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New Zealand and the Proposed Australian Model Workplace Health and Safety Act

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Introduction

This paper compares the scope and coverage of the proposed Australian Model Workplace Health and Safety Act (MWHS Act) with the New Zealand Health and Safety in Employment Act 1992 (HSE Act). It contrasts broader coverage of "workers" and "others" under the primary duties of the MWHS Act, including volunteers, children and other people in the workplace with coverage under the HSE Act. It identifies other key points of difference, including:

(a) Key "General" or "Primary" Duties of the HSE and MWHS Acts;
(b) The Requirement for Risk Management;
(c) Directors' and Officers' Duties; and
(d) Consultation, Worker Participation and Discrimination / Victimisation.

The Scope of "General" or "Primary" Duties

Key General or Primary Duties

The MWHS Act imposes very broad duties in comparison with the HSE Act, some of which seem very open-ended and undefined.[1] The new duties pursuant to the MWHS Act will be held by a "Person Conducting a Business or Undertaking" (PCBU) rather than an "Employer" pursuant to the HSE Act.

The "General" or "Primary" Duties are to protect the health and safety of "employees" (in the HSE Act) or "workers" (in the MWHS Act), framed in terms of what is "reasonably practicable."

Section 19 of the MWHS Act provides that a PCBU must ensure, as far as is reasonably practicable, the health and safety of workers who are: [2]

(a) directly engaged to carry out work for their business or undertaking;
(b) placed with another person to carry out work for that person; or
(c) influenced or directed in carrying out their work activities by the person, while workers are at work in the business or undertaking.

Pursuant to s 19(2), a PCBU must also ensure, as far as is reasonably practicable, that the health and safety of *other persons* is not *put at risk* from work carried out as part of the business or undertaking. The employer's primary duty under the HSE Act does not extend to "other persons"

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[1] Section 16 of the HSE Act limits general duties to a warning for some non-employees. See also *Department of Labour v Berryman* [1996] DCR 121; *River Valley Adventures v Maritime NZ* HC Palmerston North CRI 2010-454-15, 17 December 2010; *Department of Labour v Dominion Bookbinders Ltd* DC Manukau CRI 2009-092-503893, 31 March 2010. See also ss 16 and 18 HSE Act regarding contractors, subcontractors and their employees.

[2] SafeWork Australia "Explanatory Memorandum – Model Work Health and Safety Bill 2010" (2010) at [77] <www.safeworkaustralia.gov.au>.

like the duty in the MWHS Act. Rather, s 15 of the HSE Act merely sets out that every employer shall take "all practicable steps" to ensure that no action or inaction of any employee while at work harms any other person.

The key things a person must do to satisfy the duty of care are listed, and includes providing and maintaining a work environment without risks to health and safety, and provision and maintenance of safe systems of work and safe plant and structures. The phrase "put at risk" is similar to "expose to risks." A United Kingdom case applying duties not to "expose [the public] to risks" has held that bacteria causing legionnaire's disease which escaped from a cooling tower could expose members of the public within 450 metres to risks to their health and safety. The prosecutor did not have to show that members of the public actually inhaled the bacteria, it was sufficient that there was a risk the bacteria were in the 450m range.[3] The HSE Act would probably not allow this outcome as the requirement is that the hazard does not harm any person therefore, actual harm must be proven.

A limiting factor in the MWHS Act may be the Object of the Act of "protecting workers and others against harm…through the elimination and minimisation of risks." This may be interpreted as requiring actual harm to be shown in order to obtain a remedy pursuant to the MWHS Act. Section 17 of the MWHS Act sets out that a duty imposed on a person to ensure health and safety requires the person to eliminate risks to health and safety so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks as far as is reasonably practicable.

Duty of a "Person Who Controls a Place of Work"

Pursuant to s 20 of the MWHS Act, a "person with management or control of a workplace" must ensure so far as is reasonably practicable that the workplace, the means of entering or exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person. Section 20 also makes it clear that the duty holder may control the place of work in whole or in part.

Section 16 of the HSE Act provides considerable divergence from the levels of protection under the MWHS Act. Pursuant to s 16, a person who controls a place of work must take all practicable steps to ensure that no hazard that is or arises in the place harms people in the vicinity of the place (including people in the vicinity of the place solely for recreation or leisure) or people who are lawfully at work in the place. People who are at the place of work with the express or implied consent of the person who controls the place of work, and have paid the person to be there or undertake activity there, or are there to undertake activities that include buying or inspecting goods, are protected in the same way as people lawfully at work in the place.

A person who controls a place of work must only take all practicable steps to warn other people who have been expressly authorised to be in the place of work; and people who are working at the place of work under the authority of any enactment of any significant hazard that is or arises in the place of work. This hazard must also arise from work that is or has been carried out for gain or reward in the place of work and not, in the ordinary course of events, be reasonably expected to be in or likely to arise in a place of work of that type. The person controlling a place of work must have also oral advice of the presence of the above people.

There is no duty in respect of any person who is in the place of work solely for the purposes of recreation and leisure. This leads to the odd situation in which people in the vicinity of the place of

[3] Richard Johnstone "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking" (1999) 12 AJLL 73 at 82.

work are offered greater protection than to those working at the place of work pursuant to an enactment or who have been expressly authorised to be there, and those people who are there solely for the purposes of recreation and leisure.

The original s 16 imposed on every person, who controlled a place of work (not being a home occupied by the person), a duty to take all practicable steps to ensure that people in the place of work and people in the vicinity of the place of work were not harmed by any hazard that was or arose in the place of work.[4] Following the case of *Department of Labour v Berryman*, there was concern about the extent of farmer liabilities. In that case, a farmer was prosecuted under the HSE Act after a beekeeper was killed when his truck went through a bridge maintained by the Berrymans. Hughes points out that there is now a lacuna in protection given to children and volunteers.[5]

He makes the point that a farmer would not usually be liable to warn authorised recreational visitors of "natural" hazards which do not arise from work, but would be liable to warn such people of significant hazards created through work activity, such as spray drift. He notes that trespassers, visitors to public facilities such as council parks, reserves and public hospitals and school grounds outside school hours are excluded. He also comments that children are not generally protected under the HSE Act while visiting workplaces. [6]

The limiting requirement for "control" pursuant to the HSE Act

The definition of "control" also limits the general duties under the HSE Act. Cases such as *River Valley Adventures v Maritime New Zealand*[7] and *Department of Labour v Diveco Limited*[8] have strictly interpreted the "control" requirement in the duty held by persons controlling a place of work pursuant to s16. In the *River Valley Adventures* case, an experienced river rafting guide drowned after two rafts collided in a set of dangerous rapids. One of the charges against River Valley Adventures was not "being in control of a workplace and failing to take all practicable steps to ensure that no hazard arose which harmed people."

In relation to the latter charge, the Court referred to the case of *Department of Labour v Diveco Limited* in which a diver supplied by the defendant company suffered decompression illness after collecting sediment samples from the seabed. The Court of Appeal held that controlling a place of work requires something more than mere occupation of a particular area for a short period of time in circumstances where the occupier does not assert and has no right to exclude others from the area.[9]

In reliance on the authority of the *Diveco* case, the Court in *River Valley* held that the length and nature of occupation of the place and the fact that River Valley did not and could not control the flow or conditions or who used or went through the rapid were relevant considerations. River Valley did not control the rapid as it could not give directions in relation to it, nor exercise authority over it.[10]

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[4] John Hughes, "Public Safety in Places of Work" [1998] ELB 46. See also John Hughes "Volunteers under the Health and Safety in Employment Act 1992" [2003] ELB 43 at 45.
[5] Ibid at 48.
[6] Ibid at 50.
[7] *River Valley Adventures v Maritime New Zealand* HC PMN CRI 2010-454-15, 17 December 2010.
[8] *Department of Labour v Diveco Limited* (2004) 2 NZELR 72 (CA).
[9] *River Valley Adventures v Maritime New Zealand* HC PMN CRI 2010-454-15,17 December 2010 at [28].
[10] Ibid, at [45]-[46]. However see also *Department of Labour v Dominion Bookbinders Ltd* DC Manukau CRI 2009-092-503893, 31 March 2010.

However in contrast to the above decisions, *Department of Labour v Dominion Bookbinders Ltd*[11] held that a gate was a place of work under the control of the defendant. In that case, the young child of a part-time cleaner at the defendant's premises was killed when a gate fell on her. Dominion Bookbinders was charged under s 15 with failing to take all practicable steps to ensure that no one was harmed by any action or inaction of one of its employees while at work. Dominion Bookbinders argued that the gate was not under its control because the gate was not the employee's place of work, and Dominion Bookbinders only had the right to use the gate under the terms of its lease. Further, it was argued that since the first defendant was not legally obliged to maintain the gate, it could not be said to have been "in control" of it.[12]

The decision in *Berryman* was notable since the gate was not a "transitory" place but a fixed location and subsequent legislative amendments widened the definition. The *Diveco* decision was also notable since the emphasis on exclusive possession or occupation in that decision was seen to have stemmed again from the transitory nature of the seabed. However, the Court held that, because the gate was intended as part of the first defendant's lease, it could be deemed to be a lessee of the gate. As occupier, the first defendant had the right to use the gate and to pass through it. In addition, there was physical control over the gate and an element of exclusivity arising from possession of a key and the power to prevent passage through the gate and entry to its premises. The gate was held to be a place of work, over which the first defendant had control for the purposes of the HSE Act.

In Australia, the position is quite different. As stated above, s 20 of the MWHS Act makes it clear that a duty holder may control the place of work in whole or in part. The cases on the definition of control confirm that more than one person may have control over a workplace at one time and control may shift from one person to another.[13] In addition, a workplace is defined in s 8 as including a vehicle, vessel, aircraft or other mobile structure and any waters and any installation on land, on the bed of any waters or floating on any waters. Therefore, the decisions in the *Diveco* and *River Valley* cases would probably be quite different had the incidents occurred in Australia.

Application of the HSE Act to volunteers

In 2002, amendments to the HSE Act created two classes of volunteers. The first is volunteers doing regular work to whom s 3C of the HSE Act applies and who have limited coverage as "deemed employees." The second is "other volunteers" who are covered by an unenforceable "duty of care" under s 3D.[14]

Under subs (1), s 3C applies if a volunteer does work for another person (i.e: an employer or self-employed person) with that other person's knowledge or consent, and the volunteer does the work for that other person on an "ongoing and regular basis" and the work is an integral part of the business of the other person. The relevant aspects of the HSE Act that apply are ss 6-12, covering the employer's general duties in relation to the provision of a safe workplace, s 19 which covers the employee's duties in relation to safety, and Part IV, concerning, amongst other things, enforcement.

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[11] *Department of Labour v Dominion Bookbinders Ltd* DC Manukau CRI 2009-092-503893, 31 March 2010.

[12] Anderson and others (eds) *Mazengarb's Employment Law* (looseleaf ed, LexisNexis) at 6002.15.4.

[13] *Inspector Dall v Brambles Australia Ltd* [2006] NSWIRComm 213. National Review into Model Occupational Health and Safety Laws "Second Report to the Workplace Relations Ministers' Council" (January 2009) at 70. See also *McMillan Britton & Kell Pty Ltd v WorkCover Authority* (NSW) (1999) 89 IR 464 at 480, *WorkCover Authority (NSW) (Inspector Callaghan) v Rowson* (unreported, Industrial Relations Commission, NSW,CT93/1156, 30 June 1994), referred to in *McMillan Britton & Kell Pty Ltd v WorkCover Authority (NSW)* (1999) 89 IR 464 at 479; *WorkCover (NSW) v Rowson* [1994] NSWIRC 76.

[14] John Hughes "Volunteers under the Health and Safety in Employment Act 1992" [2003] ELB 43 at 45.

Section 3C does not apply to a volunteer participating in a fundraising activity or assisting with sports and recreation for a sports club, a recreation club, an educational institution, assisting with activities for an educational institution outside the premises of an educational institution or providing care for another person in the volunteer's home. These people are covered by s 3D, together with volunteers who fail the test of "ongoing and regular" work under s 3C (1).[15]

The application of the MWHS Act to volunteers

Pursuant to s 7(1) a "worker" is defined as carrying out work in any capacity for a person conducting a business or undertaking, including work as a volunteer. However, pursuant to s 5 (9) of the MWHS Act, a volunteer association does not conduct a business or undertaking for the purposes of that Act. A volunteer association is defined in s 5(8) as a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

Therefore, the situation in Australia is quite different; there is no lacuna in protection for people whose volunteer work is not "ongoing and regular" when voluntary work is done for a PCBU. The authors of a leading text on the MWHS Act believe that it should be amended to provide clearer guidance as to when a charitable, social or sporting organisation may be considered to be a PCBU. They believe that provision for an exemption for an organisation or specific activities may be one way of achieving an appropriate balance between the need to ensure safety at work while not discouraging charitable or social activities.[16]

The Requirement for Risk Management

Both the definition of "all practicable steps" in the HSE Act and the general duties under that Act have been held by the courts to require "risk assessment".[17] Risks arising from the organisation of work, stress and peoples' behaviour must be assessed as well as those arising from physical hazards. However, risk management encompasses controlling and preventing the risk and not just assessing it.[18] This seems to have been accepted in *Gilbert v Attorney-General*[19] where the Court stated ss 7 – 10 of the HSE Act set out a minimum hierarchy of action in relation to the elimination of hazards in the workplace and that complements the general duty to take "all practicable steps."

The requirement for risk management is likely to be confusing and unclear to many employers as the word "risk" is not used in the HSE Act, and neither is the risk management process made clear. A clearer approach is taken under the MWHS Act. The management/elimination of risks is referred to in sections 17 and 19. Although it does not specify or require a process of hazard identification or risk assessment in the Act, it seems to be accepted that the general duties in all Australian workplace safety acts effectively require duty holders to engage in systematic OHS [risk]

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[15] Ibid at 45.

[16] Barry Sherriff and Michael Tooma *Understanding the Model Work, Health and Safety Act* (CCH Australia, 2010) at 23.

[17] *McKee Fehl Constructors Ltd v Department of Labour* HC Wellington AP 180/97, 25 September 1997; *Cadrona Ski Resort Ltd v Department of Labour* HC Invercargill CRI-2009-425-000016, 11 Sept 2009 at 21.

[18] Elisabeth Bluff and Richard Johnstone "The Relationship Between Reasonably Practicable and Risk Management Regulation" (2005) 18 AJLL 25 at 5.

[19] *Gilbert v Attorney-General* [2000] 1 ERNZ 332; *Attorney-General v Gilbert* [2002] NZCA 55 at 131. The requirement for risk assessment and management in cases of workplace stress was further clarified in *Rosenberg v Air New Zealand* ERA Auckland, AA 311/09 50500651, September 2009 at [196]; *Alo v NZ Customs Service* [2012] NZEmpC 47.

management.[20] The legislation instead allows for a process to be established via regulation with guidance from a code of practice.[21] The Code of Practice is clear and provides the sort of guidance that would also assist duty holders in New Zealand.

Directors' and Officers' Duties

Pursuant to s 56 of the HSE Act, any directors or agents of a corporate body who "directed, assented to, acquiesced in, or participated in" any failure to comply with the provisions of the Act is a party to and guilty of the failure.[22] The Department of Labour has indicated that they may prosecute any officer, director or agent of a company "primarily where the person(s) in question had clear knowledge that the situation in question was unsafe or otherwise contrary to the health and safety legislation".[23]

Cases which have resulted in convictions under this provision include *Department of Labour v Latham Construction*,[24] *Department of Labour v Dominion Bookbinders Ltd*,[25] and *Department of Labour v Ian Roebuck Crane Hire Ltd.*[26] The duties of officers and directors are much more stringent under the MWHS Act than the HSE Act. Clause 27 imposes a positive duty on officers of a PCBU to exercise "due diligence" to ensure that a PCBU complies with any duty or obligation under the Act.[27] Due diligence is defined in s 4 of the MWHS Act and requires active steps to be taken by the director or officer, taking reasonable steps:

(a) To acquire and keep up-to-date knowledge of occupational health and safety matters;
(b) To gain an understanding of the nature of the operations of the trade, business or other undertaking of the corporation and generally of the hazards and risks associated with those operations;
(c) To ensure that the corporation has available, for use and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the trade, business or other undertaking of the corporation;
(d) To ensure that the corporation has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
(e) To ensure that the corporation has and implements processes for complying with any duty or obligation of the corporation under the relevant provisions of the Act.

However, there have been divergent decisions on the liability of Directors, in *Workcover Authority of NSW (insp Dowling) v Barry John Coster*,[28] and *Inspector Ken Kumar v David Aylmer Ritchie.*[29]

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[20] National Review Into Model Occupational Health and Safety Laws "Second Report to the Workplace Relations Ministers' Council" (January 2009) at 31.
[21] Ibid at 171.
[22] Mazengarb above n 12 at 6000.11.
[23] Department of Labour *Keeping Work Safe* 2009.
[24] *Department of Labour v Latham Construction* (2004) Ltd DC Auckland CRN 07004503883, 12 March 2009.
[25] *Department of Labour v Dominion Bookbinders Ltd* DC Manukau, CRI 2009-092-503893, 31 March 2010.
[26] *Department of Labour v Ian Roebuck Crane Hire Ltd* DC New Plymouth CRI-2009-043-1927, 25 November 2009.
[27] SafeWork Australia *Explanatory Memorandum – Model Work Health and Safety Bill 2010* <www.safeworkaustralia.gov.au/ABOUTSAFEWORKAUSTRALIA/WHATWEDO/PUBLICATIONS/Pages/ExplanatoryMemorandum.aspx> at 119.
[28] *Workcover Authority of NSW (insp Dowling) v Barry John Coster* [1977] NSWIRComm 154.
[29] *Inspector Ken Kumar v David Aylmer Ritchie* [2006] NSWIRComm 323. See also National Review into Model Occupational Health and Safety Laws, above n 20 at 60, quoting M Tooma *Tooma's Annotated Health and Safety Act* (2 ed, Thomson Reuters, Sydney, 2004) at 130.

Consultation, Representation and Discrimination

Both the HSE and MWHS Acts make provision for employee participation through (inter alia) the election of Health and Safety Representatives (HSRs) and formation of Health and Safety Committees. This section of the paper will focus on:

(a) Consultation requirements;
(b) The powers of HSRs; and
(c) Discrimination, victimisation and coercion.

The nature and extent of consultation under the HSE and MWHS Acts

Consultation under the HSE Act

The consultation provisions of the HSE Act are included in the section covering general worker participation. Pursuant to s 19B, there is a general duty to involve employees in health and safety matters. Pursuant to subs (1), every employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work.

Subs (5) defines reasonable opportunities. Pursuant to s 19C organisations with less than 30 staff must only have an employee participation system if one or more employees or a union representing them requires the development of an employee participation system. Unlike the MWHS Act, the HSE Act does not define the nature of consultation. This has been established by case law.[30] The *Maritime Union* case considered consultation requirements. Chief Judge Colgan stated: [31]

> The length of the consultative process, the numbers of meetings, the discussion of the object and content of the intended policy, the correspondence between the parties on these topics and the employer's preparedness to alter aspects of the policy as suggested by the union, all point together to a sufficient consultation, both statutory and contractual. The initial formulation of the policy by the employers does not mean that there was a failure of consultation.

Chief Judge Colgan considered that, having consulted about the issue, the defendants were entitled in law to decline to agree with the union's proposal for ownership of the policy.[32]

In *New Zealand Steel v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc,*[33] the new requirements pursuant to the HSE Act were taken into account. The fact that the HSE Amendment Act 2003 extended hazard to include a person's behaviour was noted. The Employment Relations Authority was satisfied NZ Steel did not have a fixed mind in relation to the final content of the drug and alcohol policy. This was supported by the changes made to the original document and the fact is that the summary of changes set out in the minutes from the final

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[30] *Maritime Union of New Zealand Inc v TLNZ* (2007) 5 NZELR 87; *NZ Steel Ltd v NZ Amalgamated Engineering Printing and Manufacturing Union Inc* ERA Auckland, BC200770511, 24 July 2001; *NZ Amalgamated Engineering Printing and Manufacturing Union v Air New Zealand Ltd* (2004) 2 NZELR 5 at [143]. Both former cases applied the *Air New Zealand* case in which the Court agreed to the reasonableness of drug and alcohol testing provisions depending on whether employees were engaged in safety sensitive areas or operations but left the identification of these employees to the parties to determine in consultation.

[31] *Maritime Union of New Zealand Inc v TLNZ* (2007) 5 NZELR 87 at [25].

[32] Ibid, at [49].

[33] *NZ Steel Ltd v NZ Amalgamated Engineering Printing and Manufacturing Union Inc* ERA Auckland, BC200770511, 24 July 2001.

meeting of the joint consultation committee show there were at least 10 key changes made from the original document.[34]

However, the result in *Corrections Association of NZ v Chief Executive of the Department of Corrections* was quite different.[35] The case involved the Corrections Department's decision to introduce a new roster pattern and other arrangements for staff at Mt Eden and Auckland Central remand prisons. The Employment Relations Authority held the evidence and established that any consultation that may have occurred with the Corrections Association was clearly inadequate and that it was not given a reasonable opportunity to consider the proposal.

On the basis of the preceding decisions, the Courts do not consider the decision whether or not drug test in safety sensitive areas at all should be a matter for consultation, rather that consultation should take place about which areas of a safety sensitive business should drug test. On the other hand, the Courts have held that any substantial changes to rosters in the prison sector should be the subject of employee consultation.

Consultation under the MWHS Act

Part 5 of the MWHS Act covers consultation, representation and participation. Employee participation measures are set out in Division 3-6 relating to Health and Safety representatives. Pursuant to s 46 of the MWHS Act, if more than one person has a duty, they must consult and co-operate with all other persons who have a duty in relation to the same matter. This duty of "horizontal engagement" is subject to the qualifier of what is reasonably practicable, as defined in s 17 of the MWHS Act.[36] Section 47 sets out the duty of a person conducting a business or undertaking to consult so far as is reasonably practicable… with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety. Both of these duties are enforceable by way of penalties.

Section 48 sets out the nature of consultation, including that relevant information is shared with workers; workers are given a reasonable opportunity to express their views and raise health or safety issues in relation to the matter and are able to contribute to the decision making process in relation to the matter, that workers views are taken into account and they are advised of the outcome in a timely manner. Pursuant to s 48 (2), consultation must involve the HSR if workers are represented by one.

This is basically a codification of consultation requirements illustrated in case law. The requirement to consult does not mean that a PCBU has to reach agreement with other workplace participants on the actions they take for compliance.[37] Section 49 sets out the health and safety matters in respect of which consultation is required. These are:

a. when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking;
b. when making decisions about ways to eliminate or minimise those risks;
c. when making decisions about the adequacy of facilities for the welfare of workers;
d. when proposing changes that may affect the health or safety of workers;
e. when making decisions about the procedures for:

[34] Ibid at [63].
[35] *Corrections Association of NZ v Chief Executive of the Department of Corrections* ERA Auckland AA488/10 5324954, 18 November 2010.
[36] Sherriff, above n 16, at 74.
[37] Sherriff above n 16 at 68. Cases illustrating the requirement to consult include *TVW Enterprises v Duffy* (1985) 62 ALR 63; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others v Queensland Rail and Others* (2010) 268 ALR 514.

i. consulting with workers; or
ii. resolving work health or safety issues at the workplace; or
iii. monitoring the health of workers; or
iv. monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or
v. providing information and training for workers; or

f. when carrying out any other activity prescribed by the regulations for the purposes of this section.

This differs from previous legislation and the HSE Act, in that duties to consult under the HSE Act apply to employers and employees, therefore, excluding people who are outside this relationship. The HSR has a right to stop unsafe work and to issue provisional improvement notices pursuant to the new Act. In Western Australia, employers have an obligation to protect the health and safety of employees through drug testing. The issue was considered in *BHP Iron Ore Ltd v Construction, Mining Energy etc Union of Australia, Western Australian Branch.*[38]

The powers of Health and Safety Representatives

The functions of health and safety representatives are set out in Part 2 (2) of Schedule 1A of the HSE Act. They include identifying and bringing to the employer's attention hazards in the place of work and discussing with the employer ways the hazards may be dealt with. The MWHS Act gives broad powers to HSRs under s 68 aimed at facilitating effective consultation and issue resolution, monitoring the compliance of the PCBU, inspecting the workplace, investigating complaints from members of the work group relating to health and safety and inquiring into the risks to the health and safety of workers in the work group arising from the conduct of the business or undertaking.[39]

Discrimination

Section 104 of the Employment Relations Act (ERA) 2000 provides that, for the purposes of s 103(1)(c) of the ERA, a person is discriminated against (inter alia), or if they refuse to do work under s 28A of the HSE Act 1992 or involved in the activities of a union. Section 107 sets out the definition of involvement in the activities of a union for the purposes of s 104, and this includes an employee who is representing employees under the HSE Act 1992, whether as a health and safety representative or otherwise, is to be treated as if he or she were a delegate of other employees for the purposes of s 107(1)(g).[40]

The MWHS Act prohibits discrimination in s 104, sets out prohibited reasons in s 106, and what constitutes discriminatory conduct is set out very clearly in s 105. Discriminatory conduct includes when a person dismisses a worker, terminates a contract for services, puts a worker to their detriment in the engagement of the worker, alters the position of a worker to the worker's detriment and fails or refuses to engage a potential worker. Prohibited reasons include the person being, having been or proposing to be a HSR.[41]

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[38] *BHP Iron Ore Ltd v Construction, Mining Energy etc Union of Australia, Western Australian Branch* [1988] WAIRComm 130.

[39] Sherriff, above n 16, at 82.

[40] In *Yukich v Carter Holt Harvey* [2004] 1ERNZ 78, the plaintiff successfully claimed unjustified constructive dismissal, although he did not succeed in his discrimination claim.

[41] A case which involved discrimination against an Authorised Union Representative and Health and Safety Representative was *Michael Watts v Australia Post* [2002] AIRC 1141.

Conclusion

The WHS and HSE Acts are designed to provide protection from industrial or commercial hazards and risks that stem from workplaces. Pursuant to these statutes, duties are imposed to protect health and safety framed in terms of what is "reasonably practicable." Both statutes protect employees but the extent to which other types of workers, volunteers and other members of the public are protected differs markedly. The employer's primary duties under the HSE Act do not extend to "other persons" like the duty in the MWHS Act. Section 16 creates a complicated and confusing hierarchy of duties to non-employees. Children and recreational visitors to public facilities are excluded from coverage pursuant to the HSE Act. Volunteers whose work is not "ongoing or regular" are excluded from coverage under the HSE Act whereas volunteers are included in the definition of worker under the MWHS Act.

While a positive step in many respects, the MWHS Act has been criticised for the resulting uncertainties created by the wide duties it imposes. The new definition of PCBU together with the broad approach to what is "workplace related" in the MWHS Act, mean the liabilities of duty holders will be much wider than under the HSE Act. The MWHS Act explicitly covers work that takes place in rivers and the sea whereas the HSE Act has been held not to, due to a requirement for exclusive occupation and control. The MWHS Act also makes it clear a duty holder may control a place of work in whole or in part. The position in New Zealand is less clear about partial control of a workplace, although it does depend on the extent of exclusivity of control.

The MWHS Act places greater emphasis on risk management and clarifies this process with a comprehensive regulation and code of practice. The MWHS Act imposes more stringent "due diligence" requirements than the HSE Act on all directors and officers, irrespective of whether they are directly involved in the management of the company. Consultation and employee participation are important components of the WHS and HSE Acts. The HSE Act sets out clearly what must be taken into account when determining reasonable opportunities for employees to participate in the improvement of health and safety processes at work. The MWHS Act defines the nature of consultation whereas in New Zealand this has been established by case law. The requirements under the MWHS Act to consult with multiple duty holders may prove overly onerous and complicated.

HSRs in Australia have a function that encompasses greater monitoring of and liaison with PCBUs whereas the HSE Act includes identification and monitoring of hazards as a HSR function. Although both the HSE Act and MWHS Act prohibit discrimination against HSRs, the MWHS Act sets out what constitutes discriminatory conduct more clearly in s105. Australian Courts have also been historically prepared to enforce anti-discrimination provisions.