

7 September, 2000

## **MINISTER OF LABOUR**

### **REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: THE "PLACE OF WORK" DEFINITION**

#### **Purpose**

1. The purpose of this paper is to brief you on the issues surrounding the definition of "place of work" in section 2 (1) of the Health and Safety in Employment Act 1992 (HSE Act). This project attempts to resolve deficiencies identified since the enactment of the HSE Act and improve the effectiveness of the HSE Act. This project is being undertaken as part of the HSE Review Project (refer 99/004522).

#### **Problem Definition**

2. The intention of the HSE Act when it was introduced was that it would apply to all work places across the board as opposed to specific work places in specific legislation. Previous health and safety law included fourteen statutes and a plethora of regulations. A founding principle of the HSE Act is to provide "comprehensive coverage of all work situations"<sup>1</sup>.
3. A fundamental cornerstone of the HSE Act is the "place of work" definition but confusion has arisen surrounding this. That is, are mobile workers (e.g. courier drivers, truck drivers, postal delivery workers, a person pushing a wheelbarrow from one point of work to another, or a conservation worker tramping into the back country to mark out a track) covered by the HSE Act or are those workers not covered by the HSE Act because their "place of work" is mobile.

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<sup>1</sup> The principles underpinning the Health and Safety Act 1992 were based on a paper called "Management of Health and Safety in Employment" otherwise known as the "Ten Principles Paper". This was a public discussion paper released in August 1991 by the then Minister of Labour (Bill Birch) and resulted from a review of the Labour Party's 1990 OSH Bill. It sought submissions on matters to be covered in the HSE Bill.

4. The place of work definition first became an issue when OSH charged Mr Berryman on 16 September 1994 under section 16(a) of the HSE Act, following the death of Mr Kenneth Richards on 22 March 1994. A brief description of the facts are:<sup>2</sup>
  - Mr Richards and his partner kept beehives on the Berryman farm by invitation of the Berrymans.
  - Mr Richards, his partner and their employee were harvesting honey from the beehives. Mr Richards was driving a vehicle loaded with honey across the access bridge for the Berryman farm to load the honey on to a larger vehicle when the bridge collapsed plunging his vehicle approximately 30 metres to the Retaruke River below.
5. In the District Court, Judge Abbott heard a preliminary hearing on points of law. The central issue for this preliminary hearing became whether the bridge was part of Mr Richards' "place of work". He found that the bridge was not part of Mr Richards' place of work although Mr Richards was at work at the time of the accident, consequently the charge against Mr Berryman was dismissed.
6. The definition as interpreted by the judge limits the coverage of the HSE Act so that the principle of comprehensive coverage of all work situations<sup>3</sup> is undermined.

## **Background**

7. The HSE Act was introduced in 1992 replacing a plethora of industry specific statutes. Ten key underlying principles were the basis of the new Act. The first of these principles was that the HSE Act should provide "comprehensive coverage for all work situations".<sup>4</sup>
8. Section 5 of the HSE Act states the principal objective '...is to provide for the prevention of harm to employees at work'. To achieve this, the HSE Act describes various work relationships. Duties and obligations flow from these relationships. Throughout the HSE Act the terms "at work" and "place of work" are used to trigger when these duties and obligations apply.

## **The importance of the term "place of work" in the scheme of the HSE Act**

9. The term "place of work" is central to the HSE Act and Regulations. The HSE Act defines the term "place of work" as follows.

"Place of work" means a place (whether or not within or forming part of a building or structure) where any person is to work, is working, for the time being works, or customarily works, for gain or reward: and in relation to an

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<sup>2</sup> For full details of the *Berryman* case refer to the *Department of Labour v Berryman*, the "Coroner's Decision", and the "Submissions by the Department of Labour to the Social Services Select Committee" number 98/001630.

<sup>3</sup> Refer "The Ten Principles Paper" entitled Management of Health and Safety in Employment

<sup>4</sup> Refer "The Ten Principles Paper" entitled Management of Health and Safety in Employment

employee, includes a place or part of a place, under the control of the employer (not being domestic accommodation provided for the employee), -  
Where the employee comes or may come to eat, rest, or get first aid or pay; or  
Where the employee comes or may come as part of the employee's duties to report in or out, get instructions, or deliver goods or vehicles; or  
Through which the employee may or must pass to reach a place of work

10. The two most significant areas where the term is used are in the definition of "at work" and in section 16:
11. The definition of "place of work" links through to the definition of "at work" which provides,  
"At work", in relation to any person, means present, for gain or reward, in the person's place of work.
12. If a person is not "at work" they cannot be in their "place of work" unless they fall into the extended part of the definition (a), (b) or (c). "At work" is a key ingredient in respect of the status that triggers duties under Part II of the HSE Act.
13. Section 16 imposes duties on a person who controls a place of work.<sup>5</sup> They are required to take all practicable steps to ensure that no hazard that is or arises in the place harms, people in the vicinity of the place, people who are employees, contractors or subcontractors to that person and are in the place of work, or people as described by subsection (2) and (3) of section 16.

### **The implication of the District Court Judge's interpretation of "place of work"**

#### *Limiting the coverage of "place of work"*

14. The District Court Judge's decision on the interpretation of "place of work" means, from a practical perspective, that certain types of workers who are mobile in the course of their work do not have the protection of the HSE Act when they are moving.
15. The judge concluded on the specific facts of the Berryman case, that while Mr Richards was working at the hives where he had harvested the honey, Mr Berryman would have owed him duties under section 16(a)<sup>6</sup> of the HSE Act if there had been any relevant hazard in that place. However, when Mr Richards got into his vehicle to ferry the honey to the truck on the far side of the bridge Mr Richards was working but he was not working in a "place of work".

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<sup>5</sup> Refer to Briefing Paper "The Amendment to Section 16 of the HSE Act", number 00/004711

<sup>6</sup> This decision was prior to the HSE Act amendment to section 16 in 1998.

16. The judge said,<sup>7</sup> 'in my view the definition is intended to connote a place where a person is working in more than a transitory sense'. He viewed the bridge as nothing more than a place of access to the hives, which was the place of work.

*The Department of Labour's interpretation of "place of work"*

17. It is the view of the Department that what constitutes a "place of work" will be a question of fact in every case. In the Berryman case the work involved a system that was devised by Mr Richards and Mr Berryman, of unloading the hives in smaller loads on a smaller vehicle that would cross the bridge to a larger vehicle on the other side of the bridge. This larger vehicle couldn't safely cross the bridge due to its weight. In the Department's view the work of unloading the hives was not complete until the contents of all the hives was secured on the larger truck.

18. Accordingly in the circumstances the system devised for unloading the hives included the bridge as a place of work simply because the "work" was continuing when the smaller vehicle and the part load was en route to the larger vehicle. On this approach the bridge was not an accessway to a place of work but was itself part of that place.

19. Analogous law in Australia supports this view.<sup>8</sup> The High Court of Australia, on facts similar to the Berryman case, favoured the interpretation that a worker, who was moving from a point of work to another point of work and was injured while doing so, was in his place of work while moving.

20. In general, the Department's interpretation of "place of work" has been to identify where work is taking place or is being planned to take place as a question of fact. "Place of work" is a concept influenced by the facts of each situation. This means that if a person is "at work" they are in a "place of work" wherever that may be at the time and they are entitled to the protection of the HSE Act. Including those people who are mobile in their work, the Department has always considered the "place of work" travels with them.

21. This is qualified by the "all practicable steps" obligation of the employer, principal or person in control of a place of work. For example, if a worker is harmed while moving from one point of static work to another, by a hazard that the employer could have taken all practicable steps to eliminate but did not, the employer is liable under the HSE Act.

22. The two approaches point of difference:

<b>Judge Abbott's interpretation</b>	<b>The Department's interpretation</b>
A "place of work" is more than transitory, therefore mobile workers are not in a "place of work" while moving	Mobile workers take their "place of work" with them as they move from place to place, when they are "at work"

<sup>7</sup> *Department of Labour v Berryman* [1996] DCR 121

<sup>8</sup> *Australian Iron & Steel Pty Ltd v Luna* [1968] 123 CLR 305

## **Consistency with the Accident Insurance Act 1998**

23. A stated purpose of the HSE Act review is to ensure the HSE Act is aligned with changes to labour market legislation, which includes the Accident Insurance legislation. The Accident Insurance Act 1998 in section 32(1)(a) (also to be included in the new accident insurance legislation) states:
- While he or she is at any place for the purposes of his or her employment, including, for example, a place that moves or a place to or through which the insured moves...
24. It is inconsistent that one government agency covers a moving place of work or a place to or through which a person moves for insurance purposes (ACC) yet there is confusion as to whether another government agency (OSH) has the ability to enforce health and safety legislation in the same circumstance.
25. The inclusion of the concept of a moving place of work in accident insurance legislation reinforces the Department's view that the HSE Act was intended to cover mobile workers.

## **Resource issues**

26. Currently OSH is able to cover approximately 15% of New Zealand's workplaces each year (through a combination of proactive and reactive work). The use of OSH's allocated resources in the most effective way requires the operation of the legislative framework to be streamlined and targeted to achieve its stated outcomes.
27. The "place of work" definition is an integral part of the HSE Act. Resolving the confusion surrounding the definition will assist the effective operation of the HSE Act and enhance the ability of the Inspectorate to fulfil their functions under the HSE Act. It is not anticipated that the recommendations in this paper will require additional allocation of resources.

## **Compliance Costs to Business**

28. To the extent that the proposed changes would extend the current HSE Act obligations of business to certain individuals this may lead to increased costs to businesses. There may also be some benefits to business in clarifying the application of the Act. The extent of these costs and benefits is not clear.

## **Options**

### **The District Court Judge's interpretation of "place of work" v the Department's interpretation**

#### *Administrative Option*

29. Remain with the status quo and wait for an appropriate case to test the District Court Judge's interpretation of "place of work". OSH will continue interpreting "place of work" as described in paragraphs 17 to 22. OSH will continue to

consider mobile workers are included under the HSE Act and that they take their "place of work" with them as they move from place to place while "at work".

30. This option holds the risk that the Court's interpretation would uphold the present stance of the District Court on the interpretation of "place of work". This would mean the HSE Act does not cover mobile workers and comprehensive coverage of all work situations would not have been achieved.
31. The "place of work" definition is fundamental to the HSE Act. The need for certainty and consistency of application is essential for its effective operation. This option will not provide clarity until a suitable case has been through the Court system which could take years.
32. This option will have no impact on resource issues. Any impact on compliance costs to business will remain unknown until an outcome is reached through the court system.

#### *Legislative option*

33. Amend the "place of work" definition to reflect the Department's interpretation as described in the above discussion, that is, mobile workers take their "place of work" with them as they move from place to place, when they are "at work".
34. This option will provide consistency in workplace health and safety legislation. It ensures the principle of "comprehensive coverage of all work situations" is given immediate effect. It maintains the integrity of the current framework of the HSE Act and will ensure consistency with the Accident Insurance Act 1998. It will provide certainty to business and consistency in the application of the HSE Act.
35. This option avoids the waiting period inherent in the administrative option detailed in paragraphs 29 to 32 and will have an immediate impact on the effectiveness on the operation of the HSE Act.

#### **Summary**

36. This paper discusses the confusion surrounding the "place of work" definition. It analyses the need for legislative change to achieve a founding principle of the HSE Act to provide "comprehensive coverage of all work situations".
37. This paper recommends amending the "place of work" definition to clarify that mobile workers are covered under the HSE Act.
38. The administrative solutions to the issue surrounding the "place of work" definition will not provide certainty. The issue of coverage for mobile workers has potential to be resolved through the court system. This holds the risk that a court would not agree with the Department's interpretation of "place of work". The outcome of this would be the HSE Act would not cover mobile workers.

## **Recommendations**

I recommend that you:

- a) **agree** to amend the "place of work" definition to include mobile workers.

RJM Hill  
for Secretary of Labour

## APPENDIX 1

The full text of section 16 of the HSE Act is as follows:

16 Duties of persons who control places of work—.

A person who controls a place of work (other than a home occupied by the person) must take all practicable steps to ensure that no hazard that is or arises in the place harms—

People in the vicinity of the place (including people in the vicinity of the place solely for the purpose of recreation or leisure):

People who are lawfully at work in the place—

As employees of the person; or

As contractors engaged by the person; or

As subcontractors to a contractor engaged by the person; or

As employees of a contractor or subcontractor to whom subparagraph (ii) or subparagraph (iii) applies.

A person who controls a place of work (other than a home occupied by the person) must take all practicable steps to ensure that no hazard that is or arises in the place harms people—

Who are in the place with the express or implied consent of the person; and

Who—

Have paid the person (directly or indirectly) to be there or to undertake an activity there; or

Are there to undertake activities that include buying or inspecting goods from whose sale the person derives or would derive (directly or indirectly) any gain or reward.

A person who—

Controls a place of work (other than a home occupied by the person); and

Knows of any significant hazard that—

Is in, or is likely to arise in, the place of work; and

Arises from work that is being carried on, or has been carried on, for gain or reward in the place of work; and

Would not, in the ordinary course of events, be reasonably expected to be in, or to be likely to arise in, a place of work of that type; and

Either—

Expressly authorises any other person to be in the place of work; or

Has personally received oral advice that any other person will, under the authority of any enactment, be working in the place of work; and

Is not obliged, in relation to that other person, to comply with subsection (1) or subsection (2)—

must take all practicable steps to warn that other person of the significant hazard.

Except in the case of the practicable steps required by this section to be taken in relation to any person described in subsection (2) or subsection (3) (c) (i), this section does not impose on any person who controls a place of work any duty in

respect of any person who is in the place of work solely for the purpose of recreation or leisure.

The warning required to be given to a person to whom subsection (3) (c) (i) applies—

Must be given to that person at the time at which the express authority to be in the place of work is given to that person; but

If the express authority is given in respect of a group of persons or a body of persons, whether corporate or unincorporate, it is sufficient if the warning is given at that time to a representative or member of that group or body of persons.

The oral advice required by subsection (3) (c) (ii) must be given by the person who will be working in the place of work or by that person's employer.