

Submission

By

**THE
NEW ZEALAND
INITIATIVE**

to the Ministry of Business, Innovation and Employment

on the consultation document

Have your say on Work Health and Safety

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1. Introduction and Summary

- 1.1 This submission is made by The New Zealand Initiative (the **Initiative**) in response to the Government's consultation document "Have your say on Work Health and Safety," released in June 2024. The Initiative is a Wellington-based think tank supported primarily by major New Zealand businesses.
- 1.2 We undertake research that contributes to developing a prosperous, free, and fair society with a competitive, open, and dynamic economy. We have a long-standing interest in helping governments to raise the quality of government regulation, including safety regulation.
- 1.3 We appreciate and support the government's intention to review and potentially improve the work health and safety regulatory system. We think it is currently far too costly and ineffectual. Technologies and better know-how are improving safety independently of regulatory actions. It is hard to say what net value, if any, the current excessive system is adding.
- 1.4 The Initiative is not well-placed to comment on focus areas one to four of the consultation document. Our members can better comment on these areas individually should they wish to do so. This submission focuses instead on area five - "the objective of the work health and safety regulatory system".
- 1.5 We recommend that the government moves to allow a greater role for individual employers and employees to contract between themselves for the trade-offs between safety and pay, but this should be in the context of greater reliance on strengthened private law remedies for negligence, fraudulent deceit and the like, with an enhanced role for private insurance. In other words, we recommend that the balance between directive government regulation, 'no-fault' ACC, tort law and private insurance needs to be shifted at the margin at least from the former to the latter.
- 1.6 Government should, of course, monitor this system, provide relevant safety information as a public good, and continue to take full responsibility for public health matters such as contagious illnesses and for the safety of infrastructure that it controls, such as roads.

2. Brief History of Work Health and Safety Legislation in New Zealand

- 2.1 Workplaces have always been risky, on land, on the seas and in the air. Legal disciplines have always applied, particularly in relation to negligence and fraud. Assumption of risk applied to voluntary contracting, with higher wage rates being paid to those undertaking riskier jobs, such as miners. The economic literature refers to those wage premiums as compensating wage differentials.
- 2.2 In New Zealand and overseas the growth of government regulation of risk taking, in place of common law disciplines is most notable in the last 50 years. In New Zealand a seminal moment was the abolition of the right to sue for personal injury from accidents in 1974.
- 2.3 In the case of the US for example, the 9th edition of the Cato Handbook observed that:

Before the 1970s, federal health and safety regulations did not exist, with the exception of certain regulations for food safety and prescription drugs. Ralph

Nader's 1965 book *Unsafe at Any Speed*, about motor vehicle safety, started the modern politicized safety and health movement ...

- 2.4 The abolition in New Zealand of redress for personal injury due to negligence inevitably became an affront to public opinion. The abolition relied for public support at the time on confusing the need to penalise negligence with the need to insure against personal injury risks. In response to the growing dissatisfaction with the fragmented "standards-based" nature of what remained of safety disciplines, the National government passed The Health and Safety in Employment Act 1992. It marked a significant shift in New Zealand's approach to workplace safety. It introduced a more comprehensive performance-based framework for managing workplace hazards and risks, placing primary responsibility on employers to ensure worker safety.
- 2.5 This development was opposed at the time by submissions made by the New Zealand Business Roundtable in 1988 and 1990. One concern was that the imposition of centralised direction was at odds with how the best combination of risk, pay, safety and insurance could vary from workplace to workplace. The proposals neglected to take into account the broader determinants of workplace safety and health.
- 2.6 The next big event leading to change was the 2010 Pike River Mine disaster, which resulted in 29 deaths. A subsequent Royal Commission of Inquiry inevitably called for greater central government control and direction.
- 2.7 The Health and Safety at Work Act 2015 aimed to provide a more robust and comprehensive framework for workplace safety, aligning New Zealand's legislation more closely with Australian models. One goal was to reduce workplace accident rates by 25% by 2020. The cost of achieving this was something that was left to be discovered.
- 2.8 Representatives of the business community expressed a range of concerns:
 - (a) Just what did "all practical steps" mean, and why would it be in workers' interests to forgo the compensating wage differentials, or in the interests of non-negligent employers?
 - (b) The complexities of these schemes could be largely impenetrable to many small- and medium-sized enterprises
 - (c) Even the new regulator, WorkSafe New Zealand, could struggle to determine what was permissible and what was not, firm-by-firm across the country
 - (d) Compliance costs would be substantial
 - (e) A tick-the-box approach to compliance could be a common end result
 - (f) Insufficient regard was being placed on the desirability of using market mechanisms to assess optimal risk-return trade-offs.
- 2.9 An ACC regime that combined the abolition of personal redress for injury with no-fault coverage may be seen as superior to high-cost forms of relying on tort and liability. America's approach makes it difficult for individuals to choose to pursue activities at their own risk, because property owners and others can wind up being sued even if all have agreed to a caveat-emptor framework. New Zealand's system, for a time, attenuated redress rights while enabling individuals to take on risk if they preferred: a potentially defensible trade-off if only second-best options are available. Health and safety regulation has since replicated many of the defensive prohibitions against action found in America's tort-driven system, but without the benefits of proper compensation. Where American property owners and businesses find it necessary to prohibit moderately-risky activity on their property for fear of crippling damage

awards under American tort law, New Zealand property owners and businesses find it necessary to do so for fear of crippling rulings under health and safety regulation.

3. A Holistic Approach to Work Health and Safety

3.1 A more effective approach to work health and safety should consider:

- a) Tort Law: The role of civil liability in incentivising safe practices and compensating injured parties.
- b) Insurance: The potential for insurance markets to price risk effectively and encourage safety improvements.
- c) Public Health: The broader societal impacts of workplace safety and health.
- d) Informational Asymmetry: Addressing the imbalance of information between employers and employees regarding workplace risks.
- e) Compensating Wage Differentials: Recognizing that workers may accept higher risk in exchange for higher wages.
- f) Liberty: Respecting individuals' right to make informed choices about the risks they are willing to accept.

4. Application to the proposed objective in area 5

4.1 The consultation document's proposed objective is

"We think that the objective of the work health and safety regulatory system should be to protect people from harm, in a way that is clear, effective, flexible and durable, proportionate to the risks, and balances risks with costs."

4.2 Our concerns with this objective are:

- a) Overemphasis on Protection: People should be permitted to knowledgeably assume risks in their work, just as they are allowed to in other aspects of life.
- b) Lack of Opt-Out Provision: The current "no contract out" provision in Section 28 of the 2015 Act is overly restrictive.
- c) Ambiguity in Key Terms: The objective uses terms like "clear," "effective," "flexible," and "durable" without providing concrete metrics for measuring these qualities.
- d) "Highest Level of Protection": The Act's requirement for the "highest level of protection... as is reasonably practicable" may not align with workers' and responsible employer preferences.
- e) Determination of "Reasonably Practicable": This term is subjective and could be better determined on a case-by-case basis between employers and employees.
- f) Balancing Risks and Costs: This balance is complex and may be better achieved through market mechanisms rather than centralised regulation.

5 Recommendations

5.1 We recommend the following:

- a) Revise the Objective: The emphasis should not be on protection from harm. It should be on allowing adults to take risks of their own choosing, with protections against negligence, fraud, coercion, misinformation and with market opportunities to share risks with insurance companies and employers by private contracting.
- b) Allow for Opt-Outs: Introduce provisions allowing workers to opt out of certain protections if they are appraised of the risks.
- c) Emphasise Market Mechanisms: Encourage the use of insurance and compensating wage differentials to manage workplace risks.

- d) Simplify Regulations for SMEs: Develop a tiered regulatory approach that reduces complexity for smaller businesses.
- e) Regular Review: Implement a system for regular review of regulations to assess their effectiveness and unintended consequences. We note that the falls from heights regime was imposed with neither a prospective cost-benefit assessment nor an adequate ex-post review.

6. Conclusion

- 6.1 The Initiative submits that a more decentralised and choice-based approach to work health and safety regulation would allow workers and businesses to achieve better mutually-beneficial outcomes overall. Our recommendations emphasise informed choice, flexibility in contracting and insurance mechanisms, and less prescriptive regulation to create a system that better serves New Zealanders.