Section 44 of the Health and Safety at Work Act 2015 states:

44 Duty of officers

- (1) If a PCBU has a duty or an obligation under this Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.
- (2) For the purposes of subsection (1), an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation) —
 - (a) the nature of the business or undertaking; and
 - (b) the position of the officer and the nature of the responsibilities undertaken by the officer.
- (3) Despite subsection (1), a member of the governing body of a territorial authority or regional council elected in accordance with the Local Electoral Act 2001 does not have a duty to exercise due diligence to ensure that any council-controlled organisation (as defined in section 6 of the Local Government Act 2002) complies with its duties or obligations under this Act unless that member is also an officer of that council-controlled organisation.
- (4) In this section, **due diligence** includes taking reasonable steps —
 - (a) to acquire, and keep up to date, knowledge of work health and safety matters; and
 - (b) 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; and
 - (c) 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; and
 - (d) to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information; and
 - (e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
 - (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).