

## **Regulatory Impact Statement: Further decisions to improve New Zealand's Workplace Health and Safety Regulatory Framework**

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1. This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Business, Innovation & Employment.
2. This RIS has two parts:
  - a. Part 1 provides an analysis of proposed licensing fees for the new licensing regime being introduced under the new *Health and Safety at Work (Asbestos) Regulations 2016* (the new Asbestos Regulations).
  - b. Part 2 provides an analysis on the identification of high risk industries or sectors (high risk sectors) in the *Health and Safety at Work (Worker Engagement, Participation and Representation) Regulations* (the WEPR regulations). The purpose of identifying high risk sectors in the WEPR regulations is to give the intended effect to the scope of an exemption contained in the *Health and Safety at Work Act 2015* (the HSW Act) for small, lower-risk businesses from specific worker representation requirements.
3. Separate regulatory impact statements cover the other policy decisions on the HSW Act and supporting regulations.

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# Part 1: Health and Safety at Work (Asbestos) Regulations 2016 – Licensing Fees

## Agency disclosure statement

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1. Cabinet made decisions in March 2015 on the suite of proposed new health and safety at work regulations, and approved the release of exposure drafts for public and stakeholder feedback in March-April [EGI Min (15) 4/13 refers]. At that time Cabinet also noted that the regulations for asbestos, hazardous substances and major hazard facilities will need to set administrative fees.
2. These fees relate to the recovery of the costs to WorkSafe New Zealand (WorkSafe) for the provision of authorisation-related aspects of the regulations, such as licensing fees for asbestos removalists and hazardous substance test certifiers, and a levy to recover the costs of regulating major hazard facilities. Due to fees for those regulations raising different considerations and timeframes, the fees or charges for each set of regulations are being developed and set separately.
3. This RIS is constrained to considering options for fees that have policy approval under the new Asbestos Regulations. It is limited to seeking to recover the costs of the services provided for the licensing requirements under these regulations. Broader consideration of how WorkSafe is funded, and other fees and levies will be addressed in other processes.
4. A separate RIS was also developed to consider the impact and options for the full set of phase one regulations being developed under the new *Health and Safety at Work Act 2015* (the HSW Act). This RIS is consistent with the analysis in the separate RIS.

## Problem definition

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### Background

5. Asbestos has been widely used throughout the world, particularly in building and insulation materials. Inhaled asbestos fibres can remain in the lungs for long periods and can cause serious lung disease including asbestosis, lung cancer, pleural thickening and mesothelioma. These diseases are associated with all forms of asbestos and have long latency periods, in the order of 10-50 years.
6. Based on confirmed diagnosis and post mortem results, it can be inferred that 170 of the estimated 600 to 900 deaths from workplace disease in New Zealand in 2010 were due to asbestos exposure, making it the single biggest cause of work-related disease mortality. This estimate is considered conservative and corresponds to the lower limit of epidemiologists' estimates, which range from 170 to 300 deaths per annum.
7. The Canterbury rebuild highlighted the prevalence of asbestos in the built environment in New Zealand. It also increased the interaction of workers with asbestos in that region. It reinforced the importance of ensuring adequate controls are in place to protect workers and others in the vicinity of work involving asbestos.
8. Overall the reforms in the new Asbestos Regulations are intended improve awareness, strengthen controls and improve work practices regarding the management of asbestos in New Zealand. One element of this is improving existing removal practices by strengthening regulatory requirements for the removal of asbestos. These changes should raise the standards of practice across the industry and bring New Zealand into line with international best practice to reduce occupational disease over the long term.
9. The policy design of the strengthened asbestos removal provisions reflects the fundamental decision to adopt the Australian approach to licensing, which imports the Class A and Class B licenses, the split between licence holders and supervisors, and process matters such as the 5 year duration of licences. It also follows the outcome of consultation in May-August 2014, with Cabinet policy decisions in March 2015 [EGI Min (15) 4/13 refers]. The Cabinet paper<sup>1</sup> (paragraphs 83 to 86 and recommendations 11.6, 11.8, 11.16-17 refer) covers the following:
  - a. the strengthening of the competency framework
  - b. aligning to Australian competencies
  - c. higher levels of controls for higher risk asbestos removal, eg friable (ie powdered or able to be crumbled by hand) or degraded non-friable asbestos (and conversely, an example of lower risk asbestos is bonded asbestos-containing materials)
  - d. requiring competency standards and training for Class A and Class B supervisors
  - e. establishing a licence regime for Class A and Class B persons conducting a business or undertaking (PCBUs) with qualified supervisors
  - f. requiring a clearance inspection and certificate from a licensed assessor for Class A removal work
  - g. the development of processes for licences.
10. Cabinet also noted that administrative fees would need to be set for authorisation-related aspects of new regulations, such as licensing fees for asbestos removalists [EGI Min (15) 4/12, paragraph 15 refers].
11. The new asbestos licensing fees will replace existing fees for the certificates of competency in the current *Health and Safety in Employment (Asbestos) Regulations 1998* (the 1998

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<sup>1</sup> Available online at: <http://www.mbie.govt.nz/info-services/employment-skills/workplace-health-and-safety-reform/document-and-image-library/policy-decision-regulations-paper-b.pdf>

regulations), where every individual removalist needs a certificate of competence. The proposed new licensing fees are similar in nature to the existing fees but have key differences which relate to the design of the new licensing framework.

12. The new regulations will bring New Zealand much closer to Australian and United Kingdom requirements. In terms of licensing of removalists, the new regulations also have provisions to allow recognition of key overseas jurisdictions qualifications.

### Problem definition

13. Currently there are no charges in place to recover the costs associated with the new licensing functions associated with the introduction of the new Asbestos Regulations.

### Status quo

14. The 1998 regulations require people who undertake or directly supervise “restricted work”, ie removal of friable asbestos, to hold certificates of competence. The administrative fees for certificates are \$204.44 for applications and \$102.22 for renewal. WorkSafe sets the renewal period for the certificates of competence. The renewal period is currently one year after the initial application, and two yearly after that.
15. The rates are in Schedule 2 of the regulations. The fees are inclusive of goods and services tax (GST), and were amended by the 2010 legislative GST rate change.
16. The current regulations do not require certificates of competence (or fees) for removal of non-friable asbestos, but the lack of clarity over what types of asbestos are covered under the existing regulations means that certificates of competence are often being required by the regulator as a matter of practice.

### Principles for proposed asbestos licensing fees

17. WorkSafe has developed the fees proposal, based on current costs in line with the guidelines for public-sector fee setting: the Auditor-General’s 2008 *Charging fees for public sector goods and services*, and the Treasury’s December 2002 *Guidelines for Setting Charges in the Public Sector*.
18. The primary principle is that the fees have been set to recover the full costs of the regulator’s services. The fees involve a private benefit, and there is no basis to discount the costs, as otherwise it would be subsidised by all businesses who pay the Working Safer Levy (WSL), which refunds the Crown’s costs in providing health and safety services.
19. This is shown in the following table:

Principle	Rationale	Asbestos fees
Full cost recovery	The fees should reflect the full efficient unit costs of a specific good or service, unless there is some specific reason for the costs to be funded by another source	The services have been identified and costed (based on experience-based estimates of staff time, taking care to match the tasks appropriately to the skill and pay scale of the administrative service involved), and there is no basis for recovery from the WSL

26. The full cost-recovery principle has then been weighed alongside the following principles:

Principle	Rationale	Asbestos fees
Appropriateness of fees	Fees are appropriate for government services provided directly to specific individuals or organisations who derive a benefit from those services	It is standard for government to charge fees for licensing, as licensed persons receive the benefit of providing a chargeable service

Principle	Rationale	Asbestos fees
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Proportionality	The fees should be proportionate to the service provided	The fees proposed are reasonable and moderate. They are within general fee levels for licensing. They are similar to fees in the asbestos regulations that are being replaced. WorkSafe also benchmarked the fees against Australian fees for asbestos removal licensing
Equitable treatment of fee payers	The fees should be equitable as between levy payers, reflecting the service provided to individual applicants (or groups of similar class of applicant)	The fees reflect the estimated time and cost involved in individual applications
Efficient implementation	The cost recovery charges should be minimized by ensuring they are: efficient and effective (to administer); transparent; and consulted	The fees are straightforward to recover, and have been benchmarked against general fee-setting, the current asbestos fees, and Australian fees for asbestos removal licensing. The basis for the costings is clear and included in the consultation process
Transparent	The basis for the fees should be clear to levy payers	The fees were consulted with levy payers, who were generally supportive of the proposed fees

## Proposed asbestos licensing fees

47. Only one licensing fees option is proposed, as in light of the decisions on the design of the new Asbestos Regulations, there are no other appropriate options for cost-recovery. The fees replace an existing fee framework with something similar.
48. The proposed fees are set out in the following table.

*Table of proposed fees for asbestos licensing*

Item	Fee payable (incl. GST)	
Application for Class A asbestos Licence	490.00	
Nominated supervisor in Class A asbestos licence application	470.00	each supervisor
Application for Class B asbestos licence	490.00	
Nominated supervisor in Class B asbestos licence application	80.00	each supervisor
Application for asbestos assessor licence	490.00	
Application for renewal of Class A asbestos licence	490.00	
Nominated supervisor for Class A asbestos licence renewal	470.00	each supervisor
Application for renewal of Class B asbestos licence	490.00	
Nominated supervisor for Class B asbestos licence renewal	80.00	each supervisor
Application to add a new nominated supervisor to Class A asbestos removal licence	550.00	
Application to add a new nominated supervisor to Class B asbestos removal licence	170.00	

Application to amend licence condition	220.00	
Application for replacement licence	120.00	

49. As noted, some design features in the new Asbestos Regulations impact on the fees. The key design features and the broad effect on the licensing fees are set out below.

Key design change	Effect on licensing fees
Licensing a PCBU, and at least one competent supervisor, rather than certifying each individual removalist	<ul style="list-style-type: none"> <li>The fee is split between the licence processing fee and the fee for assessing one supervisor, and allows for adding further supervisors</li> </ul>
<p>Creating Class A and B categories for higher and lower risk asbestos removal:</p> <ul style="list-style-type: none"> <li>Class A PCBUs will need supervisors who meet higher standards of competence and industry experience (including a practice check by the regulator), and the PCBU will need a certified health and safety management system</li> <li>Class B PCBUs will need supervisors with roughly the equivalent of current competency levels (with some improved checks by the regulator)</li> </ul>	<ul style="list-style-type: none"> <li>There are separate fees at Class A and B levels</li> <li>Class A fees are higher to reflect additional checks, and a general practice check on the certified safety management system</li> <li>Class B fees are similar to existing fee levels, but still incorporate more checking than in the current regulations</li> <li>This has a flow on effect for fees to renew, amend and replace certificates</li> </ul>
Creating a new role of independent assessor to check class A removal work	<ul style="list-style-type: none"> <li>The new role has the same fee as class B removalists, as it involves similar processes and checks</li> </ul>

50. The fees reflect the different types of application and the services provided by WorkSafe. They cover applications for Class A and B licences, incorporating at least one supervisor at the time (and applications may be made later to add supervisors). They also cover amendment, renewal and replacement of licences. All involve time by the most appropriate staff, with hours quantified based on experience of similar processes, and using the average pay rates. The costings incorporate some allowance for managers' time and overheads.

51. WorkSafe also checked the proposed fees against Australian fees for asbestos removal licensing, and the levels are consistent with most states and well below those charged in South Australia and New South Wales.

52. Further detail on how specific services were costed by WorkSafe are outlined in the table below:

Service	How it was costed
Class A applications	<ul style="list-style-type: none"> <li>Administrative and support staff time processing licence applications, allowing manager sign off (approx. 6 hours)</li> <li>Cost of licence document</li> <li>Time by administrative and support staff to check certified safety management system, check completion of training by supervisors, review their past experience and check references (approx. 3 hours)</li> <li>Inspector time and expenses in conducting site visit to review practices on site and testing the competence of supervisors (approx. 2.5 hours)</li> </ul>
Class B applications	<ul style="list-style-type: none"> <li>Administrative and support staff time processing licence applications, allowing manager sign off (approx. 6 hours)</li> <li>Cost of licence document</li> <li>Checking completion of training by supervisors, reviewing the past experience and</li> </ul>

Service	How it was costed
	checking references - by administrative and support staff (approx. 1 hour)
Assessors	<ul style="list-style-type: none"> <li>Administrative and support staff time processing licence applications, allowing manager sign off (approx. 6 hours)</li> <li>Cost of licence document</li> </ul>

## Impact of proposed licensing fees

53. The proposed fees involve an increase above the current rates for certificates of competence, but overall the impact of the rate change is unlikely to be significant. While it is not possible to make a direct comparison, the following table shows current fees based on a two-yearly renewal and the proposed new fees over a five year period (the term of a licence).

*Table of current vs new fees over a 5-year period for different sized businesses*

Type of business	Number of licensees or supervisors	Current fees	New fees	
		Two yearly renewal	Total A licence	Total B licence
Self-employed	One licensee / supervisor	\$408.88	\$960	\$570
Small or medium sized business – ie 1-19 employees	Two licensees or supervisors	\$817.76	\$1,430	\$650
Large business – ie 20+ employees	Three licensees or supervisors	\$1,226.64	\$1,900	\$730

54. The impact of the proposed fees flows from the adoption of the Australian approach to licensing, implemented by Cabinet's policy decisions to reform and broaden the scope of the provision of licensing requirements for asbestos removal, alongside the introduction of requirements for assessors. These changes have seen significant support from stakeholders.
55. Under the current framework there are approximately 350 individual certificate of competence holders. At the moment certificate of competence holders are individuals rather than firms. There are a range of firms who undertake this work; the majority of firms are smaller businesses, including a number of sole operators.
56. For those undertaking friable asbestos removal with certificates under the current framework, there will be a choice to seek a class A licence under the new regime. These licensees are likely to see an approximate doubling in their fees over a five year period, however, this is dependent on the number of certificates a firm currently has and the number of supervisors the PCBU chooses to nominate under the new framework. The new framework allows flexibility to have supervisors at different competency levels to fit different jobs and reduce costs.
57. Those current certificate holders who apply for a class B licence to undertake non-friable asbestos removal will, over a five year period, be paying a relatively similar fee to that required under the existing regulations.
58. Outside of current certificate holders, there will be a number of construction companies and others currently undertaking non-friable asbestos removal who do not currently require a certificate of competence or to pay any fees. Under the new regime these companies will be required to apply for a class B licence and pay the relevant fee or stop doing non-friable asbestos removal. MBIE considers these fees are also fair, and are in line with the intent to raise operating standards in the industry.
59. Under the new licensing framework the PCBU will hold a licence and have nominated supervisors specified on the licence. WorkSafe have estimated there are approximately 150 firms which employ the current 350 certificate of competence holders. In the initial licensing period it is expected that the majority of current firms will apply for transitional licences (the

detail of the two-year transitional period is set out in the Implementation Plan section below) and nominate existing certificate holders as supervisors.

60. It is expected that over time (and in particular once the transitional period ends) that the changes to the licensing regime itself will reduce the number of licence holders in the industry and encourage firms to consolidate and specialise. The intent of the reforms to the licensing regime is to raise the standards across the industry in order to mitigate the health risks presented to removalists and others in the vicinity of work from asbestos.
61. It is also recognised that the overall regulatory changes, including the new fees, will increase barriers to entry for new firms into the asbestos removal market and will particularly impact on small businesses. However, given the importance of ensuring that asbestos removal work is done in the right way to prevent health issues to the removalists and others in the vicinity of the work, increased barriers are warranted. The regime may in fact encourage fair and equal competition as service standards are more equal and poor operators are removed from the market. Increased enforcement and supervision of the regime will also ensure that poor operators do not continue to operate illegally.
62. The fee changes will mainly impact the existing certificate holders and their customers. It is likely that any increase in costs to licensees would be passed through to the customers of the licensed firms for the provision of asbestos removal services.
63. Collectively, the regulatory changes and fee changes may see a slight increase in costs of asbestos removal, which may flow through to renovation and removal costs during construction projects. However, these costs are insignificant when considered in the scheme of the overall costs involved in construction and when weighed against the health hazards presented by asbestos.

## Consultation

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64. Under section 226 of the new HSW Act the responsible Minister is required to consult those considered appropriate before making regulations (this also reflects the current consultation requirements in section 21 *Health and Safety in Employment Act 1992*).
65. In order to fulfil these requirements, with the approval of the Minister for Workplace Relations and Safety, MBIE undertook a targeted consultation in September 2015 with existing certificate holders (approximately 350 holders) and other interested stakeholders. Certificate holders and stakeholders were contacted directly via email or post.
66. A targeted consultation was undertaken as the proposed fees will only directly affect a limited group of readily identifiable stakeholders. In addition full public consultation had already occurred on the policy proposals and draft regulations which indicated the overall proposed scope of changes to the requirements for work involving asbestos. The time involved in a full consultation was also likely to mean that the fees would not be able to be implemented in time for the regime to come into force on 4 April 2016.
67. Very little feedback was received from existing certificate of competence holders, with only 14 submissions being received. Those that did submit were largely from the removal industry. Feedback from all but one submitter generally supported the proposed rates and the five year term. The need for cost-recovery was generally accepted and the proposed rates were seen to be fair and reasonable given the additional checks the regulator needs to undertake with the new licensing regime.

## Recommendation

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68. Based on the fees principles and the feedback from affected stakeholders, MBIE considers the proposed fees to be appropriate for the new asbestos regulatory regime. The new regime seeks to raise the overall standards in relation to the way asbestos removal is undertaken in order to reduce the rates of asbestos-related disease and deaths.



69. Under this new regime the licensing applications will require the regulator to undertake additional checks before issuing licences or other approvals. As such, the increased cost to the regulator is reflected in the increase in the fees proposed.
70. WorkSafe has considered the most efficient and effective way of delivering these services and that the fees are set only to recover the costs involved.
71. It has also been considered whether these fees are proportionate and they have been compared to fees in other jurisdictions including Australia, and on that basis MBIE considers the fees to be appropriate.

## **Implementation plan**

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72. The new regulations are due to come into force on 4 April 2016, alongside the new HSW Act. A two-year transitional period has been allowed in order for the new licensing requirements to fully come into force. The new licensing requirements will come in as follows:
  - a. enable current certificate holders to operate until either their certificate expires or for two years after the regulations come into force
  - b. allow builders and others currently completing asbestos removal work that does not require a certificate of competence to apply to WorkSafe for a licence and then carry out the work for a six month period while they meet licensing requirements
  - c. allow for licences to be offered to PCBUs conditional on new training requirements being met and safety management system audits being completed within a two-year period.
73. This will allow the development and approval of the appropriate unit standards and training providers, and time for applicants to complete the training.

## **Monitoring, evaluation and review**

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74. Review of the fees will be done on a regular review cycle (three or five years).
75. The Government's *Working Safer Reforms* saw: WorkSafe New Zealand established in December 2013; the new HSW Act passed in November 2015 and coming into force on 4 April 2016; and the development of a suite of regulations to support the new Act (including the new Asbestos Regulations), also due to come into force on 4 April 2016.
76. This work programme also includes a review of fees and levies - that is currently underway and due for completion by 1 July 2016 - and the WorkSafe Funding Review - due for completion by November 2016. These reviews will ensure there are principles for WorkSafe's broader fees and levies that create the right incentives for WorkSafe to be efficient in how it provides services and be consistent in its approach to fee-setting. This work will inform the timing and content of future reviews of asbestos fees.

## Part 2: Specifying high risk industries or sectors for worker representation requirements

### Agency disclosure statement

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#### Data constraints

1. There are some limitations with the data used to calculate industry rates of severe injury and fatality:
  - a. The data does not include bystanders or workers under the age of 15.
  - b. Using data at higher levels of the industry classification is more robust as there is a higher number of observations, however, it may average out the injury/fatality rates for some sub-industries that have a higher rate when they are combined with other sub-industries that have very low rates.
  - c. A relatively large number of fatalities and injuries are not attributed to any particular industry, ie the data are coded into “not elsewhere included” categories. This means that the rates of at least some industries must be understated to a greater or lesser degree.
  - d. The data provides standardised industry injury/fatality rates to allow meaningful comparison between industries of different sizes. However, the rates in industries with very small numbers of workers are more prone to being skewed and elevated by one-off events than in industries with a large number of workers. Because of this effect, the rates in each industry are not necessarily strictly relative to each other (ie it does not necessarily follow that a sector with a fatality rate of 30 is three times more risky than a sector with a fatality rate of 10 if those two sectors are of different sizes).
  - e. Injury count and employment numbers may change over time as further claims are lodged and employment estimates are finalised.
  - f. The data cannot be broken down into injury and fatality rates for small businesses only.
2. There is a lack of robust data on the incidence of occupational illness and disease - particularly at an industry level - meaning that it is challenging to objectively quantify and rank the level of occupational health risk. Similarly, the actual occurrence of catastrophic events is too infrequent to rely on as an indication of catastrophic risk in any industry, because there may be decades between events (but the impact of those events is huge). However, identification of the level and types of occupational health risk and the presence of catastrophic risk in sectors can be well informed by technical experts drawing on an established body of knowledge and research, including international experience. An analysis has not been done to identify whether any other industries would merit inclusion on the basis of occupational health.
3. There is limited evidence on the effectiveness and cost of health and safety representative and committee systems relative to other worker participation practices. In particular, it is difficult to establish whether any relationship identified between the presence of health and safety representatives or committees in a work environment and better health and safety outcomes for workers is causal or correlational. This requires that the impact analysis involves a significant degree of judgement.

## Problem definition

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### Background

4. On 4 April 2016, a new health and safety regime will come into effect that will strengthen New Zealand's approach to work health and safety and support the culture shift needed to improve New Zealand's poor health and safety record. The new *Health and Safety at Work Act 2015* (the HSW Act) and supporting regulations strengthen and clarify what businesses and workers need to do to ensure their work is safe. The new framework includes strengthened provisions for worker engagement and participation to support better health and safety outcomes.

### Context – the statutory landscape

5. The HSW Act and regulations are part of the government's *Working Safer* package of reforms. *Working Safer* seeks to achieve a step change in New Zealand's health and safety performance.
6. The HSW Act works to focus effort on what matters, including:
  - a. clarifying that everyone is responsible for workplace health and safety while reinforcing proportionality – what duty holders have to do depends on the level of risk and level of control the duty holder has
  - b. shifting the focus to managing critical risks
  - c. ensuring more effective worker engagement and participation
  - d. strengthening the effectiveness of the enforcement regime, including new enforcement tools
  - e. providing for effective sharing of information among participants in the work health and safety system.
7. The primary duty is held by persons conducting a business or undertaking (PCBUs). PCBUs will usually be an organisation. The primary duty of all PCBUs is to ensure the health and safety of its workers and others affected by the work of the business so far as is reasonably practicable. In addition to the primary duty:
  - a. All PCBUs have duties for worker engagement and participation.
  - b. Some PCBUs will have specific duties relating to the particular industry (eg mining) or work activity (eg asbestos removal) of the business.

### **Statutory requirements for worker participation and engagement**

8. The HSW Act requires all PCBUs, regardless of the size or risk profile of the business, to engage with its workers on health and safety matters and have effective practices that allow workers to participate in improving health and safety in the business in an ongoing way (worker participation practices).
9. The HSW Act does not prescribe what types of worker participation practices a business must have. The emphasis is on the effectiveness of the practices – rather than the type of practice. This provides businesses with flexibility to choose the practices that suit them and their workers.
10. Two types of worker participation practices that a business can have are health and safety representatives (HSRs) and health and safety committees (HSCs), which are both forms of formal worker representation. Other worker participation practices a PCBU could choose to have include having “health and safety” as a routine agenda item at team meetings, interactive intranet sites, one-on-one discussions, safety circles and suggestion schemes.
11. A PCBU can choose to have HSRs or HSCs on its own initiative, or workers can request them. However, the HSW Act provides that a small business (being one with fewer than 20

workers) that is not in a prescribed high risk sector is not required to respond to a request from workers for HSRs or HSCs. The HSW Act provides for regulations to specify the high risk sectors.

12. Large businesses in any sector and small businesses in high risk sectors will need to carry out elections for a HSR or consider setting up a HSC if requested by workers.
13. The diagram that follows summarises and illustrates the statutory landscape. The white boxes identify the context for the scope of the exemption to which this RIS relates.

All PCBUs must ensure, so far as is reasonably practicable, that the health and safety of workers and other people is not put at risk by its work.



## Status quo

14. There is currently no definition of high risk sectors for worker representation purposes. If no high risk sectors are prescribed in the *Health and Safety at Work (Worker Engagement, Participation and Representation) Regulations* (the WEPR regulations), the exemption in the HSW Act from the requirement to respond to a worker request for HSRs or HSCs would apply to *all* businesses with fewer than 20 workers.

## International comparisons

15. Many other international jurisdictions identify high risk industries, but more commonly for the purpose of targeting information, intervention, regulator resource or enforcement action. Criteria used include fatality and injury rates, occupational health risks and risk of catastrophic harm.
16. Few jurisdictions use an explicit risk threshold to place differential legal requirements on businesses. One particular exception is the worker compensation legislation in Queensland, where businesses operating in specified high risk industries are required to appoint a rehabilitation coordinator to assist injured workers.

17. While the risk rating process of each jurisdiction can result in minor variations, commonalities emerge – construction, manufacturing, and agriculture are consistently represented in any country’s assessment of its high risk industries. Mining, forestry and fishing also usually appear whenever those industries are present in that jurisdiction.

### Problem definition

18. Regulations specifying high risk sectors are needed for the exemption in the HSW Act to have the intended effect. The HSW Act does not define high risk or prescribe how high risk sectors are to be determined. While the term ‘high risk’ is in common use *outside* of legislation, a number of judgement calls are needed to determine where to appropriately draw the line for this specific purpose.

## Objective and Criteria

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### Objective for specifying high risk

19. The objective is to give form to the exemption for lower-risk, small businesses from being required to respond to worker requests for HSRs and HSCs. The specified high risk sectors should include those businesses which, due to their sector’s health and safety risk, should be required to have worker representation practices where workers wish to have them even if the businesses are quite small. Conversely, small businesses in sectors where the level of risk is such that the benefits of worker representation could be outweighed by the associated compliance costs should not be included as high risk.

### Criteria

20. The following criteria are used here when assessing how high risk sectors should be defined in the regulations:
  - a. **Robust:** the definition of high risk is evidence-based
  - b. **Credible:** the results are broadly publicly acceptable and in line with common perceptions about high risk sectors
  - c. **Effective:** the definition of high risk is aligned with the objective of the HSW Act to protect workers and other persons from harm.
  - d. **Clear:** it is easy for workers in small businesses and PCBUs with small businesses to know if the business is high risk or not (and therefore whether the exemption in the HSW Act applies).
  - e. **Proportionate:** balances the management of risks/benefits with the costs.

## Options analysis

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21. The phrase ‘high risk’ is commonly understood to describe a particular thing (eg person, population, business, activity or sector) with a greater than usual chance of a particular poor outcome (eg heart disease, abuse, financial loss, accident or loan default).
22. Within the context of work health and safety, therefore, a high risk sector is one where *the work of that sector carries a greater-than-usual risk of death, serious injury or serious illness to its workers, when compared across all other sectors.*
23. The use of the terms ‘high’ and ‘low’ risk implies that there is a clear line between the two concepts. In reality, the boundary between the two is not clear cut.
24. The Ministry considers that there are two key elements for determining high risk sectors for the purposes of the worker representation requirements in the HSW Act:
  - a. the indicators used to quantify relative work health and safety risk

- b. the point at which those indicators are considered to constitute high risk.

### **Indicators of risk**

25. Various options exist for indicators to quantify work health and safety risk and our description and analysis of these options follows. We consider the criteria outlined in paragraph 20 relevant to this particular assessment are **robust, credible and effective**. The **clear and proportionate** criteria are more relevant to subsequent analyses in this RIS.

### ***Fatality and severe injury rates***

26. Data about fatality and severe injury rates<sup>2</sup> provide an indication of the relative volume of people dying or being hurt at work in various sectors. This type of data is commonly used as an indicator of health and safety outcomes. There are some limitations with this data, as outlined in the agency disclosure statement.
27. Fatality and severe injury data may either indicate that the work in a particular sector is high risk, or it may simply indicate that a sector is not managing its health and safety risks well. In any event, high fatality or severe injury rates are likely to indicate the sectors that could benefit from better management practices, which for some businesses could be a form of worker representation such as HSRs and HSCs.
28. As this type of data is necessarily backward-looking, it cannot capture emerging risks (eg due to changes in work practices or technology) and can be relatively slow to reflect improvements in risk management practices.

### ***Occupational health risks***

29. Information about occupational health risks provides an indication about the different ill-health effects that can be suffered by workers in a sector as a result of carrying out their work. Compared to information about acute work-related injury, there is a lack of robust data about the actual incidence of occupational illnesses and disease. This is due to a range of issues, including long latency effects and the difficulty in recognising and establishing causal links between the work performed and the illness that results. In the absence of such data, however, information on occupational health risks can be informed by technical experts drawing on a body of existing research evidence, although this necessarily involves a level of subjectivity.

### ***Risk of catastrophic failure***

30. Potential for catastrophic harm refers to a single event that could cause multiple fatalities or widespread injury or serious illness. This indicator takes into account low frequency but high consequence events that may occur in some industries that may not otherwise have particularly high injury or fatality rates. Relying solely on hard data about actual catastrophic events occurring in New Zealand businesses as an indicator is not viable, as the dataset would need to encompass extremely long timeframes – many decades – in order to be meaningful, and work processes can change and develop quite quickly in some industries, changing the catastrophic risk potential over time. However, as with occupational health, the data gap can be informed by expert knowledge and overseas' experience, adding some subjectivity to the robustness of the indicator.

### ***Inherent risk in the nature of the work***

31. A further possible indicator recommended by stakeholders was to identify high risk sectors based on the known inherent health and safety risks associated with the work of the sector, rather than - or perhaps in addition to - the industry's actual safety performance (ie fatality and severe injury rates). One way suggested was by the use of a job exposure matrix (JEM). A JEM is a type of academic database that outlines the types or quantities of exposures to a variety of potentially harmful agents that occur in different occupations or industries, based

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<sup>2</sup> Severe injuries are defined as accepted ACC claims where the worker receives weekly compensation wage replacement following more than a week away from work due to a work-related injury.

on a body of research (usually international). Various JEMs are in development around the world, with most of them focusing at least initially on filling the knowledge gap about occupational health, rather than being a complete description of all risks (including physical injury) involved in different types of work. There is currently no JEM specific to work undertaken in New Zealand.

### **Comment**

32. The indicators of risk used to identify high risk sectors were:
  - a. elevated fatality rates
  - b. elevated severe injury rates
  - c. known occupational health risks and exposures involved in the work of the sector
  - d. potential for catastrophic harm.
33. Within the available evidence base, the Ministry considers that using a combination of these four indicators cumulatively provides the best assessment against the relevant criteria that is currently available. As noted in the discussion above, each of the indicators has its own strengths and weaknesses but relying on any one of them alone would not result in a **robust, credible** or **effective** determination of high risk sectors.
34. We note that only considering severe injuries (rather than the rate of *all* injuries incurred in a particular sector) may be seen as a gap in the indicators. This is because some injuries that do not require extended time off work but have a negative impact on workers' health and safety, such as gradual process injuries, are not taken into account in the assessment of whether a sector is high risk or not.

### **Options considered and rejected: Risk ratings for accident compensation schemes**

35. Another indicator suggested was to follow the risk ratings used in compensation schemes in New Zealand or Queensland to identify high risk sectors in the regulations. We rejected this as an option as those risk ratings give an indication of costs to the scheme, rather than the level of risk involved. For example, higher costs for the ACC scheme could arise because of a high volume of low level injury claims (such as postal services) or a relatively small number of very expensive claims (such as professional sports).
36. There may be merit in the concept of an additional indicator that considers the inherent (and possibly emerging) risks involved in the work and is therefore more forward-looking to complement injury or fatality data. However, a comprehensive JEM (encompassing physical safety as well as health risks) applicable to the New Zealand work landscape would be required.

### **Determining where to set the threshold for high risk**

37. Once the indicators of risk are identified, additional analysis is needed to determine the 'cut-off' point at which the results of those indicators constitute "high risk".

### **Fatality and injury rates**

38. The national average annual fatality rate is 3 per 100,000 employed peoples. For severe injuries it is 10 per 1,000. Both rates are calculated using data from 2008-2013.
39. For the purposes of this RIS, we've considered four potential cut-off points or ranges although there are any number of cut-off points or combinations that could be considered.
  - a. option 1: fatality and severe injury rates *at or above* the national average (resulting in 46 level 2 ANZSIC sectors being identified as high risk)
  - b. option 2: fatality and severe injury rates *at or above two times* the national average (resulting in 28 level 2 ANZSIC sectors being identified as high risk)
  - c. option 3: fatality and severe injury rates that are *25 or greater* (resulting in 7 level 2 ANZSIC sectors being identified as high risk) [option consulted on]

- d. option 4: fatality and severe injury rates *ten or more times* above the national average (resulting in 3 level 2 ANZSIC sectors being identified as high risk).
40. Annex 1 lists the sectors that would be captured by each of these options.
41. Submitters that commented on the threshold suggested setting the cut-off point for high risk at rates between one and three times the national average.
42. Options 1 and 4 do not meet the **credible** or **proportionate** criteria as either nearly half of firms or virtually no firms would be defined as high risk so they were eliminated from further analysis.
43. Options two or three are more consistent with the credibility, effectiveness and proportionality criteria.
44. The following uncertainties make assessing effectiveness and proportionality challenging:
- a. The benefits of a formal worker representative system relative to other forms of worker participation at reducing workplace harm are unknown. Under the new legislation, all PCBUs will have to have effective worker participation practices in place. There is some evidence that formal representative systems can have better health and safety outcomes, with certain preconditions,<sup>3</sup> and they have the advantage of being a relatively well-established mechanism for worker participation. The challenge is that we are not aware of any evidence of the *relative* effectiveness of different types of worker participation practices in reducing injury and harm, ie is there any difference in the effectiveness of HSRs versus other forms of worker participation for firms with 19 or fewer workers. We suspect that, in most situations, the impacts on health and safety should be relatively low as the PCBU is still required to have effective worker participation practices in place. Not having a representative system may be more of an issue in organisations where workers do not feel able to raise issues directly with their PCBU. It may be possible to get some evidence on the effectiveness of different practices in small firms ahead of the review of these regulations, due to commence in around two years' time. However, this is likely to remain a challenging judgement as it will be difficult to isolate the impact of worker participation practices compared to other features of the workplace.
  - b. The relative costs of formal worker representation and other worker participation practices. The direct costs for HSRs include time away from their usual work required to undertake their role, paid leave for training and training fees (estimated at \$800 for initial training). The direct costs of other forms of effective worker participation are unknown, although they are still likely to include some time away from workers' usual duties. Our best guess is that they are unlikely to prohibitively large or materially different from those for HSRs.
45. Between the two options, option two is more likely to be considered **credible** as it is in line with submitter recommendations. It is difficult to make a call between options two and three on which is more **proportionate** due to the limited knowledge of the costs and benefits associated with being subject to the requirement to respond to a worker request to have HSRs and HSCs as well as those of the alternative worker participation practices that would need to be in place.
46. The **clear** and **robust** criteria are satisfied by both options because the WEPR regulations will be sufficiently clear and evidence based to allow workers and PCBUs to determine whether they are classified as high risk.

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<sup>3</sup> For example, Walters, D. Nichols, T., Connor, J., Tasiran, A.C. and Cam S. (2005). *The role and effectiveness of safety representatives in influencing workplace health and safety*. Research Report 363. Prepared by Cardiff University for the Health & Safety Executive. Suffolk: Health & Safety Executive.



## *Outliers*

47. Because of the data limitations and judgement needed to determine high risk, it would be useful to undertake additional analysis to assess the accuracy of the high risk sectors determined by the indicators used.
48. A more rounded (but necessarily more subjective) assessment could include an informed consideration by experts about the nature of work and known risks as well as the data, including a check against non-severe injury data to see if this information was material to the overall assessment. It would identify outliers in data caused by one-off events (eg fatalities/injuries caused by the Canterbury earthquakes) that may not be linked to work health and safety risks. It could also identify regulated sectors that do not have their own separate category in the datasets used but where they may be perceived as having a poor safety record or involve the risk of serious harm (eg adventure activities). Some adjustments may be made to improve the acceptability and implementation of the final list to the regulated community.
49. Adjustments should be made where they will enhance the **robustness** and **credibility** of the resulting list. A judgement of what inclusions and exclusions should be made would depend on the final proxies used and the sectors identified using those proxies.

## ***Occupational illnesses and catastrophic risk***

50. It is challenging to determine the threshold of what constitutes high risk in respect of these two indicators, as they are not based on hard data.
51. However, a relatively straightforward way to set criteria for catastrophic risk would be to include sectors that are subject to bespoke workplace health and safety regulation because of their elevated potential for catastrophic harm. In the New Zealand context this includes those in the industries covered by major hazard facilities, petroleum and mining regulations. This was the option that was consulted on and no comments were received from submitters recommending alterations suggesting that it is a relatively comprehensive list.
52. For occupational illness, criteria could be based on:
  - a. option 1: an assessment of the overall potential for exposure to occupational disease
  - b. option 2: identify particular exposures/diseases of concern. For example, consultation proposed the inclusion of the risks of asbestos and silica dust as these are well-established for the construction sector.
53. Submitters recommended taking a broad approach to identifying occupational health risks.
54. Option one is likely to be more **credible** because a greater number of known risks are likely to be captured. However, this results in a trade-off with **robustness** due to the limited evidence base. Option two is more **robust** because more is known about the risks of some exposures and resulting diseases or catastrophic events than others. It may also be clearer because it is based on an explicit disease or sector that individual workers or businesses can easily self-identify with. We are unable to make an assessment on **proportionality** or have been able to compare the impacts of these options.
55. The discussion of effectiveness in paragraph 44 above applies to assessing options here.
56. MBIE considers that either option is feasible, but on balance we favour taking a broader approach to identifying occupational health risks. However, given that this approach is inevitably more subjective more work would be required to identify whether any other industries would merit inclusion on this basis. MBIE has not undertaken this analysis.

## Conclusion

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57. The identification of high risk sectors in the regulations serves a specific and limited purpose – the application of requirements for HSRs and HSCs at the request of workers. PCBUs operating businesses covered by the exemption will still be required to have other types of worker participation practices in place.
58. There is little firm evidence on the relative costs and benefits of different types of worker participation practices in small firms on which to base a judgement on where to draw the line. While some options can be ruled out as casting the net too widely or narrowly to be credible and proportionate, there are a range of options in the feasible set. More evidence may emerge over time on the effectiveness of different types of worker participation practice. However, there are always likely to be challenges in isolating the effect of this given the wide range of other factors that contribute towards health and safety performance in firms.

## Consultation

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59. An exposure draft of the WEPR regulations was released in October 2015. Of the 59 submissions received, about a quarter commented on the method or criteria used to identify high risk sectors.
60. Two submitters supported the criteria used. Most submitters raised concerns about the robustness of the method and/or criteria used. Feedback included that the threshold used for determining elevated rates of fatalities and severe injuries was set too high, that there should be a broader approach to assessment of occupational health risks, and that all types of injuries should be used as a proxy.

## Implementation and monitoring

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61. WorkSafe is developing guidance and other material to assist businesses to understand and comply with the new legislative framework. This will include information to help businesses determine if they are high risk for worker representation purposes.
62. The regulations will require a review of the sectors specified as high risk as soon as practicable after the regulations have been in force for two years. The Ministry will undertake further work to explore alternative approaches to identifying high risk ahead of this review. This may include analysis on the suitability of JEM data to identify known risks instead of, or as well as, using past injury and fatality rates to identify high risk sectors.
63. MBIE will work with WorkSafe to monitor the provisions relating to high risk sectors and identify areas of concern that could be addressed as a part of the review.

## Annex 1: List of sectors captured by different options for injury and fatality rates

64. In the analysis on determining where to set the threshold for high risk for injury and fatality rates, MBIE considered four options. The table below identifies the sectors that meet the injury and fatality thresholds considered. It uses level 2 of the Australian and New Zealand Standard Industry Classification but excludes the “not elsewhere included” category.

Option 1: At or above national average	Option 2: At or above 2x national average	Option 3: rates of 25 per 100,000/1,000 or more (consultation option)	Option 4: At or above 10x national average	Final high risk sectors included in the regulations
<ul style="list-style-type: none"> <li>• Agriculture</li> <li>• Aquaculture</li> <li>• Forestry and Logging</li> <li>• Fishing, Hunting and Trapping</li> <li>• Agriculture, Forestry and Fishing Support Services</li> <li>• Coal Mining</li> <li>• Metal Ore Mining</li> <li>• Non-Metallic Mineral Mining and Quarrying</li> <li>• Exploration and Other Mining Support Services</li> <li>• Food Product Manufacturing</li> <li>• Textile, Leather, Clothing and Footwear Manufacturing</li> <li>• Wood Product Manufacturing</li> <li>• Pulp, Paper and Converted Paper Product Manufacturing</li> <li>• Polymer Product and Rubber Product Manufacturing</li> <li>• Non-Metallic Mineral Product Manufacturing</li> <li>• Primary Metal and Metal Product Manufacturing</li> <li>• Fabricated Metal Product Manufacturing</li> <li>• Transport Equipment Manufacturing</li> <li>• Furniture and Other Manufacturing</li> <li>• Electricity Supply</li> <li>• Water Supply, Sewerage and Drainage Services</li> <li>• Waste Collection, Treatment and Disposal Services</li> <li>• Building Construction</li> <li>• Heavy and Civil Engineering Construction</li> <li>• Construction Services</li> <li>• Basic Material Wholesaling</li> <li>• Grocery, Liquor and Tobacco Product Wholesaling</li> <li>• Commission Based Wholesaling</li> <li>• Food Retailing</li> <li>• Road Transport</li> <li>• Rail Transport</li> <li>• Air and Space Transport</li> <li>• Other Transport</li> <li>• Postal and Courier Pick-up and Delivery Services</li> <li>• Transport Support Services</li> <li>• Broadcasting (except Internet)</li> <li>• Auxiliary Finance and Insurance Services</li> <li>• Building Cleaning, Pest Control and Other Support Services</li> <li>• Defence</li> <li>• Public Order, Safety and Regulatory Services</li> <li>• Adult, Community and Other Education</li> <li>• Residential Care Services</li> <li>• Heritage Activities</li> <li>• Sport and Recreation Activities</li> <li>• Gambling Activities</li> <li>• Repair and Maintenance</li> </ul>	<ul style="list-style-type: none"> <li>• Agriculture</li> <li>• Aquaculture</li> <li>• Forestry and Logging</li> <li>• Fishing, Hunting and Trapping</li> <li>• Agriculture, Forestry and Fishing Support Services</li> <li>• Coal Mining</li> <li>• Non-Metallic Mineral Mining and Quarrying</li> <li>• Food Product Manufacturing</li> <li>• Wood Product Manufacturing</li> <li>• Non-Metallic Mineral Product Manufacturing</li> <li>• Fabricated Metal Product Manufacturing</li> <li>• Furniture and Other Manufacturing</li> <li>• Electricity Supply</li> <li>• Water Supply, Sewerage and Drainage Services</li> <li>• Waste Collection, Treatment and Disposal Services</li> <li>• Building Construction</li> <li>• Heavy and Civil Engineering Construction</li> <li>• Commission Based Wholesaling</li> <li>• Road Transport</li> <li>• Rail Transport</li> <li>• Air and Space Transport</li> <li>• Other Transport</li> <li>• Transport Support Services</li> <li>• Broadcasting (except Internet)</li> <li>• Auxiliary Finance and Insurance Services</li> <li>• Defence</li> <li>• Adult, Community and Other Education</li> <li>• Sport and Recreation Activities</li> </ul>	<ul style="list-style-type: none"> <li>• Aquaculture</li> <li>• Forestry and Logging</li> <li>• Fishing, Hunting and Trapping</li> <li>• Coal Mining</li> <li>• Food Product Manufacturing</li> <li>• Water Supply, Sewerage and Drainage Services</li> <li>• Waste Collection, Treatment and Disposal Services</li> </ul>	<ul style="list-style-type: none"> <li>• Forestry and Logging</li> <li>• Fishing, Hunting and Trapping</li> <li>• Coal Mining</li> </ul>	<ul style="list-style-type: none"> <li>• Aquaculture (except for onshore aquaculture)</li> <li>• Forestry and logging (except for forest product gathering)</li> <li>• Fishing, hunting and trapping (except for hunting or trapping certain non-New Zealand species)</li> <li>• Coal mining</li> <li>• Food product manufacturing (except for bakery product manufacturing when carried out in the home and non-factory based)</li> <li>• Water supply, sewerage and drainage services</li> <li>• Waste collection, treatment and disposal services</li> <li>• Building construction</li> <li>• Heavy and civil engineering construction</li> <li>• Construction services (except for curtain installation and fly wire screen installation)</li> <li>• Businesses subject to the health and safety regulations for major hazard facilities; mining and quarrying operations; and petroleum exploration and extraction.</li> <li>• Adventure activities including those operating in the maritime and aviation sectors</li> </ul>