

# Occupational Health And Safety: Why And How Should Worker Participation Be Enhanced In New Zealand?

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## Abstract

This paper provides a brief overview of the international academic commentary on the subject of worker participation in Occupational Health and Safety (OHS) and then considers the character of worker participation in New Zealand OHS management (OHSM) in more detail. The paper highlights how vital worker participation is for the health and safety (H&S) of workers. The paper concludes that the changes introduced by the Health and Safety at Work Act 2015 (HSW Act) provide evidence that New Zealand has taken steps in the right direction, but there is further room for improvement; in particular H&S representatives and H&S committees should be available to all workers without exceptions.

## Key words

Occupational health and safety, OHS, worker participation, Health and Safety at Work Act 2015.

## Introduction

Occupational health and safety (OHS) law in New Zealand has been in existence since the 19th century.<sup>1</sup> Despite such a lengthy presence, the country's work-related injury fatality rate is comparatively one of the worst internationally.<sup>2</sup> The development of OHS seems to have taken place roughly after major mine explosions occurred in New Zealand.<sup>3</sup> The natural conclusion which flows from such an observation is that OHS reform is reactionary — the most recent evidence stemming from the Pike River mine disaster in 2010, which resulted in the Health and Safety at Work Act 2015 (HSW Act).

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<sup>1</sup> Felicity Lamm "Participative and productive employment relations: the role of health and safety committees and worker representation" in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 168 at 169; and see generally Noel Woods *Industrial Conciliation and Arbitration in New Zealand* (RE Owen, Government Printer, Wellington, 1963).

<sup>2</sup> See Appendix I; Philip Gunby "How Bad is the State of Occupational Fatalities in New Zealand?" (2011) 36(1) NZJER 35 at 39-40; and see also Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health And Safety: He Korowai Whakaruruhau* (April 2013) at [15].

<sup>3</sup> See Appendix II.

This paper begins with a general introduction to the topic of worker participation. This is followed by an explanation of New Zealand's development of worker participation in OHS, including a section on the HSW Act. The bulk of the text discusses international academic commentary on the benefits of granting participation to workers in OHS matters. Based on that international literature, certain factors are discussed that would help to ensure that whatever worker participation practice is implemented, it is done so as to maximise its own benefits. Lastly, certain lessons are drawn for the New Zealand government, employers, workers and other interested parties to consider.

## Overview of Worker Participation

There is no precise definition of worker participation; thus, whenever authors use the particular phrase, they often indicate their own personal preference for the term.<sup>4</sup> Worker participation is the “expression [that] is possibly the most common[ly]” used,<sup>5</sup> standing in competition with many other well-known phrases: employee (or worker) involvement, employee participation, industrial democracy, worker control, high-involvement Human Resources Management (HRM), voice and self-management.<sup>6</sup> One of the reasons certain authors prefer to use worker participation is because the term is more inclusive of a great variety of activities and is therefore broader in its scope, whereas the other alternative terms tend to exclude certain activities undertaken by workers.<sup>7</sup>

Despite being generally broader than the other terms, worker participation has a spectrum of meanings of its own. When the term worker participation is used at its broadest, it is typically done in the context of discussing or explaining the various forms of worker activities;<sup>8</sup> but because authors may have strong personal commitments to particular forms of participation, they choose to restrict the definition of worker participation.<sup>9</sup> For instance, the most common practice among some writers is to exclude collective bargaining as an activity covered by worker participation.<sup>10</sup>

Nevertheless, authors are in agreement that worker participation practices, which influence the decision making of the organisation, can be divided into direct and indirect

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<sup>4</sup> See Adrian Wilkinson and others “Conceptualizing Employee Participation in Organizations” in Adrian Wilkinson and others (eds) *The Oxford Handbook of Participation in Organizations* (Oxford University Press, New York, 2010) 3 at 3–7 and 10–13; and see also Raymond Markey and others “Exploring employee participation and work environment in hotels: Case studies from Denmark and New Zealand” (2014) 39(1) NZJER 2 at 3–5.

<sup>5</sup> AJ Geare “Worker Participation” in *The System of Industrial Relations in New Zealand* (2nd (revised) ed, Butterworths, Wellington, 1988) 409 at 411.

<sup>6</sup> At 410.

<sup>7</sup> At 411.

<sup>8</sup> At 411.

<sup>9</sup> At 411–412.

<sup>10</sup> See examples at 412, n 1, n 2 and n 3; and contrast Richard Block and Peter Berg “Collective Bargaining as a Form of Employee Participation: Observations on the United States and Europe” in Adrian Wilkinson and others (eds) *The Oxford Handbook of Participation in Organizations* (Oxford University Press, New York, 2010) 186.

participation (also known as representative participation).<sup>11</sup> Some examples of such practices are, inter alia, communication and discussion, face-to-face consultation with a manager, company-wide meetings, collective bargaining, works councils, joint management, self-management and worker ownership.<sup>12</sup>

It is now appropriate to explain the history of worker participation in New Zealand, specifically in the OHS context.

## **Development of Worker Participation in OHS in New Zealand**

The first seed to give all workers a more participative role in OHS in New Zealand was planted by the ACOSH Report in 1988.<sup>13</sup> The conclusions reached by the ACOSH Report were primarily based on the equivalent, but much earlier, United Kingdom report better known as the Robens Report.<sup>14</sup> The two documents advocated for the need to impose:<sup>15</sup>

...a statutory duty on every employer to consult with his employees or their representatives at the workplace on measures for promoting safety and health at work, and to provide arrangements for the participation of employees in the development of such measures.

This view became very dominant because it was realised that “real progress is impossible without the full co-operation and commitment of all employees”.<sup>16</sup>

The United Kingdom’s Health and Safety at Work etc Act 1974 intended to implement the Robens Report recommendations, but it soon drew much criticism on the basis that the new laws were inconsistent with “the scheme which the [Robens] Committee had in mind”.<sup>17</sup> The Safety Representatives and Safety Committees Regulations 1977 have, in contrast, had a much bigger impact because, to the Government’s considerable hesitation, they provided for the appointment of H&S representatives and committees.<sup>18</sup> In essence, whereas the Act allowed much discretion for having certain participatory practices in place, the Regulations constituted a far stricter imposition on employers.

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<sup>11</sup> Geare, above n 5, at 414–415.

<sup>12</sup> See generally at 414–419.

<sup>13</sup> Advisory Council for Occupational Safety and Health (ACOSH) *A Public Discussion Paper: Occupational Safety And Health Reform* (June 1988); and see generally John Wren “From the ‘Balkanisation of Control’ to Employer Management Systems: OHS Policy and Politics in New Zealand 1981–1992” in Michael Lloyd (ed) *Occupational Health and Safety in New Zealand: Contemporary Social Research* (Dunmore Press, Palmerston North, 2002) 43 at 43–47.

<sup>14</sup> Committee on Safety and Health at Work (Lord Alfred Robens Chair) *Safety and Health at Work: Report of the Committee 1970-72* (1972) (the Robens Report).

<sup>15</sup> Robens Report, above n 14, at [70]; and see also ACOSH, above n 13, at 11.

<sup>16</sup> Robens Report, above n 14, at [59].

<sup>17</sup> Adrian Merritt “Britain: The Health and Safety at Work etc Act 1974” in *Guidebook to Australian Occupational Health & Safety Laws* (CCH, North Ryde (NSW), 1983) 243 at 252.

<sup>18</sup> At 253.

Following a similar path in the 1970s and 1980s,<sup>19</sup> Australian states and territories have enacted their own statutes granting workers the right of participation in OHS.<sup>20</sup> Hence, the laws governing OHS in Australia varied in many respects for over 30 years, ultimately inciting Australia to begin the process of harmonisation:<sup>21</sup> its 2008 national review resulted in the Model Work Health and Safety Act 2011<sup>22</sup> (discussed in further detail later).<sup>23</sup>

New Zealand was one of the last countries to plant a seed that worker participation is a necessity — the ACOSH Report of 1988 — but, unfortunately, that same seed did not germinate until many years later. For instance, the Health and Safety in Employment Act 1992 did not give workers a statutory right of participation. In fact, it was severely opposed: the then Minister of Labour believed H&S representatives and committees to be a “confrontational approach”.<sup>24</sup>

Nevertheless in 2002, approximately 20 years after the United Kingdom and Australia, New Zealand underwent a considerable shift in attitude which demonstrated significant support for employee involvement in OHS. When speaking in 2001, Margaret Wilson — then Minister of Labour — showed her support for the insertion of statutory rights for the participation of workers:<sup>25</sup>

The [Health and Safety in Employment Amendment Bill] ... recognises that health and safety issues are fundamentally employment relations issues. A good culture of health and safety practices requires the participation of everyone.

Consequently, the 2002 Act introduced a general duty to involve employees in OHS matters: “[e]very employer must provide reasonable opportunities for the employer’s employees to participate effectively in ongoing processes for improvement of health and safety in the employees’ places of work”.<sup>26</sup> The purpose of this new duty was to ensure that all those with relevant knowledge and expertise were involved in OHS, thereby resulting in better decision making by employers on H&S matters at the workplace.<sup>27</sup>

The large number of incidents in employment since 2002 — including road worker injuries, hazardous substances spills, forestry injuries, Ashburton Work and Income shootings, farming accidents, construction incidents and the Pike River mine accident —

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<sup>19</sup> Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, Sydney, 2012) at 4–6, 136–137 and 141–143.

<sup>20</sup> At 6–8.

<sup>21</sup> See generally at 8–25.

<sup>22</sup> See generally at 26–37.

<sup>23</sup> See generally at 26–37.

<sup>24</sup> Ian Campbell “From no fault to own fault? Changes in OSH regulation in New Zealand” (1992) 1 *J Occ Health Safety – Aust NZ* 3 at 4.

<sup>25</sup> (3 December 2002) 604 *NZPD* 2442.

<sup>26</sup> Health and Safety in Employment Amendment Act 2002, s 13; and see also Health and Safety in Employment Act 1992, s 19B.

<sup>27</sup> Health and Safety in Employment Amendment Act, s 13; and see also Health and Safety in Employment Act, s 19A.

have highlighted the inadequacy of the OHS legislative framework in New Zealand.<sup>28</sup> In particular, the 2010 Pike River incident, which took the lives of 29 men, was a major wake-up call for the whole country.<sup>29</sup> As a result, two reports have been produced regarding the accident,<sup>30</sup> one of which recommended that New Zealand align its OHS laws with that of Australia — the Australian Model Health and Safety Act 2011 — because:<sup>31</sup>

- It is the most recent expression of the Robens approach;
- It is the result of a long period of investigation and consultation (domestically and internationally);
- Australia has undergone an extensive modernisation process, including the development of regulations and information, and New Zealand can capitalise on that work; and
- There are advantages to New Zealand companies in having a common trans-Tasman approach to workplace health and safety.

As a direct consequence of the Pike River disaster, the HSW Act was passed in August 2015, proving once again the reactionary nature of OHS reform in New Zealand.

## **HSW Act – Worker Participation**

The HSW Act, which is comparable to the Australian Model Act in many respects, began its life as the Health and Safety Reform Bill.<sup>32</sup> What has been described as “the meat and drink of the bill” is Part 3, which deals with worker engagement, participation and representation.<sup>33</sup>

### ***The Twin Duties***

The HSW Act places a duty on a PCBU to engage with workers whenever engagement is required.<sup>34</sup> A PCBU is defined as a person conducting a business or undertaking, which has the effect of broadening the scope of persons responsible for their workers.<sup>35</sup> A PCBU and its workers may agree on adequate procedures for engagement, but the procedures must not be inconsistent with s 59, which prescribes what engagement with workers must involve.<sup>36</sup> Even though the Act’s notes to the engagement sections suggest

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<sup>28</sup> See WorkSafe New Zealand “Workplace Fatalities Summary 2013–2015” <[www.business.govt.nz](http://www.business.govt.nz)>.

<sup>29</sup> See also JR Lamare and others “Independent, dependent, and employee: Contractors and New Zealand’s Pike River Coal Mine disaster” (2015) 57(1) JIR 72 at 82.

<sup>30</sup> Royal Commission on the Pike River Coal Mine Tragedy *Royal Commission on the Pike River Coal Mine Tragedy: Volume 1 and Volume 2* (October 2012); and Independent Taskforce, above n 2.

<sup>31</sup> Richard Rudman “Health and Safety” in *New Zealand Employment Law Guide* (CCH, Auckland, 2015) 391 at 425; and see Independent Taskforce, above n 2, at [215].

<sup>32</sup> Health and Safety Reform Bill 2014 (192-2).

<sup>33</sup> (19 August 2015) 707 NZPD 5919.

<sup>34</sup> Health and Safety at Work Act 2015, s 58(1).

<sup>35</sup> Section 17(1).

<sup>36</sup> Sections 58(2) and 58(3).

that they are comparable to the Australian Model Act, it is noteworthy that the Australian equivalent is called a duty to *consult* as opposed to engage.<sup>37</sup>

The Act also places a duty on a PCBU to have worker participation practices, which should “provide reasonable opportunities for workers ... to participate effectively in improving work health and safety in the business or undertaking on an ongoing basis”.<sup>38</sup> In essence, the most substantial change from the Health and Safety in Employment Act 1992 is that instead of a general duty to provide reasonable opportunities for employee participation, employers must now implement practices to ensure the provision of such opportunities.

If a PCBU were to breach either of its twin duties, it would commit an offence and, thus, would be liable on conviction to a fine.<sup>39</sup>

### ***H&S Representatives and Committees***

The Act prescribes two practices of worker participation: H&S representatives and H&S committees.<sup>40</sup> A H&S representative may be elected either if a worker notifies a PCBU that he or she wishes to have a representative or if a PCBU wishes to do so on its own initiative.<sup>41</sup> If elected, workers may be divided into work groups with different representatives.<sup>42</sup> A H&S committee may be established if there is a request made and directed at PCBU by a H&S representative or by five or more workers at that workplace.<sup>43</sup>

The controversy surrounding the Health and Safety Reform Bill on these two practices arose because there was a significant change between the Bill’s original wording and its post-Select Committee version, which has been adopted in the Act.<sup>44</sup> In summary, a PCBU may decline to respond affirmatively to a worker’s request for a H&S representative if that PCBU runs a small business with fewer than 20 workers in a non-high-risk sector.<sup>45</sup> Moreover, the same kind of business may also reject a request for a H&S committee.<sup>46</sup> High-risk sectors, as recently defined in the Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016, are predominantly agricultural and labour-intensive business undertakings only.<sup>47</sup>

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<sup>37</sup> Work Health and Safety Act 2011 (Cth), s 47.

<sup>38</sup> Health and Safety at Work Act, s 61(1).

<sup>39</sup> Sections 58(4) and 61(4).

<sup>40</sup> Part 3, sub-pt 2.

<sup>41</sup> Sections 62(1) and 62(3).

<sup>42</sup> Section 64(1).

<sup>43</sup> Section 66(1).

<sup>44</sup> See WorkSafe New Zealand “Health and Safety Reform Bill – key changes” <[www.business.govt.nz](http://www.business.govt.nz)>.

<sup>45</sup> Health and Safety at Work Act, s 62(4).

<sup>46</sup> Section 66(3).

<sup>47</sup> Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016, reg 5.

The recently-passed Act is intended to improve the OHS legislative framework in New Zealand, especially because it repeals, inter alia, the Health and Safety in Employment Act 1992.<sup>48</sup> It is true that the recent reform is a step in the right direction because, as explained below, worker participation is very advantageous and the HSW Act places a duty on every PCBU to engage with workers and to implement worker participation practices. However, the enacted exceptions to the twin duties could in practice reduce the potential significance of the recent OHS reform by *effectively* depriving workers at smaller businesses of the right to have H&S representatives or committees (but more on this later). Hence, the New Zealand legislative framework for OHS may need to be revisited shortly.

## Goals and Benefits of Worker Participation

As explained above, worker participation does not have a precise definition and, hence, authors use the phrase because of their personal preference for it. The issue that stems from a lack of definition is that generalisations about the outcomes of worker participation are very difficult to make. Some results may be heavily biased due to the writer's own preferences: "evidence is apparently viewed not only through rose tinted glasses, but through rose tinted glasses with distorted lenses".<sup>49</sup> Nevertheless, this section argues that worker participation may achieve a variety of goals, which may result in many benefits for both employees and businesses in an OHS context. It is, therefore, not surprising that worker participation in OHS has been recognised internationally.<sup>50</sup>

### *Employee Wellbeing*

#### *Ethics*

The ethical argument in favour of worker participation is that "workers bear the brunt of the effects of work-related hazards", so they should be able to identify and address the various hazards in their workplace.<sup>51</sup> The benefits, which stem from participation, are twofold: (a) managers are able to develop more adequate H&S measures when their workers highlight danger-prone areas, and (b) it is more likely that workers' interests will be protected whenever conflicts may arise "between the drive for production and profits on the one hand, and work health and safety on the other".<sup>52</sup> In essence, democracy will be evident at the workplace.<sup>53</sup>

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<sup>48</sup> Section 231.

<sup>49</sup> Geare, above n 5, at 434.

<sup>50</sup> Occupational Safety and Health Convention, 1981 (ILO Convention C155) 1331 UNTS 280 (entered into force 11 August 1983); and European Union Framework Directive 89/391 on OSH [1989] OJ L183.

<sup>51</sup> Johnstone and Tooma, above n 19, at 137–138.

<sup>52</sup> At 138; and see also Leigh-Ann Harris "Legislation for Participation: an Overview of New Zealand's Health and Safety Representative Employee Participation System" (2011) 36(2) NZJER 45 at 45.

<sup>53</sup> See generally Stewart Johnstone and Peter Ackers "Introduction: Employee voice" in Stewart Johnstone and Peter Ackers (eds) *Finding a Voice at Work? New Perspectives on Employment Relations* (Oxford University Press, New York, 2015) 1 at 8.

## *Social Justice*

A related argument for worker participation is the socially just case for representative participation.<sup>54</sup>

...the rights of workers to form unions, elect representatives, and participate in the running of business through work councils and collective bargaining are ... absolute entitlements that must be respected regardless of cost.

In short, the right to participate is an end in itself and, thus, a benefit to workers.

## *Reduction in the Number of Injuries and Fatalities*

Arguably, the main goal of worker participation in an OHS context is to reduce the number of accidents that result in injuries and fatalities. Academic literature is consistent in the view that the number of injuries and fatalities in the workplace decreases as a consequence of worker participation practices.<sup>55</sup>

A number of studies suggest that indicators of objective OHS performance, such as injury rates, are better in situations in which joint arrangements are in place and/or when trade unions are engaged in worker representation in workplaces. Other studies point to associations between the presence of representative structures and indicators of a more systematic approach to OHSM to determine the extent to which such measures are central to workplace arrangements for OHSM.

Since New Zealand decided to align its laws with the laws of Australia, it is natural to look to our neighbour's statistics for confirmation. The Model Act in Australia has proven to be a success, with the rate of occupational injuries and casualties falling. For instance, in the period of 2011-2012, just after the Act was passed, the injury incidence rate fell by 26 per cent and the fatality incidence rate fell by 41 per cent.<sup>56</sup> Moreover, Australia has recently reported the lowest number of work-related deaths in 11 years,<sup>57</sup> and the lowest compensated fatality rate in a decade.<sup>58</sup>

This segment might lead one to think that any regulation of H&S primarily benefits workers, but the benefits that employers (or management) receive cannot be excluded.

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<sup>54</sup> Edmund Heery "Frames of reference and worker participation" in Stewart Johnstone and Peter Ackers (eds) *Finding a Voice at Work? New Perspectives on Employment Relations* (Oxford University Press, New York, 2015) 21 at 29.

<sup>55</sup> David Walters "Workplace Arrangements for Worker Participation in OHS" in Elizabeth Bluff, Neil Gunningham and Richard Johnstone (eds) *OHS Regulation for a Changing World of Work* (Federation Press, Sydney, 2004) 68 at 75; and see also Richard Johnstone, Michael Quinlan and David Walters "Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market" (2005) 47(1) *J Ind Relat* 93 at 94-95.

<sup>56</sup> Safe Work Australia *Comparative Performance Monitoring Report: Comparison of work health and safety and workers' compensation schemes in Australia and New Zealand* (October 2014) at vii.

<sup>57</sup> Safe Work Australia "Lowest number of work-related deaths in 11 years" (15 July 2014) <[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)>.

<sup>58</sup> Safe Work Australia "Lowest compensated fatality rate in a decade" (9 October 2014) <[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)>.



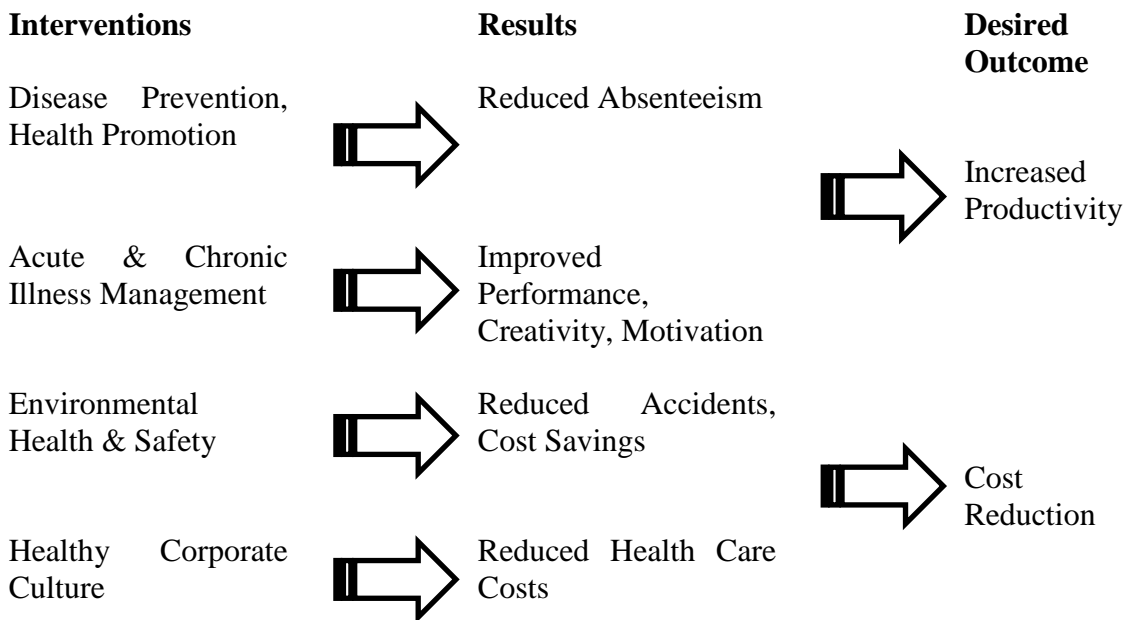
***Business Wellbeing***

Certain academics are of the view that “the core purpose of worker participation is to improve business performance”.<sup>59</sup> In order to attempt to measure business performance, it must be remembered that “[t]he success of any business depends on the employees. That is the bottom line.”<sup>60</sup> As discussed above, there are multiple ways in which employee wellbeing can improve if worker participation practices are implemented; as a result, it is natural to conclude that the business where those employees work would also flourish.<sup>61</sup>

...human performance is higher when people are physically and emotionally able to work and have a desire to work. Higher levels of human performance lead to higher levels of productivity, which in turn can lead to higher profits.

The following figure, created by other authors, is useful in explaining the benefits of worker participation for a business:<sup>62</sup>

**Pathways to Productivity**



<sup>59</sup> Heery, above n 54, at 25.

<sup>60</sup> James Roughton and James Mercurio “Employee Participation” in *Developing an Effective Safety Culture: A Leadership Approach* (Butterworth-Heinemann, 2002) 116 at 116.

<sup>61</sup> Michael O’Donnell “Health and Productivity Management: the Concept, Impact, and Opportunity – Commentary to Goetzel and Ozminkowski” (2000) 14(4) AJHP 215 at 215.

<sup>62</sup> Based on the figure of John Riedel and others “The Effect of Disease Prevention and Health Promotion on Workplace Productivity: A Literature Review” (2001) 15(3) AJHP 167 at 168 as cited in Felicity Lamm, Claire Massey and Martin Perry “Is there a link between Workplace Health and Safety and Firm Performance and Productivity?” (2007) 32(1) NZJER 72 at 76.

If an employee is given a chance to participate, then that employee is likely to become more aware and thus more engaged. This may result in a higher enjoyment of the work and a greater responsibility for the job, which in turn results in a better quality product or service.<sup>63</sup>

Furthermore, higher engagement of workers has been found to lead to lesser absenteeism and reduced turnover,<sup>64</sup> which is likely to result in a direct saving of costs to the business. However, it must be remembered that it is difficult to assess specifically the contribution of OHS to the overall productivity of a business because other aspects of business life and management also play a role.<sup>65</sup>

Lastly, it is important to appreciate that worker participation practices may result in the development of a safety culture over time, thereby maintaining employee and business wellbeing into the future.

## **How To Maximise Benefits of Worker Participation in OHS**

The HSW Act does not prescribe which worker participation practices must be implemented, unless there are requests to elect a H&S representative or to establish a H&S committee. Every practice has its own advantages in comparison with others, but a particular practice may prove far more beneficial within one organisation over another because it is better suited to the type of industry, business, workplace size or some other matter. This section explores which factors must be present and considered to enhance any particular type of worker participation. However, before diving into a discussion of these various factors, the special role of H&S representatives and H&S committees in OHS must be emphasised.

### ***The Special Role of H&S Representatives and Committees***

There is some empirical evidence available to indicate that direct participation practices, particularly when carried out by individual non-unionised workers engaging with their managers, have little effect on workplace H&S.<sup>66</sup> Instead, indirect (representative) participation schemes have been found to be much more useful.<sup>67</sup> In short, “joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when employers manage work health and safety without representative worker participation”.<sup>68</sup>

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<sup>63</sup> See Roughton and Mercurio, above n 60, at 121.

<sup>64</sup> At 121.

<sup>65</sup> See Terri Mylett and Ray Markey “Worker Participation in OHS in New South Wales (Australia) and New Zealand: Methods and Implications” (2007) 7(2) Employment Relations Record 15 at 18–21; and see also Lamm, Massey and Perry, above n 62, at 81–82.

<sup>66</sup> Johnstone and Tooma, above n 19, at 138; and see also Walters, above n 55, at 79–80.

<sup>67</sup> Johnstone and Tooma, above n 19, at 138–139.

<sup>68</sup> At 139.

Within the indirect participation umbrella, the 1972 Robens Report emphasised the need for the two forms of worker participation incorporated by the HSW Act: H&S representatives and H&S committees. The Robens Report was of the view that the role of H&S representatives is key to any success in OHS,<sup>69</sup> therefore H&S representatives “should have strong channels of communication with government work health and safety inspectors”.<sup>70</sup> The significant role of H&S representatives in OHS is certainly supported by international literature.<sup>71</sup>

The role of joint committees may be more difficult in practice because decision making is not always easy when there are many parties with various interests. However, in order to improve OHS, it is best to have a H&S committee, which would represent the variety of interests at any one workplace, because the skills and experience of multiple teams or departments may prove useful.<sup>72</sup>

Although the two discussed practices are vital for OHS, there are exemptions available under the HSW Act for PCBUs who run a small business with fewer than 20 workers in a non-high-risk sector.

Arguably, this permissible exclusion is inappropriate because many businesses in New Zealand may fall into that category: “small business sectors ... represent approximately 90 per cent of the business population and [employ] 60 per cent of the business population”.<sup>73</sup> Many New Zealand workplaces, particularly those operating within the construction, forestry and agricultural industries, might not take advantage of the two practices, which are empirically proven to be the most useful in dealing with OHS.

Furthermore, it seems somewhat nonsensical for a New Zealand Act modeled on that of Australia to introduce such an exception when none exists in the Model Act. No doubt some may argue that this decision was made to reflect New Zealand’s unique features, but it would be hard to justify such a proposition.

New Zealand could perhaps learn from Sweden, which established regional or territorial H&S representatives for its workers in the 1960s-1970s. This practice underwent substantial evaluations in the 1970s and 1990s, which concluded overall that regional H&S representatives “are amongst the most powerful, effective and sustainable of intermediaries for stimulating and supporting participative arrangements for health and safety in small businesses”.<sup>74</sup> In summary, every workplace, no matter how big or small, should be represented by a H&S representative and/or committee.

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<sup>69</sup> Robens Report, above n 14, at [66].

<sup>70</sup> Johnstone and Tooma, above n 19, at 141.

<sup>71</sup> At 139; Felicity Lamm and David Walters “Regulating Occupational Health and Safety in Small Businesses” in Elizabeth Bluff, Neil Gunningham and Richard Johnstone (eds) *OHS Regulation for a Changing World of Work* (Federation Press, Sydney, 2004) 94 at 109–110.

<sup>72</sup> See Roughton and Mercurio, above n 60, at 121.

<sup>73</sup> Markey and others, above n 4, at 7.

<sup>74</sup> Lamm and Walters, above n 71, at 110.

## *Factors That Maximise Worker Participation Practices*

In case H&S representatives and/or committees are not established, academic literature suggests that the following factors should help to support and maximise any worker participation practice: legislation, workplace culture, information and training, and trade union involvement.

### *Legislation*

It is important to note that state intervention is crucial if improvements in OHS are to be achieved: “[l]egislation provides guidance on the form and nature of participation and legitimises representatives’ rights to resources, thus enabling participation.”<sup>75</sup> It is therefore encouraging to see New Zealand trying to solve its OHS problem through legislation, but it is most unfortunate that this legislation permits exemptions to the two most useful worker participation practices.

### *Workplace Culture and Management Commitment*

The fact that culture generally matters is equally applicable to OHS worker participation practices. Before any program or scheme is implemented, it pays to observe and consider the existing organisational and social-relational conditions because these will strongly affect the outcomes of the participatory practice. For instance, one study showed that workers “under more traditional managerial ‘regimes’” do not tend to welcome any change, thereby reducing the likelihood of positive outcomes if new worker participation systems are introduced.<sup>76</sup> Overall, it is best if there is evidence of “worker organisation at the workplace that prioritises OHS and integrates it in other aspects of representation on industrial relations”.<sup>77</sup>

The workplace culture also extends to (senior) management, which ought to show its commitment to improving OHS performance and participative arrangements.<sup>78</sup>

### *Information and Training*

Training is absolutely crucial when it comes to workplace H&S: empirical evidence suggests that better-trained H&S representatives contribute significantly to OHS at a workplace.<sup>79</sup> It is promising to note that H&S representatives, if elected, are entitled to attend training and be paid for it under the HSW Act.<sup>80</sup>

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<sup>75</sup> Harris, above n 52, at 45 [inline citation omitted]; and see also Lamm and Walters, above n 71, at 112.

<sup>76</sup> Vicki Smith “Introduction” in Vicki Smith (ed) *Worker Participation: Current Research And Future Trends* (Elsevier JAI, Amsterdam, 2006) xi at xiv.

<sup>77</sup> Walters, above n 55, at 78.

<sup>78</sup> At 78.

<sup>79</sup> At 79; and Lamm and Walters, above n 71, at 113–114.

<sup>80</sup> Health and Safety at Work Act, sch 2 s 12.

Any training, however, should extend to all those working in an organisation.<sup>81</sup> It is also desirable to update workers regularly on OHS matters because some will undoubtedly forget what the correct procedures are.

### *Trade Union Involvement*

Trade unions' involvement significantly increases the voice and representation of workers and consequently OHS statistics are likely to improve.<sup>82</sup> Specifically, the role of trade unions in the provision of information and training to workers and H&S representatives is desirable.<sup>83</sup>

However, it is important to note that the role of trade unions has diminished since the 1980s around the world and most certainly in New Zealand. Hence, the falling influence of trade unions is a phenomenon that must be accepted, despite it being extremely unfortunate for OHS. It must be emphasised, however, that non-union participation may have just as much, if not greater, contribution to OHS.

## **Conclusion: Lessons for New Zealand**

This paper argues that worker participation can support OHS in any workplace. Consequently, due to the HSW Act's imposition on PCBUs of a duty to engage with workers and to adopt worker participation practices, the recent reform is a step in the right direction for the legislative framework of OHS in New Zealand. The Act was modeled on a similar Australian Act, which has fortunately helped to reduce the incidence of occupational injuries and fatalities in Australia.

This paper also suggests that, out of the many worker participation practices available, the two that are the most suitable for OHS are H&S representatives and H&S committees. It is pleasing that the HSW Act actually provides for those practices in its provisions; however, the problem lies in the fact that the Act allows PCBUs to reject any request for either practice if the business has fewer than 20 workers and is considered not high-risk.

A lesson ought to be learnt from the United Kingdom's Health and Safety at Work etc Act 1974, as mentioned earlier, which gave too much discretion to employers, thereby weakening the spirit of the Robens Report. The 1977 Regulations, which placed an imposition upon employers to appoint H&S representatives and committees, proved to be more effective than the Act in advocating for appropriate OHS. Moreover, the Australian Model Act does not have a similar exception in its provisions, thus the exception in the New Zealand HSW Act is illogical and should not exist. The bottom line is that every worker is susceptible to injuries no matter where they work, so it is crucial for everyone to have access to practices of worker participation that truly work.

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<sup>81</sup> See Roughton and Mercurio, above n 60, at 130.

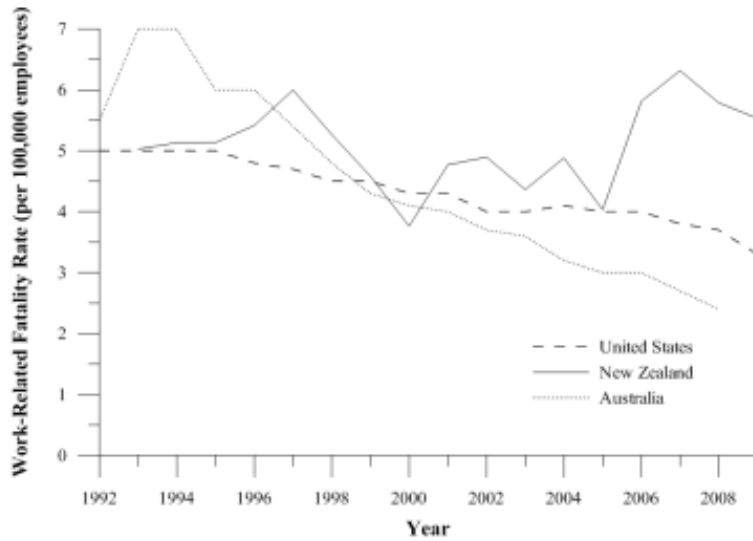
<sup>82</sup> Lamm and Walters, above n 71, at 111–112.

<sup>83</sup> Walters, above n 55, at 78–79.

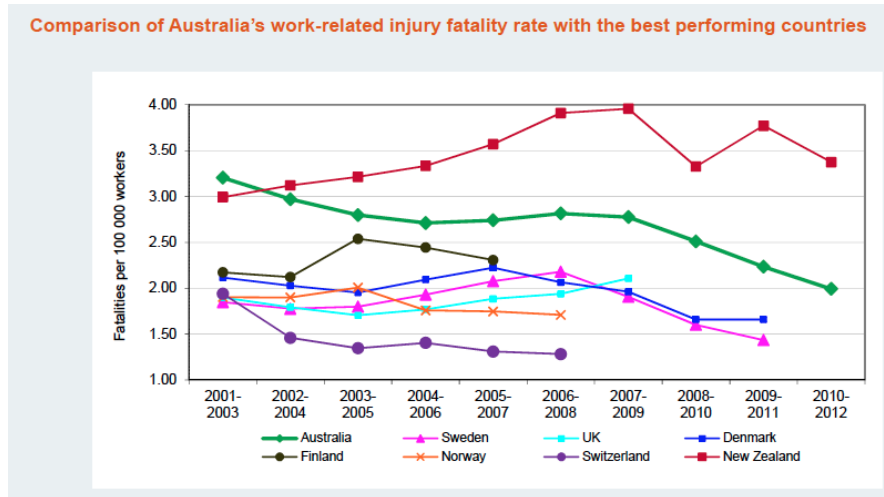
If, nevertheless, H&S representatives and committees are not implemented, the following factors may prove useful in improving OHS if taken into account by the government, employers and other interested parties: legislative support, workplace culture, provision of information and adequate training, and trade union involvement.

# Appendix I

## Work-Related Fatalities by Country



## Work-Related Fatalities by Country.<sup>84</sup>



## Comparison of Australia's work-related injury fatality rate with the best performing countries.<sup>85</sup>

<sup>84</sup> Philip Gunby "How Bad is the State of Occupational Fatalities in New Zealand?" (2011) 36(1) NZJER 35 at 39.

<sup>85</sup> Safe Work Australia *National OHS Strategy 2002-2012: Progress against targets* (February 2015) at 3.

## Appendix II

Major mine disasters in New Zealand	Casualties	Response
21 February 1879 Kaitangata	34 deaths	Mines Department was given the power to inspect mines. The 1890s Liberal government's reforms such as the introduction of Factories Act 1891, which set out minimum standards of work.
26 March 1896 Brunner	65 deaths	
12 September 1914 Ralph's mine, Huntly	43 deaths	The Workers Compensation Act 1900 mentality of compensating for injuries, as opposed to preventing them, was dominant.
3 December 1926 Dobson mine	9 deaths	
24 September 1939 Glen Afton mine, Huntly	11 deaths	
19 January 1967 Strongman mine	19 deaths	The OHS reforms of 1970s/1980s in New Zealand (explained in the paper) and introduction of ACC.
19 November 2010 Pike River mine	29 deaths	Health and Safety at Work Act 2015.

Mining accidents in New Zealand.<sup>86</sup>

<sup>86</sup> Based on Alan Sherwood and Jock Phillips "Coal and coal mining: Mining accidents" (17 November 2015) Te Ara: The Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.