

**NEW ZEALAND BUSINESS ROUNDTABLE**

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**SUBMISSION ON THE HEALTH AND SAFETY IN  
EMPLOYMENT AMENDMENT BILL**

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**MARCH 2002**

## **Introduction**

1.1 This submission on the Health and Safety in Employment (HSE) Amendment Bill is made by the New Zealand Business Roundtable (NZBR), an organisation comprising primarily chief executives of major New Zealand businesses. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

## **2.0 Key elements of the HSE Bill**

2.1 Broadly, the proposed changes are aimed at extending coverage of the HSE Act, encouraging employee/union participation in workplace health and safety and strengthening the enforcement provisions of the Act.

2.2 Key changes in the HSE Bill are as follows:

- coverage under the HSE Act is extended to railway workers, aircraft and shipping personnel, "mobile" employees and "loaned" employees;
- the definitions of harm and hazard under the HSE Act are broadened to include mental harm and hazards arising through physical or mental fatigue;
- a duty is placed on employers to ensure that employees have the opportunity to participate in workplace health and safety management;
- employees may refuse to perform work which they reasonably believe could cause them serious harm;
- hazard notices may be issued by health and safety representatives to employers who do not address notified hazards promptly;

- maximum penalties for non-compliance with the HSE Act are increased from \$100,000 to \$500,000 for "serious harm" offences and from \$50,000 to \$250,000 for other breaches;
- employers will not be able to insure themselves against HSE Act fines, although they will be able to insure themselves against the costs of defending a prosecution;
- private prosecutions will be allowed under the HSE Act in instances where the Occupational Safety and Health Service (OSH) decides not to prosecute;
- the time limit for bringing an action under the HSE Act will be extended to six months from the time when a breach was either known or should have been known to an OSH inspector; and
- OSH inspectors will be able to issue 'spot' fines for specific offences.

### **3.0 Summary**

- The NZBR supports the objective of ensuring the appropriate degree of safety in New Zealand workplaces. However, we do not support the changes proposed in the HSE Amendment Bill. In our view, the appropriate test is not whether the HSE Amendment Bill is well-intentioned. Rather, the benchmark for these policy changes should be whether or not their benefits exceed their costs. In our view, the HSE Amendment Bill fails this test. Indeed, we believe that the proposed changes either will not achieve their safety objectives or will achieve them only in a way where their benefits are less than their costs.
- There are several reasons for this:
  - the HSE Amendment Bill shows insufficient appreciation for the significant progress that the private sector has made in recent years in addressing issues of workplace safety;

- the changes will skew the balance of instruments toward regulation rather than market mechanisms in promoting health and safety in the workplace, to the potential detriment of overall safety;
  - the benefits of increased regulation and a greater OSH presence, in terms of increased safety in the workplace, are unproven;
  - the changes will make the HSE regulatory environment more uncertain by introducing coverage in areas such as mobile workers and stress and fatigue;
  - the changes will add significantly to the regulatory burden on all businesses and particularly on small businesses, thus inhibiting their scope to grow and innovate;
  - to the extent that these changes adversely affect economic growth, they could reduce health and safety in the workplace, given that a major driver of safety is higher national income;
  - changes to the HSE Act are being introduced as a means of overcoming weaknesses in other parts of the regulatory framework for health and safety, including the ACC scheme and tort law; and
  - there is a considerable risk that the new OSH rules will become a tool for unions to use to control work processes, notwithstanding the fact that strict liability applies to employers for any contraventions of the statute.
- The existing design of the HSE Act is flawed. The proposed changes will make it worse. The net costs of the proposed OSH changes are potentially significant in terms of reduced competitiveness and higher compliance costs for New Zealand businesses. Indeed, many in the business sector view the potential

adverse impact of these changes as being similar in scale to the changes made to the Employment Contracts Act.

- The HSE Act changes will come on top of a series of recently introduced or proposed anti-growth policies, including the increased regulation of the labour market, re-nationalisation of ACC, higher taxes, the introduction of paid parental leave, planned changes to the Holidays Act, higher minimum wages and ratification of the Kyoto Protocol.
- The concerns of business with respect to the HSE Amendment Bill have been noted in the final report of the Ministerial Panel on Business Compliance Costs.<sup>1</sup>
- We are also concerned that such a significant policy change does not appear to have undergone rigorous scrutiny and, in particular, that no cost benefit analysis has been carried out on the proposed changes.
- The proposed HSE Amendment Bill Act should be abandoned. Instead, an independent review of the existing HSE Act, and possible options for addressing existing shortcomings, should be undertaken. Other recommendations for action include facilitating the dissemination of information on best practice, examining wider policies such as ACC and tort reform to achieve health and safety objectives, and improving the policy-making process.

- **Background**

#### **4.1 *Economic approach to the analysis of OSH***

- This submission adopts primarily an economic approach to the analysis of the issues raised by the changes to the HSE Act. Some may be concerned that an economic approach to these issues is inappropriate given that the worth of a

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<sup>1</sup> Ministerial Panel on Business Compliance Costs (2001), *Finding the Balance: Maximising Compliance at Minimum Cost*, p 6.

human being clearly goes well beyond any measurement of the economic value of a human life.

- While we are not arguing that all aspects of welfare can be captured by economic measures, we nonetheless believe that an economic approach to the analysis of the issues is appropriate. There are three reasons for this, as outlined in a recent paper prepared for the International Labour Organisation (ILO):
  - identifying and measuring the economic costs of occupational injury and disease can motivate greater awareness of the costs of workplace death and injuries to employers and greater awareness among governments of the impact of OSH problems on economic growth and development;
  - understanding the connections between the way firms and markets function and types of OSH problems that arise is crucial to the success of public policy; and
  - while the protection of worker health and well-being is important, it is not the only objective of modern society. Economic analysis can show instances where safety objectives complement other societal objectives and others where there are trade-offs between different objectives.<sup>2</sup>
- ***The economics of health and safety in the workplace: A brief review***
- A key starting point for the analysis of the proposed changes to the HSE Act is to determine the rationale for government intervention in the area of health and safety in the workplace. Such an analysis can help identify:
  - the role played by the private sector in ensuring health and safety in the workplace;

- the reasons why government intervention might be justified in order to ensure that there is an appropriate amount of health and safety in the workplace;
- the appropriate form that any government intervention should take in order to improve health and safety outcomes; and
- alternative policies that could be adopted in order to improve occupational health and safety outcomes.

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<sup>2</sup> Dorman, Peter (2000), *The Economics of Safety, Health and Well Being at Work: An Overview*, paper prepared for the International Labour Organisation's InFocus Programme on Safety and Health at Work and the Environment, Geneva, p 2.

- There is an extensive literature addressing the issue of the role of the government and the private sector in promoting workplace health and safety.<sup>3</sup> Without going into significant detail on the economics of occupational health and safety, several points are important in evaluating the HSE Amendment Bill:
  - all activities, whether at work or at play, involve risk, which can result in injury, illness or even death. Risk is not unique to the work environment. Indeed, available evidence suggests that workers in New Zealand and elsewhere are safer in the workplace than they are at home;<sup>4</sup>
  - some, but not necessarily all, risk can be reduced or avoided to save lives and prevent accidents. Avoiding risks is costly. All decisions to reduce risk necessarily involve tradeoffs between costs and benefits. Risks should only be reduced where the benefits of doing so exceed the costs. As a result, it is not feasible to eliminate risk completely since the costs of doing so would exceed benefits. People recognise this in electing to drive on the roads and in participating in sport and recreational activities;
  - firms operating in an otherwise unregulated market have a strong incentive to improve safety in the workplace. This is because firms that want to attract workers into 'unsafe' work environments must pay higher wages than could be earned in 'safe' work environments. Firms and industries providing 'unsafe' work environments will face higher labour costs, thus causing them to contract relative to industries providing 'safe' work environments;

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<sup>3</sup> See, for example: Jacobsen, Veronica (1996), *Risky Business: A Review of Institutional Arrangements for Occupational Health and Safety*, report prepared for the New Zealand Treasury, Wellington; Mears, Tracy and Simon Chapple (1996), *Government Involvement in Health and Safety: A Literature Review*, Department of Labour Occasional Paper 1996/1, Department of Labour, Wellington; and Shapiro, Sydney (1999), *Occupational Health and Safety Regulation*, Encyclopaedia of Law and Economics and Viscusi, W Kip, John M Vernon and Joseph E Harrington Jr (1997), *Economics of Regulation and Antitrust*, 2nd ed. MIT Press, Cambridge, pp 655-709.

<sup>4</sup> According to the Cato Institute, in 1993 the chance of dying in an accident at work in the United States was 8/100,000 - slightly below the chance of dying at home (9/100,000) and half the chance of dying in an automobile accident.



- the evidence suggests that wages do reflect differences in job risk (the pay premium is known as a 'compensating variation'). Mears and Chapple (1996) argue that "the balance of North American and UK evidence suggests that compensating variations exist in the labour market";<sup>5</sup>
- in some circumstances, market mechanisms may not provide the appropriate amount of workplace health and safety. For example, the incentives for firms to provide safety may be blunted when wage premiums do not reflect actual risks (eg because of a lack of information on the riskiness of different jobs);
- even if there is market failure (ie the market is not delivering the appropriate level of workplace health and safety), this does not imply that government intervention is justified. Indeed, government intervention (eg through regulation) could actually make things worse or achieve workplace safety improvements at such a high cost that the costs of intervening exceed the benefits;
- the government can intervene in different ways. For example, it can regulate, provide information to workers on the riskiness of particular jobs or provide information to firms and workers on good practice in health and safety;
- the nature and design of government regulations is a critical issue. The way in which the government regulates is as important as whether it regulates. Regulations are not all created equal. Indeed, there are significant differences in the cost-effectiveness of various regulations aimed at increasing health and safety. For example, Hahn, Lutter and Viscusi (2000)

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<sup>5</sup> Mears, Tracy and Simon Chapple (1996), *op cit*, p 66.

show that the amount of risk reduction obtained from regulations with a similar cost can vary by as much as 100,000 times;<sup>6</sup> and

- there are a number of mechanisms in addition to the labour market and regulation for handling workplace risk. These include insurance, workers' compensation and tort liability, which interact with the labour market to provide firms with incentives to provide an optimal level of health and safety at work.

## 5.0 Comment

5.1 There are many aspects of the HSE Amendment Bill that merit comment. Our objective in this submission is three-fold:

- to provide some broader policy analysis to assist the Committee in its consideration of the Bill;
  - to comment on the general policy approach to improving workplace safety that underlies the Bill; and
  - to comment on selected specific policy proposals included in the Bill.
- We do not adopt a clause by clause analysis of the Bill.
  - ***The HSE Amendment Bill's approach to increasing health and safety in the workplace***
  - The issue of health and safety in the workplace is an important one. While recent years have seen considerable progress on this front, more remains to be done.

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<sup>6</sup> Hahn, Robert W, Randall Lutter and W Kip Viscusi (2000), *Do Federal Regulations Reduce Mortality?*, AEI-Brookings Joint Center for Regulatory Study, Washington, DC, p 3.

- The HSE Amendment Bill proposes an extension of the current approach to health and safety regulation that is broader in terms of coverage and focuses to a much greater degree on regulation, *ex-post* enforcement and penalties.
- The NZBR supports the objective of ensuring the appropriate degree of safety in New Zealand workplaces. We do not support the proposed measures in the HSE Amendment Bill as we think they:
  - show insufficient appreciation for the powerful role that market mechanisms can play in increasing workplace health and safety and the significant gains that have been made in workplace safety both prior to, and in the period since, the passage of the HSE Act 1992; and
  - are unlikely to achieve the desired objectives of increasing workplace safety or will do so only in a way that is not cost-effective.
- As noted above, there are strong incentives on firms to improve workplace safety. These have led to considerable progress in lifting workplace safety, both in aggregate and for particular industries. Evidence from the United States shows that:
  - workplace fatalities dropped from 37 per 100,000 workers in 1933 to 4 per 100,000 workers in 1998. Nearly 60 percent of this decline occurred during the period prior to 1970, when OSHA was created in the United States;<sup>7</sup> and
  - the number of work-related musculoskeletal disorders (MSDs) dropped from 750,000 in 1992 to less than 600,000 in 1997, with an accelerated decline in MSD injuries of 17 percent in the last three years of the reporting period.<sup>8</sup>

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<sup>7</sup> Wilson, D Mark (2000), *The Workplace: Enhancing Opportunity, Safety and Innovation*, Chapter 11 of Issues 2000, Heritage Foundation, Washington, DC, p 405.

5.8 A variety of factors are responsible for recent gains, including structural changes in the economy, new technology and better information.<sup>9</sup>

5.9 Evidence from New Zealand shows a similar trend in workplace health and safety. For example:

- the number of work-related fatal injuries declined from 87 in 1985 to 57 in 1994. Two-thirds of this decline occurred during the period prior to the passage of the HSE Act in 1992.<sup>10</sup> In 2001, the number of fatal accidents attended by OSH stood at 39;<sup>11</sup>
- between 1985 and 1994, the number of work-related deaths fell from 5.7 deaths per 100,000 employees to 3.9 deaths per 100,000 employees, a decrease of over 30 percent. Since 1975, the decrease has been 51 percent;<sup>12</sup>
- claims for RSI/OOS fell by 75 percent between 1996 and 1999 as a result of the introduction of early identification and intervention programmes;
- notifiable occupational diseases fell from a peak of nearly 2,000 in 1995/96 to 800 in 1999/2000;<sup>13</sup>
- notifications for occupational overuse syndrome/osteoarthritis dropped by nearly half between 1996 and 1998 – from 828 to 426;<sup>14</sup> and

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<sup>8</sup> Mahoney, Richard J and Milka S Kirova (2000) *Ergonomics by OSHA... Ergo, Outgo by Business*, CSAB Forum, Number 7, Center for the Study of American Business, Washington University, St. Louis, p 2.

<sup>9</sup> Vedder, Richard (2000) *Technology and a Safe Workplace*, Policy Study Number 156, Center for the Study of American Business, Washington University, St Louis, p 16.

<sup>10</sup> Department of Labour (1999) *Briefing to the Ministers of Accident Insurance, Immigration, Labour and Social Services and Employment*, Wellington.

<sup>11</sup> See <http://www.osh.govt.nz/hazards/stats/fatals/fatals.html>

<sup>12</sup> Occupational Safety and Health Service (1999), *No room for Complacency after Drop in Workplace Deaths*, Department of Labour, 2 September.

<sup>13</sup> Occupational Safety and Health Service (2001), *Report on the Notifiable Occupational Disease System*, Department of Labour, Wellington, p 9.

- in the meat industry, the rate of accidents causing time off work beyond the day of the accident declined from around 30 accidents per 100,000 hours worked during the 1980s to 12.7 accidents per 100,000 hours worked in March 1996, 9.9 accidents per 100,000 hours worked in March 1997 and 6.2 accidents per 100,000 hours worked in March 2000.<sup>15</sup>

5.10 Private firms and industry groups, as well as the private sector more generally, are continuing to take steps to improve health and safety in the workplace. In many cases, these initiatives are undertaken in partnership with ACC. For example:

- the Meat Industry Association (MIA) has conducted the Lost Time Injury Frequency Rate Survey (LTIFRS) for more than 20 years. The LTIFRS provides a benchmarking tool for meat companies to gauge performance on safety issues. Similar benchmarking tools have now been adopted by other industries, including dairy;
- the MIA is also undertaking a number of projects, in cooperation with the Meat Industry Research Institute of New Zealand, to reduce accidents in the industry. Many of these initiatives are small but reports suggest that they are achieving excellent results; and
- Safeguard Publishing publishes a magazine and newsletter that explore New Zealand health and safety issues, including product and service reviews;
- the New Zealand Forest Industries Council/New Zealand Forest Owners Association, with the financial support of ACC, have undertaken initiatives such as the *Alcohol and Drug Free Workplace Programme* (October 2000). Other

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<sup>14</sup> Statistics New Zealand (2000), *The Occupational Safety and Health Service: Ratonga Oranga*, <http://www.stats.govt.nz>

<sup>15</sup> Meat Industry Association Annual Report 2000, p 14.

industries are said to be considering using the materials from this programme; and

- the Wellington telephone book lists some 15 safety consultants providing a range of safety services and equipment to firms.

5.11 These are only a few of the ways the private sector is working to increase health and safety in the workplace. Many other initiatives are underway across a range of industries, including fishing, forestry, meat, construction and road transport.

5.12 It should not be surprising that the private sector actively works to increase workplace health and safety. Firms have much to gain from these improvements. As noted by Kniesner and Leeth (2001):

Market forces also promote worker safety and health. Empirical studies show wages rising with workplace risk. All else being equal, the typical American worker in a job with a likelihood of injury earns, on average, 2 to 4 percent more than a person working in a safer job. The added compensation firms must pay to workers who accept more hazardous work is an incentive for firms to expand their investments in safety programs. Firms weigh the benefits of improved safety – smaller compensating wage premiums, lower costs of purchasing workers' compensation insurance, fewer work stoppages, and smaller fines for possibly violating OSHA health and safety standards – against the costs of expanded safety programs.<sup>16</sup>

5.13 Also in a US context, Vedder (2000) cites evidence that moderately risky jobs pay around 10 percent more than so-called risk-free or low-risk jobs.<sup>17</sup> Viscusi notes that firefighters in Kuwait during the Gulf War were paid \$US500,000 per annum, while elephant handlers at the Philadelphia Zoo receive additional annual compensation of \$US1000 because of the risk of injury.<sup>18</sup>

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<sup>16</sup> Kniesner, Thomas J and John D Leeth (2001), *Occupational Safety and Health Administration*, in *Cato Handbook for Congress: Policy Recommendations for the 107<sup>th</sup> Congress*, Cato Institute, Washington, DC, p 416.

<sup>17</sup> Vedder, Richard (2000), *Technology and a Safe Workplace*, Policy Study Number 156, Center for the Study of American Business, Washington University, St Louis, p 2.

<sup>18</sup> Viscusi, W Kip (1992), *Fatal Tradeoffs: Public and Private Responsibilities for Risk*, Oxford University Press, New York, p 6.

5.14 The existence of compensating wage differentials creates a strong incentive for employers to take care – as long as the cost of doing so is offset by the gains from lower wage costs and a lower employee turnover rate. In a competitive market such measures will reduce an employer's insurance premia.<sup>19</sup> Employers will not necessarily choose to eliminate workplace risk, even if this were possible without ceasing operation. Indeed, depending on worker preferences for higher wages, the optimal level of risk could be very high in the riskiest industries.

5.15 The combined effect of labour market incentives in the form of compensating wage differentials, insurance and non-regulatory instruments such as workers' compensation is likely to be much greater than the effect of regulation on workplace safety and health. This is because the total amount spent on fines and on OSH enforcement is very small relative to wage premiums and workers' compensation. For example, compensating wage differentials and workers' compensation payments in the United States amounted to over \$US260 billion in 1998, compared with only \$US132 million levied in fines during that year. As Kniesner and Leeth (2001) comment:

The ratio of those costs – nearly 2,000 to 1 – makes the economic incentives to improve safety by reducing compensating wage differentials and workers' compensation insurance expenses far greater than the safety-enhancing incentives of the relatively small fines imposed by OSHA for violating its standards.<sup>20</sup>

5.16 The US experience with OSHA and other countries' experience with occupational health and safety regulation suggest that efforts to improve workplace safety through greater regulation are unlikely to bear fruit or will achieve gains only at a much higher cost than is necessary. A number of studies report only mixed results from efforts to increase workplace safety through greater regulation. For example:

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<sup>19</sup> Viscusi, W Kip, J Vernon, and J Harrington Jr (1995), *Economics of Regulation and Antitrust*, 2<sup>nd</sup> ed, MIT Press, Cambridge.

<sup>20</sup> *Op cit*, p 416.

- Smith (1976) found that actual injury rates were not significantly lower than predicted injury rates in high hazard industries that were targeted for enforcement by OSHA;<sup>21</sup>
- Mendeloff (1980) found that OSHA did have an impact for some types of injuries in California, but that it had no impact on the aggregate injury rate for California and the nation;<sup>22</sup>
- Vedder (2000) argues that "summing up the historical evidence, the trends seem to suggest that, in the absence of OSHA and similar agencies, workplace safety would probably be similar to what is actually observed. The benefits of regulation, if any, are comparatively small. However, the costs are considerable;"<sup>23</sup>
- Scholz and Gray (1990) found that the threat of fines and inspections had a small, but significant, impact on workplace injury rates. They also found that increasing the number of inspections is far more effective than a comparable increase in average penalty value.<sup>24</sup> Gray and Jones (1991) found similar evidence, with inspected firms exhibiting a significant reduction in hazards;<sup>25</sup>
- Lanoie (1992) found that safety regulation had only a minor impact on accident frequency;<sup>26</sup> and

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<sup>21</sup> Smith, Robert S (1976), *The Occupational Safety and Health Act: Its Goals and its Achievements*, American Enterprise Institute, Washington, DC.

<sup>22</sup> Mendeloff, John M (1980), *An Economic and Political Analysis of Occupational Safety and Health*, MIT Press, Cambridge, MA.

<sup>23</sup> Vedder, Richard (2000), *Technology and a Safe Workplace*, Policy Study Number 156, Center for the Study of American Business, Washington University, St Louis, p 7.

<sup>24</sup> Scholz, John and Wayne Gray (1990), OSHA Enforcement and Workplace Injuries: A Behavioural Approach to Risk Assessment, *Journal of Risk and Uncertainty*, vol 3, pp 283-305.

<sup>25</sup> Gray, Wayne and Carol Jones (1991), 'Are OSHA Health Inspections Effective? A Longitudinal Study in the Manufacturing Sector', *Review of Economics and Statistics*, 73 (3), pp 504-512.



- Mears and Chapple (1996) review a range of studies on the impact of occupational health and safety. They conclude that "perhaps the strongest conclusion comes regarding regulations. US and Canadian evidence suggests that health and safety regulations have little or no significant direct impact on safety, let alone meet cost-benefit criteria".<sup>27</sup>

5.17 As noted above, the evidence on the impact of increased regulation on workplace safety is mixed. This means that the proposed changes in the HSE Amendment Bill, which rely principally on greater regulation and *ex-post* enforcement, are unlikely to have a major impact on workplace safety. Furthermore, the proposed changes could actually reduce safety if they adversely affect New Zealand's growth rate. This is because the key driver of greater health and safety generally is increasing income ('wealthier is healthier').<sup>28</sup> Growth and safety are complements, not substitutes.

5.18 While a small minority of firms may expose their employees to undue risks, that is not a reason to impose excessive costs on the vast majority of firms that take all reasonable steps to maintain a safe working environment. Occasional mistakes, sometime with tragic consequences, will occur no matter how demanding the regulatory regime. The appropriate approach is to focus on those who breach safety standards by applying the existing criminal and other law.

5.19 The HSE Amendment Bill represents another example of government regulating interactions between consenting private individuals without any analysis or evidence being presented that demonstrates the superiority of legislation over the common law.

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<sup>26</sup> Lanoie, Paul (1992), 'The Impact of Occupational Safety and Health Regulation on the Risk of Workplace Accidents: Quebec, 1983-1987', *Journal of Human Resources*, vol 27, pp 643-660.

<sup>27</sup> *Op cit*, p 66.

<sup>28</sup> Hahn, Robert W, Randall Lutter and W Kip Viscusi (2000), *Do Federal Regulations Reduce Mortality?*, AEI-Brookings Joint Center for Regulatory Study, Washington, DC.

5.20 As noted in Wilkinson (2001), there have been many encroachments by legislation on the common law, often with detrimental effects.<sup>29</sup> Kirk recently commented on the trend for statute law to displace the common law as follows:

In the twentieth century, the common law of England, of the United States, and indeed of every country that has adapted English common law to its needs, steadily gives ground before the advance of statutory law. Some legislators scarcely seem aware that the common law still exists, and they succeed in enacting statutes which deal in less satisfactory fashion with subjects already adequately covered by common law.<sup>30</sup>

### **5.21 Additional compliance costs**

5.22 A general concern with the HSE Amendment Bill is that many of the changes will increase compliance costs for business while doing little, if anything, to improve occupational health and safety. For example:

- the introduction of what is effectively mandatory employee participation in occupational health and safety, together with the power given to (union) safety representatives to issue 'hazard notices'; and
- allowing parties other than the statutory authority to take prosecutions. This step opens the way for actions based on a variety of motives. Although such prosecutions may have little chance of success, they would impose significant legal costs and loss of management time on employers.

5.23 As is noted at several points in this submission, these compliance costs will be amplified by existing uncertainties in the HSE Act, including the requirement that employers take 'all practicable steps' to ensure safety.

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<sup>29</sup> Wilkinson, Bryce (2001), *Constraining Government Regulation*, New Zealand Business Roundtable, Federated Farmers of New Zealand Inc, Auckland Regional Chamber of Commerce and Industry and Wellington Regional Chamber of Commerce.

<sup>30</sup> Kirk, Russell (1992), *The Roots of American Order*, 3<sup>rd</sup> ed, Regnery Gateway Publishing, Washington, DC, cited in Wilkinson (2001).

5.24 These additional compliance costs come on top of those already introduced by the government, estimated by Business NZ to be in excess of \$26,000 for a medium sized business.<sup>31</sup>

**5.25 *Extension of definition of 'harm' and 'hazard' to include 'stress'***

5.26 The NZBR is extremely concerned that the HSE Amendment Bill proposes to widen the definition of 'harm' and 'hazard' to include 'stress'. The inclusion of stress risks creating a relatively open-ended liability because:

- stress is not well defined and is in fact very difficult to define. It is therefore more susceptible to fraudulent claims than physical injuries;
- there is considerable variation in individual susceptibility to stress; and
- stress often has its roots in personal problems outside work.

5.27 The open-ended nature of this liability in the HSE Amendment Bill contrasts with the provisions of workplace legislation in other jurisdictions, which are much more limited in scope. For example, workplace legislation in Queensland and South Australia requires proof that the job was a 'substantial' cause of the disability and that the disability did not arise predominantly from reasonable management action by the employer.<sup>32</sup>

5.28 As currently drafted, the inclusion of stress would greatly increase uncertainty for employers and could result in employers bearing responsibility for illnesses that were not caused by work circumstances at all. This will amplify the uncertainties that already exist in the HSE Act as a result of the ill-defined and open-ended requirement that employers take "all practicable steps" to ensure

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<sup>31</sup> Business NZ (2002), 'The Great NZ 7 Day Service Co. Ltd', Press Release, 25 February.

<sup>32</sup> Muir, Philippa (2002), 'Dialogue: Stress bill hazardous for business', *New Zealand Herald*, 12 February.

safety. Experience with claims on ACC for pain and suffering illustrates the risks involved.

- 5.29 A second concern is that the inclusion of stress in the HSE Amendment Bill and giving unions and employees the right to issue hazard notices and bring actions against employers, invites people to abuse safety legislation for industrial purposes. This suspicion is reinforced by the comments of the minister of labour in the *New Zealand Herald* on 11 February where she is quoted as citing the financial services industry as one where:

"People are being set performance targets which keep on changing". Employers may claim that performance targets are an essential part of the industry, but the goals have to be achievable. "That's where the consultation comes in, and that's where I'm hoping that we can set up codes within those industries where there are particular issues."<sup>33</sup>

- 5.30 This concern will be exacerbated by the fact that health and safety representatives will be elected. The election process will provide unions with a vehicle to use this role as a tool for pursuing industrial agendas, thus raising compliance costs and removing the focus of management from running a successful business. For example, in the financial services industry, Finsec would like a greater say in how work is organised – especially in the setting of performance targets and pay. Leaving the detail out of the HSE Amendment Bill so that it can be decided in consultation with employee representatives will encourage the union to use OSH legislation to advance their industrial objectives. Indeed, the minister's comments suggest that this is exactly what is envisaged.

### **5.31 *Removal of ability to insure against fines***

- The HSE Amendment Bill makes it unlawful to insure against fines issued under the Act, although insurance for the cost of defending a prosecution remains

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<sup>33</sup> Taylor, Kevin (2002) 'Stress claims must be proved', *New Zealand Herald*, 11 February.

lawful. As noted by Campbell (2002), the proposal appears to be based on two premises:

- that allowing insurance against OSH fines is tantamount to allowing persons to contract out of their obligations under the Act; and
- that insurance removes or significantly reduces any incentive to comply with the HSE Act.<sup>34</sup>

5.33 Campbell dismisses both of these arguments, noting that the "[T]hese rather opaque claims reflect a surprising misunderstanding of the effect that insurance has in relation to obligations under legislation such as the Health and Safety in Employment (HSE) Act". He argues that, contrary to what the HSE Amendment Bill's drafters appear to believe, insurance does not allow employers to contract out of the HSE Act, nor does it reduce, to any significant extent, their incentive to comply with the HSE Act.<sup>35</sup>

5.34 While the benefits of this provision may be minimal, the costs are likely to be high given that they will significantly increase uncertainty for employers. Once again, this uncertainty will be amplified by existing design of the HSE Act which already creates considerable uncertainty.

### **5.35 *Quality of policy advice***

5.36 An issue of significant concern to the NZBR is the poor quality analysis that is displayed in the Cabinet papers underlying the HSE Amendment Bill. The Regulatory Impact and Compliance Cost Statements attached to the individual Cabinet papers do not meet even the most minimal tests for good quality policy advice. In general, the papers:

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<sup>34</sup> Campbell, Neil (2002), 'Editorial: Insuring against OSH fines', *Company and Securities Law Bulletin*, p 133.

- are not underpinned by a rigorous analytical framework;
- are weak on problem definition;
- provide only a cursory analysis of the proposed measures and little discussion of alternatives that would meet whatever objectives are being sought by the policy changes;
- contain little or no assessment of the potential benefits and costs of the proposed measures. In many cases, the stated rationale for adopting a particular measure is that that it received "support from submissions on the Discussion Paper"<sup>36</sup>; and
- make no attempt to quantify the potential benefits and costs of the proposed measures in terms of lives saved, reduced injuries, costs imposed on business, etc.<sup>37</sup>

5.37 For example, the Cabinet paper entitled *Changes to the Health and Safety in Employment Act: Effective Enforcement Paper* states that "increasing the certainty of detection and the severity of punishment under the HSE Act will improve compliance..." In fact, as outlined in paragraph 5.16 above, the evidence on this issue is not nearly as clear-cut as is implied by this statement. A comprehensive review of the evidence on this particular issue was readily available on the Department of Labour's own website.

5.38 The weakness of the analytical base that is used to support these changes is of particular concern given the importance of the issues being addressed and the potential adverse impacts on business of the proposed changes for what would

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<sup>35</sup> *Ibid.*

<sup>36</sup> For example, this is the stated rationale for banning insurance against fines under the HSE Act.

<sup>37</sup> For a more comprehensive critique of the quality of the Regulatory Impact Statement, see Capital Economics (2001), *Assessment of the Health and Safety in Employment Bill: Regulatory Impact Statement*, Draft paper, Capital Economics, Wellington.

appear to be little gain in terms of increased safety. It is also of particular concern given that the Ministerial Panel on Business Compliance Costs had noted the concerns of business with respect to the HSE Amendment Bill.<sup>38</sup>

- 5.39 The poor quality policy process contrasts with the processes used in other countries such as the United States. For example, OSHA's proposed introduction of an ergonomics standard underwent extensive analysis and even this was criticised as insufficient. The process included a full economic analysis by OSHA, review by the Small Business Administration and the General Accounting Office and several quantifiable cost-benefit analyses by both government and non-government researchers.<sup>39</sup> As a result of this process, the proposed standard was withdrawn. It is important to highlight that the changes in the HSE Amendment Bill are much more comprehensive than what was proposed in the United States, yet they appear to have received little or no quality analysis.
- 5.40 Given the potential impact of the HSE Amendment Bill, it is crucial that the policy proposal undergo much more rigorous independent scrutiny.

## **6.0 Conclusion**

- The issue of health and safety in the workplace is clearly an important one. Considerable progress has been made in recent years in reducing accidents, illness and death in New Zealand workplaces. But more remains to be done. The NZBR is concerned to ensure that there is the appropriate amount of safety in New Zealand workplaces. From its perspective, the HSE Amendment Bill's objective of improving health and safety in the workplace is not at issue. However, there are difficult trade-offs in the achievement of health and safety.

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<sup>38</sup> Ministerial Panel on Business Compliance Costs (2001), *Finding the Balance: Maximising Compliance at Minimum Cost*, p 6.

<sup>39</sup> See, for example, Employment Policy Foundation (2000), *Critique of OSHA's Economic and Regulatory Flexibility Analysis of the Proposed Ergonomics Program Standard*, Employment Policy Foundation, Washington, DC and Mahoney, Richard J and Milka S Kirova (2000), *op cit*.

- In the end, the HSE Amendment Bill cannot be judged on its objectives. It has to be judged on whether or not its benefits exceed its costs. In our view, the HSE Amendment Bill fails this test. In particular, we believe that the proposed measures are unlikely to significantly improve health and safety in the workplace and could in fact make things worse if they lower economic growth. Furthermore, even if the proposed measures do increase workplace health and safety, these gains will come at a much higher cost than if alternative measures were adopted. In other words, a different set of policies would allow more lives to be saved and reduce workplace illness and injury by more than would be achieved under the proposed measures at the same lower cost to society. This is of significant concern because it means that resources that could have contributed to the betterment of New Zealand society are being thrown away.
  
- Achieving health and safety in the workplace involves a complex mix of environmental factors, equipment and individual actions. Available evidence suggests that health and safety in the workplace can best be achieved by the following:
  - the implementation of sound strategy to raise economic growth. Citizens of countries with the highest per capita incomes are among the healthiest. High-income countries also have more choices when it comes to spending on safety and health and other activities;<sup>40</sup>
  
  - well-functioning labour markets that compensate workers *ex ante* for job risks and force employers to compete against other employers for available labour. The employer's safety record is a factor in such competition;
  
  - *ex-post* compensation for injuries or illness through appropriately designed workers' compensation schemes and/or tort law. The deficiencies of tort law

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<sup>40</sup> Hahn, Robert W, Randall Lutter and W Kip Viscusi (2000), *op cit*.



in New Zealand will, other things being equal, lead to more deaths and more injuries in New Zealand workplaces; and

- appropriately designed regulatory interventions.<sup>41</sup>
- Regulations differ significantly in terms of their effectiveness and their performance on a cost-benefit basis. It is therefore very important to 'get it right' when new regulations are introduced.
- In our view, the HSE Amendment Bill is flawed because it places too little emphasis on the first three of the elements noted in paragraph 6.3 and includes a number of poorly designed regulatory interventions. In particular:
  - the benefits of increased regulation and a greater OSH presence, in terms of increased safety in the workplace, are unproven;
  - they will make the HSE regulatory environment more uncertain by introducing coverage in areas such as mobile workers and stress and fatigue;
  - the changes will add significantly to the regulatory burden on all businesses and particularly on small businesses, thus inhibiting their scope to grow and innovate;
  - to the extent that these changes adversely affect economic growth, they could reduce health and safety in the workplace, given that a major driver of safety is higher national income;
  - changes to the HSE Act are being introduced as a means of overcoming what may be weaknesses in other parts of the regulatory framework for health and safety, including the ACC scheme and tort law; and

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<sup>41</sup> Shapiro, Sydney (1999), *op cit*, p 620.

- there is a considerable risk that the new OSH rules will become a tool for unions to use to control work processes, notwithstanding the fact that strict liability applies to employers for any contraventions of the statute.
- There are already significant concerns with the existing HSE Act.<sup>42</sup> The changes proposed in the HSE Amendment Bill are likely to make the position worse. The net costs of the proposed OSH changes are potentially significant in terms of reduced competitiveness and higher compliance costs for New Zealand businesses.
  - The government has made an ambitious commitment to restore New Zealand to the top half of the Organisation for Economic Cooperation and Development (OECD) income rankings. The issue of economic growth is also top of mind for many New Zealanders. A recent UMR survey carried out for Business New Zealand, the Knowledge Wave Trust and the Science and Innovation Advisory Council showed that, of those surveyed:
    - only 21 percent felt that the economy was performing well enough to deliver enough high quality jobs and quality health, education and other social services; and
    - 83 percent felt that growing the economy was the best way to deliver more quality jobs, better health care, education and other social services.

6.8 Yet, New Zealand's growth performance has been deteriorating, not improving, in recent years.<sup>43</sup> The HSE Amendment Bill changes will do nothing to help the government meet these ambitious growth targets. Indeed, they are very likely to move us further away from achieving them.

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<sup>42</sup> See Wilkinson, Bryce (2001), *op cit*, pp 28-33 and Ministerial Panel on Business Compliance Costs (2001), *op cit*, pp 73-78.

<sup>43</sup> Kerr, Roger (2002), *Agenda 2002: An Election with Vision*, Speech to Rotary Club of Wanganui, New Zealand Business Roundtable, 28 January.

## 7.0 Recommendations

- The NZBR opposes the measures outlined in the HSE Amendment Bill and recommends that it should not proceed. Instead, we recommend:
  - a high quality independent review of the design of the existing HSE Act and possible options for addressing existing shortcomings. This should include research aimed at building up the research base on health and safety issues, including assessing available evidence on what works and what does not work in promoting workplace health and safety;
  - facilitate the dissemination of information on best practice in workplace health and safety. New Zealand's experience in recent years is that industries can and do learn a lot from one another about ways of improving workplace health and safety;
  - consider health and safety objectives within a wider policy framework, including ACC and tort reform.<sup>44</sup> Both of these can have an impact on health and safety by improving incentives to take care. To the extent that these policy settings are wrong, OSH policy is being asked to make up for their deficiencies. For instance fines, private prosecutions and exemplary damages can be seen as attempts to skirt around the weaknesses of the no fault principle; and
  - examine possible initiatives to improve the policy-making process. Despite the potential significance of the workplace health and safety changes, the analysis underpinning the proposals is not at all rigorous. Workers, taxpayers and businesses deserve better. One possibility is to consider the

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<sup>44</sup> Credit Suisse First Boston (1998), *Accident Compensation: Options for Reform*, New Zealand Business Roundtable, Wellington.

introduction of a regulatory responsibility act, as discussed in Wilkinson (2001).<sup>45</sup>

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<sup>45</sup> Wilkinson, Bryce (2001), *op cit.*