A Bad Day at the Sausage Factory: The Health and Safety at Work Act 2015

JEFF SISSONS*

Abstract

This paper outlines key concerns relating to New Zealand's new Health and Safety at Work Act 2015. It puts the Act in context as the most recent governmental attempt to reform health and safety in the workplace. The reports of the Independent Taskforce and the Royal Commission provided an opportunity to address New Zealand's poor workplace health and safety record, however the Government has failed to do so effectively. This paper identifies significant issues with the Act, particularly with regards to worker participation and the use of work groups to push for change.

Key words

Health and Safety at Work Act 2015, health and safety, labour law, worker participation, work groups.

Those who believe in justice and those who love sausage should never watch either being made.[1]

Introduction

A casual observer of the progress of the Health and Safety Reform Bill may have been surprised by the abrupt fracturing of the cross-party and cross-industry consensus supporting the Bill as it made its way back from the Transport and Industrial Relations Committee.

The Bill passed its first reading on 13 March 2014 with the support of all parties. By the second reading on 30 July 2015, the Labour, Green and New Zealand First parties had withdrawn their support for the Bill. The New Zealand Council of Trade Unions (CTU) and affiliated unions launched a significant nationwide campaign to push for change in the Bill in concert with the families of workers killed at work (including those who lost loved ones working at Pike River Mine and in the forestry industry).

Despite the disquiet and dissent, the Bill passed into law as the new Health and Safety at Work Act 2015 (the Act) and a series of major amendments to other existing pieces of legislation. Most of the key provisions came into effect on 4 April 2016 and there will be significant work to complete supporting regulations and guidance in the meantime.

The purpose of this paper is to explain the CTU's most fundamental concerns with the new Act. It is important to acknowledge at the outset that legal change is not a panacea for the dismal state of health and safety practice in New Zealand. If New Zealand is to lift its performance we must also tackle fundamental deficits in knowledge, culture and power. However, good regulation should provide the framework that brings about the change needed for a positive health and safety culture

* General Counsel, New Zealand Council of Trade Unions – Te Kauae Kaimahi.

[1] Otto von Bismarck (attributed).

and, conversely, badly-made law can hinder this cultural change. It is the view of the CTU that the Act will not deliver the change we need. The evidence suggests there is a problem.

This paper explains why changes made by the new Act to existing health and safety legislation some substantially compromise its effectiveness.[2] Before addressing these concerns it is useful to begin with a reminder of how New Zealand arrived at its current health and safety position and the ingredients that have gone into the new Act.

The Pike River Tragedy and Aftermath

On Friday 19 November 2010, a methane explosion occurred at the Pike River Coal Mine on the West Coast of the South Island. 29 men were trapped in the mine by the explosion, condition unknown. Following a second explosion five days later, all were presumed dead. Their bodies have never been recovered.

The Royal Commission on the Pike River Coal Mine Tragedy was convened and found major flaws in the performance of the regulator and the operation of the Health and Safety in Employment Act 1992. The Royal Commission said that "major change [is] required and fast" and that "administrative and regulatory reforms are urgently needed to reduce the likelihood of further tragedies."[3]

The report's findings regarding the regulatory failings led to the then-Minister of Labour, Kate Wilkinson, resigning her ministerial warrant. The Royal Commission identified two particular weaknesses in the Health and Safety in Employment Act 1992: weak legal duties for directors to ensure health and safety and weak worker participation.

While the Royal Commission was investigating, the Government convened an expert taskforce to research, investigate and hear submissions on issues regarding New Zealand's workplace health and safety performance. The Independent Taskforce on Workplace Health and Safety (the Taskforce) was chaired by the Chairman of Shell Oil, Rob Jager, and included representatives of businesses, workers and the agricultural sector.

The Taskforce issued its report in April 2013. The report is a clear-eyed survey of the health and safety landscape in New Zealand. It is also an indictment. The Taskforce noted that there are around 200,000 claims to ACC each year by people injured at work and that, along with an emotional toll, the economic, medical and social costs of these injuries may be as high as four percent of GDP. The Taskforce described this as "appalling, unacceptable and unsustainable."[4]

The Taskforce identified 12 key areas of weakness:[5]

1. Confusing regulation;

[2] Given the scope and complexity of the health and safety reforms, this paper only canvasses a small portion of the Act. For more detail on both the elements of the Act which the CTU supports and other changes, see the CTU submission on the Health and Safety Reform Bill, available at <www.union.org.nz>.

[3] Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy: Volume One* (October 2012) at 29.

[4] Independent Taskforce on Workplace Health and Safety *Main Report of the Independent Taskforce on Workplace Health and Safety* (April 2013) at 4.

[5] Independent Taskforce on Workplace Health and Safety *Executive Report of the Independent Taskforce on Workplace Health and Safety* (2013) at 11-12. The problems in each area are set out in greater detail at Appendix I.

2. A weak regulator;
3. Poor worker engagement;
4. Inadequate leadership;
5. Capacity and capability shortcomings;
6. Inadequate incentives;
7. Poor data and measurement;
8. Risk tolerant culture;
9. Hidden occupational health;
10. Problems in regulating major hazard facilities;
11. Particular challenges to small-to-medium enterprises (SMEs); and
12. Weak protections for at-risk populations.

According to the Taskforce, one fundamental weakness underlies all of the others: a lack of tripartism. To understand the importance of this weakness, it is necessary to revisit the genesis of our current health and safety system.

Robens-Lite

The conception of New Zealand's health and safety system (along with those of most other common law countries) lies in a revolutionary document. Following a series of industrial disasters, the newly-elected Conservative Government commissioned Lord Alfred Robens, the Chairman of the National Coal Board, to carry out a root-and-branch review of the United Kingdom's health and safety law. A Committee on Safety and Health at Work was formed in 1970 and gathered evidence over the next two years, reporting in July 1972. As Eves notes, the Robens Report recommended the implementation of "a more self-regulating system" for employers and workers and criticised the current regime's over-reliance on "prescriptive statutory regulation".[6] It suggested the promotion of industry-led health and safety reform through "agreed voluntary standards and codes of practice to promote progressively better conditions" and the regulation of health and safety through one all-encompassing statute.[7]

The Robens model posits a 'three-legged stool' consisting of a strong regulator, capable employers and informed, empowered workers. Each of these 'legs' acts as a check and balance upon the effective operation of the others.

The Robens Report founded the basis for new health and safety laws in the United Kingdom, Australia, Canada and, eventually, New Zealand by way of the Health and Safety in Employment Act 1992.

There were problems from the start with New Zealand's implementation of the Robens principles. As the Taskforce noted in its report,[8] New Zealand's introduction of the Robens system occurred later, and constituted a "much lighter version" than in other jurisdictions. The Taskforce concluded that:

> The lighter version reflected a range of local and historical factors.

[6] David Eves "Two steps forward, one step back: a brief history of the origins, development and implementation of health and safety law in the United Kingdom, 1802–2014" (April 2014) History of Occupational Safety and Health <www.historyofosh.org.uk>.
[7] Eves, above n 6.
[8] Independent Taskforce *Main Report*, above n 4, at [66].

> a. *Resource constraints.* The late 1980s and 1990s were a period of fiscal discipline, frozen budgets and staff cuts across the public sector. No additional funding was made available to support a comprehensive implementation of the new Act, including the development of adequate levels of supporting regulations, approved codes of practice (ACoPs) and guidance, as well as inspectorate capabilities.
>
> b. *Changing attitudes towards the roles of government and business.* The HSE Act was developed in an era of deregulation and a growing ethos of business self-regulation. This informed low levels of resourcing for and a light-handed approach to regulation, and high levels of reliance on businesses' capabilities and commitment.
>
> c. *Liberalisation of the labour market and the weakening of union representation.* Labour market liberalisation in the 1980s and 1990s resulted in a sustained fall in union membership and growth in casual, part-time and short-term employment relationships…It is likely that this factor influenced omissions from the HSE Act, including the failure to establish a tripartite body and to set obligations requiring employers to have formal worker-participation systems.

The Taskforce attributed weaknesses in New Zealand's health and safety framework to "a fundamental failure to implement properly the Robens health and safety model".[9]

What Works in Worker Participation

Both the Royal Commission and the Taskforce singled out worker participation as a crucial weak link in New Zealand's health and safety system. The Taskforce noted that, compared to other jurisdictions, worker engagement in New Zealand "falls well short," is "generally ineffective and often virtually absent" and is not well supported by legislation.[10]

Australia's Model Act arose out of two reports, both entitled 'National Review into Model Occupational Health and Safety Laws.' The first report quoted and endorsed an earlier review of Australia's health and safety legislative framework called the Laing Review:[11]

> …the election of safety and health representatives and the constitution of safety committees are fundamental if genuine consultation is to develop in workplaces. Without the authority provided under the Act, almost any other consultative approach will result in unequal relationships and consultation may be one sided or tainted by the incapacity to openly and fearlessly put the necessary issues for discussion. As a consequence, while there may be considerable talk there may be little consultation.

Worker engagement is a prerequisite for a well-performing health and safety system. As leading Australian health and safety experts Johnstone and Tooma note, "workers bear the brunt of the effects of work related hazards, and should therefore participate in measures to identify and address hazards."[12] Johnstone and Tooma go on to note that "worker experience and knowledge" of workplace hazards assists in the development of better health and safety practices and, further, that

[9] Independent Taskforce *Main Report,* above n 4, at [61].
[10] At [93].
[11] Robert Laing *Review of the Occuptional Health and Safety Act 1984 (WA)* (2002) at 155, as cited in Department of Education, Employment and Workplace Relations *National Review into Model Occupational Health and Safety Laws Second Report* (2012) at [25.8].
[12] Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: The Model Act* (Sydney Federation Press, Sydney, 2012) at 137–138.

worker participation in health and safety is necessary to uphold workers' rights over employers' commercial interests.

> The available empirical research suggests that direct participation by means of individual non-unionised employees engaging with managers appears to have little effect on work health and safety. There are very few studies on the use by individual workers of an individual right to refuse to perform dangerous work, and what research there is suggests that this right is little used in small firms, where workers inhabit 'structures of vulnerability'.
>
> There is much stronger evidence on the positive effects of collective worker participation on work health and safety. This evidence comes from a number of countries, including from countries where there is no statutory basis for worker participation. The research shows that participatory mechanisms that enable higher levels of worker involvement are better than those that provide for more limited involvement. Many of the studies prove that there is a relationship between objective indicators of work health and safety performance (such as injury rates or exposure to hazards) in workplaces that have implemented structures for worker participation, such as the presence of trade unions, joint health and safety committees, or union or worker health and safety representatives. International research supports the argument that joint arrangements involving employer, worker, and trade union representatives at the workplace are associated with better work health and safety outcomes than where representative worker participation is absent. Other studies provide more indirect evidence of the impact of worker representation on work health and safety management practices, and suggest that participatory workplace arrangements lead to improved work health and safety management practices and compliance with work health and safety regulatory standards.
>
> Despite their diversity in terms of method and other details, taken collectively these studies support the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than employer management of work health and safety without representative worker participation.

The National Review into Model Occupational Health and Safety Laws Second Report concluded in relation to health and safety representatives that:[13]

> Overwhelmingly, stakeholders and regulators alike are of the view that provision should be made in the model Act for workers to elect HSRs. The election of HSRs has been a common feature in OHS legislation for many years and represents contemporary practice. The benefits of effective representation through HSRs have been demonstrated.

The most complete recent survey of what works in the health and safety representation sphere is a 2014 study of the coal mining industry undertaken by four of the foremost experts in health and safety representation: David Walters, Richard Johnstone, Michael Quinlan and Emma Wadsworth.[14]

Fear and Loathing in Thorndon

The Health and Safety Reform Bill generated a considerable amount of heat but little light. In this, it was reminiscent of the previous reforms in 1992 and 2002. Both were characterised by considerable opposition from employer groups who saw the empowerment of workers in relation to their own

[13] Department of Education, Employment and Workplace Relations, above n 9, at [25.19].

[14] David Walters, Richard Johnstone, Michael Quinlan and Emma Wadsworth *A study of the role of workers' representatives in health and safety arrangements in coal mines in Queensland* (Construction, Forestry, Mining and Energy Union: Mining and Energy Division, January 2014) available at <www.cfmeu.com.au>.

health and safety generally and health and safety representatives in particular as a stalking horse for the union movement.

It seemed as though the clear and sobering messages of the Royal Commission and the Taskforce might temper this opposition. In June 2013, the Business Leaders Health and Safety Forum wrote to senior cabinet ministers stating:[15]

> Ministers you may wonder if business leaders have concerns about the Taskforce's recommendations on worker participation, increased costs and increased penalties. We want to reassure you that our members are not concerned about these recommendations being implemented as part of a comprehensive and balanced approach.
>
> Evidence tells us that meaningful worker participation (that includes representative unions, where relevant) is a core requirement for high-performing safety systems. We believe participation provisions must be flexible, and that checks and balances can be put into place to ensure that they do not encroach on aspects of the employment relationship unrelated to health and safety.

It appeared that New Zealand was experiencing a rare armistice of agreement on what needed to be done. The Health and Safety Reform Bill received unanimous support at its first reading on 13 March 2014 and was widely welcomed. However, many of the other submissions strongly resembled concerns raised in previous attempts at reform.

The Talley's Group submissions on industrial legislation are well-known for their particular style of invective. Peter Talley's submission on the Bill is particularly notable in this respect. He notes:[16]

> With control of such work groups resting with unions and their members, it is inevitable that they will use that power to their own advantage both to increase their power and influence and to make employers fund the Union's favoured members to undertake union activities under the guise of health and safety. Unscrupulous Unions could also use Sections 66 to 68 to intentionally damage or destroy a business, by appointing dozens of their members as representatives, have multiple unnecessary work groups and drive a business to bankruptcy, without an employer having any recourse.

Mr Talley's submission meanders on in a similar vein:[17]

> We believe the changes in the Health & Safety legislation will be used by the Union as another tool to force companies to capitulate to Union desires. eg: during collective bargaining a Union could use Health & Safety as a tool to tie up the time and resources of company executives, and place pressure on the company. Due to the importance of Health & Safety and relating issues, companies would have no option but to investigate any claims, frivolous or not, and it would be difficult to prove that unsubstantiated claims were in essence an act of bad faith on behalf of the Union. As a result either a great deal of resources are wasted on investigations into unfounded Health & Safety claims, or, due to repetitive unfounded Health & Safety claims "crying wolf' mentality sets in and serious Health and Safety issues may be overlooked.

[15] Letter from Julian Hughes (Executive Director of the Business Leaders Health and Safety Forum) to Bill English (Finance Minister), Steven Joyce (Economic Development Minister; Tertiary Education, Skills and Employment Minister) and Simon Bridges (Labour Minister) regarding the Independent Taskforce recommendations (18 June 2013), available at <www.mbie.govt.nz>.

[16] Talley's Group Ltd "Submission to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2014" at 8.

[17] Talley's Group Ltd, above n 18, at 16–17.

> The Talley Group is also worried that the powers to be given to workers through the creation of Health & Safety representatives may undermine existing relationships and activities. We see the extended powers as unnecessarily boosting the power of workers unions using the Health & Safety issue as the vehicle for that agenda. We do not believe the Health & Safety Reform Bill should facilitate or encourage that agenda.

It was not only intemperate employers who weighed in against strengthening of worker representation. Several major employers expressed milder versions of the same sentiments.[18] These submissions lacked any empirical evidence to back claims of misuse and abuse of worker participation and representation systems. We suggest that this may be because there is a strong international and research consensus on these points. The closest the employers' submissions come to engagement with the international research is the EMA Northern submission, stating at [21]:

> We believe the argument for health and safety representatives has been taken from myth to the point of becoming fact. We are often told about research studies which make it clear that health and safety representatives are very effective within the work places. Following our research this is not as clear as the myth may portray. Indeed David Walters who is the instigator of health and safety representatives in the UK, his latest research strongly suggests that there are many variables within a work place that can assist or detract from the effect of this health and safety representative thus to say that a health and safety representative as an item alone is effective is somewhat misleading.

Concerned that the EMA's submission was a misrepresentation of Professor Walter's work, the CTU wrote to him enclosing the EMA's submission and asking for his comment. He responded that the EMA's submission had misconstrued his scholarship, since:[19]

> [The EMA's submission] is a misinterpretation of what I have written. The evidence is not myth – it's a reflection of reality. There is strong quantitative research evidence to indicate that establishments with trade union supported health and safety representatives have better health and safety performance (in terms of both objective outcomes such as improved injury rates and in terms of better management arrangements) than workplaces in which employers manage OHS in the absence of such arrangements. My recent work (including evidence submitted to the Royal Commission Inquiry on Pike River – and verbal evidence to the Task Force…) has cited and discussed this evidence at some length. My discussion of these empirical findings tries to account for the conditions – or preconditions that support this success and of course these include other factors such as a clear regulatory steer and support for its implementation from state inspectors – as well as managerial commitment to the operation of participative arrangements on OHS – as well as trained and informed representatives.

MBIE's Departmental Report on the Health and Safety Reform Bill lacks consistency between the changes and their justifications. Officials comment that:[20]

> Under the HSE Act, one worker can request an employee participation system, which defaults to an election for HSRs, if after six months there is no agreement between the employer and employees on the employee participation system. This approach has not led to an overload of HSRs in businesses where they are not appropriate.

[18] Examples from a long list include Air New Zealand, Business Central, Carter Holt Harvey, Federated Farmers, Fletcher Building, Fonterra, the Meat Industry Association, the New Zealand Forest Owners Association, and Seafood New Zealand.

[19] Email from Professor David Walters to the author regarding the EMA Northern submission on the Health and Safety Reform Bill 2014 (10 September 2014).

[20] MBIE "Departmental Report Part A to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2014" at [179]–[181].

> A more flexible outcomes-based approach also creates risk. To effectively implement the Taskforce recommendations and international conventions, there is a need to have minimum conditions to improve New Zealand's worker participation practices. It is difficult to design a flexible approach which allows workers to have a voice in safety, have some workers who understand health and safety obligations so they can engage effectively, not face unfair consequences, and be able to act, without this simply looking like a HSR system.
>
> This kind of approach would also be difficult to design and enforce, would provide more uncertainty for business, and create a greater ability for abuse, at a time when the health and safety reforms are trying to encourage worker participation and better practices.

Despite this evidence, the Health and Safety at Work Act 2015 takes a substantial step backwards in relation to worker engagement, representation and participation for the following reasons:

- Health and safety representatives are optional for SMEs that are not high risk and may be isolated to small PCBU-determined work groups in all other circumstances (see discussion below);
- Employers have increased powers to push for the removal of health and safety representatives;
- Health and safety committees are optional for all PCBUs;[21]
- There is no requirement to provide training for health and safety committee members;
- The default worker participation scheme where agreement cannot be reached is no longer present; and
- Unions have a greatly reduced role in the set-up of the system, the election of health and safety representatives and the assistance of workers.

Essentially, what constitutes an effective worker engagement system is to be determined by the employer or, in the framing of the new Act, the person conducting a business or undertaking (abbreviated to PCBU). The PCBU will not be required to negotiate with the workers but only to engage with them (a similar process to consultation under general employment law).

Minister Woodhouse has argued that all PCBUs will have an obligation to develop effective worker engagement practices and that this will drive the necessary change, with WorkSafe enforcing the requirements if necessary. Section 64 of the Health and Safety at Work Act 2015 obliges PCBUs to "have practices that provide reasonable opportunities for workers… to participate effectively in improving work health and safety… on an ongoing basis."

However, there was an almost identical duty under s 19B of the Health and Safety in Employment Act 1992, which states that "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."

The definition of 'reasonable opportunities' is effectively the same in both old and new law. WorkSafe and its predecessors have never taken action for a breach of s 19B and it appears likely that it will struggle to enforce such an inchoate obligation.

[21] Health and Safety at Work Act 2015, s 86A (particularly subss (3) and (4)).

Risky Business

One of the most problematic aspects of Part 3 of the new Act (worker engagement, participation, and representation) is the exemption from requirements to elect health and safety representatives or consider implementing a health and safety committee if a PCBU has less than 20 workers and operates outside of certain 'high risk' industries set by regulations.

The Government was strongly criticised for its initial list of 'high risk' industries. The Health and Safety at Work (Worker Engagement, Representation and Participation) Regulations 2016 contain a modified list of industries designated as high risk including adventure activities, aquaculture; forestry and logging; fishing, hunting, and trapping; major hazard facilities; mining drilling and quarrying; food product manufacturing; water supply; sewerage, and drainage services waste collection, treatment, and disposal services; and construction.

The Regulations see approximately 560,000 workers without the right to have a health and safety representative system if requested.[22] The Minister received advice that this would see 5 out of 6 workers in small businesses lose this right that they enjoyed under the Health and Safety in Employment Act 1992.[23] Workers in small businesses who have lost this right include:

- Transport workers, including water, road and rail freight transport;
- Port operation workers;
- Most manufacturing workers;
- Hospital, health care and disability workers;
- Agricultural workers; and
- Public order, safety and regulatory services workers.

Perhaps wary of the opprobrium that greeted his proposal to retain worm-farming and cat-breeding on the list of high risk activities while leaving out sheep, dairy and beef farming, the Government specifically excluded activities such as curtain installation, snake-catching, crocodile and buffalo hunting from the definition of high risk.

The Minister was advised by officials that in other comparable jurisdictions, strong commonalities emerge amongst what is considered a high-risk industry. Construction, manufacturing, and agriculture are **consistently** represented in any country's assessment of its high-risk industries. Mining, forestry and fishing **usually** appear whenever those industries are present in that jurisdiction.[24]

[22] Document titled "Small Business exclusion from HSRs if requested by worker", undated and anonymous (Obtained under Official Information Act 1982 Request to the Minister of Workplace Relations and Safety). This estimate was determined when agriculture was considered a high-risk industry.

[23] Email from Kelly Hanson-White to Michael Woodhouse (Minister for Workplace Relations and Safety) regarding the proposed Regulations (16 August 2015) (Obtained under Official Information Act 1982 Request to the Minister of Workplace Relations and Safety).

[24] Document titled "Guidance to the House", undated and anonymous (Obtained under Official Information Act 1982 Request to the Minister of Workplace Relations and Safety).

Flaws in the model used to assess whether an industry is high risk include:

- No consideration of injury rate generally (outside of serious injury and death). The purpose of a health and safety framework is to protect people at a workplace from injury, not merely injuries that result in a week off work or more;
- No consideration of occupational disease in the categorisation of 'high risk.' This was assessed in earlier iterations of the model but then removed. Gradual process injuries are also excluded;
- The exclusion of deaths and injuries to bystanders and children under 15, which is concerning given that New Zealand has no minimum age of employment and children are often killed (particularly in agriculture);
- Reliance on workers making claims to ACC and those claims being accepted. Many industries systematically under-report;
- The use of an annualised average. Many seasonal industries have periods of much greater risk (such as calving season in dairy and beef farming). Some may have short, perhaps random, periods of very high risk (such as security guards);
- No consideration of the death and injury rate in SMEs in each industry. Evidence strongly suggests that SMEs have higher death and injury rates than larger businesses, so a multiplier effect may be appropriate;[25] and
- No consideration of the effect of previous interventions in the industry (for example, electricians work in an inherently hazardous environment which is controlled by regulation and training).

Other practical hurdles include the question of how and when 20 workers are counted, given that the definition of 'worker' includes contractors, temporary employees and some types of volunteers.

A practical problem with the model is the definition of high risk industries in reg 5(1)(b) as industries where a business "operates predominantly." This seems illogical, given that a business with 18 workers that allocates 49 per cent of its time and resources to operating a forestry crew and 51 per cent to operating a wood chipping business is equally as risky while undertaking forestry as a business with 9 workers that undertakes forestry 100 per cent of the time.

The high risk exemption removes an existing right to request representatives and committees. It is poorly thought-through and confusing. It is symptomatic of other changes wrought by the Government during the Select Committee process.

Setting Work Groups

Other less-understood changes are the restriction of health and safety representatives' powers and duties to a particular work group and the manner in which these work groups are set up.

Under the Health and Safety in Employment Act 1992, the default position was that health and safety representatives can act on behalf of any employee. The Health and Safety at Work Act 2015 follows

[25] See, for example, John Mendeloff and others *Small Businesses and Workplace Fatality Risk: An Exploratory Analysis* (RAND Corporation, 2006), available at <www.rand.org>.

the Australian approach of limiting health and safety representatives from acting on behalf of workers outside of the work group that elected them.[26]

Work groups were seen as unduly bureaucratic by the Taskforce, which recommended that they not be implemented.[27] The CTU, Business New Zealand and the Business Leaders Health and Safety Forum agreed, and made a specific joint approach to the Transport and Industrial Relations Committee to persuade it to remove work groups.

Nonetheless, work groups remain a feature of the Health and Safety at Work Act 2015. The process for their determination has been left to the PCBU, unlike in Australia where worker agreement is required. The default is that one work group covers the entire PCBU, but s 66(3) states that a PCBU may determine one or more work group if the PCBU considers that a work group covering the whole business or undertaking would be inappropriate having regard to the structure of the business or undertaking. This section has the potential to be misused by a PCBU to isolate health and safety representatives to small pockets within the workplace.

Conclusion

The foreword of the Taskforce's Report identified that "[a] key challenge in addressing workplace health and safety is that it requires balancing the interests and needs of a number of participants, particularly employers and workers."[28] The report noted that New Zealand's implementation of the Robens model failed to strike that balance, and that health and safety law has only become more "complex" in recent years. According to the Taskforce, its recommendations adequately address that balance – and any major changes to its recommendations "will lose the vital support of some participants and significantly weaken the potential benefits."

Despite some positive changes, the Health and Safety at Work Act 2015 is a flawed piece of legislation. This hybrid of Australian and New Zealand law has wound up with some of the weakest aspects of both. The new Act fails to strike an appropriate balance between the competing interests of workers and employers.

The Government had both public support and a legitimate opportunity to address New Zealand's poor workplace health and safety record and fell at the final hurdle. It is possible, and perhaps even likely, that the new law will improve New Zealand's health and safety record, however it will still fall far short of comparable countries like the United Kingdom or Australia. These changes constitute another chapter in the history of muddled compromise that has led to the death of thousands of New Zealand workers. However this country dresses the sausage, we suspect it will leave a bad taste.

[26] See Health and Safety at Work Act 2015, sch 2 cl 9. Clause 6 of sch 2 sets out some limited exceptions where health and safety representatives may act on behalf of members of other work groups. However, in what is a worrying but likely unintended consequence, health and safety representatives cannot exercise their powers on behalf of workers who are not members of work groups (even seemingly in situations of imminent serious harm).
[27] Independent Taskforce *Main Report*, above n 4, at [250].
[28] Independent Taskforce *Main Report*, above n 4, at 5.

Appendix I: Independent Taskforce on Workplace Health and Safety Summary of Key Systemic Weaknesses[29]

1. Confusing regulation
The system currently fails to make clear expectations of regulated entities and duty holders, and the regulator does not make compliance easy for the vast majority who want to comply. Sanctions for those who intentionally, or through neglect, break the law are not adequate. The framework is confusing with multiple pieces of legislation, blending hazard- and risk-management specifications, falling across overlapping and ambiguous jurisdictional boundaries. There is a lack of coordination between agencies and gaps in coverage.

2. A weak regulator
Despite efforts in specific areas, and the integrity and dedication of many staff, the primary regulator has failed to deliver on core responsibilities under the Robens model. Overall, it has failed to provide the system with sufficient certainty on how duty holders and regulated entities should comply. The regulator lacks capacity and capabilities, and it has failed to collaborate with other agencies on effective harm prevention.

3. Poor worker engagement
Worker engagement in health and safety is generally ineffective and often virtually absent. New Zealand falls well short of the strength of worker representative legislation and levels of engagement operating in comparable jurisdictions.

4. Inadequate leadership
There is little leadership being shown by a large number of people and organisations who have influence in the workplace. The issues include a lack of capability among managers generally, New Zealand's shortage of large private sector employers who could become exemplars, and defensive attitudes in some industry bodies.

5. Capacity and capability shortcomings
These shortcomings exist among workers, managers, health and safety practitioners, business leaders and the regulator. The shortcomings include insufficient knowledge of workplace health and safety risks and specific hazards, and insufficient knowledge of workplace health and safety regulatory requirements, including of rights and obligations.

6. Inadequate incentives
New Zealand lacks the positive incentives and deterrents needed to drive compliance with minimum health and safety standards or to foster behaviours that lead to continual improvement. The low likelihood of inspector visits, and of prosecution or other action, creates an uneven playing field and effectively rewards non-compliance. The regulators' resources are not applied optimally, penalties are far too low and the tools available are limited.

7. Poor data and measurement
New Zealand has poor information and intelligence on health and safety risk concentrations, causes of workplace injuries and illnesses, and the effectiveness of interventions to improve health and safety outcomes. We do not know the full extent of the issues or what to target. Reviewers and committees have reported on the issues before, but their recommendations have been largely ignored.

[29] Independent Taskforce *Executive Report*, above n 5, at 11-12.

8. Risk tolerant culture

Our national culture includes a high level of tolerance for risk, and negative perceptions of health and safety. Kiwi stoicism, deference to authority, laid-back complacency and suspicion of red tape all affect behaviour from the boardroom to the shop floor. If recognition and support for health and safety are low or intermittent, workplaces are liable to develop, accept and defend low standards, dangerous practices and inadequate systems.

9. Hidden occupational health

New Zealand's estimated 500-800 premature deaths year from occupation ill-health receive little government, media or business attention. Inadequate data systems and research mean the scale and nature of the issues are largely unknown – and the system is unresponsive to new and emerging risks. Activity is fragmented across multiple regulators, disciplines and sectors with no effective co-ordination or leadership.

10. Major hazard facilities

Some major hazard facilities have insufficient oversight. The current framework focuses on certain industries (e.g. offshore petroleum, mining, geothermal energy) but other facilities with comparable dangers are not subject to the same degree of oversight and regulation. This reflects the gaps in knowledge about major hazards, and the fact that the risk landscape in New Zealand is not understood.

11. Particular challenges to SMEs

Challenges arise for SMEs from the generally less formal management style of smaller businesses, their resource constraints, limited access to external advice and support, and lack of systems fit for health and safety purposes. The current regulator has provided insufficient relevant advice to SMEs who are particularly dependent on it.

12. Particular at-risk populations

Some groups experience disproportionate levels of workplace-related poor health and injury. Low literacy and poor communication skills are, in themselves, risk factors especially in workplaces that are inherently more risky. This presents a particular challenge to policy-makers and regulators, as a one-size-fits-all response to population-specific outcomes, without a careful analysis of all underlying causes, may result in poorly targeted and ill-conceived interventions.