NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

**to the**

# Ministry of Business, Innovation & Employment

**on**

## Developing Regulations to support the new Health and Safety at Work Act

**P O Box 6645**
**Wellington**
**August 2014**

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## INTRODUCTION

This submission is made on behalf of the 37 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 330,000 members, the CTU is one of the largest democratic organisations 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.

For further information about our role in relation to worker's health and safety see the introduction to our submission on the Health and Safety Reform Bill.

In our response to the consultation document we have followed the numbering of MBIE's questions. Where we have made additional comment, we have done so outside of the numbered paragraphs at the point where (following the structure discussion document) these comments would be relevant.

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## CHAPTER 1: OVERVIEW

**1. Do you have any comment to offer on the proposed approach to phasing the development of regulations?**

1.1. We have three concerns with the proposed phasing of the regulations.

1.2. First, 1 April 2017 is too long to wait for critical regulations to be made. This issue is particularly acute in relation to regulations regarding hazardous work, plant and structures. The Australian Model Workplace Health and Safety Regulations ("the Model WHS Regulations") are considerably stronger in relation to these issues and should be implemented as soon as practicable. We would like MBIE and WorkSafe to attempt to put these regulations in place by 1 April 2016 at the latest.

1.3. Second, as we outline below in our reply to question 9 regarding risk management it is extremely undesirable to have, in effect, three different risk management frameworks based on whether the particular hazard or risk is covered by regulations made under the current act and regulations, the detailed risk management process under the new regulations or the general risk management process under the new act alone. This is a recipe for confusion and may bring the new law into disrepute. We recommend a solution below.

1.4. Third, the proposed timetable is missing a number of key regulations that we submit should be given high priority by MBIE, WorkSafe and the Government. The Independent Taskforce on Workplace Health and Safety recommended development or possible development of a number of regulations, ACOPs and guidance at [424]-[426]. Alongside recommendations regarding planned regulations, the Taskforce also recommended policy work and regulation relating to:

- obtaining competent advice and selecting a health and safety practitioner
- addressing occupational health issues,

- promoting and supporting health and safety management systems, including risk assessments, accident
- investigations and the roles of managers and supervisors in health and safety management
- young and old workers, workers who are new to roles, and temporary, casual and seasonal workers
- fatigue generally, and long hours of work leading to fatigue specifically
- workers with LLN issues
- the use of performance pay systems
- the financial condition of a company or the competitive environment that a company faces
- new and emerging technologies.

1.5. Industry specific regulation is needed urgently in relation to a number of high-risk industries. It is likely, for example, that the Independent Forestry Safety Review Panel may recommend regulation of the forestry industry.

**2. As a duty holder, do you rely on commercially-printed hard copies of regulations purchased either from Legislation Direct or selected retail outlets? Or, do you view or print off your own copies of regulations from the NZ Legislation website as needed?**

2.1. We use copies of regulations viewed and printed from the legislation.govt.nz website. As the cost of portable computers such as tablets continues to reduce, we think they are likely to displace traditional printed legislation though we acknowledge that different duty holders will adjust at different speeds.

**3. What do you think are the relative benefits and drawbacks of either: having a single set of Health and Safety at Work regulations containing all regulatory requirements in one place; or having multiple sets of**

**regulations each focusing on a single topic (some of which will apply to everyone, and others which will only apply to a select group of duty holders)?**

3.1. We agree with the arguments set out in the discussion document in favour of a consolidated set of regulations.

3.2. An issue with the current format is that some legal requirements (such as those relating to employment of children or accommodation for agricultural employees) are tucked away in counterintuitive places. A consolidated set of regulations allows clearer delineation of (for example) requirements relating to accommodation and children's employment.

3.3. Another option worth exploring may be to keep all of the regulations of general or cross-industry application together in one place but to hold industry-specific regulations (such as those relating to construction or mines in the Model WHS Regulations) separately. As these are not of general applicability there is a better case for their standalone nature.

**4. Do you have any comment to offer on the proposed approach to identifying regulatory offences?**

4.1. We do not consider that adequate information has been presented to allow comment on the proposal. This is a complex technical area and we would like to request further information. Specifically:

- How many times have duty holders been sentenced in the District Court and appellate jurisdictions for breaches of regulations under s 50 of the Health and Safety in Employment Act 1992? What was the average, highest and lowest sentence? What approach has the Court taken to sentencing under these sections?

- What approach have the Australian Courts taken to sentencing for breaches of the equivalent provisions to those in the Model WHS Regulations? Do you anticipate that the New Zealand courts would

follow a similar approach? How would the Sentencing Act 2002 influence this approach?

- What is the intended enforcement approach where a person's actions constitute both a regulatory and (separately) a statutory offence?

4.2. We would be grateful for a meeting to discuss and work through these questions.

**5. Do you have any comment to offer on the principles for identifying which requirements of the new regulations should be infringement offences?**

5.1. As discussed in our meeting with MBIE officials there is a significant issue with minor infringement offences precluding the laying of further more serious charges by either the regulator (see cl 164(2) of the Health and Safety Reform Bill) or by a private individual (see cl 165(1)(a) of the Bill). While we recognise the need to protect individuals from double jeopardy, the broad definition of "matter" in cl 162 of the Bill may mean that an infringement notice issued early on may tie the hands of the regulator and others where much more serious consequences are later discovered.

5.2. Assuming that these issues can be remedied, we agree with the general principles outlined in the discussion document and refer you to also consider the Cabinet Guidelines on the Development of Infringement Offences, issued by the Ministry of Justice. In particular, we note the following points in the Guidelines about the creation of new infringement schemes:

- The purpose of an infringement scheme is to:
    - Achieve compliance with the law and to reduce the harm caused by minor offending;
    - Hold people accountable for their actions and to promote a sense of responsibility;

- Educate people about unacceptable conduct and its inherent social harm.

- It is important to remember that there are benefits and trade-offs for the prosecuting agency, the defendant and the justice system, including:
  - The prosecuting agency does not have the cost of bringing court proceedings or of proving the elements of the offence. However, by using an infringement notice, it reduces the penalty level imposed and, through being unable to obtain a criminal conviction, lowers the deterrent effect and other impacts such as moral condemnation;
  - The defendant has the benefit of a discounted penalty, no possibility of conviction and, despite the diminution of their legal rights, avoids the time and cost involved in a court hearing;
  - The justice system does not need to devote judicial and court resources to determining whether each offence has occurred. The Court system does, however, become involved where the unpaid infringement fee is filed for enforcement or the infringement notice is challenged by the defendant.
- An infringement scheme should:
  - Address misconduct that is generally regarded as being of comparatively minor concern to the general public;
  - Involve actions or omissions that involve straight-forward issues of fact;
  - Only apply to strict liability or absolute liability offences; and
  - Be an appropriate mechanism or part of an appropriate mechanism to encourage compliance with the law.

**6. Are there any proposed requirements in the regulations that you think should be infringement offences? Which ones, and why?**

6.1. This depends on whether infringement offences preclude further action being taken where the same matter discloses more serious breaches or consequences. If they do, then very few offences should be treated as infringement offences. If not, then many offences may be good candidates. In South Australia, for example, there are several dozen health and safety infringement offences, as set out in this document: https://www.safework.sa.gov.au/uploaded_files/Fact_Sheet-Infringement_Notices.pdf

**7. Do you think any of the new regulations will need an extended period of time to allow duty holders to comply (i.e. beyond when the proposed new Act and regulations first come into effect)? Which ones, and why?**

7.1. We do not think that an extended lead in time is needed for any of these regulations. To the contrary, New Zealand's poor health and safety record demands immediate action.

7.2. In the main, the regulations particularise the duties set out in the Health and Safety Reform Bill and set out concrete actions needed to comply with them. Delaying implementation of the regulations is likely to make it more difficult for duty holders to understand and comply with the new framework, not less.

**8. Are there any other transitional issues that you think should be considered? Please explain.**

8.1. There are a number of crucial approved codes of practice that must also be in place to support the roll-out of the Health and Safety at Work Act including worker participation and risk management. These have been set down for development but it appears that these may not be developed in time for the coming into force of the new law.

8.2. A critically necessary approved code of practice concerns ways in which health and safety duty holders can discharge their obligation to consult,

collaboration and co-operate under the Health and Safety at Work Act.[1] This code does not appear to be on officials' work plans at this stage and must be advanced.

8.3. While we recognise that the Government cannot do everything all at once, we are concerned that delay in developing guidance relating to these matters has risks for health and safety along with overall acceptance and understanding of the new laws.

[1] For the Australian equivalent Code of Practice see: http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/consultation-cooperation-coordination-cop

## CHAPTER 2: REGULATING GENERAL RISK AND WORKPLACE MANAGEMENT

**9. Do you have any comment to offer on the regulatory proposal about the process for managing specified risks to health and safety in the workplace? Specifically, do you have any comment on the Australian requirements for reviewing control measures, and which of them may be appropriate here?**

9.1. We are deeply concerned that the tiered risk management process set out in the Model WHS Regulations is unwieldy and unfit for purpose. These problems are compounded by the proposed staggering of activities covered by the regulatory risk management process in New Zealand. While the issues with the framework are primarily problems with the Australian law, New Zealand is in a position to learn from these mistakes not repeat them.

*The Australian framework*

9.2. At the heart of the Australian risk management framework is an awkward kludge which we understand MBIE intends to replicate. Explaining this kludge requires an examination of the Model WHS Act, the Model WHS Regulations and the Model Code of Practice 'How to Manage Workplace Risks.'

9.3. Clause 17 of the Model WHS Act (identical to cl 22 of the Health and Safety Reform Bill bar the section title) states:

> **17 Management of risks**
> A duty imposed on a person to ensure health and safety requires the person:
> (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
> (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

9.4. Part 3.1 of the Model WHS Regulations states:

> **Part 3.1 Managing Risks to Health and Safety**
>
> **32 Application of Part 3.1**
> This Part applies to a person conducting a business or undertaking who has a duty under these Regulations to manage risks to health and safety.
>
> **33 Specific requirements must be complied with**

Any specific requirements under these Regulations for the management of risk must be complied with when implementing the requirements of this Part.

**Examples**

1 A requirement not to exceed an exposure standard.
2 A duty to implement a specific control measure.
3 A duty to assess risk.

**34 Duty to identify hazards**

A duty holder, in managing risks to health and safety, must identify reasonably foreseeable hazards that could give rise to risks to health and safety.

**35 Managing risks to health and safety**

A duty holder, in managing risks to health and safety, must:

(a) eliminate risks to health and safety so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety—minimise those risks so far as is reasonably practicable.

**36 Hierarchy of control measures**

(1) This regulation applies if it is not reasonably practicable for a duty holder to eliminate risks to health and safety.

(2) A duty holder, in minimising risks to health and safety, must implement risk control measures in accordance with this regulation.

(3) The duty holder must minimise risks, so far as is reasonably practicable, by doing 1 or more of the following:

(a) substituting (wholly or partly) the hazard giving rise to the risk with something that gives rise to a lesser risk;

(b) isolating the hazard from any person exposed to it;

(c) implementing engineering controls.

(4) If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls.

(5) If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment.

**Note**

A combination of the controls set out in this regulation may be used to minimise risks, so far as is reasonably practicable, if a single control is not sufficient for the purpose.

**37 Maintenance of control measures**

A duty holder who implements a control measure to eliminate or minimise risks to health and safety must ensure that the control measure is, and is maintained so that it remains, effective, including by ensuring that the control measure is and remains:

(a) fit for purpose; and

(b) suitable for the nature and duration of the work; and

(c) installed, set up and used correctly.

**38 Review of control measures**

(1) A duty holder must review and as necessary revise control measures implemented under these Regulations so as to maintain, so far as is reasonably practicable, a work environment that is without risks to health or safety.

(2) Without limiting subregulation (1), the duty holder must review and as necessary revise a control measure in the following circumstances:

(a) the control measure does not control the risk it was implemented to control so far as is reasonably practicable;

**Examples**

1 The results of monitoring show that the control measure does not control the risk.
2 A notifiable incident occurs because of the risk.

(b) before a change at the workplace that is likely to give rise to a new or different risk to health or safety that the measure may not effectively control;

(c) a new relevant hazard or risk is identified;

(d) the results of consultation by the duty holder under the Act or these Regulations indicate that a review is necessary;

(e) a Health and Safety representative requests a review under subregulation (4).

(3) Without limiting subregulation (2)(b), a change at the workplace includes:

(a) a change to the workplace itself or any aspect of the work environment; or

(b) a change to a system of work, a process or a procedure.

(4) A Health and Safety representative for workers at a workplace may request a review of a control measure if the representative reasonably believes that:

(a) a circumstance referred to in subregulation (2)(a), (b), (c) or (d) affects or may affect the health and safety of a member of the work group represented by the Health and Safety representative; and

(b) the duty holder has not adequately reviewed the control measure in response to the circumstance.

9.5. Importantly, the risk management process set out in the Model WHS Regulations does not apply to all risks. Regulation 32 states that it applies to those with a duty under the regulations to manage risks to health and safety (*not* the duty under the Model WHS Act cl 17).

9.6. Specific regulations (for example regs 51, 52, 54 and 57) expressly require that the regulation risk management process be used. These constitute the 18 specified risks requiring the full risk management process. It is intended that New Zealand start with 6 specified risks.

9.7. Section 3.1 of the Model Code of Practice 'Managing Risks' states:

**3.1 When should a risk assessment be carried out?**

A risk assessment should be done when:

- there is uncertainty about how a hazard may result in injury or illness
- the work activity involves a number of different hazards and there is a lack of understanding about how the hazards may interact with each other to produce new or greater risks
- changes at the workplace occur that may impact on the effectiveness of control measures.

A risk assessment is mandatory under the WHS Regulations for high risk activities such as entry into confined spaces, diving work and live electrical work.

Some hazards that have exposure standards, such as noise and airborne contaminants, may require scientific testing or measurement by a competent person to accurately assess the risk and to check that the relevant exposure standard is not being exceeded (for example, by using noise meters to measure noise levels and using gas detectors to analyse oxygen levels in confined spaces).

A risk assessment is not necessary in the following situations:

- Legislation requires some hazards or risks to be controlled in a specific way – these requirements must be complied with.
- A code of practice or other guidance sets out a way of controlling a hazard or risk that is applicable to your situation and you choose to use the recommended controls. In these instances, the guidance can be followed.
- There are well-known and effective controls that are in use in the particular industry, that are suited to the circumstances in your workplace. These controls can simply be implemented.

9.8. So under the Australian model, there is an overall duty to eliminate or minimise risk and a due process to be followed in relation to specified risks. Other risks may be dealt with using this process or controlled in accordance with legislation, codes of practice or "well-known and effective controls."

9.9. This can be contrasted with the hazard management approach in the Health and Safety in Employment Act 1992. Section 7 of that Act requires employers to systematically identify existing and new hazards and regularly assess whether those hazards are significant hazards (defined in s 2 of the Act as an actual or potential cause of serious harm, harm based on exposure level, or long-latency harm. Where the hazard is deemed significant then the employee is required to eliminate, isolate or minimise it.

9.10. Two of the foremost Australian health and safety experts, Professor Richard Johnstone and Michael Tooma made an important submission on the Model WHS Regulations.[2] They were sharply critical of the risk management provisions and their critique at [36]-[42] of their submission is sufficiently important to include at length:

> 36 … In our view, the model regulations adopt an inappropriate and inconsistent approach to risk management. First, the regulations do not include a general risk management provision and therefore no corresponding prescribed hierarchy of controls. A decision appears to have been taken to adopt the Victorian approach to risk management and accordingly to omit the 'assess the risks' step and go straight to controls. We are not aware of any public consultation on this issue, or even of any public announcement of this decision. Second, it is highly likely that the courts will interpret the primary duty as requiring PCBUs to do more than just respond to demonstrated risks and will require PCBUs to have a system of searching for and identifying all possible risks, and instituting reasonable and appropriate measures: in other words, PCBUs should have a proactive systematic approach to OHS management. Consequently duty holders will need guidance on the relationship between the processes involved in risk management and in determining the 'reasonably practicable' standard. Third, risk management is prescribed in relation to certain hazards and certain industries but the approach in relation to the requirements and the order of the implementation of controls is inconsistent across those hazards and industries and is often inconsistent with the hierarchy of controls or incomplete.
>
> 37 The draft Model Regulations do not include an express risk management obligation. There is currently an express obligation in all regulations in Australian jurisdictions with the exception of Queensland and Victoria. In Queensland, there is a general requirement in section 27A of the Act, and the obligation also exists under a

[2] http://www.safeworkaustralia.gov.au/sites/SWA/model-whs-laws/public-comment/Documents/Model%20work%20health%20and%20safety%20public%20comment%202010/Public%20submissions%20J/258%20Johnstone%20_Richard%20and%20Michael%20Tooma.pdf. All references to Johnstone and Tooma (2010) in this submission refer to this document.

> code of practice which under the Queensland regime has a quasi legal effect because of the treatment of codes of practice in that jurisdiction.
>
> 38 Express risk management provisions are also widely accepted internationally. Singapore, Canada, and New Zealand all have express risk management obligations in their respective legislation. The exclusion of express risk management obligations including a prescribed hierarchy of controls is a very significant omission from the draft Model Regulations. Simply stated, it results in a clear and unambiguous diminution in health and safety standards across Australia. It also has the effect of reducing the standards and protection afforded to workers in Australia as compared to other workers in comparable jurisdictions around the world. The issue is particularly serious in relation to what have been termed 'new and emerging hazards', which, as noted above, include well known hazards arising from the changes in work organisation and work arrangements. Under the existing approach to the Act and regulations, **there is no statutory requirement to take a generic approach to identify, assess and control hazards which fall outside the hazards specifically addressed in the regulations.** This is a very serious deficiency in the draft Model Regulations. This deficiency is exacerbated by the very conservative approach that has been taken to the hazards addressed in the draft Model Regulations and in the tranche of draft Codes of Practice that have been released for comment. It would appear that the drafters of the draft Model Regulations and Codes are very much picking the lowest hanging fruit and addressing the issues in which there is currently a fair degree of agreement. Inevitably this means that new and emerging hazards have been given low priority. Many of these hazards are not in fact 'new' – for example, stress, fatigue, and harassment.

9.11. We agree with Johnstone and Tooma that this is a significant hole in the regulations. It is a considerable backwards step from the current law (as Johnstone and Tooma term it "a clear and unambiguous diminution of health and safety standards").

9.12. This lacuna is widened to a gaping hole by the phased approach to regulation with only 6 specified risks proposed in our proposed regulations (remote and isolated work, hazardous atmospheres, ignition sources, falling objects, asbestos and hazardous substances) against the 18 in the Model WHS Regulations.

9.13. The limited range of specified risks under regulation have some markedly odd and undesirable consequences. For example, a more rigorous risk assessment process is necessary under the proposed regulations for ignition sources than electrical risks, for falling objects than falling people.

9.14. Complicating matters further, some of the carried-over regulations continue to use the current significant hazard approach to risk management. For example, reg 16 of the Health and Safety in Employment (Pipelines) Regulations 1999 states in part:

> **16 Work which might adversely affect pipelines**
> (1) An employer must—
> (a) take all practicable steps to ensure that any work on, in, or around a pipeline is undertaken in such a manner as to minimise any significant hazards that may arise; and
> (b) ensure that, before work is undertaken, the manager is notified of those activities specified in subclause (4) that are likely to adversely affect the structural integrity or operation of any pipeline and create a significant hazard.
> (2) A pipeline worker must take all practicable steps to ensure that any work on, in, or around a pipeline is undertaken in such a manner as to minimise any significant hazards that may arise.

9.15. So depending on the range of work undertaken by a PCBU, they may be subject to the new specified risk management approach, the current specified hazard management approach or neither (but a general duty to eliminate or minimise risks). This is likely to bring the new law into disrepute.

9.16. A strongly preferable approach would be the inclusion of a general, systematic risk management requirement for all risks with breach set as a regulatory offence (failure to properly manage the risk will be a breach of the Bill in any case). In relation to specified risks, such as asbestos, set processes in the regulation would apply and be failure to manage the risk may have a significantly higher maximum penalty.

9.17. This approach has the benefit of unifying the risk management processes into a coherent whole without gaps created by design or transitionally as the regulations are reviewed.

*Systematic risk assessment*

9.18. As the CTU notes at part 12 of our submission on the Health and Safety Reform Bill, a significant weakness of the Model WHS Act and Model WHS Regulations (not shared by the Health and Safety in Employment Act 1992) is the absence of explicit reference to the ongoing and systematic nature of hazard and risk identification. This is likely to mislead PCBUs since the Australian Courts have consistently held that there is in effect an ongoing obligation to implement a systematic approach. The New Zealand Courts are likely to follow suit.

9.19. A reiteration of the current s 7 of the Health and Safety in Employment Act 1992 is therefore an important addition to both the Health and Safety Reform Bill and the new regulations.

9.20. It is important that Health and Safety representatives retain the right to request a review of control measures if they believe that the controls in place do not effectively control the risk.

*The hierarchy of controls*

9.21. The hierarchy of controls set out in the Model WHS Regulations has been criticised by Australian experts for departing from accepted best practice though the equivalent weight given to the so-called "level 2 control measures" of substitution, isolation and engineering controls. The problem is that substitution is a more effective, higher-order control than isolation and isolation is in turn a more effective, higher-order control than engineering controls. The Model WHS Regulations allow minimisation of risks by way of "one or more" of these three controls.

9.22. As Johnstone and Tooma (2010) note at [49]:

> [A] PCBU would be able to comply with the risk control requirements set out in the provision by introducing a combination of isolation and engineering controls without ever considering a substitution control (substituting the hazard for a lesser hazard giving rise to lesser risk), which was available and which is a higher order control than isolating people from the risk or engineering out the risk. This is possible because while listing the controls in the hierarchy of controls for risk minimisation in the order of the hierarchy of hazard controls, nowhere in the provision does it specify that the … PCBU must adopt those measures in the order as written.

9.23. The hierarchy of controls should follow international best practice by placing substitution, isolation and engineering controls sequentially in the hierarchy not as alternatives.

**10. What do you think are the main benefits and costs of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical)**

10.1. The manner in which the Model WHS Regulations deal with the risk management process is unduly complex and confusing. The intersection of

the prescribed regulatory process, non-prescribed process for other risks, and the shift from hazard to risk except in particular industries covered by legacy regulations will confuse duty holders and increase compliance costs while delivering worse health and safety outcomes.

10.2. We are deeply concerned that such a fragmentary approach to a key aspect of the new law is likely to bring it into disrepute and jeopardise the changes we are all working towards.

10.3. We note that these changes also appear to run afoul of MBIE's own "Guiding principles for the development of regulations under the new Health and Safety at Work Act." These requirements are to:

- provide greater certainty to duty holders about how to meet their primary duty of care in specific circumstances, or in relation to specific hazards/risks. Accordingly, obligations should be stated as absolutes whenever possible, avoiding qualifying statements.
- contribute towards an overall lifting of standards, but definitely not lowering standards from status quo
- enable compliance
- help instil behaviour/culture change (as part of a cohesive whole legislative and guidance package)
- focus on what matters
- be enforceable
- be mindful of business costs, proportional to the level of tolerable risk. (i.e. risk and cost benefit analyses are needed)
- contribute (where relevant) towards a reduction in workplace injuries of 25% by 2020.

**11. Do you have any comment to offer on the regulatory proposal about the provision of information, training, supervision and instruction?**

11.1. We support this proposal. The integration of the New Zealand and Australian provisions is a good example of harmonising the laws of both countries to create better laws.

**12. Do you have any comments about the proposed regulations for general workplace facilities?**

12.1. We do not support the weakening of protections for workers generally in relation to humidity and air velocity. We are strongly opposed to the weakening of provisions relating to agricultural workers' accommodation. We discuss these below in our reply to question 13.

12.2. Aside from these issues, the CTU supports the general framework relating to workplace facilities.

**13. Do you envisage any impacts (positive or negative) as a result of not specifically mentioning things such as controlling humidity and air velocity, over-crowding, and accommodation for agricultural workers in the proposed regulations?**

*Accommodation for agricultural workers*

13.1. We are deeply concerned by the removal of basic living standards in accommodation for agricultural workers. Regulations 63 and 64 of the Health and Safety in Employment Regulations 1995 set out the current framework:

> **63 Accommodation and general facilities for agricultural employees**
> (1) The facilities to which this regulation applies are—
> (a) toilets:
> (b) washing facilities:
> (c) sleeping facilities:
> (d) lighting in all rooms:
> (e) ventilation in all rooms:
> (f) heating facilities:
> (g) refrigeration facilities:
> (h) rubbish disposal facilities:
> (i) laundry facilities:
> (j) furniture:

(k) drinking water.

(2) Every employer who employs any employee to carry out any agricultural work shall take all practicable steps—

(a) to ensure that any such employee lives in accommodation—

(i) that is made of permanent materials; and

(ii) that is maintained in good order and condition; and

(iii) that contains or has access to facilities of the kinds to which this regulation applies; and

(b) to ensure that any facilities of the kinds referred to in paragraphs (a) to (j) of subclause (1), in the accommodation or to which the accommodation has access, are—

(i) suitable for the purposes for which they are to be used; and

(ii) sufficient in number or amount; and

(iii) maintained in good order and condition;….

**64 Cooking facilities or meals for agricultural employees**

Every employer who employs any employee to carry out any agricultural work and who provides accommodation for that employee shall take all practicable steps—

(a) either—

(i) to provide all meals to that employee; or

(ii) to provide cooking and eating facilities in the accommodation provided; and

(b) to ensure that any facilities provided under paragraph (a)(ii) are—

(i) suitable for the purposes for which they are to be used; and

(ii) sufficient in number or amount; and

(c) to maintain any facilities provided under paragraph (a)(ii) in good order and condition.

13.2. These obligations are distinct and more substantial than a landlord's obligations under 45 of the Residential Tenancies Act 1986:

**45 Landlord's responsibilities**

(1) The landlord shall—

(a) provide the premises in a reasonable state of cleanliness; and

(b) provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes; and

(c) comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises; and

(ca) if the premises do not have a reticulated water supply, provide adequate means for the collection and storage of water; and

(d) compensate the tenant for any reasonable expenses incurred by the tenant in repairing the premises where—

(i) the state of disrepair has arisen otherwise than as a result of a breach of the tenancy agreement by the tenant and is likely to cause injury to persons or property or is otherwise serious and urgent; and

(ii) the tenant has given the landlord notice of the state of disrepair or made a reasonable attempt to do so; and

(e) take all reasonable steps to ensure that none of the landlord's other tenants causes or permits any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises.

(1A) Failure by the landlord to comply with any of paragraphs (a) to (ca) of subsection (1) is declared to be an unlawful act.

> (2) The landlord shall not interfere with the supply of gas, electricity, water, telephone services, or other services to the premises, except where the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out.

13.3. Fundamentally, the Residential Tenancies Act 1986 sets out the condition of the property **not** the types of facilities to be provided. The proposed change would mean that employers of agricultural workers are no longer required to provide them with accommodation that's made of permanent materials, with heating, lighting and furniture in all rooms. The requirement to provide meals to workers or cooking facilities in their accommodation is also gone.

13.4. Given the lack of bargaining power of agricultural workers (particularly migrants who cannot inspect their accommodation before coming to the country) this is quite simply a significant reduction in workers' rights.

13.5. There is a case to be made that it is unfair to apply these requirements selectively to agricultural workers only. We agree and would submit that a sensible option would be to extend the current requirements to all employers who provide their workers with accommodation as part of their remuneration.

13.6. There is also a question as to where these requirements best sit and whether they would be more usefully placed in (for example) the Residential Tenancies Act 1986 or even the Employment Relations Act 2000. However, simply removing these protections is not the answer.

13.7. The CTU will need to consider campaigning on this issue if this change is not made. Farm workers' rights should not be compromised. The proposal to remove these requirements also runs counter to the regulatory principle that these changes should not lower standards.

*Heat, humidity and air velocity*

13.8. An analogous issue is the removal of the requirement that each workplace should have access for all workers to means for controlling humidity arising from any work process or activity (current reg 4(2)(f)) or for control atmospheric conditions including air velocity, radiant heat or temperature

(current reg 4(2)(g)) replaced by the general requirement that workers be able to carry out their work without risks to health and safety.

13.9. This is a backwards step in relation to workers' comfort at work. An uncomfortably cold or hot or humid workplace may not necessarily pose a direct risk to health and safety but is still important. Provision of decent working conditions is the mark of a civilised society. These requirements should be maintained.

**14. Do you have any comment about the regulatory proposal for the provision of first aid facilities? Does the proposal differ greatly from how you are interpreting the current requirements? Please explain.**

14.1. We support this proposal. We agree that it is clearer. Ensuring an adequate number of first aid-trained workers is essential to a safe workplace. It is important that the requirement is 'scalable' based on the risks and remoteness of the workplace. Greater levels of first aid training and more sophisticated equipment may be needed, for example, in forestry where assistance may take some considerable time and where injuries are often severe.

**15. Should some businesses not be subject to the requirement to develop, maintain and implement an emergency plan? If so, on what basis (e.g. business size/number or location of workers/risk type) and why?**

15.1. We agree with the discussion document that the Canterbury earthquakes have highlighted the need for emergency planning. The earthquakes also highlighted that it was not the type of business but rather the location that mattered (for example, the collapse of CTV building affected medical and counselling services, a language school and a television production company). Natural disasters are difficult or impossible to predict.

15.2. It does not therefore make sense to exempt any businesses from the requirement to develop an emergency plan. High hazard industries will need much greater levels of planning and small, low risk businesses may be able

to use adaptable templates (and it would be good to see WorkSafe taking a lead to develop these).

**16. Do you have any other comments to make about the regulatory proposal for emergency plans?**

16.1. No.

**17. Do you see any issues with including protective clothing within the definition of PPE as in the Australian model regulations?**

17.1. No, this appears sensible.

**18. Do you think the proposed requirements on PCBUs for the provision and use of PPE, based on the Australian model regulations, are clear and detailed enough? Please give reasons.**

18.1. Yes.

**19. Do you agree with the proposed amendment to the Australian model regulations about PPE needing to be compatible with other required PPE? What is the impact of incompatible PPE in your area of work? Please give examples.**

19.1. Yes.

**20. Do you think it is necessary to continue the current provisions enabling a worker to genuinely and voluntarily choose to provide their own personal protective clothing so long as this does not compromise their safety? Do you agree to broaden this out to include all PPE? Please give reasons.**

20.1. We think the provisions relating to protective clothing remain important Workers and unions fought hard to include these provisions in the Health and Safety in Employment Act 1992 following huge problems with inferior and uncomfortable protective clothing.

20.2. The challenge is to ensure that this situation only occurs where a worker "genuinely and voluntarily chooses" to do so. Often genuine choice is not given (for example this issue is common in the forestry sector). The Independent Forestry Safety Review commented in their recent public consultation document *Factors Influencing Health and Safety in the Forestry Sector* (June 2014) at 77 that:

> Forestry workers appear to be paid a range of allowances to provide, maintain and renew their clothing and equipment. PPE and chainsaw allowances are common. The PPE allowance is of particular concern to the Review Panel. It appears that many workers are paid an allowance for what constitutes the protective clothing and equipment necessary to keep them safe on the forest block. The Review Panel has found that this is accepted in the sector as normal practice.
>
> Requiring a worker to provide their own PPE is a breach of current health and safety legislation. Section 10(3) of the Health and Safety in Employment Act 1992 (the HSE Act) and clause 28 of the proposed Health and Safety Reform Bill (the Bill) are clear: it is the duty of persons conducting a business or undertaking (PCBUs) to provide suitable clothing and equipment to protect workers from harm. PCBUs cannot pay a worker an allowance instead of providing PPE, nor can they require a worker to provide their own.
>
> Aside from being an illegal practice, from a safety-first perspective PPE allowances are entirely unsatisfactory. Paying an allowance or requiring a worker to provide their PPE significantly increases the scope for equipment of varying quality to be used. PPE needs to be replaced fairly regularly to remain effective on the forest block. There is a temptation for workers to use their PPE allowances for other living expenses and to compromise their safety by using inadequate or cheap gear or to skimp on maintenance. This presents a significant safety risk and the Review Panel is of the view that the practice of PPE allowances must stop.

20.3. Given these issues, strong protections are needed. We propose a regulatory offence of undue influence on workers to provide their own protective clothing.

20.4. The case for extending this exemption from protective clothing to other kinds of PPE is considerably weaker and we are concerned that without robust worker protections, these issues may act as a de facto barrier to entry (particularly for contractors given the framing of cl 27 of the Bill which only prohibits requirement of PPE as a prerequisite for employees).

**21. Do you agree to continue the absolute nature of the requirement on PCBUs to provide PPE to workers and other people in the workplace, and ensure it is used/worn? What are the positive/negative impacts of this? Please give your reasons.**

21.1. Given the balance of power between PCBUs and workers, including duties under the Health and Safety Reform Bill for workers to follow the PCBUs' reasonable instructions and in the case of employees duties of fidelity under employment law generally, it is appropriate that there should be very strong incentives on PCBUs to ensure that workers wear adequate and appropriate PPE.

21.2. We therefore support some form of strict liability for PCBUs in relation to both the provision of PPE and ensuring that it is used by workers and others in the workplace. This should be at the infringement offence level with more serious penalties at the regulatory offence level. We refer you to our reply to question 5 regarding issues of infringement notices precluding later action on more serious breaches and note that this issue is particularly acute in relation to PPE failures as a contributing factor to more serious offences.

**22. Do you agree to maintain the absolute nature of the provisions on workers and other people in the workplace to use/wear PPE? What are the positive/negative impacts of this? Please give your reasons.**

22.1. On the one hand, lack of adequate PPE is a common factor in workplace injuries. It is critical that workers and others are encouraged to wear appropriate PPE at all times. This should include enforcement action against them when they fail to do without adequate excuse. An absolute requirement (backed with the ability of inspectors to issue infringement notices and take other compliance action where required). Strict liability backed by credible and robust enforcement may motivate compliance.

22.2. On the other hand, workers' duties are expressed in cl 40 of the Health and Safety Reform Bill as to "take reasonable care for his or her own health and safety" and to "comply, as far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU." It is perhaps unfair to

workers to penalise them significantly for situations that are genuinely beyond their control. Strict liability means that a worker could be penalised for inadequate or no PPE provided by the PCBU.

22.3. Any strict liability imposed upon workers for failure to comply should be at a low fine level given their relatively lack of influence over the PPE supplied.

**23. Are there any other amendments that you think should be made to the new regulations relating to PPE? Please give your reasons.**

23.1. It would be helpful for the regulations regarding PPE to expressly include a requirement for PCBUs to engage with workers in relation to the selection of PPE. Cl 63 of the Health and Safety Reform Bill clearly envisions such consultation in stating that "Engagement with workers is required… when making decisions about ways to eliminate or minimise these risks".

23.2. Adding an express reference to this engagement in the regulations draws this link more clearly.

**24. Do you support the proposal to introduce a specific requirement on PCBUs to manage risk to the health and safety of workers doing remote or isolated work? Do you think this requirement is necessary in the New Zealand context based on the meaning of remote and isolated work? Do you have examples of this kind of work in New Zealand? Please give reasons.**

24.1. We think this regulation is important to plug a hole in the New Zealand framework.

24.2. Significantly, the definition in the Australian legislation refers to "remote **or** isolated work" not "remote **and** isolated work" as it is phrased in the question above. The two concepts are distinct and the distinction is important as to what kind of work is captured in the requirements.

24.3. The Australian 'Model Code of Practice - Managing the Work Environment and Facilities' contains a useful discussion of remote or isolated work at 23:

> Remote or isolated work is work that is isolated from the assistance of other people because of the location, time or nature of the work being done. Assistance from other people includes rescue, medical assistance and emergency services.
>
> A worker may be isolated even if other people may be close by, for example, a cleaner working by themselves at night in a city office building. In other cases, a worker may be far away from populated areas, for example, on a farm.
>
> Remote and isolated work includes:
>
> - all-night convenience store and service station attendants
> - sales representatives, including real estate agents
> - long distance freight transport drivers
> - scientists, park rangers and others carrying out field work alone
> - health and community workers working in isolation with members of the public.
>
> In some situations, a worker may be alone for a short time. In other situations, the worker may be on their own for days or weeks in remote locations, for example, on sheep and cattle stations.

24.4. So remote or isolated work is mischaracterised as being solely about geographical isolation (as the discussion document appears to suggest through examples of DOC rangers and scientists).

24.5. A tragic example of failure to adequately manage the risks of isolated work is that of security guard Charanpreet Dhaliwal, killed on his first day of work in 2011. Mr Dhaliwal was not provided with any real training nor effective means of communication. Had he been, he may have been able to call for help and this may have altered the course of events that led to him being struck in the head with a piece of wood and killed.

24.6. The Model WHS Regulations and code of practice focus on people working alone. However, framing the regulations in this way loses considerable value. A group of people who are isolated from emergency services are almost as vulnerable as one person alone (particularly in high risk work such as forestry or underground mining).

24.7. The communication channels with the surface and other miners are particular important in underground mining. The Royal Commission of Inquiry into the Pike River Coal Mine Tragedy said at [29], [30] and [34] of Chapter 33 of Part 2 of their Final Report that:

> 29. The provision of adequate communication devices, capable of surviving emergency events such as explosions, ensures that workers underground can raise the alarm with the surface and with other workers, and can advise surface personnel

> of the status of workers underground and their planned escape route. A communication system allows those on the surface to guide workers underground towards the best way out of the mine. This is especially important if a particular route could lead workers into danger. Communication and personnel location devices are also beneficial when workers cannot get out of the mine on their own. In such situations, surface rescue teams can be directed straight to the survivors without having to undertake a time-consuming search of the mine.
>
> 30. In New Zealand there are no express legal requirements for the provision of communications systems in underground mines, either during an emergency or in normal operating conditions….
>
> 34. All underground mines should have an adequate communications system that allows effective contact between miners underground and the surface during an emergency. New Zealand should keep abreast of the development of effective personnel location systems. As reliable and suitable systems become available, mine operators should also be required to install these.

24.8. The proposed regulations for remote or isolated work would require better systems to have been put in place in both of these instances.

24.9. Forestry work is also often both remote and isolated. Adequate communication equipment is essential. The Independent Forestry Safety Review comment in their Public Consultation Document *Factors Influencing Health and Safety in the Forestry Sector* (June 2014) at 76 that:

> A high proportion of crew members use two-way radios constantly and the industry knows that good electronic communication tools are available. Yet concerns have been raised to the Review Panel that good practice is not always evident when it comes to radio communications. The Review Panel has been advised that some radios are ineffective because signals are inaudible and that radios are not always quickly replaced or repaired when they are broken or when batteries go flat. We have also heard of work occurring without two-way communication channels being in place. Yarder hooters that do not allow two-way communication are error-prone and not good practice.
>
> Communication equipment is key safety equipment. It is essential for both internal communication between crews and for external communications in case of emergencies. Workers' line of sight is often obscured; for example, by weather, undergrowth and topography. The Review Panel saw at first hand the difficulty of addressing poor faller performance when there is no direct line of communication with the crew boss.
>
> The Review Panel suggests that injury may be prevented or lives saved by the use of better communication equipment such as radio frequency identification (RFID). The Review Panel considers that GPS comes into its own during emergencies, particularly for crews working in isolated areas and individuals working alone. Despite the routine use of radio and GPS devices, the Approved Code of Practice for Safety and Health in Forestry Work (the forestry ACoP) rarely specifies their use for tasks on the forest block (exceptions being tree felling and helicopter operations).

24.10. Similar issues occur in agriculture. Given the high risks present in these sectors (excluding occupational disease, forestry and agriculture together accounted for more than half of deaths by workplace accident in New Zealand in 2013) increased emphasis on communication is very important.

24.11. We strongly support this proposal but suggest the ambit should be broadened to include isolation from emergency services (not just other people).

**25. Are there any other amendments that you think should be made to the new regulations relating to remote or isolated work? Please give your reasons.**

25.1. No.

**26. Do you have any comments to make in relation to the regulatory proposal for managing risks from airborne contaminants? Particularly, what do you think is a reasonable timeframe for keeping records of air monitoring?**

26.1. We disagree with the suggestion regarding air monitoring that "given the average life-cycle of businesses in New Zealand, 30 years may not be a reasonable requirement…." If New Zealand is serious about tackling occupational disease then we must improve our record keeping and data gathering capabilities.

26.2. The CTU submission on the Health and Safety Reform Bill sets out the Health Surveillance scheme used in the United Kingdom. We note at [26.9]-[26.12] of our submission that:

> 26.9 We suggest investigation of the United Kingdom's "Health Surveillance" regime. This regime is one way of tackling some of the problems associated with occupational disease particularly under-reporting and a lack of data.
>
> 26.10 A United Kingdom employer must keep a health register of its employees if those employees are in a workplace that exposes its workers to hazards such as noise, vibration, solvents, dusts, fumes, hazardous substances, asbestos, and radiation. The substances the workers are exposed to have to be recorded and this record is linked to workplace monitoring of hazards. The worker's health register is distinct from medical records kept separately to medical records to avoid privacy issues. Details included in the register are:[3]
>
> - What work has the employee been doing/for how long?
> - Have all risks in the work activity been assessed?

[3] http://www.hse.gov.uk/health-surveillance/what/index.htm

- Have you chosen the most effective and reliable controls?
- Have you considered all routes of exposure?
- Is the employee trained, both for the job and in the use of any equipment used to control risk?
- Have you maintained/checked the control measures to make sure they stay effective?
- Is any necessary personal protective equipment (PPE), including protective clothing, provided and used correctly?
- Is any necessary respiratory protective equipment (RPE) provided and used correctly?
- Is RPE and PPE maintained?
- Could activities outside work have caused ill health?

26.11 Because of long latency for occupational disease, the register must be kept for 40 years. This allows a diagnostic link to be made between occupational exposure and onset of disease.

26.12 This information would be beneficial particularly for preventative, research, educational, and even compensation purposes under the Accident Compensation Act 2001. The Taskforce recommended that WorkSafe should be collecting and monitoring occupational health monitoring and exposure monitoring data. A duty on the PCBU to keep a health register for workers would assist WorkSafe in meeting this recommendation as inevitably WorkSafe will need to collect this information from the workplace.

26.3. We submit therefore that exposure records (among others) should be kept for 40 years. A way to address the issue of business lifecycle would be to introduce a requirement for businesses to send these records to WorkSafe at the point of liquidation. This would have considerable ancillary benefits to WorkSafe's ability to undertake long-term research and analysis.

**27. Do you think the proposed regulation for managing risks from airborne contaminants will impose any additional costs on PCBUs? Conversely, what are the benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical)**

27.1. Extended record keeping will impose some additional costs on PCBUs but the benefit of better data to deal with occupational disease is worth many millions of dollars to the New Zealand economy if it prolongs workers' working lives and keeps them from requiring health services. This is quite independent of the value of keeping workers alive and well.

**28. Do you have any comments in relation to the regulatory proposals for managing risks associated with hazardous atmospheres?**

28.1. We support the inclusion of hazardous atmospheres as a specified risk requiring the use of specific risk management process.

**29. Do you think the proposed regulation for managing risks associated with hazardous atmospheres will impose any additional costs on PCBUs? Conversely, what are the benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical)**

29.1. We do not think that there will be significant additional costs from the proposal.

**30. Do you think New Zealand should define an atmosphere as hazardous: if the concentration of flammable gas, vapour, mist or fumes exceeds 5% of the substance's lower explosive limit (the Australian model approach), or based on the concentration of flammable gas, vapour, mist or fumes as classified by AS/NZS 60079.1.10: 2009, or other such standards? Please give reasons, noting positive or negative effects.**

30.1. No comment.

**31. Do you have any comment to make in relation to the regulatory proposal about the storage of flammable substances at the workplace?**

31.1. We support the imposition of a "lowest practicable quantity" requirement for the storage of flammable substances.

**32. Do you think the proposed regulation for the storage of flammable substances at the workplace will impose any additional costs on PCBUs? Conversely, what are the benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical)**

32.1. We are concerned that the description of the weighing up process between the costs of more regular deliveries and smaller bulk discounts against workplace safety mischaracterises the general duty and in particular fails to capture the requirement that cost only be the deciding factor when it is grossly disproportionate to the safety gains. There should always be a thumb on the scales in favour of safety.

**33. Do you have any comment on the regulatory proposal about managing the risk of falling objects?**

33.1. We support this proposal.

**34. Do you have any comment on the regulatory proposal about managing risks associated with hazardous containers and loose but enclosed materials?**

34.1. We support the retention of the more detailed New Zealand standards in relation to hazardous containers and loose but enclosed materials.

**35. Do you have any comment on the regulatory proposal about carrying over the current provisions for young persons?**

35.1. It is disappointing to see the New Zealand Government's continuing failure to implement the provisions of ILO Convention 138 on Minimum Age ('C138'). As one of the eight fundamental ILO Conventions the Government has committed to the observance of C138 through ILO Membership and New Zealand's endorsement of the ILO Declaration of Fundamental Rights and Principles at Work (1998).

35.2. New Zealand's health and safety law should be brought into full compliance with the provisions of C138. The CTU advocates for the introduction of a

minimum age of employment. However, we do not consider that the health and safety regulation making process is the correct vehicle for this process.

35.3. The issue of when young people should be permitted to undertake hazardous work is a very important issue, however. Art 3 of C138 states in part:

> **Article 3**
>
> 1. The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years.
>
> 2. The types of employment or work to which paragraph 1 of this Article applies shall be determined by national laws or regulations or by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist.
>
> 3. Notwithstanding the provisions of paragraph 1 of this Article, national laws or regulations or the competent authority may, after consultation with the organisations of employers and workers concerned, where such exist, authorise employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.

35.4. According to Statistics NZ data, young persons are significantly over-represented in serious injury claim statistics with the highest rate of serious injury claims in 2012 of any age group (119 per 1,000 FTEs).[4] These are for workers aged 15-24 and we do not have published statistics for workers aged under 15. However, they represent cause for significant concern. The agriculture, forestry, fishing construction, and manufacturing have significantly higher death and injury rates than other industries and it is these industries to which the health and safety restrictions relate.

35.5. We call for the age restriction on hazardous work, injurious work, machinery and self-propelled plant (including tractors) to be lifted to 18 years from the current 15 years. An exemption for 16 year olds under proper supervision and with adequate training may be reasonable but should be worked through with the social partners. We are letting our children down with lax regulation.

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[4]See http://www.stats.govt.nz/browse_for_stats/health/injuries/InjuryStatistics_HOTP12.aspx

**36. How do you think regulation 61 of the current regulations relating to the use of tractors for agricultural work by 12 year olds should be transferred to the new regulations? Do you think that this exception should be removed? Please give your reasons.**

36.1. We support the removal of this exemption. As above, we believe the age restriction for mobile plant (including tractors) should be 18 years.

**37. Do you think there should be a provision in the new regulations prohibiting people younger than 15 years of age from working in an area where hazardous substances are manufactured, handled or sold? Please give your reasons.**

37.1. We support the introduction of this provision. As above, we believe the age restriction should be increased to 18 years for all hazardous work (including work with hazardous substances).

**38. Do you have any comment to offer on the regulatory proposal about limited child care providers?**

38.1. This proposal is ungainly and fragmented policy-making.

38.2. We are unconvinced that limited child care centres are not included in the new vetting and screening regime introduced by the Vulnerable Children Act 2014.

38.3. Limited child care providers may be required to vet their staff as a specified organisation under s 24 of the Vulnerable Children Act 2014 if they are "to be funded (whether wholly or partly and whether directly or indirectly) by a State service to provide regulated services."

38.4. Regulated services include (Sch 1, cl 31 of the Vulnerable Children Act 2014):

> services provided at any location on behalf of a limited child care centre (as defined in section 2(1) of the Health and Safety in Employment Act 1992).

38.5. It would be far preferable for the purposes of consistency and clarity to have all safety checking and vetting of children's workers covered by one statute.

The provisions of the Vulnerable Children Act 2014 are also substantially more thorough than those under the proposed regulations. It is difficult to see why children in limited childcare provider's care deserve less protection.

38.6. We recommend that MBIE urgently seek the advice of the Vulnerable Children's Board on this matter. If it is necessary to regulate to fix this issue, a better proposal would be to regulate under the Vulnerable Children Act.

## CHAPTER 3: REGULATING WORKER PARTICIPATION, ENGAGEMENT AND REPRESENTATION

The empirical evidence is strong on the value of organised worker participation in health and safety. It bears repeating Johnson and Tooma's summary of research (2012)[5] at 137-138, which we set out in our submission on the Health and Safety Reform Bill.

> Why *should* workers have the right to be represented and to participate in work health and safety issues? … The ethical argument is that workers bear the brunt of the effects of work related hazards, and should therefore participate in measures to identify for requiring worker participation in effective work health and safety management. First, worker participation assists managers to develop better approaches to work health and safety. Managers will rarely have perfect or full knowledge of the production process, the hazards that emanate from production and the best measures to eliminate or reduce hazards. Managers therefore generally need to draw on worker experience and knowledge of these issues. Second, although employers' and workers' interests in health and safety largely coincide, there is also a tension, sometimes a conflict, between the drive for production and profits on the one hand, and work health and safety on the other – worker participation in work health and safety management is essential to ensure that workers' interests are properly protected.
>
> The available empirical research suggests that direct participation by means of individual non-unionised employees engaging with managers appears to have little effect on work health and safety. There are very few studies on the use by individual workers of an individual right to refuse to perform dangerous work, and what research there is suggests that this right is little used in small firms, where workers inhabit 'structures of vulnerability'.
>
> There is much stronger evidence on the positive effects of collective worker participation on work health and safety….

Johnston and Tooma's summary is consistent with a meta-analysis conducted for the International Labour Organisation that concluded that research evidence demonstrates a strong link between arrangements for worker representation and consultation and improved health and safety outcomes.[6] It is important to note, however, that improved outcomes are subject to certain conditions, including:

- 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

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[5] Johnstone, R and Tooma, M (2012) *Work Health and Safety Regulation in Australia: The Model Act.* Sydney, Federation Press.

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

- 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.

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, their employers and others in their workplace that has the potential to make a real difference.

Therefore, these regulations, and the Bill, must make dramatic improvements to the current worker participation requirements. The Independent Taskforce on Workplace Health and Safety found that worker involvement in workplace health and safety was critical, but that in New Zealand it was "too often ineffective and often virtually absent". They also concluded (at 98) that there were a number of factors at play in New Zealand's poor performance in worker participation:

a. There is limited support in the legislation for worker engagement
b. There is a lack of regulator enforcement and guidance
c. Employees often lack awareness of their rights and, if they are aware, fear reprisals if they exercise them
d. Union density has fallen substantially, and there are increasing levels of unorganised, casual, contract and short-term labour in the workplace
e. Many managers lack the awareness, motivation to engage and capabilities needed to respond effectively to workers raising health and safety issues
f. Many businesses prioritise production targets over health and safety concerns.

Both the new Act and these supporting regulations must create effective worker participation and representation mechanisms by removing these barriers.

**The relationship between primary and delegated legislation in relation to worker participation and representation**

In our submission on the Bill we also challenged the decision to delegate much of the important provisions relating to worker participation from the primary legislation to regulation. We reiterate this.

The Taskforce recommended that worker participation be **further** strengthened by having specific requirements and information about how worker participation is expected to operate in regulations. It was envisaged that the Bill would strongly

support worker participation and representation. The proposed Bill and regulations have got this balance wrong. In several instances, the devolution to regulation represents a backwards step from the current law. This is unacceptable, given that even in its current state, the provisions relating to worker participation and representation are not adequate. Moreover, certain critical elements of the proposed regulations have the potential to be controversial and should be in primary legislation, such as the process for setting up work groups, requirements for training of Health and Safety Representatives and the makeup and processes of Health and Safety Committees. The extent of the devolution also means that it is difficult to know exactly how the worker participation system envisaged in these reforms will work as a whole.

**39. Do you have any comments on the proposed procedure for determining or varying work groups where there is one PCBU?**

39.1. In our submission on the Bill we oppose work groups as being overly bureaucratic and a mechanism for limiting the role and scope of Health and Safety representatives. We agree with the Taskforce's view at [250]:

> 250. We do not, however, consider that the following provisions of the Model Law are necessary or appropriate for a New Zealand context: the detailed provisions around different types of Health and Safety representative (e.g. provisions defining work groups and related to deputy Health and Safety representatives)….

39.2. Health and Safety representatives must be able to exercise their powers in the workplace wherever they identify a health and safety issue. Limiting a Health and Safety representative's powers to the work group disregards the changing and the complex structure of modern workplaces which the concepts of 'PCBU' and 'worker' are defined to address. For example, on a construction site, where the personnel (both PCBUs and workers) can change daily. The proposed regulations seem to envisage that negotiations to change the work group would be required. This is unworkable.

39.3. We favour the less bureaucratic approach of the Health and Safety in Employment Act 1992 schedule 1A, which also allows for the Health and Safety representatives to exercise their powers outside the workgroup.

39.4. If it is decided that workgroups will go ahead we, make the following recommendations:

- We note that the discussion document identifies than a series of small deadlines like 14 days for commencing negotiations to set up a workgroup. This could be hard to administer and it might be easier to have a single deadline within which a PCBU must have a workgroup in place e.g. 3 months after being approached by a worker

- If there is a union in the workplace they should be involved in the negotiations. Unions are largely absent from the discussion document and we should make the point that the occasional reference to workers' representatives is not enough. Once again we recommend the HSE provisions as the basis of union involvement

39.5. If workgroups remain as constituted in the Bill, clauses 16 and 17 of the Model WHS Regulations should be imported into the New Zealand regulations.

39.6. The Model WHS Regulations are somewhat paraphrased in the regulation discussion document and this should be avoided. The way the regulations have been paraphrased introduces ambiguity and uncertainty. For example, the discussion document states that workgroups must be established in a way that "most effectively and conveniently enables the health and safety interests of workers to be represented". That is much more ambiguous than the Australian regulations that state workgroups must be established in a way that "most effectively and conveniently enables the interests of the workers, in relation to work health and safety, to be represented."

*Default system*

39.7. The provisions relating to setting up a system of worker participation are a considerable step backwards from the default provisions of s 2(3) of Sch 1A of the current Act. Feedback from our affiliated unions is that the current model of a default system of employee participation that applies if the parties

cannot agree within six months is effective in ensuring progress in the initial set up phase of a health and safety system.

39.8. If workgroups are introduced, a default system should be retained if parties cannot agree on a worker engagement system within three months. The provisions for the default system should be based on the following principles:

- All workers present in a workplace should be covered by the worker engagement system, including temporary and contract workers.
- Workplaces with less than 10 workers are not required to have a Health and Safety representative or Health and Safety committee (unless requested by the workers or the PCBU). However, these workplaces must have a formalised and documented system for undertaking each of the functions of a health and safety committee. The system must be robust and demonstrate that workers have genuinely and effectively been engaged with.
- Workplaces with more than 10 workers must have at least one trained Health and Safety Representative per 10 workers. These Health and Safety Representatives will be deemed to represent all workers on any particular workplace. As a default, this will incentive PCBUs to meaningfully negotiate smaller workgroups.
- For multiple PCBU workplace, should negotiations fail, the principal contractor or primary PCBU must ensure one or more Health and Safety Representatives for every 10 workers on the workplace. If a PCBU withdraws from negotiating, that PCBU must also have at least one Health and Safety Representative for every worker of that PCBU at that workplace.
- Workers who are temporarily at a workplace should be covered by a pre-existing workgroup and pre-existing Health and Safety Representatives should be able to exercise his or her powers in relation to that temporary worker.

39.9. Critical to the Australian model regarding workgroups are the penalties for failure to negotiate workgroups. These must be carried over and the penalties under regulations must be lifted to a maximum of $50,000 to permit the same sentence as that in cl 56 of the Model WHS Act.

**40. Do you have any comments on the proposed process for determining workgroups where there are multiple PCBUs? (pp. 68-69)**

40.1. We oppose the proposal allowing a PCBU to withdraw from negotiating with multiple PCBUs to determine a workgroup. Such a provision would undermine the shift from the concept of employer and employee to PCBU and worker.

40.2. There is also an apparent gap in the discussion document about the relationship between an existing workgroup and a workgroup from another PCBU, when that PCBU comes onto a workplace such as a house construction, for only a short period of time. They should be covered by an existing workgroup and subject to a Health and Safety representative who is already in place, rather than having to renegotiate a workgroup for what is a temporary purpose.

40.3. A PCBU that withdraws from a multiple PCBU workgroup negotiation should still owe the duties in clauses 78 to 80 of the Bill to all Health and Safety representatives in the workplace, such as the requirement to provide health and safety representatives with information and access. This is an important question that requires clarity.

40.4. This may also be a situation in which the concept of a roving Health and Safety representative supported by a regional health and safety centre as we proposed in our submission on the Bill as the workgroups might well be transitory.

**41. Do you have any comments on the proposed eligibility criteria for a Health and Safety representatives?**

41.1. Consistent with our earlier comments about workgroups we oppose the requirement for the Health and Safety representative to be a member of the workgroup (see above).

41.2. We agree that an individual must be willing to be a Health and Safety representative, but we have a question about the third bullet point, which states that the individual must work sufficiently regularly and for sufficient time to carry out their role effectively. This is taken from the Health and Safety in Employment Act 1992 requirements and is reasonable on the face of it however it should not be used to exclude a casual worker from standing, just because they are designated as casual. Casual workers should still be able to be Health and Safety representatives, provided that they work sufficient hours to carry out their role effectively.

**42. Do you have any comments on the regulatory proposals for the election process for Health and Safety representatives?**

42.1. The wording on how Health and Safety representatives are elected on 69 of the discussion document is too tentative. Members of the workgroup “must” choose who they want to represent them, rather than “should.”

42.2. We support the proposal for PCBUs to facilitate the election and provide resources. This is not necessarily the same as ‘conducting’ the election. The role of unions in the election of Health and Safety representatives must be written into the regulations. Schedule 1A of the current Act recognises the important role and valuable experience of unions in holding workplace elections (such as those for union delegates) and running ballots (ratification of collective agreements for example). We submitted that cl. 68 of the Bill should specify that elections are conducted by workers and their unions unless the workers ask that the PCBU or PCBUs conduct the election, and if this proposed amendment fails then this matter needs to be addressed in these regulations.

42.3. The discussion document proposes that the regulations will allow workers to have a worker's representative help them organise the election "if the majority of the work group wish them to". This proposal has the wrong emphasis and runs the real risk that unions will be excluded from conducting ballots which their members want them to manage, and it could result in badly run ballots. We would propose that union involvement should be the default process for organising an election unless 3 or more workers object.

42.4. We support the regulations specifying that all members of a work group have the right to nominate someone, including themselves, to stand as a Health and Safety representative and that where the number of nominations equals the number of vacancies, the nominees will become the Health and Safety representatives without an election.

42.5. A secret ballot should be mandatory. These are not too onerous to run. Unions have decades of experience in holding secret ballots. There is a risk that some workers might not want to stand or participate in an election where the ballot is conducted by a show of hands.

**43. Do you have any comments on the regulatory proposal about the term of office of three years?**

43.1. A term of office of three years is probably reasonable. However, the prospect of a three year term may put off workers who may not know where they will be working in three years. The regulations or the approved code of practice needs to address how these requirements might apply in temporary workplaces like house construction, or in industries where casualised labour is used or there is a high turnover of staff.

**44. Existing trained Health and Safety representatives are able to issue hazard notices – what additional training do you think is required in order for these Health and Safety representatives to issue PINs and direct unsafe work to cease, if any? Please give your reasons.**

**45. What essential content needs to be covered in training for Health and Safety representatives to have enough knowledge to effectively carry out their functions and powers? Please give your reasons.**

**46. How do you think Health and Safety representative training should be delivered, for example online or face-to-face? Please give your reasons.**

46.1. This section replies to questions 44-46 together.

46.2. The review of the health and safety representative training being undertaken by MBIE in consultation with Business NZ and the CTU should inform the regulations, particularly around such matters as the competencies required.

46.3. The emphasis needs to be as much, if not more, on the competencies required to effectively organise and represent the workers and engage with the PCBU, as on an understanding of the law. The technical side, such as knowing when to issue a PIN, is important but if a Health and Safety representative does not have the ability or confidence to represent the workers in dealings with the PCBU, the technical knowledge will not be much use.

46.4. Health and Safety representatives should be entitled to two days each year of face to face training for three consecutive years. There should be an entitlement to two days in the fourth year for those representatives who have been re-endorsed and who wish to be involved in standard setting at a sector or industry level.

46.5. Refresher training is important because, as stated above, the content and competencies are not just about the technical requirements of issuing a PIN or ordering work to cease. People can become de-skilled without top-ups. In

some situations refresher training may be effectively facilitated outside of a traditional classroom set up and include online programmes and follow-up visits of trainers to the worksite, for example.

46.6. Members of Health and Safety committees also need training. We support the current provisions under the Health and Safety in Employment Act 1992, whereby Health and Safety representatives comprise the majority of the committee and question the proposal in the Bill which would enable PCBUs to meet the requirement of having worker participation practices just by having a committee. If the proposal in the Bill becomes law then the regulations should ensure that the Health and Safety committee are also trained.

46.7. We are strongly opposed to the suggestion that Health and Safety representative training be delivered on-line. Given that the emphasis should be on managing relationships and working with workers and employers, not just technical and legal matters, an on-line approach would be completely inadequate. Many workers still do not have access to computers or the internet. If training was linked to online learning only this would be a barrier to many workers taking on the H&S Rep position. Online training, devoid real-time social interaction and stimulation, would not provide appropriate learning opportunities to develop and practice critical interactive skills for effective dialogue and assertiveness, skills that contribute to building the confidence that is essential for effective representation. Face-to-face training (involving active learning techniques such as critical questioning, role-plays and group discussions) is the only way to provide an effective learning environment for health and safety representatives.

46.8. Evidence shows that follow-up training opportunities significantly enhance the learning experience and augment the retention of skills and knowledge. Therefore WorkSafe should be responsible for funding follow up support, such as annual regional workshops.

**47. What level of experience and qualifications must the training organisation have in order to provide training for Health and Safety representatives?**

47.1. We emphasise the importance of unions as training providers. In 2002 the CTU developed a two-day training course for worker representatives and entered into a joint venture with the Accident Compensation Corporation. In doing this, the CTU accepted responsibility to act on behalf of all workers and not just union members. We did so because we regard workplace health and safety as a crucially important issue and because the union movement has the networks and the experience to reach out to all workplaces.

47.2. Since 2002, more than 27,500 Health and Safety representatives have been trained by the CTU and the training courses have received overwhelmingly positive feedback from participants. CTU trainers are highly experienced with most having had a long professional association with worker learning. They are well equipped to understand the challenges Health and Safety representatives face in carrying out their role.

47.3. Accordingly, union trainers should be regarded as default providers, unless other providers can provide the same level of expertise, experience and degree of worker perspective.

47.4. If this proposal is unacceptable then there should be a tripartite body responsible for approval of the training organisation (and trainer quality) and the teaching programme. The training organisation would be responsible for having approved trainers who meet certain criteria, including:

- Systems for effective quality assurance.
- A strong understanding of the workers voice and commitment to helping learners the confidence to be an effective Health and Safety representatives.
- Independence from safety retail organisations and the PCBU that employs the workers.

**48. What assessment should Health and Safety representatives have to undergo, if any, as part of their training to be able to exercise their powers and functions under the new Act?**

48.1. We do not support a tick-box written exam type assessment for Health and Safety representatives because no evidence supports the veracity of this type of exercise for assessing competency.

48.2. Rather, the evidence shows that training which is more interactive and discussion based, where the representatives share their experiences and knowledge is significantly more effective. Currently CTU Health and Safety representative training provides participants with generic tools for them to practice their use and apply (in groups) to their own work environment. This type of practical exercise provides direct application of learning from the course to the workplace. Trainers will often use a formative assessment approach during a course through observing of participants, questioning and dialogue with learners, to enhance the quality and outcomes of the learning session. Participants leave the course with a work plan for implementation back in the workplace.. In terms of assessment of competency on the job, ideally there is a structured follow-up activity involving engagement with the Representative, their fellow workers and the employer. Unions are ideally place to be able to carry-out this type of follow-up activity.

48.3. Training participants should have the option of undertaking a NZQF-linked credentialed programme following completion of the two day face to face course, or set of courses. This could be undertaken in a distance fashion, such as online, with adequate support for the learner during the process. However, this should be optional only, and Health and Safety representatives should not have to be credentialed before being able to exercise their powers and functions under the new Act.

**49. Do you have any comments on the proposed process for Health and Safety representatives to access training and the PCBU's obligations for training?**

49.1. The worker should have the right to choose their training provider. The PCBU should not have a right of veto only to be consulted.

**50. Do you have any comments on the proposed reasons for someone to cease being a Health and Safety representative or the process for workers to remove a Health and Safety representative?**

50.1. The CTU is opposed to the power of the regulator to remove Health and Safety representatives as currently drafted. This power is drafted too widely and with insufficient structural or procedural safeguards. The power should lie with either the District Court or a tribunal.

50.2. We do not support the provision for a Health and Safety representative to be removed because they are not part of the work group they represent. We have earlier raised issues about the restrictive nature of work groups and how they limit the ability of a Health and Safety representative to exercise their powers where they might be needed. It would be more appropriate for a Health and Safety representative to be removed if they are no longer part of the group that elected them *and* they are not in a position to exercise their powers in relation to that group.

50.3. We agree with the processes proposed for when a group of workers want to remove a Health and Safety representative.

**51. Do you have any other comments on the regulatory proposals for Health and Safety representatives?**

51.1. We submit that PCBUs should be required to maintain and display a list of health and safety representatives. Further, they should be obliged to provide it to the regulator and the regulator should have a register of Health and Safety representatives.

**52. Do you think PCBUs must be required to appoint at least one person to the Health and Safety committee who has delegated authority to make decisions on H&S matters? Please give your reasons**

52.1. We strongly support the representation of appropriately authorised managers on the Health and Safety committee.

**53. Do you have any comments on the proposed regulations regarding Health and Safety committees?**

53.1. We have addressed this issue in our submission on the Bill and alluded to the issues of training when discussing Health and Safety representative above. Health and Safety Committee members require training, particularly given that PCBUs can fulfil their duty to have worker participation practices by having Health and Safety committees instead of Health and Safety representatives. As currently proposed, these committees may not have a mandate from workers (there is no requirement for elections), they are not entitled to health and safety training, and cannot exercise the powers of Health and Safety representatives. We believe that the regulations should set out that:

- Health and Safety committee members should have training, particularly in respect of health and safety law and on how to represent workers on health and safety matters
- The worker members should be elected (not ‘chosen’) by workers
- Any Health and Safety representatives in the workplace must be members of the committee unless they decline
- Members of Health and Safety committees must have the same protection against undue influence and adverse conduct as Health and Safety representatives

**54. Do you have any comments on the proposed situations where an inspector may make a final decision about a matter?**

54.1. The CTU supports the granting of the power to inspectors to make final decisions on the matters listed on page 76 of the discussion document, provided that there is the right of review of inspectors' decisions, via the proposed internal review system proposed in the Bill and as modified in our submission on the Bill.

**55. Do you have any further comments you would like to make on the regulation of worker participation?**

*Issue resolution provisions*

55.1. The Model WHS Regulations contain detailed issue resolution provisions at Part 2.2. It is unclear whether it is intended to replicate these in the New Zealand regulations.

55.2. Part 2.2 of the Model WHS Regulations states:

> **Part 2.2 Issue Resolution**
>
> **22 Agreed procedure—minimum requirements**
>
> (1) This regulation sets out minimum requirements for an agreed procedure for issue resolution at a workplace.
>
> (2) The agreed procedure for issue resolution at a workplace must include the steps set out in regulation 23.
>
> (3) A person conducting a business or undertaking at a workplace must ensure that the agreed procedure for issue resolution at the workplace:
>
> (a) complies with subregulation (2); and
>
> (b) is set out in writing; and
>
> (c) is communicated to all workers to whom the agreed procedure applies.
>
> Maximum penalty:
>
> In the case of an individual—$3 600.
>
> In the case of a body corporate—$18 000.
>
> **23 Default procedure**
>
> (1) This regulation sets out the default procedure for issue resolution for the purposes of section 81(2) of the Act.
>
> (2) Any party to the issue may commence the procedure by informing each other party:

(a) that there is an issue to be resolved; and

(b) the nature and scope of the issue.

(3) As soon as parties are informed of the issue, all parties must meet or communicate with each other to attempt to resolve the issue.

(4) The parties must have regard to all relevant matters, including the following:

(a) the degree and immediacy of risk to workers or other persons affected by the issue;

(b) the number and location of workers and other persons affected by the issue;

(c) the measures (both temporary and permanent) that must be implemented to resolve the issue;

(d) who will be responsible for implementing the resolution measures.

(5) A party may, in resolving the issue, be assisted or represented by a person nominated by the party.

(6) If the issue is resolved, details of the issue and its resolution must be set out in a written agreement if any party to the issue requests this.

**Note**

Under the Act, ***parties*** to an issue include not only a person conducting a business or undertaking, a worker and a health and safety representative, but also representatives of these persons (see section 80 of the Act).

(7) If a written agreement is prepared all parties to the issue must be satisfied that the agreement reflects the resolution of the issue.

(8) A copy of the written agreement must be given to:

(a) all parties to the issue; and

(b) if requested, to the health and safety committee for the workplace.

(9) To avoid doubt, nothing in this procedure prevents a worker from bringing a work health and safety issue to the attention of the worker's health and safety representative.

55.3. We submit that these provisions should be included (with necessary modifications). They provide important procedural safeguards for the parties (such as the ability to request that solutions to problems are recorded in writing and to involve their representatives).

## CHAPTER 4: REGULATING WORK INVOLVING ASBESTOS

### Asbestos - Background

New Zealand Unions have been at the forefront of asbestos campaigns for decades.

In 1977 the Engineers Union raised concerns about a deceased asbestos victim and developed union guidelines on asbestos disease prevention.

In 1978 – 1982 the Engineers Union kept records of exposure and disease cases and the number of cases increased.

In 1983 a study was conducted by the Trade Union Health and Safety Centre which re-analysed the x-rays of 321 asbestos cement factory workers in Auckland, 36 of those workers had developed asbestos induced lung changes while working at the factory. Also in 1983, the Asbestos Workers and Engineers Unions successfully campaigned for the cessation of the manufacture of asbestos products at the James Hardy Factory in Auckland.

In 1990 the CTU initiated a public debate about asbestos after a court case involving a mesothelioma victim. This public debate lead to the Labour Government's establishment of an Asbestos Advisory Committee.

In 1999 the CTU published a report: "Rebuilding ACC Beyond the Year 2000" which focused on compensation issues.

In 2005 the CTU passed a resolution to campaign for amendments to ACC legislation for asbestos victims, and for the banning of the use of asbestos.

In 2006 the CTU launched a campaign for asbestos victims highlighting that "…credible international research had been available since the early 60s yet New Zealand workers continued to be exposed to asbestos right though the 60s, 70s and 80s." Fletchers and James Hardies were the main importers of asbestos and asbestos products and the CTU urged these companies pay extra levies to fund fair compensation.

In 2010, as part of an international campaign, the CTU wrote to the Prime Minister of Canada supporting a ban on asbestos in line with the International Labour

Organisation's statement on asbestos. This campaign was to end the use of the substance worldwide "…because the substance claims one life every five minutes around the world."

**The current problem**

Asbestos is the biggest workplace killer. MBIE has acknowledged epidemiological studies suggest that more than 300 people will die per annum as exposures from the 1960s and 1970s take effect. Asbestos causes cancer and no level of exposure is safe. We have known this since at least 1986 when the World Health Organisation declared just that. Further, the risks have been known to employers and government for thirty years.

New Zealand is out of step with many other countries around the world as we fail to have a plan in place to eliminate asbestos, and we fail to ban imports of asbestos containing products. In Australia and the U.K., asbestos products are strictly banned at the border.

The Government has a goal of reducing workplace accidents by 25 percent by 2020. It must also have a goal to prevent the high rate of occupational lung diseases caused by asbestos exposure.

The aim of the goal should be to completely eradicate asbestos from all workplaces. The European Parliament has agreed to 'eradicate' asbestos by 2028, and there is a plan to eradicate asbestos in Australian by 2030. New Zealand should follow suit and have a national plan to eliminate asbestos from our built environment.

The CTU is concerned about the exposures to asbestos that have occurred in Christchurch. Demolition workers, tradespeople, carpenters and householders may have been needlessly exposed to asbestos fibres. The Government should have been proactive in its approach to the presence of this known workplace carcinogen. There is a moral obligation for the Government to take urgent action.

In light of the standards in place in comparable countries, and the situation in Christchurch, the CTU recommends that:

- The Government urgently prioritises upgrading the current asbestos health and safety regulations. Currently these are slated to come into force alongside the proposed Health and Safety at Work Act in mid-2015. This is too far away and the Minister of Labour should regulate as quickly as possible. Further amendments can be made following more detailed consultation.

- As MBIE has proposed, the new regulations should be based on the Australian approach which includes a presumption that asbestos is present in the built environment and therefore workplaces, and lowering the exposure limits which are out of line with international standards. They also require more prescription in relation to removal work.

- There should be mandatory licensing and training for those working with asbestos (both maintenance and demolition).

- The distinction between friable and non-friable asbestos is inappropriate given the possible deterioration and disturbance of previously non-friable asbestos. This should be removed.

- A complete ban on the importation of asbestos-containing products should be implemented.

- There should be a National Plan to eliminate all asbestos containing material from the built environment by 2030.

- All work with asbestos should be notifiable.

- All identified asbestos should be registered. If a building contains asbestos materials, the priority should be to remove it. If asbestos is identified in a building it should required to be notified in LIM reports.

- The National Asbestos Registers should be reinvigorated and improved including by making them compulsory.

- Lung cancer should be registered and recorded in more detail if it relates to asbestos exposure. There should be a system of notification by medical

practitioners of all potential asbestos related conditions including, lung cancer and pleural plaques [asbestosis and mesothelioma are currently recorded].

The Government should also take urgent steps to implement a Health Surveillance scheme similar to that used in the United Kingdom for many years. This requires employers (or all persons conducting businesses or undertakings under the proposed law changes) to keep records of worker exposure to hazards such as asbestos for 40 years to allow tracking of long latency diseases such as those caused by asbestos exposure (see Part 26 of our submission on the Health and Safety Reform Bill).

**56. Is the approach of a general prohibition with exceptions the best means of restricting work with asbestos in New Zealand workplaces? Do you consider it would be more effective than the current New Zealand system? What would be the implications of this approach for people that currently deal with asbestos?**

56.1. Yes. We support this approach.

**57. Is the definition of "work involving asbestos" comprehensive and consistent with the definition in the current regulations?**

57.1. Yes.

**58. Is the list of exempt activities contained in the Australian model regulations appropriate for New Zealand?**

58.1. Yes. We support the adoption of the list of exemptions from the Model WHS Regulations.

**59. Is there a date from which it can be assumed that asbestos is not present in workplaces and from which plant or structures installed after that date could be exempted from the regulations?**

59.1. There is no date that it can be assumed that asbestos containing products or not present in the New Zealand environment. This is because New Zealand

has continued to allow the importation and use of asbestos containing products in many industries.

**60. What are the foreseeable situations where WorkSafe NZ could approve "methods adopted for managing risk associated with asbestos"?**

60.1. If a situation where WorkSafe could approve methods is foreseeable, it should be included in the list of exemptions and managed in accordance with prescribed regulations. Worksafe should not have discretion to grant approved methods that do not adhere to the regulations. We are concerned that Worksafe could be pressured to approve methods adopted for managing risk associated with asbestos that may be motivated by cost rather than practicality.

60.2. If you decide that WorkSafe should have this discretionary power, a principled approach should be prescribed in regulations that would guide WorkSafe's decision making. Safety of the workers should be paramount. Before the methods adopted for managing risks associated with asbestos are approved by WorkSafe, workers and unions should be engaged with (as they have been in the creation of the asbestos regulations).

**61. Do you support the imposition of a broad duty on all PCBUs at a workplace to eliminate the exposure of persons at the workplace to asbestos, and where this is not reasonably practicable to not exceed a workplace exposure standard? What would be the practical effect of introducing this duty?**

61.1. The first priority should be to eliminate all asbestos from the environment. Asbestos is a known hazard, and to prevent future exposures the regulations should prescribe its elimination as a first step.

61.2. The assumption (that asbestos will be present) contained in Part 8.3 of the Model WHS Regulations at paragraph 422 (1) needs to be included in the new regulations. The evidence suggests that the prevalence of asbestos in New Zealand buildings and workplaces is comparable to Australia.

61.3. The duty for PCBUs to provide a safe working environment needs to be clear in relation to asbestos. Workers should be informed of the presences of the substance and be involved in decisions relating to the elimination and/or control of the substance in their workplace. Part 8.3 of the Model WHS Regulations should be adopted in New Zealand, particularly the provisions around monitoring, registers and information sharing.

61.4. Impac's report, *Information Interviews – The Management of Asbestos on New Zealand Workplaces* which was published in 2007*,* explains that there are very few businesses that conduct asbestos surveys and have a management plan. One demolition contactor is quoted as saying "Even half the schools don't have asbestos reports".[7]

61.5. Having clear regulations and therefore compliance standards is necessary to begin the process of deepening the knowledge base of asbestos in New Zealand.

**62. Should the same standard be adopted for chrysotile (white asbestos) as for crocidolite and actinolite and the exposure standard brought into line with those of the Australian and United Kingdom jurisdictions?**

62.1. We support the adoption of the same standard for chrysotile as for crocidolite and actinolite, and aligning the exposure standard with the Australian and United Kingdom jurisdictions.

62.2. It should be made clear that these standards apply to people who work with asbestos and not to people who work in buildings that contain asbestos. Work environments where "work with asbestos" is not occurring should have no detectable asbestos fibres present. Time Weighted Averages should not be applied to the ambient air exposure standard for workplaces where "work with asbestos" is not being undertaken.

[7] Impac Risk and Safety Management Solutions, Report to the Department of Labour, *Information Interviews – The Management of Asbestos in New Zealand Workplaces,* September 2007

**63. Should the exposure standard be specified in the new regulations themselves, or in an approved code or other instrument?**

63.1. The exposure standards should be in regulation, as in Australia. Given the severity of the consequences of exposure to asbestos, the exposure standards require the force of law and should not be contained in an unenforceable document such as an approved code of practice.

**64. Should the distinction between friable and non-friable asbestos in the current regulations be removed and the Australian approach of requiring the same processes for all asbestos or asbestos-containing materials be adopted for New Zealand?**

64.1. The distinction between friable and non-friable asbestos should be removed as non-friable asbestos can easily become friable. So called non-friable asbestos can deteriorate with age and become extremely hazardous. There should be no date from which it is reasonable to preclude the existence of asbestos. There are reports that it was used until 1990, and considering the failure of New Zealand to have a ban on importation, products like asbestos cement sheet could still be used today.

**65. How should the new regulations define a "competent person" to determine/assess whether or not asbestos or asbestos-containing material is present in a workplace?**

65.1. A "competent person" under the regulations must have appropriate training and work experience for at least two years. The CTU and industry should be further consulted with on the issue of training once these proposals are better defined.

**66. Should an asbestos register, or statement of the non-existence of asbestos, be required for every workplace or potential workplace (including residential properties under the management or control of PCBUs) in New Zealand? What is the burden of compliance likely to be, and is the compliance burden justified?**

66.1. An asbestos register should be required to be kept at all workplaces and workers should be involved in, and informed of, its contents. If there is no asbestos present, a statement of the non-existence of asbestos should be required. By including these requirements we ensure that people are empowered to have a choice as to their own potential exposures. This will assist reasonable decision making and management plans.

**67. Is a workplace asbestos register best addressed for all types of workplaces under health and safety regulations or would some, such as residential premises, be better addressed through another regulatory regime, such as under the Building Act 2004?**

67.1. The distinction between residential premises used solely for residential purposes and residential premises that are also workplaces should be made clear.

**68. Should the new regulations contain a requirement for a written Asbestos Management Plan in all cases? Are there some workplaces that could be dealt with by specific regulatory requirements or "rules" for types of work involving asbestos?**

68.1. There should be a requirement for a written asbestos management plan in all cases. In accordance with the duty of engagement with workers in clause 63 of the Bill, the plan should be developed with workers as it will be workers who may be exposed to asbestos in their workplace. The availability of a written plan will be important for workers, Health and Safety representatives and the regulator.

**69. Is there additional guidance that New Zealand workplaces would need to develop that is not available from Australia, or are there significant**

**differences in terms of risk or practices that should be considered in developing the new regulations?**

69.1. The two Approved Codes of Practice that support the Model WHS Regulations should be adopted in New Zealand.

**70. Is the process for the management of asbestos and associated risks set out in part 8.3 of the Australian model regulations as described above appropriate in a New Zealand context?**

70.1. The process for the management of asbestos set out in Part 8.3 of the Model WHS Regulations is appropriate. We agree that the plan must include the identification, decisions and reasons for decisions, procedures for dealing with incidents or emergencies and the workers carrying out the work.

**71. What level of accreditation is required for New Zealand laboratories, and what expertise and infrastructure would need to be in place to support an appropriate level of accreditation? Does this currently exist?**

71.1. There needs to be a high standard of accreditation for laboratories in New Zealand as test results are relied on to keep workers safe. The requirement for laboratories to be accredited by IANZ is best practice and should be retained.

71.2. Workers who undertake testing need appropriate training and at least six months working in the laboratory before they are considered to have adequate skills to test for asbestos fibres. Institutional knowledge is important and new start-up laboratories need to have the skills and experience to provide quality service.

**72. New Zealand has limited naturally-occurring asbestos deposits. Are provisions concerning such deposits necessary in the new regulations?**

72.1. There are deposits of naturally occurring asbestos in New Zealand. Potentially these areas can be worked or disturbed in the future. The CTU is

aware that asbestos occurs in Golden Bay and the King Country, and there are reports of it being discovered in the process of mining limestone.

72.2. With the view to keeping these sites and workers safe, the provisions concerning asbestos deposits in the Model WHS Regulations are necessary in new regulations for New Zealand.

**73. Are the proposed health monitoring requirements for workers carrying out asbestos removal work or asbestos related work adequate? What changes, if any, will be needed to implement them in New Zealand?**

73.1. Proposed health monitoring requirements for asbestos workers are essential. Currently there is often no monitoring and therefore no information about exposures recorded on medical files. However, protections should also be built into the regulations covering:

- genuine consent of the worker being monitored being obtained
- the worker having genuine choice of medical practitioner
- how the results may be used
- privacy
- the length of time the results must be kept for

**74. Are the proposed training requirements for workers carrying out asbestos removal work or asbestos related work adequate? What institutional and other resources, if any, will be needed to implement them in New Zealand?**

74.1. Capability to provide training at the level needed under the regulations exists in Australia. We recommend that initially the Australian providers are used to train asbestos workers in New Zealand. The Australian trainers should also be used to upskill New Zealand based trainers.

**75. Is the proposed prohibition on the use of high pressure water sprays or compressed air equipment on asbestos or asbestos-containing**

**material, and the requirement for controls on power tools, brooms, and other implements used on asbestos appropriate? Do the new provisions reflect New Zealand practice?**

75.1. The proposed prohibition on the use of high pressure water sprays or compressed air equipment on asbestos or asbestos containing material is supported.

**76. Should the new regulations prescribe a mandatory process to identify and manage asbestos hazards in the demolition and refurbishment of all structures and plant? Is the process in the Australian model regulations an effective way of identifying and managing the risk? How much would this differ from current New Zealand practice?**

76.1. We support the proposal that new regulations prescribe a mandatory process to identify and manage asbestos hazards in the demolition and refurbishment of all structures and plant.

**77. Should the duty to identify and remove asbestos in workplaces that are residential premises rest with the PCBU that has been commissioned to do the work?**

77.1. The duty to identify asbestos in residential premises should rest with the PCBU commissioned to do the work. The PCBU should inform the residents of the premises immediately and be responsible for the register. However, the regulations should ensure that the duties between PCBUs are shared ones rather than solely held by the PCBU completing the work.

77.2. There should be a separate requirement for house owners to supply known asbestos information relating to their property in LIM reports.

**78. In the absence of a date where asbestos and asbestos-containing material were banned from importation and use in New Zealand, is there a date after which structures or plant were built or installed from which they should be exempt from the process requirements?**

78.1. There is no date from which asbestos can be considered absent from the built environment in New Zealand. New Zealand still allows the importation of asbestos and numerous products being sold in New Zealand contain asbestos (often unlabelled).

**79. Are the requirements for asbestos removal set out in part 8.7 appropriate for New Zealand? And what new capacity or infrastructure would be needed to support them?**

79.1. We support the proposal that the requirements for asbestos removal work set out in 8.7 are appropriate for New Zealand.

79.2. Significant resources within WorkSafe must be dedicated to tackling asbestos. WorkSafe should set up an internal group similar to the Asbestos Safety and Eradication Agency (ASEA) in Australia. The internal group would then provide the capacity and infrastructure to support the part 8.7 requirements. This would have to be built using Australian expertise. WorkSafe is at arms-length from the industry and it is crucial that there is integrity in the licensing and qualification process. It is important for WorkSafe to show continued and sustained leadership on this issue.

**80. Does the 10 square metre exemption create an appropriate threshold for the use of a licensed asbestos removalist? If not, is there an alternative means of exempting small-scale or "de minimis" asbestos removal work? If it is, are there ways of ensuring the exemption is not exceeded?**

80.1. We oppose the exemption of small-scale removal work of 10 square metres of non-friable asbestos. WorkSafe must accept that no level of exposure to asbestos is safe and regulations should prescribe methods for handling asbestos in any quantity.

80.2. This exemption has been used as a loop-hole in Australia where work involving, say, 50 square metres of asbestos is divided into five separate pieces of work. This division has been used by PCBUs to avoid requirements to employ licenced removalists to do the job safely.

80.3. The 10 square meter exemption is a loop-hole that should not be adopted in New Zealand. All asbestos should be required to be removed by a person qualified to do it safely i.e.: a licenced removalist.

**81. What information should be provided to the regulator on notification of asbestos removal work?**

81.1. We are very concerned that there have only been 40 notifications of asbestos work in the Wellington region in the last year. This does not appear to represent the amount of work that would be expected to be done with asbestos in the New Zealand environment. The number of notifications should increase under the new regulations.

81.2. The information that is provided to the regulator on notification of asbestos work should include: The location, type and amount of asbestos; the name and contact details of the PCBU and the licence holder; who is doing the work, the worker's training/skills, the proposed duration; the written management plan; the monitoring plan; evidence of communication with workers and others in the area.

**82. What level of ITO or other training should be required for asbestos removal license holders and removal workers for the two classes of licensed asbestos removal work?**

82.1. The level of ITO training required for asbestos removal license holders and removal workers for the two classes of removal work should be no less than equivalent to the qualifications and experience required in Australia.

**83. Should there be a link between licensing and the appropriate disposal of asbestos waste?**

83.1. We support the link between licensing and the appropriate disposal of asbestos waste.

**84. Is there currently the industry capability to provide for licensed asbestos removalists?**

84.1. We recommend that initially the Australian providers are used to train and license asbestos workers. The Australian trainers should also be used to upskill New Zealand based trainers.

**85. Is it appropriate that businesses, as distinct from individuals, are licensed?**

85.1. To ensure credible businesses are involved in asbestos removal work the CTU agrees that businesses, as distinct from individuals, are licensed.

**86. Should there be a requirement to have an asbestos removal supervisor always present during class A work and available for class B work?**

86.1. A supervisor should always be present when class A and class B work is being done. “Always present” will require further definition. This could mean being somewhere in the same vicinity (on a big work site), or directly supervising the workers while they are working.

**87. What level of qualification is appropriate for licensed asbestos assessors?**

87.1. There are reports that some assessments currently provided are grossly inadequate. The level of qualification for a licensed asbestos assessor should be equivalent to the Australian qualification, and should include at least two years’ work experience.

**88. How should a PCBU be able to determine if asbestos is being assessed by a "competent person"?**

88.1. A PCBU should be able to determine if asbestos is being assessed by a "competent person" by being able to access the work history of the assessor. The assessor should have no less than two years' experience and this history should be available to provide assurance.

**89. Should a clearance certificate be required in all cases of asbestos removal, or is there scope for the issuing of exemptions?**

89.1. A clearance certificate should be required for all cases of asbestos removal as this provides some assurance that the area is safe. However, further definition is required:

- Who issues the certificate?
- To who?
- When can one be issued?
- Is testing required as evidence of clearance?

**90. What would the expected demand be for independent licensed assessors to meet these requirements? And what will be necessary for the regulator and asbestos removal industry to meet this demand?**

90.1. No comment.

**91. Does the membrane filter method provide the best means of air monitoring for class A asbestos removal work?**

91.1. The CTU has no comment.

**92. Are the thresholds of 10 percent and 20 percent of the workplace exposure standards for asbestos dust appropriate for the investigation and review and ceasing of class A asbestos removal work respectively?**

92.1. These levels could be even lower. WorkSafe must accept the evidence that no level of asbestos exposure is safe. Even at 10 percent of the workplace exposure standard, exposure to asbestos dust can have serious consequences.

**93. Should class A asbestos removal work apply to the removal of all occurrences of friable asbestos and asbestos-containing dusts above minimum quantities? Are there other situations in New Zealand workplaces or residential premises that it should apply to?**

93.1. We support the proposal to adopt the requirements relating to class A asbestos work and these should apply to all work involving friable asbestos and asbestos containing dust above minimum quantities. These minimum quantities should be set in consultation with the CTU and industry.

**94. Are the steps required for the removal of friable asbestos in the regulations appropriate in a New Zealand context? Having considered the materials in support of the Australian model regulations, what additional guidance or resources would be required in New Zealand?**

94.1. Australian guidance should be transferred to New Zealand.

**95. Is the list of asbestos-related work (as defined by the exemptions to the prohibition on work involving asbestos) comprehensive enough for New Zealand?**

95.1. Please refer to our answer to question 58.

**96. Are the minimum standards for asbestos-related work contained in part 8.9 of the Australian model regulations suitable for the asbestos-related work carried out in New Zealand?**

96.1. We support MBIEs proposal to include the minimum standards for asbestos related work contained in part 8.9 of the Model WHS Regulations.

96.2. We support MBIEs proposal that PCBUs are required to get material tested if it is uncertain as to whether asbestos is present or not and all the proposed requirements for work related to asbestos.

96.3. We are concerned that there may be confusion between the obligations of the PCBU and the obligations of a licensed removalist. Further guidance is necessary.

**97. Are the requirements and processes for the licensing of asbestos removalists suitable for the New Zealand industry and workplaces?**

97.1. We support the adoption of the licensing regime from the Australian Regulations. The CTU recommends that an internal body within WorkSafe created (similar to the The Asbestos Safety and Eradication Agency (ASEA) in Australia). This body could provide the capacity and infrastructure to support the licensing requirements. This would have to be built using Australian expertise.

**98. Are the requirements and processes for the licensing of asbestos assessors suitable for the New Zealand industry and workplaces?**

98.1. We support the requirements and processes for licensing of asbestos assessors.

**99. Is there an agency, other than WorkSafe NZ, that is most suited to the maintenance of the licensing regime in New Zealand? Or should the regime be operated by the regulator?**

99.1. WorkSafe should continue its role as the licenser. Worksafe is at arms-length from the industry and it is crucial that there is integrity in the licensing and qualification process.

**100. Would the asbestos removal industry and supporting infrastructure be able to meet the new requirements?**

100.1. Yes.

**101. What, if any, requirements are superfluous or are missing from the licensing process?**

101.1. The CTU submits that where a PCBU is granted a class A or B license, there should be a requirement that they must only use employees as workers. This is to ensure that the PCBU complies with its duties as an employer, in particular relating to the duty to provide personal protective equipment to its employees rather than relying on a contractor to provide his or her own personal protective equipment (see cl 27 of the Health and Safety Reform Bill). The PCBU (as an employer) will also have direct control and responsibility over the work being undertaken that the license has been granted for.

**102. Are the qualifications and experience required for each category of license in the Australian model regulations suitable for the New Zealand industry?**

102.1. ‘Asbestos related work’ should be defined to alleviate any doubt about its meaning via the exemption.

**103. Should any further terms be defined in the new regulations?**

103.1. No comment.

## CHAPTER 5: REGULATING WORK INVOLVING HAZARDOUS SUBSTANCES

There is much criticism of New Zealand's hazardous substances legislation and regulation; with it often being touted as too complex and difficult to apply by those involved with and using hazardous substances. The CTU has a strong interest in protecting workers by ensuring that the law regulating hazardous substances is complied with and enforced where it is not. In principle, the CTU supports any changes to the hazardous substances regime that furthers that interest, and improves current practice in the workplace.

*Definition and hazard classification system:*

We are disappointed that this opportunity has not been used to review the definition of hazardous substances and New Zealand's hazardous classification system. The CTU submits the hazardous substances classes should be updated to be in line with the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS). These classes are used by some States in Australia already, and will be compulsory by 2017. New Zealand should align itself with Australia and the GHS.

*Worker participation*

The specific worker participation requirements for workplaces with hazardous substances need to be spelt out in the regulations. The worker participation provisions are not sufficiently detailed to cover the concept of workers having representation when the PCBU is:

1. undertaking health monitoring,
2. monitoring the exposure of workers to the hazardous substances,
3. reviewing controls,
4. selecting medical practitioners,
5. disclosing and holding health information.

In all these situations the regulations must expressly enable worker participation **and** representation.

**104. Do you have any comments in relation to the regulatory proposal requiring a PCBU to prepare and maintain an inventory of hazardous substances?**

104.1. We support the proposal to require a PCBU to prepare and maintain an inventory of hazardous substances. It should be an infringement offence to fail to do so, or to fail to produce the inventory when asked by an Inspector.

104.2. The list of details the inventory must include is incomplete and should also include:

- The number of containers as well as the size, as there could be multiple containers of various sizes
- All locations, if spread across multiple locations
- Details of how the containers of significant hazardous substances will be disposed of

104.3. The inventory should also be available to and accessible by Health and Safety representatives and unions, if they are representing workers who may be likely to be affected by a hazardous substance in the workplace.

104.4. The CTU submits an inventory should be required for hazardous substances that are in transit in a workplace while other goods are being loaded onto or unloaded from a vehicle. Without this inventory, workers who are loading or unloading other goods from a vehicle that also has hazardous substances could be at risk without knowing it. If an incident occurred, the workers would not have ready access to the information they would need to respond, for example, the safety data sheets, which include recommendations for the immediate first aid response. It is precisely those substances which the PCBU or workers do not encounter frequently that could pose the greatest risk as they do not have procedures in place to deal with these rare but hazardous products as they are in transit. We note that the Australian

regulations require an inventory when the substances are significantly or frequently present while in transit.

**105. Given that this proposal seeks to codify existing good practice, do you think the proposed regulation, requiring a PCBU to prepare and maintain an inventory of hazardous substances, will impose any additional costs on PCBUs? Conversely, what do you think are the main benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical).**

105.1. The main benefit of this proposal is a greater awareness and assurance of what, how much, and where hazardous substances are on any particular site. This enables better control and management of hazardous substances, better enables inspections of the workplace by an Inspector, and provides a basis for emergency management if necessary. Most importantly, it will result in better and more in-depth information being supplied to those personally dealing with the hazardous substances – the workers.

**106. Do you have any comments in relation to the proposed regulations setting out processes and considerations for managing the risks to health and safety associated with using, handling, generating, or storing a hazardous substance at a workplace?**

106.1. Risk assessment is a vital part of managing hazardous substances. The proposed regulations are silent on the workers, their representatives, and contractors' involvement in risk assessment. This is a significant omission. The Bill requires PCBUs to engage with workers on matters relating to work health and safety,[8] and specifically when identifying hazards and assessing risks to work health and safety.[9] Workers are directly affected by risk management decisions. The CTU has submitted on the risk management regulations at paragraph 9.

[8] Health and Safety Reform Bill, cl 60.
[9] Health and Safety Reform Bill, cl 63(a).

106.2. Any process and consideration of risk management must involve Health and Safety representatives and workers. It needs to be express in the regulations that the views of Health and Safety representatives, workers, and their unions must be considered by the PCBU. This should be included in the list of matters a PCBU is required to take into account (set out on page 111-112 of the discussion document). It is insufficient to rely on provisions in other regulations, especially given the requirements associated with managing the risks of hazardous substances.

106.3. We support the inclusion of a regulation requiring PCBUs to annually revise all measures implemented to control risks in relation to hazardous substances. However, we have some concerns about the list of events that would trigger an earlier review.

106.4. An earlier review should also be required when there was a 'near miss' **notifiable incident.** In the context of hazardous substances, a near miss notifiable incident (e.g. a hazardous substance came very close the spilling or leaking, or a container holding a hazardous substance came very close to overturning) could reveal at least as much information about the control measures that have been implemented as would a near miss notifiable injury or illness which are intended to be covered under the regulations.

106.5. Further, the list should include a requirement to review control measures where the physical environment is altered (for example, a new container is added), or when new energy sources or fuels are added or removed from the environment.

106.6. There should be specific worker participation requirements when workplace controls are being reviewed and revised.

106.7. Failure to annually review the risk management controls should be a strict liability offence.

**107. Given that employers are currently required to manage significant hazards in accordance with sections 8 – 10 of the HSE Act, do you think that the proposed processes and considerations for managing**

**the risks to health and safety associated with hazardous substances will impose an additional costs on PCBUs? Conversely, what do you think are the main benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical).**

107.1. As this is codification of existing process, the cost would only fall on those who are currently not complying with best practice. These costs are significantly outweighed by the benefits of this proposal.

**108. Do you have any comment to make about the regulatory proposal to transfer the requirements of the Classes 1 to 5 Controls regulations and parts of the Dangerous Goods and Scheduled Toxic Substances transfer notice into the new regulations?**

108.1. The discussion document itself notes that the regulations lack adequate controls for the safe management of some substances. These substances are some of the most hazardous of all substances- with properties of explosiveness, flammability, and capacity to oxidise. However the proposal is for these regulations to be transferred into the new regulations without amendment but review within two years.

108.2. We are very concerned that such hazardous substances lack adequate controls. A review of these regulations should be prioritised by MBIE and WorkSafe and should be completed as urgently as possible.

**109. Do you think there are any immediate improvements that should be made to the controls on class 1 to 5 substances that are being transferred into the new regulations before the review is carried out?**

109.1. See above (108).

**110. Do you have any comment to make about the regulatory proposal to transfer the requirements of Schedules 4, 5, and 6 of the HSNO Fireworks, Safety Ammunition, and Other Explosives Transfer regulations into the new regulations?**

110.1. No.

**111. Do you think there are any immediate improvements that should be made to the controls on fireworks, safety ammunition, and other explosives that are being transferred into the new regulations before the review is carried out?**

111.1. No.

**112. Do you have any comment to make about the regulatory proposal to transfer regulations 7 – 10 and 29 and 30 of the HSNO Classes 6, 8 and 9 Controls regulations into the new regulations?**

112.1. We support the proposal to build in more specific controls to manage the risks associated specifically with class 6 and 8 substances. We reiterate our opinion set out at paragraph 106 that any prescribed risk management process must have worker participation built into it.

112.2. We are concerned that these regulations currently cover hazardous substances being kept in places that are not necessarily workplaces. The non-workplaces may no longer be regulated. The EPA should retain control of locations (not workplaces) that have, store, or use hazardous substances. Persons in control of these locations should have the same duties as they currently do. We understand the intention of the EPA to draft an EPA Notice addressing this issue. This approach seems reasonable.

112.3. We are also concerned about the proposal only to transfer clauses 29 and 30 to the new Regulations. This would see that the workplace exposure standard is set by WorkSafe with input from the EPA. The workplace exposure standard is a concentration of a substance in the air. However, the regulations covering the acceptable daily exposure value are not being transferred and will be set by EPA with no requirement for input from WorkSafe. The acceptable daily exposure value means exposure to an amount of substance for each unit of body weight per day that would not result in an appreciable toxic effect on a person over a lifetime of daily exposure to the substance. WorkSafe should also be charged with setting the acceptable daily exposure value, with input from the EPA.

112.4. All standards should be set in consultation with the social partners, unions and industry.

**113. Do you think there are any immediate improvements that should be made to the controls on class 6 and 8 substances that are being transferred into the new regulations before the review is carried out?**

113.1. The language of the current regulations will create confusion about who owes the duty once the new Act is implemented. The regulations use the term 'person in charge'. It is unclear if this language will be retained under the new regulations. It should be clear that this duty remains on either the PCBU or the "person with **management or** control of a workplace" (the language used in section 53 of the Bill in relation to notifiable events) or both. If the PCBU and person with management or control of a workplace are both covered by this duty, they should also have the shared duty to co-operate and collaborate.

**114. Do you think that workplaces storing classes 6.1A, 6.1B, and 6.1C (substances that are acutely toxic) and class 6.7A (substances that are known or presumed human carcinogens) should be required to establish a hazardous substance location and obtain a test certificate for that location?**

114.1. Workplaces storing these substances should be required to establish a hazardous substance location and obtain a test certificate for that location. These substances are acutely toxic and they should not be exempt from these requirements.

114.2. Classes 6.1D and 6.1E (both substances that are acutely toxic) and 6.7B (substances that are suspected human carcinogens) should be included and required to establish a hazardous substance location and test certificate for that location. All these substances are required to be under the control of an approved handler, and it is unclear why they are not currently covered by the requirement to establish the hazardous substance location and to obtain a test certification.

**115. Do you have any comment to make about the regulatory proposal to transfer the requirements of Schedules 2 and 3 of the HSNO Fumigants transfer notice into the new regulations?**

115.1. We are concerned about the incorporation of the current wording of the Hazardous Substances (Fumigants) Transfer Notice 2004. New regulation 56A deems compliance with Regulation 56 of Hazardous Substances (Classes 1 to 5 Controls) Regulations 2001 if a hazardous substance being transported is being done so in accordance with an approved safety case under the Railways Act 2005 or a safety system under the Transport Services Licensing Act 1989.[10]

115.2. The safety system and the approved safety case mechanisms require immediate change to include worker participation and representation in the negotiation and approval of an approved safety case or safety system. These systems are currently signed off by the Regulator (such as NZTA) without any input from workers or their unions and this is entirely inconsistent with the requirement in the Bill of engagement of workers on matters that affect their health and safety. WorkSafe should not permit other regulatory agencies to work in a way other than that which is consistent with the Bill.

**116. Do you think there are any immediate improvements that should be made to the controls on fumigants that are being transferred into the new regulations before the review is carried out?**

116.1. Approved safety cases and safety systems should not be deemed compliance with Regulation 56 of the Hazardous Substances (Classes 1 to 5 Controls) Regulations 2001 if there has not been proper worker engagement.

**117. Do you have any comment to make about the regulatory proposal to require a PCBU to ensure that a hazardous substance used, handled, or stored at the workplace is correctly labelled in accordance with the**

[10] Unless it is a tank wagon or transportable container to which the Hazardous Substances (Tank Wagons and Transportable Containers) Regulations 2004 apply.

**HSNO Identification regulations (8 to 30, 32 and 33) and the HSNO Emergency Management regulations (8 to 10)?**

117.1. We support this proposal.

**118. Do you think there are any other immediate improvements that should be made to workplace labelling requirements?**

*HSNO Identification regulations*

118.1. There should also be a duty on the PCBU to ensure regulation 7 of the Identification Regulations have been complied with. A PCBU should ensure that a person in charge of a hazardous substance is complying with regulation 7. Where the PCBU is not the person in charge of a hazardous substance, this change will ensure there is responsibility for safety right through the supply chain.

118.2. Moreover, as submitted above at paragraph 113, there is difficulty with using the language "person in charge". This should be aligned with the language of the Bill or further defined to avoid confusion between the term "person in charge" and "person with management or control of a workplace".

118.3. The discussion document states that the new regulations would require the PCBU to ensure the label information is available in a manner that enables a worker handling the substance to gain rapid access to the label information. Therefore the CTU submits that the PCBU should also be required to ensure compliance with regulations 34, 35, and 36. These regulations relate to the comprehensibility, clarity, and durability of the information and labelling. A duty on PCBUs to ensure hazardous substances are labelled means nothing without the duty to ensure they are labelled in a way that is understandable, clear, and accessible. It is unclear why these regulations have been omitted.

118.4. The PCBU should also have a duty to ensure compliance with regulations 39 to 50 where a hazardous substance has specific documentation requirements.

*HSNO Emergency Management Regulations*

118.5. We support the imposition of a duty on PCBUs to ensure compliance with regulations 8 to 10 of the Emergency Management Regulations.

118.6. However, it seems from the discussion document that the reasoning behind this proposal is a worker handling the substance can gain rapid access to the label information (as above). However, regulations 8 to 10 of the Emergency Management Regulations will not ensure this. These regulations include information that is much more in depth than the labelling requirements. The information in clauses 8 to 10 does not have to be displayed on the label. Therefore, it is important for the comprehensibility, clarity and durability requirements **for labels** in clauses 34 – 36 of the Identification Regulations to also be imposed on a PCBU.

**119. Do you have any comments in relation to the proposed regulations requiring a PCBU to obtain and make available the current safety data sheet for a hazardous substance?**

119.1. We support the requirement for PCBUs to obtain the current SDS for a hazardous substance from the manufacturer, importer, or supplier when the hazardous substance is first supplied or before it is used at the workplace. The CTU also supports the duty to make this readily accessible to workers and emergency service workers.

119.2. The failure of a PCBU to obtain an SDS before the substance is first used should be an infringement offence.

119.3. This duty should extend to making this information readily accessible to all persons who are involved **directly or indirectly** in the use, handling, or storing of that substance**,** or **may** be exposed in any way to that substance while at the place of work, **as well as any person at the workplace who asks for it.** This would include test certifiers, Health and Safety representatives, unions, and Inspectors if required. This is consistent with the Australian Model WHS Regulations, in regulation 344(6). This is important as the SDS contains information about reactions to exposures to

the substance, first aid emergency responses. If the person directly using, handling, or storing the substance is overcome by the substance, it is important that the SDS is available to others in the workplace.

119.4. It should be an infringement offence for a PCBU to fail to provide the SDS to any of those persons listed in the paragraph above.

119.5. Like the labelling and emergency management regulations, the CTU also believes that the SDS need not only be accessible, but also **comprehensible, clear, and durable**. Multiple copies of the SDS should be kept in a way that is quickly accessible in cases of emergencies (for example, in ring-binders in the actual lab, as well as electronically or off-site for access for emergency services).

**120. Do you think the proposed regulations, requiring a PCBU to obtain and make available the current safety data sheet for a hazardous substance, will impose any additional costs on PCBUs? Conversely, what do you think are the main benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical).**

120.1. The biggest benefit is quick and comprehensible access to accurate safety information about hazardous substances being used in a workplace.

120.2. This duty will not be overly onerous for PCBUs, particularly when weighed against the significant benefit achieved. We understand that workplaces that use a number of hazardous substances (who would be required to obtain SDS's for each one) already subscribe to electronic databases that contain the SDS for each hazardous substance.

120.3. The cost of obtaining the SDS from the supplier should be minimal, and the cost would only be in the time spent obtaining it. Given today's technology – email capacity and such - this should be a simple task.

**121. Do you have any comment to make about the regulatory proposal to transfer the existing signage requirements set out in the HSNO**

**Identification regulations (51 and 52), and Emergency Management regulations (42) into the new regulations and merge into a single obligation?**

121.1. As submitted above at paragraph 106, the CTU has concerns that if these requirements are removed from the HSNO regulations, that signage requirements will not be applicable to places that are using, handling, or storing hazardous substances but are not considered workplaces. For example, a home owner might be storing a hazardous substance that exceeds a "quantity that is consistent with household use" but not be caught by the signage requirements as they are not a PCBU, person in control of a workplace, or storing the substance at a workplace.

121.2. Moreover, given the problems with the definition of workplace, PCBU, worker, and volunteer association in the Bill, there may be a range of locations that store hazardous substances that do not fall under the workplace regulations. These problems are set out in our submission on the Health and Safety Reform Bill.

121.3. The failure to adhere to the signage requirements should be an infringement offence.

**122. Do you think there are any immediate improvements that should be made to the signage requirements that are being transferred into the new regulations before the review is carried out?**

122.1. As above.

**123. Do you have any comment to make about the regulatory proposal to transfer the requirements of the HSNO Compressed Gases regulations into the new regulations?**

123.1. No.

**124. Do you think there are any immediate improvements that should be made to the requirements for the design, manufacture, verification,**

**testing, and filling of compressed gas containers that are being transferred into the new regulations before the review is carried out?**

124.1. No.

**125. Do you have any comment to make about the regulatory proposal to transfer the requirements of the HSNO Tank Wagons and Transportable Containers regulations into the new regulations?**

125.1. No.

**126. Do you think there are any immediate improvements that should be made to the requirements applying to tank wagons and transportable containers regulations that are being transferred into the new regulations before the review is carried out?**

126.1. No.

**127. Do you have any comment to make about the regulatory proposal to transfer Schedule 8 of the HSNO Dangerous Goods and Scheduled Toxic Substances transfer notice into the new regulations?**

127.1. No.

**128. Do you think there are any immediate improvements that should be made to the requirements applying to stationary container systems that are being transferred into the new regulations (before the review is carried out)?**

128.1. No.

**129. Do you have any comment to make about the regulatory proposal to transfer the HSNO Exempt Laboratories regulations into the new regulations?**

129.1. No

**130. Do you think there are any immediate improvements that should be made to the requirements applying to laboratories that are being transferred into the new regulations before the review is carried out?**

130.1. We support awaiting the results of the review so long as it is carried out within the next two years.

**131. Do you have any comment to make about the regulatory proposal to transfer the HSNO Tracking regulations (excluding regulation 4(2)) into the new regulations?**

131.1. We support the proposal to continue the requirement of keeping a record of what happens to a hazardous substance from when it was imported or manufactured, through to distribution, use and disposal. However, this requirement should apply to all persons who use, handle, or store hazardous substance. There may be people who are not PCBUs or caught by the Health and Safety Reform Bill and regulations who should be subject to these requirements. Further consideration should be had of whether to retain this duty under the control of the EPA and HSNO Act and regulations.

**132. Do you think there are any immediate improvements that should be made to the tracking requirements that are being transferred into the new regulations before the review is carried out?**

132.1. Consideration of hazard classes should be updated to be aligned with the United Nations Globally Harmonised System of Classification and Labelling of Chemicals (GHS). This change would make it a lot clearer to those involved about what hazardous substances need be or need not be tracked.

**133. Do you have any comment to make about the regulatory proposal to transfer the existing emergency preparedness requirements set out in the HSNO Emergency Management regulations (21 – 41) into the new regulations?**

133.1. As submitted at paragraph 131.1, we have concerns with transferring this regulation entirely into the new workplace regulations without retaining the

regulations for locations that are not workplaces. It is worrying, for example, that the requirements to have effective and well located fire extinguishers will not apply to persons and places that use, handle, or store hazardous substances that are not workplaces.

**134. Do you have any comment to make about the regulatory proposal that an emergency response plan, or any part of an emergency response plan, could be part of any other management documentation for an emergency whether – required by the general risk and workplace management regulations made under the proposed new Act; or required by some other Act; or undertaken by a PCBU for some other reason?**

134.1. We are particularly concerned by the proposal that "any part of an emergency response plan could be part of any other management documentation for an emergency". The CTU submits that there must be a clear, comprehensive, consolidated, and complete version of an emergency response plan in an accessible place, and should not be fragmented across a number of management documents.

**135. Do you have any comment to make about the regulatory proposal that an operator who is required to prepare an emergency plan for a major hazard facility in accordance with new regulations covering major hazard facilities would not be also required to prepare an emergency plan by the new regulations covering work involving hazardous substances?**

135.1. As above, there must be a clear, comprehensive and complete version of an emergency response plan in an accessible place.

**136. Do you have any comment to make about the regulatory proposal to require a PCBU to revise their emergency response plan, if the Fire Service makes a written recommendation about the content or effectiveness of the plan?**

136.1. We support this proposal. Workers and their unions should be engaged with any time the emergency response plan is revised.

**137. Do you think that we should retain the current prescriptive list of matters to be addressed in an emergency plan (as set out in regulations 29 and 30 of the HSNO Emergency Management regulations) or we should adopt the more flexible list of matters used in Australia (regulation 43 of the Australian model regulations)? Why/why not?**

137.1. The two lists should be amalgamated to ensure that the emergency plan is as comprehensive as possible. As a baseline, the CTU prefers the New Zealand prescriptive approach. The current approach anticipates that a PCBU will have different emergency response plans for different types of emergency (for example, an emergency response plan to a spill might be different to an emergency response plan to an explosion). This is practical as the response to an emergency will inevitably be determined by the emergency itself.

137.2. However, there are aspects of the Model WHS Regulations that New Zealand would benefit from adding, including:

- Contacting emergency services, and
- Effective communication between the person authorised by the PCBU to coordinate the emergency response and all persons at the workplace.

137.3. There should be a specific duty on PCBUs to collaborate on emergency plans in a multiple PCBU workplace.

**138. Do you think that we should retain the current prescriptive set of requirements in relation to fire extinguishers (as set out in regulations 21 – 24 of the HSNO Emergency Management regulations) or should we adopt the more performance-based requirements used in Australia (regulations 359 and 360 of the Australian model regulations)? Why/why not?**

138.1. The Guiding principles for the development of regulations under the new Health and Safety at Work Act require that regulations

- provide greater certainty to duty holders about how to meet their primary duty of care in specific circumstances, or in relation to specific hazards/risks. Accordingly, obligations should be stated as absolutes whenever possible, avoiding qualifying statements.

- contribute towards an overall lifting of standards, but definitely not lowering standards from status quo

138.2. Therefore, we support the retention of regulations 21 to 24, rather than the Australian regulation approach. The current prescriptive approach provides clarity and certainty to all PCBUs and workplaces regarding their duty to ensure fire extinguishers are available and suitable (in terms of numbers, location, and type of extinguisher). Any retraction from this would likely result in less certainty and an overall lowering of standards from status quo.

**139. Do you think there are any immediate improvements that should be made to the emergency preparedness requirements that are being transferred into the new regulations before the review is carried out?**

139.1. The new regulations should include a provision that workers and their unions should be engaged with on the content of all emergency preparedness requirements.

**Test certifiers**

A full review of the classes of hazardous substances that fall within the test certifier regime should be undertaken. The CTU supports a broader review of the test

certifier regime, also looking at how WorkSafe can ensure quality control of the third party test certifiers.

**140. Do you have any comment to make about the regulatory proposal to revoke the existing approved handler requirements and replace with duties in relation to the provision of information, training, instruction, and supervision?**

140.1. This proposal is a significant change from the current regulations. We acknowledge concerns about the adequacy of the current approved handler scheme; particularly those that the approved handler (i.e. the worker who has training and knowledge of the hazardous substance and how to handle it) may not be the person who is actually handling the hazardous substance.

140.2. We agree in principle to the proposed change, requiring a PCBU to provide information, training, supervision and instruction to all workers that use, handle, generate, or store hazardous substances, or operates, tests, maintains, repairs or decommissions a storage or handling system, or has the potential to be harmed by a hazardous substance. This proposal has much better 'coverage' than the current approved handler system, and will ensure that there will be trained persons available at all times. It is consistent with the CTU submission at paragraph 119 that SDS's should be available to any person where there is the potential for them to be harmed by the hazardous substance.

140.3. We also strongly agree with the requirement that a PCBU must keep written records for each worker of the information, training, and supervision they receive, along with records of how that knowledge and practical skills are tested. There should be a requirement that this information is kept for 40 years, consistent with the health surveillance scheme. The failure to keep written records, or a failure to produce them, should be an infringement offence.

140.4. However, we have concerns about how to ensure the information, instruction, and training is sufficient and of quality. WorkSafe's statement of intent identifies the areas of the workforce that it intends to target.

Inspecting a workers record of learning is not an area it has identified that it will target. Also, there will be a number of workplaces that are not within the high-risk industries and businesses that WorkSafe is targeting (construction and forestry for example) that regularly use, store, or handle hazardous substances. Given that there is a limited pool of inspectors, it seems unlikely there will be any significant quality assurance checks of the 'learning record' of workers handling hazardous substances. This is a significant problem. Without adequate resources to enable quality assurance, the approved handler scheme should be retained. Test certifiers could be delegated the authority to review the information, training, instruction and supervision workers receive. There would need to be provision to ensure that test certifiers did not have a conflict of interest.

140.5. We are concerned that the information, instruction, and training need be tailored in accordance with the "potential degree of exposure". This wording implies that if the risk of exposure is low, there is less need for information, instruction, and training – irrespective of the potential consequences to health and safety if the risk eventuated.

**141. Do you think the proposal to revoke the existing approved handler requirements and replace with duties in relation to the provision of information, training, instruction, and supervision, will impose any additional costs on PCBUs? Conversely, what do you think are the main benefits of this proposal? (Please quantify any impacts identified and express in dollar terms to the extent practical).**

141.1. There may be some additional cost due to the requirement to train all workers that have the potential to be harmed by the hazardous substances, rather than one or two approved handlers as currently required. However, in-house training is permitted (provided it meets the requirements of the regulations), and that would significantly mitigate the costs of the training. Moreover, the cost would not outweigh the benefit of having adequately trained and informed workers, particularly when they are dealing with such dangerous substances.

**142. Do you have any comments in relation to the proposed regulation requiring a PCBU to carry out workplace exposure monitoring where it is necessary to determine the efficacy and effectiveness of measures introduced to control exposure to substances hazardous to health?**

142.1. We support workplace exposure monitoring. There should be a review of the hazardous substances that require monitoring.

**143. Do you have any comments in relation to the proposed regulations for establishing health monitoring for any worker who may be exposed to a substance hazardous to health?**

143.1. We support health monitoring for workers who may be exposed to a substance hazardous to health. The UK health surveillance system should be adopted by New Zealand. The UK health surveillance system is set out in our submission on the Health and Safety Reform Bill at [26].

143.2. We agree with the requirements regarding records, but these records should be kept for at least 40 years. This is particularly important given the long latency period of a number of occupational diseases. There should be provision for employers or PCBUs whose businesses wind up during that time that the records are to be disclosed in full to WorkSafe. These records should be available to the worker and the worker should be able to obtain a copy, even if they are no longer employed or engaged by that PCBU.

143.3. Engagement with workers in regards to selection of a medical practitioner (noted at 129 of the discussion document) needs to be genuine engagement and should include unions or worker representative if there is one. "Consultation" should be altered "engagement" to be consistent with language of the Bill.

143.4. The regulations should impose an obligation on a PCBU to tell WorkSafe if the PCBU receives advice that a worker has contracted an occupational disease, or has received recommendations for a remedial measure. There should be an infringement offence if the PCBU fails to do so.

**144. Given that employers, in accordance with sections 10(2) of the HSE Act, are currently required to monitor an employee's exposure to significant hazards (i.e. substances hazardous to health) and, with informed consent, monitor the employee's health, do you think that the proposed regulations for carrying out workplace exposure monitoring and establishing health monitoring will impose any additional costs on PBCUs? (Please quantify any impacts identified and express in dollar terms to the extent practical).**

144.1. Additional costs of health monitoring does not outweigh the benefit of undertaking it. Health monitoring is necessary, and particularly important given the burden of occupational disease. There is a dearth of information on occupational disease and disease causing agents in New Zealand, and health monitoring, surveillance, and record keeping is one way to begin to address these issues.

## CHAPTER 6: REGULATING MAJOR HAZARD FACILITIES

**145. Do you have any comment to make on the proposed definitions?**

145.1. We support the definition of major accident.

145.2. The definition of facility should mirror that of Australia's, and should include "hazardous chemical that are present **or likely to be present**".

145.3. The definition of facility is not wide enough to capture a number of facilities that should be deemed major hazard facilities because of the capacity to cause a major accident:

- Facilities where large quantities of dust are stored, as even paper dust can explode.
- Grain silos
- Coolstores (e.g. Tamahere Coolstore)
- Foundries/Smelters

145.4. We support the definition of operator.

145.5. "Substantially" should be removed from the definition of safety critical element**.**

**146. Do you have any comments on the types of facilities that are proposed in scope or are proposed to be out of scope?**

146.1. We are concerned about the exclusion of facilities already covered by the HSE (Pipelines) Regulations 1999. These Regulations use old language such as "significant hazard" that do not feature in the Bill and will not be consistent when the Act comes into force. These Regulations will need urgent attention.

**147. Do you have any comments on the proposed notification process?**

147.1. The operator only has a notification duty once the operator "becomes aware" of the circumstances giving rise to the obligation to notify. This is not good enough. An operator could remain wilfully blind to the circumstances and avoid their responsibility to notify WorkSafe. The operator should have a strict liability duty to notify WorkSafe as soon as practicable (but not more than three months) after the hazardous substances are present or likely to be present.

147.2. We are concerned about the proposal that isolated quantities of less than 2 percent of the individual threshold can be excluded from the aggregate quantity threshold if its location within a facility is such that it cannot act as an initiator of a major accident elsewhere on site. This would suggest the hazardous substance is not subject to the more prescriptive regulations relating to safety data sheets and emergency plans. This is short-sighted. For example, it is perceivable that there could be a major accident elsewhere on the site and the isolated quantity is affected (i.e. was not the imitator but at risk if a major accident occurred).

147.3. The discussion document also notes that there are complications in determining the identification of the owner and/or the facility. The discussion document states that "ideally" the calculation of aggregate quantities of hazardous substances and a determination of responsibility would be "discussed" with WorkSafe before submitting a notification. This is not good enough. Regulations should not use language such as "ideally". Where identification is complicated, the owner(s) must consult with WorkSafe before submitting a notification.

**148. Do you have any comments on the proposed review procedure?**

148.1. The list of "interested persons" should include the EPA, and any unions, as well as Health and Safety representatives.

**149. Do you have any comments on the proposed process for establishing the suitability of the facility operator or the proposed process for notification by new operators?**

149.1. The consideration of whether the facility operator is suitable should not be limited strictly to the operator who is selected. This is particularly important where multiple PCBUs have management or control of the facility and only one has been selected as the operator. The consideration had by WorkSafe must be a real and genuine consideration of the suitability of all PCBUs and the health and safety and emergency systems in place.

149.2. Suitability requirements should not be confined to 'new' operators. A PCBU may be a corporation, and should be subject to a suitability assessment if the operator is bringing significantly different hazardous substances into their facility or significantly altering the environment such that a new notification should be assessed.

149.3. The list of considerations should be widened:

- It should not be limited to convictions or findings of guilt. For example, an operators previous involvement in a major incident should be reason enough to review the notification (whether the operator plead guilty or not).
- The list should also consider whether any notices were issued under the Health & Safety in Employment Act 1992, and should include any breaches of overseas Health and Safety legislation or criminal legislation for health and safety or workplace breaches.
- Other considerations should include the operators "near miss" record.
- The regulator should also consider the operator's record of learning, training, and supervision– e.g. are the workers trained by third parties, or does the operator provide adequate in-house training?

- The regulator should also consider the operator's worker participation systems and processes, and whether there are any trained Health and Safety representatives

- Also relevant are the training and experience of the operator in health and safety and qualifications to work in major hazard facilities (as recommended by the Taskforce).

149.4. This would increase the number of operators caught by this regulation, however, it must be kept in mind that the existence of any of these considerations would not automatically deem the operator as unsuitable. Having an extensive list of considerations would merely ensure that WorkSafe is able to properly and meaningfully consider the operators suitability.

**150. Do you have any comments on the proposed threshold quantities for individual hazardous substances or categories of hazardous substances?**

150.1. The CTU is concerned about a number of the proposed threshold quantities for individual hazardous substances or categories of hazardous substances. A number of the lower thresholds are significantly higher than the lower Australian thresholds (0.1% of the column 3 threshold in Table 15.2 of the WHS Model Regulations), for example:

- Ammonium nitrate-based fertilisers

- Ammonium nitrate

- Arsine

- Bromine or bromine solutions

- Ethyleneimine

- Phosgene

- Sulfuric Anhydride

150.2. The higher lower threshold means that facilities in New Zealand can store greater amounts of hazardous substances before they are required to notify WorkSafe NZ that they are using, storing, or handling hazardous substances. The Taskforce specifically recommended that New Zealand should align itself with Australia.

**151. Do you agree with the proposed threshold calculation? Why/why not?**

151.1. The CTU supports the threshold calculation.

**152. Do you have any comments on the proposal to require operators to carry out a formal safety assessment for the operation of a major hazard facility?**

152.1. The Taskforce recommended that it is necessary for operators to undertake systematic identifications of risks and to develop comprehensive mitigation measures.

152.2. The CTU is concerned about the wording used in the discussion document to describe the 'so far as reasonably practicable' test. The wording used in the discussion document implies that the definition of reasonably practicable for the purposes of the regulations will be different to the definition of reasonably practicable in the Health and Safety Reform Bill. Clause 17 of the Bill makes it clear that the cost associated with eliminating or minimising the risk may only be taken into account after assessing the extent of the risk and the available ways of eliminating or minimising it. Even then, whether the cost is "grossly disproportionate" is still only one factor the PCBU must consider.

152.3. The same definition should be applied in the regulations. This is consistent with the Model WHS Regulations.

152.4. Risk management should be thought of slightly differently for major hazard facilities and cost should be considered against the gravity of potential consequences of not implementing elimination or minimisation controls.

152.5. The discussion document states the operator will be able to rank available control measure options according to their benefits and costs in qualitative or quantitative terms. Our submission has covered the hierarchy of controls in our response to question 9. We oppose the use of the word "or". It should be mandatory that measures are qualitatively assessed, with "quantitative" terms a secondary consideration.

**153. Do you have any comments on the proposal to require operators to establish and implement a safety management system for the operation of a major hazard facility?**

153.1. We support the requirement for operators to establish and implement a safety management system for the operation of the major hazard facility. However, the proposals in the discussion document do not go far enough.

153.2. It is unclear from the discussion document when the safety management system must be created and implemented by. As with the safety case requirements, this should be implemented six months before operations commence for a proposed or new major hazard facility, or within 3 months of being designed as a major hazard facility for an existing facility.

153.3. The safety management system should include those aspects listed on pages 150 and 151 of the discussion document, but should also include the matters from Schedule 17 of the Model WHS Regulations that have been omitted:

- Principles and standards: a statement of the principles, especially the design principles and engineering standards, being used to ensure the safe operation of the major hazard facility. Also, a description of any technical standards, whether published or proprietary, being relied on in relation to such principles and standards.

- Performance monitoring: NZs regulation discussion document too failure/near miss orientated. These should be more similar to the Model WHS Regulations that focus on performance monitoring as a

tool to continually improve all aspects of the safety management system (even if nothing is technically wrong).

153.4. Genuine worker participation should be required in all aspects of creation and implementation of the safety management plan.

**154. Do you have any comments in relation to the matters that would need to be included in an emergency plan?**

154.1. We support the requirement for all major hazard facilities to have an emergency plan. The emergency plan should be succinct, but that cannot mean compromised content. The plan should be developed (and revised) in consultation with Health and Safety representatives, unions, as well as workers.

154.2. We are concerned at how emergency services are dealt with in the emergency plan. A large number of major hazard facilities are in rural locations, where paid, full-time, or fully-equipped emergency response services do not exist. For example, Kinleith Paper & Pulp Mill (which the CTU submits should be considered a major hazard facility) would be serviced by the Tokoroa Volunteer Fire Bridage, which has one fire engine. Kinleith Mill's emergency plan must take this into account. If the available emergency services are not sufficient to respond to a major accident, the major hazard facility should be required to ensure it has its own method of responding to an emergency without recourse to emergency services.

154.3. The plan should be reviewed, revised, and tested on the same basis as the emergency plan under the hazardous substances regulations: annually unless an early review is triggered. They should not be limited to a change of the persons, procedures, or actions in the plan. An earlier review should be triggered by a request, a notifiable event, or a near miss notifiable event occurring. It should also be triggered by a change to the physical environment (for example, the addition of a new hazardous substance or addition of a new storage container)

154.4. We support the proposed content for the emergency plan, with the following comments:

- The maximum number of persons, including workers, likely to be present at the facility on a normal working day: this needs to account for non-standard work, for example, where there is shift work and there may be a significantly variable amount of workers present throughout the day and night, such as during shift changes where two shift crews may be present. The plan should include a description of the normal roster of work, and where the workers are likely to be working.

- Notifications: a process or procedure for identifying and notifying family or next of kin for any persons injured or killed as a result of an accident.

**155. Do you have any comments in relation to the proposal that would require an operator to consult with the local council, when preparing an emergency plan, in relation to the off-site health and safety consequences of a major accident occurring?**

155.1. We fully support this proposal. The CTU recommends regional councils should also be consulted.

**156. Do you have any comments in relation to the proposal that would require an operator to provide a copy of the emergency plan to every person identified in the plan as being responsible for executing it (or a specific part of it) and to every emergency service provider?**

156.1. We fully support this proposal.

**157. Do you have any comments in relation to the proposal that would require an operator to test their emergency plan at least every 12 months in order to demonstrate that every procedure or action in the plan is workable and effective?**

157.1. We support this requirement, but also submit that the plan should be tested every time it is revised or reviewed.

**158. Do you have any comments in relation to the proposal that would require an operator to test their emergency plan within 3 months of any change to the persons, procedures, or actions specified in the emergency plan in order to demonstrate that the changed persons can perform their functions under the plan and each changed procedure or action is workable and effective?**

158.1. We support this. Additionally, the plan should be tested if there is a change in the physical environment such as the addition of a new hazardous substance or a change in the layout of the facility as well.

**159. Do you have any comments on the proposal to require operators of proposed major hazard facilities to send a design notice to WorkSafe NZ after initial design for the facility has been completed and before making a final investment decision?**

159.1. We support this proposal. There should also be a duty to send a design notice to other identifiable interested persons, such as local and regional councils, the EPA, the fire service, and unions.

159.2. However, we note the potential for a conflict here. There may be liability issues where WorkSafe signs off a design for a major hazard facility and there is subsequently a problem with the design or the design contributes to or causes a major accident.

**160. Do you have any comments in relation to the particulars that would need to be addressed by a design notice?**

160.1. No.

**161. Do you have any comments on the proposal that would require the operator of a proposed facility to provide WorkSafe NZ with a completed safety case at least six months before commencing operations at the facility?**

161.1. We support this proposal, as well as the proposal that a proposed facility may not operate before the safety case has been accepted by WorkSafe.

161.2. We are concerned that an existing facility deemed to be a major hazard facility has 24 months to complete and submit its safety case. That is far too long, and should be restricted to six months. If a facility does not already have a safety case, the creation of a safety case should be formalisation of the processes already in place ensuring the safety of its facility and workers. If a facility requires more than six months to create a safety case, the facility should have to cease work until it is created and submitted to WorkSafe.

**162. Do you have any comments on the safety case process including comments in relation to the information that a safety case should contain or the proposed safety case assessment process?**

162.1. We support the requirement for multiple operators in the same vicinity to coordinate the preparation of safety cases

162.2. The safety case should also contain a description of any arrangements made in relation to the security of the major hazard facility. The reference to consultation with workers should read “engagement with workers” (as referred to in the Bill) and should also include unions and Health and Safety representatives.

**163. Do you have any comments on the proposal that WorkSafe NZ would have power to withdraw acceptance of a safety case?**

163.1. We support this proposal. The regulations should also state that if the operator chooses to judicially review WorkSafe’s decision, activities must remain ceased until either 1) a new safety case has been accepted, or 2) WorkSafe’s decision is overturned by the Court.

**164. What do you estimate to be the benefits of the proposal, in terms of avoided costs associated with a major accident? (Please quantify these impacts and express in dollar terms to the extent practical).**

164.1. The cost associated with the safety case proposals is outweighed by the benefit. We strongly support the proposal for major hazard facilities to prepare a safety case for the facility. Research has shown support for the benefits of the safety case regime in Australia.[11] The regime "*can be understood as a progressive approach to the reduction of major hazard risk*." The research supports the prescriptive requirements of the safety case regime, particularly when paired with an effective regulator: "*the stringency of the regulations together with the collaborative, problem solving approach of regulators could both reduce risk and create an alertness concerning major hazard risk by both employees and senior management*". Research found "*there is no uncomplicated, stress-free regulatory approach that can ensure the safety of some of our most hazardous industries*".

**165. Do you have any comments in relation to the proposal to require operators to review and as necessary revise the safety assessment, emergency plan, safety management system, and safety case?**

165.1. We have concerns about the use of the words "material change". This term is ambiguous and requires further definition or guidance.

165.2. There should be a review of risk management if there is an actual accident or near miss. This is not included on the list of circumstances where a review would be required.

[11] Haines, F and Phung, C P (2009) *'Thoughts, Feelings, Action': Survey of Victorian Managers of Major Hazard Facilities*. Working Paper 65 National Research Centre for OHS Regulation, Canberra.

**166. Do you have any comments on the proposal to require operators to provide the local community and the council (for the district in which the major hazard facility is located) with information about the facility, its operations, how the community would be notified if a major accident occurs, and what the community should do if a major accident occurs?**

166.1. We support this proposal.

**167. Do you have any comments in relation to the proposal to require operators to notify WorkSafe NZ of dangerous incidents?**

167.1. We support the extension of the list of notifiable incidents and the requirement for the operator to prepare and provide a detailed written report including a root cause analysis. This report, however, should not abrogate the responsibility of WorkSafe to undertake its own investigation into the incident.

**168. Do you have any comments on the proposal to require an operator to implement a safety role for the workers at a major hazard facility?**

168.1. We support this proposal. However, it is unclear how this role sits with Health and Safety representatives and Health and Safety committees. The safety role for workers should not negate a request for either Health and Safety representatives or committees.

168.2. The person fulfilling the safety role for the workers should be elected by the workers. Moreover, the operator should be required to ensure the person fulfilling the safety role for the workers has access to information required to fulfil that role, and is appropriately trained by the operator in all aspects of health and safety including:

- health and safety law and regulation
- how to use, handle, and store all hazardous substances on site
- the processes and work undertaken across the entire major hazard facility

- emergency preparedness and responses
- first aid

168.3. Without such training and knowledge, the person fulfilling that role could not adequately contribute to the tasks required of them.

168.4. The language of the regulations should mirror that used in the Bill: “engagement” rather than “consultation”.

**169. Do you have any comments on the proposal to require an operator to consult with workers at the facility in relation to the implementation of the workers’ safety role at the facility?**

169.1. We support this proposal. The language of the regulations should mirror that used in the Bill: “engagement” rather than “consultation”.

**170. How should coordination between councils and WorkSafe NZ be encouraged in relation to potential major hazard facilities and developments in the vicinity of existing major hazard facilities?**

170.1. The CTU has no comment to make, however, we support the proposal that there should be good coordination between local and regional councils and WorkSafe.