

Introduction

1. This chapter explores the regulatory framework for worker participation and recommends some improvements. Although aimed at health and safety in underground coal mines, some of the recommendations have wider application.
2. Worker participation is essential to keeping workplaces healthy and safe. Workers have practical experience in the daily hazards that arise and employers need their contribution to manage such hazards. Worker participation is required by the International Labour Organisation (ILO)'s Occupational Safety and Health Convention 1981 (C155), which was ratified by New Zealand in 2007.

Regulatory framework

3. The Health and Safety in Employment Act 1992 (HSE Act) places a general duty on all employers to give employees reasonable opportunities to participate in improving health and safety.¹ That includes providing a safe working environment, safe facilities and plant and identifying and managing hazards. Employees can participate directly or indirectly, through health and safety representatives and joint employer/employee health and safety committees.
4. The contribution employees make depends on their knowledge and expertise, the information and training they are given, the effectiveness of the health and safety processes in their workplace and the degree of support they receive from the regulator. Employers are required to provide employees with a range of information such as the results of health and safety monitoring by the employer or the regulator, emergency procedures, identified hazards, potential hazards and the location of safety equipment.² Employers must take all practicable steps to ensure that their employees are competent to perform their work safely, or are supervised by someone with sufficient knowledge and expertise.³
5. The HSE Act requires employers with 30 or more employees to develop an employee participation system. Where there are fewer than 30 employees, an employee participation system is required only if an employee or a union representative requests it. The HSE Act requires only that the system have a review process.⁴

Health and safety representatives and committees

6. Two ways of involving workers in the management of health and safety are through elected health and safety representatives and joint health and safety committees. The role of representatives includes fostering positive health and safety management practices, identifying hazards and drawing them to the employer's attention, consulting health and safety inspectors and promoting the health and safety of employees.⁵
7. Health and safety representatives must have ready access to information about workplace health and safety, and they must be given paid leave for health and safety training.⁶ Only trained representatives can issue hazard notices, which may recommend steps for dealing with the hazard, and they can choose to notify a health and safety inspector that they have issued a notice.⁷
8. Health and safety committees are committees of workers with the ability to make recommendations. The employer must either adopt the recommendations of a health and safety committee (or a health and safety representative) or explain in writing why the recommendations have not been adopted. There is no stipulated timeframe for responding.

Employee rights to refuse work

9. Employees can refuse to do work they believe is likely to cause them serious harm. They can continue to refuse if they are unable to resolve the matter with their employer and they have reasonable grounds for believing that the work is likely to continue to cause them serious harm. Reasonable grounds include advice from a health and safety representative that the work is likely to cause serious harm.⁸ This right to refuse work on health and safety grounds must be exercised individually (including individually by each member of a group), but under the Employment Relations Act 2000 employees can also collectively decide to strike for health and safety reasons. The lawfulness of a strike, as opposed to an individual refusal to work, is subject to the Employment Relations Act 2000.
10. Employees must be aware that they have the right to refuse to work and understand what that means. To exercise their rights, employees need sufficient information and training about the hazards to which they may be exposed and the harm they could suffer.

Problems with the framework

11. The framework provided by the HSE Act for employee participation is generally sound. It gives employees the means to ensure their workplace is run in a healthy and safe manner and to protect themselves. However, the framework has limitations regarding contractors, the requirement to develop a system, the range of information readily available to employees and the powers of health and safety representatives.

Contractors

12. The HSE Act distinguishes between employers' duties to their employees and to contractors, including their supervision and training. Principals and people in control of a workplace are generally required to ensure that contractors, subcontractors and their employees are not harmed while lawfully at work,⁹ but are not expressly required to ensure that they are competent to do the work safely or that they are supervised. This can be problematic when a business or person is engaged to do work in an unfamiliar environment. For example, a coal mine may contract experienced builders to erect structures underground who do not understand the mine's unique hazards. Employers should have a positive duty to take all practicable steps to ensure that contractors are competent to do work safely or are adequately supervised.
13. Nor does the requirement for an employee participation system cater adequately for modern workplaces where the workforce consists of employees, contractors and subcontractors. The government has addressed the absence of an express requirement for businesses to collaborate in the Health and Safety Amendment Bill (No. 2). The bill requires collaboration by all who have duties at the same place of work, except employees. Those people will be required to work together to meet their employee participation duties (and other duties). The bill was introduced to Parliament in August 2008 and needs to be progressed.

Requirement for employee participation system

14. While all employers must provide opportunities for employees to participate in ongoing health and safety processes, only those with 30 or more employees are required to have a system. As a result, small businesses may have no formal or documented systems that can be the subject of audits and that will ensure workers know how they can participate. All underground coal mines, regardless of their size, should have documented worker participation systems. In small workplaces, such systems could be quite simple.

Information readily available

15. Employees are not entitled, as a matter of course, to receive the full range of information about health and safety in their workplace. Unless they request it, employees do not have to be given information about hazards they will not be exposed to or will not create.¹⁰ But that information may be useful for assessing how well the employer identifies and manages hazards.

16. Employees should not have to ask for information about workplace monitoring; they need it to understand the conditions of their workplace. But they may not want to alert others, including their employer, to their interest in the information. Section 11(2)(b) of the HSE Act should be framed as a positive duty to make such information available to all workers without request.
17. Employers are not required to provide workers with the results of their investigations into health and safety incidents. These should be automatically made available to workers without them having to ask. The information may have to be provided in a form that does not breach the employer's other obligations, such as protecting the privacy of employees involved in or disciplined as a result of the investigation.

Power of health and safety representatives to inspect

18. The HSE Act does not give health and safety representatives the right to gather health and safety information through workplace inspections. Such inspections would provide a fuller picture of workplace hazards and their management than is possible from merely examining documents and talking to workers. Representatives should be able to carry out inspections, including during their normal working hours.

Power of health and safety representatives to protect workers

19. Health and safety representatives may discover hazards that are a source of immediate harm, but they have no power to stop activities.¹¹ Representatives can inform workers of the hazard and the workers can choose whether to stop work. Workers may not, however, have sufficient training or information to make an informed choice. They may also worry that refusing to work will jeopardise their employment or contract.
20. Health and safety representatives can raise the hazard with the employer, but the employer may not agree that work should stop immediately. The representatives can refer the matter to the regulator but that may not ensure immediate action either.
21. Trained health and safety representatives should be able to stop all or part of operations when there is an immediate danger to workers. This would give them a similar power to that of Queensland's site safety and health representatives to stop work.
22. Because stopping a business's operations has such a serious impact, the decision should be made only by health and safety representatives who have received sufficient training in health and safety, and in the exercise of that power.

Union check inspectors – underground coal mines

Background

23. The New Zealand Council of Trade Unions (NZCTU), the Engineering, Printing and Manufacturing Union (EPMU) and the Public Service Association (PSA) argued for the introduction of union check inspectors, similar to those previously known as workmen's national inspectors.
24. Workmen's national inspectors, appointed by the union, were used in underground coal mines before the HSE Act. They inspected mines where union members worked and reported their findings to the mine manager. If the workmen's national inspector reported that the mine or part of it was dangerous to life, or that any dangerous practice existed, the mine manager had to forward a copy to the mines inspector. But the workmen's national inspector could not require that work stop or workers be withdrawn.¹²
25. The union check inspectors now advocated for are based primarily on the union-appointed industry safety and health representatives in Queensland. They can direct operations be suspended when they believe the risk from coal mining operations is unacceptable.¹³

26. The industry does not support union check inspectors, with Solid Energy New Zealand Ltd saying employee participation can be adequately assured without them. Both the Coal Association of New Zealand (CANZ) and Solid Energy were concerned that such inspectors could make safety issues 'a focal point for any unrelated industrial conflict'.¹⁴ The commission was not provided with evidence to support that concern or to show it occurs in Queensland. CANZ and Solid Energy also suggested that union check inspectors could undermine engagement of all employees in health and safety.

Advantages of union check inspectors

27. A union check inspector would be an extra set of eyes and ears, and a further line of defence. Such inspectors may have made a difference at Pike River. Experience in Queensland shows that workers are more willing to report problems to their industry safety and health representatives than to the mines inspector, which means the representatives may be better informed. Union check inspectors would not be subject to the same employment concerns as workers (including health and safety representatives).
28. Union check inspectors could also play a valuable role in small underground coal mines where there are few workers and establishing sophisticated worker participation systems may be more difficult. It may not be appropriate for such mines to elect trained health and safety representatives, and union check inspectors could fill the gap.
29. The mines inspectorates in Queensland and New South Wales support the use of union check inspectors: 'We are comfortable with this. Don't see them as abusing their powers. If it has ever been an issue then the inspectorate deals with it.'¹⁵
30. Union check inspectors, appointed and paid by the union representing coal mine workers, should be introduced. They should have the power to enter and examine an underground coal mine. If they reasonably believe there is an immediate danger to the health and safety of a worker or workers, they should be able to stop operations. In all other cases where there may be danger, they should be required to refer their concerns to a mines inspector.
31. Their powers should apply only to health and safety matters. The regulator would investigate any allegations that union check inspectors were acting with any other motivation. If the allegations were justified, the appointed representative could be removed by the regulator.
32. Union check inspectors would need sufficient training and experience in underground coal mining and health and safety to ensure that they can properly and effectively exercise their powers. At the least, they would need a deputy's certificate of competence.

Practical measures to support worker participation

Employer support

33. The workplace environment needs to encourage workers to exercise their rights and perform their duties effectively. Employers should create a 'no-blame culture' that values health and safety and that supports workers who raise health and safety concerns. This requires leadership and commitment by management and the building of trust with workers, including health and safety representatives.
34. The development of high-trust relationships takes time. Senior management must be willing to listen to workers' concerns about health and safety and should respond to them promptly, even if only to explain why no action has been taken. The response should be given directly to the worker who reported the problem. All workers should be informed about the problem and the response.
35. The employer should support the health and safety committee by providing an employer representative who is senior enough to ensure that any concerns raised are dealt with quickly and appropriately.

36. Managers and supervisors need to demonstrate competence in workplace health and safety. A reasonable level of knowledge will help managers to judge the quality of the health and safety advice they receive and maintain constructive relationships with health and safety representatives. Performance appraisal and reward systems should recognise health and safety as a key results area.
37. The effectiveness of worker participation systems should be regularly reviewed and any problems addressed.

Union support

38. Trade union support may make it more likely that worker participation and representation will result in improved health and safety, but this may not be the case where there are difficult worker/employer relationships. A sample of mines at two Australian companies showed that below average safety performance was more common at the more heavily union-dominated workplaces where there were also adversarial relationships between workers and management and low levels of trust.¹⁶
39. The unions should support workers and health and safety representatives, regardless of union membership. In terms of training representatives, the NZCTU said it 'has accepted responsibility to act on behalf of all workers and not just union members. It does so because it regards workplace health and safety as a crucially important issue and because, although its resources are very limited, the union movement has the networks and the experience to reach out to all workplaces.'¹⁷

Regulator support

40. In early 2010, the Department of Labour (DOL) recognised the importance of the regulator actively supporting employee involvement in workplace health and safety and the role of health and safety representatives.¹⁸ DOL inspectors should engage with workers and their representatives regularly and make their contact details available. They should routinely consult health and safety representatives during inspections and audits. When possible, a representative should accompany the inspector during a visit.
41. The regulator should issue an approved code of practice on worker participation, and should promote it – and worker participation more generally – through education and publicity. Workers need to understand their rights and obligations; health and safety representatives need to understand their role. The code should help employers to meet their obligations and improve worker participation.
42. Health and safety representatives need to be well trained. Training is provided mainly by the NZCTU, Business New Zealand and Impac Services, and funded by the Accident Compensation Corporation (ACC) and by DOL through the Employment Relations Education Contestable Fund. ACC's funding has dropped substantially in recent years. DOL has provided more money, but has not been able to meet the entire shortfall. The government should ensure sufficient funding is available to train health and safety representatives.

Recommendation 11:

Worker participation in health and safety in underground coal mines should be improved through legislative and administrative changes.

- Legislative changes should:
 - require operators of underground coal mines to have documented worker participation systems;
 - ensure all workers, including contractors, are competent to work safely, are supervised and are included in the mine's worker participation system;
 - empower trained worker health and safety representatives to perform inspections and stop activities where there is an immediate danger of serious harm;

- require the results of monitoring and investigation of health and safety in the workplace to be automatically made available to workers; and
- allow unions to appoint check inspectors with the same powers as the worker health and safety representatives.
- The regulator should
 - issue an approved code of practice on employee participation;
 - promote workers' rights and obligations through education and publicity; and
 - ensure that inspectors routinely consult workers and health and safety representatives as part of their audits or inspections.

ENDNOTES

¹ Health and Safety in Employment Act 1992, s 19B.

² Ibid., ss 11–12.

³ Ibid., s 13.

⁴ Ibid., s 19C.

⁵ Ibid., sch 1A, pt 2. These are mandatory functions for health and safety representatives elected following a failure by an employer to develop a system when required. Health and safety representatives who are part of an agreed employee participation system have the functions as agreed between the employer, employee and if applicable, the union.

⁶ Ibid., s 19E.

⁷ Ibid., s 46A.

⁸ Ibid., s 28A.

⁹ Ibid., ss 15, 18.

¹⁰ Ibid., s 11(2)(b).

¹¹ Before the HSE Act was passed, the Occupational Safety and Health Bill proposed giving health and safety representatives the power to stop dangerous work and giving employees the right to refuse to do dangerous work. Those provisions were not retained by the HSE Act. The right to refuse work was inserted into the HSE Act in 2003 to comply with ILO Convention C155.

¹² Coal Mines Act 1979, s 175.

¹³ Coal Mining Safety and Health Act (Qld), s 167(1).

¹⁴ Adam Holloway, transcript, p. 5480.

¹⁵ Neil Gunningham and Darren Sinclair, ACARP Research Report Mine Safety Regulation: Towards a National Approach, March 2010, p. 18.

¹⁶ Neil Gunningham, Mine Safety: Law Regulation Policy, 2007, Federation Press, p. 201.

¹⁷ New Zealand Council of Trade Unions, Submissions on Phase 4 Issues, 16 March 2012, NZCTU0001/24.

¹⁸ Department of Labour, Workplace Services Practice Note – Health and Safety – No: 2010/11: Engagement with Health and Safety Representatives, March 2010, DOL3000100005.