Submission

By

to

Transport and Industrial Relations Select Committee

on the

Health and Safety Reform Bill

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

HEALTH AND SAFTEY REFORM BILL ("the Bill")

INTRODUCTION

1. BusinessNZ welcomes the opportunity to submit on the Bill and asks to be heard by the select committee.

2. BusinessNZ recommends that the Bill proceed, but with amendments, as set out in the body of this submission.

COMMENTARY

3. For the most part, the Bill follows the structure and content of the Australian Model Work Health and Safety Act ("the Model Law"). This is as recommended by the Independent Taskforce on Workplace Health and Safety, in which Business New Zealand participated.

4. By and large the Bill is appropriate for its stated purpose. However, there are aspects that may be regarded as ambiguous, or which may lead to inappropriate or unintended outcomes. These are enumerated in the body of this submission together with recommendations for improvement. We are also aware of industry specific examples where ambiguity may present itself. We understand that these will be identified in the separate submissions of a number of our members and we urge the Committee to study these in the context of our remarks herein.

5. It is to be regretted that discussion drafts of regulations proposed to accompany the new legislation have not been available for consideration before the deadline for submissions on this Bill. Indeed, the extension of time granted by the select committee was in large part to permit this to occur. In the absence of knowledge of the scope and tenor of the proposed regulations, it may be that further consideration will need to be given by the select committee when the discussion documents are published and feedback on them has been received.

6. We understand that the discussion document(s) on the proposed suite of regulations that will accompany the Bill are nearing completion and will be available for comment before the select committee makes its report to Parliament in September. That being so, we reserve the right to make further supplementary submissions to the committee on any matter contained in the proposed regulations that would impact on the interpretation or management of the matters covered by the Bill.

Part 1 – Health and safety at work

7. Part 1 contains proposed preliminary provisions, interpretation, and application sections. Changes from the present regime include

    a. A new primary duty holder to be known as ‘a person conducting a business or undertaking’ (‘PCBU’), whose duties will replace the current duties of employers, principals and suppliers under the HSE Act.

    b. Using the term “worker” rather than “employee”, thus including contractors, subcontractors, and others.

    c. Introducing a new test of “reasonably practicable” (as opposed to “all practicable steps”) taking into account risk, cost and other circumstances.
    d. Introducing a new category of duty holder (ie “officers”) encompassing company directors and people in similar positions in a body corporate or unincorporated body and other persons with significant decision making responsibilities in a business (for example, the chief executive or chief financial officer), and partners in partnerships.

Comments

Subpart 3 – Interpretation

8. The term “*officer*” is defined in clause 12, the meaning of the term “PCBU” in clause 13, and the meaning of the term “worker” in clause 14. As in some circumstances a person may fulfil multiple roles, the inter-relationship between these clauses is important. An officer includes a director or partner and “*any other person who makes decisions that affect the whole, or a substantial part of, the business of a PCBU*”. This definition is itself ambiguous, but this uncertainty is further compounded by c13(b)(i) which states that a PCBU does not include “a person conducting a business or undertaking to the extent that the person is employed or engaged solely as a worker in, or an officer of, the business or undertaking”. Because status as an "officer" attracts significant potential culpability by virtue of clauses 42-45, we **recommend** that the term is unambiguously defined in the legislation.

9. Much of an assessment of how well a PCBU has complied with the law will depend on matters of degree. To this end it is noted that there is a lack of definition of what is deemed to be “*serious”* and what is not. While it will be up to the courts to determine degree, it is our view that they will benefit greatly from the guidance that would be available from defining this term. Moreover, given the size of penalties proposed, a definition would ameliorate the possibility of

disproportionate penalties being applied in any given circumstance. We **recommend** that the term “serious” be defined.

10. Clause 14 provides that a “constable” is a worker within the meaning of “worker” in the Bill. However, while “constable” is in common use in Australia as a generic term for police officers, it is somewhat antiquated in New Zealand. The term “police officer” is the compatible generic term in New Zealand and we **recommend** it should be used instead.

Subpart 4 - Key principles relating to duties

11. Clause 25 (Person may have more than one duty) is capable of causing confusion, as there are many different scenarios in which multiple PCBUs may coexist in a workplace. These include construction sites, ports, forestry operations, manufacturing plants, and many more. While it may prove difficult to amend the Bill to give sufficient guidance on how to comply with the proposed duties in such cases, we **recommend** that guidance materials be prepared to support the new Act. These may comprise any or all of regulations, code of practice or guidelines

12. Clause 28 (PCBU must not levy workers) prohibits a PCBU from imposing a levy or charge for anything done or provided in relation to health and safety including protective clothing and equipment [28(1)]. It also prohibits a PCBU requiring a worker to provide his or her own protective clothing or equipment [28(2)]. This second restriction applies whether or not the PCBU pays the worker an allowance or extra salary or wages instead of providing the protective clothing or equipment [c28(3)]. In situations where there is a pre-existing employment agreement which provides for such allowances, a PCBU may have to pay for protective clothing and/or equipment twice, as legally the PCBU is unlikely to be able to unilaterally remove the allowance and affected workers may not consent to removal of such clauses from their employment agreement.

13. Our preference is that the parties should be able to negotiate suitable arrangements, particularly in relation to protective clothing e.g. full employer provision, or the reimbursement of employee expenses, or the provision of an allowance. However, if the Bill is to mandate employer provision, we **recommend** that it should also provide that this statutory obligation over-rides any pre-existing agreement for the provision of allowances, which become null and void on the commencement of the provision.

14. Clause 29 (No contracting out) prohibits duty-holders contracting out of their responsibilities. This is entirely appropriate. However, it could be argued that there would be greater certainty if, in workplaces where there are numerous duty holders and multiple

PCBUs with overlapping coverage, the parties were able to determine and document how the various health and safety responsibilities are to be allocated and managed. Not only would this promote transparency, accountability, and the efficient use of scarce resources, but we anticipate it would lead to enhanced health and safety outcomes. Accordingly, we **recommend** that the Bill should make specific provision for such contractual arrangements, with the necessary safeguards.

Part 2 – Health and safety duties

15. Part 2 defines the proposed duties of PCBUs, incident notifications, authorisations for work and workplaces and penalties. Key changes include:

    a. Establishing that the primary duty of care of a PCBU is to ensure, so far as is reasonably practicable, the health and safety of workers engaged directly or indirectly or whose activities are influenced by the PCBU. In addition, a PCBU must ensure, so far as is reasonably practicable, that the health and safety of others is not put at risk by work carried out as part of the conduct of the business or undertaking.

    b. Providing that the duties apply "cradle to grave" to the design, manufacture supply and operation of anything that carries a health and safety risk.

    c. Requiring "officers" to undertake due diligence to ensure that those in governance roles proactively manage health and safety.

    d. Placing obligations on workers and others to take reasonable care for their own health and safety and for the health and safety of those around them.

    e. Introducing a three-tier system of offences based on the degree of recklessness and whether a risk of death or serious injury or illness arose. Stronger maximum penalties (up to $3 million for a body corporate, and $600,000 and/or five years in prison for an individual for the most serious offences) are proposed.

Comment

16. We support the expanded definitions of duties for PCBUs. These make it clear that the duties apply from design to operation. Making this clear will have long term benefits.

17. We note that the government has followed through on the recommendation of the Independent Taskforce for more significant penalties. While many businesses may have concerns in this regard there is general recognition that New Zealand's generally

poor performance in health and safety needs attention; the penalties regime is one means of sending this message.

Subpart 3 – Offences relating to health and safety duties

18. Clause 42 identifies three categories of those liable to penalties for offences against the provisions of the Bill. There are;

    a. an individual who is not a PCBU or an officer of a PCBU,
    b. an individual who is a PCBU or an officer of a PCBU, and
    c. *any other person*.

19. The term "person" is not defined in the Bill. While it has been interpreted under current law as including such entities as bodies corporate, it is not clear if the Bill carries this interpretation over.

20. The Bill provides for significantly higher penalties than at any time in the past. It will be important that these are applied consistently, appropriately and fairly. Given that fines are also cumulative, there is potential for penalties to be economically fatal to some businesses, especially small ones, unless they are applied with appropriate consideration of the relative seriousness of the offence. It is therefore important that it be clear in the Bill as to who is captured by the various categories of those may attract penalties We **recommend** that "*person"* should be defined in the Bill to avoid confusion.

21. Clause 47 (Liability of certain office holders) exempts members of boards elected under the Local Electoral Act 2001 from the duties provided in the Bill. We believe this is inappropriate, as such officers are in positions analogous to elected directors of business organisations, and oversee organisations that employ workers and managers who are subject to the Bill's provisions. We **recommend** that this exemption be deleted.

Subpart 4 – Duties to notify notifiable events and preserve sites

22. Clauses 10 and 11 (Meaning of notifiable injury and illness, and incident) are comprehensive and should be adequate for their intended purpose. However at the end of each of the relevant sections (10(3) and 11(c)) the Bill provides that the definition does not include illness or injury of a "prescribed kind". This term is not defined but appears to relate to anything that may be prescribed in regulations that support the proposed Act. If it is intended that regulations may exclude specified issues from the definitions in the Act, we **recommend** that this should be made clear.

23. Clause 52 (Requirement to keep records) requires a PCBU to keep records of each notifiable event for at least five years from the date on which the notice of the event is given to the regulator. We

recommend that the Bill confirm that in the event of a change in ownership, the new PCBU assumes this obligation.

24. Clause 53 (Duty to preserve sites) requires that, in the event of a notifiable event the PCBU must, so far as reasonably practicable, ensure that the site is not disturbed until authorised by an inspector. While we accept the rationale for this requirement, we note that any significant delay in the inspection of a site could have a detrimental impact on the on-going work activity at a site. Accordingly we **recommend** that there should be an obligation on the regulator to discharge its incident inspection functions in a timely manner.

Part 3 – Engagement, worker participation and representation

25. Part 3 covers worker participation, the role of health and safety representatives, and discriminatory and misleading conduct. Changes include:

    a. A greater emphasis on worker participation in health and safety, including a requirement that all PCBUs have worker participation practices appropriate to their workplace. This is a change as, currently, worker participation systems are only required in workplaces with more than 30 employees or where a worker or union requests one.

    b. In relation to health and safety representatives, requirements that PCBUs:
        i. Facilitate their appointment
        ii. Consult them on health and safety matters;
        iii. Allow them paid time off for training within three months of training being requested;
        iv. Provide the time and resources needed for them to perform their roles; and
        v. Give them access to health and safety information.

    c. Trained health and safety representatives will be given powers to issue provisional improvement notices to persons they believe are contravening the Health and Safety at Work Act or regulations. “Trained” is not defined in the Bill, the standards to be met are to be provided in accompanying regulations.

    d. PCBUs, workers and their representatives to be required to make reasonable efforts to achieve a timely and effective resolution of any issues that arise. Parties will be able to access resources such as guidance and information, an inspector, or mediation, to assist with this. This approach is more flexible than the Model Law which requires PCBUs, workers and their representatives to agree on an issue resolution procedure (or in the absence of agreement to follow a set default procedure).

e. Workers are to make up at least half of any workplace health and safety committee.

f. An extended right to stop unsafe work will be created. This will allow workers to cease work that they believe may expose them to a serious health and safety risk, and to allow workers to refuse to carry out work that may expose another person to a serious risk of harm. This right exists now in the Strike provisions of the Employment Relations Act, but is being made more specific. Trained health and safety representatives will also have power to direct unsafe work to cease.

g. Worker protection from adverse, coercive and misleading conduct in connection with health and safety.

Comment

26. The clauses in the Bill relating to worker participation do not send a clear message that businesses are free to set up their own health and safety systems, albeit that this is what is proposed. The bottom line requirement is that they develop an approach to health and safety that is appropriate to the nature, size and complexity of their businesses. This message is somewhat overtaken by the degree of prescription provided for the appointment and support of workplace representatives and health and safety committees. We **recommend** that a preamble that places the various options in context be inserted at the head of Part 3.

27. The requirement to consult workers in matters of health and safety is set out clearly in the Bill. However what is not clear is the relationship between these provisions and the obligations of good faith contained in sections 4 and 32 of the Employment Relations Act.

28. These sections have been interpreted by the courts to impose a duty to consult on all matters affecting the employment of employees. Some employers have expressed concern that this broader duty will "muddy the waters" and permit health and safety issues to be drawn into discussion affecting other aspects of employment. In particular, where collective bargaining is afoot proposals for change including to health and safety processes and policies may be caught by the injunction in section 32(1)(d)(iii) to not do anything that might undermine the bargaining. In other words the fact that collective bargaining is afoot may be used to blunt initiatives related to health and safety. This should not be allowed to occur.

Subpart 2 – Health and safety representatives

29. Clause 71 (Health and safety representative may enter and inspect workplace) permits a representative to enter workplaces and inspect them after giving reasonable notice. The wording of this clause suggests it is possible for a health and safety representative to enter a workplace other than their own. However clause 60 makes it clear that a health and safety representative must be a member of the workgroup, work sufficiently regularly and for long enough to enable them to carry out their function and be willing to take on the responsibilities. Clause 76 provides that representatives may perform the functions and exercise the powers only in relation to workers in the work group that elected them. It is thus not clear why the Bill should create statutory permission for a health and safety representative to enter a workplace that is almost certainly their own. This may give rise to interpretations that, for instance, a union official may be elected as a health and safety representative and use the powers conferred by the Bill to circumvent the more general rules relating to access provided in the Employment Relations Act. We **recommend** that this be clarified.

30. Clause 80 (Requirement to allow health and safety representative to attend certain training) requires a PCBU to comply with any prescribed requirements for the training of health and safety representatives and for leave to undertake the required training to be paid. We agree this is reasonable, but note that the existing Health and Safety in Employment Act 1992 sets maxima for paid leave, which is calculated on the basis of the number of employees a representative is responsible for representing. We assume that a similar approach will be adopted in new regulations which are yet to be developed, however we **recommend** that the Bill clarify that regulations can set maximum training leave entitlements and/or cap the amount to be paid for such training.

31. On the subject of training, many employers have expressed serious concerns that, given the Bill's wide, new and comprehensive duties and powers, the training provided, and the meaning of "trained" in the context of health and safety representatives, needs to be more than attendance at a course designed to introduce them to the content and meaning of the Bill. We **recommend** that "training" be designed and delivered against a competency framework so that a representative's competence to exercise the powers conferred upon them can be, and is, assessed and measured.

Subpart 3 - Health and safety committees

32. Clause 88 (Health and safety committees) requires a committee to be established within 2 months of either a health and safety representative or 5 or more workers in the workplace requesting that one be established. While we have no major concern about

setting up a committee at the behest of a representative, there is a serious disproportionality in the 5 or more workers criterion. A major proportion of New Zealand businesses employ 5 or fewer workers. In such cases, establishing a health and safety committee requires agreement of (or close to) 100% of the workforce, whereas the proportion in large businesses will be a small fraction. We **recommend** this be addressed to ensure perceptions of balance and fairness. No specific mechanism is recommended, but it may be worth considering a graduated approach using percentages instead of absolute numbers

Subpart 5 - Right to cease or direct cessation of work

33. Clause 107 (Health and Safety Representative may direct unsafe work to cease) introduces a new ability for a trained worker health and safety representative to direct work to cease if it is unsafe.

34. There are a number of conditions that must be met before a representative may issue such an instruction. There is also significant overlap here with clause 106 which permits a worker to unilaterally cease unsafe work. However, what is not clear in the Bill is how these provisions relate to or are influenced by the strike provisions of the Employment Relations Act 2000.

35. We **recommend** that the Bill ensure that any capricious action on the part of more militant workers is capable of early redress, as well as ensuring that the withdrawal of labour from unsafe work may not form part of wider industrial relations situations in the workplace. To this end, we **recommend** that the Bill make it clear that the provisions of Part 8 of the Employment Relations Act 2000 apply to the cessation of work under the provisions of the Bill.

CONCLUSION

36. BusinessNZ supports the Bill in terms of its objectives and most of its content. However in BusinessNZ's view there are some matters that need further thought before they can sustainably achieve their aims.

37. Broadening the definitions of coverage and duties means that no one escapes the need to be focused on health and safety from the board room to the coal face, from owner, to manager, to worker to external; contractor and others. All are now clearly covered.

38. The introduction of a new test of "reasonably practicable" will allow a more balanced approach to interpretation of the law, and making the provisions governing worker participation more broad will be of long term benefit to most.

39. Care will need to be taken to ensure that the expansion of power of workers' representatives is balanced with rigorous competency based training and adequate legal protections.

Paul Mackay
Manager Employment Relations Policy
BusinessNZ

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

BusinessNZ is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, Business Central, Canterbury Employers' Chamber of Commerce (CECC), and the Otago-Southland Employers' Association (OSEA) – 72 affiliated trade and industry associations, and 83 major corporate members Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the breadth and depth of the entire New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council (BIAC) to the Organisation for Economic Cooperation and Development.