Submission

by

Business|NZ

to the

Transport and Industrial Relations Select Committee

on the

Health and Safety in Employment Amendment Bill 2001

March 2002

PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

HEALTH AND SAFETY IN EMPLOYMENT AMENDMENT BILL 2001

SUBMISSION BY BUSINESS NEW ZEALAND

MARCH 2002

1. PART 1 - INTRODUCTION

1.1 This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The full regional members comprise the Employers and Manufacturers Association (Northern), Employers and Manufacturers Association (Central), Canterbury Manufacturers' Association, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting the business and employment sectors.

1.2 Business New Zealand is the leading national organisation representing the interests of New Zealand's business and employing sectors comprising some 76,000 individual enterprises. Business New Zealand champions policies that would transform and accelerate the growth of high value added goods and services to significantly improve the prosperity of all New Zealanders. One of Business New Zealand's key goals is to see the implementation of policies that would see New Zealand retain a first world national income and to regain a place in the top ten of the OECD in per capita GDP terms.

1.3 Health and safety in employment is an issue that concerns all employers. Business New Zealand through its regional organisations strives to encourage "Best Practice" in health and safety. Health and Safety Consultants and Advisers assist members in the everyday management of health and safety issues, and we have actively worked alongside the Occupational Safety and Health division of the Department of Labour in an endeavour to educate employers on their responsibilities under the current Act.

1.4 Since the enactment of the Health and Safety in Employment (HSE) Act in 1992 there has been a considerable increase in the awareness and understanding of employers' responsibilities to provide a healthy and safe working environment. In general this has resulted in employers genuinely trying to improve health and safety in their workplaces. For small and medium sized workplaces it often takes considerable effort due to resourcing and financial constraints to comply with overly prescriptive legislation. However the attitudes towards health and safety and the commitment to it by employers and employees alike, particularly over the last nine years, is clearly demonstrated by ACC statistics which show that workplace accidents have continued to reduce.

1.5 In light of the continuing downward trend of workplace accidents and the positive health and safety culture in by far the majority of workplaces in New Zealand, it is perplexing, to say the least, to employers as to why the changes proposed by this amending Bill are being sought. The focus on employers only, when self-employed people are three times more likely to have a fatal accident than employees, is also concerning. The focus instead should be on inculcating a philosophy of safety in ***everyone*** involved in work.

1.6 The overwhelming response of the employers consulted in the preparation of this submission is that the changes suggested will add increased complexity, uncertainty and substantial costs – both in ensuring compliance and in monetary terms. In the analysis that has been undertaken, it is the view of Business New Zealand that the proposed amendments in the key areas identified in the "Purpose of the Bill", cannot be supported. It is thus our contention that the Bill should not proceed.

1.7 Instead, what is required is consistent and transparent enforcement of existing rules and regulations, while at the same time providing incentives to those companies with an excellent health and safety record and systems in place and targeting for special education, assistance and ultimately penalties, those enterprises which are performing poorly.

1.8 This submission is in two further parts. The next deals in general with the key provisions identified in clause 3 of the Bill with the third part comprising a clause-by-clause analysis and suggestions for action.

PART 2 – GENERAL COMMENT

Clause 3 of the Bill sets out the purpose of the proposed new Act. The five key issues, and the four sub-sets under extended coverage, will each be dealt with separately.

(a) Provide more comprehensive coverage by

(i) Including the maritime, rail and air industries

Although it is recognised that the principles embodied in the current HSE Act are applied in the three sectors mentioned by way of criteria established respectively by the Maritime Safety Authority, the Land Transport Safety Authority and the Civil Aviation Authority, there are international obligations and particular circumstances relating to the maritime and aviation industries that make their specific inclusion under this legislation inappropriate.

In the case of the maritime sector, for example, New Zealand companies provide staff to overseas operators placing them at the control of the Master of those clients' vessels. These are overseas ships which are the legal territory of the state of the flag which they are flying and subject to the laws of that state and the international laws of the sea such as the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Standards of Training Certification and Watchkeeping for Seafarers – 1995 amendment (STCW95) and the International Safety Management Code which govern safety of life at sea and working conditions etc. These laws are enforced by flag state inspection and by "Port State" inspection (that is the country into which the vessel arrives at its overseas port of destination). In the case of New Zealand, Port State control is vested with the Maritime Safety Authority. Issues such as an interface with OSH inspectors at that point need to be resolved. Further issues such as employer liability where a ship is subject to foreign passage and the crews are repatriated from an overseas port also need to be addressed.

Similarly because of the well-established involvement of the Civil Aviation Authority with particular regard to international requirements, in-flight inspections, expertise in aircraft safety, compliance issues and warranting of CAA auditors it is our contention that the current regime operates well and should not be changed.

(ii) Confirming that persons who are mobile while they work are covered

It is recognised that the intention of this amendment is to clarify the currently unclear position under the HSE Act by ensuring that bus drivers, courier van drivers, sales representatives and the like are covered by the provisions of the Act.

However, four points of concern arise.

- Potential inclusion of someone travelling to and from work in a company-owned or provided vehicle,
- Extent of employer liability for motor vehicle standards.
- Extent of employer liability for potential hazards on the roads.
- Interface between police, LTSA and Occupational Safety and Health investigators.

- To avoid doubt, the legislation must make it clear that persons travelling to and from work in a company-owned or -provided vehicle are not covered by this legislation. We recommend in Part 3 the inclusion of the same definition as applies under the Accident, Insurance Act 1998 and its successor the Injury Prevention Rehabilitation and Compensation Act 2001 (hereafter referred to as ACC legislation). To not do so would place too great a requirement of control by employers over their employees' movements travelling to and from work. This is particularly so in light of the proposal to include fatigue and stress in the definition of harm.

- If a motor vehicle is considered to be a workplace then that motor vehicle itself may be deemed to be a hazard and therefore issues surrounding the vehicle need to be eliminated, isolated or minimised. This could include such things as the need to exclude distracting radios or stereos, the compulsory provision of air bags etc. It must be made clear that the intention of this clause is not to impose any particular motor vehicle standards beyond what it is currently the legal requirement. That is, any vehicle that has a current warrant of fitness, is registered and is driven by a licensed employee currently meets the requirements of the Ministry of Transport and should be sufficient for the purposes of this Act.

- It must be made clear in appropriate legislation (either in this Act or transport/road safety legislation) that employers have no more responsibility or liability for bringing to the attention of the relevant authority hazards on the road, than any other member of the travelling public. Any suggestion that employers might have such an additional responsibility is quite untenable.

- Issues regarding the interface of police, LTSA and OSH investigators might arise if, for example, driver fatigue is a factor in a motor vehicle accident. Clear protocols must be in place between those organisations to ensure transparency and consistency of approach.

(iii) Providing protection to volunteers and employees on loan

While the intention of this amendment is perhaps understandable - to provide a healthy and safe workplace for everyone there regardless of their legal status - the wide definition of “volunteer” will make this provision virtually impossible to operate in practice.

It is a well-established principle that employers have special responsibilities to those with whom they have an employment

relationship. However, to extend the concept to where there is no relationship has proved too difficult even for such an august body as the International Labour Organisation. For two years (1998 and 1999) tripartite experts struggled to define other groups of “workers” who did not have either a contract *of* service or a contract *for* service in an attempt to bring them under the protection of various ILO instruments. They were unable to do so. To take this step now in New Zealand legislation to extend employee rights to those where there is patently no employment or contractual relationship would be taking a quantum leap that no other country has done.

Currently under Section 6(1)(c) of the Employment Relations Act volunteers are expressly excluded from being deemed to be employees. Under the ACC legislation, because there is no premium being paid, volunteers will also be deemed not to be employees. When there are two of the three major pieces of employment legislation supporting one notion of what comprises an employee, the proposal under this Bill being at odds with the other key legislation does nothing to promote consistency between statutes and makes compliance costs and understanding even more onerous.

The definition would capture those participating in school working bees, meals on wheels, church cleaners, surf life saving clubs and the like. The tourism sector would be particularly hard hit. Many community-run tourism attractions such as museums, art galleries, heritage locations and historic buildings depend largely on volunteer work to stay open – especially given that such places normally have very limited budgets. The compliance issues for all organisations accepting volunteers would be quite extraordinary as, if these volunteers are deemed to be employees, then the full induction programme, hazard identification training, establishment of safety committees and the like would legally apply. Again the issue of fatigue and stress adds further complexity. Volunteers are an essential element of any community, tourism in local areas is an important revenue source for many small towns and regional

areas. Local attractions depending on volunteer labour are an important draw card. Their existence could mean the difference between travellers stopping or not stopping at a particular location. To include all volunteers as deemed employees would put at risk the continued existence of many such community organisations.

Of particular concern is the "volunteer" who is at the workplace for the purpose of training or gaining work experience. While it is without question that all workplaces have a duty of care to everyone who is legitimately there, it is our strong submission that "volunteers" should not be deemed to be employees for the purposes of the Act.

In contrast, Business New Zealand has no difficulty with the specific inclusion of a "loaned employee" although it is a superfluous amendment in our view. Where there is an employment relationship - as must exist for the term "employee" to apply - then whoever has responsibility for the workplace where that employee is carrying out work must exert the responsibilities and accept the liabilities of an employer.

(iv) Confirming that fatigue and work-related stress are covered

Business New Zealand submits that it is sophistry to claim that fatigue and work-related stress have always been so inherently part of harm and a hazard at the workplace that by making explicit reference to these issues it is a mere confirmation of the status quo.

We hold to the opposite view - that by bringing fatigue and work-related stress into the definition of harm it is an open invitation to all and sundry to raise potential fatigue and stress as a reason to simply and, according to this legislation legitimately, stop doing the work they were employed for.

True, there is a common law principle that an employee can allege that medical conditions aggravated by fatigue and work-related stress which

were brought to an employer's attention but were blatantly ignored, can be considered in a constructive termination situation. However, there have been only two such cases ever brought before New Zealand courts, significantly, cases affecting the state sector brought against the Attorney General. The threshold of proof required under the common law in this instance is at the very high end - quite unlike the totally open-ended and non-defined concepts set out in this Bill.

Under the HSE Act "harm" correctly covers injury and occupational illness. "Correctly" because both of those occurrences are well defined and demonstrable in a medical context. In contrast, there is no such medical condition as stress, or work-related stress, or indeed occupational stress. It is widely accepted medically that stress is a symptom for some other condition. These conditions in a medical/psychological sense are at times difficult to diagnose.

The English Court of Appeal has recently *(Sutherland v Hatton [2002] EWCA Civ 76)* set out eight principles to be applied:

- Employers are generally entitled to take what they are told by employees at face value unless they have good reason to think otherwise. They do not have to make searching inquiries.

- An employer will not be in breach of duty in allowing a willing employee to continue in a stressful job if the only alternative is dismissal or demotion.

- Indications of impending harm to health arising from stress at work must be plain enough to show that an employer needs to take action.

- The employer is in breach of duty only if he fails to take steps that are reasonable, depending on the size of the risk, the gravity of the harm, the costs of preventing it and justification for running the risk.

- There are no occupations that should be regarded as intrinsically dangerous to mental health.

- Any employer who offers a confidential counselling advice service with access to treatment is unlikely to be found in breach of duty.

- An employee must show that the illness has been caused by a breach of duty, not just occupational stress.

- Damages will be reduced to take account of pre-existing disorders or the chance that the claimant would have fallen ill anyway.

It is our strong submission that these should be adopted in New Zealand either specifically by way of legislation or at least by clear inclusion in a Code of Practice relating to the management of work-related stress and work-related fatigue.

This difficulty (some might say impossibility) of diagnosing “stress” as a medical condition per se is doubtless behind the decision not to include stress as being compensatable under ACC legislation.

To have a situation as this Bill would propose whereby the definition of harm in one Act includes fatigue and work-related stress but is not compensatable by other legislation where 99.9% of conditions coming within the definition of harm are, is patently absurd. That is, employees who are deemed to be harmed by fatigue or work-related stress will not be eligible for compensation payable by the ACC but all other incidents under the definition of harm will be. Much pressure will doubtless be

exerted on OSH to initiate a prosecution under the HSE Act and ensure monetary “compensation” through that method.

Yet another concern that employers have is the ability of the Governor General by Order in Council (that is without any opportunity for input from any person likely to be affected) to declare fatigue or work-related stress “serious harm”. Obviously the penalties, were this to be the section under which a prosecution was taken, would be even higher.

No doubt the intention of the definition is to focus on people who are clearly and demonstrably not coping at work. Whether work caused this inability to cope or not is a different issue entirely. It is right that employers who have employees who are demonstrably not coping have a duty towards those employees - just as employees in that situation must have a duty to explicitly raise the situation with the employer (as confirmed by the English Court of Appeal). It has often been said that what might be stressful to one person is just the push required by another to perform well. Further, the impact of pressures and events outside the work environment on an individual’s ability to cope at work cannot be underestimated or unentangled.

Similar concerns apply to the extension of the definition of hazard to include someone who, because of physical or mental fatigue, is deemed to be a hazard.

The most obvious question is how, particularly at the beginning of the day and before actual harm accrues because of that fatigue, is an employer to assess a state of fatigue. Employers are not trained to carry out psychometric tests to determine whether a person is or is not fatigued - physically, or indeed mentally.

The second question is what is the employer to do if an employee is suspected of being so fatigued - physically or mentally – as to pose a hazard.

- Is the person to be sent home; and if so, on what payment basis, if any?
- Can the person be asked to carry out duties that might comprise less of a hazard?
- What happens if there are no such alternative duties or the person refuses?
- How far can the employer enquire into what is causing the fatigue?
- If it is because of other work being carried out or other outside work activities, can the employer insist that the work or other activities stop? How are the provisions of the Human Rights Act and Privacy Act to be reconciled with the employer's obligations to ensure an individual does not pose a hazard?
- What if the employee is working at more than one job?
- Can an employer require the employee to leave his or her secondary employment?
- If an employee is deemed to so pose a hazard and the employment is consequently terminated, is this a full defence in any personal grievance action that might be initiated? (At the very least, if an employee does believe he or she is suffering from work related stress or fatigue, there must be a requirement on the employee to notify the employer that that is the case before any action against the employer can succeed.)

Given the extension of coverage of this Act to the international maritime and aviation sectors, to volunteers and potentially to employees travelling to and from work in company owned or provided vehicles, the potential for disruption, conflict and uncertainty is enormous.

Under Section 19 of the HSE Act employees have an obligation not to do things to harm themselves or other people. As part of that obligation employees have a duty to come to work in a fit state to perform the duties for which they have been employed.

Accordingly, Business New Zealand strongly submits that to include fatigue and work-related stress in the definitions of harm and hazard is totally unwarranted, unhelpful and unacceptable.

(b) Include provisions requiring good faith co-operation between employers and employees

Under the guise of "good faith" are 11 new clauses in the Bill setting out extraordinarily prescriptive requirements for employee participation.

We repeat the fact that workplace accidents have decreased each year since the HSE Act came into effect in 1993. Something must be working - which again perplexes employers as to why such a prescriptive regime is considered necessary now.

Section 14 of the HSE Act explicitly requires employers to give employees the opportunity to be involved in the development of health and safety procedures. This requirement to include ***all*** employees without prescribing how it must be done recognises two crucial realities.

- 92.6% of enterprises in New Zealand employ ten or fewer people, with 86.2% employing fewer than five, as at February 2001 (Statistics New Zealand's Business Demographic Statistics). These statistics exclude the agriculture sector.

  Prescription of the type contemplated adds an additional and unacceptable compliance burden on those employers. Such enterprises simply do not engage in the formalities of officially electing one of their number to a position of responsibility for the actions of all.

- Safety and health at work must be the responsibility of everyone at the workplace.

> The culture carefully nurtured in all workplaces over recent years has been the recognition that each person must take responsibility for the safety of his or her work environment, acknowledging that only through personal responsibility of those actually performing the work will all at the workplace be protected. It is axiomatic that each person is in the strongest position to have most relevant input as to safety requirements and procedures pertaining to their particular job.

Moving the focus back to health and safety representatives is a backward step and reflective of an old philosophy of making one person responsible for many. Increased prescription that requires additional funding from employers for training and the maintenance of systems for employee participation, raises compliance costs and has the potential to become adversarial. Increased involvement of nominated employees in issuing hazard notices will cause friction between the issuing employee and the receiving employer.

Significantly, the employer retains ultimate responsibility for all health and safety issues in the workplace on a strict liability basis. Inevitable conflict and confusion will arise where health and safety representatives have a specific ability to consult directly with OSH inspectors (to the exclusion of the employer) and issue hazard notices that must be complied with as, if left unactioned, they could form the basis of a higher level of penalty.

Business New Zealand does not support health and safety issues being used either as industrial bargaining points or as fuelling an adversarial approach to providing a healthy and safe workplace.

It is clear from New Zealand and international practice that the last thing "good faith" requires is a one-size-fits-all prescription. It is instead a focus on open communications with the inherent requirement not to mislead. It has long been a hallmark of New Zealand enterprises, acknowledged clearly as such by the parties formulating the Code of Good Faith for Bargaining for Collective Agreement. Clause 1.4 states:

> "The existence of the Code does not imply that employers in general, or unions in general, act in bad faith in their dealings with each other."

That general underpinning of open, common-sense communication envisaged by the general concept of good faith, bolstered by section 14 of the HSE Act specifying employee participation and further reinforced by section 84 of the Employment Relations Act 2000 (ERA) making it lawful to stop work (i.e. take strike action) where there are reasonable grounds for believing that the strike is justified on the grounds of safety or health are, in Business New Zealand's submission, more than sufficient to ensure the proper balance between employers' responsibilities and liabilities and employees' participation and protection.

In relation to the Bill's employee participation requirements the following specific points can be made:

- There are no transitional provisions for those employers who already have a system of employee participation. It is not clear whether those employers will have to disband their current system (which in most situations has been an agreed system working well) to start all over again with the enactment of the new law.

- The requirements to develop and implement an employee participation system are difficult in practice for multi-site employers or employers who have more than one union involved in their worksite(s). The statutory time limit of 6 months is also unreasonable for employers in these situations particularly where agreement by a number of unions needs to be sought or employees are spread over wide geographical areas

- The default to the election of a health and safety representative where a participation system is not agreed upon places employers in the position of being forced to have a health and safety representative, with potential pressure to pay a representative more remuneration due to

their duties (a realistic implication of clause 19H "Functions of health and safety representatives").

Further, it is not clear within the draft Bill whether a breach of good faith in the context of health and safety will be a breach of the HSE Act itself, or not. It needs to be very clearly spelt out that if there is such an allegation of breach whether it can be pursuant to this legislation or whether the general provisions of the ERA Act might apply.

(c) Provide for more effective enforcement of the Act

The examples that can be identified as providing "more effective" enforcement are:

- the five-fold increase in penalties;
- the ability for trained health and safety representatives to issue a hazard notice;
- the ability of OSH inspectors to issue an infringement notice; and
- the ability for ***any*** person at all to initiate a prosecution.

Employers will be forgiven for believing that the size of the stick has much increased but any carrot is entirely missing. Unfortunately the emphasis on enforcement may make employers reluctant to approach OSH for assistance and therefore prove counterproductive. With ACC intending to treat education as the first step before any penal increase in levies is contemplated it can well be said that much more would be achieved if the purpose clause were to place the emphasis on education not enforcement.

Five-fold increase in penalties

The rather specious reason given for the five-fold increase in fines is that this brings the penalties in line with penalties for breach of the Hazardous

Substances and New Organisms Act 1996. The causal link between the two is not obvious to employers.

Business New Zealand submits that the assumption that a more punitive regime based on a deterrent effect will result in safer workplaces, is totally incorrect. The "big stick" approach fails to recognise that the most effective way to prevent accidents and encourage safety in the workplace is through consistent education programmes and committed management. There is no evidence to support the notion that increasing fines decreases injury accident rates. No evidence has been put forward at all to support this, the reason doubtless being that there is none.

There appears to be an assumption that many companies deliberately flout the law. This is also incorrect and fails to take into account the adverse publicity associated with companies which are fined for breaches of the Act along with the costs of downtime, low morale, personal injury and rehabilitation. Business New Zealand strongly asserts that no company wants to have an accident occur on their premises. Further, under a no fault, strict liability regime where there is no requirement to prove intention, the proposed fines reflect much more serious criminal offences and are simply not appropriate.

OSH figures show that the average of all fines under the Act since it came into effect in April 1993 is $6,196.15 – well short of the $50,000 maximum set out in section 50(d) and nowhere near the maximum of $100,000 under section 49(3). In fact the highest penalty imposed of the three cases taken under this latter section is $45,000.

It might be expected that the courts will continue to apply the High Court criteria established in *Department of Labour v De Spa Ltd* ([1994] 1 ERNZ, 339) which includes taking into account the financial circumstances of the "offender". However, the judges must take cognisance of the fact that the maximum levels have increased 500% and may well consider themselves bound to likewise multiply by a factor of five, the amount of penalty they first

considered appropriate. In fact this phenomenon was borne out with the increases brought about by the HSE Act in 1992: a ten-fold increase in the maximum resulted in a ten-fold increase in the average.

With such a huge gap already existing between the average fine and the current maximums imposable, Business New Zealand can see no valid reason whatsoever for any increase from the present levels.

We note in this context the recommendation by OSH to Cabinet that the level of fines should increase **for the medium and large companies**, for example one might suggest for those employing more than 30 employees. However, to increase the levels across the board with no distinction as to size of enterprise and against the advice given is of grave concern to employers.

Ability to issue hazard notices

Of initial concern, before moving to the actual ability to issue hazard notices, is the open-ended nature of how many health and safety representatives there may be at any one enterprise who will have that power. The Bill envisages that any and all persons at a workplace can put themselves forward for the position with a consequent requirement that the employer allow each and every one of them two paid days' leave each year to attend training. This training is of course in addition to the employment related education leave provided for union members under the ERA. It once again shows a complete disregard for employers' inability to absorb ever higher costs imposed by legislation.

The ERA at least recognises some limit to the allocation of employment relations education leave that unions might make, depending on the size of the enterprise. At the very least, this Bill must do likewise.

That point notwithstanding, this provision was yet another that perplexed employers who were consulted.

Sections 7 to 10 of the HSE Act clearly set out the duties of employers in relation to hazard management. Many, many employers have very active hazard identification systems which include daily reporting so that any new hazard can be immediately identified and dealt with.

To employers there can only be two reasons for the inclusion of this provision allowing safety representatives to issue hazard notices:

- To move the management and decision making in this area from employers (who continue to have a strict liability responsibility) to employees' representatives.

- By enabling the representative to advise OSH inspectors directly of the issuing of such a notice, to put the employer in the higher section 49 category of "offending" where the maximum penalty under the Bill will be $500,000 and/or two years' imprisonment.

- Neither is a satisfactory rationale for such a provision to be introduced.

Ability to issue infringement notice

This new right for OSH inspectors to impose an infringement notice specifying an infringement fee to be paid, in one move destroys any credibility OSH might have as an organisation providing education and assistance to employers.

Given that an infringement notice can be issued for an event causing no harm whatsoever, and can be based on a hazard notice imposed by an employee representative, the potential for abuse of the system clearly exists. The concern employers have is that the culture of workplace safety being clearly outside the sometimes adversarial nature of workplace relations, will no longer be able to be maintained.

Also of concern is the infringement fee schedule itself, set out in clause 22 of the Bill substituting a new section 56F.

First, it does not take account of the practice for "sole traders" to establish a legal entity for business purposes. The difference in fines between an individual who employs someone in an individual capacity and an individual who incorporates and thus becomes a body corporate, simply does not take account of those 86.2% of enterprises employing fewer than five people.

Secondly, there is no distinction to vary the level of fine imposed. Therefore a failure to comply with section 7(1) – the requirement to formulate a hazard identification procedure – even where no harm occurs, will see the same $4,000 fine imposed against the largest corporate and the employer of two staff. Viewed in a context where the *average* fine imposed by the Courts is $6,196.15 where an employer knowingly takes, or fails to take, an action reasonably likely to cause harm, this level of absolute imposition of $4,000 in each and every circumstance is totally inappropriate.

*Ability for **any** person to prosecute*

Although it is accepted that the cost of mounting a private prosecution is high and accordingly may act as a filter to some private actions, the main concern for employers is the added incentive that will be placed on OSH itself to bring a prosecution. If OSH decided not to prosecute and a private prosecution were subsequently taken, the Department of Labour would no doubt be called to account very closely for its decision. Similarly, if private prosecutions were to be invoked OSH may well be more proactive in taking future prosecutions in order to maintain its status and authority in the area.

The criteria used by OSH to determine whether a prosecution is appropriate or not must be clear and transparent, and consistently applied. The ability to bring private prosecutions should not become a bargaining tool in union hands, affectively imposing on employers a form of double jeopardy.

(d) Prohibit indemnification against the cost of penalties for failing to comply with the Act

If the rationale for many of the previous provisions discussed perplexed employers then this prohibition on the normal business practice of managing risk truly has them stumped. A very large number of New Zealand companies choose to insure under statutory liability policies. Most such policies include virtually all statutes with the exception of Acts usually associated with obvious criminal activity. And criminal activity requires two components; mens rea, the intention to commit a crime, and actus reus, the deliberate carrying out of such an intention.

When all breaches of the HSE Act are deemed to be "criminal" including, for example, the failure to carry out systematically a hazard identification procedure, then the bounds of credibility to be classified a criminal are well stretched.

There seems to be no logical reason to pick out the HSE Act and make it illegal to insure against the fines and penalties contained there – particularly given the five-fold increase in the level of fines and the lack of control an employer may have about things like an individual's stress or fatigue levels.

It appears the drafters of the legislation are once again demonstrating their lack of knowledge of the business world by assuming that employers are deliberately avoiding their obligations under the Act by paying an insurance premium and transferring the risk to the statutory liability insurer. The reality is quite different. Insurance policies have standard exclusions and conditions which materially affect any insurance claim where statutory obligations have not been complied with. As was clear during the short period when the private insurance companies were able to offer cover for workplace accidents, the focus on good, robust injury prevention systems was notable because premiums were calculated taking these into account. The ability to achieve a cheaper premium because of good systems and procedures required by the

HSE Act is by far a better incentive for full compliance than the perverse decision to prohibit insurance at all.

(e) Promote compliance with ILO Convention 155 – Occupational Safety and Health and the Working Environment

Convention 155 came into force on 11 August 1983 and since that time has attracted a mere 35 ratifications out of a possible 174 ILO member states. Even this meagre total has been reached only as a consequence of the break up of Yugoslavia and the Soviet Union whose 11 former constituent members have subsequently ratified in their capacity as independent nations. Notably lacking from the list of signatories are Australia, Canada, the United Kingdom, the United States, France, Germany, Japan and a significant number of other OECD countries.

The ILO itself has now acknowledged that this dearth of ratifications is indicative of a poorly functioning Convention and has placed the whole topic of occupational safety and health on its Conference agenda for 2003 with a view to the adoption of a plan of action. In recognising that a complete overhaul is required, the ILO is coming to accept that a prescriptive approach to occupational safety and health and, indeed, to other relevant industrial relations matters is inappropriate and that adopting a principles-based approach is likely to produce far more effective results. A principles-based approach allows a diverse range of social and economic circumstances to be taken into account (not least the question of enterprise size) so that good intentions do not produce an effect contrary to that anticipated. Or, on the other hand, lead countries – whatever their individual approaches to occupational safety and health – to opt out of signing up to detailed provisions useful only for encouraging accusations of compliance failure. A principles-based approach leaves countries free to acknowledge the need for change (where there is such a need) but to proceed at a sensible pace.

It is extraordinary that New Zealand should currently contemplate seeking to promote compliance with a manifestly unsuccessful Convention based on

outmoded prescription – the more so since in two years' time that Convention will likely no longer exist.

A related point – and more relevant than an ILO standard – is New Zealand Standard 4801 upon which the ACC audit tool is based. These documents are based on the principles-based approach and leave employers (together with their employees) the scope to develop their own systems to meet the principles that produce the desired outcome. It would be counterproductive to ratify and promote a Convention that is distinctly different from the current workplace safety management practices or audit, within New Zealand, as promoted by ACC.

PART 3 - CLAUSE BY CLAUSE ANALYSIS

Clause 3 Purpose

Comment

The amendment Bill's purpose clause introduces a new interventionist philosophy, greater prescription and a shift in the overall responsibility for health and safety from employers and all employees, to an employee representative. It also extends significantly the coverage and the ambit of the original Act. As set out more fully in Part 2 of this submission, Business New Zealand submits that the changes in this Bill, rather than improving heath and safety outcomes, would be counterproductive in their effect: the three sectors covered by clause 3(a)(i) (maritime, air and rail) are already adequately protected by their own safety authorities; making employers responsible for mobile employees once they are on the road – clause 3(a)(ii) - presents major difficulties; creating a fictitious employment relationship where none exists in fact – in relation to volunteers clause 3(a)(iii) – is likely seriously to curtail volunteer activity; and endeavouring to distinguish between work and non-work-related fatigue and to determine who, in the workplace will and will not be affected by tasks that have an inevitably stressful element is a near impossibility (clause 3(a)(iv)). Section 14 of the principal Act and the Employment Relations Act 2000 already provide for employee/employer co-operation and the exercise of good faith (clause 3(b)), while the "more effective" enforcement provided for (clause 3(c)) is disproportionate to the size of the most New Zealand businesses and likely to act as an employment disincentive. Given the strict liability nature of offences under the Act, removing the ability to insure (clause 3(d)) is entirely inappropriate. So too is the proposal to promote compliance with ILO Convention 155 (clause 3(e)) when the ILO itself is to revisit standards relating to occupational safety and health at its 2003 Conference.

Recommendations

Delete clause 3

Clause 4 Interpretation

Comment

Reasons for the deletions recommended from the interpretation clause are canvassed more fully under the relevant substantive clauses where the terms herein defined are discussed in greater detail. Re clause 4(9), it must be made clear that there will be health and safety implications for employers only where employees are being driven to or from work in employer-provided transport by the employer or by a representative of the employer. (That is, the same responsibility that employers currently have under ACC legislation.) Subclause (12),

inserting a new section (2A) into the principal Act, is a further source of confusion. While essentially in the same terms as section 28(1)(a) of the Injury Prevention, Rehabilitation and Compensation Act 2001 (in force 1 April 2002), this new section seeks to make injuries suffered by mobile workers the employer's responsibility. By contrast, the Injury Prevention Act recognises such injuries as occurring in motor vehicle accidents (although making provision for the employer to pay first week compensation). This is the only realistic approach to accidents and injuries over which an employer can have little or more control

Recommendations

Delete clause 4(1). Retain the current definition of "crew".

Delete clause 4(2). Retain the current definition of "employee".

Delete clause 4(3).

Delete clause 4(4). Retain the current definition of "employer".

Delete clause 4 (5). Retain current definitions of "harm" and "hazard".

Delete clause 4(6).

Delete clause 4(8).

Amend clause 4(9) (and existing section 2(1)) as set out below to indicate that a vehicle is not a "place of work" when driven by an individual employee travelling to or from work, even if the vehicle concerned has been provided by the employer. It should also be made clear that the vehicle standard required is no greater than that of a registered vehicle with a current warrant of fitness driven by a licensed employee, where this is a requirement for the vehicle concerned.

> "Place of work" means a place (whether or not within or forming part of a building, structure, or vehicle being, where this is a requirement for the vehicle concerned, a registered vehicle with a current warrant of fitness driven by an employee licensed pursuant to Ministry of Transport requirements) where any person is to work, is working, for the time being works, or customarily works for gain or reward; and, in relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee or transport provided for an individual employee for the purpose of travelling to and from work), -
>
> [(a), (b) and (c) unchanged]."

(Note that in section 2(1) of the principal Act the words “or structure are currently written in parenthesis but that the amended words “structure, or vehicle” do not appear to have been similarly parenthesised.)

Delete clause 4(10).

Delete clause 4(11).

Delete clause 4(12)

Clause 5 New sections 3A and 3B inserted

Section 3A Application of Act to aircraft
Section 3B Application of Act to ships

Comment

Reference has already been made to the fact that both the aviation and maritime sectors currently have their own, perfectly adequate, safety authorities. The proposed new sections would lead to inconsistency of application as currently these sectors have developed their own specialised safety regimes. Duplication of the kind proposed in new sections 3A and 3B can lead only to dispersed responsibility, particularly given the risks inherent in any mobile activity.

Recommendation

Delete clause 5. Retain current section 2(3)(a) and (b).

Clause 6 New section 5 substituted

Section 6 Object of Act

Comment

The object of the current Act is threefold, to promote excellence in health and safety management by employers, to prescribe and impose on employers duties in relation to the prevention of harm to employees, and for the making of regulations and codes of practice relating to hazards. The proposed amended objects go much further than this, widening the scope of the Act and producing an effect that is both significantly more prescriptive and significantly more punitive than is appropriate. While much of the principle involved can be readily accepted, the extended ambit of the new objects clause, and much of the subsequent detail, must be a cause of concern. It should also be recognised, contrary to the words of proposed new section 5(b), that it is an impossibility to suppose that “all hazards and harm” can be covered. Such harm as does occur is more often than not the consequence of a hazard that could not be readily foreseen. By the same token, fatigue and work- related stress may well be associated

more with domestic factors or personality disorders than with paid employment as such. They may, however, manifest themselves in the workplace, leaving the employer open to charges under the Act if it is amended in the way proposed. For just such reasons (together with the strict liability nature of the Act) it is invidious to deny employers the opportunity to insure against the cost of safety and health prosecutions (new section 5(g)). It should also be noted that the word "fatigue" is not qualified by the words "work-related". Employers should not be made responsible for fatigue resulting from an employee's private activities.

Recommendations.

Delete clause 6.

If the entire clause is not deleted:

Remove from paragraph (b) of new section 5(b) the words "so that all hazards and harm are covered, including those associated with fatigue and work-related stress".

If the above amendment is rejected:

Insert "work-related" before the word "fatigue" in paragraph (b) of section 5.

Delete subsection (g) from new section 5.

Clause 7 Significant hazards to employees to be minimized, and employees to be protected, where elimination and isolation impracticable.

Comments

This clause purports to amend section 10(2)(b) of the principal Act but appears to add nothing to the original meaning. It constitutes a distinction without a difference that may well lead to confusion as to the application of the clause.

Recommendation

Delete clause 7. Retain existing section 10(2)(b).

Clause 8 Information for employees generally.

Comment

Business New Zealand does not support the concept of an obligatory health and safety representative and, on the contrary, considers that relevant information should be supplied to all affected employees. Consequently, it submits that clause 8 is unacceptable.

Recommendation

Delete clause 8.

Clause 9 Repeal of section 14 of the current Act.

Comment

Business New Zealand does not support the repeal of section 14 of the principal Act which, it submits, already adequately and succinctly covers the issue of employee involvement in the development of workplace health and safety procedures.

Recommendation

Delete clause 9. Retain current section 14.

Clause 10 New section 18A inserted

Section 18A Duties of persons selling or supplying plant for use in place of work

Comment

This proposed new section requires those who sell or supply plant or equipment for use in workplaces to take all practicable steps to ensure that the plant or equipment is safe for its intended use. However, the extent of the section's intended application is unclear.

Some questions raised are:

Is the section intended to apply beyond the point of sale?

How far does the seller or supplier have to go to establish intended use?

Is the new section intended to apply to the loaning and hiring of equipment?

How can a seller or supplier ensure that the plant in question is "arranged, designed and made" so that it is safe for its intended use when some other person, such as an engineer, is responsible for "arranging" (setting out and installing) the plant and the seller is reliant on the expertise of the arranger, designer and manufacturer?

For how long a period must the equipment be maintained?

Does "been maintained" refer to the way the equipment has been looked after up to the point of sale? If not, how can the seller or

supplier ensure maintenance if he or she is not employed for that purpose?

The intent of the section is apparent but in pragmatic terms it would appear to impose a burden which no seller or supplier should be asked to bear – particularly given that applicable legislation already exists (Sale of Goods Act, Fair Trading Act and so on).

Recommendation

Delete clause 10.

If the above recommendation is not accepted:

Replace clause 10 with the following:

> "A person who sells or supplies to another person plant to be used in a place of work must take all practicable steps to ensure that the plant in question is safe for its intended use."

Clause 11 New Part 2A inserted

Section19A General duty to involve employees in health and safety matters

Comment

Business New Zealand supports the principles behind this proposed new section but submits that these are already covered by section 14 of the principal Act the retention of which is recommended earlier in this submission. However, the further provision, requiring an employer to take into account any approved code of practice for employee participation (section 19A(3)), is nothing so much as a means of introducing more prescription into what, even without it, represents an over-legalised system. Although guidelines have never been considered mandatory, this provision would make for the obligatory observance of any such guidelines developed for employee participation purposes. This new provision changes the role of a code of practice from guidance to something prescriptive and enforceable.

Recommendations

Delete section 19A

(4) if the above recommendation is not accepted add a further sub-section:

> "Notwithstanding anything provided for in this Part of the Act, compliance with those provisions is established if, regardless of enterprise size, a satisfactory level of employee involvement is already occurring."

Section 19B Development of employee participation scheme

Comment

Proposed new section 19B is a striking example of the way the amendment Bill moves from principle to prescription. As provided by existing section 14 – which Business New Zealand submits should be retained - employers must give their employees the opportunity to be involved in health and safety matters. But how this is done is left open so that whatever is put in place can accommodate the ethos of the individual workplace. By contrast, a system that distinguishes between workplaces of 30 or more employees and those with fewer than 30 (subsections (1) and (2)) immediately suggests that increasing establishment size would be foolish. Why acquire the amendment Bill's obligations? Not that Business New Zealand is suggesting there should be an imposition of an absolute obligation on smaller employers. Any such obligation, if introduced, should be confined to workplaces with more than 100 employees. Prescription of the kind proposed is, however, both undesirable and unacceptable.

Then there is the issue of seasonal labour fluctuations when sometimes the Bill's obligations would apply and other times not. And how do the obligations impact on volunteers? Even if such matters were not effectively policed, there could be little respect for legislation leading inevitably to inadvertent law breaking.

There is the further complication of partly-unionised workplaces. Any union present would have an automatic right of representation though only a minority of employees were union members and the union representative's views were not majority opinion.

The whole election process (subsection (3)) would be costly in terms of time, and, good faith directives notwithstanding, could become adversarial and counter-productive. However, given that a system was in place, requiring an expiry date (subsection (4)) would also be time wasting. And who would be eligible for election? It is entirely unclear whom the legislation considers an employee (subsection (5)). The "employer" with ultimate responsibility is frequently a manager although managers are themselves employees. Could a manager be an employee representative? Given ultimate employer responsibility, anyone elected to a health and safety committee has to be the best person for the job. So managers must be eligible for election. The same subsection (paragraph (b)) prohibits a committee from consisting of more employer than employee committee members. That suggests employee representatives will be able to outvote their employer counterparts, notwithstanding the employer's strict liability. Giving such power to a committee of this kind is totally unacceptable and, arguably is itself a breach of good faith. Moreover, the employer has no right to insure against any mistakes that might be made. Subsection (6),

requiring any code of practice (approved by whom?) to be taken into account, is a further anomaly. Codes of practice can never be more than guidelines.

Obligatory health and safety systems and the difficulties inherent in committee decision-making (with often reluctant participants) are not the most effective way of ensuring an employer's statutory obligations are met.

There is the further problem of whether, if a breach of good faith is alleged under section 19B(2), the allegation will be dealt with under the Health and Safety in Employment Act or under the Employment Relations Act. This should be clarified.

Recommendation

Delete section (19B) (clause 11).

If the above recommendation is not accepted:

Limit the application of subsection (1) to workplaces of 100 or more employees.

Amend subsection (2) to clarify whether any allegation of failure to act in good faith will be dealt with under the Health and Safety in Employment Act or under the Employment Relations Act.

Amend subsection (4) to provide for a review from time to time rather than an expiry date.

Amend subsection (5) to make clear that members must be individuals considered to be the best persons for the job, that managers are entitled to be employee representatives, and that employee representatives may not outvote employer representatives, namely,

"(5) If a system includes a health and safety committee, the committee must consist of representatives best qualified for the job and must –
(a) comprise -
(i) employee representatives, who may be members of management; and
(ii) representatives of the employer; but,
(b) in view of the strict liability imposed on the employer, in all issues regarding health and safety, employee representatives shall at no time be entitled to outvote the employer's representatives."

Amend subsection (6) to provide that any code of practice approved by employers *may* be taken into account in developing an employee participation system.

Section 19C Effect of failure to develop system if there are fewer than 30 employees.

Comment

As previously indicated, prescription is time wasting and generally undesirable. What is provided here is nothing so much as an open invitation to use health and safety as a bargaining tool – not the best way to develop appropriate safeguards.

Recommendation

Delete section 19C.

Section 19D Effect of failure to develop system if 30 employees or more.

Comment

As above: too prescriptive and time wasting and likely to produce an entirely inappropriate result.

Recommendation

Delete section 19D.

19E Filling vacancy for health and safety representatives
19F Employees or union may require employer to hold election for health and safety representatives.
19G Method of electing health and safety representatives

Comment

These proposed new sections typify the emphasis on prescription which makes the amendment Bill an unworkable document. It is just this kind of prescriptive approach that has led the ILO to recognise that placing the emphasis on principle rather than directing what is to happen achieves much the most successful outcomes. Furthermore, allowing any union to require the employer to hold an election for a health and safety representative (new section 19F) when many workplaces will be only partly unionised puts the focus the wrong way round. What is important is that employees, not unions, should be given the opportunity to be involved in workplace health and safety, because it is their – as well as the employer's - interests that are affected by the outcome of health and safety management. But genuine involvement cannot be forced while reluctant involvement achieves little. It cannot be too often reiterated that notwithstanding the

amendment Bill, workplace health and safety is the employer's ultimate responsibility. Furthermore, with unions covering only about 20% of the workforce, giving them a mandatory role makes little sense from a freedom of association point of view.

Recommendation

Delete proposed new sections 19E, 19F, and 19G.

Section 19H Functions of health and safety representatives

Comment

This section purports to move the health and safety focus away from the employer and on to a safety representative. Given that health and safety should be a shared management/employee responsibility with management (the employer) ultimately required by the principal Act to assume absolute responsibility this is unacceptable. Fostering positive health and safety management practices (new section 19H(a)) is implicit in the principal Act and is well understood. So too are the duties of employers in relation to hazard management. If some new hazard becomes apparent, it should be brought to the employer's attention by the person who identifies it, not by a solitary employee representative (the problem may become distorted in the telling). Given employer liability, any consultation on health and safety issues should be between the employer and a health and safety inspector, not between the inspector and an employee representative (new section 19H(c)). Promoting the interests of employees who have been harmed at work is another matter in which the employer must have primary involvement (new section 19H(d)), although in terms of the Injury Prevention, Rehabilitation and Compensation Act, the decision to provide vocational rehabilitation is initially a matter for the Accident Compensation Corporation. If the Corporation has determined that it is reasonably practicable to return an injured employee to the same employment in which he or she was engaged prior to injury, the employer must take all practicable steps to assist the claimant with vocational rehabilitation under the individual rehabilitation plan developed by the Corporation (see section 71 of the Injury Prevention Rehabilitation and Compensation Act). Consequently the health and safety representative function set out in new section 19H(d) conflicts with a the legislative requirement imposed on the employer by the Injury Prevention Rehabilitation and Compensation Act. Proposed section 19H(e) requires a health and safety representative to participate in any health and safety committee established in the workplace but this is an unnecessary provision since, if such a committee has been voluntarily established, it goes with out saying an appointed health and safety representative would participate in it. There is a very real concern that what is provided for here will undermine the vast improvement in employer-employee

communications achieved since the Health and Safety in Employment Act came into force. As well new section 19H(f), like section 19B(6), refers to a code of practice in obligatory terms. To give something voluntary in character the status of a legally binding instrument is not acceptable.

Recommendation

Delete proposed new section 19H.

If the above recommendation is not accepted:

Amend section 19H(c) to provide that if a health and safety representative does consult with a health and safety inspector this must be done in conjunction with the employer.

Amend section 19H(d) to remove the present conflict with the Injury Prevention, Rehabilitation and Compensation Insurance Act.

Amend section 19H(f) to recognise that a health and safety representative can be guided by any suggested functions set out in a relevant code of practice but is not legally required to perform any such functions. Thus:

> "(ii) … representing the representative.
>
> For the avoidance of doubt, any functions referred to in a relevant code of practice are for the guidance of health and safety representatives only, to be performed only if and when appropriate."

Section 19I No discrimination against health and safety representatives

Comment

The criticism here is of the requirement to have health and safety representatives and the assumption – inherent in the reference to section 107(g) of the Employment Relations Act 2000 – that such representatives will have union connections. Where a health and safety representative has been voluntarily appointed the question of discrimination is unlikely to arise but, in any event, the automatic assumption that being a health and safety representative necessarily constitutes involvement in the activities of a union is unacceptable.

Recommendation

Replace section 19I with the following:

> "For the purposes of section 104 of the Employment Relations Act 2000, the prohibited grounds of discrimination referred to in that section shall include acting as a health and safety

representative under the Health and Safety in Employment Act 1992."

19J Training of health and safety representatives.

Comment

As the amendment Bill's health and safety provisions currently apply, with no limitation on health and safety representative numbers, there is real potential for employees to nominate each other in this capacity, thus attracting an entitlement under proposed section 19J to two days' paid leave each year to attend approved health and safety training. To avoid any such outcome, the section should refer not only to sections 78 and 79 of the Employment Relations Act 2000 but should contain some formula similar to that set out in section 74 of the ERA to ensure a relationship between enterprise size and training allocation. Furthermore, the training concerned must relate to the needs of the enterprise – a general health and safety course, as currently possible under the ERA, would not be appropriate. By the same token, a distinction should be made between types of enterprise since many will have few health and safety concerns.

Recommendation

Include a formula for health and safety representative training allocation that takes account of enterprise size and limits accordingly both the number of health and safety representatives who may be appointed and the total number of days' leave available for training purposes.

Specify that any health and safety training undertaking must be relevant to the needs of the particular enterprise and qualify the right to take time off for training in situations where few workplace hazards exist.

19K Minister may approve occupational health and safety training.

Comment

The comment above applies equally to this proposed new section. In particular it must be stressed that general health and safety training is not adequate. If health and safety representatives are to have a useful role to play, training must relate to the needs of the specific workplace since what is appropriate will vary greatly from one workplace to another. "Consistency with the object of the Act" and "relevant to the role of a health and safety representative" are too non-specific to be helpful guides to what is required.

Recommendation

Amend section 19K to provide that any approved training must relate to the processes and equipment used in the workplace of the particular health and safety representative.

Clause 12 Codes of practice

Comment

For codes of practice to be developed by the Department of Labour for approval by the Minister without any requirement for industry consultation is entirely unacceptable. This section must make clear that before a code of practice can be developed full consultation must take place.

Recommendation

Reword clause 12 to ensure that no direction of the Minister is carried out without full industry consultation, as:

> "The Minister may direct the Secretary to prepare after full consultation with any affected industry, and submit for the Minister's approval in accordance with this section, … ".

Clause 14 New headings and section 28A and 28B inserted

Section 28A Employees may refuse to perform work likely to cause serious harm

Comment

This new provision fails to recognise that for many years health and safety issues have been a reason for refusing to work (see section 84 of the Employment Relations Act for the latest version of this kind of provision). New section 28A is therefore more in the nature of a belt and braces provision the presence of which adds little beyond confusion to long-accepted industrial relations practice. The confusion arises because some situations in which employees work are inherently likely to be harmful whatever protections are in place. However, from subsections (2) and (3) it appears that although there may be essential work to be done, these subsections would allow employees, in certain circumstances, to refuse to perform such work. While there must be a general duty to keep any work-place hazard free to the extent possible, subsections (2) and (3) are far too strongly worded and could well lead on to far greater hazards. For example, someone employed to type for two persons could, in terms of these sections, if required to type for a third, refuse to carry out his or her task because directed not to by a health and safety representative (subsection (2)) or because the risk of serious harm had "materially increased beyond the inherent or usual risk" (subsection (3)). The new

section would also increase the temptation to use health and safety matters as a bargaining tool. There is nothing to be gained by placing a third person (the employee representative) between the employee and employer. The preferable option in any risk situation is for the employee to inform the employer as soon as possible. Notwithstanding section 28A(6)(b), this not an employment relationship problem but a hazard management issue.

Recommendation.

Delete proposed new section 28A and continue to rely on section 84 of the Employment Relations Act.

Enforcement by other agencies.

Section 28B Enforcement by other agencies

Comment.

There is something rather strange about bringing sectors such as aviation, maritime and rail under the ambit of the principal Act and then making provision for their own agencies to administer the statute. Given the nature of such industries the better course would be to allow them to continue under the regimes that currently apply. There is also the fact that opening up the right to prosecute to other agencies will be the cause of great uncertainty to affected employers and an impediment both to employment and business growth. Employers will have no way of knowing whether a prosecution is inevitable and, if so, which agency will be involved.

Recommendation

Delete section 28B. Retain regimes that currently apply to specific sectors.

Clause 15 Functions of inspectors.

Comment

It is manifestly impossible for an inspector to determine whether or not the principal Act “is likely to be” complied with – the future is simply unknowable.

Recommendation

Delete the words “or is likely to be”. Reword: “has been or is being”

Clause 16 Powers of entry and inspection

Comment

This clause purports to extend considerably an inspector's powers of entry and gives rise to some specific queries as to what is intended. What for example, would be the effect of paragraph (b) which provides for a right of entry whether or not "the place of work is still a place of work"? Would this allow an inspector to enter private premises formerly used as a factory but since converted into apartments? Does it permit entry to private property once any building or maintenance work has been completed? The section is entirely too broad and appears to invest inspectors with powers not even enjoyed by the police force. The right of entry provisions in section 31 of the principal Act are entirely adequate for the purpose for which they were provided.

Recommendation

Delete clause 16.

Clause 17 Powers to take samples and other objects and things.

Comment

The point to be made about this amendment to section 33 of the principal Act is that if there is to be delegation to other authorities of the powers provided to inspectors under the Act then the interface between inspectors and other authorities must be made clear. Otherwise there may be real confusion as to where responsibility lies. The amendment also uses the phrase "is likely to be" found in clause 15 and about which disapproval has been expressed under that heading.

Recommendation

Make clear how inspectors are to interface with other agencies if the inclusion of industries currently covered by their own regimes is to go ahead. This may require an amendment not only to clause 17 (section 33) but to sections 31 and 30(b) of the principal Act.

Delete from clause 17 the words "or is likely to be" and amend to read "or is being".

Clause 18 New heading and section 46A inserted

Section 46A Trained health and safety representatives may issue hazard notices

Comment

As noted in Part 2 of this submission, the effect of clause 46A is to move health and safety management and decision-making from

employers to employee representatives, despite the fact that it is employers who carry strict liability responsibility - a situation exacerbated by the ability of health and safety representatives to notify inspectors that a hazard notice has been issued (subclause (4)). Once an inspector has been notified, the employer will become a "higher category offender" (section 49) subject to a maximum $500,000 penalty or two years' imprisonment. A clause of this nature (particularly in combination with new infringement notification provisions) has the obvious potential to encourage an adversarial approach to health and safety, the good faith provision of subsection (5) notwithstanding. In any event, in terms of sections 8, 9 and 10 of the principal Act, the ability to issue hazard notices should relate only to "significant" hazards.

Recommendation

Delete clause 18/new section46A.

Amend subsection (1)(a) by inserting "significant" before "hazard" and further amend to accommodate this change.

If the entire clause/section is not deleted:

Delete subsection (4).

Clause 19 Offences likely to cause serious harm

Comment

Given the considerable gap between the current maximum fine and the average imposed - reflecting the generally small size of New Zealand businesses - there is nothing to be gained from an increase in penalties of the magnitude proposed. Accidents are typically unforeseen events, not deliberate infringements. A "big stick" approach is unhelpfully retributive, doing nothing to provide for health and safety education or to ensure that an employer has the means to develop sounder health and safety systems in the future.

Recommendation

Delete clause 19.

Clause 20 Other offences

Comment

Comments made in relation to clause 19 apply equally to clause 20. In addition, there is nothing to be gained in terms of furthering good industrial relations, or indeed of encouraging the development of new

firms and consequent new employment opportunities, by subjecting employers to fines in the following new circumstances**:**

1. Where employees claim not to have had sufficient opportunity to be involved in health and safety matters (new section 19A),

2. Where an election of health and safety representatives has not been held (new section 19F), or

3. Where there has been entry into an insurance policy indemnifying the employer for liability to pay a fine or infringement fee under the Act (new section 56I(1)).

Recommendation

Delete clause 20.

Clause 21 Section 52 repealed

Comment

Existing section 52 provides that any failure to allow employees the opportunity to be fully involved in the development of hazard management procedures may be taken into account where an employer has been convicted of failing to comply with the Act's hazard management provisions. It is entirely adequate to meet any perceived need to penalise an employer where compliance failure has been established.

Recommendation

Delete clause 21. Retain section 52.

Clause 22 New section 53 to 54D substituted

Section 53 Proof of intention not required

Comment

If the extension of section 50(1) to cover infringement notices and new sections 19A, 19F and 56I(1) is to proceed (see under clause 20, above), these should certainly not be made the subject of strict liability. This is particularly so given the maximum fine imposable (even under the principal Act) and the evidential difficulties that will inevitably arise, notably in regard to section 19A and to infringement notices. Under the current Act strict liability can prove inequitable and, given the no fault nature of accident compensation legislation, produces the odd result of apportioning blame where there has been no intention to injure and where any injury caused has by no means been reasonably foreseeable.

Recommendation

Delete proposed new section 53.

Replace existing section 53 with the following:

> "Section 53. Proof of intention required – In any prosecution for an offence under this Act it is necessary to prove that the defendant –
>
> (a) Intended to take the action alleged to constitute the offence; or
>
> (b) Intended not to take the action, the failure or refusal to take which is alleged to constitute the offence."

Section 54 Notification to Secretary of interest in laying information or issuing infringement notices

Comment

The open-ended nature of this clause is of great concern since it appears to let anyone (including officious bystanders) seek from the chief executive of the Department of Labour information as to whether or not a particular matter has been, or is to be, subject to either the laying of an information or the issuing of an infringement notice. The words "anyone with an interest in knowing" are prima facie extremely broad, in no way limiting inquiries to persons with an immediate interest in the matter in question. Since, as will be apparent from subsequent comment, infringement notices are themselves considered to be an inappropriate means of preventing workplace accidents, this provision is also to be considered inappropriate.

Recommendation

Delete proposed new section 54.

If the above recommendation is not accepted, reword 54(1) as follows:

> "Where a person with an immediate interest in the matter considers that an infringement has occurred, that person may notify the Secretary in the prescribed manner seeking information as to whether the particular matter has been, or is to be, subject to either the laying of an information or the issuing of an infringement notice."

Section 54A Laying an information

Comment

In the interests of industrial harmony and employer certainty it is inappropriate that persons other than inspectors should be able to lay an information in respect of an offence under the Act. At the very least, the right to lay an information should be limited to someone with an immediate interest in the matter in question (as above). In any event, terminology used in the proposed section appears to be confused. If, as subsections (1) and (2) indicate, for an information to be laid there must be an offence under the Act, there must also be an apparent, not a "possible", defendant (the word used in paragraphs (a), (b) and (c) of subsection (2)). The laying of an information would seem to require a greater degree of certainty as to the identity of the offender than the word "possible" indicates. It is also unusual to consider an offence committed before it has been proved. With respect to subsection (3), the double jeopardy aspect of this subsection (allowing an information to be laid by any person even though an enforcement authority has taken prosecution action) is abhorrent and the subsection should not be allowed to stand. All in all, it would be far better from an industrial relations standpoint, were prosecutions in relation to health and safety offences confined to the bringing of proceedings by inspectors should an accident seeming to merit prosecution occur.

Recommendation

Delete section 54A.

If the above recommendation is not accepted, delete subsection (3) and reword section 54A(1) and (2) as follows:

"(1) An inspector may lay an information in respect of an alleged offence under this Act.

(2) Other than an inspector, a person with an immediate interest in the matter may lay an information in respect to an alleged offence under this Act if –

(a) an inspector has not laid an information or issued an infringement notice against an alleged defendant in respect of the same matter; and

(b) an enforcement authority has not taken prosecution action under any Act against an alleged defendant in respect of the same incident, situation, or set of circumstances; and

(c) any person with an immediate interest in the matter has received notification from the Secretary under section 54(2) that an inspector has not, and will not

lay an information or issue an infringement notice against an alleged defendant in respect of the same matter;

and the person with an immediate interest in the matter has first informed the employer concerned of his or her intention to lay an information."

Section 54B Time limit for laying information

Comment

This proposed new section, if proceeded with, should prove a fruitful source for legal argument. Whether anyone else would benefit is arguable to say the least. The section is far from helpful as a means of ensuring that health and safety matters are dealt with effectively undermining, as it does, an employer's capacity to manage hazards in the way the principal Act requires.

Recommendation

Delete proposed new section 54B.

Section 54C Extension of time for person other than inspector to lay information

Comment

This is another time wasting section where the only persons likely to benefit are the lawyers involved. Not only does it involve considerable uncertainty for an employer but it is of no assistance whatsoever to the pursuit of an effective health and safety regime, undermining the employer's 's ability to ensure that a satisfactory scheme is in place.

Recommendation

Delete section proposed new section 54C.

Section 54D Extension of time if inspector needs longer to decide whether to lay information

Comment

If previous new sections are undesirable this section represents nothing so much as a bureaucratic nightmare. It is clearly not at all helpful to employers endeavouring to carry out their statutory duty of identifying and dealing with hazards in the best way possible since it leaves them in suspense as to whether or not something done or not done is in fact a breach of the Act. It would be far better were the Bill to emphasise the educative role inspectors should play.

Recommendation

Delete proposed new section 54D.

Clause 23 New headings and sections 56A to 56I inserted

Infringement offences

Section 56A Infringement offences
Section 65B infringement notices
Section 56C Prior warning of infringement offence
Section 56D Inspector may require information
Section 56E Procedural requirements for infringement notices
Section 56F Infringement fees
Section 56G Payment of infringement fees
Section 56H Effect of infringement notice

Comment

See comment in relation to section 50(1) (clause 20) re the inclusion of sections 19A, 19F, and 56I under the definition of "Other offences" (section 56A)). That aside, the move to allow OSH inspectors to impose infringement notices specifying the payment of an infringement fee destroys that organisation's credibility as a provider of education and assistance to employers. This aspect of the amendment Bill, together with its information laying provisions, will prove particularly disadvantageous to smaller employers, many of whom would welcome the guidance and help of a well-informed State agency. Instead, the Bill adopts a litigious rather than an educative approach that will make it extremely difficult for employers to seek the assistance of OSH in case they are subsequently penalised for doing so. Moreover it is invidious to provide that an employer convicted of an offence under the Act then becomes susceptible to an infringement notice (section 65(E)). A provision of this kind results in an unwarranted double jeopardy that is entirely unacceptable. With regard to the infringement fee to be imposed (section 56F), it is ludicrous to suppose that a one-size-fits-all fee – regardless of enterprise size and circumstances (including individual circumstances) - can lead to anything other than an increased backlog of unpaid fines.

Recommendation

Delete sections proposed new section 56A – 56H.

If the above recommendation is not accepted:

Delete paragraph (e) from proposed new section 56C.

Revise the infringement fees set down in section 56F to take account of company size and circumstances, including the circumstances of individuals.

Clause 56I Insurance against fines unlawful and of no effect

Comment

As has been previously emphasised, the principal Act imposes strict liability on every employer who comes within its coverage, that is to say, no element of intention to commit an offence is required to obtain a conviction. Furthermore the offences are statutory in nature and are not offences resulting from a criminal act. An employer faced with a conviction or an infringement fee under the Act is scarcely profiting from the proceeds of crime by having insured against the possibility of such an event. The purpose of the insurance contract is to ensure that in such circumstances the business remains viable with the concomitant effect that employment opportunities can still be offered. The situation is the more invidious given the uncertainties inherent in the amendment Bill, its extension to the transport sector (self-evidently prone to unanticipated accident-inducing situations), its coverage of voluntary organisations, and its new offences relating to employee/union involvement. Employees cannot be made to take part in health and safety management if they do not wish to and, in any event, it is the employer who bears the ultimate responsibility. Decision-making by committee is rarely satisfactory. Recognising, therefore, the enormous problems raised by the amendment Bill and the strict liability employers already face, it is objectionable in the extreme not to permit them to protect themselves against the possibility of a conviction/infringement fee for a non-criminal, statutory offence.

Recommendation

Delete proposed new section 56I.