

7 September, 2000

MINISTER OF LABOUR

REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: LEVEL OF FINES

Purpose

1. The purpose of this paper is to review the level of penalties set in the Health and Safety in Employment Act 1992 (HSE Act) in order to gain better health and safety outcomes. The deterrent effect of prosecutions is known to partly depend on both the probability of being prosecuted and the size of penalties imposed. Both the perceived severity and perceived certainty of punishment influence injury rates, although certainty has a substantially stronger effect than severity.¹
2. Raising fines levels is recommended as an incentive for medium to large organisations to comply with the HSE Act. Recent research indicates that small businesses already perceive the fine levels to be high and that increasing the certainty of being prosecuted would be a more significant driver for those small employers that choose not to comply.² These issues are discussed in detail in the paper.

Background

3. The 10-principles paper³, which was the starting point of the HSE Act, specified that the level of penalty needs to reflect the seriousness of the offence or potential consequences of the exposure, event or injury. 'High penalties are essential for exposures, events or accidents that have the potential for death or serious injuries.'⁴ In terms of workplace health and safety legislation at that time the Factories and Commercial Premises Act 1981 was the most significant Act with the highest fine set at \$5000 for charges involving injury and \$10,000 for charges involving a fatality. The ten-fold increase in penalties under the HSE Act responded to the direction recommended in the 10-principles paper.

¹ J.Braithwaite and T.Makkai, "Testing an Expected Utility Model of Corporate Deterrence" (1991) 25 Law and Society Review 7.

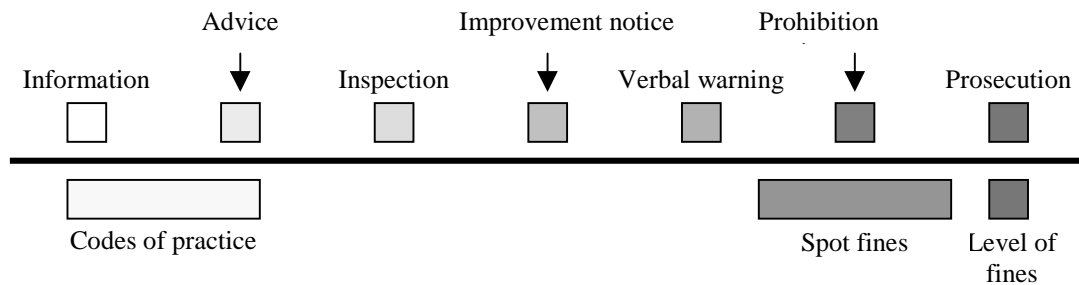
² Case Study Research on the Effects of Employment Regulation in the Accommodation, Winemaking and Brewing Industries; Case Study Research into the Compliance Costs of HSEA in Textile and Light Metal Fabrication Industries (unpublished).

³ This was a public discussion paper issued by the Minister of Labour in 1991 for consultation of matters to be covered in the HSE Bill.

⁴ "Management of Health and Safety in Employment", August 1991.

- The HSE Act is an enabling framework. The Act places “ownership” for the management of occupational safety and health with employers and employees, to the greatest extent practicable. For this reason, the Act has a range of measures to encourage compliance. The Department of Labour’s Occupational Safety and Health Service (OSH) administers the Act. OSH uses advice and information to reduce the need for enforcement activity⁵. Where a firmer approach is warranted, “enforced compliance” is often more appropriate. There are specific tools available to an HSE inspector to obtain this compliance –for example, the issuing of improvement or prohibition notices. As a last resort, underpinning all these measures, prosecution is undertaken.

Spectrum of tools to encourage compliance with the HSE Act 1992



- Sections 49 and 50 of the HSE Act provide that it is an offence to breach most⁶ of the obligations of the Act. The Act imposes strict liability, which means that it does not have to be proved that the defendant intended to take the action alleged to constitute the offence. For offences covered in section 50, therefore, it is sufficient to prove that the action or inaction occurred. The maximum penalty under this section is a fine of \$25,000, or \$50,000 where the failure to comply with the Act has caused any person serious harm. To be convicted under section 49, however, it is also necessary to prove that a person or corporation had knowledge that the action or failure to act was reasonably likely to cause serious harm. The maximum penalty under section 49 is a fine of \$100,000 or imprisonment for not more than 1 year.
- The introduction of the HSE Act has increased the quantum of fines for health and safety offences. In percentage terms, however, the level of fine being imposed by the Courts remains the same as pre-HSE Act levels: a ten-fold increase in the maximum has resulted in a ten-fold increase in the average⁷. The average fine imposed by the Courts since the HSE Act was introduced is \$6,196.15. This can be compared to an average fine of approximately \$500 in the two years prior to the passing of the HSE Act.

⁵ e.g. Codes of Practice.

⁶ Failure to comply with section 14 of the HSE Act, requiring employers to involve their employees is not an offence.

⁷ Before the HSE Act, the maximum fine was \$5,000 under the Factories and Commercial Premises Act 1981.

Other Jurisdictions

Canada

7. Maximum fines in Canada for violations of occupational health and safety legislation tend to vary in the different provincial jurisdictions and at the federal level. However they can be substantial, ranging from a maximum of NZ\$69,000⁸ in New Brunswick to NZ\$1.38 million under the Canada Labour Code.
8. In 1990, the Ontario legislature passed Bill 208, which strengthened the external responsibility system. Directors and officers of a corporation were made directly responsible for securing compliance with the act in their workplace and liable to prosecution if they failed to do so. Conviction could lead to a fine of up to NZ\$35,000 or a prison term of up to one year. Penalties and fines for corporations convicted of violating the act were also increased from a maximum of NZ\$35,000 to NZ\$688,000.⁹

United Kingdom

9. In the United Kingdom, prosecutions can currently be heard in either the magistrate's courts, which are able to award maximum fines of NZ\$62,000 or in the Crown Courts, which can impose unlimited fines and have the power to impose prison sentences. In the last decade, 32 cases have resulted in seven-figure fines, peaking at NZ\$5.1 million¹⁰. A quarter of these have arisen in the final year for which data is available (1997/8).
10. This inflationary pattern is set to continue with the Court of Appeal's recent endorsement in the case of *Howe and Son* of fines for safety offences correlating more closely with the means of companies.¹¹ This landmark November 1998 judgment criticised the generally low level of fines on employers who breach health and safety legislation. The Court of Appeal was concerned that the average fine in the Magistrates Court (per offence prosecuted) in 1997/98 was NZ\$19,000 for breach of the general duties under sections 2-6 of the Health and Safety at Work Act. This was less than one third of the maximum NZ\$62,000 fine, which can be imposed by magistrates for those offences. In the Crown Court, where the level of fine is unlimited, the average fine per offence is NZ\$55,000.
11. The greatest impact from *Howe* may be felt by large companies with sufficient profits and income to meet substantial fines. The Court of Appeal rejected the use of historical fine levels as a yardstick for serious cases.
12. The UK Select Committee on Environment, Transport and Regional Affairs 1999 commented that the penalties awarded for health and safety offences were too low. The committee noted that the *Howe* case has provided some reason to be optimistic since it sets a precedent for courts to award higher fines. The Health

⁸ To aid comparison and readability foreign currencies have been converted to NZ\$ and rounded to the nearest \$1000.

⁹ Corporate Crime, Contemporary Debates, p253.

¹⁰ The largest health and safety fine imposed on a single company to date - £1.5m - was handed down by the Old Bailey to Great Western Trains Company Ltd. This followed the death of seven passengers in the rail accident at Southall, West London, on 19 September 1997.

¹¹ *R v F Howe & Son (Engineers) Ltd*, [1999] 2 All ER 249

and Safety Executive also reported that this case seemed to result in a greater number of cases being committed to the Crown Court for sentence. ‘We recommend that the Government introduce legislation at the earliest opportunity.’

13. In the UK, the Government intends to legislate to increase the penalties available to the courts for health and safety offences by extending the £20,000 (NZ\$62,000) maximum statutory fine in the lower courts to most offences, and also making them subject to a sentence of imprisonment.

Australia

14. The 1995 inquiry into Occupational Health and Safety by the Australian Government recommended that all jurisdictions consider an immediate increase of the maximum penalties in their OHS legislation.¹² The Commission recommended maximum penalty levels of at least NZ\$600,000 for corporations. The Tasmanian Government argued that ‘An increase in penalties certainly emphasises the seriousness of loss of life, injury and illness at work and such increases should be of such a magnitude that unfavourable comparisons with other non-OHS offences are not so easily made.’
15. The leading Australian decision on the determination of penalties held that the penalty must reflect the nature and quality of the particular offence.¹³ The court will determine the appropriate penalty by taking into account:
 - Primary factors such as the nature and the quality of the offence which established the seriousness.
 - The level of penalties must, without being oppressively high, bring attention to the OHS risks, to ensure that persons are not exposed to risks in the workplace.
 - Subjective factors which mitigate the seriousness of the offence.¹⁴
16. The Occupational Health and Safety Act in NSW imposes a maximum penalty of NZ\$600,000 for first offenders and NZ\$900,500 or 12 months jail for repeat offenders. Both Victoria and South Australia impose a maximum fine of NZ\$300,000.

USA

17. In the USA, administrative penalties are used. As part of its enforcement role, OSHA is empowered to assess monetary penalties. The Occupational Safety and Health Act 1970 allows individual states to run their own enforcement programmes with Federal standards as a minimum. In California, the maximum fine that can be imposed is NZ\$3 million.¹⁵ An employer may contest an OSHA penalty before the independent Occupational Safety and Health Review Commission.

¹² The increase was recommended to be to the levels in Commonwealth Seafarer OHS legislation.

¹³ *WorkCover Authority of NSW v Waugh* [1995] 59 IR 89.

¹⁴ Considered in *Altcatel Australia Ltd v Workcover Authority of NSW* [1996] 70 IR 99.

¹⁵ Fines of this amount would apply to a large company for a serious offence.

Discussion of the level of fines under the HSE Act

Would raising the maximum fine levels improve health and safety?

18. Raising the maximum fine levels under section 49 and section 50 would provide a signal from Parliament to the Judiciary to increase the fines imposed. However, it needs to be assessed whether this increase would actually alter employer behaviour and whether this would result in improved safety outcomes.

Deterrence and significance to the offending employer

19. The level of fines imposed under section 50 of the HSE Act has recently been commented on by Tranz Rail in their submission to the Tranz Rail Ministerial Inquiry. While discussing the costs associated with ensuring safety¹⁶, Tranz Rail noted that ‘the threat of a maximum fine of \$50,000 under the HASIE Act [HSE Act] is not of the highest monetary significance.’ Although Tranz Rail note that addressing equipment costs to overcome the fault causing the accident cost them \$3 million, it is apparent that to some of New Zealand’s larger businesses, fine levels have little significance and are therefore less than effective as a deterrent.
20. It can not be presumed that an increase in penalties will deter all non-compliance with the HSE Act, as the offender may be a risk taker or poorly informed about the level of risks. A joint compliance cost study currently underway between OSH and the Ministry of Economic Development has shown that some employers do not believe that there are high risks to health and safety in their workplace, even if the contrary is true.
21. Other research has found that fine levels and increased severity alone may not be the best approach for improving health and safety outcomes in all types of business, particularly those of small size. These businesses often have considerable anxiety about the possibility of an HSE inspection or prosecution. They also have the perception that fines imposed are substantial. Yet this “fear” does not persuade them to reduce the risk of prosecution, as they perceive the risk of an HSE inspection to be low.¹⁷ This finding strengthens the assertion that increased fine levels alone are not sufficient to result in improved health and safety outcomes.
22. This paper is part of a wider review of the HSE Act. Officials are currently working on a range of initiatives to enhance the ‘certainty’ of the HSE Act. These initiatives include:
 - The removal of the OSH monopoly on prosecutions
 - Extending the 6 month limitation
 - Spot fines
 - Employee representation and Provisional Improvement Notices
23. Should these initiatives be incorporated into the HSE Act there will be an increase in the number of people focussed on the pursuit of enforcement action (removal of the monopoly and employee representatives), an increase in enforcement tools

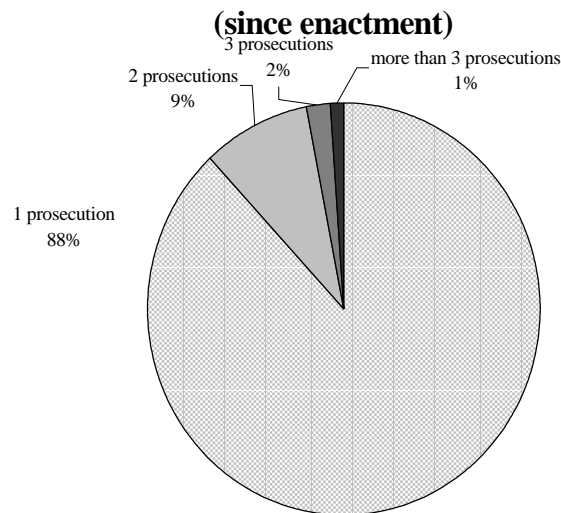
¹⁶ These costs included the provision of better protective equipment.

¹⁷ Labour Market Policy Group (1999) *The Effect of Employment Regulation. Case Study Research in the Accommodation, Winemaking and Brewing Industries*, Department of Labour.

available (spot fines and PINs) and an increased period over which prosecution can be pursued. This should lead to an increase in the both the perception and actuality of the certainty of being caught for non-compliance.

24. These initiatives and an increase in severity in the form of higher fine levels are established methods of deterring non-compliance with health and safety legislation.¹⁸ Higher fine levels would also signal to employers and employees the importance the government places on healthy and safe workplaces.

Number of prosecutions per offender under the HSE Act 1992



25. The main reason for prosecuting health and safety offences is deterrence. This is the attempt to restrain persons from offending by the threat, or actual imposition, of punishment. The principle behind prosecution is two-fold: it may both specifically deter the offender before the court from reoffending and punish the offender with sufficient severity to discourage others from committing similar acts.

26. Fine levels are currently low in comparison with both health and safety legislation in other jurisdictions and fines for public welfare offences in New Zealand.¹⁹ The level of fines being imposed is not acting as a sufficient deterrent. This is shown by the fact that 12% of offenders have been prosecuted more than once under the HSE Act.

27. The Full Court of the High Court in *de Spa* accepted that there was no need for specific deterrence in the particular case but held that there was a need for the fine to be at a sufficient level to deter others. The Court stated, ‘deterrence for present purposes requires a fine at a sufficient level to encourage other employers to take seriously their obligation to actively seek out hazards and to deal with them. No room must be left in the community for the view that it is easier to wait until an accident happens, pay the fine and try and do better in the future.’²⁰

¹⁸ “Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety legislation” in *Osgoode Hall Law Journal*, Vol.30 no.3, 1992, p.703.

¹⁹ e.g. the Resource Management Act 1991 and the Building Act 1993.

²⁰ *Department of Labour v de Spa & Co Ltd*, [1994] 1 ERNZ 339.

28. The severity of punishment may have a bearing on compliance, although there is less empirical evidence of any causal relationship. A measure of the severity of sanctions for health and safety offences is the size of monetary penalties. In those overseas jurisdictions where there are criminal prosecutions, the severity of the fines are higher than those jurisdictions using administrative penalties. However, it can be argued that this is offset by the far greater certainty of punishment in the United States.²¹
29. For example, the probability of an inspection resulting in a penalty is more than sixty times higher in the United States with its administrative penalties than in Ontario, Canada. Like New Zealand, Ontario has criminal prosecutions that result in higher penalties than the US administrative penalties.

Value of life

28. In regard to ‘value of life’ courts have made the following statements.
- ‘generally where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence. The penalty should reflect public disquiet at the unnecessary loss of life.’
 - ‘High penalties are essential for exposures, events or accidents that have the potential for death or serious injuries’
 - ‘Penalties emphasise the seriousness of loss of life, injury and illness at work’
29. Although not directly linked with occupational safety and health, it is interesting to note the value placed on life by the Ministry of Transport and Transit New Zealand. The value of statistical life they use shapes their investment priorities and regulatory decisions.
30. A willingness-to-pay survey showed that respondents were willing to pay \$2.478 million per life saved to buy road safety for their families.²² This recommended value is consistent with the willingness-to-pay values adopted overseas. The LTSA report notes that although the survey was cast in the context of highway safety, the values are applicable in other contexts including occupational health and safety.²³

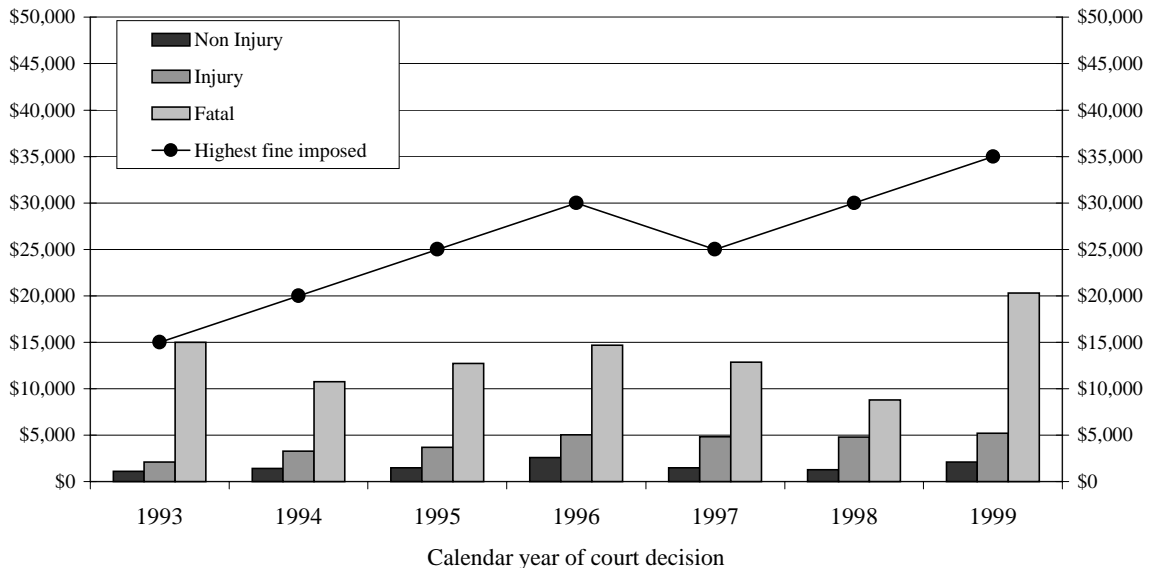
²¹ Deterrence theory argues that compliance is a function of the probability of an offender being punished and the severity of the penalty.

²² “The Value of Statistical Life in New Zealand” survey was conducted in 1989/90 as part of the Ministry of Transport’s periodic travel survey. The paper recommends adopting a value of \$2 million per life saved for public road safety analysis. This has been adjusted to \$2.478 million as at May 2000, based on increases in the ordinary wage rate.

²³ These values relate to risks where people feel in control and also include environmental exposures, and airline and public transport safety.

Current Trends in Fine Levels

Comparison of average fine levels imposed under the HSE Act 1992 for non-injury, injury and fatal incidents by calendar year (1993-1999)



31. The average penalty per case since the HSE Act was introduced in 1993 is \$6,196.15. The level of fines is influenced by two initial factors:
32. First, the section of the HSE Act that the case is brought under. Although many commentators focus on the maximum fine available under s49 of \$100,000 or a year in prison, only 30 charges from a total of 1459 charges brought under the HSE Act have been laid under that section. Of these, there have been only 9 convictions that resulted in a fine. In the remainder of cases the maximum fine available is either \$50,000 if serious harm has occurred, or \$25,000 if serious harm has not occurred.
33. Second, the criteria used by judges. In imposing a fine under the HSE Act, judges consider the 'de Spa' factors and consider the trends of cases under the legislation. In *de Spa & Co*,²⁴ the High Court spelt out the relevant factors in determining what level of fine to impose in an HSE Act prosecution. The Court emphasised that it was not an exhaustive list, leaving room for other factors to be introduced in subsequent cases. The judgement was given on 31 March 1994 and in the six years since that time, the Courts have followed the de Spa factors closely. The factors are as follows.
- The degree of the offender's culpability.
 - The degrees of harm resulting.
 - The financial circumstances of the offender.
 - The offender's attitude after the incident occurred.
 - Whether or not a plea of guilty was entered.
 - The need for deterrence, both particular and general.
 - The possibility of awarding part or the entire fine to the victim under section 28(1) of the Criminal Justice Act 1985.
 - The offender's safety record.

²⁴ *Department of Labour v de Spa & Co Ltd*, [1994] 1 ERNZ 339.

- Other matters, that may be relevant in the particular case.

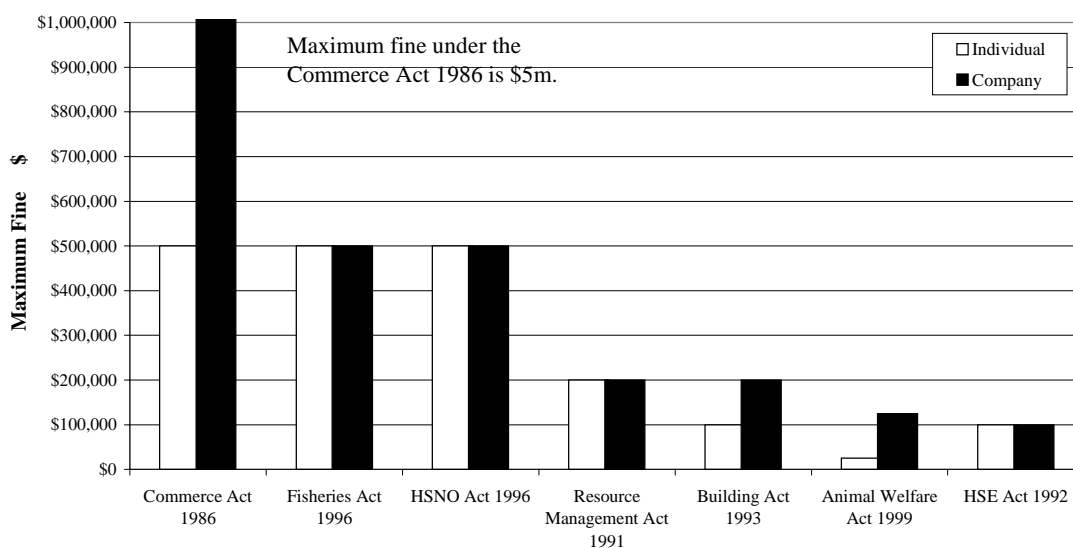
34. The High Court in *de Spa* also considered the need to leave room for a ‘worst case scenario’.²⁵ Considering that there is only \$15,000 left for this scenario (the highest fine imposed thus far being \$35,000), it is doubtful that the courts will impose much higher fines under section 50.

Removal of distinction between serious harm and non serious harm injuries

35. As noted there is currently a distinction in section 50 between a failure causing serious harm²⁶ and a failure that does not cause serious harm.²⁷ It is argued that there is no need for this legislative distinction as the courts consider the degree of harm resulting as a ‘de Spa’ factor. Although this legislative distinction may have had value at the time it was drafted, since *de Spa* the distinction has become unnecessary. In addition, the lower amount (\$25,000) that can be imposed for non-serious harm is contrary to the stated object of the Act: ‘[the] principal object is to provide for the prevention of harm to employees at work.’²⁸ By imposing a lower maximum fine level on non-serious harm cases, they may be regarded as a less serious offence. This is contrary to the objective of the HSE Act, which is to prevent harm and ‘promote excellence in health and safety management by employers.’²⁹

How do HSE Act fine levels compare with other New Zealand legislation?

Comparison of the maximum fine levels in NZ legislation



36. This graph shows legislation containing some element of strict liability. There is an apparent lack of relativity in the fines imposed for the protection of human life as against other matters. The Commerce Act imposes a maximum fine of \$5 million. Other Acts range in maximum penalties from \$125,000 in the Animal

²⁵ The need to leave scope for a worst case scenario was also considered by the Court in *Ansett New Zealand Air Freight Limited*, 2 February 1996.

²⁶ S50(d) HSE Act

²⁷ S50(e) HSE Act

²⁸ S5(1) HSE Act

²⁹ S5(2)(a) HSE Act

Welfare Act to \$500,000 in the Hazardous Substances and New Organisms Act 1996 and the Fisheries Act 1996.

Hazardous Substances and New Organisms Act 1996

37. Section 97(a) of the HSNO Act provides that the Department of Labour shall ensure that the provisions of this Act are enforced in any place of work. Failure to control a hazardous substance is an offence under section 6 of the HSE Act and section 109 of the HSNO Act.³⁰ An HSE inspector could take a prosecution for this offence³¹ under either the provisions in the HSE Act or the HSNO Act.
38. Under the HSNO legislation, failure to control a hazardous substance could result in a fine of \$500,000 or imprisonment for three months. If the fine is a continuing one, the offender is subject to a further fine of \$50,000 for every day or part of a day during which the offence has continued. This is in stark contrast to the HSE Act, where the maximum penalty for knowingly failing to control a hazardous substance is \$100,000 or one year's imprisonment. The current disparity in fine levels between the two Acts may give an HSE inspector an incentive to pursue a prosecution under the legislation that has the higher penalty. It may also result in inequity in sentencing for similar offences should this disparity remain.

Summary

29. The certainty of being caught and the severity of the punishment influence compliance. Other matters being addressed by the HSE review will enhance the certainty of being caught. The level of severity of current fines imposed is out of step with related New Zealand and overseas legislation. Considering the direction set by those Acts and the direction of awards made under the HSE Act to date it is suggested that:
- Section 49 fine levels are increased to \$500,000 or two years imprisonment
 - Section 50 fine levels are increased to \$250,000 or 3 months imprisonment.
- The current distinction in fines between serious harm and non-serious harm offences would be removed.³² The degree of harm resulting from the offence is already a *de Spa* factor, considered by the Court in imposing sentence.

Compliance costs

30. Increasing the level of fines could be expected to increase costs for defendants and the Department (or others pursuing prosecutions). Currently HSE inspectors initiate between 250-300 prosecutions per year. For the defendant the possibility of a significant fine or imprisonment is likely to influence their investment in legal advice. This in turn may impact on the rigour of the investigation and level of legal advice required by OSH in pursuit of a conviction.

³⁰ S109(e) – (i)

³¹ The HSNO Act is not yet fully operational. It is expected to be fully enforceable by early next year.

³² S50(d) provides for 'a fine not exceeding \$50,000, if the failure caused any person serious harm.' S50(e) provides for 'a fine not exceeding \$25,000, in any other case.'

Recommendations

I recommend that you

- a) note** current fine level maximums under the HSE Act are \$100,000 or one year's imprisonment for offences under section 49 and \$50,000 for offences under section 50.
- b) note** the current average fine is \$6,195.15 and the highest fine that has been imposed so far is \$35,000.
- c) note** that the deterrent effect of prosecutions depends on both the probability of being prosecuted and the size of penalties imposed. Other changes such as removal of the monopoly on prosecution and the introduction of spot fines will also impact on the effectiveness of enforcement of HSE Act requirements.
- d) note** that in order to provide sufficient incentive to medium/large companies to comply with the HSE Act, the fine levels need to be raised in line with other New Zealand and overseas legislation.
- e) agree** to recommend to Cabinet that the maximum fines under the HSE Act be increased to \$500,000 or two years' imprisonment under section 49 and \$250,000 or three months imprisonment under section 50.

RJM Hill
For Secretary of Labour

Current trends in prosecution

In *Debro Transport*, the \$20,000 fine represented 50 percent of the company's gross income (before expenses and tax) for the last financial year. On appeal to the High Court, Justice Tipping reduced the fine to \$14,000 saying 'to require the company to sell all its assets effectively in order to pay the fine is an enormous penalty. Similarly, I doubt very much that it could borrow the whole fine.'³³

In *Tegel Foods*, where an employee was thrown from a cherry picker, the defendant appealed to the High Court against its \$12,500 fine. Justice Cartwright said, 'As in all other areas of sentencing, the fine must be tailored to the means of the offender...when working for a large company, an employee is entitled to believe that all possible measures are being taken to protect him or her. That is not to say that the employee of a small company should not hope for the same, but the reality is that the proprietor of a small business may simply not have the resources or even the knowledge to ensure employees' safety is as secure as the owner of a large business. In those circumstances it may well be that there is a far greater personal responsibility on the small business owner.' Justice Cartwright in *Tegel Foods* seems to have placed some emphasis on the "hurt factor" as a means of determining the appropriate penalty.³⁴

The CHE, Southern Crown Health Enterprise, was treated with particular lenience, notwithstanding its considerable size and turnover, because it was a financially strapped organisation whose purpose was to serve the public good.³⁵

Generally, large organisations can expect to be treated more harshly than small organisations. The degree of compliance with the Act expected of them will also be greater. In *Talleys Fisheries* Judge Gaskell said, 'I take into account that this defendant is a major New Zealand company, and, as such, it should strive to be beyond reproach in providing for the safety of its employees.'³⁶

Justice Cartwright in *Tegel Foods* also stated that, 'There is also real relevance in the size of the company involved. A small business has fewer resources to meet large fines and that factor must be balanced against its obligations to its injured employee. That cannot be the case with the present appellant who also has the advantage of the resources to produce and impose a safety programme that will work in those most common of circumstances; when its own employees are careless.'

³³ *Debro Transport Ltd v Department of Labour*, HC Christchurch, AP 110-95.

³⁴ *Tegel Foods Ltd v Department of Labour*, HC Auckland, AP 242-95.

³⁵ *Department of Labour v Southern Crown Health Enterprise Ltd*, DC Invercargill, (1997) 5 NZELC 98,457 (digest), Noted [1997] ELB 129.

³⁶ *Department of Labour v Talleys Fisheries Ltd*, DC Blenheim, [1994] ELB 47