NZCTU0001

UNDER	**THE COMMISSIONS OF INQUIRY ACT 1908**
IN THE MATTER OF	**ROYAL COMMISSION ON THE PIKE RIVER COAL MINE TRAGEDY**

SUBMISSION ON PHASE 4 ISSUES ON BEHALF OF NEW ZEALAND COUNCIL OF TRADE UNIONS TE KAUAE KAIMAHI

16th March 2012

Advocate for CTU
Ross Wilson
106 Austin Street
Mt Victoria
Wellington
Mobile: 0274468767
Email: rossw@nzctu.org.nz

Contents

Summary of recommendations

Key measures excluded from HSE Act

- **That the Commission note that the Health and Safety in Employment Act 1992 did not include key measures recommended by the Advisory Council on Occupational Safety and Health in 1988 including a tripartite commission and effective worker participation.**

Pre-operation approval

- **That the Commission should recommend the amendment of the HSE Act to require an approval to operate from the regulator, at least in the case of high hazard industries.**

- **The regulator should also have regard to the financial capacity of the proposed operator to fund the necessary investment to ensure that the operation can be undertaken safely. The CTU asks the Commission to note the qualification to the general duty in the HSE Act which allows the cost of taking a "practicable step" to be weighed against others. (see discussion below on "all practicable steps").**

- **The CTU would also go further and propose that all new businesses should be required to turn their mind to how they will protect the health and safety of workers in the proposed business and prepare a "safety case" plan.**

High Hazard Unit

- **That the Commission endorse the establishment of the High Hazard Unit in principle with a recommendation that the details of the unit and its operation should be the subject of further consideration by the tripartite Workplace Health and Safety Council. This consideration should include a review of the scope of "High Hazard industries" which may include, for example, forestry in the private sector and corrections in the public sector.**

"All practicable steps"

- **That the Commission note that almost all comparable jurisdictions have "all practicable steps" as the general duty test in their legislation but, unlike New Zealand, have supplemented it with comprehensive and prescriptive regulations in the coal mining industry.**

Regulations and ACOPS

- **That more comprehensive and prescriptive regulations and approved codes of practice are required where possible to provide greater certainty to duty holders under the Act.**

- **That, in an industry like the underground coalmining industry, where the hazards and the control measures are well known, there should be a positive legal obligation in the Act to regulate for the protection of workers, rather than simply a power to regulate.**

- **Such regulations and approved codes of practice should reflect, as far as possible, similar instruments in the comparator jurisdiction; in effect creating a co-regulatory arrangement.**

Tripartite Advisory Council and Industry Committees

- **That the existing tripartite Workplace Health and Safety Council be re-constituted as a statutory body, and properly resourced, to undertake a review and advisory role, engage in the process of standard-setting and recommending changes to OHS standards, and promoting of OHS education and training, and to supervise the work of tripartite industry committees.**

Task Force Approach

- **That the Royal Commission recommend to the Government that a "task force" approach, under the auspices of the Workplace Health and Safety Council, be taken to the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996.**

The Regulator

- **That the Commission recommend that consideration be given by Government to the creation of a new Crown Entity under the Crown Entities Act 2004, with a tripartite governance structure, as a specialist agency focused solely on the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996.**

- **That the Commission note the expert evidence that the location of an OHS inspectorate in a government agency whose primary responsibility is the economic success and productivity of the very industry it purports to regulate is "a prescription for disaster".**

Expert Evidence on Employee Participation

- **That the Commission note the expert evidence to this Inquiry that worker participation in the identification, assessment and control of workplace hazards is fundamental to reducing work related injury and disease.**

Employee Participation: general provisions

- **The Commission should recommend the following enhancements to the Part 2A of the Act in relation to the Health and Safety provisions of application to all industries:**
    - **Extending the function of Health and Safety representatives (Schedule 1A Part 2) representation rights to include all workers (e.g contractors) –**
    - **Allowing Health and Safety Representatives adequate time and support to enable them to undertake their functions**
    - **Strengthening the requirement on employers to consult Health and Safety Representatives with regard to process and systems such as risk management and osh systems**
    - **Requiring the inspectorate to recognize and consult with Health and Safety Representatives**
    - **Requiring the regulator (DOL) to fund the proper training of Health and Safety Representatives under the HSE Act.**
    - **Requiring the regulator to enforce Part 2A of the HSE Act**
    - **Recommending the development of a Code of Practice (as anticipated in section 19B(3) and provided for in section 20 (1)(ad) of the HSE Act)**
    - **Providing a specific power for Health and Safety Representatives to stop dangerous work**
    - **Provide Health and Safety Representatives with a power to issue a Provisional Improvement Notice in addition to their current power to issue a Hazard Notice.**
    - **Providing Health and Safety Representatives with effective legal protection against discrimination and unjustified actions (including dismissal) if there is any cause to suspect that it may be related to the duties undertaken as an HSR.**

Employee Participation: Coal mining industry

That the Commission recommend that a system of site and district check inspectors be put in place in the coal mining industry based on the comparator Queensland jurisdiction

Employee Participation: High Hazard Industries"

That similar enhanced worker participation systems be considered by the Workplace Health and Safety Council for other "high hazard industries".

Regulatory Agency

That the Commission recommend that consideration be given by Government to the creation of a new Crown Entity under the Crown Entities Act 2004, with a tripartite governance structure, as a specialist agency focused solely on the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996.

Leadership and Penalties

That the Commission recommend to Government that the adequacy of the penalty regime under the Health and Safety in Employment Act be reviewed and an offence of corporate manslaughter be introduced into New Zealand criminal law.

Funding

That the Royal Commission should, in recommending to Government the work programme necessary to upgrade the Act and its administration and enforcement, particularly in relation to high hazard sectors such as underground coal mining, propose that the HSE Levy be used, and increased as might be necessary, to ensure that the work is properly funded.

That the Commission note the expert evidence that research on US coal mines shows that the fatality rate is inversely related to the size of the Government budget allocation to the regulator – the larger the budget, the smaller the fatality rate.

Part A Introduction

1. This submission is made on behalf of the 39 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 330,000 members, the CTU is the largest democratic organisation in New Zealand. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

2. The CTU has a long-standing interest in occupational safety and health. This reflects the high importance which union members have consistently assigned to health and safety protection at work, and a union role in ensuring effective protection, in surveys of membership views and priorities conducted by unions over many years. It is fundamental, both as a right and as an effective contribution to ensuring their own health and safety at work, that employees, and the unions through which they work collectively on these issues, should be able to participate in the determination and implementation of health and safety standards. The CTU believes that the government has a responsibility to establish, and enforce, an effective occupational safety and health statutory framework at national, industry, and enterprise levels.

3. The particular focus of this submission is on (e) to (i) of the Commission's order of reference.

> (e) the requirements of the Acts, regulations, or other laws, or of any recognised practices, that govern each of the following: underground coal mining and related operations: health and safety in underground coal mining and related operations; and
> (f) how the requirements in paragraph (e) interact with other requirements that apply to the mine or to the land in which it is situated, including, without limitation, those for conservation or environmental purposes; and
> (g) resourcing for, and all other aspects of, the administration and implementation of the laws or recognised practices that apply to the mine or to the land in which it is situated; and
> (h) how the matters referred to in paragraphs (e) to (g) compare with any similar matters in other countries; and
> (i) any other matters arising out of, or relating to, the foregoing that come to the Commission's notice in the course of its inquiries and that it considers it should investigate:

4. The approach of the submission will be to examine the adequacy of the Health and Safety in Employment Act 1992, and it's administration by the

Department of Labour, as the legislative framework which has as its object "the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work". This will include comment on resourcing for, and other aspects of, the administration of the laws or recognised practices that applied to the Pike River Mine. This analysis is covered in Part B of the Submission and the Specific Questions raised by the Commission in Minute No 10 are answered in Part C.

5. The CTU has supported the EPMU in the key role it has played at the Royal Commission hearings and endorses the submissions it has made on behalf of its members. The CTU perspective is at a higher, and more limited (in relation to the Commission's Order of Reference) level, and is made also on behalf of the workers in other industries and sectors who are reliant upon the Health and Safety in Employment Act 1992 for their protection.

Part B. General Submission

6. The Health and Safety in Employment Act 1992

a) The legislative policy model, now reflected (the CTU would argue inadequately) in the Health and Safety in Employment Act 1992, had its origins in Scandinavian legislation and practice, but is more commonly associated with the recommendations of the 1972 Robens Commission of Inquiry in the UK and the 1988 recommendations of the tripartite Advisory Council on Occupational Safety and Health (ACOSH) in New Zealand.

b) The ACOSH Report recorded six basic principles which had been agreed on a tripartite basis for a proposed new statutory framework:

(i) 'The present toll of injury and disease can be reduced by appropriate prevention measures. These can be applied at all levels, from the workplace to the Government.

(ii) A preventative strategy needs to focus on underlying work systems and not solely on making workers and employers aware. Accidents and disease do not necessarily occur because of 'apathy' or carelessness but also through unsafe systems of work and processes.

(iii) For economic and social reasons, a basic level of safety needs to be imposed by law on all enterprises.

(iv) Lax enforcement of the law undermines the position of employers who

responsibly abide by these minimum legal standards. The law should therefore be adequately, uniformly and equitably enforced, through a system of inspection and the imposition of penalties for contravention.

(v) Because occupational safety and health is an issue affecting employers, workers and government, the establishment of policy and the determination of the basic standards of safety and health secured by law should involve a statutory tripartite process at national level. In addition, it is through these tripartite structures that any conflicts which may arise between employers and unions over health and safety issues can be resolved.

(vi) Although the provision of a safe and healthy workplace is a management responsibility, workers need to be involved collectively in applying and maintaining safe and healthy conditions and practices in the workplace."

c) The Law Commission in 1988 noted the work of ACOSH and evidence that worker participation can dramatically improve safety performance.[1]

d) John Hughes records[2] that:

"The key feature of the ACOSH proposal was a proposed new piece of legislation that would apply to all work activities and replace existing legislation by setting out basic principles, just as the Health and Safety at Work Act 1974 (UK) had done. Thus, the legislation was envisaged as addressing issues such as the respective duties of employers, employees, designers, manufacturers, importers and suppliers by setting out broad performance standards. Underpinning these broadly stated general duties, regulations under the Act would deal with particular hazards or circumstances and prescribe desired standards for performance. Codes of practice would then set out the recommended practices in technical detail which could be followed in order to achieve the standard of performance prescribed in regulations.

The advantages of this legislative approach were seen as being, among other things, coherence, accessibility, uniformity of standards, and universal coverage.

ACOSH also recommended the establishment of a Tripartite Commission (unions, employers, and Government) accountable to a Minister, and responsible for developing and implementing policies to ensure a safe and healthy work environment. An Authority was envisaged as acting as the administrative and operational arm of the Commission, with support from an Institute providing technical and scientific research. It was suggested that this division of function would ensure that objectives were not confused; that no one party would "capture" policy advice; that functions would be devolved to a local level; and that the Commission was "accountable" to all of the interested parties."

e) However, in the political environment of the time the ACOSH recommendations were not adopted in several important respects.

---

[1] New Zealand Law Commission *Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme)* (NZLC R4, Wellington, 1988) n 10, 28.

[2] Hughes John *The Policy Considerations which prompted the enactment of the Health and Safety in Employment Act 1992 and the subsequent mining regulations in 1996 and 1999* EPMU0003/8-9

Gunningham and Neal note in their report[3]

> 'The HSE Act was a product of this deregulatory environment and in its initial version was stripped of some of the key measures recommended by Robens, not least tripartism, worker participation and an independent executive".

Submission: That the Commission note that the Health and Safety in Employment Act 1992 did not include key measures recommended by the Advisory Council on Occupational Safety and Health in 1988 including a tripartite commission and effective worker participation.

7. Pre-operation approval

a) The HSE Act provides no process for pre-operational approval of a new high hazard operation such as the Pike River Coal Mine. All that is required is a 14 day notification in writing to an "inspector" of the commencement of the operation (Reg 8 Health and Safety in Employment (Mining – Underground) Regulations 1999.

b) It is a bitter irony that while the Crown Minerals Act requires a permit to ensure "a fair financial return for the Crown from the extraction of coal", and the Resource Management Act requires resource consents to ensure that there is avoidance, remediation, or mitigation of adverse environmental effects, there is no similar process in the Health and Safety in Employment Act for the protection of the health and safety of the workers in the operation.

c) As Michael Cosman notes in his Impac Services submission[4] to the Commission:

> "This lack of prescribed regulatory involvement in mine planning means that key decisions are taken by the operator alone and then, in effect, presented as a *fait accompli* to the regulator who can only challenge them after the event and against undefined performance standards."

d) Dr Murray Cave noted in his 2002 report[5]:

[3] Gunningham Neil & Neal David *Review of the Department of Labour's interactions with Pike River Coal Limited* 4 July 2011 DOL0100010001/18 at para 46

[4] Cosman Michael IMP0001/10

[5] Cave Murray DOC0010030027/15 at para 54

> "...this project is a significant one requiring significant capital input. There are risks if the mine is opened up and the company cannot satisfactorily manage the technical risks or appropriately allocate capital to the problems inherent in a geologically complex area and consequently the mine is not performing satisfactorily."

e) From the evidence to this Inquiry[6], it would appear that in a comparable jurisdiction (Queensland):

> "The CMSH Act and the CMSH Regulation are very prescriptive about the requirements for coal mine operations and mining companies are required to submit detailed plans on all aspects of the proposed mining operation to the Queensland Government prior to the approval (or otherwise)".

f) In his report[7] to the Department of Labour Professor Quinlan has recommended the option of safety case review in situations where there are "challenging" mining conditions"

> "..the option of imposing SCR should be introduced in situations where it has been requested by the mine operator or where the inspectorate judges the mining conditions to be such as to warrant the imposition of SCR".

g) Although safety case processes have not been adopted in the mining industry in comparator jurisdictions a model for a safety case process for the mining industry is outlined and discussed by Professor Anthony Hopkins and Peter Wilkinson in a 2006 working paper published by the National Centre for OSH Regulation at Australia National University[8i] They propose that such a process should include, in particular, a focus on identifying hazards, assessing risks, applying control measures and managing them effectively backed up by effective workforce involvement.

h) It would be sensible to develop such a process in the coal mining industry as a co-regulatory initiative with a comparable Australian regulatory agency (such as Queensland) given that such applications would be infrequent in New Zealand with the small scale of our coal mining industry. It would also be appropriate for specific expertise to be contracted to

---

[6] White Timothy David Witness statement CFMEU0001/9 at para 31

[7] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003/17 at para 36*

[8] Hopkins Anthony and Wilkinson Peter, *Safety Case Regulation for the Mining Industry* Working Paper 37 National Centre for OSH Regulation, Australian National University. http://ohs.anu.edu.au/publications/pdf/wp%2037%20-%20Hopkins(2).pdf

undertake safety case assessment depending on the high risk industry which the application relates to. The CTU accepts that the current Queensland regime is not a formal "safety case" process and that there may be a suitable alternative process to ensure that a mining operation such as the Pike River Mine doesn't commence operation before all relevant health and safety considerations have been assessed and approved.

<u>Submission</u>: That the Commission should recommend the amendment of the HSE Act to require an approval to operate from the regulator, at least in the case of high hazard industries.

The regulator should also have regard to the financial capacity of the proposed operator to fund the necessary investment to ensure that the operation can be undertaken safely. The CTU asks the Commission to note the qualification to the general duty in the HSE Act which allows the cost of taking a "practicable step" to be weighed against others. (see discussion below on "all practicable steps").

The CTU would also go further and propose that all new businesses should be required to turn their mind to how they will protect the health and safety of workers in the proposed business and prepare a "safety case" plan.

8. Special Focus on High Risk Industries

a) The Department of Labour's administration of the HSE Act provided no particular focus on, or provisions for, high risk industries. The establishment of the High Hazards Unit is a welcome, albeit belated, recognition of the need for the department to increase its capacity to meet its regulatory responsibilities of industries with the potential for catastrophic impacts such as the petroleum and extractive sectors.

b) But the CTU supports the view expressed by Michael Cosman[9] that:

> "The DOL does not know where major hazard sites are located in New Zealand, has no major hazard industry programme or priorities and tends to deal with high risk industries on an *ad hoc* and reactive basis rather than a systematic and strategic manner" and that "..this lack of understanding of major hazards in the broader sense is a fundamental weakness that needs to be addressed alongside any changes In relation to mining or oil and gas".

[9] Cosman Michael supra IMP0001/15

c) Professor Quinlan discusses[10] the experience of Tasmania, which like New Zealand absorbed mining into its generic OHS legislation in 1995 but, following a series of serious incidents in 2011 re-instituted mine specific regulation with "more stringent requirements with regard to OHS management systems". He also recommends[11], drawing on his three reports, a number of changes to the HSE regulatory system which might be considered.

d) The CTU believes that the scope of "high hazard Industries" is too narrow and consideration needs to be given to other sectors where high hazard processes exist.

<u>Submission:</u> That the Commission endorse the establishment of the High Hazard Unit in principle with a recommendation that the details of the unit and its operation should be the subject of further consideration by the tripartite Workplace Health and Safety Council. This consideration should include a review of the scope of "high hazard industries" which may include, for example, forestry in the private sector and corrections in the public sector.

9. The "all practicable steps" test

a) Section 6 of the Health and Safety in Employment Act provides for a general duty on employers to take all practicable steps to ensure the safety of employees while at work. "Safety" means a state of not being exposed to any hazards.[12] The broad duty under s 2A is to take steps that are "reasonably practicable", which are then defined by reference to balancing considerations such as severity of harm and the cost of achieving the result. As John Hughes notes in his paper (EPMU0003/24)

> "The leading statement of what is meant by "reasonably practicable" remains that of Asquith LJ in *Edwards v National Coal Board*.[13] Under this analysis, so far as it applies to s 2A of the HSE Act, the phrase "reasonably practicable" is narrower in meaning than "physically possible"[14] and involves balancing factors

[10] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at paras 49-50*

[11] Supra para 91-99

[12] HSE Act 1993, s 2.

[13] [1949] 1 KB 704.

[14] That is, a measure might be "practicable" in the sense that it could be implemented, which is, nevertheless, not "reasonably practicable" because it would be too economically onerous (*Waikato Turnery Ltd v Inspector of Machinery*, High Court, Hamilton AP 92/87, 25 September 1987).

> such as the degree of risk against the cost of averting that risk. In particular, "reasonable practicability" does not require an assumption of cost that is grossly disproportionate to the degree of risk.[15]

And at EPMU0003/27:

> "After assessing the significance of the risk, the Court has to weigh up the cost to the employer of avoiding it. The textbook example is the English decision *Marshall v Gotham Co Ltd*,[16] where the cost of shoring up roofs throughout a mine, in order to avoid an unusual and disputed geological fault, would have obliged the employer to close down.

b) The CTU's concern is that an operator, such as Pike River Coal Limited, is currently able to embark on a high risk coal mining operation without any prior consent process to determine whether it has the financial capacity and expertise to put in place the necessary protections for the health and safety of its workers and other persons, and then may have the benefit of having the cost of undertaking a "practicable step" as a balancing factor. Perhaps more dangerous than the (hopefully small) possibility that the New Zealand superior courts would allow business cost to outweigh the safety of workers, is the real likelihood that some employers might interpret the current definition of "all practicable steps" to allow them to do this. This likelihood is increased by the Department of Labour's current enforcement policy and the comments of some District Court judges on sentencing in prosecutions under the Act.

c) The CTU notes that almost all comparable jurisdictions also have "all practicable steps" as the general duty test in their legislation, and that, as the expert evidence of Professors Quinlan and Gunningham to this Inquiry have confirmed, those other jurisdictions have supplemented it with prescriptive regulations.

Submission: That the Commission note that almost all comparable jurisdictions have "all practicable steps" as the general duty test in their legislation but, unlike New Zealand, have supplemented it with comprehensive and prescriptive regulations in the coal mining industry.

[15] Asquith J referred at this point to the defendants discharging "the onus on them", but it must be emphasised that the onus is on the informant under the HSE Act.

[16] [1954] AC 360; see also *Associated Dairies Ltd v Hartley* [1979] IRLR 171.

10. Regulations and Codes of Practice

a) When the Health and Safety in Employment Act was passed in 1992 there was an understanding between Department of Labour officials and social partners (CTU and the NZ Employers Federation) that the standards in existing instruments (Acts, regulations and codes of practice) would be "rolled over" and applied under the new Act, while a tripartite standard setting process reviewed the existing standards and new regulations and codes of practice were developed and promulgated. In practice this never occurred and, in the mid 1990s the then Minister of Labour, Hon Doug Kidd announced that this was no longer the government's policy.

b) As John Hughes has emphasised[17]:

> "regulations and approved codes of practice are vital to provide the appropriate level of detail for performance-based standards, yet appear not to be prioritised, possibly due to budgetary constraints and lack of technical support available to the Department of Labour."

c) In 2009 the Minister of Labour Kate Wilkinson in the foreword to the Department of Labour's published enforcement policy for the HSE Act[18] acknowledged:

> "in recent years business representatives have signaled their concerns that uncertainty about complying with the law might actually compromise health and safety".

d) In the same year the National Occupational Safety and Health Advisory Committee (NOHSAC) to the Minister reported:

> "In New Zealand codes of practice are developed relatively rarely, notwithstanding the perceived need for such instruments. In New Zealand, of the 29 approved codes of practice listed on the Department of Labour's website, only four were issued in the last five years, and 17 are more than ten years old.
>
> Consequently, the codes of practice that are available are sometimes inconsistent with current industry practice. The Department of Labour has no formal system for prioritizing the review of approved codes of practice. Many codes of practice contain references to outdated standards, legislation and definitions. Sixteen years after the introduction of the HSE Act, stakeholders, such as employers, unions and OHS practitioners remain concerned about a

[17] Hughes John *The Policy Considerations which prompted the enactment of the Health and Safety in Employment Act 1992 and the subsequent mining regulations in 1996 and 1999* EPMU0003/15

[18] *Keeping Work Safe* Department of Labour 2009 http://www.dol.govt.nz/PDFs/keeping-work-safe.pdf

lack of support and guidance for workplaces from governmental agencies."

e) The Act contains broad regulating making powers (section 21) including regulations:

> "(b) Providing for any other matters contemplated by, or necessary for giving full effect to this Act."

f) It also specifically provides for the development and amendment of approved codes of practice (section 20).

g) The CTU submits that the evidence to this inquiry points to an urgent need for the establishment of a properly resourced process for standard setting. In its submission to the Parliamentary Select Committee considering the 2002 Amendment to the HSE Act the CTU said:

> "The Council of Trade Unions strongly believes that the Government has a responsibility to provide an effective Occupational Safety and Health statutory framework at national, industry and enterprise levels.
>
> At the national level there should be a process that determines acceptable minimum standards of safety. It should be recognized that standard setting is a social process and that it should not be the prerogative of technical experts to determine what is an acceptable level of risk,
>
> The process of standard setting should involve two distinct stages:
>
> - *The technical stage of establishing a link between a hazard and its consequent health effects*. This is sometimes called risk assessment and is properly the province of technical experts.
> - *The evaluation of the social impact of these health effects.* Absolute safety is never guaranteed and the process of determining the minimum acceptable level of safety should include the representatives of the workers who are exposed to the risks."

h) The CTU has proposals for such a process which will be outlined later in this submission.

i) With regard to the specific conditions in the coal mining industry the CTU strongly supports the concluding observations of Professor Quinlan in his report to the Department of Labour[19]

> "Overall, the evidence suggests systems are better able to deal with high probability/low impact risks than high consequence/low probability events. Given this, and the fact the major hazards in mining are relatively well known (and

[19] Quinlan Michael, *Survey Report Reviewing Evidence from High Hazard Incidents and Matters Related to Regulation in Underground Mining* DOL4000010002 at para 224

> a number of control measures well understood), there is an argument that more emphasis should be laid on prescriptive regulation with regard to such hazards (setting a context for risk assessment and an element to be incorporated into management systems). For example, mandatory reporting/notification requirements with regard to hazardous events and potentially hazardous events or deviations from safe practices are critical. Where control measures are clearly known in relation to hazard a requirement that they should be applied is unambiguous and assists management in terms of compliance".

j) Former Department of OSH National Operations Manager Michael Cosman comments[20] "arguments about whether or not [the vertical return air shaft as the secondary means of escape] was compliant with the New Zealand legislation reflect the vagueness of the current regime and hence why default standards or benchmarks are needed to underpin the general duties". The CTU agrees with his opinion.

k) As Gunningham and Neal point out[21] the Department of Labour, for both reasons of government policy and because they are "time-consuming and onerous", has deliberately chosen not to develop approved codes of practice and:

> "In consequence not only some duty holders (particularly small and medium sized enterprises) but also inspectors themselves lacked, and to a significant extent still lack, sufficient guidance in discharging their respective responsibilities[22]."

l) Another consequence is that some employer groups have, apparently with the tacit approval of the Department of Labour, developed their own codes of practice and guidelines. This has included Codes and guidelines in the coal mining industry developed by Minex. As Gunningham and Neal caution[23] "there is a risk of conflict of interest between industry's concern to minimise costs (which might result in the creation of low standards or no standards at all) and the public (and worker) interest in improved occupational safety and health outcomes. Such codes might, for example, result in the lowest common denominator approaches and a de facto lowering of the general duty standard of care".

m) The CTU therefore strongly urges the Royal Commission to recommend that this standard setting function be undertaken by an independent specialist body which includes representation from the appropriate industry (employer and union) representatives. As Gunningham and

[20] Cosman Michael supra at IMP0001/10

[21] Gunningham and Neal supra at paras 57 and 70

[22] Gunningham and Neal supra at para 76

[23] Gunningham and Neal supra at para 63-64

Neal have recorded[24] this is an essential part of the Robens model and Quinlan reports[25] that such a process is reflected in similar legislation in comparable countries such as the UK, Australia and South Africa.

n) The CTU suggests that the existing tripartite Workplace Health and Safety Council could be given a statutory basis with the power to recommend the establishment of tripartite industry or sector committees to undertake standard-setting and other functions as may be determined.

<u>Submission:</u> That more comprehensive and prescriptive regulations and approved codes of practice are required where possible to provide greater certainty to duty holders under the Act.

That, in an industry like the underground coalmining industry, where the hazards and the control measures are well known, there should be a positive legal obligation in the Act to regulate for the protection of workers, rather than simply a power to regulate.

Such regulations and approved codes of practice should reflect, as far as possible, similar instruments in the comparator jurisdiction; in effect creating a co-regulatory arrangement.

That the existing tripartite Workplace Health and Safety Council be re-constituted as a statutory body, and properly resourced, to undertake a review and advisory role, engage in the process of standard-setting and recommending changes to OHS standards, and promoting of OHS education and training, and to supervise the work of tripartite industry committees.

11. A Task Force Approach

a) The CTU submits that it would be appropriate for the Royal Commission to recommend that a "task force" approach be taken to the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996. The expert reports from Professor Quinlan to the

[24] Gunningham and Neal supra at para 46

[25] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour DOL4000010001 paras 129-139.

Department of Labour confirm that there is a substantial deficit in the development of appropriate health and safety standards in the form of regulations and approved codes of practice under the HSE Act. The CTU proposes that this task force role be given by the Minister of Labour to the existing tripartite Workplace Health and Safety Council.

b) The reports of Professor Quinlan reflect the concerns of the CTU which have been expressed in submissions and representations to successive governments. While it is for the Royal Commission to make findings of causation, if it considers it appropriate to do so, the CTU considers that some urgency is required in addressing the deficits identified in Professor Quinlan's reports, and that this would be best done by recommending that the Minister of Labour provide the resources to ensure that these issues can be prioritized and addressed as a matter of urgency under the oversight of the tripartite Workplace Health and Safety Council. Such an approach would be consistent with the requirements of International Labour Convention 155 which was ratified by New Zealand in 2007, and with the current terms of reference of the WHSC.

<u>Submission</u>: That the Royal Commission to recommend to the Government that a "task force" approach, under the auspices of the Workplace Health and Safety Council, be taken to the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996.

12. The Regulator

a) The Pike River Tragedy, and evidence which has been presented to this Inquiry, have shaken the already low level of confidence in the Department of Labour (as the agency responsible for the HSE Act) by workers throughout New Zealand, including the 350,000 represented by the CTU. It has been argued by many that the Department has forfeited its right to continue in that role. Concern has also been expressed that the specialist capacity of the Department has been so diminished over the years that it does not have the skills and knowledge to take the urgent action needed to ensure that the potential of the HSE Act, as an instrument for the protection of the health and safety of workers, is able to be realized. The Prime Minister's announcement that the Government will, within the next few months, create a "super Ministry" which includes the Department of Labour increases the CTU concern that this specialist

occupational safety and health function will be subsumed in a government agency which has as its primary focus the promotion of business and economic growth. The CTU has therefore given consideration to other possible options for the function of regulator of occupational safety and health.

b) An obvious alternative to the current Department of Labour or a "super Ministry" is that a new Crown Entity under the Crown Entities Act 2004 be created, with a tripartite governance structure, as a specialist agency focused solely on the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996. This new Crown Entity would be a Crown Agent (as Civil Aviation Authority (CAA), Land Transport New Zealand, the Environmental Protection Agency, Maritime New Zealand and ACC currently are), an Autonomous Crown Entity (ACE) as Standards New Zealand, or an Independent Crown Entity (ICE) such as the Transport Accident Investigation Commission. Such a model would be consistent with original recommendations of the 1988 ACOSH Report, as well as the models of similar statutory occupational safety and health authorities in "Robens" countries i.e. UK, Canada, Australia. Such a model would ensure that an important regulatory function, the protection of the heath and safety of workers in their employment, is not subverted to, or unduly influenced by, the primary functions of a super Ministry It would also provide greater flexibility to enter into co-regulatory or skill/resource sharing partnerships with, for example, Australian regulatory authorities.

c) In promoting the independent agency option the CTU is not intending to question the integrity of well-intended specialist and other staff in the Department of Labour. It can be reasonably inferred that the key decisions relating to the Act and its administration have been made at a political level and the experience to date with the new High Hazards Unit and its new leadership given hope that lessons have been learned and that the Minister and the Department would accept the expert advice from such an eminent international expert as Professor Quinlan and will be willing to act on it with the urgency that is warranted. The CTU is also very mindful of the fact that the employers in this tragedy, particularly PRCL, were at all times under the general duty obligations of the HSE Act in an industry where the "practicable steps" necessary for the protection of the health and safety of workers are well known. However, with the emergence of the proposals for a "Super-Ministry" of "economic development" the CTU is firmly of the view that the regulator function

should be carved out and established as an independent agency. There are real risks of regulatory capture in such an agency as Gunningham and Sinclair clearly warn in their 2007 report[26]:

> "…the location of an OHS inspectorate in a government agency whose primary responsibility is the economic success and productivity of the very industry it purports to regulate is a prescription for disaster".

The CTU would like the opportunity to make further submissions on this at the Commission hearings on Phase 4.

<u>Submission</u>: That the Commission recommend that consideration be given by Government to the creation of a new Crown Entity under the Crown Entities Act 2004, with a tripartite governance structure, as a specialist agency focused solely on the development, administration and enforcement of the HSE Act 1992 , and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996.

<u>Submission:</u> That the Commission note the expert evidence that the location of an OHS inspectorate in a government agency whose primary responsibility is the economic success and productivity of the very industry it purports to regulate is "a prescription for disaster".

13. Employee Participation

The Robens/ACOSH Model and its application in New Zealand

a) The concept of tripartism and employee participation is fundamental to the Robens/ACOSH model. As Gunningham and Associates state in their report[27]:

> "There is considerable literature (though very little of it with regard to underground mining) which suggests that worker participation in the identification, assessment and control of workplace hazards, is fundamental to reducing work related injury and disease. Workers have the most direct interest in OHS of any party; it is their

[26] Gunningham N and Sinclair D, *Factors Impinging on the Effectiveness of the Mines Inspectorate* The Australian National University 2007 EPMU0011/14

[27] Gunningham and Associates *Report to the Department of Labour* (DOL0010020402/15

> lives and limbs that are at risk when things go wrong. Moreover, the hazards at work need to be identified and evaluated, and workers experience and knowledge is crucially important in successfully completing both of these tasks. Worker participation also has a number of other benefits."

And later[28]:

> "Evidence based research suggests that it is where the active involvement of workers is underpinned by legal entitlements to perform OHS functions, and to receive training and information, that is the most effective in improving OHS outcomes".

b) However the Government in 1992 declined to include any provisions relating to elected health and safety representatives or enforceable employee involvement in health and safety policies and processes. Its view was that health and safety should be managed by the employer, to the exclusion of employees or their representatives if the employer thought fit.

c) What this meant was that, for the 10 years after the Health and Safety in Employment Act 1992 came into force on 1 April 1993, we had a general duty legislative framework, supplemented by a limited number of codes of practice and guidelines and enforced by a seriously under-resourced inspectorate. However, notably absent were any of the worker rights or participation systems, such as the elected health and safety representatives, which have been a feature of the United Kingdom model since the Robens Report[29] in the 1970s which, in turn, was heavily influenced by the Scandinavian models.

d) The 2003 amendments to the Health and Safety in Employment Act 1992 included:

   i. A new general legal duty on all employers to ensure that all employees have the opportunity to be effectively involved in health and safety processes.[30]

   ii. The right for workers to elect health and safety representatives in their workplace with statutory or agreed roles as part of worker participation arrangements. Unless otherwise agreed under agreed arrangements health and safety representatives had an annual right to two days training leave and the power to serve hazard notices on

[28] Gunningham and Associates *Report to the Department of Labour* (DOL0010020402/17

[29] Report of the Committee on Safety & Health at Work 5034 HMSO London 1972

[30] S19B Health and Safety in Employment Act 1992

employers.[31]

iii. A statutory right to refuse dangerous work (reflecting a common law right and which is arguably an obligation under the section 19 duty on all workers to take all practicable steps to protect their own health and safety and the health and safety of others).[32]

e) The amendments to the Act also reflected the requirements of International Labour Convention 155 which was formally ratified by the New Zealand Government in 2006, and the ILO Health and Safety in Mines Convention 176 which has not yet been ratified by New Zealand.

The Health and Safety Representative Training System

f) The Council of Trade Unions began preparing for this health and safety representative system in early 2002. It developed a two-day training course and entered into a joint venture with the Accident Compensation Corporation. Since then more than 38,000 health and safety representatives have been trained, some to Level 4 in the tier of training course levels which have been developed.

g) But the proof of the product has been in the evaluation reports and the overwhelmingly positive feedback from participants. Independent evaluations commissioned after the introduction of the system were very favourable[33], and talked about a "sea change"[34] of interest in health and safety occurring in workplaces. But it is not enough to legislate for worker participation systems, or even to elect health and safety representatives in every workplace. It is what they actually do, and are supported to do by the law and their employers and others in their workplace which has the potential to make a real difference.

---

[31] Part 2A Health and Safety in Employment Act 1992

[32] S19 & 28A Health and Safety in Employment Act 1992

[33] Innovation & Systems Limited (2004) *Worksafe Reps Introductory Training Programme:assessment and evaluation,* Innovation & Systems Limited, Wellington, NZ.

[34] Innovation & Systems Limited, above Page 44.

h) The New Zealand evaluations are consistent with international research including a report by Professor David Walters[35] for the International Labour Organisation in 2008 which concluded that the published research evidence demonstrates a strong link between arrangements for worker representation and consultation and improved health and safety outcomes but that this is subject to there being:

- A strong legislative steer
- Effective external inspection and control
- Demonstrable senior management commitment to both OHS and a participative approach, and sufficient capacity to adopt and support participative OHS management
- Competent management of hazard/risk evaluation and control
- Effective autonomous worker representation at the workplace and external trade union support
- Consultation and communication between worker representatives and their constituencies

i) The CTU, in its partnership with ACC, has accepted responsibility to act on behalf of all workers and not just union members. It does so because it regards workplace health and safety as a crucially important issue and because, although its resources are very limited, the union movement has the networks and the experience to reach out to all workplaces.

Improvement of Employee Participation provisions in Part 2A of the HSE Act

j) It is submitted that relevant to this inquiry is whether the employee participation provisions of the HSE Act are working effectively, and whether any shortcomings (particularly as identified in the course of this Inquiry) relate to the provisions in the Act and their administration by the Department of Labour, or to the conditions in the labour market and the workplace itself.

k) John Hughes has noted (EPMU0003/14) that:

> "Health and safety representation was envisaged by *Robens* as depending on strong union organisation within large enterprises, yet union density in the private sector effectively collapsed in New Zealand after the introduction of the Employment Contracts Act 1991 and this too has been seen to have led to a lack of support and guidance for workplaces. [36]"

[35] Walters D.R. *The Role of Worker Representation and Consultation in Managing health and safety in the* construction industry International Labour Organisation 2008

[36] Allen & Clarke, *Occupational health and safety in New Zealand. Technical Report prepared for the National Occupational Health and*

l) Similarly Michael Cosman has also commented[37]:

> "The notion of a tripartite approach to health and safety envisaged in Robens and ACOSH, has tended to be the exception rather than the norm, partly due to reduced union membership in some sectors and, in others, an antipathy towards employee involvement. The tripartite approach is important as the model envisages an approach in which all of the key stakeholders participate in setting and monitoring safety standards. Without the involvement of employee reps there can be a lack of buy-in and commitment to the resulting product in the same way that the absence of involvement of the regulator can result in standards which are unenforced. And it should not be forgotten that ILO conventions, such as 155, to which New Zealand is a signatory, mandate such an approach."

m) Although little research evidence is available in New Zealand of the impact on workplace health and safety of the Employment Contracts Act, there is a general acknowledgement that it had an adverse effect particularly as a result of the de-regulation of the labour market and the legislative health and safety framework.

n) The 1990s saw a dramatic growth in precarious employment; shiftwork and nightwork, self-employment, part-time jobs, multiple job holding, home work, and casual and temporary employment (increasingly through labour-hire companies).

o) A review[38] of 93 research studies covering 11 countries covering a range of industries and employing a number of methodologies has shown that that the growth of these types of work arrangements are having adverse effects on workers health and safety. Of the 93 studies, 76 found that precarious employment was associated with a measurable deterioration in occupational safety and health.

p) The experience in New Zealand accords with the broad findings common to those studies:

- First, precarious employment is often associated with economic pressures or changes to payment and reward systems that endanger health. These include competitive tendering and consequent "corner-cutting" by subcontractors, the outsourcing of dangerous tasks, payment by results and low pay, work intensification and overload, long hours of work, and the limited resources that some businesses devote to OHS

Safety Advisory Committee: NOHSAC Technical Report 7: Wellington, 2006, 32.

[37] Supra IMP0001/24

[38] Quinlan M, Mayhew C & Bohle P *The Global expansion of precarious employment, work disorganisation, and consequences for occupational health: a review of recent research* International Journal of Health Services, Vol 31 Number 2 – 2001 pp 335-414

- Second, precarious employment can be associated with dangerous forms of work disorganisation such as the difficulty of ensuring adequate training of temporary or labour hire workers, especially where the workforce is young and inexperienced or where there is a high level of labour turnover. Outsourcing and labour hire contracting means the introduction of "strangers" to the workplace, disruption of informal flows of safety knowledge and communication, and an increase in complexity and ambiguity in rules and procedures. Downsizing can result in a loss of knowledge with the loss of older and more experienced workers and resulting multi-tasking may result in additional risks if workers are not suitably retrained. Precarious workers are often in a weak position to raise or complain about OHS issues, particularly in a non-union environment.
- Third, the OHS regulatory framework is designed and implemented to predominantly deal with permanent employees in large workplaces. On multi-employer work-sites complex webs of legal and management responsibility and control increase risk. To compound this, changes to labour legislation weakened minimum standards and union input.

q) In the opinion of the CTU the combined effect of the changes to employment and occupational safety and health laws in New Zealand in the 1990s was:

- The widespread weakening of employee participation in occupational safety and health.
- A lessening of employee knowledge and awareness of health and safety issues
- A weakening of union representation and bargaining on health and safety issues
- An increasing unwillingness of workers to report OHS problems.

r) The past 10 years have seen some initiatives to address this situation, primarily through the introduction of the employee participation provisions in the Health and Safety in Employment Act from May 2003.

s) But there are some challenges:

- **Lack of enforcement of Part 2A by the DOL**- The Department of Labour itself took no steps to promote, or undertake training in relation to, Part 2A of the HSE Act relating to employee

participation after it came into effect in 2003. There is widespread non-compliance with the requirement of the Act for health and safety representatives to be elected in all workplaces with 30 employees or more. Further, despite requests from the CTU, the DOL has only very recently (in the *Keeping Work Safe* publication[39]) acknowledged that "employee participation in health and safety is an effective means of driving compliance with the HSE Act and making places of work safer and healthier" and that "we will make it a priority for our inspections to ensure that employers have given their employees reasonable opportunities to participate in their workplace's health and safety or have employee participation systems in place…Our inspectors will also work closely with trained health and safety representatives in places of work". The CTU has yet to see substantive evidence of these commitments being carried into practice.

- **The hostility of some employers** – The non-compliance with Part 2A substantially reflects the opposition of many employers to employee participation, individually or collectively, in health and safety processes as the Act requires. Sometimes this manifests itself in anti-union sentiment and there has been evidence before the Commission of this at Pike River. In other cases lip service only is paid to the requirements of the Act and essential information is withheld from health and safety representatives and employees.
- **Lack of recognition and support** - Reps need a reasonable level of respect, time and resources in the workplace in order to undertake the role effectively. In some workplaces that is working well; in others the reps are expected to do the work in addition to their normal workload and with no support or facilities.
- **Uncertainty about resources for training** – With the proposed government changes to ACC there is uncertainty about the future funding of HSRep training. It is important that we keep the training momentum going. Research shows[40] that, without regular training refreshment, the Rep's workplace activity tends

[39] Department of Labour *Keeping Work Safe 2009 p 13*

[40] Walters, D.R., Kirby,P and Daly, F (2001). *The impact of trade union education and training in health and safety on the workplace activity of health and safety representatives* Health and Safety Executive Contract Research Reports, No 321/2001

to tail off and their feelings of adequacy and support also diminish, particularly if they are facing challenges to their role.

- **Lack of a representative role in some workplaces -** There is a need to focus on the "representativeness" and the role of Health and Safety Representatives, and to provide more guidance to workplaces. For example, it is intended that they should be elected by workmates rather than appointed by managers. The development of a Code of Practice (as anticipated in section 19B(3) and provided for in section 20 (1)(ad) of the HSE Act) was frustrated by employer representatives in 2006 and has not been progressed by the Department of Labour.

t) Given these impediments to the successful development of an effective health and safety representative system the CTU urges the Commission to endorse the value of employee participation in workplace health and safety processes through the health and safety representative system, and to recommend that the Part 2A provisions of the HSE Act be more effectively enforced, supported by the Department of Labour (or other agency responsible), and strengthened.

Strengthening of Part 2A provisions.

u) Professor Quinlan in his report to the Department of Labour reviewing the 2006-9 Mine Safety Review concludes[41]"

> "In sum, in the light of my review of the evidence (and regulatory frameworks) I think that the findings and recommendations of the 2006-9 mine safety review on employee participation should be re-considered. There is a case for strengthening the regulatory requirements by establishing a tripartite advisory body, requiring consultation with regard to risk assessment about changes to work conditions that could have OHS effects, and establishing a system of district and mine site check inspectors with appropriate training and powers".

v) Gunningham and Associates in their 2009 report[42] to the Department of Labour identify several ways that workers' rights might be strengthened such as:

- Extending employee representation rights to include all workers

[41] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at para 71*

[42] Gunningham and Associates, *Underground Mining Information: Contextual Advice on International Standards and Literature Review* June 2009 DOL0010020402/19.

(e.g contractors)

- Improved rights of access, to intervene, and to represent workers interests on issues of work intensity, work organization and working time, all of which can increase the risk of ill health.
- Strengthening the requirement to consult with regard to process and systems such as risk management and osh systems.
- Increasing the role of the inspectorate in ensuring consultation..

w) In a comparative study on inspection regimes[43] Walters and others comment that:

> "OHS statutes in countries like Sweden and Australia have gone beyond the Robens' approach of consultation with work people to vest health and safety representatives with powers to stop dangerous work and to issue 'provisional improvement notices'".

The authors note that although such rights are seldom used in practice (in Sweden they are invoked on average 50-100 times a year) they nevertheless add an ultimate tool for safety representatives to secure normative influence on their managers that is supported by their extensive rights of a dialogue.

The 1996 (Bradford) Select Committee Review of the HSE Act[44] recommended that the Provisional Improvement Notice scheme, as used in the state of Victoria, be considered by Government but only the weaker Hazards Notice process was included in the HSE Act in 2002.

x) A common problem in New Zealand workplaces is also that Health and Safety Representatives are often not permitted time, or given support, to undertake their statutory functions.

y) The CTU submits that it would be appropriate for the Commission to recommend that the general functions and powers of Health and Safety Representatives under the HSE Act (as provided in Schedule 1A Part 2 clause 2) be reviewed and amended as necessary to bring them into line with similar powers in other comparable jurisdictions.

---

[43] Walters D, Johnstone R, Frick K, Quinlan M, Baril-Gingris G, and Thebaud-Mony *Regulating Workplace Risks* Edward Elgar Publishing 2011

[44] Report of the Labour Select Committee *Inquiry into the Administration of the Occupational Safety and Health Policy* House of Representatives 1996

In support of this submission the CTU also refers to Professor Quinlan's advice that[45]:

> "My review of regulatory frameworks identified a number of areas where the participatory provisions in the HSE Act were arguably 'inferior' or less 'demanding' to those found in comparable OHS legislation of a number of other countries. For example the legislation of a number of Canadian and Australian jurisdictions (indeed most if not all of the latter) require employers to consult workers when undertaking risk assessment or there is a change in work processes that could affect OHS".

z) The CTU submits that the specifics of improvements to the employee participation provisions in Part 2A of the Act should be the subject of detailed consultation with, and discussion at, the Workplace Health and Safety Council but should include:

- Extending the function of Health and Safety representatives (Schedule 1A Part 2) representation rights to include all workers (e.g contractors) -
- Strengthening the requirement on employers to consult Health and Safety Representativeswith regard to process and systems such as risk management and osh systems – as recommended by Quinlan[46]
- Requiring the inspectorate to recognize and consult with Health and Safety Representatives –
- Requiring the inspectorate to recognize, engage and cooperate with Health and Safety Representatives –

  Note. It wasn't until 2009 that the DOL (in the *Keeping Work Safe* publication[47]) acknowledged that "employee participation in health and safety is an effective means of driving compliance with the HSE Act and making places of work safer and healthier" and that "we will make it a priority for our inspections to ensure that employers have given their employees reasonable opportunities to participate in their workplace's health and safety or have employee participation systems in place…Our inspectors will also work closely with trained

[45] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at para 66*

[46] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at para 71*

[47] Department of Labour *Keeping Work Safe 2009 p 13*

health and safety representatives in places of work". A Practice Note to this effect was issued in March 2010 but the CTU has been little evidence of this being implemented in practice and this should be a mandated requirement as it is in the UK[48]

- Requiring the regulator (DOL) to fund the proper training of Health and Safety Representatives under the HSE Act.
- Requiring the regulator to enforce Part 2A of the HSE Act which requires, inter alia:
    - Every employer to provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employee's place of work.
    - Every employer employing 30 employees or more (and employers with less than 30 if an employee or union requires) to have in place an agreed (within the 6 month periods stipulated in Schedule 1A Part 3) employee participation system or the default (Schedule 1A) health and safety representative system.

      Note: Section 137 of the Employment Relations Act 2000 provides specifically for the enforcement of Part 2A by Compliance Order under the Act. It is acknowledged by the CTU that individual employees can exercise personal grievance rights under Section 103 of the Employment Relations Act 2000 and apply for compliance orders, but Section 137 clearly contemplates action by inspectors by way of compliance orders.
    - Recommending the development of a Code of Practice (as anticipated in section 19B(3) and provided for in section 20 (1)(ad) of the HSE Act)
    - Providing a specific power for Health and Safety Representatives to stop dangerous work

      In a comparative study on inspection regimes[49] Walters and

[48] http://www.hse.govt.uk/foi/internalops/ogprocedures/reps.htm

[49] Walters D, Johnstone R, Frick K, Quinlan M, Baril-Gingris G, and Thebaud-Mony *Regulating Workplace Risks* Edward Elgar Publishing 2011

others comment that:

> "OHS statutes in countries like Sweden and Australia have gone beyond the Robens' approach of consultation with work people to vest health and safety representatives with powers to stop dangerous work and to issue 'provisional improvement notices'".

- The authors note that although such rights are seldom used in practice (in Sweden they are invoked on average 50-100 times a year) they nevertheless add an ultimate tool for safety representatives to secure normative influence on their managers that is supported by their extensive rights of a dialogue.

  Provide Health and Safety Representatives with a power to issue a Provisional Improvement Notice in addition to their current power to issue a Hazard Notice.

  Note. The 1996 (Bradford) Select Committee Review of the HSE Act[50] recommended that the Provisional Improvement Notice scheme, as used in the state of Victoria, be considered by Government but only the weaker Hazards Notice process was included in the HSE Act in 2002.

- Providing Health and Safety Representatives with effective legal protection against discrimination and unjustified actions (including dismissal) if there is any cause to suspect that it may be related to the duties undertaken as an HSR.

Additional strengthening of Part 2A provisions in relation to "High Hazard" industries and sectors

aa) A strong case can be made for Part 2A of the HSE Act to be amended to provide for more specialized employee participation provisions by regulation. Professor Quinlan in a report to the Department of Labour[51] notes that:

> "In high hazard industries marked by serious disasters in the past, such as

[50] Report of the Labour Select Committee *Inquiry into the Administration of the Occupational Safety and Health Policy* House of Representatives 1996

[51] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour at p 47

> mining, the importance of providing workers with meaningful 'voice' has often been seen by policy makers as deserving special attention beyond that found in general OSH laws"

bb) The Commission has heard much evidence about the Check Inspector system as it operates in New South Wales and Queensland, and which operated in New Zealand from the time of the Brunner Mine Disaster until it was abolished by the HSE Act 1992. The reintroduction of such a system was proposed by the EPMU and others to the 2008 Department of Labour review of mine safety but was not adopted. Professor Quinlan has commented[52] after noting that the major concerns of those opposed to the measure was that it would duplicate that of qualified managers, would blur responsibilities under the HSE Act, risked creating tensions in the workplace, and that a case for treating mining as a special case in this regard had not been established, that:

> "As this report makes clear, there were a number of jurisdictions where similar arrangements had been operating over a number of years, enabling the arguments on both sides to be tested against actual experience".

cc) Professor Quinlan reviews[53] check inspector/roving safety representatives systems and performance in a number of jurisdictions and, of particular relevance, notes that "[s]ite check inspectors are seen (by the Department of Primary Industries) to play a vital role in mine safety in NSW", and that "[b]eyond this, legislation in both Queensland and New South Wales have provided for the appointment of (union nominated and funded) full-time roving safety representatives, with similar wide-ranging powers, known as (in coal mining) Industry Check Inspectors in New South Wales and Industry Health and Safety Representatives in Queensland". Professor Quinlan expressed the view[54] that their powers "were used astutely and not abused". He also notes that "In Sweden – often regarded as the world leader in OHS – for example a system of regional (and roving) industry-based safety representatives has operated successfully over many years".

---

[52] Supra p50

[53] Supra pp47-51

[54] Supra p 49

dd) Professor Walters[55] in his report concludes:

> "….the forms of representation that already exist in some countries in coal mining, such as check inspectors in Australia, or the workmen's inspectors provided for under Section 123 of the Mines and Quarries Act in the UK, offer a useful model that would help to strengthen existing provisions on workers' representation and consultation in coalmining in New Zealand. As such, they would help to improve the operational effectiveness of the multi-level risk management practices required to help prevent the occurrence of such tragedies as Pike River in the future".

The CTU submits that the Commission should recommend that a system of site and district check inspectors be put in place in the coal mining industry based on the comparator Queensland jurisdiction.

The CTU further submits that, as with the other regulatory arrangements which need to be developed, such a check inspector system should closely model that currently working (satisfactorily) in Queensland. It is desirable that the system be subject to consultation in the proposed tripartite industry committee before being put in place by regulations under the HSE Act.

The CTU considers that similar enhanced worker participation systems should also be considered in other "high risk industries" (however that may ultimately be defined ...and may include, for example, forestry in the private sector and corrections in the public sector) with a model appropriate to the industry being put in place by specific regulations under the HSE Act.

<u>Submission:</u> That the Commission note the expert evidence to this Inquiry that worker participation in the identification, assessment and control of workplace hazards is fundamental to reducing work related injury and disease.

<u>Submission:</u> That the Commission recommend the following enhancements to the Part 2A of the Act in relation to the Health and Safety Representative provisions of application to all industries:

Extending the function of Health and Safety representatives (Schedule 1A Part 2) representation rights to include all workers (e.g contractors) –

Allowing Health and Safety Representatives adequate time and support to

[55] Walters David *The Role of Worker Representation in Managing Health and Safety – A report in support of the EPMU submission to the Royal Commission of Inquiry on the Pike River Coal Mine Tragedy*

enable them to undertake their functions

Strengthening the requirement on employers to consult Health and Safety Representatives with regard to process and systems such as risk management and osh systems

Requiring the inspectorate to recognize and consult with Health and Safety Representatives

Requiring the regulator (DOL) to fund the proper training of Health and Safety Representatives under the HSE Act.

Requiring the regulator to enforce Part 2A of the HSE Act

Recommending the development of a Code of Practice (as anticipated in section 19B(3) and provided for in section 20 (1)(ad) of the HSE Act

Providing a specific power for Health and Safety Representatives to stop dangerous work

Provide Health and Safety Representatives with a power to issue a Provisional Improvement Notice in addition to their current power to issue a Hazard Notice.

Providing Health and Safety Representatives with effective legal protection against discrimination and unjustified actions (including dismissal) if there is any cause to suspect that it may be related to the duties undertaken as an HSR.

<u>Submission:</u> That the Commission recommend that a system of site and district check inspectors be put in place in the coal mining industry based on the comparator Queensland jurisdiction

<u>Submission:</u> That similar enhanced worker participation systems be considered by the Workplace Health and Safety Council for other "high hazard industries".

14. Leadership and Penalties

a) The tolerance level of workplace injury and death in New Zealand is high compared with, for example, road injury and deaths, and with many comparable countries. This is reflected in our media, in the frequent ridicule of health and safety laws as "political correctness", and in the bitter opposition from the employer community when steps are taken, as they were for

example in 2002, to strengthen the Health and Safety in Employment Act and increase the level of maximum penalties. It is also reflected in the rather weak enforcement policy of the Department of Labour[56], the fact that few prosecutions under the Act are taken, those that are taken are invariably after an accident has occurred, and the penalties imposed are low. In short the whole system encourages many employers to take a "gaming" approach to whether they will be "caught" for non-compliance. In the case of Pike River Coal Limited it permitted the company to undertaken a complex and dangerous coal mining operation without any pre-operational approval process.

b) Strong leadership on health and safety at work, and the need for proper protections in law and in practice, is required from all of us; from the Prime Minister and other politicians, through Board rooms and smoko rooms and society at large. The cost to society of failing to prevent accidents is much higher than most appreciate. First and most important is the huge cost of pain and anguish to the families and friends as West Coast people know so well. But there is also the monetary cost. The cost of not preventing workplace accidents and disease is estimated to be as high as 10% of GDP in some studies. OSH estimated in 1999 that occupational *injury* costs alone were around $3.18 billion, based on the formula used by ACOSH in 1988. There is also ample evidence that good health and safety management is consistent with good productivity growth[57]

c) But where employers fail to comply with the requirements of the law there should be a firm and fair enforcement of the law and the penalties. In comparable jurisdictions, the rates of prosecutions for breaches of the OHS legislation are much higher than New Zealand. For example, Queensland's Workplace Health and Safety inspectorate carried out 214 prosecutions in 2005, with offenders ordered to pay fines and costs totalling more than $4.76 million compared with New Zealand's Department of Labour which undertook only 154 prosecutions, netting a total of $633 300 (Queensland Department of Employment and Industrial Relations, 2005; New Zealand Department of Labour, 2006). When the then Minister of Labour Bill Birch promoted the Health and Safety in Employment Act in 1992 he strongly emphasised the deterrent effect of heavy penalties[58] .

d) Professor Quinlan in his report[59] stated that:

---

[56] *Keeping Work Safe* Department of Labour 2009 http://www.dol.govt.nz/PDFs/keeping-work-safe.pdf

[57] Department of Labour http://www.dol.govt.nz/publications/research/good-sense/summary.asp

[58] For example in his address to N Z Institute of Safety Management 17 July 1992

[59] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour DOL4000010001 para 161.

> "The adequacy of the current penalty regime under the Health and Safety in Employment Act compared to those of other countries warrants consideration."

e) The CTU also submits that the Commission should recommend that the Government consider the introduction of a criminal offence of corporate manslaughter into New Zealand law similar to that introduced in the UK in 2006. In doing so the CTU is not intending to assume any particular findings by the Commission in relation to Pike River Coal Limited or any other company. However, some of the issues canvassed in the evidence once again raise feeling among the public that the law should be able to fix criminal responsibility on the corporate person itself. The issues in relation to this are canvassed in an article in the University of Canterbury Law Review[60] which makes the point that:

> "The arguments reflect the view that the Act fails to properly reflect the moral outrage that the community feels when a death occurs through the gross negligence of the employer, and fails to reinforce the notion that all workplace fatalities are unacceptable. This is borne out by factors such as the offences not being indictable and, therefore, generally prosecuted in the lower courts; that prosecution is considered only a last resort; that the fines imposed by the courts are generally small; fines for large corporations are not sufficiently punitive and therefore lack the necessary deterrent and retributive effect; and the small number of proceedings against senior officers of corporations[61]."

<u>Submission:</u> That the Commission recommend to Government that the adequacy of the penalty regime under the Health and Safety in Employment Act be reviewed and that an offence of corporate manslaughter be introduced into New Zealand criminal law.

15. Funding Issues

a) The CTU has considered the cost implications for the Department of Labour in increasing its capacity to both undertake the work programme necessary to address the deficiencies in the HSE Act and its current administration, and to ensure more effective enforcement. Although there is a strong case to be made for an increased Government budget appropriation through Vote Labour, there is also the option of increasing the revenue available to the DOL for this purpose by increasing the existing HSE Levy which is currently collected through ACC, and which

[60] Wong Jonathan *Corporate manslaughter: a proposed corporate killing offence for New Zealand* http://www.nzlii.org/nz/journals/CanterLawRw/2006/6.html

[61] Supra at P7.

has not been increased since 1999. Attached is an information note on the levy prepared by the CTU Economist Dr Rosenberg which provides publicly available information on the history of the levy and its current use, which includes the funding of the High Hazard Unit.

b) The CTU submits that the Royal Commission should, in recommending to Government the work programme necessary to upgrade the Act and its administration and enforcement, particularly in relation to high hazard sectors such as underground coal mining, propose that the HSE Levy be used, and increased as might be necessary, to ensure that the work is properly funded. Research evidence from the USA shows that the coal mining fatality rate is closely related to funding of the regulatory agency:

> "research on US coal mines shows that the fatality rate is inversely related to the size of the federal budget allocation to the regulator – the larger the budget, the smaller the fatality rate. Moreover this is independent of the nature of the legislation being enforced. In short, a well resourced regulator is the key to reducing fatalities".[62]

<u>Submission:</u> That the Royal Commission should, in recommending to Government the work programme necessary to upgrade the Act and its administration and enforcement, particularly in relation to high hazard sectors such as underground coal mining, propose that the HSE Levy be used, and increased as might be necessary, to ensure that the work is properly funded

<u>Submission</u>: That the Commission note the expert evidence that research on US coal mines shows that the fatality rate is inversely related to the size of the Government budget allocation to the regulator – the larger the budget, the smaller the fatality rate.

[62] Hopkins A and Wilkinson P *Safety Case Regulation for the Mining Industry* Working Paper 37 National Research Centre for Occupational Safety and Health, Australian National University 2005 in Gunningham and Sinclair supra Note 26

Part C The Specific Questions of Interest to the Commission

With regard to the specific questions identified in Minute Number 10 as being of interest to the Commission the CTU has the following comments and submissions:

A. Mining Regulation and recognised practices

Comparators

1. *Appropriate comparator countries.*

> *The Commisslon is minded to use the Western Australia, New South Wales and Queensland regulatory structures (including the National Mine Safety Framework established by a steering group on behalf of the Standing Council on Energy and Resources') to provide a comparison for the regulation of the New Zealand underground coal mining industry ("mining industry"). Nonetheless, are there other countries or states which should also be used as comparators?*

The CTU agrees that the Western Australia, New South Wales and Queensland regulatory structures are appropriate to provide a comparison for the regulation of the New Zealand underground mining industry. The expert evidence before the Commission from Professor Quinlan and others confirms that these regulatory regimes are robust and administered by experienced specialist staff. In addition, we have a similar legal and cultural history, with CER encouraging greater convergence and cooperation within the common labour market. The experience to date with the High Risk Unit appears to be confirming the value of drawing on the expertise from their much more extensive mining sector. The CTU supports an approach which would develop a close cooperative, even co-regulatory, relationship with an Australian regulator (probably Queensland). However, it submits that it would also be appropriate to have regard to the regulatory structures, and the experience, of Sweden, the UK, Canada and Tasmania for the reasons noted by Professor Quinlan (in particular) in his reports[63].

2. *Significant features of the comparator regulatory regimes.*

> *What are the significant features or principles of these overseas regulatory structures which are worthy of consideration?*

The CTU considers the significant features or principles of these overseas regulatory structures which are worthy of consideration are as follows:

[63] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour at paras 29-31

a. All of the comparator countries (and states) referred to above have jurisdiction wide and industry tripartite bodies which undertake a review and advisory role, assessing the effectiveness of existing standards, recommending changes of OHS standards, codes and the like, promoting OHS education and training, coordinating intra-government policies on OHS and reviewing accreditation and licensing arrangements.[64] As Professor Quinlan notes[65]:

> "Formal participation mechanisms have advantages over informal arrangements in terms of procedural equity, trust, influence with government, and the capacity to address issues over a period of time. A body of this type in New Zealand could pursue a number of issues such as undertaking or commissioning a review of evidence on the best ways to manage gassy mines, monitoring mechanisms of worker involvement and means of enhancing this or developing frameworks for OHS management and risk assessment. Other possible activities include reviewing the implementation of measures that may arise from mine safety reviews (as was the case in NSW and could be the case with the present Royal Commission) or deciding on priority issues to be explored in the medium to long term. As in other jurisdictions, working parties can be set up or expert consultants engaged to look at particular issues and report back."

b. Comparable jurisdictions have a process for pre-operational assessment and approval of proposed health and safety systems. Evidence to the Commission has reported[66] that in Queensland:

> "The CMSH Act and the CMSH Regulation are very prescriptive about the requirements for coal mine operations and mining companies are required to submit detailed plans on all aspects of the proposed mining operation to the Queensland Government prior to the approval (or otherwise)".

c. Comparable jurisdictions have had extensive experience of, and a stronger focus on, a more systematic approach to OHS[67] in high hazard industries. Professor Quinlan notes[68]

> "In sum, there is a clear trend to recognizing the value of a more systematic approach to OHS management in mining (reflecting a more general trend), in regulatory frameworks, notwithstanding some concerns with system design and implementation. …..In some jurisdictions the requirements are more developed, impose additional obligations or set higher standards with regard

[64] Supra at paras 129-139

[65] Supra at para 139

[66] White Timothy David Witness statement CFMEU0001/9 at para 31

[67] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour at paras 88-107

[68] Supra paras 106-7

> to mines (for example in Queensland).
>
> ..It is fair to say that the regulatory framework in New Zealand to implement such systems is less developed than a number of other jurisdictions and therefore provides less guidance to employers."

d. There is a stronger interpretation and enforcement of the general duty tests[69] (c.f. HSE Act 'all practicable steps' test), assisted by prescriptive regulations and higher monetary penalties, by the comparatively better resourced regulators in the other jurisdictions.

e. Comparable jurisdictions have a better balance between performance and process standards on the one hand and prescriptive standards on the other[70]. The general duties in the Act are invariably supplemented by prescriptive regulations. Professor Quinlan observes[71] that in an industry like mining where the major hazards and appropriate control measures are well known there should be a greater emphasis on prescriptive regulation:

> Given this, and the fact the major hazards in mining are relatively well known (and a number of control measures well understood), there is an argument that more emphasis should be laid on prescriptive regulation with regard to such hazards ..... Where control measures are clearly known in relation to hazards a requirement that they should be applied is unambiguous and assists management in terms of compliance"

f. The comparator countries' legislation all provide for strong worker participation provisions in the form of check inspectors and full-time roving safety representatives. As Professor Quinlan notes[72]

> "In high hazard industries marked by serious disasters in the past, such as mining, the importance of providing workers with meaningful 'voice' has often been seen by policy makers as deserving special attention beyond that found in general OSH laws"

Professor Quinlan reviews[73] check inspector/roving safety representatives systems and their performance in a number of

---

[69] White Timothy David Witness statement CFMEU0001/9 at para 31

[70] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour at paras 37-56

[71] Quinlan Michael, *Survey Report Reviewing Evidence from High Hazard Incidents and Matters Related to Regulation in Underground Mining* DOL4000010002 at para 224

[72] Quinlan Michael, *Report Comparing Mine Health and Safety Regulation in New Zealand with other Countries* Prepared for the New Zealand Department of Labour at p 47

[73] Supra pp47-51

jurisdictions and, of particular relevance, notes that "[s]ite check inspectors are seen (by the Department of Primary Industries) to play a vital role in mine safety in NSW", and that "[b]eyond this, legislation in both Queensland and New South Wales have provided for the appointment of (union nominated and funded) full-time roving safety representatives, with similar wide-ranging powers, known as (in coal mining) Industry Check Inspectors in New South Wales and Industry Health and Safety Representatives in Queensland". Professor Quinlan expressed the view[74] that their powers "were used astutely and not abused". He also notes that "In Sweden – often regarded as the world leader in OHS – for example a system of regional (and roving) industry-based safety representatives has operated successfully over many years".

3. The particular features of the New Zealand mining environment and industry

> *Are there particular features of the New Zealand mining environment and industry which need to be taken into account in making a comparative evaluation against overseas regimes?*

The particular features of the New Zealand mining environment and industry which need to be taken into account are its smallness, but also its apparent geological complexity. The smallness suggests the desirability of a close regulatory relationship with one of the comparator regulators (Queensland) and the need for a robust regulatory regime to reflect the risks associated with the geological complexity.

The nature and form of regulatory arrangements

4. Additional regulatory arrangements needed

> Aside from the Health and Safety in Employment Act 1992 (HSEA), what additional regulatory arrangements are needed in relation to the mining industry?

Aside from the Health and Safety in Employment Act 1992 the CTU submits that the following regulatory arrangements are needed in relation to the mining industry;

a. Much more comprehensive and prescriptive regulations are required and appropriate for this industry. As Professor Quinlan has observed:[75]

> Where control measures are clearly known in relation to hazards a

[74] Supra p 49

[75] Quinlan Michael, *Survey Report Reviewing Evidence from High Hazard Incidents and Matters Related to Regulation in Underground Mining* DOL4000010002 at para 224

requirement that they should be applied is unambiguous and assists management in terms of compliance"

It is also the view of the CTU that, in a situation such as Professor Quinlan describes in the coal mining industry, there should be a positive legal obligation in the Act to regulate for the protection of workers, rather than simply a power to regulate.

Such regulations should reflect, as far as possible, similar regulations in the comparator jurisdiction; in effect creating a co-regulatory arrangement.

b. A well-resourced industry tripartite body to undertake a review and advisory role, engage in the process of standard setting and recommending changes to OHS standards, promoting OHS education and training etc.

c. A robust check inspector/roving health and safety representative system also reflecting, as far as possible, the existing systems in the comparator jurisdiction.

5. The form of the regulatory arrangements

With reference to the form of the mining industry regulatory arrangements:

- *at what level, and when, is prescriptive regulation appropriate? what type of regulatory arrangements (regulations, approved codes of practice, codes of practice and industry standards) are most appropriate?*
- *should a "safety case" requirement or components thereof be included as an aspect of the mining industry regulatory arrangements?*
- *if so, what form of requirement is appropriate and should the safety case be subject to review, or approval, by the regulator or an independent third party?*

The CTU makes the following comments regarding the Commission's policy questions on the form of mining industry regulatory arrangements:

a. Prescriptive regulation is appropriate at the level of both regulations and approved codes of practice made under the Act pursuant to Sections 20 and 21. The Quinlan point that in the mining industry where hazard control measures are clearly known a requirement that they should be applied is unambiguous and assists management in compliance, the concern of Minister of Labour Kate Wilkinson [76] that business representatives have signaled their concerns that uncertainty about complying with the law compromises health and safety". It would

[76] *Keeping Work Safe* Department of Labour 2009 http://www.dol.govt.nz/PDFs/keeping-work-safe.pdf

also address the concern expressed to this Inquiry by Gunningham and Neal[77] that the failure of the Department of Labour to develop approved codes of practice has meant that "not only some duty holders (particularly small and medium sized enterprises) but also inspectors themselves lacked, and to a significant extent still lack, sufficient guidance in discharging their respective responsibilities[78]."

b. For the same reason the CTU considers that regulations and approved codes of practice under the Act should be the preferred instruments rather than the informal code and guideline arrangement which the Department of Labour has encouraged. This has included Codes and guidelines in the coal mining industry developed by Minex. As Gunningham and Neal caution[79] "there is a risk of conflict of interest between industry's concern to minimise costs (which might result in the creation of low standards or no standards at all) and the public (and worker) interest in improved occupational safety and health outcomes. Such codes might, for example, result in the lowest common denominator approaches and a de facto lowering of the general duty standard of care". For this reason the standards and the approved codes and regulations should be developed in a properly resourced tripartite industry process.

c. The CTU has earlier noted that Professor Quinlan in a report[80] to the Department of Labour has recommended the option of safety case review in situations where there are "challenging" mining conditions", and we have proposed a form of safety case assessment as part of a pre-operation approval process. However, the CTU has also noted the evidence to this Inquiry[81] that there appears to be a robust pre-operational process in place in Queensland and accepts that such a process may be adequate and preferable if a co-regulatory arrangement is developed between the New Zealand and Queensland regulators. On the question of whether a safety case approach should be applied more generally in the mining industry the CTU notes that such a system has not yet been applied in other jurisdictions and

[77] Gunningham and Neal supra at paras 57 and 70

[78] Gunningham and Neal supra at para 76

[79] Gunningham and Neal supra at para 63-64

[80] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003/17 at para 36*

[81] White Timothy David Witness statement CFMEU0001/9 at para 31

would prefer to leave consideration of its merits to a tripartite industry deliberation taking account of views from Australian regulators and the advice from Professor Quinlan.

d. The CTU suggests that a safety case system would best be considered in conjunction with Australian regulators but would certainly see any safety case being subject to approval by the regulator, or an expert appointed by the regulator.

6. Employee Participation Provisions

> Do the employee participation provisions in Part 2A of the HSEA require improvement and, if so, in what respects?

The CTU strongly submits that the employee participation provisions in part 2A of the HSE Act require improvement in relation to the general health and safety representative system provided for, but also to provide for an enhanced check inspector/roving health and safety representative system as described by Professor Quinlan in his report to the Department of Labour reviewing the 2006-9 Mine Safety Review:[82]"

> "In sum, in the light of my review of the evidence (and regulatory frameworks) I think that the findings and recommendations of the 2006-9 mine safety review on employee participation should be re-considered. There is a case for strengthening the regulatory requirements by establishing a tripartite advisory body, requiring consultation with regard to risk assessment about changes to work conditions that could have OHS effects, and establishing a system of district and mine site check inspectors with appropriate training and powers".

a. Enhancing the current provisions of general application

As already noted in this submission Professor Quinlan advised the Department of Labour[83] that the participatory provisions in the HSE Act are "arguably 'inferior' or less 'demanding' to those found in comparable OHS legislation" and the CTU submits that the specifics of improvements to the employee participation provisions in Part 2A of the Act should be the subject of detailed consultation with, and discussion at, the Workplace Health and Safety Council but should include:

- Extending the function of Health and Safety representatives (Schedule 1A Part 2) representation rights to include all workers (e.g contractors) -

[82] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at para 71*

[83] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at para 66*

- Strengthening the requirement on employers to consult Health and Safety Representativeswith regard to process and systems such as risk management and osh systems – as recommended by Quinlan[84]

- Requiring the inspectorate to recognize and consult with Health and Safety Representatives –

- Requiring the inspectorate to recognize, engage and cooperate with Health and Safety Representatives –

  Note. It wasn't until 2009 that the DOL (in the *Keeping Work Safe* publication[85]) acknowledged that "employee participation in health and safety is an effective means of driving compliance with the HSE Act and making places of work safer and healthier" and that "we will make it a priority for our inspections to ensure that employers have given their employees reasonable opportunities to participate in their workplace's health and safety or have employee participation systems in place…Our inspectors will also work closely with trained health and safety representatives in places of work". A Practice Note to this effect was issued in March 2010 but the CTU has been little evidence of this being implemented in practice.

- Requiring the regulator (DOL) to fund the proper training of Health and Safety Representatives under the HSE Act.

- Requiring the regulator to enforce Part 2A of the HSE Act which requires, inter alia:

  - Every employer to provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employee's place of work.

  - Every employer employing 30 employees or more (and employers with less than 30 if an employee or union requires) to have in place an agreed (within the 6 month periods stipulated in Schedule 1A Part 3) employee participation system or the default (Schedule 1A) health and safety representative system.

  Note: Section 137 of the Employment Relations Act 2000 provides

[84] Quinlan Michael, *Analysis Report: Reviewing Evidence to Assess whether the Conclusions and Recommendations of the 2006-2009 Mine Safety Review Still Relevant and Changes in Regulatory Framework the Royal Commission might consider" DOL4000010003 at para 71*

[85] Department of Labour *Keeping Work Safe 2009 p 13*

specifically for the enforcement of Part 2A by Compliance Order under the Act. It is acknowledged by the CTU that individual employees can exercise personal grievance rights under Section 103 of the Employment Relations Act 2000 and apply for compliance orders, but Section 137 clearly contemplates action by inspectors by way of compliance orders.

- Recommending the development of a Code of Practice (as anticipated in section 19B(3) and provided for in section 20 (1)(ad) of the HSE Act)

- Providing a specific power for Health and Safety Representatives to stop dangerous work

  In a comparative study on inspection regimes[86] Walters and others comment that:

  "OHS statutes in countries like Sweden and Australia have gone beyond the Robens' approach of consultation with work people to vest health and safety representatives with powers to stop dangerous work and to issue 'provisional improvement notices'".

  The authors note that although such rights are seldom used in practice (in Sweden they are invoked on average 50-100 times a year) they nevertheless add an ultimate tool for safety representatives to secure normative influence on their managers that is supported by their extensive rights of a dialogue.

- Provide Health and Safety Representatives with a power to issue a Provisional Improvement Notice in addition to their current power to issue a Hazard Notice.

  Note. The 1996 (Bradford) Select Committee Review of the HSE Act[87] recommended that the Provisional Improvement Notice scheme, as used in the state of Victoria, be considered by Government but only the weaker Hazards Notice process was included in the HSE Act in 2002.

- Providing Health and Safety Representatives with effective legal protection against discrimination and unjustified actions (including dismissal) if there is any *cause to suspect that it may be related to the duties undertaken as an HSR.*

[86] Walters D, Johnstone R, Frick K, Quinlan M, Baril-Gingris G, and Thebaud-Mony *Regulating Workplace Risks* Edward Elgar Publishing 2011

[87] Report of the Labour Select Committee *Inquiry into the Administration of the Occupational Safety and Health Policy* House of Representatives 1996

b. Providing special enhanced arrangements for high risk industries

The CTU submits that the Commission recommend that a system of site and district check inspectors be put in place in the coal mining industry based on the comparator Queensland jurisdiction. As the recognized international authority on worker participation systems Professor Walters[88] has advised: these forms of participation:

> "would help to improve the operational effectiveness of the multi-level risk management practices required to help prevent the occurrence of such tragedies as Pike River in the future".

The CTU submits that, as with the other regulatory arrangements which need to be developed, such a check inspector system should closely model that currently working (satisfactorily) in Queensland. It is desirable that the system be subject to consultation in the proposed tripartite industry committee before being put in place by regulations under the HSE Act.

The CTU considers that similar enhanced worker participation systems should also be considered in other "high risk industries" (however that may ultimately be defined ...and may include, for example, forestry in the private sector and corrections in the public sector) with a model appropriate to the industry being put in place by specific regulations under the HSE Act.

The establishment of regulatory arrangements

7. Oversight responsibility

> Who should have primary responsibility for establishing and updating the mining industry regulatory arrangements for:
> a. occupational health and safety;
> b. prospecting, exploration and mining permits.

The CTU considers that the Workplace Health and Safety Council should be responsible for providing oversight, and primary responsibility for establishing and updating the mining industry regulatory arrangements for occupational safety and health.

The CTU earlier in this submission refers to the need for a "task force" approach to addressing the substantial deficit in the development of appropriate health and safety standards in the form of regulations and approved codes of practice under the HSE Act. The CTU proposes that this task force role be given by the Minister of Labour, together with the necessary

[88] Walters David *The Role of Worker Representation in Managing Health and Safety – A report in support of the EPMU submission to the Royal Commission of Inquiry on the Pike River Coal Mine Tragedy*

resourcing and powers, to the existing tripartite Workplace Health and Safety Council.

This would be consistent with the requirements of International Labour Convention 155 which was ratified by the New Zealand Government in 2006, and with best practice as reflected in the reports of experts which have been made available to this Inquiry.

The WHSC should be properly constituted as a statutory body with appropriate powers, functions, and staffing. Its powers would include the appointment of industry tripartite health and safety committees with appropriate powers, functions and resourcing.

The CTU has no comment on who should have primary responsibility for establishing and updating mining industry regulatory arrangements for prospecting, exploration and mining permits.

8. *Tripartite Involvement*

> Accepting the need for tripartite involvement, which bodies or individuals should participate in the drafting and review of the mining industry regulatory arrangements, and how can this best be achieved?

The most representative bodies of employers and unions should participate in the drafting and review of the mining industry regulatory arrangements, together with regulatory officials (including inspectors) and independent expertise (e.g.academic) as required. This would be undertaken as an industry tripartite committee appointed by the WHSC. If a regulatory partnership is developed with, for example, Queensland, then tripartite representatives, officials and experts from that jurisdiction would need to be involved in the process.

9. *Cooperation with Australia*

> Generally, would there be advantages in greater cooperation, coordination and sharing of expertise with Australia and its States in relation to the regulation of the mining industry? If so, how might a closer relationship be achieved? Would there be any disadvantages?

The CTU submits that there are very good reasons for greater cooperation, coordination, and sharing of expertise with Australia and its States in relation to the regulation of the mining industry. It is clear from the reports made available to this Inquiry by experts such as Professors Quinlan, Walters and Gunningham that we have a lot we can learn and benefit from a closer working relationship with the regulators, and social partners, in the Australian States, and with the Federal authorities as work is undertaken to put a common

occupational safety and health regime in place. Their regulatory regimes and practice reflect current international best practice.

A closer regulatory relationship is also entirely consistent with the Closer Economic Relationship between Australia and New Zealand. The two economies are becoming increasingly integrated and there is, in practice, a single Australasian labour market. Co-regulation in occupational safety and health is a logical objective in this context.

B. The interaction of mining and other law and practice

How do overseas jurisdictions manage the interface between mining and other legal requirements (including conservation and environmental) with reference to:

a. the permitting of prospecting, exploration and mining activity;
b. occupational safety and health.

Should applicants for prospecting, exploration and mining permits be assessed as to their capacity (financial, managerial and technical) to develop the mine proposal and to do so in a safe manner?

If so, how should this assessment be carried out, by whom and should there be a sharing of information between regulators?

The only comment the CTU has in relation to the Part B questions is to repeat the point that it is a bitter irony that while the Crown Minerals Act requires a permit to ensure "a fair financial return for the Crown from the extraction of coal", and the Resource Management Act requires resource consents to ensure that there is avoidance, remediation, or mitigation of adverse environmental effects, there is no similar process in the Health and Safety in Employment Act for the protection of the health and safety of the workers in the operation.

The CTU submits that, whether it is a form of safety case or the very prescriptive requirements of the Queensland jurisdiction[89], there is a need to have a pre-operation approval process which includes an assessment of the financial and technical capacity of the operator to implement the required health and safety systems and protection.

[89] White Timothy David Witness statement CFMEU0001/9 at para 31

Appendix One

Funding Health and Safety

Bill Rosenberg, CTU Economist

28 November 2011.

The existing HSE levy

The existing HSE levy is set at 5 cents per 100 dollars of leviable earnings. It has been at this rate since 1 April 1999 when it was reduced from 6 cents. The levy is "payable by employers and the self-employed to meet the costs of the administration of the Health and Safety in Employment Act 1992" according to the Health and Safety in Employment (Rates of Funding Levy) Amendment Regulations 1999. The definition of "leviable earnings" is the same as those for ACC levies[i]. (The Act also provides for a levy for shareholder-employees, but there does not appear to be a levy set for this group.)

A description of the levy provided by the Department of Labour (DOL) [i] is as follows:

1. The HSE levy is a mechanism for recovering the Crown's cost of delivering health and safety services and interventions. It is provided in s59 of the HSE Act, paid to the Crown by employers and the self-employed, and collected alongside one of the ACC levies. The HSE (Rates of Funding) Regulations 1994 prescribe the levy rate, currently set at 5c per $100 of leviable earnings.

2. The HSE levy does not directly fund health and safety services, as these are funded through the Budget/Vote processes. It is nevertheless closely linked to health and safety costs because of its statutory purpose of cost recovery.

3. The Department manages the levy, and ensures that levy revenue is aligned with health and safety costs on an ongoing basis. In December 2007 Cabinet approved establishment of a memorandum account to allow levy revenue to be smoothed across financial years [EDC Min (07) 29/14 and CAB Min (07) 45/5 refer]. The memorandum account balance is reported in the Department's Annual Report in the notes to the financial statement.

4. The memorandum account tracks the costs of workplace health and safety activity against HSE levy revenue. A surplus could result from accumulated revenue that is not offset against costs, either through leviable earnings being higher than forecast, or from reduced and/or cheaper services. If there is a significant surplus beyond what is appropriate for smoothing, Cabinet may decide to reduce charges on levy payers through a reduction in the levy rate.

The DOL in its Briefing to the Incoming Minister in 2008, stated (p.26) that "health and safety

operations are funded by an appropriation from Government that is offset by" the levy. Some of the levy is also spent by the Civil Aviation Authority and Maritime New Zealand.

The levy and expenses allocated against it are as follows (from DOL annual reports 2002-2011).

HSE Levy ($000)

Year	Revenue	Expenses	Voted	Balance, year end
2002	14,697			
2003	28,085		25,569	
2004	30,259		27,859	
2005	31,843		29,067	
2006	36,694		29,067	
2007	35,950		39,305	
2008	37,977	-35,794	38,608	2,184
2009	41,138	-39,828	40,142	3,494
2010	49,017	-38,645	43,051	13,866
2011	43,802	-41,894	43,911	15,774

Source: DOL annual reports.

From 2008, a "balance" has been recorded, with this explanation:

> This notional account was established on 1 July 2007 in accordance with the Cabinet Economic Development Committee Decision EDC Min (07) 29/14. The account does not hold accessible funds. It records Health and Safety in Employment (HSE) levy revenue accumulated by the Crown; offset by the amount of levy revenue spent by the Department of Labour and designated agencies (the Civil Aviation Authority and Maritime New Zealand) on appropriated HSE activity. The account balance is determined at the end of each financial year. If the balance is greater than zero it means the revenue collected to that point is higher than expenses, and conversely, a negative balance denotes higher accumulated expenses compared to revenue. The accumulated balance in the account, the forecast revenue and known future expenses to be appropriated will be considered annually in determining changes to the HSE levy rates within set parameters. The rate of the HSE levy is currently set in the Health and Safety in Employments Regulation 1994, at 5 cents per 100 dollars of leviable earnings.

From 2011/12 forward, a further line appears as revenue to the Memorandum account, providing "Crown Funding" of $2,720,000 in the year to June 2012, $3,393,000 in 2013 year, $3,270,000 in 2014, and $2,970,000 in 2015. This appears inconsistent with a record of actual levies but is explained as being "a result of changes made during the last budget. As functions such as the Partnership Resource Centre were cut and the money retained, government effectively subsidized health and safety service delivery. This line reflects the fiscal impact of these changes on HSE expenditure." [i]

As is seen in the above table, the actual expenses (which include DOL, the Civil Aviation Authority and Maritime New Zealand) bear only passing resemblance to the levies collected. In each year the expenses have been recorded, they have been less than revenue. The DOL itself states that "The HSE levy historically yields more money than is actually appropriated for health and safety activities."[i] The largest difference was in 2009/10 when revenue increased by almost $8 million (I understand as a result of a recognition of underspending of the levy in previous years) but expenses fell.

In fact the levy is passed to the DOL, which then pays it to the consolidated fund. Expenditure is governed by an appropriation like any other. The appropriation rose just 2.0 percent between 2010 and 2011 despite the large "balance" of underspent funds. The appropriation has in general been less than the levy income, and even that has been underspent. Budget estimates show that the Department of Labour partly funds it by cuts in other parts of its services.

Within the DOL, the appropriation and expenses come mainly under the Output Class "Services to Promote and Support Safe and Healthy People and Workplaces" (budget $40.901 million in 2011/12) and some under Policy Advice. There is consideration whether hazardous substances ("Safe Management of Hazardous Substances in the Workplace and Amusement Devices" which received $4.219 million in 2011/12) should also be "funded" by the levy.

The 2011 Budget showed Services to Promote and Support Safe and Healthy People and Workplaces was being partially funded from the Disestablishment of the Partnership Resource Centre, and by taking funding from Joint EEO Trust Funding, from Completion of Workplace Productivity Research and Demonstration Projects. Funds were taken from Policy Advice for work on an Adventure Tourism Health and Safety Regime. As from 2007/08 it has also been partially funded by $8,172,000 per year from "HSE Levy Proposal to use Unallocated Revenue". Over the last few years it has been "flat lined" – that is, it has not been increased other than for specific "initiatives", regardless of the increases in income from the HSE levy.

The $8,172,000, together with $184,000 used to fund Policy Advice (see below) were additional funding provided in July 2007 which "utilised forecast HSE levy surplus revenue. Consequently, the funding increase was cost neutral to Government and businesses, as the costs were met within the existing levy rate", according to DOL[i]. It was "not retained in a single cost centre but, rather, was added to a range of operational costs. These include:

- Health and safety inspectors
- Technical specialists and standard setters
- Occupational health specialists
- Engagement tools including online tools, sector engagement and awareness campaigns
- Specialist equipment
- Motor vehicles
- Training and capability
- Legal costs associated with interventions such as prosecution
- Corporate costs."

For Services to Promote and Support Safe and Healthy People and Workplaces the appropriations and expenses have been as follows:

Appropriations and expenses for "Services to Promote and Support Safe and Healthy People and Workplaces"($000)

Year to June	Total Revenue	Revenue from Crown	Revenue from Depart-ment	Revenue from other	Expenses
2003	25,070	24,938	0	132	24,897
2004	24,666	24,590	34	42	24,646
2005	25,536	25,368	147	21	24,208
2006	27,920	27,621	280	19	28,073
2007	28,471	27,994	274	203	27,916
2008	32,175	31,879	294	2	31,734
2009	35,900	35,158	740	2	36,002
2010	36,057	35,759	298	0	35,904
2011	39,202	38,297	895	10	38,873
2012	*40,901*	*39,645*	*0*	*1,256*	

Source: 2003-2011 – actuals from DOL Annual Reports; 2012 – budgets from Budget 2011.

The Performance Information for Appropriations for Vote Labour for Budget 2011 stated that "The growth from 2006/07 to 2011/12 in the appropriation for Services to Promote and Support Safe and Healthy People and Workplaces is largely due to changes in the work programmes in 2007/08 funded from the unallocated revenue associated with the Health and Safety in Employment Levy."

Services to Promote and Support Safe and Healthy People and Workplaces is defined to include "the provision of information, education and support for workplaces regarding effective workplace health and safety practice, and enforcement action to promote compliance with the Health and Safety in Employment Act 1992". (This class was renamed to the present title in 2004, from "Promoting Excellence in Self Managing Occupational Health and Safety Hazards in the Workplace".)

Policy Advice, which covers much more than Health and Safety and received a vote of $10.1 million in 2011/12, has $184,000 per year allocated to it as a result of a "HSE Levy Proposal to use Unallocated Revenue" dating from 2007/08. It is not clear how much of Policy Advice is regarded as funded by the levy however.

The HSE Levy (also known as the "OSH Levy") is collected by ACC as part of its own levy collection process[i] and paid to DOL. DOL make an annual payment to ACC for their collection costs. In practice

the levy paid to DOL for a given year relates to the prior year leviable earnings, once those are finalised. Until the year to June 2002, the levy was collected by IRD. It appears that ACC collects it at a much lower cost to DOL.

Collection Services ($000)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Actual	1,896	978	978	978	869	869	869	869	869	869	
Voted		978	978	978	869	869	869	869	869	869	869

"Voted" is as in the Supplementary Estimates except for the latest year

Source: 2002-2011 – Actuals from DOL Annual Reports; 2012 – votes from Budget 2011.

As noted above, the levy also funds expenditure in Civil Aviation Authority and Maritime New Zealand.

According to Civil Aviation's 2009/10 Annual Report, one of its roles is "Oversight administration of the Health and Safety in Employment Act 1992 and Hazardous Substances and New Organisms Act 1996 in the Aviation Sector". It carries out "management of inspections and audits under the HSE Act, including identification and follow-up of corrective actions that need to be taken by employers in the aviation sector to ensure adherence and compliance to Health and Safety Employment regulations". In 2009/10 and 2008/09 it received $440,000 in Crown funding for Health and Safety in aviation from Vote Transport. For the years since 2008/09 and budgeted out to 2014/15, $441,000 has been counted as part of CAA HSE Levy expenditure (see below).

According to its 2010 Annual Report, Maritime New Zealand has been designated under the HSE Act as "the responsible agency to administer this Act for work on board ships and for ships as places of work". Its "Output 1.6: Health and safety on board vessels" includes "to administer the HSE Act for work on board ships and for ships as places of work; to take appropriate action as required in the public interest to enforce the provisions of the HSE Act and regulations and rules made under this Act, including carrying out or requiring inspections and audits". It received $400,000 in revenue for this Output in 2009/10 and spent $800,000, resulting in a $400,000 deficit. For the years since 2008/09 and budgeted out to 2014/15, $400,000 has been counted as part of Maritime New Zealand HSE Levy expenditure (see below).

It is not clear why the levy income is not used directly to fund these activities. It could be seen as misleading those paying the levy and those who stand to benefit from it. The position is in contrast to the Migrant Levy (levied under section 399 of the Immigration Act 2009), also administered by the DOL, which most categories of migrants must pay when granted residence and whose expenditure is directly accounted for. The disconnection between HSE levy revenue and HSE expenditure does have the potential advantage of increasing flexibility in the funding of HSE activities, but the flexibility seems to have been exclusively exercised to reduce funding rather than increase it (at least over the period since 2007/08 when the comparison has been recorded). If flexibility is an overwhelming consideration, the only reason to maintain the levy is to ensure employers pay something resembling the costs of these activities. If funding for the activities was tied to levy

income, the levy would need to be actively reviewed every year instead of being left at the same rate as it has been for over a decade. The Minister of Labour, in her proposal to Cabinet for a High Hazards Unit, stated: "I review the levy rate annually", but this has not led to any change in its rate.

Taking into account all these factors, the funding of HSE is getting increasingly confused.

Existing issues

Use of the Levy

The DOL has provided this breakdown of use of the Levy revenue:

$000	2008/09	2009/10	2010/11
HSE Levy Revenue	**$41,138**	**$49,017**	**$43,902**
HSE Act costs			
DoL HS services cost	*$36,120*	*$35,906*	*$38,910*
DoL HS policy	*$2,867*	*$1,899*	*$2,143*
CAA	*$441*	*$441*	*$441*
MNZ	*$400*	*$400*	*$400*
Total HSE costs	**$39,828**	**$38,646**	**$41,894**
Surplus	**$1,310**	**$10,371**	**$2,008**

Estimates for future income and use of the levy are also available.

The High Hazards Unit

The creation of a High Hazards Unit was announced by the Minister of Labour in August 2011[i]. It replaces five existing staff with eleven. The existing staff comprise two Senior Advisors High Hazards (Petroleum and Geothermal, both of whom were about to leave), one Senior Advisor High Hazards (Extractives) and two mines inspectors (one position vacant) with a Chief Inspector and three regional inspectors in each area plus an administrative position, a business analyst and a standard setter.

The proposal the Minister took to Cabinet[i] was funded "through surpluses in the Health and Safety in Employment Memorandum Account at a cost of approximately $1.5 million in new funding annually", according to the Minister's August media release. However, the "Memorandum Account", as described above, "does not hold accessible funds". The actual funding is therefore from "an increase of up to $1.5 million in the Vote Labour appropriation, beginning on a pro-rata basis from December 2011/12" Notionally this is "met by using accumulated unallocated revenue in the HSE levy memorandum account. There is sufficient accumulated revenue in the account to fully meet the increase in appropriation, including into outyears. No increase in the HSE levy rate for businesses will be required." In fact of course, this "unallocated revenue" has been allocated by the government to expenditure elsewhere in its total budget. The funding comes from Imprest Supply in the short run, and will appear as an increase in the appropriations for the Department of Labour in the longer run,

unless the method of funding is changed.

As it stands, $432,000 of the funding for the Unit in 2011/12 and $740,000 annually in future years is coming from "reprioritised funding" within the DOL. It is not clear how much of this is simply shifting the costs of the existing High Hazard operations into the Unit.

Levy rates and funds raised

The current levy is a flat rate (currently $0.05) per $100 of leviable earnings, where "leviable earnings" has the same meaning as for ACC levies. In the year to March 2011, there were $89,549 million in leviable earnings. Thus every 1 cent of a levy per hundred dollars would have raised $8.95 million in that year. Using ACC projections, each cent of a levy would raise the following over the year to March 2011 and the next five years.

Revenue raised per cent of levy ($m)

Year ended March	Estimated Leviable earnings	Each cent/$100 of levy raises
2011	89,549	8.95
2012	91,421	9.14
2013	94,089	9.41
2014	98,056	9.81
2015	102,760	10.28
2016	107,866	10.79

Source: "ACC Work Account 2012/13 Technical Report on Levy Setting Methodology", Actuarial Services, ACC, 22 July 2011, p.31.