HEALTH AND SAFETY REFORM BILL: A UNION’S PERSPECTIVE

1. Objective and summary of advice
   1.1 My objectives are:
       a. To research the relevant changes for unions in the exposure draft of the Health and Safety Reform Bill; and
       b. To consider how these changes are significant from a union’s perspective.

   1.2 In summary, the key changes are to:
       • Terminology;
       • The regulatory body (establishing Worksafe NZ);
       • Standard of compliance for duty holders;
       • Scope of duties;
       • Penalties;
       • Consultation;
       • Health and safety training;
       • Right to cease or direct cessation of unsafe work; and
       • Visibility of protections under the Employment Relations Act 2000.

   1.3 These changes are significant from a union’s perspective because they increase pressure on employers to comply with health and safety requirements, provide greater opportunity for consultation and participation in determining workplace health and safety matters and expand the protection of workers’ rights.

2. Background information
   2.1 The Ministry of Business, Innovation and Employment (MBIE) has released an exposure draft of the Health and Safety Reform Bill (the Bill). This is part of the ‘Working Safer’ reform package which aims to reduce New Zealand’s workplace injury and death toll by 25% in 2020.1

   2.2 The Bill will replace the Health and Safety in Employment Act 1992 (HSE) with the Health and Safety at Work Act.

   2.3 This memorandum will discuss the changes in the exposure draft. It is noted that the exposure draft excludes Parts 4 to 6 of the Bill. These parts are still being drafted and will govern enforcement, regulations, regulators and repeals and amendments to other Acts including the Accident Compensation Act 2001.

3. Changes

3.1 The Bill continues New Zealand’s commitment to the Robens approach to workplace health and safety. This approach seeks to govern health and safety with broad legislative principles that are reinforced by industry-specific regulations and codes of practice.  

3.2 The Bill draws heavily on the recently introduced Australian Model Work Health and Safety Act and regulations (Model Law). This is a modernisation of the Robens approach.

Terminology

3.3 The Bill introduces the concept of a ‘person conducting a business or undertaking’, or ‘PCBU’. This is the equivalent of employer, principal or supplier under the HSE Act. The change emphasises that the legislation extends beyond standard employer-employee relationships to include modern working arrangements. For example, PCBU will include contractor and sub-contractor relationships.

3.4 ‘Officer’ means senior managers/directors of private companies, partners, or persons making decisions affecting the business of the PCBU. This will include those at the level of CEO, CFO, COO in DHBs.

3.5 ‘Worker’ means any person who carries out work in any capacity for a PCBU.

Worksafe NZ

3.6 The Bill contains provisions regarding the function of Worksafe NZ (Worksafe), the new stand-alone health and safety regulatory agency. In 2013 Worksafe will take over the functions of the Health and Safety Group within MBIE. Its funding will increase from $48 million to $80 million from December 2013.

3.7 Worksafe is intended to have a key role in providing certainty regarding the requirements under the new legislation. It will be proactive in informing duty holders what is expected of them and will promote education and training on workplace health and safety matters.

3.8 Worksafe will monitor and enforce compliance with the relevant health and safety legislation.

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2 At [2].
3 Ministry of Business, Innovation and Employment Health and Safety Reform Bill Exposure Draft (Parts 1 to 3): Commentary and Request for Feedback (2013) at [7].
4 Health and Safety Reform Bill, cl 5.
5 Clause 4.
6 Clause 6.
7 Worksafe NZ will be established as the new regulator under the Health and Safety (Pike River Implementation Bill) which is currently before Parliament.
8 “Working Safer” and the Health and Safety Reform Bill” (2013) 30 Apex Summit 10 at 12.
**Standard of compliance for duty holders**

3.9 Under the HSE Act duty holders are required to take ‘all practicable steps’ to meet the general duties. In reviewing the HSE Act the Independent Taskforce on Workplace Health and Safety considered that this qualifier was poorly understood, too vague, and difficult to apply.¹⁰

3.10 The qualifier has been replaced with ‘so far as reasonably practicable’.¹¹ This requires a reasonableness judgement based on risk assessment and a cost-benefit analysis.

**Scope of duties**

3.11 The Bill provides for the duties of PCBUs, officers, workers and other persons at a workplace.

3.12 The core duties of a PCBU are set out at clause 20:

(1) A PCBU must ensure, so far as reasonably practicable, the health and safety of –
   (a) Workers engaged, or caused to be engaged, by the PCBU while the workers are at work in the business or undertaking; and
   (b) Workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out work.

(2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

3.13 Where there are multiple PCBUs involved each PCBU is required to manage the health and safety performance of the PCBUs beneath them. This is to be achieved through supervision and monitoring.¹²

3.14 An officer of the PCBU is under a duty of due diligence to ensure the PCBU complies with its duties and obligations.¹³ This is a positive duty to proactively manage health and safety in the workplace. The language of due diligence emphasises that health and safety is part of governance.¹⁴

3.15 The creation of a positive duty is a significant change from the HSE Act. The Independent Taskforce on Workplace Health and Safety noted that as the HSE Act does not explicitly require positive action, directors who avoid involvement in health and safety matters are effectively rewarded.¹⁵

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¹⁰ MBIE, at [5].
¹¹ Health and Safety Reform Bill, cl 20.
¹² MBIE, at [41].
¹³ Health and Safety Reform Bill, cl 29.
¹⁴ MBIE, at [50].
¹⁵ At [5].
3.16 One issue raised for discussion in the exposure draft is whether persons in elected positions (for example elected members of DHBs) should be specifically excluded from the duties imposed on officers of a PCBU.¹⁶

3.17 Workers are under a duty to take a reasonable degree of responsibility for their own health and safety and the health and safety of those around them.¹⁷

Penalties

3.18 The Bill adopts a tiered penalty regime and an increase in the maximum penalties. Under the current system, the maximum penalty is $500,000. This will be increased to $3 million for a body corporate and $600,000 (or five years imprisonment) for an individual.¹⁸

3.19 Commentators have observed that this is likely to result in an increase in the average penalty from $40,000 to $200,000.¹⁹

3.20 The increased penalty levels are intended to strengthen the general deterrent effect of the legislation and emphasise the importance of health and safety in the workplace.

Consultation

3.21 A PCBU is under a duty to consult workers on health and safety matters.²⁰ This requires PCBU to share relevant information, give workers a reasonable opportunity to express their views and contribute to the decision-making process, take into account the views of workers and advise the workers consulted of the outcome of the consultation.²¹

3.22 Consultation is required when:

- Identifying hazards and assessing risks to work health and safety;
- Making decisions about ways to eliminate or minimise those risks;
- Making decisions about the adequacy of facilities for the welfare of workers;
- Proposing changes that may affect the health or safety of workers;
- Making decisions about procedures for consulting workers, monitoring the health of workers or monitoring conditions at the workplace, or providing information and training for workers;
- Making decisions about procedures for resolving health and safety issues; and
- Developing worker participation practices.²²

3.23 The Bill does not take a prescriptive approach to problem resolution. Instead, it provides that parties must make reasonable efforts to achieve a timely, final and effective resolution.

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¹⁶ At [16].
¹⁷ Health and Safety Reform Bill, cl 30.
¹⁸ Clauses 32-35.
²⁰ Clause 49
²¹ Clause 50
²² Clause 51
in accordance with any relevant procedure for resolving workplace health and safety issues. This may change, as MBIE has sought feedback on whether the final draft should include specific prescriptive clauses.

3.24 It is also expected that Worksafe will consult workers in setting standards and developing new codes of practice in relation to workplace health and safety.

Health and safety training

3.25 The workers may elect a health and safety representative. The representative may require the PCBU to allow them time off for training (within three months of a request) and the PCBU must pay for that training.

Right to cease or direct cessation of unsafe work

3.26 Workers may cease or refuse to carry out work that may expose the worker or any other person to a serious health and safety risk. In addition, a health and safety representative may direct a worker to cease work if the representative has a reasonable concern that carrying out the work would expose the worker to a serious risk to health or safety.

3.27 This is an extension of the position under the HSE Act, where employees are able to refuse to perform work that is likely to cause serious harm to themselves.

Protections under the Employment Relations Act 2000

3.28 Under the ERA an employee may take a personal grievance if he or she is disadvantaged or dismissed due to taking part in industrial action in relation to health and safety concerns.

3.29 The Bill includes amendments to the Employment Relations Act 2000 (the ERA). These are intended to clarify the existing provisions, make them more explicit and increase their visibility.

4. A union’s perspective

4.1 From a union’s perspective the proposed changes are significant in three key ways:

- Increased pressure for compliance;
- Greater opportunity for consultation and participation; and
- Expansion of the worker’s rights.

Compliance pressure

4.2 The explicit purpose of the Bill is to secure the health and safety of workers and workplaces. This can be contrasted with the HSE Act, which aims to ‘promote’ the

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23 Clause 52.
24 Subpart 2.
25 Clause 79.
26 Clauses 91.
27 Clause 92.
28 Part 4.s
prevention of harm. This strengthening of terminology is a reflection of the substantive changes securing compliance.

4.3 One source of compliance pressure is increased scrutiny under the creation of Worksafe as a stand alone agency with a substantially increased budget. Commentators have suggested that this pressure will be particularly great for government departments such as DHBs, with the expectation that they will set an example for the rest of the country.⁹⁰

4.4 An additional source of pressure is the amplification of deterrent factors. The dramatic increase in potentially penalties can be expected to grab the attention of PCBUs and incentivise the tightening of health and safety practices. The creation of a positive duty on officers of PCBUs will put further pressure on senior managers and directors to become actively involved and informed in health and safety matters.

Opportunity for consultation and participation

4.5 The requirements of consultation and participation are not new to the workplace health and safety regime. Nevertheless, the proposed provisions explicitly detailing the manner of consultation and the areas for consultation reinforce the workers’ right to be closely involved in workplace health and safety matters.

4.6 It is hoped that the direct engagement of workers with health and safety matters in their workplace will also be secured through consultation between Worksafe and workers when preparing industry-specific codes of practice.³¹

Expansion of worker’s rights

4.7 The extension of the worker’s right to refuse or cease to perform work may be significant to a union when considering action regarding unsafe work practices. It will be necessary to consider the effect of the change (if any) in standard from ‘likely to cause serious harm’ to ‘serious health and safety risk’. As the new standard is in line with Model Law commentary guidance from Australia will become particularly relevant.

4.8 The clarifications to the ERA protections against dismissal for industrial action reinforce the worker’s rights in this area. The protections themselves are not substantively changed.

Resources

http://www.mbie.govt.nz/what-we-do/ Pike River Implementation Plan/ Worksafe New Zealand is being established

http://www.mbie.govt.nz/what-we-do/Workplace Health and Safety Reform

²⁹ Clause 3.


Health and Safety Reform Bill Exposure draft (Parts 1 to 3).