

Submission of
The New Zealand Mining Industry Safety Council (MinEx)
to the
Transport & Industrial Relations Select Committee

Health and Safety
(Pike River Implementation) Bill

25 July 2013

Contact

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Introduction

1. MinEx¹ welcomes the opportunity to submit on the “The Health and Safety (Pike River Implementation) bill. We note the submission deadline of 25 July 2013.
2. MinEx wishes to be heard at public hearings on the Bill.
3. In stepping up its engagement with government on health & safety, the New Zealand minerals sector has restructured its health and safety representative body, MinEx, with an expanded budget and secretariat (through Straterra), a new business plan, focused accountability and the appointment of a CEO, mining engineer and industry consultant, Les McCracken.
4. As a preface to our submission, we wish to raise a particular concern we have with regard to the implementation of the Pike River Royal Commission’s recommendations. To repeat, and be clear on our position, we support, fully, all the recommendations. Our concern arises because, in November 2012, a decision was taken to apply the recommendations to the Mining sector, not just to the Coal sector as envisaged by the Royal Commission. Again, we support that decision per se, but that decision needed to recognise that there are major differences between the safety issues in an underground coal mine, and all other mining. An underground coal mine can ‘blow up’, other mines cannot!

Put simply, and recognising that most of the implications of this issue are manifest in the Regulations rather than this Bill, our concerns are that it is not possible to ‘cascade’ from coal to non-coal regulations, and that the implementation program does not allow sufficient time to address these issues in way that will allow effective and functional law and regulation to be developed for non-coal mining.

5. Straterra provides a collective voice for the New Zealand minerals sector. Its membership comprises more than 90% by value of NZ minerals production, exploration, scientific research, engineering and geotechnical services, and legal, financial, environmental and other consultancy services. The organisations that participated in the MinEx-led industry consultation process were:
 - the Aggregate and Quarry Association (AQA);
 - the NZ branch of the Institute of Quarries (IOQNZ);
 - the NZ branch of the Australasian Institute of Mining and Metallurgy (AusIMM);
 - the Coal Association;
 - the Contractors’ Federation;
 - the Engineering, Printing and Manufacturers union (EPMU); and,
 - Straterra.
6. MinEx has 46 member companies and these are listed in Attachment 1. Accordingly, most of the companies active in the mining industry have been invited to participate in developing this submission as have most of the professionals through the AusIMM and the IOQNZ.
7. The extensive and constructive engagement between the Pike River Implementation Team and MinEx is acknowledged, and appreciated. It is clear there is a significant degree of alignment between government and industry on the future shape of the mining regime. Accordingly, the Government’s objectives for the new mining regime are supported: to improve public confidence in the New Zealand

¹ MinEx is a national Health & Safety Council for the New Zealand minerals industry. Its main purpose is to help industry to improve its health and safety performance, and to provide centralised industry representation on matters relating to health and safety.

mining sector, and to bring mining health and safety regulation into line with international best-practice.

8. The driver for the reforms is the Pike River Coal Mine tragedy of November 2010. Like the Government, industry is committed to ensuring that such an event does not occur again in New Zealand. This is a realistic goal.
9. The Bill is intended to give effect to the matters laid out in “Safe Mines: Safe Workers” to which we submitted on 1 July 2013.
10. We note that that the Transport and Industrial Relations Select Committee commenced their consideration of the proposed bill on the same date that the “Safe Mines: Safe Workers” submissions closed. Accordingly, we are placed in the position of submitting on a Bill without knowing MBIE’s response to our earlier submissions.
11. Part 1 of the Bill deals with the establishment of Worksafe New Zealand and we support this initiative, with some suggestions to improve outcomes.
12. Part 2 of the Bill deals with:
 - Amendments to the Health and Safety in Employment Act 1992 to give effect to the proposals in Safe Mines: Safe Workers and specifically;
 - Employee participation in health and safety including establishing the roles of mine health and safety representative and mining industry health and safety representative;
 - The issuing of codes of practice;
 - The establishment of a Board of Examiners to deal with competency matters; and,
 - The powers of the Inspectors.
13. Part 3 of the Bill deals with mines rescue matters.
14. We broadly support the Bill but we have identified room for improvement, particularly in relation to:
 - Mine Health and Safety Representatives; and,
 - Mining Industry Health and Safety Representatives.

Part 1 - Worksafe New Zealand

General

15. The proposed provisions for the establishment of and functioning of WorkSafe New Zealand are generally supported.

Section 8 - Advisory groups

16. WorkSafe can establish advisory groups as a forum for dialogue, co-operation, and advice between the Government, employers and workers; and to provide advice to WorkSafe that represents the view of these groups. MinEx's only concern with the Advisory Group concept is that there needs to be a requirement on WorkSafe, when looking at a particular industry or industry sector, to include co-opted industry sector experts on the Advisory Group.

Section 9 – WorkSafe New Zealand's main objective

17. The objective is:

to promote and contribute to the prevention of harm to all people at work and in, or in the vicinity of, the workplace

The objective is very broad and is supported.

Section 10 – WorkSafe New Zealand's functions

18. MinEx submits that there should be a requirement on WorkSafe to form industry working groups during the development of codes of practice (item (e)).

Part 2 - Worker Participation, Mine and Mining Industry Health and Safety Representatives

General

19. The concept of enhanced worker participation through mine and industry health and safety representatives, is generally supported (Part 2B of the Bill, sections 19Q ff.) There are precedents for this in previous New Zealand legislation, and in current Australian legislation, in particular, in Queensland.
20. In considering the Bill, industry is guided by the need to preserve natural justice in legislation and regulation, and to avoid actual or perceived conflicts of interest.
21. Enhanced regulatory oversight is obviously necessary, in light of the manifest failure of the Pike River Coal operator and mine management to protect mine workers from extreme harm.
22. We draw attention to:
- Appointment of Mine Health and Safety Representatives who are employees of the Mine Operator and who have the power to both suspend and stop operations or parts of the operation; and,
 - Appointment of Mining Industry Health and Safety Representatives who are employees of a Union or group of workers and who have essentially the same powers as the Mine Health and Safety Representatives.

23. These two new statutory roles are in addition to the general requirement under the Health and Safety in Employment Act 1992 to form a Health and Safety Committee. It is not clear in the Bill how the new provisions are to operate within the framework of the committee.
24. MinEx submitted on Safe Mines: Safe Workers in relation to the establishment of these new roles. The competency proposed for the Mining Industry Health and Safety Representative is a deputy certificate of competency (underground coal). MinEx submitted that this was entirely inappropriate for tunnels, underground metal mines, and opencast mines since the competency and inferred experience does not include any knowledge and skill in these other operations which are quite different to an underground coal mine. Without the appropriate competency, skills and knowledge, a Mining Industry Health and Safety Representative would have no basis upon which to exercise judgment relating to suspending or stopping work.

Problem definition – current proposal

- The Mine Health and Safety Representative has the power to issue notice of suspension and this requires that the Senior Site Executive (SSE) stop that part of the mining operation the notice refers to. Given that the issuing of a notice implies no immediate likelihood of serious harm, it would seem sensible to require some form of consultation with the SSE via the mine health and safety committee before the SSE is required to stop operations;
 - Unless this change is made and persons with the appropriate competency, skill and knowledge are issuing notices, the Mine Health and Safety Representative could make an inappropriate decision that otherwise could have been circumvented;
 - The Mine Health and Safety Representative has the power to require that operations stop where serious imminent harm is likely to be caused. In this situation it is vital that the person issuing the stop work instruction has the competency, skills and knowledge to exercise the judgment required to make such a call, and MinEx submits that the proposed competency requirement is appropriate solely for underground coal mines;
 - Any two or more mine workers could form a group to appoint, by any means, a Mining Industry Health and Safety Representative (subject to qualifications and competencies). With a group of workers, as distinct from a union, having the right to appoint a Mining Industry Health and Safety Representative, this could lead to there being a number of such roles established covering the same mining operations. While the requirement on the group to pay the costs of the role will no doubt limit this occurring, we believe this is awkward law making;
 - Union-appointed Mining Industry Health and Safety Representatives could have a conflict of interest between their statutory functions and any worker advocacy role they may stray into. It is acknowledged that the Bill, at section 19ZV, allows for removal of the person but it also includes functions that could cause the person to act as an advocate for other employees (sections 19V (a) and (b)); and,
 - Given the above, Mining Industry Health and Safety Representatives are at risk of making inappropriate decisions at mines where they lack experience of, or familiarity with that mining operation and where this occurs, the mine operator would have to prove a negative to WorkSafe, at a potentially significant cost in lost time and production, which, if avoidable at the outset, would be manifestly unfair and unreasonable to the operator.
25. The above are serious shortcomings of the proposed regime, however, we believe there are straightforward solutions to make the system workable.

Proposed solutions

26. MinEx fully supports that worker health and safety representation is desirable and necessary, unionised or not, and that these representatives must have some statutory functions and powers.

27. In that light, the Royal Commission² on the Pike River Coal Mine Tragedy's Recommendation 11 is supported, while sounding a note of caution on: "Legislative changes should empower trained worker health and safety representatives to perform inspections and stop activities where there is an immediate danger of serious harm, [and] allow unions to appoint check inspectors [Mining Industry Health and Safety Representatives] with the same powers as the worker [Mine] Health and Safety Representatives."
28. We broadly support the April 2013 report³ of the Independent Task Force (ITF) on Workplace Health and Safety, in Rec. 4b, where it states: "[WorkSafe] should provide increased support for worker participation, including increased support for: (i) worker health and safety representatives, (ii) workers who raise workplace health and safety matters, including either confidentially or anonymously, (iii) unions' existing rights of entry". As well, the ITF report favours "much stronger alignment and co-ordination of workplace health and safety activities (Rec. 5)".
29. Accordingly, in relation to the Mine Health and Safety Representative, MinEx proposes the following:
- a. Mine workers at a mine should be able to elect a Mine Health and Safety Representative for that mine. One such representative for each mine will be sufficient, with provision for a stand-in, in case of absence;
 - b. At complex mining operations, a Mine Health and Safety Committee would cover off the different health and safety issues applying to different parts of the mining operation, for example: underground mining compared with a processing plant at surface. That would avoid the need to have more than one Mine health and safety representative at a mine as the committee should consist of more than one worker representative as distinct from the Mine Health and Safety Representative;
 - c. On the proposed power for the Mine Health and Safety Representative to give notice to suspend operations, and given that the issuing of a notice implies no immediate likelihood of serious harm, it would seem sensible to require some form of consultation with the SSE via the mine health and safety committee before the SSE is required to stop operations. Presumably, the SSE would have to notify WorkSafe of any notice to suspend. Section 19ZD dealing with hazard notices contains such a process and it would seem appropriate to include this same process under section 19ZE.
30. MinEx concerns about the Mining Industry Health and Safety Representatives could be resolved in a number of ways:
- a. Restrict the application of this section of the Bill solely to underground coal mines since the competency nominated in Safe Mines: Safe Workers is only applicable to that section;
 - b. Amend the competency requirements to require experience and a certificate of competency in other sectors of the industry (tunnels, surface mines and underground metal mines). As it is very unlikely that a single person would be competent to cover all sectors, more than one and probably more than two representatives would be required;

² <http://pikeriver.royalcommission.govt.nz/Volume-One---Recommendations>

³ <http://www.hstaskforce.govt.nz/documents/executive-report-of-the-independent-taskforce-on-workplace-health-safety.pdf>

- c. Amend the competency requirements to require both general mining industry experience as well as competencies in safety management systems, safety auditing and risk management which elevates the competency towards that of a Worksafe Inspector; or,
- d. Adopt the Queensland Coal Mining Safety and Health Act 1999 provisions in Part 8 of that act.

31. If option (d) was selected, then:

- Mining Industry Health and Safety Representatives would be appointed by the Minister on receipt of nominations, and in the performance of functions and exercise of powers, they would be responsible to Worksafe. Costs would be paid by WorkSafe. That would avoid actual or perceived conflicts of interest, and would free up the union to advocate for its members;
- The Mining Industry Health and Safety Representatives could then have similar powers to those proposed, although it is noted that the power to stop work is not included in the Queensland Act while the power to suspend is included; and,
- It would be appropriate and desirable for these persons to participate in investigations and industry wide initiatives, as currently proposed.

32. MinEx favours the adoption of option (c), above, and has had some discussions with the Pike River Implementation Team on this option. However, it is acknowledged that not all industry companies support this approach, and neither do all of the industry representative bodies.

Summary of MinEx proposals for Part 2

33. The overall theme is that appropriate Mine Health and Safety Representatives would be able to issue hazard notices, and suspend or stop mining operations, where necessary and subject to appropriate levels of consultation with the mine operator. Union representatives would continue to have an advocacy role, and could receive complaints and approach WorkSafe directly, or a Mining Industry Health and Safety Representative with that complaint.

34. Mining Industry Health and Safety Representatives would hold similar powers to the Mine Health and Safety Representatives and would be

- appointed by unions or groups of workers with controls to ensure no duplication and with amended competencies to ensure that they were competent to perform their role across the different sectors of the mining industry.

Section by section analysis

35. This submission now turns to each draft provision.

Section 19Q – general duty to involve mine workers in health and safety matters

36. Sub-section (1): It is not clear what a “documented worker participation system” is (noting this would be spelled out in codes or guidelines). That aside, mine workers should have “reasonable opportunities” (defined in sub-section (5)) to participate in processes for improving health and safety in the mine.

Section 19R – development of worker participation system

37. Sub-section (2): The operator, the mine workers and any union will have to agree on the worker participation system. What if the parties cannot agree? New section 19T appears to address this issue, at least partially.

38. Sub-section (3): The system does not have to provide for Mine Health and Safety Representatives, however that would depend on the mine workers being satisfied with that outcome (sub-section (4)). It is not clear how such representatives would be elected (although, see section 19U).
39. Sub-section (5): More than one Mine Health and Safety Representative or committee at a mine could lead to the system at a mine becoming unworkable. A single health and safety committee with one representative should suffice.

Section 19T – prescribed provisions if no scheme in place

40. If the parties at a mine cannot agree on a worker participation system within three months of the mining operation starting (section 19R (2)), regulations must be followed. We will need to see the regulations. As well, it is not clear what would happen in a mining operation that is in existence when the new regime enters into force.

Section 19U – election and qualifications of mine health and safety representatives

41. Sub-section (1): If a worker participation system does not provide for the election of a Mine Health and Safety Representative to be held, regulations will be followed. We will need to see the regulations.

Section 19W – no duty on mine health and safety representatives

42. A Mine Health and Safety Representative is exempted from having to do their statutory job, despite having an extensive list of statutory functions (section 19V) and powers (sections 19X – 19ZF). With rights come responsibilities, we suggest. This section could include a requirement to work in good faith, to further the purpose of the Act, and so forth (noting section 19ZK).

Section 19Z – power of mine health and safety representative to examine and copy documents

43. We note there is the potential difficulty of separating health and safety issues from other operational issues, e.g., rosters, random alcohol and drugs testing.

Section 19ZE – power of mine health and safety representative to give notice requiring suspension of mining operation

44. The Mine Health and Safety Representative can give notice to suspend a mining operation, with no consultation with the mine operator.
45. We propose instead an approach similar to that taken in Queensland’s Mining and Quarrying Safety and Health Act 1999 under section 94, except that consultation with the SSE via the mine health and safety committee should be required before the SSE is required to stop operations. Recall, this is a notice to suspend where the representative believes the whole or part of the mining operation is likely to cause serious harm and, implied through the power to issue a notice, that the harm is not imminent. There is time provided to consult.

Section 19ZP – appointment of mining industry health and safety representatives

46. Sub-section (1): “Mining group” is not defined. Theoretically, any number of Mining Industry health and Safety representatives could be appointed. This would obviously be unworkable. We are also concerned over the lack of transparency over such appointments, especially if these persons hold statutory functions and powers. The concern extends to union representatives, where a conflict of interest could arise between advocating for workers, and regulating for worker health and safety.
47. The Bill proposals relating to the appointment of Mining Industry Health and Safety Representatives does not reflect the reality of union coverage in the industry, namely:
 - The EPMU members are mostly from the coal sector, both underground and surface operations;

- The EPMU has some members in the quarry sector;
- The Amalgamated Workers Union (AWUN) has members in the metalliferous sector; and,
- Union coverage in the industry is similar to overall coverage across New Zealand at about 30% of the mining industry workforce.

48. Our proposed approach (lifting the Mining Industry Health and Safety Representative competency to that approaching a Worksafe Inspector) would address industry concerns about competency but still leave other matters of concern;

- Group and union appointments leading to multiple representatives reporting to different groups and/or unions (EPMU and AWUN);
- Transparency issues; and,
- Potential conflicts of interest issues.

Union/Group appointment leading to multiple representatives

49. This could be addressed by:

- Requiring that, in the case of a group of workers, that they are only able to appoint a representative if the group covers multiple sites and that the powers of the representative are restricted to those multiple sites; and,
- Requiring that, in the case of multiple unions appointing representatives, that they are only able to appoint a representative if the union covers multiple sites and that the powers of the representative are restricted to those multiple sites where their union has the majority of members.

Transparency and conflicts of interest issues

50. The issue of transparency of appointment could be addressed by setting out a process in the Bill dealing with how unions and/or groups appoint representatives.

Section 19ZR – functions and powers of mining industry health and safety representatives

51. Sub-section (1): As previously, explained, we believe it is appropriate for Mining Industry Health and Safety Representatives to hold powers to issue hazard notices, and suspend or stop mining operations, however, subject to following due process around consultation with the mine operator, in the interests of fairness and natural justice.

Other amendments to The Health and Safety in Employment Act 1992

Section 20F – membership of board

MinEx submitted on Safe Mines: Safe Workers on the composition of the Board. While the Bill varies from the proposal in Safe Mines: Safe Workers, MinEx submits that there is no justification for including both an education role and a training role and that these two roles should be combined. MinEx also submits that the Board must include appropriately experienced and qualified representatives for each mining sector (tunnels, surface mines, underground coal mines and underground metal mines).

Section 39A –inspectors may issue improvement notices in relation to mining operation

MinEx submits that there needs to be an appeal right relating to improvement notices as contained in most Australian State Acts.

Section 41A – inspectors may issue prohibition notices in relation to mining operation

MinEx submits that there needs to be an appeal right relating to prohibition notices as contained in most Australian State Acts.

Mines Rescue

Section 40 – meaning of mine operator

The definition of a mine operator under Part 3 is the same as that in Part 2 except that quarries and surface mines are excluded in Part 3. Presumably, they have been excluded because the equipment and expertise within Mines Rescue is inappropriate to surface mine rescue situations. MinEx agrees that this is the case.

The definition under Part 3 is now restricted to underground metal and coal mines which then begs the question of what service remote mines are going to receive from Mines Rescue stations. These are currently located at Huntly and Greymouth. This then leads to the issue of what levy will they pay for this service. This detail will be contained in regulations, which we have yet to see. This is a complex matter, and we suggest further deliberation will be needed to reach a workable and effective solution.

Section 45 – membership of board

The board membership should reflect the definition of those sectors that are included as mining operations.

Section 46 – regulations imposing levies

Missing from the proposal is a need to determine whether or not services are being provided at unreasonable cost, i.e., there needs to be provision for a cost-benefit analysis.

Minor matters not covered above

Part	Page	Reference	Issue	Solution
2	20	19L	<u>Mine Worker definition.</u> Not clear that this includes contractor employees working on the site. This needs to exclude those coming to site to do short term fixed location type work, e.g., fixing a light switch.	Revise definition so that it picks up the recommendations in Safe Mines: Safe Workers.
	23	19Q(1)	<u>Worker participation in H&S.</u> Via the 1992 HSE Act, the H&S Cttee is part of this process. Should state this. Unclear how the Mine H&S Rep fits with the Cttee.	Clarification required
	25	19T	<u>Participation scheme if none agreed.</u> Needs to be more specific that this applies if no agreement is reached. Also needs to cover existing operation situation.	Clarification required
	25	19U(2)	<u>Competency.</u> No Mine H&S Rep can be appointed unless competent. Problem is with new mine may take time to train. Need ability to appoint interim person or allow the H&S Cttee to take on the role of the Mine H&S Rep until a competent person has been appointed. Cttee must have worker reps so worker participation is covered.	Use H&S Cttee until Rep appointed
	26-27	19X – Z	<u>Powers.</u> Need to deal with privacy issues	
	35	20	<u>Codes.</u> Need to require codes to have a life to first review. Needs mechanism for industry to refer codes to the Advisory Board for review outside the nominated review time.	
2	41		<u>Inspector notices.</u> There is a need to make provision for these to be challenged. Needs response times for information supplied to inspectors.	

MinEx Membership

Aggregate & Quarry Association
Blackhead Quarries Ltd
BlueScope Steel
Doug Hood Mining Ltd
Fonterra Glencoal
Fulton Hogan Ltd
Golden Bay
H G Leach
Harker Underground Construction
Higgins
Holcim
Horokiwi Quarry
Ihumatao Quarries
Imerys Tableware
Infracon
J Swap Contractors
Kai Point Coal
Materials Processing Ltd
McConnel Dowell Constructors Ltd
New Talisman
Oamaru Shingle Supplies
Oceana Gold
Origin Quarries
Perry Resources
Prenter Aggregates
Pukepoto Quarries Ltd
Rangitikei Aggregates
Ravensdown
NZ Coal
Selwyn District Council
Sibelco NZ
Solid Energy
Southern Aggregates
Stevenson Resources
Taupo Scoria
Waitotahi

Websters Hydrated Lime
Whitestone
River Run Products Ltd
Road Metals Co Ltd
Southern Aggregates Ltd
Stevenson Resources Ltd
Taupo Scoria Ltd
Taylor's Contracting Co Ltd
The Isaac Construction Co Ltd
Vickers Quarries Ltd
Victory Lime 2000 Ltd
Waiotahi Contractors Ltd
Winstone Aggregates
Wirtgen New Zealand