



NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

**Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi**

to the

Ministry of Business, Innovation and Employment

on the

**Exposure Draft of the Health and Safety at Work
(Hazardous Substances) Regulations 2016**

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February 2016

1. Introduction

- 1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. The CTU has a strong interest in protecting workers by ensuring that the law regulating hazardous substances is complied with and enforced. In principle, the CTU supports changes to the hazardous substances regime that further this and improves current practice in the workplace. The CTU supports many of the changes made to the Health and Safety at Work (Hazardous Substances) Regulations 2016. However, the CTU also has a number of significant reservations.

2. Training, information, instruction and supervision

- 2.1. The CTU supports the strengthening of the provisions covering training and supervision of workers handling hazardous substances in r 4.3. These provisions, if adhered to (and enforced when they are not) are central to ensuring the health and safety of workers who handle hazardous substances. Without proper training and supervision, the best additional controls on hazardous substances cannot keep workers safe.
- 2.2. The CTU also supports the ability for inspectors and compliance certifiers to check the record of instruction and training provided to each worker. This record should also include details of supervision arrangements under r 4.4 to allow inspector and compliance certifiers to ensure any supervision arrangements are appropriate to the level of training, instruction and information that workers have been provided with.
- 2.3. Duties under r 4.4 are as just critical as to health and safety as those set out in r 4.3. Given this the CTU submits the fine for contravening duties under r 4.4

should be the same as that for contravening duties under r 4.3: for an individual, \$10,000 and for any other person, \$50,000.

- 2.4. Regulation 6.20 should be clarified to ensure that compliance with r 4.3 and r 4.4 must be considered before the compliance certifier can issue a compliance certificate. If the compliance certifier refuses a compliance certificate because, in his or her opinion, r 4.3 and r 4.4 have not been complied with, the compliance certifier should be required to notify WorkSafe, regardless of whether any “potential adverse effect” has been “satisfactorily avoided”. A failure to properly train and supervise workers is likely to be indicative of a wider health and safety problem within the workplace, and WorkSafe should be notified.
- 2.5. Moreover, given the introduction of duties onto workers (including corresponding offences & penalties)¹, a PCBU should have an express duty under r 4.3(3) to ensure workers are informed of their particular duties under these regulations and how to comply with them. Workers should not be expected to review over 500 pages of hazardous substances regulations to establish which specific duties apply to them. This is impracticable and unfair.

3. Labelling of hazardous substances containers

- 3.1. The CTU is wary of the exemption for labelling requirements when a hazardous substance will be used immediately at the workplace and not supplied to a person outside the workplace. It is very possible that the substance could be used immediately by a worker, but because the substance is not labelled, the worker is unaware of the substance they are working with. For example, a worker might be required to work with a substance immediately after it is decanted from its original container by another worker. The removal of this requirement is a step backwards from the current regime and should not be implemented. Labelling is not an onerous or costly requirement.
- 3.2. Furthermore, the CTU submits that the PCBU should also be required to ensure compliance with rs 34, 35, and 36 of the Hazardous Substances (Identification) Regulations 2001. These regulations relate to the comprehensibility, clarity, and durability of the information and labelling. A duty on PCBUs to ensure hazardous substances are labelled means nothing without the duty to ensure they are

¹ Discussed below at para 5.

labelled in a way that is understandable, clear, and accessible. It is unclear why these regulations have been omitted.

4. Duty to keep hazardous substances inventory

- 4.1. The CTU supports the requirement in r 3.1 for the PCBU to ensure an inventory is prepared and up to date. However, the inventory should also be available to and accessible by Health and Safety representatives and unions, if they are representing workers who may be likely to be affected by a hazardous substance in the workplace. This is consistent with the employer's duty of good faith (towards employees and their unions) and a PCBU's duty to supply information to health and safety representatives.
- 4.2. Further, the CTU submits an inventory should also be required for hazardous substances that are in transit in a workplace while other goods are being loaded onto or unloaded from a vehicle. Without this inventory, workers who are loading or unloading other goods from a vehicle that also has hazardous substances could be at risk without their knowledge. If an incident occurred, the workers would not have ready access to the information they would need to respond, such as the safety data sheets, which include recommendations for the immediate first aid response. It is precisely those substances which the PCBU or workers do not encounter frequently that could pose the greatest risk as they do not have procedures in place to deal with these rare but hazardous products as they are in transit. We note that the Australian regulations require an inventory when the substances are significantly or frequently present while in transit.

5. Duties on workers

- 5.1. The CTU was surprised to see the introduction of specific duties on workers that did not feature in the previous regulations. Our understanding is that:
 - Regulations 11.43, 11.46, 11.47, and 11.48 provide new duties. There are no corresponding duties on workers in older versions of our regulations or in the Australian model regulations.
 - Regulations 16.39, 16.40, and 16.41 now specifically place duties on workers. Under the 2004 regulations, the equivalent duties were on the "person in charge" rather than worker. A person in charge was defined as "in relation to a place, a hazardous substance location, a transit depot, or a place of work,

means a person who is— (a) the owner, lessee, sublessee, occupier, or person in possession of the place, location, or depot, or any part of it; or (b) any other person who, at the relevant time, is in effective control or possession of the relevant part of the place, location, or depot”. In some instances that would be a worker, but in some it may not be. Placing the duty on the person in charge is consistent with the basic principle that those with greatest ability to control risks should have the greatest responsibility to do so. As the Independent Taskforce put it:

The Taskforce believes that the underlying foundation of the regulatory framework should be the allocation of duties to those who are in the best position to control workplace health and safety risks to keep them as low as is reasonably practicable.²

- 5.2. Given the specific nature of the duties and the limited circumstances in which they apply, we do not oppose the introduction of the duties. However, as stated at paragraph 2.5, because of the very specific nature of these regulations and the fact they are found hidden on pages 195-198 and 362-636 of 524 pages of the regulations, they must be paired with a duty on PCBU's to inform workers of these duties.

6. Emergency response plans

- 6.1. The CTU opposes changes made to regulation 5.11 regarding the steps a PCBU must take in regard to a recommendation made by the New Zealand Fire Service about the contents or effectiveness of an emergency response plan.
- 6.2. The scope of the review by the Fire Service is already limited to considering whether the role for the Fire Service is achievable and consistent with the operational policies of the service, along with identifying anything that may adversely affect service operations during an emergency. The Fire Service is best placed to consider its role, capability and capacity to respond in an emergency.
- 6.3. Therefore, any recommendation made by the New Zealand Fire Service should be complied with. At a minimum, the concern forming the basis of the

² Independent Taskforce on Workplace Health and Safety. (2013). *The report of the Independent Taskforce on Workplace Health and Safety: he korowai whakaruruhau*. Wellington, New Zealand: New Zealand Government at paragraph 219, p.53. Retrieved from <http://www.hstaskforce.govt.nz/>

recommendation must be remedied. If the Fire Service considers it cannot fulfil the role given to it in an emergency plan, a PCBU must address this and not merely “have regard” to such a recommendation, which could include ignoring the recommendation in its entirety.

7. Safe Work Instruments

- 7.1. The CTU supports the intention to create safe work instruments to set exposure limits, requirements, and other controls for hazardous substances. The CTU is wary of any safe work instrument that might provide for an alternative of complying with any matter that is the subject of requirements or controls in the regulations. Safe work instruments should not be used as a quick and dirty method of changing the regulations. Safe work instruments should be used to set further or more detailed requirements to those set out in the regulations, rather than alternative ways of complying with the regulations.

8. Safety cases under the Railways Act 2005

- 8.1. Regulation 13.13 deems compliance with r 13.11 if the hazardous substance being transported by rail is being done so in accordance with an approved safety case under the Railways Act 2005.
- 8.2. The CTU is very concerned about this. The safety system and the approved safety case mechanisms require immediate change to include worker participation and representation in the negotiation and approval of an approved safety case or safety system. These systems are currently signed off by the Regulator (such as NZTA) without input from workers or their unions. This is inconsistent with the requirement in the Act that engagement must occur with workers on matters that affect their health and safety. The Government should not permit other regulatory agencies to work in a way other than that which is consistent with the Act.
- 8.3. Approved safety cases and safety systems should not be deemed compliant with r 56 of the Hazardous Substances (Classes 1 to 5 Controls) Regulations 2001. There must be proper worker engagement before they are agreed to be compliant.

9. Parts 18 and 19

- 9.1. The CTU representatives on the guidance group have reviewed Parts 18 and 19 of the regulations and support the content. There is a typographical error in r 19.4(3): “any other active ingredient described in an applicable a safe work instrument”.

10. Exposure standards

- 10.1. The wording used to describe exposure standards for hazardous substances is misleading. For example, r 13.21 imposes a duty on the PCBU to “ensure that a person is not exposed to a concentration of a class 6 substance that exceeds the prescribed exposure standard (if any) for that substance”. Other examples can be found in rs 13.9, 14.34, and 18.14. The CTU submits that wording the duties in such a way undermines the general duty under the Act to eliminate or minimise a risk so far as is reasonably practicable. It encourages PCBU’s to think of exposure standards as a “safe” or “tolerable” level of exposure, when this is, for most substances, far from the truth. Other controls, including personal protective equipment, should be used well before exposure standards are exceeded for most substances.
- 10.2. Members of unions affiliated to the CTU regularly struggle with this issue: employers deny any controls must be implemented unless it is likely the exposure standard will be exceeded. Any language encouraging that mind-set or approach must be changed. An example of where this has been properly encapsulated is r 14.25(3)(a)(ii).
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