9 May 2014

Committee Secretariat
Transport and Industrial Relations
Parliament Buildings
WELLINGTON 6011

Dear Sir/Madam

PEPANZ Submission: Health and Safety Reform Bill

Introduction and details

This document constitutes the Petroleum Exploration and Production Association of New Zealand's ("PEPANZ") submission in respect of the *Health and Safety Reform Bill* ("the Bill").

We wish to appear before the Committee to speak to our submission.

I can be contacted at 04 494 8974 and email (andrew.saunders@pepanz.com).

PEPANZ represents private sector companies holding petroleum exploration and mining permits, service companies and individuals working in the industry. PEPANZ members account for more than 95% of New Zealand's hydrocarbon production.

This submission is in two parts:

- Part 1 – Overarching issues
- Part 2 – Comments on individual clauses of the Bill

Part 1 – Overarching issues

Which PCBU? overlapping duties imposed on multiple entities

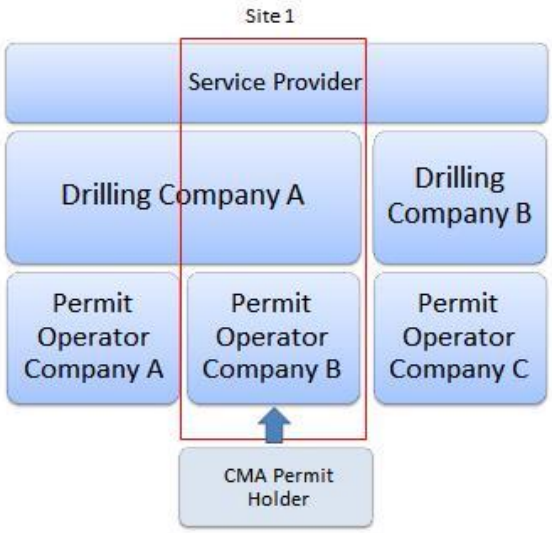
PEPANZ recognises the limitations of the focus in the current Act on duties between employers and employees and supports moving away from this as provided for in the Bill.

The principal duty holder under the Bill is the PCBU (person conducting a business or undertaking). We support this concept and recognise the appropriateness of ensuring the person (generally corporate person) who is ultimately responsible for the work being undertaken is responsible for how it is carried out, even where they are not the employer of many of the individuals involved. We also recognise the Bill deliberately (refer clause 26) imposes overlapping obligations on different PCBU's that reflect the different roles and responsibilities of companies (e.g. designers and manufacturers of equipment and the operators of that equipment).

It is possible and deliberate that multiple PCBUs will be responsible for the health and safety of an individual worker at a single time and working at a single site/facility/operation. This has advantages but also brings the potential for confusion – which of the various PCBU's will do what to ensure a

worker's health and safety? To facilitate the practical application of co-existing duties, the Bill imposes a positive obligation on PCBUs to consult and cooperate with other PCBUs if they are responsible for the same worker's health and safety (refer for example clauses 26(3) and 27).

However we are concerned that in some places the Bill purports to impose specific duties on a single PCBU in situations where they may be multiple PCBU's present. The following simplified diagram illustrates the potential for multiple PCBU's to be present at a single site or workplace (diagram is of a common petroleum industry situation). All these companies with the red box would likely be PCBU's for the purposes of the Bill and there could seemingly be workgroups within those PCBU's operations on both a multi-site basis (i.e. for the service provider at multiple sites) and on a site specific basis (e.g. Site 1).



The Bill provides obligations to "the PCBU" in the following clauses where in many situations there could be multiple PCBU's present at a workplace with overlapped duties in respect of specific individuals or events:

- Clause 40 - Duties of workers. Workers have duties to "comply, as far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU". What does this mean for an employee of the Service Provider working on Drilling Company A's rig at Permit Operator Company B's site, as shown in the diagram above?
- Clause 51 - Duty to notify notifiable event. If there is an a notifiable event involving an employee of the Service Provider working on Drilling Company A's rig at Permit Operator Company B's site – are all PCBU's required to notify the event separately in terms of clause 51(1) of the Bill?
- Clause 78 - Obligations of a PCBU to a health and safety representative ("HSR") in the situation where the HSR is for a multi-site workgroup (e.g. workers of Drilling Company A) – how does this relate to PCBU that controls a specific site (e.g. Permit Operator Company B that controls only site 1).

Clauses 26 and 27 and the additional duty provided to PCBU's that control workplaces (clause 32) put in place sensible expectations but don't resolve this. Consideration should be given to ensuring

the provisions in the Bill (or regulations under it) make responsibilities clear in situations where more than one PCBU is present in a workplace.

Recommendation 1

- Consideration is given to amending the Bill to make specific responsibilities clear in situations where more than one PCBU is present in a workplace.

Meaning of PCBU – Application to joint ventures with dedicated permit operators

We recognise the proposed definition of PCBU is deliberately very broad. A joint venture ("JV") is likely to fall within the definition, being an unincorporated body which is conducting a business for profit or gain. It appears that the general intention of the Bill is also to include JV parties as PCBUs (refer explanatory note to the Bill page 6).

JV arrangements are very common in the petroleum and wider resources sector in New Zealand and internationally, with many permits under the *Crown Minerals Act 1991 ("CMA")* being held by multiple parties, generally as unincorporated joint ventures. Under a JV the "permit operator" gives effect to the business intention of the JV partners and this would be specified in the JV agreement. The permit operator, which must be a JV partner[1], has the responsibility for carrying out activities under the permit, and either carries out or causes to carry out the operations, including ensuring that health and safety obligations are exercised in accordance with the relevant laws. Where there is only one permit participant with a 100% interest in the permit, it is the permit operator.

We are concerned that making JV's or individual JV participants PCBU's in terms of activities for which the permit operator has clear legal responsibilities under statute and in terms of the JV agreement would create uncertainty and be incompatible with other recently passed law that recognises the specific role of the permit operator in the context of joint ventures in the petroleum and resources sectors, notably:

- The recently amended CMA requires each permit to have a permit participant who is responsible, on behalf of the permit holder (often a JV), for the day-to-day management of activities under the permit (section 27). Furthermore under section 29A of the CMA the Minister of Energy to be satisfied the permit operator has the capability and systems to meet health, safety and environmental requirements of relevant Acts. This recognises it is the permit operator that undertakes the activities under the permit (e.g. drilling wells, operating production facilities etc.). Worksafe NZ is specifically required to be consulted in making this determination under section 29A.

- The *HSE (Petroleum Exploration and Extraction) Regulations 2013* ("HSE (PEE) Regs") specify the permit operator as the default duty holder. These recently introduced regulations reflect the unique and bespoke operating environment in the petroleum sector and are based on international best practice (notably the United Kingdom and Australian petroleum specific health and safety regimes).

Making the JV or individual non-operating JV participants PCBU's for workplaces under the control of the permit operator would increasingly complicate various features of the Bill and would result in

[1] There is one exception to this provided for in Schedule 1 of the CMA to reflect longstanding arrangements.

multiple PCBUs effectively being responsible for the same business or undertaking. Furthermore if an action was to be taken against JV (as a PCBU) it is unclear how, or if, this could be undertaken.

For these various reasons we consider that within the proposed framework of the Bill (i.e. duties predominately on the PCBU) it is most appropriate for the relevant PCBU for workplaces in the upstream petroleum sector to be the permit operator, rather than a JV holding the CMA permit or individual non-operator JV participants. We nonetheless recognise the importance of all relevant parties being subject to health and safety duties and would welcome the opportunity to work further with officials on this topic in the development/revision of regulations.

We note that the petroleum sector in Australia is subject to industry specific legislation (e.g. *Offshore Petroleum and Greenhouse Gas Storage Act 2006*), whereas in New Zealand the petroleum industry would be subject to provisions modelled on the general Australian Model Work Health and Safety Act ("The Model Law").

Recommendation 2

- Provide that the permit operator is the relevant PCBU for operations under a CMA permit rather than a JV holding the permit, or non-operating JV party, by either:
  - (a) including JV's holding CMA permits and non-operator JV parties as a person or class of persons that is not a PCBU for the purposes of the Bill in regulations in accordance with clause 13(1)(b) of the Bill; or
  - (b) amending clause 13(1)(b) of the Bill.

Aligning the HSE (Petroleum Exploration and Extraction) Regulations 2013 with the provisions of the Bill

The HSE (PEE) Regs were brought into effect in mid-2013 and represented a significant change in regulatory approach. Industry provided substantial input into these regulations and a particular focus was on how the various duties were applied to the different commercial entities involved in upstream petroleum industry activities (e.g. permit operators, drilling contractors etc.). These regulations apply various duties to three main classes of person: "duty holders", "operators" and "well operators" and the default is that the duties are held by the "permit operator" in terms of the CMA.

We are concerned the introduction of the PCBU as the key duty holder and the use of different terms in the Bill and these regulations will create similar but different and potentially overlapping or uncertain duties as between the regulations and the new overarching legislation provided in the Bill. This would be an inappropriate and inefficient outcome that would impose compliance costs on the industry and create confusion around responsibilities. Accordingly these HSE (PEE) Regs need to be reviewed and updated as necessary to align the terminology and obligations provided under them with the terminology and obligations applying under the Bill. We are not seeking a wholesale review of these regulations but consider that more than simply replacing terms with different terms will be required.

Specific areas that will require attention to ensure compatibility between the regulations and the new legislation include:

- Reconciling the specific duties provided under the HSE (PEE) Regs with the aspects of the Bill that prevent the transfer of obligations under the Bill.
    - The Bill (refer clauses 24, 26 and 29) states that each PCBU with the same duty has the duty to discharge obligations to the extent to which that person has the capacity to influence or control the matter regardless of whether they have transferred that influence or control to another party under a contract (clause 26). This does not align with the HSE (PEE) Regs where for example the permit operator can appoint an employer and effectively transfer duties to that employer who then becomes the "operator"/"duty holder" in respect of the production installation (refer regulation 5(1)(a) of the HSE (PEE Regs). The current meaning of "operator" and "well operator" under these regulations also do not allow for there to be two "(well) operators".
    - For the Bill and the HSE (PEE) Regs to be consistent then the regulations need to be reshaped to align with the Bill, or the Bill needs to recognise that regulations made under may allow the contractual transfer of specific duties in certain circumstances (which would require removing the second part of clause 26(3)(b) and all of clauses 24 and 29 so that contracting out and transfer of duties can occur).
- Reconciling and aligning the use of the terms "duty holder", "operator", "owner" and "well operator" with the terms used in the Bill to avoid confusion and overlapping obligations. "Duty holder" for example has a specific defined meaning under the regulations but is used in a different way in the Bill.
- Alignment between the obligations applying to "well operators" under the regulations as compared with those applied to "designers" under clause 34 of the Bill, in so far as the obligations could fall on different parties.
- Aligning the requirement to notify certain "dangerous occurrences" under regulation 78 with the requirements relating to "notifiable incident" as outlined in clause 19 of the Bill. Those under the regulations are inherently more specific but the two sets of obligations need to be consistent to be workable for industry.

We understand officials at the Ministry of Business, Innovation and Employment are aware of the need to align these requirements and have begun exploring the details of this.

PEPANZ also considers the *Health and Safety in Employment (Pressure Equipment, Cranes, and Passenger Ropeways) Regulations 1999* and *Health and Safety in Employment (Pipelines) Regulations 1999* will require review and amendment to ensure they are consistent with the new legislative framework and terminology provided in the Bill.

For example the pressure equipment regulations impose a positive duty only on employees to report that equipment is unsafe (refer regulation 12) whereas under the Bill the PCBU would be responsible to any worker, whether employee or not. Asymmetries such as this must be resolved to ensure the overall regime functions in a logical and effective way and so that legal obligations are clear.

Recommendation 3

- The following regulations are reviewed and amended by the time the Bill is brought into effect to ensure that the duties and concepts provided in them are consistent with the obligations and terminology provided in the Bill:
  - *HSE (Petroleum Exploration and Extraction) Regulations 2013*
  - *HSE (Pressure Equipment, Cranes, and Passenger Ropeways) Regulations 1999*
  - *HSE (Pipelines) Regulations 1999*

Part 2 – Comments on individual clauses of the Bill

Clause of the Bill	Specific change proposed	Comment
12 Interpretation		
"constable"	A new definition should be included for the term "constable" or an alternative more descriptive term such as "police officer" used.	The word "constable" is not defined in the bill yet appears in several places. While this is the generic Australian term for a police officer, it is not used in the generic sense in New Zealand where constable is simply the lowest ranking police officer.
"hazard"	Note comments.	The definition of hazard, which is based on but changed from that applying under the current *HSE Act 1992*, is very broad. It for example "includes a person's behaviour where that behaviour has the potential to cause death, injury, or illness to a person (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock, or <u>another temporary condition that affects a person's behaviour</u>)". The lattermost aspect puts a challenging expectation on a PCBU to manage something that may be extremely difficult to foresee. For example it is unclear how a person will react when in shock. It is could be very challenging for a PCBU to be responsible for potentially unforeseeable behaviour of an individual worker, particularly where the worker is not its employee? We note the Model Law does not have a definition of "hazard".
"officer"	Note comments.	The term "officer" is defined in clause 12, the meaning of the term "PCBU" in clause 13, and the meaning of the term "worker" in clause 14. As in some circumstances a person may fulfil multiple roles, the inter-relationship between these clauses is important. An officer includes a director or partner and "any other person who makes decisions that affect the whole, or a substantial part of, the business of a PCBU". This definition is itself ambiguous, but this uncertainty is further compounded by clause 13(b)(i) which states that a PCBU does not include "a person conducting a business or undertaking to

			the extent that the person is employed or engaged solely as a worker in, or an officer of, the business or undertaking". Because status as an "officer" attracts significant potential culpability by virtue of clauses 42-45, we recommend that the term is unambiguously defined in the legislation.
	"plant"	Note comments.	The application of this term to entire facilities, as opposed to individual bits of "plant", could be made clearer.
	"risk"	Consider: • removing the definition of "risk" and relying on the natural meaning ; or • using a definition of risk along the lines of the following: "risk means the likelihood that a hazard will actually cause its adverse effects"	We are aware the definition of "risk" was introduced following consultation on the exposure draft of the Bill but consider it creates more problems than it solves. The definitions of the term "risk" and "hazard" used in the Bill are not consistent with definitions commonly applied to the terms, and the use throughout the Bill is confusing (e.g. its application in relation to "high-risk plant"). The Model Law does not define "risk" and "hazard". The defined term "risk" in the Bill states that it is "the possibility that death, injury or illness might occur". In almost all circumstances imaginable it is <u>possible</u> that death, injury or illness might occur, even if the possibility is remote. References to "risk" normally use the term "likelihood" or "probability" which establish that there is an uncertainty in the outcome, but provide that the more likely the outcome the greater the necessity to avoid the outcome.
13	Meaning of PCBU	Provide that the permit operator is the relevant PCBU for operations under a CMA permit rather than a JV holding the permit or non-operating JV party by either: (a) including JV's holding CMA permits and non-operator JV parties as a person or class of persons that is not a PCBU for the purposes of the Bill in regulations in accordance with clause 13(1)(b) of the Bill; or (b) amending clause 13(1)(b) of the Bill.	See comments in Part 1 of this submission.
17	Meaning of reasonably practicable	Note comments.	We note the term "reasonably practicable" is defined in this clause in the context of the duty to address a specific hazard or risk but "reasonably practicable" is used in many places throughout the Bill in terms of its natural rather than its defined meaning. In some places it is obvious that the defined meaning is <u>not</u> intended but in others it is less clear (for example clauses 27 and 53) and so simply relying on "unless the context otherwise requires" in clause 17 does not resolve this.

18	Meaning of notifiable injury or illness	Regulations or other guidance to provide greater clarity on what is 'serious' as far as relevant notifiable injuries and illness are concerned.	The description of what is a notifiable injury or illness is extensive and contains qualifiers such as 'serious' without further guidance. It is noted that regulations can prescribe what is not a notifiable injury or illness and providing greater clarity through this would be welcomed.
19	Meaning of notifiable incident	Include the qualifier 'uncontrolled' in in clauses 19(a) to (d).	It is noted that the qualifier 'uncontrolled' is not included in the Bill in (a) to (d) whereas it is included in the equivalent provisions of the Model Law. It is not obvious the extent to which the introduction to sub-clause 19(1) is intended to refine the specific list provided in 19(1)(a) to (m) and therefore what should be reported. For example is the intent that all explosions are notifiable or only those explosions that expose a worker or any other person to a serious risk to that person's health or safety? We also note that how the use of "serious" is supposed to alter the interpretation of "risk" under the Bill is not obvious (it presumably means higher-probability than a mere possibility). Guidance on the appropriate way to apply the threshold in practice may be useful. It will be necessary for regulations and/or guidance to refine and/or expand the list of notifiable incidents as appropriate so that it is very clear what must be notified.
26	More than 1 person may have same duty	Note comments.	Given the potential for multiple PCBUs to have overlapping duties in workplaces, developing guidance on "capacity" in terms of clause 26 would help organisations in complying with their obligations.
28	PCBU must not levy workers	Note comments.	This clause prohibits a PCBU from imposing a levy or charge for anything done or provided in relation to health and safety including protective clothing and equipment [clause 28(1)]. It also prohibits a PCBU requiring a worker to provide his or her own protective clothing or equipment [clause 28(2)]. This second restriction applies whether or not the PCBU pays the worker an allowance or extra salary or wages instead of providing the protective clothing or equipment [clause 28(3)]. In situations where there is a pre-existing employment agreement which provides for such allowances, a PCBU may have to pay for protective clothing and/or equipment twice, as the PCBU is unlikely to be able to unilaterally remove the allowance and affected workers may not consent to removal of such clauses from their employment agreement. It such situations it would seem more reasonable for the parties to negotiate suitable arrangements, particularly in relation to protective clothing e.g. full employer provision, or the reimbursement of employee expenses, or the provision of an allowance. However, if the Bill is to mandate employer provision then we suggest the Committee consider whether it

			would be logical to consequently provide that this statutory obligation equally over-rides any pre-existing agreement for the provision of allowances in this area.
29	No contracting out	Note comments.	This clause prohibits duty-holders contracting out of their responsibilities. This is entirely appropriate. However, it could be argued that there would be greater certainty if, in workplaces where there are numerous duty holders and multiple PCBUs with overlapping coverage, the parties were able to determine and document how the various health and safety responsibilities (under the Bill and/or potentially HSE or other regulations) are to be allocated and managed. In many cases these would recognise the role of the PCBU in overall control of the workplace.
40	Duties of workers	Suggestion consideration is given to replacing "the PCBU" with "a PCBU" in 40(c) and (d).	This clause assumes there is only one PCBU on a site where the worker is when there could be multiple PCBU's. Which PCBU should a worker comply with in terms of 40(c), or what policy in terms of 40(d) if there are overlapped workplaces?
51	Duty to notify notifiable event	Note comments.	Where there are multiple PCBU's on a site (for example a drilling contractor operating on an oil company's site) it is not obvious which one is required to report an incident involving for example a worker on a drilling rig (the rig company PCBU, or the permit operator oil company PCBU). Are all required to report it separately (as contracting out in prevented by clause 29) or can they agree amongst themselves who is responsible? Also, requiring "immediate" notification to the regulator is simply not practical. Notification must be swift but using "immediate" sets an impractical and unrealistic expectation. Suggest this is replaced with "as soon as practicable" or similar.
53	Duty to preserve sites	Note comments.	Clause 53 requires that, in the event of a notifiable event the PCBU must, so far as reasonably practicable, ensure that the site is not disturbed until authorised by an inspector. There is a logical and sensible requirement. However, as any significant delay in the inspection of a site could have a detrimental impact on the on-going work activity at a site there should be a corresponding obligation on the regulator to discharge its incident inspection functions in as timely a manner as practicable.

Part 3	Engagement, worker participation, and representation	Note comments.	The clauses in the Bill relating to worker participation do not send a clear message that businesses are free to set up their own health and safety systems, albeit that this is what we understand is envisaged. The bottom line requirement is that they develop an approach to health and safety that is appropriate to the nature, size and complexity of their businesses. This message is somewhat overtaken by the degree of prescription provided for the appointment and support of HSRs and health and safety committees. We recommend that a preamble that places the various options in context be inserted at the head of Part 3.
65	Request for election of health and safety representatives	Provide further guidance in the Bill or subsequently on how to address situations where there are differing views amongst the workforce regarding an election of health and safety representatives.	We support it being made simple for workers to request the election of HSR/s, however, the clause does not make clear what should happen if the workforce generally does not want such an election. A worker could be part of a number of overlapped workgroups (refer to the diagram in Part 1 above) which may change frequently. Seemingly a worker who carries out work for a business or undertaking may notify "the PCBU" that the worker wishes one or more HSRs to be elected. Where the worker is part of multiple workgroups involving different PCBUs this seemingly provides the ability for the employee of a subcontractor to request any of the PCBUs to have an election for HSR. Further clarity on this point would be useful.
69	Functions of Health and Safety Representatives	Note comments.	The HSRs monitoring under (d) and provision of feedback under (g) to "the PCBU" may be better directed to the person who controls the workplace or at least make it clear that the functions could relate to multiple PCBUs.
72	Health and safety representative may request information	The limitations on how a HSR can use and/or disclose information provided in clause 82 should be explicitly cross referenced in clause 72 for clarity.	The use of information, and restrictions on its use, are currently separated within the Bill and there are no cross references, which risks someone not fully appreciating all the relevant provisions of the Act.
73	Health and safety representative may be assisted by another person	Note comments.	We note changes are proposed to be made to this clause in Queensland following the Queensland Government's review of the Model Law, specifically to require at least 24 hours' notice before any person assisting a HSR can have access to the workplace.[2]
78 and 79		Note comments.	These clauses should recognise the potential for multiple PCBUs and multiple employers to relate to HSRs in a workgroup.

[2] Refer to the *Work Health and Safety and Other Legislation Amendment Act 2014*, summary at http://www.deir.qld.gov.au/workplace/law/whslaws/whs-and-other-legislation-amendment-bill-2014/index.htm

84	Immunity of health and safety representatives	Note comments.	Clause 84 provides immunity for HSRs acting in good faith in the performance or exercise of their functions or powers. It is not clear how this affects anything a HSR might do, or fail to do, in terms of the duties applying to them in their capacity as a "worker" under clause 40. A cross-reference to clarify this interrelationship could be useful.
85	Regulator may remove health and safety representative	Consider including provisions which: • provide a process for a PCBU to interact with the regulator where it considers that a person may have breached clause 85(1); and • oblige the regulator to take into account that information and make a determination within a specified time frame.	The draft Bill does not provide for any formal mechanism or process for a PCBU to interact with the regulator if it considers an HSR may not be performing their functions appropriately.
107	Health and safety representative may direct unsafe work to cease	Note comments	We note changes are proposed to be made to this clause in Queensland following the Queensland Government's review of the Model Law.[3] Specifically an amendment has been recommended that provides that HSRs may direct a worker to cease work, but only after receiving authorisation from the regulator.
110	Meaning of adverse conduct	Note comments	This clause provides a very broad definition of "adverse conduct". Applying 110(d)(iii), "omits to employ or engage any person on work of any description that is available and for which that person is qualified", appears particularly subjective.
Schedule 2		To improve clarity petroleum should be specifically excluded from the definition of "mineral". This is relevant because the definition of "mineral" in the Bill is modelled on that provided in the *Crown Mineral Act 1991*, which in contrast includes petroleum.	

[3] Ibid.