NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Transport and Industrial Relations
Select Committee

on the

Health and Safety (Pike River Implementation) Bill

P O Box 6645
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Preface

The appalling record of health and safety in New Zealand hasn't come about because of unions or workers misusing voice or power allowing workplaces to become unsafe. It is widely acknowledged now that the severe failings at Pike River and in other industries such as forestry occur when management, boards of directors and the regulator disregard the interests of workers and fail to take, in some cases, even the most basic safety precautions.

After Pike River, the public have demanded change. The Inquiry was absolutely clear: there was no check and balance. When management, owners and the regulator all failed, there was no backstop. The workers were contracted, were scared, were bullied into not speaking out. From the evidence, everyone knew the mine was unsafe – the geologists, the experts, the management, the community and the workers – but the power sat in the hands of a few who either failed in their statutory duties in the case of the regulator, or who profited from the health and safety failings (the management). Those who may have wanted to raise issues were absolutely clear as to the consequences of this – they strongly believed, and were probably accurate in that belief that at best, no one would listen, or at worst there would be recriminations. Performance pay systems and production pressure reinforced this. Mining should have been stopped at Pike River. Day after day the workers should have been in a position to say 'we will not do this work, it is dangerous'. They were not.

The Inquiry and the subsequent Taskforce made strong recommendations to put in a backstop. A strong stand alone agency with a tripartite board – a challenging structure that could fearlessly insist that the regulator did its job; strong worker representation with real rights and support including the equivalent of union check inspectors; proper regulation; and empowered mine rescue experts. This kind of structure is also needed to address the many failings identified by both reviews.

This law does not do this. While it does address the issue of mine rescues and the other points to a degree, it once again compromises the backstop. It assumes the narrative that the workers are the problem and giving their union or their representatives real say, real power to stop the work if it is dangerous, to manage the agency jointly with employer representatives to demand performance, is a step too far. It disregards what happened at Pike and what is happening throughout New Zealand and assumes workers cannot be trusted with real power to make their own workplaces safe.

It is hard to understand why this continual subjugation of the right for workers to take their safety into their own hands continues. One view is that some industries in New Zealand rely on unsafe work practices as part of their economic model as was the case in Pike River and that Government knows this and tacitly supports it. Another is that Government is of the view that workers will somehow misuse powers relating to health and safety to achieve other workplace improvements (for example as a bargaining tool). There is no evidence of this and it disregards that in fact the opposite is what is actually occurring – employers are using unacceptable health and safety risk-taking to increase returns.

We are calling on the Government to rethink its position on the role of unions and workers in health and safety and to see them as part of the solution rather than reluctantly include some provisions which again will see the safety of workers compromised. It is time to be brave and take bold steps. The Government has promised the families of the Pike River miners that it will fully implement the inquiry recommendations but is stumbling at the first hurdle. It should be remembered that it was workers that lost their lives in the Pike River mine.

Summary of main recommendations

I. Part One:

A. The bill should follow the recommendations of both the Royal Commission of Inquiry into the Pike River Coal Mine Tragedy ('the Pike River Royal Commission') and the Independent Taskforce on Workplace Health and Safety ('the Taskforce') that the Government should establish a tripartite board.

B. The board should have up to 10 members including at least two representatives each from the most representative organisation of workers and the most representative organisation of employers in New Zealand.

C. The phrasing from the Safe Work Australia Act should be incorporated into the legislated description of the appointment process to the board.

D. A tripartite board removes the necessity for cl. 8(1) which sets up an advisory group like that of the Workplace Health and Safety Council (WHSC), so it should be deleted.

E. Clause 8(2) providing for advisory groups should be subject to a general requirement for adherence to the principle of tripartism which would ensure tripartism throughout the system.

F. WorkSafe's main objective should be strengthened 'to promote and contribute to securing the health and safety of all people at work and in, or in the vicinity of the workplace, and the object of the Health and Safety in Employment Act'.

G. The bill should implement the Taskforce's functions, powers and duties for WorkSafe New Zealand in full. The proposed functions are inadequate.

H. In particular, WorkSafe New Zealand should have the power to recommend Approved Codes of Practice to the Minister, having taken them through the full process of developing and consulting on them, and have the role of developing or reviewing regulations and providing advice to the Minister on their approval.

II. Part Two:

A. Occupational health risk monitoring should be required to be undertaken by an independent organisation and the results automatically available to workers and the new regulator.

B. The rights of worker representatives to access information should specify classes of information including but not limited to copies of safety and health management system documents, including principal hazard management plans, standard operating procedures and training records.

C. Proposed s.19R(3) should be amended so that the election of health and safety representatives in mining operations is mandatory; and that the default health and safety representative system for mining be put into primary legislation, not regulation.

D. Health and safety committees should be required in a mining health and safety participation system if there are 30 or more mine workers, or if workers have requested one. This would align mining with the default system set out in the HSE Act at Schedule 1A(2)(b).

E. Power to designate certain operations as not quarries or tunnels for the purposes of the legislation should be in the hands of the regulator with robust checks and balances on applications from worksites for such exemptions.

F. The proposed s. 19Q (5) listing relevant matters for an operator when considering provision for mine workers to participate effectively in health and safety should include subsection (f) from the existing s. 19B(5) which it replicates, requiring regard for 'the willingness of employees and unions to develop employee participation systems'.

G. There should be no requirement for persons elected to the role of mine health and safety representatives to already be qualified, but they should not be able to take up the role until they have acquired the required qualifications. Further, there should be a requirement of the mine operator to provide training for elected representatives in order to acquire the required qualifications.

H. The functions of mining health and safety representatives must be set out in legislation. The system should not allow negotiations outside the Act to create site specific functions and powers that are weaker.

I. Site and industry health and safety representatives should have immunity while carrying out the duties and functions as prescribed.

J. Industry health and safety representatives should have the power to issue provisional improvement notices.

K. Both industry and site health and safety representatives should be able to request a judicial review of any decision to overrule a notice they have issued.

L. There should be a positive duty on the mine operator to provide resources and allow time for the health and safety representatives to perform their duties.

M. Procedures and reasons for removing a health and safety representative from office should be more tightly defined.

N. Industry health and safety representatives should be required to either be appointed by a union or have the endorsement of a working party

comprising the regulator and the CTU to ensure the representative's independence.

O. The establishment of the New Zealand Mining Board of Examiners should be based on the tripartite model.

III. Part Three

A. The CTU supports the extension of the Mines Rescue Trust as set out in the Bill.

B. It should be made clearer that the Mines Rescue Trust is the lead organisation which has the responsibility to take control of a disaster situation.

1. Introduction

1.1. This submission is made on behalf of the 37 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 340,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. 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.

1.3. As the collective voice of workers, unions have a critical role in ensuring health and safety. This is recognised by International Labour Organisation Convention 155 on Occupational Health and Safety which mandates consultation between unions (through the CTU), employers (through Business New Zealand) and the Government in the design and implementation of health and safety law.

1.4. The CTU has a long-standing commitment to and expertise in occupational safety and health both as the representative body for the majority of union members in New Zealand and as the representative workers' body to the International Labour Organisation ('the ILO'). As a signatory to ILO Convention 155, the Government is required to consult with the CTU (and Business New Zealand) to 'formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment' (Article 4).

1.5. The CTU provides full workplace health and safety representative training courses. More than 27,500 health and safety representatives have been trained by the CTU since 2002.

1.6. The CTU was represented on the Independent Taskforce on Workplace Health and Safety ('the Taskforce') which released its recommendations in April this year.

1.7. We note the Taskforce's fundamental emphasis on the importance of tripartism as a guiding principle throughout the health and safety system. The Taskforce identifies one of the prerequisites of a high-functioning health and safety system as:

> **Tripartism throughout the system**
>
> 178. Our vision is that tripartism is inculcated throughout the workplace health and safety system. Tripartism involves the government regulator, employers and unions working together to improve workplace health and safety outcomes. The UK has shown respect for tripartism for 40 years. Tripartism is also the dominant model in Australia. The Royal Commission found that a key reason for DoL being an ineffective regulatory body was that it had 'no shared responsibility at governance level, including the absence of an active tripartite body'. Tripartism needs to be reflected in engagements between the Government and peak representatives of employers and workers, and in the governance of the regulators. Similarly, the implementation of the Robens model needs to be done on a tripartite basis, with representatives of employers and workers actively engaged in the development of regulations, ACoPs and guidance material.

1.8. It is crucial that this lesson is learned and tripartism is not watered down.

1.9. This submission has been partly informed by discussion with our affiliate, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union (EPMU). The EPMU merged with the National Union of Miners in 1995. There are over 1,000 workers within the union working at coal and metalliferous mines, both open cast and underground. We have read its submission and fully support it.

1.10. Another affiliate, the PSA, represents many of the Ministry of Business, Innovation and Employment ('MBIE') staff affected by the creation of the new health and safety agency, WorkSafe New Zealand. We also support the direction of its submission.

Part One: WorkSafe New Zealand

2. WorkSafe New Zealand – General comments

2.1. To meet New Zealand's ILO obligations under Convention 155 it is essential that the new workplace health and safety agency has a tripartite governance board.

2.2. Tripartism in both governance and the agency's systems are vital to creating a new health and safety system which is both successful in significantly reducing harm to workers and in sustaining and continually improving on that success. There are several reasons for this but two are foremost:

2.2.1. Representatives of workers and employers bring expertise, direct experience of the workplace, and commitment to the health and safety system which is not otherwise readily available.

2.2.2. The government and agency will not get buy-in and commitment to the needed changes to the health and safety system if representatives of the principle parties in the workplace are not present at vital decision-making levels. As is recognised in international ILO conventions, being representative (not just being a worker or an employer) is essential to this if decisions are to be seen to have validity and standing.

2.3. These arrangements would act as checks and balances in the work of the new agency. Executed well, they can be far more effective than standard audit and Crown monitoring arrangements because of the crucial interests they represent, and the knowledge they have of both the health and safety system and New Zealand workplaces.

2.4. The benefits of tripartism have been summarised by Ayres and Braithwaite[1] as follows:

[1] Ian Ayres and John Braithwaite, 'Tripartism: Regulatory Capture and Empowerment', *Law & Social Inquiry*, Vol. 16, No. 3. (Summer, 1991), pp. 435-496.

a. tripartism creates stable regulatory communities which minimize the impact of capture and corruption and create relatively sustainable regulatory arrangements,

b. tripartism establishes mechanisms that modify participants' behaviour in ways that reduce and manage attempts to 'game' regulatory arrangements,

c. tripartism delivers incentives to develop mutual understanding, trust and engagement between actors,

d. tripartism allows the identification and sanctioning of those who would 'game' or seek to usurp tripartite arrangements,

e. as an effect of improved trust and communication, tripartism allows and encourages actors and agencies to monitor outcomes emerging from co-operation.

2.5. The Health and Safety Executive ('the HSE') in the United Kingdom, which has tripartite arrangements embedded in its board, advisory structures and working arrangements is recognised as one of the most successful national health and safety agencies in the world.

2.6. We are sure that the Government does not want to embark on major changes to the health and safety system and risk having it undermined by lack of confidence in the decisions that are made. It would be far better, from the outset, to recognise the need for tripartite structures that recognise the place of the most important participants in the workplace in the decision making concerning workers' health and safety. The absence of tripartism has been widely recognised as one of the weaknesses of the current law and a failing when it was enacted – this mistake cannot be repeated.

2.7. While we are pleased that a nominee with the support of the CTU will be appointed to the Interim Board and trust this will continue to the statutory board, it is in no way satisfactory to have to rely on grace and favour in matters of such importance. The absence of legislated guarantees makes the

holder of the position vulnerable and less able to take the positions he or she needs to take to give independent and fearless advice.

2.8. It is essential that the principle of tripartism is recognised at the level of governance, and throughout the agency's structure and its way of working.

2.9. The recommendations from both the Royal Commission of Inquiry into the Pike River Coal Mine Tragedy ('the Pike River Royal Commission') and the Taskforce are clear on these principles, and in particular that the Government should establish a tripartite board.

2.10. This bill fails to do that.

2.11. The Pike River Royal Commission identified New Zealand's failure to have effective shared governance of health and safety policy as a contributor to the overall failure of our health and safety system.

2.12. In identifying the problem, the Pike River Royal Commission said:

> In summary, New Zealand lacked effective shared governance, despite its importance being recognised in the DOL 10-year strategy. As Robens concluded 40 years ago, advisory committees have little influence; an executive board is required if there is to be effective participation in decision-making.[2]

2.13. Regarding the reasons behind the inspectorate's ineffectiveness the Commission found that:

> DOL has been ineffective as the regulator of health and safety in the underground coal mining industry and its strategic approach to health and safety in general provides cause for concern. The reasons include:… no shared responsibility at governance level, including the absence of an active tripartite body…[3]

2.14. The Royal Commission expected that the decision making body of the Crown Entity would include representatives from workers' organisations. The option is quoted in full below:

> **Third option – a Crown entity**

[2] Pike River Report, Vol 2, p.292
[3] Pike River Report, Vol 2, p.296

The minister's proposals recognise that in international best practice responsibility is shared between employers, workers and regulators. This approach is at the heart of the 1972 Robens report, which identified that:

> *the 'user interests' in this field – that is to say the organisations of employers and workpeople, the professional bodies, the local authorities and so on – must be fully involved and able to play an effective part in the management of the new institution. A principal theme … is the need for greater acceptance of shared responsibility, for more reliance on self-inspection and self-regulation and less on state regulation. This calls for a greater degree of real participation in the process of decision-making at all levels. … It is essential, therefore, that the principles of shared responsibility and shared commitment should be reflected in the management structure of the new institution.*

18. Lord Robens recommended governance by a board comprising a chairman, regarded by the public as authoritative about health and safety, an executive director and a number of non-executive directors. Their expertise would encompass the industrial management, trade union, medical, educational and local authority spheres. All members would be involved in policy and decision-making and implicated in the decisions made. An executive, not advisory, board was needed:

> *The distinction is vital. It is no secret that the main representative advisory committees which currently provide advice to government in this field … have not been altogether successful. They have met infrequently. They have no executive function. The fact of their existence has apparently done little to reduce the pressures which lead to protracted consultation on new or revised statutory regulations ... Representative advisory bodies of this kind have no way of ensuring that their advice really affects what the Government actually does … What is needed is participation in the actual making of decisions, both at technical level … and also in the overall management of the system, at the level where policy is determined.*

These principles are reflected in the current structures of the UK Health and Safety Executive.

19. If the health and safety regulator were established as a Crown entity, it would be directed by a focused executive board appointed according to the general criteria set out in the Crown Entities Act 2004. These require board members to have appropriate knowledge, skills and experience which, in this case, would include recognised health and safety expertise. Unlike the other two options, the Crown entity option would enable that expertise to be directly involved in setting policy and

strategies. The board would oversee the reform programme, set strategy and performance measures and appoint the chief executive.

20. The minister would appoint board members for fixed terms. The board would have independent statutory responsibilities, for example in the audit and inspection programmes, which would be delegated to the chief executive.

21. The minister would approve the regulator's strategic statement of intent and the regulator would report regularly to the minister. It would provide an annual report to Parliament. It would be monitored by the ministry on behalf of the minister. The ministry would give the regulator advice and support. On policy advice and legislative reform, the regulator would work closely with the ministry and would bring direct experience from its operations.

22. The commission has considered which form of Crown entity would be most appropriate. Two other health and safety regulators, Maritime New Zealand and the Civil Aviation Authority, are classified as Crown agents, a form of Crown entity with the least independence from ministerial direction. The new regulator could be classified in the same way. As a Crown agent, the regulator would be required by the minister to give effect to government policy and follow 'whole of government' directions.[4]

2.15. The general approach and policy outlined in option 3 is inextricably linked to the final recommendation:

To improve New Zealand's poor record in health and safety, a new Crown agent focusing solely on health and safety should be established.

- The Crown agent should have an executive board accountable to a minister.
- The chief executive of the Crown agent should be employed by and be accountable to the board.
- The Crown agent should be responsible for administering health and safety in line with strategies agreed with the responsible minister, and should provide policy advice to the minister in consultation with the Ministry of Business, Innovation and Employment.
- The ministry should monitor the Crown agency on behalf of the minister.

[4] Pike River Report, Vol 2, p.300ff

- The Crown agency should be funded by the current levies but the basis of the levies should be reviewed for high-hazard industries.[5]

2.16. It is the CTUs view that if this bill is passed into law without the appropriate amendments to ensure a tripartite board the Government will not be implementing the Pike River Royal Commission's recommendation as it was intended.

2.17. Further the Taskforce's recommendation was clear:

> 201. The new agency's governance arrangements should be reflective of stakeholders in the workplace health and safety system. To this end, the Taskforce recommends that the governance board of the new agency be constituted on a tripartite basis. That is, it includes an independent non-executive chair and has a minimum of two members representing workers, two members representing business and one member representing iwi.
>
> 202. The Taskforce also recommends that the board comprise eight to 10 people. They should be selected on the basis of their knowledge and experience in public sector governance, New Zealand's health and safety environment and the perspectives of stakeholders, and the administration of risk-based workplace health and safety regimes. The chair should have mana with stakeholders as well as being independent and expert in the area of health and safety.
>
> 203. Representative bodies of workers and businesses should be able to make nominations and have these considered by the responsible Minister. The Taskforce does not consider that members should represent their nominating constituencies. While those constituencies bring unique, important and valuable perspectives, individuals have an overriding governance responsibility as board members. The Minister should, however, be required to put in place a process for selecting the board that gives confidence to stakeholders, in particular the most representative organisations of workers and employers.[6]

2.18. Accordingly the CTU strongly recommends that the select committee follow the recommendations and amend this bill to provide for a tripartite board and for tripartism to be required as an essential part of the way the agency works.

[5] Pike River Report, Vol 2, p.303ff
[6] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 49.

3. WorkSafe New Zealand's board – cl. 7, page 8

3.1. As it stands, cl. 7 of the proposed legislation makes no explicit provision for worker representation while employer representation is made likely by reference to 'requirements for knowledge and experience of, and capability in … (d) perspectives of workplace participants … (f) business generally'. It provides no assurance of worker (employee or self-employed) viewpoints, let alone explicit representation. The phrase 'perspectives of workplace participants' is ambiguous and provides no assurance of worker (employee or self-employed) viewpoints let alone explicit representation.

3.2. The CTU recommends a larger board of up to 10 members including at least two representatives each from the most representative organisation of workers and the most representative organisation of employers in New Zealand (which is the ILO recommendation). These are recognised in New Zealand delegations to the ILO and in other contexts as the CTU and Business New Zealand. The Taskforce recommended one member representing Iwi, which we also support. In addition there should be members appointed by the Minister for their governance and workplace health and safety experience. The representatives should be nominated by their respective organisations but should, in the words of the Taskforce, 'have an overriding governance responsibility as board members'.

3.3. The Australian and UK models are informative.

3.4. The Safe Work Australia Act 2008 is of interest because of the Taskforce recommendation to base new health and safety legislation (replacing the Health and Safety in Employment Act) on the corresponding Australian model legislation (the Model Work Health and Safety Bill) which has been adopted by most Australian states. The Safe Work Australia Act 2008 which governs the Safe Work Australia agency provides for tripartism with two board members appointed from worker's organisations and two from employer organisations. The legislative sections for both sets of representatives are

drafted the same way. The section that provides for the appointment of worker representative board members is laid out below:[7]

> Appointment of workers' representatives
>
> (1) The Minister must, by written instrument, appoint a person to be a voting member who represents workers in Australia. Note: The person may be reappointed: see section 33AA of the Acts Interpretation Act 1901.
>
> Nomination of workers' representatives
>
> (2) The Minister can only make the appointment if:
>
> (a) the person has been nominated for the appointment by an authorised body; and
>
> (b) the Minister agrees to the person being appointed.
>
> (3) If an authorised body nominates a person but the Minister does not agree to the person being appointed, an authorised body (which may be the same or a different body) may nominate another person for the appointment.
>
> Authorised body
>
> (4) The Minister may authorise a body for the purpose of this section if the Minister considers that the body represents the interests of workers in Australia.
>
> (5) If the Minister does so, the body is an authorised body.

3.5. This drafting allows the Minister to authorise a representative body for the purposes of this section. This provides flexibility for a Minister to exercise a reasonable level of control. However unless the Minister recognises the 'most representative organisations' of workers and employers, the government could be in breach of our international commitments. We recommend that this phrasing be incorporated into the legislated description of the appointment process.

3.6. If the bill is mirroring the UK model of 'understandings' with few specific provisions, even the UK legislation regarding the Health and Safety Executive is more express:

[7] Work Safe Australia Act 2008, s. 15, page 10

1 The Executive shall consist of—

(a) the Chair of the Executive, and

(b) at least seven and no more than eleven other members (referred to in this Schedule as 'members').

2 (1) The Secretary of State shall appoint the Chair of the Executive.

(2) The Secretary of State shall appoint the other members of the Executive according to sub-paragraph (3).

(3) The Secretary of State—

(a) shall appoint three members after consulting such organisations representing employers as he considers appropriate;

(b) shall appoint three members after consulting such organisations representing employees as he considers appropriate;[8]

3.7. Note the words 'representing employees' rather than 'workplace participants'. The present bill is weak even in comparison to the 'understandings' based legislation in the UK.

3.8. We note however that the 'understandings' approach is based on over three decades of building trust in these appointment processes, relationships on the board, and the effectiveness of the agency itself. While this situation is one we can aspire to, at this stage in our development of workplace health and safety, where there have been gross breaches of trust as demonstrated by our record of workplace harm, tragedies like Pike River, disregard of tripartism and worker representation particularly, and ineffective funding and support for the work of our regulatory agencies, more specific provisions are called for at this time.

3.9. The proposed board is not set up to be necessarily tripartite or include worker representation. Rather the membership is almost entirely at the whim of the Minister. There is no mention of 'employee' or 'workers' let alone unions or central organisations 'most representative of workers'.

[8] Schedule 2, Health and Safety at Work etc. Act 1974

3.10. Given the background to this bill including the factors above, New Zealand should have clear and explicit worker representation on the board of its health and safety regulator. Post Pike River it is essential that we have a system with integrity and participant support.

4. Advisory groups – cl. 8, page 8

4.1. Cl. 8(1) continues to pursue the establishment of a (possibly) tripartite advisory group in a form which has been met with resounding rejection internationally and in New Zealand. The purpose of the advisory group includes being a forum for dialogue, cooperation and advice 'that represents the views of the Government, employers, and workers'. However at best this represents no change from the current model of an entirely ineffective Workplace Health and Safety Council (WHSC).

4.2. Even if this were to be the only acknowledgement of tripartism, the wording of cl. 8 does not express the ILO recommendation of 'most representative bodies'.

4.3. We reiterate the findings of the Pike River Commission and its view (quoted above) that advisory committees have little influence and an executive board is required.

4.4. The Taskforce was even more scathing. It observed that 'The Workplace Health and Safety Council is invisible and lacks impact'[9]. In recommending a tripartite board it stated:

> 204. A tripartite board constituted along the lines recommended by the Taskforce will, amongst other things, meet New Zealand's ILO obligations and provide adequate scrutiny of the new agency's performance. Therefore the Taskforce does not consider that there needs to be a separate tripartite group providing advice to the board. Nor do we support the alternative approach of an independent board that is not constituted on a tripartite basis but that is supported by a tripartite advisory group. The Royal Commission similarly concluded, 'In summary, New Zealand lacked effective shared governance, despite its importance being recognised in the DoL 10-year strategy. As Robens concluded 40 years ago, advisory committees have little

[9] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 24.

> influence; an executive board is required if there is to be effective participation in decision-making'.
>
> 205. Based on its recommendation that the board be constituted on a tripartite basis, the Taskforce recommends that the Workplace Health and Safety Council be disestablished.[10]

4.5. This group is unnecessary if there is an intention to have a tripartite board.

4.6. We recommend a tripartite board and the deletion of cl. 8(1).

4.7. Cl. 8(2) allows WorkSafe New Zealand to establish other advisory groups to provide advice to it. We strongly support the concept. Advisory groups will be essential channels to keep the agency in touch with industry and other specific knowledge, experience and expertise. We anticipate such groups being used to develop and review regulations, approved codes of practice and other guidance and advisory materials for workers, employers and the general public. Groups are likely to be needed for different industry groupings and for specific areas such as occupational health, major hazards, small and medium employers, vulnerable workers, and worker participation. Similar groups play a critical role in the Health and Safety Executive in the UK.

4.8. However, as already mentioned it is essential that these groups are constituted on a tripartite basis. This is the model used in the UK. As the Health and Safety Executive says on its web site[11]:

> **HSC Advisory committees, boards and councils**
>
> Whilst HSE provides the HSE Board with the policy, technological and professional advice that is indispensable to its functions, other expert advice comes from HSE's network of Advisory Committees.
>
> With one exception (ACDP), the Committees are serviced by HSE to help achieve the outcomes in the Commission's strategic plan. They may recommend standards and guidance and, in some cases, comment on policy issues confronting HSC or recommend an approach to a particular new problem. Some deal with particular hazard areas (e.g. toxic substances) and some with particular industries (e.g.

[10] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 49-50.
[11] http://www.hse.gov.uk/aboutus/meetings/aboutcmmittees.htm

> construction and agriculture). Each includes a balance of people nominated by employer and employee organisations and, where appropriate, public interest representatives and technological and professional experts.

4.9. Tripartism does not mean that group membership should be exclusively on a tripartite basis: for example, in most groups it will be important to have members who are subject-specific experts. Different parts of industries or occupational groups within them may also merit representation in some cases. Nonetheless, tripartism is an essential underpinning of the groups' effectiveness and credibility.

4.10. As already noted, the Taskforce clearly intended such groups to be tripartite. It stated 'Tripartism, which involves representatives of employers and workers working alongside the regulator in all parts of the system, is fundamental'[12]. It stated in its vision that 'The new agency engages well with key stakeholders and has a commitment to effective tripartism in developing guidance and support to help all parties to comply with their duties under the law, and to deter non-compliance' and 'the implementation of the Robens model needs to be done on a tripartite basis, with representatives of employers and workers actively engaged in the development of regulations, ACoPs and guidance material.'[13] This was made more specific throughout its report.

4.11. The Taskforce also recommended that the new agency

> in carrying out its functions, draw on the best available information and advice, including international experience and practice, assess the benefits, costs and risks, and consult widely, including applying the principle of tripartism.[14]

4.12. The Taskforce recommended that promoting tripartism should be one of the specified statutory ways in which the agency should achieve its objectives[15]. Further: 'when reviewing the need for or developing industry-specific

[12] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 20.
[13] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 40.
[14] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 51.
[15] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 52.

guidance and information, the new agency should collaborate with industries and unions, where possible, to promote tripartism' [16].

4.13. We therefore recommend that cl. 8(2) be included subject to a general requirement for adherence to the principle of tripartism.

4.14. The provision in cl. 8(3) that allows an advisory group to be delegated functions and powers (and then requires a board member to be a member of the group) is a useful one.

5. WorkSafe New Zealand's main objective – cl. 9, page 9

5.1. The bill states that WorkSafe's main objective is to 'promote and contribute to the prevention of harm to all people at work…'. However the Taskforce recommended that the object of the new Act should be strengthened to **secure**[17] the health and safety of workers and workplaces.

5.2. We therefore recommend that the objective of the new Act should be strengthened to be the following: 'to promote and contribute to securing the health and safety of all people at work and in, or in the vicinity of the workplace, and to the object of the Health and Safety in Employment Act'.

5.3. We recognise that the present legislation is intended to be interim pending decisions by the Government on the recommendations of the Taskforce and their implementation, and that this is legislation to establish the new agency and is not the full workplace health and safety bill. However we consider it essential that the right signals about the increased importance being given to workplace health and safety be made clear at every opportunity. This is an important opportunity to do so.

5.4. The Taskforce made a number of other important recommendations regarding the objective which we hope will be part of the new workplace health and safety act and which further strengthen the legislation. It is particularly important in the absence of those that the primary element be made much more direct, strong and positive. This can be suitably amended

[16] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 97.
[17] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 52.

when the Health and Safety in Employment Act is replaced as recommended by the Taskforce.

6. WorkSafe New Zealand's functions – cl. 10, page 9

6.1. Cl. 10 does not introduce adequate functions for a stronger regulator. It fails to implement the Taskforce's recommended specifications. They are to:

a. provide policy advice with regard to technical regulations

b. develop technical regulations and make codes of practice, and monitor and enforce these to ensure effective compliance

c. provide authoritative guidance, advice and information so as to improve certainty and predictability

d. monitor and report on how the system is working in practice, and make recommendations for improvement, including advice on a national workplace health and safety strategy

e. make recommendations to the Minister on the level and nature of any funding, including levies, fees or cost recovery, required to carry out its legislative functions effectively

f. promote and support effective worker participation

g. promote, support and co-ordinate workplace health and safety activities across appropriate government and non-government agencies

h. conduct investigations and reviews that seek to understand the root causes of accidents with a view to avoiding similar occurrences in future

i. collect, analyse and publish statistics relating to health and safety

j. promote and support health and safety related education and training

k. promote and support research into health and safety

l. promote access to competent advice

m. encourage a whole-of-life view of health and safety through the good design of plant, buildings and equipment

n. promote and support health and safety management systems, and control risks in high-risk industries and major hazard facilities to as low as reasonably practicable

o. collaborate and co-ordinate with industries, unions, sectors and communities in engaging the whole system in harm-prevention efforts

p. maintain active relationships with international counterparts and intergovernmental bodies

q. co-operate and share information with other agencies.

6.2. While the agency's functions include (cl. 10(a)) 'co-ordination across the different components of the system', it does not have the clear lead role that it requires for the effort to change and maintain the health and safety system.

6.3. We welcome it having a policy role to make recommendations, including legislative changes (cl. 10(b)), though we hope that its policy role will be broader. It will however need to be careful to maintain links with MBIE, particularly regarding any health and safety policy role it retains, and the labour inspectorate. The Health and Safety inspectors and Labour inspectors will need to work closely together.

6.4. The agency can make recommendations about the level of any funding required to effectively carry out its functions (cl. 10(d)), but not the nature of the funding (as recommended by the Taskforce, such as whether levies should be targeted towards poorly performing employers), nor on cost-recovery, nor can it advise on health and safety related funding such as the level and nature of ACC levies. These are important elements of a system design that includes incentives and penalties.

6.5. The agency does not have the power to approve ('make') Approved Codes of Practice (ACOPs), only being able to 'develop' them (cl. 10(e)) which does not go far enough. Its role with regard to technical regulations, whose development and review will be a major part of its early work, is unclear. The CTU recommends that the agency should have the power to recommend ACOPs to the Minister, having taken them through the full process of developing and consulting on them, and have the role of developing or reviewing regulations and providing advice to the Minister on their approval.

6.6. Cl. 10(i) provides for a function to share information with other agencies and interested persons. This does not expressly state whom the main parties are, particularly the tripartite partners.

6.7. There is no role in fostering tripartism and there are no functions promoting and supporting effective worker participation, carrying out diagnostic root-cause analysis investigations and reviews, collaborating with unions and other participants, encouraging a whole-of-life view through good design of

plant, directing a particular focus on major hazards, and many other functions and powers which the Taskforce recommended and which would greatly help to strengthen not only the role of the agency but the respect in which it will be held.

6.8. Neither is the new agency given powers or duties, which the Taskforce specified in some detail. We also note that the Australian model law includes a powers section that provides the power to 'do all things necessary or convenient to be done for the […] performance of its functions.'[18] Subsection 2 provides the regulator with all the powers and functions that an inspector has under the Act.[19]

6.9. It is absurd that in the whole of Part 1 of the bill covering the establishment of agency, the word 'union' is not used once despite oblique references to 'representatives' of 'persons who have duties under the relevant health and safety legislation and the persons to whom they owe duties' (10(j)), the need to represent the views of workers (8(1)), and references to collective employment agreements (e.g. clause 13). This appears to represent an ideological position.

6.10. The wording of the legislation would be much clearer if it were more direct and used plain language acknowledging the reality of the workplace.

6.11. We recommend that even at this stage, the functions, powers and duties of the agency be strengthened to those recommended by the Taskforce, while acknowledging that further submissions on such matters will be necessary.

7. Transfer of of employees to WorkSafe New Zealand

7.1. Subpart 3 concerns the transition of existing health and safety staff from MBIE to the new agency. We support the provisions and refer the Select Committee to the submission of the PSA on these matters. While acknowledging that the new agency will need to ensure that its structure and services are as effective as possible, we note that great care will need to be

[18] Part 8, The Regulator, Section 153, page 114, Model Work Health and Safety Bill.
[19] Ibid. Section 153 (2).

taken to ensure that staff who have already been through one and possibly two major restructurings within MBIE do not become demoralised by unnecessarily going through another one, such a short time later. New Zealand is desperately short of skills and experience in workplace health and safety and cannot afford to lose more of them.

Part Two: Amendments to the HSE Act 1992

8. Introduction

8.1. The Royal Commission acknowledged that employees may not have sufficient training to stop work at a mine and may worry that stopping work could jeopardise their employment. Workers need to be able to speak to a person with the right level of independence and power that enables them to speak up about health and safety without fear of reprisal.

8.2. We strongly support the Regulatory Impact Statement on this Bill where it states that:[20]

> Union representation is likely to provide for a higher level of safety communication between staff and management.

8.3. The new legislation should reflect this by encouraging union representation.

9. Mine workers to be given results of monitoring (12A) – cl. 24, page 17

9.1. The legislation should spell out that environmental monitoring results are to go to all workers but biological monitoring should only go to the worker who is being monitored.

9.2. Occupational health risk monitoring should be required to be undertaken by an <u>independent</u> organisation and the results automatically available to workers and the new regulator. Follow-up and control measures for results indicating risk need to be regulated and enforced. Occupational health risks are often monitored but followed by inaction.

[20] NZIER report – Pike River Implementation Plan draft RIS April 2013 page 21

10. Information for mine health and safety representatives (12B) – cl. 24, page 18

10.1. The new sections provide that mine operators must ensure that all mine health and safety representatives have ready access to ‘sufficient’ information regarding health and safety. The word ‘sufficient’ is ambiguous and may lead to disagreements about exactly what information is required for a representative to undertake their functions. To ensure representatives are given the information they need, mine operators should be required to provide ‘all’ information about health and safety systems.

10.2. The Queensland legislation is quite specific that the IHSRs are able to get copies of safety and health management system documents, including principal hazard management plans, standard operating procedures and training records. The bill needs to be more explicit as to the intended coverage, so there is no doubt in the minds of the SSE or Mine Manager that they must supply this documentation.

11. Training and supervision of mine workers (13AA)- cl. 26, page 18

11.1. The wording of this section is similar to that currently under Section 13 of the Health and Safety Act. However this wording is insufficient for mining operations which are high hazard. If the required training is to be set out in regulation, that should be made explicit.

12. The insertion of Part 2B – cl. 26 and 27, page 19

12.1. Cl. 26 provides that nothing in Part 2A of the HSE Act 1992 applies to a mining operation except as provided in Part 2B. A consequence is that section 19E and 19F regarding a worker’s entitlement to paid health and safety training, and the calculation of paid leave does not apply to mine workers unless they have sought to elect representatives under the new section 19R. Therefore mine workers may not have leave calculated according to sections 19E and 19F of the HSE Act 1992 unless a system has been agreed with the employer that includes a health and safety representative. Section 19E protects a workers right to training as employers

must allow 2 days paid leave each year to attend an approved health and safety course.[21]

12.2. Another consequence is that Part 1 of Schedule 1A which sets out participation systems that include representatives and committees does not need to be considered while an agreement is being made. This creates a situation in mining where there is less of an obligation to have health and safety representatives and committees.

12.3. Further, proposed s.19R(4) does not make clear how many mine workers must make a request for provision of health and safety representatives. The phrasing 'If the mine workers request' could be read as requiring every mine worker to make such a request. The current provision under 19C(a) for employers with fewer than 30 employees is for '1 or more of the employees, or a union representing them' to require such a development. For 30 or more employees, the employer is required to have an employee participation system.

12.4. The Pike River Royal Commission highlighted the importance of health and safety representatives. Rather than be discretionary, proposed s.19R(3) should be amended so that the election of health and safety representatives in mining operations is mandatory. The current provisions regarding Health and Safety Committees should also apply to mining.

12.5. In addition, there should be no requirement for persons elected to the role of mine health and safety representatives to already be qualified, but they should not be able to take up the role until they have acquired the required qualifications. Further, there should be a requirement of the mine operator to provide training for elected representatives in order to acquire the required qualifications.

13. Meaning of mining operation (proposed ss. 19M - 19P) page 21

13.1. The CTU agrees that the new regulatory regime should cover the entire mining industry along with quarrying and tunnelling. All quarries should be

[21] Health and Safety in Employment Act 1992, page 34.

within scope as the size and number of workers at a quarry is irrelevant when principal hazards are present.

13.2. The power in proposed 19P to designate that certain operations are not quarries or tunnels for the purposes of the legislation should be in the hands of the regulator with robust checks and balances on applications from worksites that want to be excluded from health and safety laws. Having this decision subject to an Order in Council means that interested operators can lobby a 'friendly' Minister and decisions may be influenced by political considerations.

14. Duty to involve mine workers in health and safety matters (s. 19Q) page 23

14.1. Proposed s. 19Q (5) outlines relevant matters to consider when an operator provides **reasonable opportunities** for mine workers to participate effectively in ongoing processes for the improvement of health and safety in mining. This section replicates s. 19B(5) in the existing HSE Act 1992 with the omission of subsection (f) which provides regard for 'the willingness of employees and unions to develop employee participation systems'.[22]

14.2. This omission only applies to the mining industry where unions have an essential role in the health and safety system. If a union industry representative is present then there should be more of an obligation on the operator to be reasonable in providing opportunities for workers to participate in improvements. Subsection (f) ameliorates a situation where an operator may have ideological preconceptions and discriminates against union involvement. We recommend that the provision in the present s. 19B(5)(f) be included in the proposed 19Q(5).

15. Development of worker participation system (proposed ss. 19R - 19U) page 24

15.1. A requirement for the election of SHSRs in mine worker participation systems needs to be specified in this legislation. If it is not, we run the risk of

[22] Health and Safety in Employment Act 1992, section 19B(5)(f), page 32.

repeating the problems that lead to the Pike River tragedy. Those problems were associated with a system of deregulated representation and participation where ‘free’ negotiations failed workers.

15.2. For an effective health and safety system it is also essential that mine workers are provided with proper legal rights to take adequate training leave. This should not be left to ‘free’ negotiations either. Under this bill, operators with financial concerns may avoid giving workers access to training by not agreeing to a representative health and safety participation system.

15.3. S.19R(4) does not make clear how many mine workers must make a request for provision of health and safety representatives. The phrasing ‘If the mine workers request’ could be read as requiring every mine worker to make such a request. The current provision under 19C(a) for employers with fewer than 30 employees is for ‘1 or more of the employees, or a union representing them’ to require such a development. For 30 or more employees, the employer is required to have an employee participation system and ‘must take into account’ a default system outlined in Part 1of Schedule 1A and Part 2 of Schedule 1A of the HSE Act. The default system is that there is an election of a health and safety representatives and the establishment of health and safety committees.

15.4. The CTU opposes the wording of section 19R(3) which is ‘***If*** [emphasis added] the system includes provision for mine health and safety representatives…’.

15.5. S. 19R(3) effectively allows mining operations to opt out of having health and safety representatives. If there is no union or similar organisation willing to seek it, the default is that there will be no representatives at all. It is unlikely that a group of non-unionised workers would seek to agree and maintain a worker participation system that includes the election of health and safety representatives. This section allows operators to avoid having on site representatives.

15.6. S. 19R(4) states that if it has been negotiated ‘at least 1 mine health and safety representative must be provided for in the participation system’. The

corresponding s. 19C(5) of the HSE Act 1992, which no longer applies, is drafted in wider terms where 'more than 1 representative is allowed'.[23]

15.7. This narrow approach to the provision of health and safety representatives runs counter to the purpose of this bill to '...make mining operations safer, and align New Zealand with international best practice on health and safety in the mining industry'.[24]

15.8. The Pike River Royal Commission highlighted the importance of health and safety representatives. Rather than be discretionary, s.19R(3) should be amended so that the election of health and safety representatives in mining operations is mandatory.

15.9. There should be no requirement for persons elected to the role of mine health and safety representatives to already be qualified, but they should not be able to take up the role until they have acquired the required qualifications. Further, there should be a requirement of the mine operator to provide training for elected representatives in order to acquire the required qualifications.

15.10. In addition the reference to s.19E of the HSE Act 1992 (the training section) should not include the ability to decrease the allocation for training in the mining industry because of the high hazards likely to be present. The CTU suggests that the ability to decrease the maximum number of days available be removed and it be left solely for a provision to include the ability of increasing the maximum number of days available.

15.11. Further, Part A 19D of the HSE Act 1992 is removed and replaced with 19T. The original s.19D specifies a process for when an employer and employees fail to develop a system - Part 3 of Schedule 1A applies. If there is no agreement the parties move to the default system as per the schedule. However, this new provision 19T for mining, states that provisions prescribed in regulations made under this Act apply. This

[23] Health and Safety in Employment Act 1992, Section 19C(5),
[24] Health and Safety (Pike River Implementation) Bill, Explanatory note.

makes these provisions weaker, as regulations can be changed without having to be amended through Parliament.

15.12. Any default health and safety representative system in mining should be in primary legislation.

16. Election and qualifications of mine health and safety representatives (19U) page 25

16.1. The discussion document noted the need for health and safety representatives having to be trained in the competencies before they can undertake the powers and functions of the role, including issuing stop work notices. However, the legislation now requires them to have the competencies before they can be elected, which will exclude anyone who has not undertaken the training. The legislation needs to reflect the intent of the discussion document and enable workers to be elected as prescribed in the previous sub-sections and then be trained using the leave available in the previous sub-sections so they can then fully perform their functions and powers under this Act.

16.2. Training will always be the key to ensuring that health and safety representatives act according to the law and the CTU supports the requirement for all representatives to undertake formal training before they are able to exercise all the functions and use the powers that come with this training, including the power to stop work. However, it is also important to acknowledge that a person can still be elected to the position without having undertaken the training, but that the training will be given before they are able to exercise the functions and powers that are available to a fully trained representative.

16.3. Not having undertaken the training should not be an impediment for people to get involved in health and safety committees or for putting themselves forward to be a representative. It should be used as a means to getting more workers trained in health and safety and thereby increase the overall safety at the worksite.

17. Functions and powers of mine health and safety representatives (ss. 19V-19ZF) p. 25

17.1. The requirement in the discussion document to 'advise' the SSE if there is a belief that the health and safety management is inadequate has been changed to 'providing feedback' to the SSE or Mine Manager about whether the requirements of the Act or regulations made under this Act are being complied with. The CTU recommends the word be 'advise' which has more proactive connotations.

17.2. Unlike the proposal in the discussion document, these amendments have not made the ability to inspect a mine both a function and a power. Inspection is no longer the function of a health and safety representative. The CTU recommends that, like in Queensland, the ability to inspect is a function and a power of a representative.

17.3. Proposed s. 19V(f) allows for any other functions as agreed by the mine operator, the representatives, and any union representing the representative. The CTU strongly recommends the functions of a health and safety representative within the mining industry need to be set in legislation. There should be no negotiations outside the Act to have site specific functions and powers. These functions need to cover all eventualities and, if it becomes obvious that there is something missing, then this needs to be put into the legislation so that it covers all mines and not just those which have identified the issue.

17.4. It is vital that the best possible health and safety outcomes apply to all mines, regardless of their size, and the best way for this to occur is to have all functions legislated for so that there are no discrepancies or conflicts between mines.

17.5. This is consistent with the Taskforce recommendations that state:[25]

> The legal provisions for worker participation in the new workplace health and safety legislation should be a foundation for good workplace practices. They should be

[25] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 56

based on mandatory minimum rights, powers and responsibilities for worker representatives. International research suggests 'where the active involvement of workers is underpinned by legal entitlements to perform occupational health and safety functions, and to receive training and information, that is most effective in improving OHS outcomes'.

17.6. The functions should also include a responsibility on mine health and safety representatives to keep fellow workers informed and to consult them on health and safety matters.

17.7. It is important that SHSRs and IHSRs are provided with immunity when carrying out the duties and functions as prescribed. If this does not occur then mine operators and others can use the threat of prosecution or legal proceedings to recover costs to restrict the representatives' ability to undertake their job fully. The fear of employer retaliation was recognised by the Taskforce as being a significant issue. The issue of immunity from prosecution for lost productivity, time etc is not provided for and is of real concern.

17.8. Regarding the power of mine health and safety representative to enter and inspect a mining operation in proposed s.19Y, the representative must give reasonable notice to the SSE. However the discussion document only had the requirement to give reasonable notice and did not require it to be given to the SSE. The CTU recommends that the wording as put forward in the discussion document is used instead of the proposed wording within the amendment.

17.9. Clause 19ZB(2)(b) states that an inspector may refuse to allow a mine health and safety representative accompanying the inspector, if they believe that their presence would prejudice the maintenance of the law. There is no additional clause that relates to how this decision can be challenged. The CTU recommends that there should be such a provision.

18. Mine health and safety representatives may issue hazard notices (s. 19ZD) p. 28

18.1. There are two notable omissions from this proposed section.

18.2. The corresponding section in the HSE Act 1992 includes at 3(b) that the representative can issue a hazard notice if 'the employer and representative do not agree on the steps that must be taken or the time within which the steps must be taken to deal with the hazard.'[26] This subsection is important in relation to the management of a hazard. To be effective health and safety representatives need to be involved in hazard management and determining appropriate control measures.

18.3. S. 46A(5) of the HSE Act 1992 does not have a direct equivalent in the proposed legislation. This section states that 'to avoid doubt, where this section applies the employer and trained health and safety representative must deal with each other in good faith.'[27]

18.4. We recommend that the good faith subsection is retained to avoid any doubt about the employment relationship.

18.5. However, in addition to the power to issue a hazard notice, SHSRs and IHSRs should have the power to issue a provisional improvement notice. This was recommended for all health and safety representatives by the Taskforce[28]. Without the power to issue a notice of this kind, the IHSR does not have the required mechanism to intervene if the management of a principal hazard is inadequate. The proposed specified functions and powers of IHSRs should also include those in the Queensland legislation, where IHSRs have been found to be effective.[29]

19. Check and balance provisions (proposed ss. 19ZG - 19ZL) page 30

19.1. This proposal talks about the ability for an Inspector to 'cancel' an order to suspend mining operations. The Queensland wording is more supportive of the representatives and does not imply that they are incorrectly issuing notices. It allows the Chief Mines Inspector the ability to withdraw directives that have been issued after the problem has been resolved/investigated. The

[26] Health and Safety in Employment Act 1992, s. 46A(3)(b), page 61.
[27] Ibid s. 46A(5).
[28] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 59.
[29] See: The New Zealand Council of Trade Unions submission to the Labour and Commercial Environment Group, the Ministry of Business, Innovation and Employment on Safe Mines: Safe Workers, Appendix One.

Queensland law implies that an investigation has to occur, which would involve all aspects associated within an investigation, whereas the ability to cancel does not give that impression.

19.2. Further, there should be the ability for either the IHSR or the SHSR to have a judicial review of the decision to overrule a notice. Finally, it should be the role of the Chief Inspector of Mines who makes this decision rather than an inspector as they have more experience and it is in line with the Queensland Act.

19.3. S. 19ZJ provides for the protection of mine health and safety representatives performing functions or exercising powers. While we welcome the protection of health and safety representatives from being prevented from or penalised for undertaking their functions and powers, we recommend there should also be a positive duty on the mine operator to provide resources and allow time for the health and safety representatives to perform their duties. Again, this was recommended by the Taskforce for all health and safety representatives[30].

20. Removal of mine health and safety representative (proposed ss. 19ZM-19ZO) p. 31

20.1. Proposed s. 19ZM(1) provides that WorkSafe may remove a representative from office if the representative 'is not performing his or her functions or exercising his or her powers satisfactorily'. This test is unnecessarily broad and leaves too much discretion to WorkSafe. What does 'satisfactorily' mean? Satisfactory to whom – to the workers the representative represents? To the employer? To WorkSafe? Representatives must be guarded from poorly evidenced allegations, or weak excuses being used to remove them. Their primary duty is to those they represent. Other than failing to carry out that duty, the justifications for their removal should be limited to persistently using their powers for improper purposes or committing a serious offence.

[30] The Report of the Independent Taskforce on Workplace Health and Safety 2013, page 59.

21. Appointment of mining industry health and safety representatives (19ZP) page 32

21.1. The CTU prefers that mining industry health and safety representatives (IHSRs) should be appointed by the union and this should be required in legislation as it is in Queensland. We have concerns around the independence of IHSRs if a group of non-union workers choose to appoint their own as the role's integrity and independence could be compromised.

21.2. When the person is a union appointment, the union is open to scrutiny by the fact that the annual accounts are audited and are available to the public. This is not true where a group of workers are paying for that person. In this situation there is no mechanism to audit how the person is being paid and how the position is sustainable.

21.3. The freedom and fairness of the appointment/election process is at stake. Unions are democratic organisations that can achieve a robust process. It is important that workers feel free to stand for the position and to act independently. In contrast, when an employer has influenced the appointment, 'arms-length' independence is threatened.

21.4. The best way to ensure the necessary independence and integrity of this position is to state that IHSR must be either union-appointed or have been endorsed by a working party comprising the regulator and the CTU. This group can then ensure that the person chosen is truly independent of the company and will fulfil the role of being the 'extra set of eyes' for the workers as envisaged by the Pike River Royal Commission.

21.5. We recommend that proposed s.19ZP not proceed so far as it allows a 'group of mine workers' to appoint an IHSR, unless the above safeguards as to independent scrutiny are provided for.

22. Codes of Practice (proposed 20, 20A)- clause 28, page 35

22.1. The proposed s. 20A(b) simply states that the Minister has consulted any persons that will be affected by the code. This is a narrower version of s.

20(3)(b)(i) of the HSE Act 1992 which includes '…all persons reasonably likely to be affected'.[31] S. 20(3)(b)(ii) has also been omitted. This subsection ensured that the Minister had given people a '…reasonable time within which to comment'.[32] This omission amounts to a relaxation of procedural fairness required for the approval of new or amended standards.

23. Board of examiners membership (proposed s. 20F) page 38

23.1. The CTU endorses the establishment and role of a New Zealand Mining Board of Examiners. However this board needs to be established on a tripartite basis. Worker representative bodies should have a guaranteed presence on board to ensure its integrity and benefit from their industry experience.

23.2. There should be mention within the legislation that the board uses a joint Australian/New Zealand Accreditation. This board should be funded out of a levy on the mining industry and the make-up of that levy should be set by WorkSafe New Zealand, via a recommendation to the Minister. WorkSafe New Zealand should make the final decision as to how this levy would be applied, after consultation with different sectors within the industry, worker representatives and the Board, prior to advising the Minister. This needs to be spelled out in the legislation so that there is transparency surrounding the setting of the levy.

24. Inspectors may issue improvement and prohibition notices (s. 39A, 41A) – p.41

24.1. These clauses are supported as it is imperative the inspectors can issue notices in advance. The inspectors require the strong support of the agency when doing so.

[31] Health and Safety in Employment Act 1992, s. 20(3)(b)(i), page 38.
[32] Ibid, s. 20(3)(b)(ii). page 38

Part Three: Mines Rescue

25. Mines Rescue

25.1. The CTU supports the roles and responsibilities for Mines Rescue, plus the expanded Board membership. We support the requirement for every mine to have emergency management processes in place to quickly respond to any emergency that may occur at that mine.

25.2. It needs to be made absolutely clear as to who has overall responsibility at a mine disaster. Police took command at Pike River because there was no clarity of roles in mining legislation. Mines Rescue must be the organisation that takes control in these situations as they have the expertise, training and technical knowledge for dealing with a disaster of this kind.

25.3. With the expanded industry coverage, there needs to be a corresponding extension in the number of Mines Rescue bases so that response time is shorter. Industry should pay a levy to appropriately fund this organisation to fulfil its roles and responsibilities. This includes the training of mine workers to ensure there is an adequate number of individuals able to respond to an emergency.