NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Transport and Industrial Relations Committee

on the

Health and Safety Reform Bill

P O Box 6645
Wellington
May 2014

1. Table of contents

2. Introduction

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

2.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa the Māori arm of Te Kauae Kaimahi that represents approximately 60,000 Māori workers.

2.3. The protection of workers' health and safety is core to our role as trade unionists and as the collective voice of workers, unions have a critical role in ensuring health and safety. This is recognised by International Labour Organisation Convention 155 on Occupational Health and Safety which mandates consultation between unions (through the CTU), employers (through Business New Zealand) and the Government in the design and implementation of health and safety law

2.4. As a party to ILO Convention 155, the Government is required to consult with the CTU (and Business New Zealand) to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment" (Article 4).

2.5. We discuss the importance of tripartite cooperation in relation to health and safety in part 67 of our submission below.

2.6. Accordingly, the CTU welcomes the opportunity to submit on the Health and Safety Reform Bill ('the Bill').

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

2.8. The CTU was represented on the Independent Taskforce on Workplace Health and Safety ('the Taskforce') which released its recommendations in April last year. We were represented in the proceedings of the Royal Commission on the Pike River Coal Mine Tragedy ('the Royal Commission') and presented substantial submissions to it.

2.9. These two recent inquiries, one more specific than the other, came to very similar conclusions regarding health and safety under the Health and Safety in Employment Act 1992 ('the current Act'). In the words of the Royal Commission: "Major change is required." The Taskforce described the situation as "appalling, unacceptable and unsustainable."

2.10. Both inquiries laid out in detail the failings of a succession of Governments to ensure New Zealand had adequate (let alone effective) legislation, regulations, enforcement, worker participation, tripartism, funding, education, competence and leadership.

2.11. We write this submission in the belief that thankfully there is now a cross-party consensus that the current situation is an affront to New Zealanders and in particular to New Zealand workers, and cannot be allowed to continue. We therefore do not recite in detail the appalling statistics and heart-rending stories of workers and their families who have become victims of an irresponsible and dangerous system.

2.12. But we should never forget that this suffering demands change, and that it demands major change. It is not a time to protect current inadequate practices or to pretend that change can be minimal.

2.13. Neither should we forget that the suffering continues and will continue until new health and safety systems are implemented. The weekly toll of death and injury in forestry, agriculture, manufacturing and other significant parts of our nation's economy continues largely unabated. Silently, because it is rarely reported, there is far greater toll – as far as can be judged, a death toll ten times the size – of occupational disease from cancers and lung diseases. Occupational disease also leads thousands of New Zealand workers to suffer debilitating and painful afflictions such as hearing loss and musculoskeletal

disorders which can destroy quality of life. Only beginning to be addressed are the many psychosocial disorders such as those arising from bullying and stress that are all too common in our workplaces.

2.14. We have strongly supported the recommendations of both inquiries. We take the same view as the Taskforce whose Chair stated in his forward to the Taskforce's report (at 5):

> A key challenge in addressing workplace health and safety is that it requires balancing the interests and needs of a number of participants, particularly employers and workers. We are starting with a 20-year-old system that did not find that balance, yet the task has become more rather than less complex over time. The Taskforce has discussed this at length, and looked at how countries with much better workplace health and safety records do it. In our view, we have found a good balance requiring compromise by all parties that will both improve outcomes substantially and respect all parties' needs. Make substantial changes to that balance and we will lose the vital support of some participants and significantly weaken the potential benefits.

2.15. This Bill, while taking New Zealand's Health and Safety regulatory system a substantial step forward, has not adequately respected that balance. In many of our recommendations for changes to the Bill we are simply asking the Government to do what the Taskforce recommended – and in some cases what its own Cabinet papers recommended. We make other recommendations in the considered belief that the new system can be further improved.

2.16. We support many of the steps the Bill provides for, though in some cases we have recommendations regarding their detail. These include the move of the primary duty from employers to Persons Conducting a Business or Undertaking (PCBUs); generalising protection to both employed and self-employed workers in order to recognise that it is unacceptable to contract out duties towards workers; the increased duties on officers and the concept of a responsibility of due diligence; the recognition of the seriousness of placing workers' health and safety at unreasonable risk in greater levels of financial penalties and imprisonment; and more extensive powers for the new, more independent, regulator and the courts.

2.17. We also welcome the recognition of the importance of worker participation in a well-functioning health and safety system, including increased powers to health and safety representatives. On the other hand, we have significant

concerns in this and a number of other areas. In worker participation, some changes are backward steps, obscuring the role and status of health and safety committees, removing legislated rights to health and safety representative training and fall-back processes for representative structures, creating clumsy and obstructive workgroups structures, and constraints on representatives' actions which are open to abuse.

2.18. In other areas, protection for workers reporting health and safety issues needs to be stronger and employees and self-employed workers should have equal protections. There needs to be more and better processes for reviewing regulators' decisions, the jurisdiction of the District Court should be reconsidered and there needs to be a clearer and consistent tripartite process for consultation on regulations, guidance and other rule making.

2.19. We are concerned that WorkSafe has not been given sufficient standing to take the much-needed role of primary and lead agency, with a long list of regulatory agencies remaining and the relationship to ACC being problematic. The change to the purpose of WorkSafe is vague, unnecessary and unhelpful.

2.20. There are many useful lessons and approaches for New Zealand in the comprehensive Australian review and harmonisation of workplace health and safety law that led to the Australian Model Workplace Health and Safety Bill ('the Model WHS Act'); and the Australian Model Workplace Health and Safety Regulations ('the Model WHS Regulations') along with accompanying guidance.

2.21. Our submission supports many aspects of the Australian law and draws in depth from the most comprehensive analysis of the new Australian health and safety law, a 2012 textbook by leading Australian experts Richard Johnstone and Michael Tooma entitled *Work Health and Safety Regulation in Australia: The Model Act*.[1] We encourage the Committee to consider acquiring this as a reference resource.

[1] Sydney: Federation Press.

2.22. As Johnstone and Tooma emphasise, the Australian approach is not perfect. There are a number of aspects where the current Act is superior to the Model WHS Act. It is incumbent on New Zealand to attempt to create a world-leading health and safety system that takes lessons from both systems.

2.23. For ease of reference we have compiled a list of our recommendations at appendix two of our submission.

3. Case study- the problem of forestry

3.1. Much discussion has occurred in the New Zealand community about the unacceptable levels of deaths and accidents in the forestry industry. There were on average 1,333 new ACC claims in forestry per year for the last five years in a workforce estimated at 6,500 workers. In 2013, ten forestry workers were killed and up to 200 seriously harmed. Forestry has an accident rate six times higher than any other industry in New Zealand.

3.2. The structure of the industry has meant that under current law, those that are in the best position to manage the safety issues in the industry are able to avoid these responsibilities by structuring their workforce through a contracting model. There are multiple forest owners in New Zealand but the industry is dominated by a relatively small number of big owners and forest managers whose holdings account for 50% of the accidents.

3.3. There are a number of ways forest owners could improve forestry safety including for example, ensuring contractors have sufficient experience and resources to operate a safe site, ensuring funding and contracting arrangements are based on a “safe pricing structure” that for example includes leeway for additional costs caused by unexpected events (such as bad weather) and realistic production rates and investment in machinery, entering into longer term contracts to ensure employment stability and investment by contractors.

3.4. The reality is under current law these forest owners as “principals” have relatively few duties and none provide the levers for the elements listed above to be considered in health and safety obligations. Not one forest

owner has been prosecuted in New Zealand for a forestry accident despite some of the biggest owners having multiple accidents in their forests.

3.5. The new law will assist in (although not completely assure) incentivising forest owners to take more responsibility for health and safety in the areas they can influence. The new PCBU requirements will put increased duties on these businesses for health and safety outcomes and the increased fines and enforcement mechanisms will increase the chances that those not fulfilling their duties will be caught and punished. Between them, the new agency WorkSafe and this Bill should see a reduction in the rates of accidents.

3.6. A challenge the Bill needs to overcome is the role of workers in participating in health and safety in the industry. It is unclear how the Bill will effectively ensure workers, in forestry for example, are supported and equipped to take a leadership role in their workplaces. The structure of the industry makes collective organisation a risk for these workers. The precarious nature of the contracting model which leaves the legal employer in the industry with almost as few employment protections as the employees, coupled with the fragmented and isolated workplaces, the lack of feasibility for concluding collective bargaining in these small enterprises and the reduction in employment protections from recent and pending changes to employment law means workers in the industry are very reluctant to raise health and safety issues. There are no independent trained health and safety representatives.

3.7. Evidence of this reluctance to speak out can be seen in the recent media coverage of forestry safety. In almost every media story of this industry, workers interviewed (and in many cases contractors as well) comment on the basis of anonymity. In this climate having trained and effective health and safety representatives in each workplace is not viable. An alternative model needs to be discussed.

3.8. It is clear that worker health and safety representatives would make a big difference to improving safety. Those accident reports the CTU has scrutinised all raise the issue that the outcome could have been different if

the employees had had some voice on the site that could assert their rights to safety. If a health and safety representative had been present they might have ceased dangerous work.

3.9. Numerous cases of long hours, poor pay, work in very bad weather, bad equipment, lack of breaks and lack of training are evident. Any of these issues may have been resolved through collective bargaining, trained reps and a union presence. The CTU has had problems even getting agreement for workers to attend our health and safety training course and in the two instances where we have managed to get leave for the workers concerned, we have had to pay the wages costs despite the legal requirement for the employer to do so.

3.10. The CTU believes a community model of representation might work for these workers. Hubs of representatives elected regionally, trained and supported by both WorkSafe staff and the union could result in a safe model. Representatives with powers to raise safety issues at any worksite including through WorkSafe or the union, recognized and supported by forestry owners, contractors and inspectors could be a model useful for other dangerous industries where the traditional “workplace based” model will not work (e.g. agriculture). The proposed law is weak on the statutory minimum requirements for health and safety representatives including the systems required to train them and the rights they may exercise. From the experience we have had in the forestry sector, unless this issue is addressed in the Bill, forestry workers will remain without voice on this issue and an essential element needed to improve the safety record in the industry will be lost.

PART 1- HEALTH AND SAFETY AT WORK

4. Purpose (cl 3)

4.1. The CTU supports the submissions of the Rail and Maritime Transport Union (RMTU) on this clause in relation to the continued recognition of a duty of good faith between parties in the workplace (see our discussion of this point at part 15 of our submission below) and protection for workers against unsafe systems of work.

S.1 We submit that a new cl 3(1)(i)should be inserted as follows:

> Successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of persons doing the work and the PCBU's involved in that place of work.

S.2 We submit that reference to "unsafe systems of work" should be added to cl 3(2) (amendment in bold):

> Clause 3(2) In furthering subsection (1)(a), regard should be had to the principle that workers and other persons should be given the highest level of protection against harm in their health, safety and welfare from hazards and risks arising from work **or from unsafe systems of wor**k or from specified types of plant as is reasonably practicable.

4.2. We also support the statement at cl 3(2) of the principle that "workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or specified types of work as is reasonably practicable."

5. Application of Part 3 to prisoners (cl 11)

5.1. The Bill excludes prisoners carrying out work inside a prison from worker participation rights. This contrasts with the current Act which draws no distinction between prisoners and other employees. We have seen no evidence that this has resulted in problems.

5.2. The Model WHS Act does not permit prisoners worker participation rights, but this position is difficult to justify. Many prison industries such as farming and construction have significant associated risks and worker participation is one

of the most critical means to reduce or eliminate these. This sends a signal that worker participation is optional to health and safety.

5.3. A major purpose of prisoner work schemes is to prepare them for life outside prison and therefore there is value in mirroring the health and safety scheme as closely as possible.

5.4. Health and safety training is a valuable skill for prisoners to learn and qualification as a health and safety representative may serve an important rehabilitative purpose.

S.3 We submit that cl 11 should be deleted.

6. Interpretation (cl 12)

Illness or injury

6.1. A feature of the Bill is the move from a formulation of 'harm' to the formulation of "death, illness or injury"[2] or 'death or serious illness or injury."[3]

6.2. We are concerned that this change risks a diminution or lack of clarity regarding corresponding duties in two circumstances:

- Unlike the current Act, there is no specific inclusion of "physical or mental harm caused by work-related stress;"
- As noted in part 26 of our submission below, the Bill does not deal well with delayed or progressive onset occupational disease or injury.

S.4 We submit that a non-exhaustive definition of "illness or injury" would assist with both of these issues as follows:

> **"Illness or injury,"** includes:
>
> physical or mental harm caused by work-related stress; and
>
> illness or injury that does not usually occur, or usually is not easily detectable, until a significant time after exposure to the hazard.

[2] See definitions of 'hazard' and 'risk' in cl 12 and in relation to sentencing criteria in cl 169(2)(c).
[3] See for example cls 42, 43 in relation of offences, cl 187 regarding inspector's powers regarding imminent danger.

Hazard

6.3. The CTU agrees with the submission of the RMTU that the definition of "hazard" in the Bill is potentially narrower than that in the current Act given the removal of reference to "arrangements" and "processes."

S.5 We submit that the first part of the definition of hazard in cl 12 should be amended as follows:

> **hazard-**
>
> (a) Means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of death, illness or injury; and

Cross references

6.4. We comment on other terms defined in the interpretation section as follows:

- "residential work" in part 7 of our submission on meaning of PCBU;
- "officer" in part 21 of our submission on duty of officers;
- A proposed definition of "serious risk" in part 43 of our submission on cessation of work.

7. Meaning of PCBU (cl 13)

S.6 The CTU strongly supports the widening of duties to workers and other persons in the workplace from 'employers' to 'persons conducting a business or undertaking.'

7.1. The widening of the definition better reflects the complex structure of modern workplaces where a significant range of parties may exercise some form of control over the working environment.

7.2. Allowing companies to elude or reduce duties through use of certain forms of work such as dependent contracting and casual employment has driven

some sectors to a 'race to the bottom' in employment and contracting standards.

7.3. This has had a detrimental effect on health and safety. As Johnstone and Tooma (2012) note at 11 and 12:

> Increased restructuring and the growth of outsourcing, resulting in increasingly precarious and contingent work, has significant implications for work health and safety. The very same competitive pressures that induce firms to engage contingent or precarious work arrangements also encourage underbidding on contracts, poorer quality or inadequately maintained equipment, inadequate levels of staffing, longer work hours and other forms of corner-cutting on work health and safety. Where these work arrangements introduce third parties or create multi-employer worksites they lead to fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck passing', and inadequate knowledge specific to the job and associated work health and safety as workers move from job to job. As organisations outsource tasks, they diminish in size and increasingly become small or medium-sized firms – with all the difficulties that small firms have in complying with work health and safety requirements. ….
>
> There is now extensive research showing the detrimental impact that contingent and precarious work has on the work health and safety and wellbeing of workers engaged in those arrangements (as measured by injury rates, disease and hazardous substance exposures, mental health, and work health and safety knowledge and compliance). A recent review of over 100 studies of job insecurity and downsizing concluded that more than 80 per cent of the studies found work health and safety had been adversely affected. Even greater adverse results were found in a review of 26 studies of outsourcing, subcontracting and home-based work while the results for a review of 22 studies of temporary work were less pronounced but still consistent. A recent international review of research on work health and safety in supply chains found that the vast majority of these studies identified negative work health and safety effects associated with the use of supply chains. Reviews of research into small business also suggest worse work health and safety outcomes…

7.4. The CTU documented the negative health and safety consequences of insecure work (of which contingent and precarious work are subsets) in our 2013 report *Under Pressure.*[4] For example we state at 45:

> International and New Zealand evidence confirms that insecure and low wage workers are especially at risk of injury and occupational disease. A recent European Parliament study… found that temporary workers face more difficult working conditions than permanent workers and are at higher risk of developing musculo-skeletal disorders.
>
> A [2007 Deakin University study] noted the international and Australian research that confirmed temporary workers have a higher incidence of workplace injury and those injuries are more severe. It found for such workers in Victoria, Australia, that labour hire workers were more likely to be injured early in their placement than direct employees, despite similar qualifications.
>
> The New Zealand Independent Taskforce on Workplace Health and Safety reported that "employees new to positions or engaged in temporary, casual or seasonal work

[4] Available at: http://union.org.nz/sites/union.org.nz/files/CTU-Under-Pressure-Detailed-Report-2.pdf

> may be particularly at risk" ….The Taskforce reported from their submissions that casual workers, those on 90-day trials, short-term contractors and seasonal workers were all identified as less likely to report injuries or voice concerns for fear of not being re-employed in the future.
>
> A [2009] report to New Zealand's Minister of Labour… stressed that employees in casual and insecure work are at greater risk of workplace injury than those who are employed in full-time fixed positions.

7.5. Moving from the employment relationship as the determinant of applicable duties greatly reduces the potential for subcontracting to minimise legal liability at the expense of health and safety.

7.6. The extension of health and safety duties beyond the employment relationship was a key recommendation of both the Royal Commission and the Taskforce.

Exclusion of home occupiers in relation to residential work

7.7. The Bill attempts to recreate the existing exemption from health and safety duties for home occupiers in relation to residential work.

7.8. However, as framed in the Bill, the exclusion causes significant difficulties by stating that these home occupiers are not PCBUs.

7.9. Those employed or engaged to carry out domestic work for the occupier of a home will not be workers for the purpose of the Bill. The definition of worker in cl 14(1) of the Bill is "a person who carries out work in any capacity for a PCBU."

7.10. As a result, a home is not a workplace. A workplace is defined in cl 15(1) of the Bill as "a place where work is carried out for a business or undertaking" and "includes any place where a worker goes or is likely to be, while at work."

7.11. A number of concerning consequences follow. For example, since those employed to do domestic work are not workers they do not have duties under cl 40 of the Bill to take reasonable care for their own health and safety or to ensure that their acts or omissions do not adversely affect the health and safety of others.

7.12. Since a home is not a workplace in relation to residential work and the home occupier is not a PCBU, the home occupier does not have duties under the Bill relating to notifiable events (cls 18-20 and 51-53).

7.13. Home occupiers and their contractors and employees have duties under other laws relating to these matters including the common law (such as torts of negligence and nuisance along with common law duties on employers such as the duty to provide a safe system of work). However, it is incoherent and somewhat perverse to remove them from the ambit of the main health and safety legislation.

7.14. This problem is likely to become more prominent as the population ages and more people become dependent on others for care and support in their homes.

7.15. Moves in other parts of Government exacerbate these issues. For example, the enhanced individualised funding model being rolled out regionally in relation to disability support allows disabled people to directly employ their carers.[5] Given the exclusion in the Bill, disabled persons may believe (wrongly given their common law employment obligations) that they are not responsible for ensuring that their employees have access to, for example, safe lifting equipment such as hoists.

7.16. It is notable that Australia has no such exemption from residential work in the Model WHS Act. 'The interpretative guideline "Model WHS Act the meaning of 'person conducting a business or undertaking'" ('the PCBU guideline') notes the centrality of the concept of 'work' to determining whether a business or undertaking is being carried out and whether a person is a worker. The PCBU guideline notes at 2 that "work does not include activities of a purely domestic, recreational or social nature" and in relation to residential work at 4:

> An individual householder may have the duties of a PCBU if they engage a worker, for example, employing a nanny to care for children in the householder's home. While the householder is not employing the worker as part of a business, employing the

[5] See http://www.health.govt.nz/your-health/services-and-support/disability-services/types-disability-support/new-model-supporting-disabled-people/enhanced-individualised-funding

> worker to carry out certain duties at the home is regarded as an 'undertaking'. Consequently, the householder has a duty of care as a PCBU and the person employed by the householder has the worker's duty of care under the WHS Act.
>
> A householder may also be a PCBU if 'work' is carried out by or for them that is not purely domestic, but is part of a business or undertaking conducted by them (e.g. a business is operated from home). The householder may then be a person conducting a business or undertaking involving the management or control of the workplace, and have duties as such. If the person is undertaking 'work' for the householder, as part of the conduct of a business or undertaking by the householder, then the householder will have the primary duty in relation to that person….
>
> All of the facts will determine if in the particular circumstances there is a business or undertaking being conducted (in which 'work' is being carried out) or if the activities are of a private or domestic nature.

7.17. The Australian approach is better than the clumsy and flawed exemption in the Bill because it has the benefit of conceptual consistency and does not create lacunas in relation to several important duties. However, it is difficult to see a clear distinction (at least at the margins) between 'work' and 'activities of private or domestic nature.' We suggest another approach.

7.18. Home occupiers constitute a special category of 'person controlling a business or undertaking' to whom it may not be appropriate to place all of the health and safety duties upon.

S.7 We submit that a better approach than a blanket exemption would be to decide which duties or penalties are too onerous for home occupiers to comply with and exempt them from these specifically. This may be done by primary legislation or through regulation (as envisioned by cl 13(1)(b)(iv)).

Exclusion of workers and officers from the definition of PCBU

7.19. Johnstone and Tooma (2012) identify a weakness in the exclusion from the definition of PCBUs for persons engaged solely as a worker or officer (see cl 13(1)(b) of the Bill equivalent to cl 5(4) of the Model WHS Act). They note at 57 and 58 that:

> The exclusion … has the potential for mischief because, as discussed below, a 'worker' is broadly defined in s 7 to be 'a person' who 'carries out work in any capacity' for a PCBU, and includes contractors and sub-contractors. This definition, on its face, does not preclude interpreting 'person' to include a corporation providing services. This interpretation would undermine the operation of the Model Act because it would mean that the only PCBU in any commercial arrangement that involved a contractual chain would be the ultimate client at the head of the contractual chain for whom the work is done. All other contractors and sub-contractors would not be

> PCBUs because they would be 'workers'. This is a perverse outcome and clearly contrary to the objects of the Model Act, and the clear intention of the National Review. …
>
> … [W]hile it is clearly the intention of the National Review that a contractor or subcontractor in a contractual chain can be a worker and be owed a duty by all PCBUs further up the chain, and at the same time be a PCBU and owe duties to those further down the chain, the clumsy drafting of s 5(4) has failed to express this intention clearly. We argue that the courts should interpret s 5(4) to only exclude from the definition of a PCBU 'workers' who are natural persons, who are 'solely' working within the PCBU's organisation and who do not operate a business (for example, as a contractor) 'in their own right'. Section 5(4) should be redrafted at the earliest opportunity to capture the intention of the National Review clearly and to put the issue beyond doubt.

S.8 We submit that cl 13(1)(b) should be amended to ensure that only workers and officers who are natural persons working for the PCBU but not operating a business or undertaking in their own right are excluded.

8. Meaning of worker (cl 14)

8.1. The CTU supports the wide ambit given to the definition of worker. We note the issues discussed above in relation to the definition of PCBU that impact upon the definition of worker (see home occupiers and exclusion of workers from the definition of PCBU).

S.9 We submit that the words "unless the context requires otherwise" should be deleted from clause 14(1). It is unclear what that means and there is no similar qualification in the Model WHS Act.

9. Meaning of supply (cl 16)

Supply of services

9.1. We are concerned that there is a gap in both the Model WHS Act and the proposed Bill in that services, such as information technology services or even health and safety advisory services, are not caught by the definition of 'supply'.

9.2. As shown by the Novopay and other high profile failures, the provision of inadequate services can carry significant consequences. Failures in a system may have significant health and safety consequences. For example, the failure of computerised railway signalling systems may contribute to tragic

consequences as was demonstrated by the Wenzhou train collision that killed 40 people in 2011.[6]

S.10 We submit that the meaning of 'supply' in cl 16 should be broadened to include the supply of services.

Loaned plant

9.3. Failure to include loaned plant (for example, loaned tools on a building site, neighbouring farmers loaning tractors, etc.) is a mistake. Under s 18A of the current Act, before loaning plant to be used in a workplace a person must ensure that the plant is designed and maintained to be safe for use.

9.4. This coverage does exist in the Model WHS Act but this is an area where existing New Zealand law is better thought out and should be retained.

S.11 We submit that the definition of supply in the Bill should include 'loan.'

10. Reasonably practicable (cl 17)

10.1. There is little difference between the current test of existing 'all practicable steps' and the proposed 'reasonably practicable' test. This may be demonstrated by a side by side comparison of the two tests:

All practicable steps (s 2A of the current Act))	**Reasonably practicable** (cl 17 of the Bill)
In this Act, **all practicable steps**, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—	In this Act, unless the context otherwise requires, **reasonably practicable**, in relation to a duty to ensure health and safety, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
(a) the nature and severity of the harm that may be suffered if the result is not achieved; and	(b) the degree of harm that might result from the hazard or risk; and

[6] See for further detail of this accident: http://www.nytimes.com/2011/12/29/world/asia/design-flaws-cited-in-china-train-crash.html?_r=0

(b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and (c) the current state of knowledge about harm of that nature; and (d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and (e) the availability and cost of each of those means. (2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.	(a) the likelihood of the hazard or the risk concerned occurring; and (c) what the person concerned knows, or ought reasonably to know, about— (i) the hazard or risk; and (ii) ways of eliminating or minimising the risk; and (d) the availability and suitability of ways to eliminate or minimise the risk; and (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

10.2. Perhaps the most striking difference between the current and proposed test is the use of the phrase "grossly disproportionate" in cl 17(e) of the Bill.

10.3. However, the addition of 'grossly disproportionate' simply reflects a more accurate rendering of the test that the Courts have applied. For example, in *Edwards v National Coal Board* [1949] 1 KB 704 (CA) at 712 Asquith LJ commented that:

> 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it can be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.

10.4. We support the move for two reasons. First, along with other changes aligning New Zealand law with the Model WHS Act, doing so may make Australian case law more accessible to New Zealand courts. Such case law will only be of persuasive value but may contain useful discussion.

10.5. Second, the Bill will be referred to by PCBUs and workers to determine their respective responsibilities. It is useful if the statute does not dramatically diverge from the common law: If the courts expect that employers will take any reasonably practicable step unless the cost is grossly disproportionate then it is better that this is spelt out specifically.

S.12 The CTU supports the move to a test of 'reasonable practicability.'

10.6. If the intention is to ensure that the cost of remedying a risk can only be considered when it is grossly disproportionate to the risk, then cl 17(e) as it is currently written does not convey this meaning strongly enough. It has a lower threshold because it is part of the list of relevant factors and whether the costs are 'grossly disproportionate' is only one consideration.

S.13 We submit that cl 17(e) should be amended by separating it out from the list of relevant matters to stand alone as cl 17(2) to read:

> Whether after assessing the extent of the risk and the available ways of eliminating or minimising the risk in s 17(1) if the cost associated with these available ways is grossly disproportionate to the risk.

11. Subpart 4- Key principles relating to duties

11.1. Several of the clauses in subpart 4 are actually duties rather than principles (such as *cl 22 duty to manage risk*, *cl 27 duty to consult other duty holders*). The equivalent subdivision in the Model WHS Act is at the beginning of Part 2- Health and Safety Duties and it is very difficult to see the rationale for the change.

S.14 We submit that Subpart 4 fits more logically in Part 2- Health and Safety Duties and should be moved to that Part.

12. Duty to manage risk (cl 22) and systematic risk identification

12.1. One of the strongest criticisms of the Model WHS Act by Johnstone and Tooma (2012) is that the duty to engage in a systematic and proactive process for identifying and controlling hazards and risks (including emerging hazards and risks such as nanoparticles) is implied rather than explicitly

stated in both the Model WHS Act and the Model WHS Regulations. Johnstone and Tooma note at 265 that:

> [T]he approach to risk management in the Model Regulations is piecemeal and fragmented, and that the major gap in the Model Regulations is the absence of any provision requiring *all* PCBUs to address the possibility of new and emerging hazards.
>
> This failure is important in two respects. First, it misleads the PCBU into believing that no generic requirement for systematic work health and safety management exists when in fact … the courts have consistently indicated that the employer's general duty in the pre-Model Act work health and safety statutes required the employer to take a proactive and systematic approach to addressing hazards and risks. Second, it misses the opportunity to link new and emerging risks with the new proactive duty of officers (discussed in Chapter 3) to exercise due diligence – through the fifth element of due diligence, the duty to take reasonable steps to ensure legal compliance.
>
> The omission of an express general requirement for the development of systematic work health and safety management approaches is frustrating given that systematic approaches are the practical means by which dutyholders comply with their duty of care. Guidance, through regulations, on what should be included in a systematic approach can only be of assistance to duty holders and result in improvements in health and safety. Concerns about the cost burden associated with such requirements, presumably the justification for not including them in the Model Regulations, are misplaced given that it would be very difficult to comply with the duty of care without taking a systematic approach. We regard the requirement for a systematic approach for a work health and safety management to be an essential evolutionary step in the development of work health and safety regulation. A transition towards this can be achieved through the development of a Code of Practice on Systematic Work Health and Safety Management and then reform of the Model Regulations as soon as possible to include a requirement for the development of such a systematic approach.

12.2. This is another area where existing New Zealand law is better and clearer than its Australian counterpart. Section 7 of the current Act states in part:

> **7 Identification of hazards**
> (1) Every employer shall ensure that there are in place effective methods for—
> (a) systematically identifying existing hazards to employees at work; and
> (b) systematically identifying (if possible before, and otherwise as, they arise) new hazards to employees at work; and
> (c) regularly assessing each hazard identified, and determining whether or not it is a significant hazard….

S.15 We recommend that cl 22 is reworded to retain this important function as follows (suggested additions and amendments in bold):

> **22 Duty to manage risk**
> A duty imposed on a person under this Act to ensure health and safety requires the person—
> **(a) to ensure that there are effective methods in place to systematically identify existing hazards and risks at work; and**

> **(b) to ensure that there are effective methods in place to systematically identify (if possible before, and otherwise as, they arise) new hazards and risks at work;**
> **(c) to regularly assessing each hazard or risk identified,**
> **(d)** to eliminate risks to health and safety, so far as is reasonably practicable; and
> **(e)** if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

13. Duties non-transferable (cl 24) may be shared (cl 26) and cannot be contracted out of (cl 29)

S.16 The CTU strongly supports these clauses as a fundamental underpinning to the wider concept of PCBU.

13.1. We are aware of concern raised by some businesses and undertakings that it is unfair that they should retain health and safety duties where they employ or engage a person with more knowledgeable or specialised in the mitigation of risks and hazards (or a particular kind of risk and hazard) than they have. This is a prevalent argument in the forestry sector for example.

13.2. Johnstone and Tooma (2012) provide an important commentary in reply to this concern at 79 and 80:

> [W]here a corporation undertakes a complex project, it might be foolish for the firm to carry out the work without engaging external expertise, because failure to draw on expertise might expose the corporation's employees and members of the public to high levels of risk. Thus a corporation specialising in civil engineering can engage a principal contractor to oversee a particular construction project. The principal contractor can engage contractors to undertake various aspects of construction and these contractors might engage specialist sub-contractors to do particular tasks. The important point here is that while it is appropriate for the corporation to devolve tasks to ensure the efficient and safe completion of the works, the corporation cannot absolve itself of responsibility for its work health and safety obligations under s 19.
>
> As Lord Hoffman in the UK House of Lords decision *R v Associated Octel Co Ltd* stated, it is self-evident 'that a person conducting his own undertaking is free to decide how he will do so'. The primary duty requires the person conducting a business or undertaking (PCBU), again in the words of Lord Hoffman:
>
> > *to do so in a way which, subject to reasonable practicability, does not create risks to people's health and safety. If, therefore, the [PCBU] engages an independent contractor to do work which forms part of the conduct of the [PCBU]'s undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. He cannot, having omitted to do so, say that he was not in a position to exercise any control.*
>
> The primary duty requires the PCBU to take reasonably practicable measures to protect workers and others 'not merely from the physical state of the premises … but

> also from the inadequacy of the arrangements which the [PCBU] makes with the contractors for how they will do the work'.
>
> Thus the PCBU at the head of the contracting chain needs to ensure that the principal contractors and contractors and sub-contractors are properly selected, and needs to manage the principal contractor, and through the principal contractors, the contractors and sub-contractors, as far as is reasonably practicable via the contract, instruments such as compliance guides, and by supervising and monitoring, to ensure that the health and safety obligations in s 19 [the general duty] are complied with.

13.3. The answer to this argument also lies in cl 26(3)(b). A person must discharge their duty "to the extent to which the person has the capacity to influence or control the matter."

14. Duty to consult with other duty holders (cl 27)

S.17 The CTU strongly supports the requirement that each person with a duty in relation to the same matter "must, so far as reasonably practicable, consult, co-operate with and co-ordinate activities with all other persons who have a duty in relation to the same matter."

14.1. This is the key link between multiple PCBUs, multiple officers and even the development of worker engagement and worker participation practices.

14.2. This provision is an important improvement particularly for dangerous industries that use multiple contractors. Construction is an example of this and a case study will assist to illustrate this:

Case study: Construction

14.3. In March 2011, construction company Wallace Building Contractors Limited (WBCL) contracted a trucking company to bring precast concrete panels onto a building site. The trucking company, Rough Terrain Transport Limited, did not have sufficient information about the nature of the work. Transporting and moving precast panels is an exercise that requires staff skilled in this area of work. The driver assigned to the work was not trained to the task and had never transported panels before. A third "self-employed" contractor (contracted to WBCL) assisted in the unloading of the panels. During this process an unsecured panel fell on this third contractor and he was seriously injured.

14.4. In this workplace there were at least three different employers involved. The communication between them was insufficient to run a safe site. The transport company was prosecuted but the building company was in the best position to ensure the safety of the self-employed contractor in our view. The duty to consult, co-operate and co-ordinate activities may have significantly reduced the likelihood of this accident occurring.

Good faith

14.5. The Australian wording can be improved upon. The importance of the duty to consult is such that it should require the imposition of a duty of good faith between the shared duty holders.

14.6. Burrows, Finn and Todd (2007) discuss a generalised contractual doctrine of good faith at [2.2.6]:[7]

> Other systems of law recognise a doctrine of "good faith" in contract, that is to say a doctrine that each party to the contract owes a duty to deal with the other party fairly and in good faith. Traditionally, English (and New Zealand) law has not admitted the existence of such a concept, except in the case of those few contracts which are described as contracts "uberrimae fidei" and in relation to employee's duties to an employer [and vice versa]. Nevertheless, a number of the doctrines of our general law of contract can perhaps be explained as being founded on a latent premise which resembles good faith.…
>
> Thomas J went so far as to support a general doctrine of good faith, stating that he "would not exclude from our common law, the concept that, in general, the parties to a contract must act in good faith in making and carrying out the contract." …
>
> It is difficult to pronounce on the future, if any, of the doctrine in New Zealand law. After 15 years or so of discussion, however, there are few signs that it will be embraced as a general doctrine any time soon. It is more likely that it will make its appearance as an implied term in particular kinds of contract that require a close degree of cooperation between the parties, which to some extent is already happening.

14.7. It is acknowledged that health and safety duties may be shared between parties without any contractual relationship with one another so a duty of good faith imposed upon persons with a shared duty would not be a strictly contractual one. Nevertheless there are significant similarities between a

[7] Burrow, J., Finn, J & Todd, S. (2007) *Law of Contract in New Zealand* (3rd NZ Ed) Wellington: LexisNexis NZ Ltd

contract requiring “a close degree of cooperation between the parties” and a statutory duty to “consult, co-operate with and co-ordinate activities.”

14.8. The centrality of the employment relationship to health and safety duties under the current Act dovetails with the specific duty of good faith under s 4 of the Employment Relations Act 2000 so employers, employees and unions all owe duties of good faith to one another. Thus most of the current interactions under the health and safety law are governed by good faith.

14.9. The extension beyond the employment relationship creates a difficult situation where some parties will owe duties of good faith to one another and others will not in relation to the same matter.

14.10. Core elements of good faith under the Employment Relations Act 2000 are set out in s 4 of that Act. Two are particularly relevant to health and safety:

- The duty not to, indirectly or directly, do anything to mislead or deceive the other party or that is likely to mislead or deceive them (s 4(1)(b)); and

- The duty to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, open and communicative (s 4(1A)(b)).

14.11. A situation where some parties are required to deal fairly with each other, not to mislead or deceive one another and to be active and constructive in maintaining a relationship and where others are not is odd and undesirable.

S.18 <u>We submit that the duty to consult other duty holders should be subject to express requirements to deal fairly with each other, not to mislead or deceive one another and to be active and constructive in discharging the duty.</u>

14.12. This would ameliorate the ‘two-track’ duty that the Bill creates and incentivises good behaviour in dealing with health and safety issues.

S.19 We recommend also that a guideline for duty holders on ways in which they can most effectively discharge their shared duties be developed and issued as soon as possible.

15. PCBU must not levy workers (cl 28)

S.20 The CTU strongly supports the banning of levies or charges for health and safety (including in particular protective clothing or equipment).

15.1. It is concerning that the wording of cl 28(2) refers only to pre-conditions or terms of *employment* in relation to the provision of protective clothing or equipment. This may act as an incentive for PCBUs to structure their contracting arrangements to use individual sub-contractors over employees and charge them for their protective clothing or equipment (and in some instances to disguise workers' employment status).

PART 2- HEALTH AND SAFETY DUTIES

16. Primary duty of care (cl 30)

16.1. In relation to the primary duty, Johnstone and Tooma (2012) quote at 39 from the 1972 Report of the Robens Committee that:

> [A] positive declaration of over-riding duties, carrying the stamp of Parliamentary approval, would clearly establish in the minds of all concerned that safety and health at work is a continuous legal and social responsibility of all those who have control over the conditions and circumstances in which work is performed. It would make it clear that this is an all-embracing responsibility, covering all workpeople and working circumstances unless specifically excluded … and applying whether or not a particular matter of detail is covered by a specific regulation. It would encourage employers and workpeople to take a less narrow and more rounded view of their roles and responsibilities in this field. It would provide guidance to assistance in the judicial interpretation of detailed statutory provisions.

16.2. A question arises as to the relationship between the primary and further duties. It appears clear from the Robens Report quotation above and the development of the Australian Model Act[8] that the further duties of care (for example, supply chain duties and duties for PCBUs that control workplaces) are aspects of the primary duty of care.

16.3. However, as Johnstone and Tooma (2012) note at 90 and 91:

> One complex issue arising from the structure of duties in the Model Act, and not addressed in the Act, the Explanatory Memorandum or the National Review's First Report, is the relationship between the primary duty of care and the further, specific, duties. The First Report recommended that the Model Act 'specifically provide that the duty should apply without limitation', and in particular should not be limited or restricted by the specific duties. The Model Act and the Explanatory Memorandum are silent on this point, apart from describing the duties placed on specific classes of PCBUs as 'further duties'.
>
> One implication flowing from the First Report's recommendation that the primary duty apply without limitation is that there can be no suggestion that compliance with the provisions of a 'further duty' will be deemed by the courts to be compliance with the primary duty. A breach of a 'further duty' will also constitute a breach of the 'primary duty', but it is clear from the discussion earlier in this chapter that there will be circumstances in which there might be a contravention of the primary duty where there is not an applicable further duty. It may be that work health and safety regulators will find it easier to prove a breach of a further duty than a contravention of the primary duty, and a regulator might choose to prosecute the breach of the further duty where it applies, with the primary duty called on only where the further duty cannot be used. A second option is that the regulator might decide to prosecute under the primary duty in all cases, and use the further duty to guide the drafting of the particulars of the offence. Further, it is common in the practice of work health and safety prosecutors for charges under different provisions to be pleaded as alternatives. Where the primary and a further duty apply, that practice appears

[8] See Johnstone and Tooma (2012) chapter 2 for further detail.

> appropriate. In any event, where a defendant is charged for multiple counts arising out of the same fact situation, a proper application of the sentencing principles would ensure that the penalty imposed fits the crime so that the defendant is not punished multiple times for what is essentially the same offence.

16.4. The clarity of the relationship between the primary and further duties is further obfuscated in the Bill by the removal of the reference to supply chain duties and duties on PCBUs that control workplaces as 'further duties.'

S.21 We submit that the primary duty of care should be expressed as applying "without limitation." Additionally, the primary and further duties should be placed in separate subparts to make the latters' subordinate status clear.

17. Further duties of PCBUs in labour hire situations

17.1. The labour hire market in New Zealand is one of the most deregulated in the developed world.[9] Health and safety is no exception.

17.2. Labour hire agencies will be caught by the new definition of PCBUs and we fully support this. However, further guidance would useful for labour hire companies as PCBUs as they often have significant resources and control over where workers are placed on an initial and ongoing basis but little control over the day-to-day direction of their activities.

17.3. As Johnstone and Tooma (2012) note at 264:

> Simply imposing the primary duty on the PCBU by itself does not properly address the major changes in work arrangements and relationships – further guidance to enable the application of the duty to the changing work environment is required. Indeed, much of the impact of the transition towards the broad duty-holder category of PCBU is lost because of the employer-centric manner in which the duty has been cast by the drafters. Despite observing the prevalence of franchising, labour hire and other modern workplace arrangements, these categories are not included in the specified categories of PCBUs who owe 'further' duties.

S.22 We submit that further duties ought to be imposed upon labour hire companies to ensure that they understand and meet their obligations under the Bill through either an additional clause or regulations. Examples might include:

[9] For example, New Zealand has the lowest rate of Employment Protection Legislation for temporary workers in the OECD. See http://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2013_empl_outlook-2013-en for more detail.

- Labour hire PCBUs must ensure that workers are given an adequate health and safety induction to the workplace;

- Labour hire PCBUs must ensure that there are adequate worker participation practices at the workplace to allow workers they employ or engage to be engaged with in relation to health and safety matters; and

- Labour hire PCBUs must ensure that all workers supplied to a workplace have all needed authorisations to undertake the necessary work.

18. Duty of self-employed persons (cl 31)

18.1. The explanatory note to cl 31 states that it "clarifies that a self-employed person is both a PCBU and a worker for the purposes of the Bill" (at 9). The problem is that the clause itself does not do so. Cl 31 simply states:

> **31 Duty of self-employed persons**
> A self-employed person must, so far as is reasonably practicable, ensure his or her own health and safety while at work.

18.2. The duty of self-employed persons is included as a subclause of cl 19 of the Model WHS Act to make it clear that self-employed persons are PCBUs subject to the general duty.

18.3. Cl 19(5) of the Model WHS Act also includes a note stating "A self-employed person is also a person conducting a business or undertaking for the purpose of this section."

S.23 We submit that cl 31 should be transferred back into a subclause of cl 30 and the explanatory note included to clarify (as intended) that a self-employed person is both a PCBU and a worker.

19. Duty of PCBU who manages or controls workplace, fixtures, fittings or plant (cls 32-33)

19.1. The CTU supports the imposition of these duties. As we note above in part 16 of our submission, it should be made clear that these duties are particular examples of the primary duty.

19.2. We have seen concern expressed by other submitters (such as Federated Farmers) that the duty under cl 32 (to ensure as far as reasonably practicable that the workplace is without risks to the health and safety of any person) is too onerous given the size of many farms along with the potential for unauthorised visitors. With respect, we believe this concern is greatly overstated. The qualifier of reasonable practicability means that any steps are subject to express considerations of likelihood, availability and suitability of ways to eliminate or minimise the risk along with a weighing up of whether the cost is grossly disproportionate to the risk.

20. Duties relating to manufacture, import, supply, installation, construction or commission of plant, substances or structures (cls 34-38)

20.1. We support the imposition of these duties. As we note above in part 16 of our submission, it should be made clear that these duties are particular examples of the primary duty.

21. Duty of officers (cl 39)

21.1. We strongly support the imposition of duties on officers of the PCBU.

21.2. Johnstone and Tooma (2012) put the case for a health and safety duty on officers forcefully at 98-99:

> Research shows that senior management leadership of the work health and safety agenda is critical to positive health and safety outcomes. Indeed, a number of studies have shown that senior management's continuous and genuine support of health and safety is key to a safe and healthy working environment. Gallagher goes so far as to suggest that action on the part of senior management is a prerequisite to significant improvement in organisational health and safety performance. Conversely, the failings of senior management have been identified as being at the root of major disasters such as the Columbia Space Shuttle disaster, the BP Texas Refinery

disaster, the Montara oil spill, the Deepwater Horizon disaster and the Upper Big Branch disaster.

A study into best practices in corporate health and safety amongst major corporations found that management practices alone are not sufficient to achieve outstanding health and safety performance. All of the company's workers must be engaged and involved. The study concluded that achieving excellence is about empowering everyone – management, supervisors, employees and contractors alike – to make health and safety truly work.

This ultimately comes down to the leadership of senior executives in relation to work health and safety. The alignment of the personal duty and liability of officers with the crucial role of leadership is a prerequisite to effective work health and safety laws.

Exemptions from the definition of officer

21.3. Given evidence of the critical importance of the officers duty of proactive due diligence to driving good health and safety practice we are perturbed by the watering down of the definition of officer from the Model WHS Act, the exposure draft of the Bill and the Bill as introduced. This duty is far too important to be restricted.

21.4. The Model WHS Act adopts, among other definitions, the definition of officer in the Australian Corporations Act 2001. The relevant parts of this definition states:

> ***"officer"*** of a corporation means:
> (a) a director or secretary of the corporation; or
> (b) a person:
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)….

21.5. The Model WHS Act also defines officer as including officer of the Crown (as set in cl 247) and officer of a public authority (as set out in cl 252). These clauses state:

> **247 Officers**
> (1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Crown is taken to be an officer of the Crown for the purposes of this Act.

(2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

252 Officer of public authority
A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a public authority is taken to be an officer of the public authority for the purposes of this Act.

21.6. The definition of officer in the exposure draft of the Bill stated:

officer, in relation to a PCBU,—
(a) means, if the PCBU is—
(i) a company, any person occupying the position of a director of the company by whatever name called:
(ii) a partnership (other than a limited partnership), any partner:
(iii) a limited partnership, any general partner:
(iv) a body corporate or unincorporated body, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company:
(b) includes any other person, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the PCBU (for example, the chief executive or a chief financial officer); but
(c) does not include a Minister of the Crown acting in that capacity.

21.7. The exposure draft lost both the concept of "a person who has the ability to affect significantly the corporation's financial standing" and a person "in accordance with whose instructions or wishes the directors of the corporation are accustomed to act" (apart from professional advisors).

21.8. The definition of officer in the Bill (cl 12) represents a further diminution:

officer, in relation to a PCBU,—
(a) means, if the PCBU is—
(i) a company, any person occupying the position of a director of the company by whatever name called:
(ii) a partnership (other than a limited partnership), any partner:
(iii) a limited partnership, any general partner:
(iv) a body corporate or an unincorporated body, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company; and
(b) includes any other person who makes decisions that affect the whole, or a substantial part, of the business of the PCBU (for example, the chief executive); but
(c) does not include a Minister of the Crown acting in that capacity

21.9. Under the Bill's definition, an officer no longer includes a person who participates in making decisions that affect the whole or a substantial part of the business of the PCBU.

21.10. We strongly oppose the exemption from the status of officer for:

- Ministers of the Crown;

- Persons with the ability to influence the actions of PCBUs outside of formal directorships;

- Persons who participate in the making of decisions that affect the whole or a substantial part of the business of the PCBU.

21.11. We examine each of these below.

Ministers of the Crown

21.12. It is hard to discern any principled reason for the decision to exclude Ministers of the Crown from a duty as officers. Johnstone and Tooma (2012) are sharply critical of this at 134:

> In the case of the public sector, the highest level of leadership is quarantined from the duty for purely cynical political reasons. The exclusion of government ministers from the definition of an 'officer' in s 257 of the Model Act creates a misalignment of accountabilities, pitting public servants against their ministers. The filtering out of bad news for political purposes is likely to be a thing of the past as senior public servants will expressly put their ministers on notice of work health and safety matters in an effort to protect their own personal liability. In extreme cases, senior public servants are likely to refuse instructions or resign from their positions in protest.
>
> From a public policy perspective, the decision to exclude ministers from liability under the Model Act is difficult to defend. Ministers are at the apex of the hierarchy of their department. Their decisions directly impact upon work health and safety. Their leadership can be felt on health and safety matters as much as any corporate leader's can.

S.24 <u>We submit that the exclusion for Ministers of the Crown is inappropriate and should be removed from the Bill.</u>

Persons with the ability to influence the actions of PCBUs outside of formal directorships;

21.13. The imposition of officers' duties on those in formal directorships but not on those who exercise *de facto* control is a moral hazard. It is conceivable that some directors will set up new governance structures to avoid liability (including ostensible silent partners that are not in reality silent).

S.25 <u>We submit that the definition of officer ought to include (per the Model WHS Act):</u>

a person:

(i) who has the capacity to affect significantly the corporation's financial standing; or

(ii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)….

S.26 Alternately, the full definition of director could be incorporated by reference to s 126 of the Companies Act 1993 (and in particular, s 126(1)).

Participants in the making of decisions affecting a substantial part of the PCBU

21.14. Johnstone and Tooma (2012) note at 128-129:

> Paragraph (b)(i) of the definition of 'officer' in s 9 of the *Corporations Act 2001* [incorporated into the definition of officer under the Model WHS Act] refers to a person who 'makes, or *participates in making*, decisions that affect the whole, or *a substantial part*, of the business of the corporation' (emphasis added). While the making of decisions may be the exclusive domain of senior managers, 'participation' in decisions occurs at all levels, particularly middle management. In *Morley v Australian Securities and Investments Commission* the NSW Court of Appeal observed that:
>
> > *It is a reality of corporate life that board and other important decisions involve many persons other than the ultimate decision-makers. Just as s 9(b)(ii) of the Law recognised the reality that a person may have "the capacity to affect significantly the corporation's financial standing", that being sufficient for the status of an officer as defined, so s 9(b)(i) recognised the reality of participation in decision making. But it required participation in making decisions affecting the whole or a substantial part of company's business.*
>
> On appeal, the High Court of Australia confirmed this broad approach to the definition of participation in making decisions affecting the whole or a substantial part of the business of the corporation, and provided the following guidance to the interpretation of para (b)(i) in the definition of an 'officer' in s 9:
>
> > *First, the inquiry required by this paragraph of the definition must be directed to what role the person in question plays in the corporation. It is not an inquiry that is confined to the role that the person played in relation to the particular issue in respect of which it is alleged that there was a breach of duty …*
> >
> > *Second, in a case like the present, where the breaches of duty alleged were omissions to provide advice, it is evident that determining how a reasonable person occupying the same office and having the same responsibilities would exercise the powers and discharge the duties of that office may be assisted by consideration of how the officer in question acted on occasions other than the one which is alleged to give rise to a breach of the duties …*
> >
> > *Third, each of the three classes of persons described in par (b) of the definition of "officer" is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition …*
> >
> > *Fourth, sub-par (i) of par (b) distinguishes between making decisions of a particular character and participating in making those decisions … [P]articipating in making decisions should not be understood as intended*

> *primarily, let alone exclusively, to deal with cases where there are joint decision makers. The case of joint decision making would be more accurately described as "making decisions (either alone or with others)" than as one person "participating in making decisions". Rather, as the Court of Appeal rightly held, the idea of "participation" directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons. The notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed.*

> Furthermore, the definition of 'officer' is not restricted to decisions that affect the whole of the business of the corporation but rather may be triggered by decisions that affect a 'substantial' part of the business of the corporation. 'Substantial' is not defined in either Act and therefore takes on its ordinary meaning of considerable or significant.

21.15. Particularly in large companies, the removal of participation in the making of decisions will remove many persons from the definition of officer whom it is prudent to insist are caught. For example, human resources and health and safety managers will customarily provide advice and counsel to the senior management team on health and safety matters rather than making the decisions personally. Senior management will often be reliant upon the skill, knowledge and expertise of these advisors but under the Bill as proposed the advisors would be under no duty of due diligence to (for example) have an up-to-date knowledge of health and safety matters or an understanding of hazards and risks inherent in the nature of the PCBU's business.

S.27 <u>We submit that the definition of officer should include persons who participate in the making of decisions that affect the whole or a substantial part of the business of the PCBU. This should be framed in such a way as it does not discourage worker engagement or participation.</u>

Officer licensing

21.16. We support the proposal by Johnstone and Tooma (2012) that consideration should be given to licensing officers to undertake the health and safety aspects of their role. Johnstone and Tooma suggest at 135:

> We propose another reform to the way in which officers' responsibilities are regulated in the Model Act. Having determined, correctly in our view, that officers should owe a proactive duty in their own right, the National Review should have taken the next step of recommending a licensing scheme for officers to ensure that they are equipped through pre-licence training and competency assessment with the skills required to discharge their due diligence duty. This reform would reinforce the move to proactive assurance rather than reactive enforcement. By being required to meet minimum

> competencies, such as undertaking an approved training program based on the due diligence requirements, officers are more likely to implement the programs necessary to drive better health and safety outcomes in their businesses or undertakings. A licence would be renewed annually, affording a proactive opportunity to review and verify the performance of an officer – even if that is done by merely seeking a declaration that they have met the due diligence requirements, such a step would represent an improvement on current enforcement approaches. The renewal process would also create an opportunity for retraining. Indeed, each of the six elements of due diligence could be built into a carefully designed licensing regime for officers. We recommend that such a licensing regime be developed and trialled immediately and, if trials are successful, implemented widely.

21.17. We recognise that there are interim problems due to the lack of recognised structure, training, competencies and qualifications for people active in workplace health and safety.

21.18. However, the process could be enabled via legislation and then brought into practice via regulation at an appropriate date (if trials are success and show value).

S.28 <u>We submit that cl 57(2) of the Bill should be amended to insert "or officer" after worker to permit the potential introduction of licensing (following policy and capacity development)</u>

22. Duties of workers (cl 40)

22.1. Persons with the greatest control over the workplace should have the greatest responsibilities under the law.

22.2. The Taskforce noted at [219] that:

> The underlying foundation of the regulatory framework should be the allocation of duties to those who are in the best position to control workplace health and safety risks to keep them as low as possible.

22.3. The whole structure of a Robens-based system is based on the principle that those with *control* over a workplace, the work carried out in it and its associated risks should have the primary duty for protecting workers against those risks. Workers do not have control of the workplace or of the work carried out in it, except to a very limited extent. The Robens principles recognise this.

22.4. We would oppose any move to give workers duties on the same basis as PCBUs or officers such as by applying the "reasonably practicable" test.

Several parts of the “reasonably practicable” test are simply out of the control or knowledge of workers. The “reasonable care” duties imposed on workers are therefore appropriate and we would not support an extension of this duty.

S.29 We support the imposition of duties on workers in the manner that those duties are set out in the Bill.

23. Offences regarding breaches of health and safety duties (cl 42-44)

23.1. We discuss these offences in parts 59 and 60 of our submission below to draw a clearer link between these offences and related provisions of the Bill including the role of the courts, sentencing provisions and other possible sanctions such as adverse publicity orders, restoration orders, work health and safety project orders and training orders.

24. Case study- the death of Philip McHardy

24.1. Philip McHardy was killed in a forestry accident on 31 August 2011.

24.2. At the time of his death there was no police photographer available according to the police so a substitute photographer was used and police note the quality was substandard. The Police noted that all of the property of Philip was secured but also note that the chainsaw was left at the scene until the Labour Department inspector was available to attend. The police note that prior to the DOL arriving (not until the next day on 1 September), the employer buried the saw and Phillips helmet under “five or six feet of mud” and it was unable to be located. Both were damaged due to being crushed and were crucial pieces of evidence as to the location of the body when Philip was killed and the adequacy of his PPE gear. The saw had apparently acted to stop Philips head being totally crushed by taking some of the weight of the tree. The act of burying this equipment prior to the DOL investigator arriving also, in the view of the family, caused major disruption to the investigation scene.

24.3. A number of other forestry families have serious concerns about the security of sites after these deaths. Some are currently still under investigation and we are unable to comment on them.

25. Notifiable events and preservation of sites (cls 18-20, 51-59)

Notifiable events

25.1. Clauses 18, 19, and 20 of the Bill set out the definitions of notifiable injury or illness, notifiable incident, and notifiable event (respectively). A notifiable event includes the death of a person, a notifiable injury or illness, or a notifiable incident. Clause 51 of the Bill creates a duty on *a* PCBU to notify the regulator of all notifiable events. The wording of these clauses is almost identical to the Model WHS Act.

Notifiable events clauses still too reactive

25.2. We support a broad notifiable event reporting regime, and believes there is scope within this Bill to create a proactive reporting regime that also acts as an educative and injury prevention mechanism. We agree with the requirement that a PCBU is the duty holder to notify WorkSafe of notifiable events. This is a shift from the employer being duty bound to report notifiable events as in the current Act. This will mean that all PCBUs that are aware of the notifiable event will be duty bound to report it, resulting in a shared duty to report the incident and potential liability for each PCBU if the incident is not reported.

25.3. If drafted and enacted correctly, these reporting requirements could also double as a method of improving systemic health and safety management before injuries or illnesses occur. As cited by Johnstone and Tooma (2012):[10]

> We should investigate all accidents, including those that do not result in serious injury or damage, as valuable lessons can be learnt from them. "Near misses", as they are often called are warnings of coming events. We ignore them at our peril, as next time the incidents occur the consequences may be more serious.

[10] T Kletz, *Learning from Accidents,* (3rd ed), Gulf Professional Publishing, Oxford, 2001, at 13.

25.4. Johnstone and Tooma comment extensively on the problems with the clauses imported from the Model WHS Act, in that those provisions do not go far enough in requiring reporting of 'near misses', and therefore create a focus on reactive enforcement. The Australian experience has been that of a significant underreporting of 'dangerous occurrences' [referred to as dangerous incidents in the Bill] and 'serious incidents' [referred to as serious injury or illness in the Bill] that did not result in a fatality.'[11]

25.5. Johnstone and Tooma (2012) also note at 257:

> It is rare for a fatal incident or serious injury to escape prosecution no matter how proactive the duty holder. Conversely it is rare for a contravention that does not result in an incident, or that finds expression in a minor incident, to lead to a prosecution regardless of the seriousness of the risk underlying the incidence or belligerence of the duty holder.

25.6. Workers in New Zealand are known for their stoicism and belief that 'it will come right' – even when workers have potentially seriously injured themselves. Typically if these workers can avoid the fuss of seeking medical attention, they will, until they absolutely have to. The requirements in cl 18(1)(b) and (c) for immediate hospital treatment or medical treatment within 48 hours therefore are problematic.

S.30 <u>We submit that there are a number of amendments that could be made to the definition of notifiable incident to ameliorate this problem:</u>

[11] Johnstone and Tooma (2012) at 210

- The definition of "serious risk" should be clarified in the interpretation section. See the discussions of this term in part 43 of our submission below;

- The word "normally" should be inserted into cl 18(b) to read "…normally requires the person to be" hospitalised, and into cl 18(c) to read "…normally requires the person to have medical treatment…"

- The word "immediate" should also be removed from cl 18(b); and

- The prerequisite in cl 18(1)(c) for medical treatment being sought within 48 hours should be increased to at least 7 days.

Occupational disease is not well recognised

25.7. As we note at part 26 of our submission below, occupational disease and illness are inadequately addressed in these provisions. The Taskforce recommended that WorkSafe should be notified of monitoring results, and if workers are exposed to particular chemicals and hazardous substances or environmental conditions such as noise. The definition of notifiable incident in clause 19 does not seem to envisage mandatory reporting of such exposures and should be amended to include exposure to such substances or environmental conditions.

25.8. The definition of notifiable injury or illness extends to cover some occupational diseases such as leptospirosis.

S.31 We submit that consideration should be given to extending this list to other diseases typically regarded as having an occupational cause, such as those listed in sch 2 of the Accident Compensation Act 2001.

Preservation of sites

25.9. We support the duty to preserve sites when a notifiable event occurs. We agree that the duty should being imposed on the person with *management or control* of the site (who may not necessarily be the PCBU).

S.32 We submit that there should also be a duty also imposed on the PCBU to notify the person with management or control of the workplace of the occurrence of a notifiable event so that they preserve the site as required by the Bill.

25.10. Without this duty, it is possible the person with management or control of the site may not know the site is required to be preserved. Johnstone and Tooma (2012) note at 214:

> Take the case of a project manager on a construction site, who has management or control of the site. If the obligation to preserve the site falls only on the project manager, then it is possible for there to be a situation whereby workers notify head office of an incident but head office fails to notify the project manager and the site is not preserved. … It is possible that a recalcitrant PCBU could avoid or delay notifying the relevant worker with management and control of the site of the occurrence of a notifiable incident as a way of thwarting the evidence preservation provisions.

25.11. The CTU disagrees with the use of 'reasonably practicable' in cl 53. The duty to preserve a site is not a 'duty to ensure health and safety' and therefore 'reasonably practicable' in cl 53 does not take the cl 17 meaning. It is defined by its ordinary meaning, allowing the cost of preservation of the site to become a major consideration when deciding what steps must be taken. When considering the importance of preservation of a site to a proper investigation, the cost of preserving the site should only be considered if it is grossly disproportionate.

S.33 We submit that cl 53 should be amended to make it clear that, like cl 17, the cost associated with preserving the site should only be considered where the cost is grossly disproportionate.

25.12. The CTU also has concerns about the exception in cl 53(2)(b) that allows actions to be taken to remove a deceased person from a site before receiving authorisation from an inspector. The CTU believes the removal of a deceased person may seriously hamper an inspector's investigation. A body would not be removed from the scene of a homicide without the Police undertaking a thorough investigation first and it is submitted the same procedure should apply for health and safety investigations.

S.34 We submit that the exemption in cl 54(2)(b) should be removed. Alternatively, a body should only be removed after receiving authorisation from the Inspector *or* a Coroner once sufficient evidence has been gathered.

26. Occupational health and disease

26.1. Occupational health, and occupational disease in particular, is a major issue for New Zealand workers. It is not adequately covered by this Bill.

26.2. In New Zealand, occupational disease accounts for considerable morbidity and mortality. More than 80 percent of work-related deaths (most due to disease rather than injury) are not documented or reported, and are not investigated.[12] This makes it almost impossible to establish exactly how many people die from work-related causes each year or to develop strategies to reduce these. However, there are an estimated 17,000 to 20,000 new cases of work-related disease per annum, of which between 2,500 and 5,500 are classified as severe. Despite there being 17,000 to 20,000 new cases each year, on average only 1,035 claims are lodged with the ACC, of which only 554 are accepted.[13] It is also estimated that there are approximately 700 to 1,000 deaths from occupational disease per annum.

26.3. Occupational diseases often have a long latency period between exposure and the emergence of symptoms or incapacity.[14] A worker may not be able to recall where they were working or whom they were working for when they were exposed to the agent leading to their disease.

---

[12] Mannetje A, Slater T, McLean D, Eng A, Briar C and Douwes J. Women's occupational health and safety in New Zealand. Technical report 13. Wellington: National Occupational Health and Safety Advisory Committee, 2009. www.dol.govt.nz/ publications/nohsac/pdfs/technical-report-13.pdf. Viewed 11 May 2012.

[13] See for example, Driscoll T, Mannetje A, Dryson E, Feyer A-M, Gander P, McCracken S, Pearce N, and Wagstaffe M. The burden of occupational disease and injury in New Zealand: technical report. National Occupational Health and Safety Advisory Committee. Wellington, 2005. www.dol.govt.nz/publications/nohsac/pdfs/bodi-tech-rep.pdf

[14] Pearce N, Dryson E, Feyer A-M, Gander P and McCracken S. The surveillance of occupational disease and injury in New Zealand: report to the Minister of Labour. Wellington: National Occupational Health and Safety Advisory Committee, 2005. www.dol.govt.nz/publications/nohsac/pdfs/surveillance-disease-injury-minister-rep.pdf. Viewed 11 May 2012.

26.4. Due to the typically long latency of occupational diseases, many current causes (agents or working conditions) of occupational disease may not be recognised until workers exposed to them become symptomatic in the future.

26.5. For example, the implications and health impact of emerging fields such as biotechnology and nanotechnology are still relatively unknown. There is growing evidence that the novel properties of some nanoparticles will bring 'unforeseen human and environmental health and safety risks.'[15]

26.6. In many industries, the nature of work has become increasingly non-standard and precarious and causalised.[16] Not only are these casualised workers the least inclined to take sick days or time off work for fear of jeopardising their future employment, but also the nature of non-standard or casual work itself poses new risks for workers. For example, there is evidence to suggest that shift work (particularly at night) may be causative of the development of peptic ulceration, ischaemic heart disease, female reproductive disorders, obesity, diabetes mellitus, hypertension, disorders of the immune system, and some forms of cancer. Occupational disease needs urgent attention from the Government.

26.7. This means it is essential to impose adequate duties on a PCBU to increase safety and mitigate risks where these risks are not realised (or realisable) until some unforeseen point in the future.

26.8. Our overseas counterparts are well ahead of New Zealand, particularly in relation to monitoring and recording exposure and occupational health data and lessons can be learned from them.

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.

---

[15] Kandlikar M, Gurumurthy R and Maynard A. Health risk assessment for nanoparticles: a case for using expert judgment. Nanotechnology and Occupational Health 2007; 9 (1): 137–156.
[16] Gander P, Pearce N, Langley J and Wagstaffe M. The evolving work environment in New Zealand. Implications for occupational health and safety. Wellington: National Occupational Health and Safety Advisory Committee, 2008. www.dol.govt.nz/ publications/nohsac/pdfs/evolving-work-environments-minister-rep.pdf. Viewed 11 May 2012.

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:[17]

- What work has the employee been doing/for how long?
- Have all risks in the work activity been assessed?
- 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

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

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.

26.13. A health surveillance scheme could run concurrently with the notifiable events requirements under the Bill.

26.14. The system would also assist in the systemic approach to risk management discussed in part 12 of our submission above.

S.35 The CTU recommends the United Kingdom approach should be adopted in New Zealand as a starting point.

27. Liability of volunteers and volunteer associations (cls 46-48) and volunteer associations and PCBUs (cl 13)

27.1. The CTU believes the provisions exempting volunteer associations from being a PCBU (cl 13) are problematic. Volunteer organisations regularly hold public events that have the potential to negatively impact on the health and safety of others (such as cycling races or club days).

S.36 We submit that a volunteer association should be considered a PCBU if it employs or engages any person to carry out work for the volunteer association. The provision could be qualified with the use of "normally" or "typically" engages any person if this is thought too onerous.

28. Authorisations (cls 54-59)

28.1. We support the authorisation framework set out in cls 54-59. Note our proposal at part 21 of our submission above regarding amendment to permit the registration of officers.

28.2. Clauses 54 to 59 create a number of offences relating to authorisation of workplaces, plant or substance, or work. The CTU supports the creation of these offences.

28.3. However, the CTU is concerned about the creation of a wide ranging regulatory power to allow for the authorisation of a person to authorise other

persons in cl 221(i)(vi). The Taskforce was clear in recommending that the new agency should be the single point of responsibility for workplace health and safety. Between the regulatory power to authorise a person to authorise other persons, and WorkSafe's ability to delegate its powers to other agencies (submitted on below at part 67 of our submission), WorkSafe has the ability to delegate and authorise its functions or powers such that it is no longer the single point of responsibility.

S.37 The CTU submits the Bill should be amended to clarify that WorkSafe will retain accountability over any person or agency that WorkSafe authorises or delegates any of its functions or powers to.

PART 3- ENGAGEMENT, WORKER PARTICIPATION AND REPRESENTATION

29. Case study- the death of John Sanderson

29.1. Forestry worker John Sanderson was killed while felling a tree on 17 January 2013. He had returned to the bush in December 2012 having ha a number of years break. He had been assessed at that point as competent and held a number of forestry qualifications in tree felling.

29.2. In the MBIE report into the accident a dispute regarding the safety on the site is recorded. A worker that had been at the site but left in the process of the investigation claimed the practises on the site were unsafe. It is recorded the worker claimed there was no proper communication on the site and the workers were under production pressure. He asserted that the company was not telling the truth in regards to the tree felling processes on the site. This matter is unresolved in the investigation report.

29.3. There were four companies involved in this accident – Taumata Plantations was the investment company that owned the trees. Hancocks Forest Management ('Hancocks') was engaged to manage the harvesting of the trees. Moutere Logging Limited ('MLL') was engaged by Hancocks to do the work and MLL subcontracted it to Cable Harvesting Limited ('CHL'). It appears CHL was a subsidiary of MLL formed especially to fell this block and used its health and safety systems. John worked for CHL.

29.4. Hancocks identified the dangers of the slope – it was heavy with undergrowth, it was extremely steep and slippery underfoot and had a number of other hazards. Mr Sanderson's partner was interviewed as part of the investigation but her views are not included in the report. In her interview, Rosemary Armstrong said that on this job "for the first time ever" John had come home and spoken about the dangerous conditions. She quoted him as saying "Fuck Rose, it's fucking dangerous". He said it was difficult even walking up to the site it was so steep. The danger on the site had subsequently been confirmed to the CTU by workers that replaced John. Rose asked him why he did not say anything to the company. He said he said he could not as it was "his job". It was his partner's view that John did

not have the correct gear, that there had been no provision for him to easily carry a radio (his leg was amputated, he could not reach his radio and he bled to death), and that he was low paid with substandard gear he had provided himself. She thought he should have had studded boots and that this area of forest should not have been harvested.

29.5. There were no elected health and safety representatives on this worksite. According to media reports MLL employs up to 100 staff but this subsidiary was small and was not required to have representatives. It is unclear if there are elected representatives in any other part of this company and even if there was an entitlement of those workers to have a representative system, without industrial support they would be unlikely to "ask" for it. This resulted in a number of elements of the "paper" and "audit based" safety systems recorded in the MBIE report as being ineffective.

29.6. A representative system that worked on this site may have resolved any of these issues: the disputed views on the accident itself, the equipment and site concerns, the communication, the need to John to have called for support when he faced a difficult cutting situation. This Bill needs to include provisions that deal with this type of complexity to prevent these situations from occurring.

30. Worker participation and representation generally

30.1. The worker participation and representation provisions in the Bill are being developed in an environment where there is little practice, experience or support for genuine worker participation and this reality needs to be built into the new system.

30.2. We can cite many examples of this, such as the refusal of employers to release workers for Worksafe Standards and Safety work and the repeated refrain from employers' groups that unions and workers will somehow misuse health and safety powers (without regard to the fact that most accidents are caused by a failure of the duties in the Act by employers to have safe systems and many in workplaces with no worker participation at all). Other examples include the concentration by employers and employers

organisations on the worker participation provisions and rights in new legislation and proposals over all other components.

30.3. The real problem is the opposite of that presented in the “health and safety Trojan Horse” narrative. Most workers that are seriously injured at work are injured in workplaces where there are no unions and no workplace representatives. There is no evidence of exploitation of worker representative power to leverage up other issues and no abuse of the process.

30.4. Where there are worker representative systems there are no regular stories of abuse and in fact even in these workplaces there is concern that many of the ‘powers’ available are so seldom used, they may be inaccessible to these workers. Very few hazard notices are issued by worker representatives including in workplaces with high accident rates: this indicates a failing in the system. Yet the narrative persists.

30.5. The real issue here is that some employers push unorganised, unrepresented workers to undertake dangerous work knowing they are unlikely to object. It is this exploitation that the worker participation system is designed to check. Where there is no adequate system and this lack creates a dangerous workplace then PCBUs should be penalised.

30.6. Many of the highly promoted safety campaigns also assist to build the false narrative – “workers must speak up (but without the power and safety of representation)”, “workers need to take responsibility for their mates (but without the genuinely free right to associate)”, “it is about safety culture where everyone plays a part (but without an honest discussion about who does what and how the employers duties can be met)”, and so on. Discussions about impairment are limited to drugs without discussion about how working conditions such as long hours and fatigue create impairment. Inspections are limited to the immediate cause of accidents and workers are blamed for simple mistakes regardless that the safety systems in these workplaces clearly failed.

30.7. There are numerous examples of this narrative being totally accepted by the "mainstream" players in health and safety.

Case study- the death of Tom Sewell

30.8. When UK mother Linda Sewell wrote to her British MP about the death of her son Tom on his first day at work on a New Zealand farm, he queried the death with Minister Bridges. The Minister said in his response that *"The regulator was faced with a difficult judgment call. … The decision not to take enforcement action was based on the mitigating circumstances that Tom had acted without permission or sufficient training and that the owner had demonstrated a proactive and swift response to the tragedy. Tom's case touches on a delicate but integral part of the New Zealand health and safety cultural dynamic. That is the principle of individual responsibility. People in the workplace are making choices about their safety every day and these choices can have a devastating effect."*

30.9. Tom Sewell was 19 years old when he died. He arrived on the farm without induction and began his first day without the farmer being present. He went with a friend on a quad bike for a ride around the farm to learn about it and was killed when the bike crashed. The bike was regularly used by the causal tourist workforce that worked on the farm and had the keys left in it as a matter of course. The bike was a known hazard and it is unclear whether any of the workers had health and safety induction training and certainly Tom was expected to complete his first day at work without an induction. There was no worker participation system on the farm and our own Minister describes the case as one of "individual responsibility". The UK Coroner was extremely critical of the circumstances.

30.10. The Department of Labour investigated and found 6 practicable steps that the employer could have taken. They noted that: *"The Practicable steps that IWV Kiwi should have taken are: Informed the employees that no one but Mr Kenna was to operate the Polaris. The Polaris Ranger should have been locked away when the owners were not on the property. There should have been rules around the use of the Polaris. When the Polaris is driven, helmets*

should be worn. If employees are working on the property there should be supervision [and] a nominated person responsible for the health and safety of those working. It should be made very clear to any visitors (potential employees) to the property that they are not permitted to start work without a health and safety induction and proper introduction to the site."

30.11. Despite this report, Minister Bridges believes this accident was down to Tom making bad choices on his first day at work.

Forestry

30.12. The CTU forestry campaign provides another clear illustration of the narrative that unions and workers are or could be a problem in health and safety.

30.13. On numerous occasions the CTU campaign for improved health and safety in forestry has been challenged by forest owners as "self-serving." This analysis includes separating out the union from its members and suggesting the union is somehow not made up of these same workers.

30.14. From the August edition of the *NZ Logger*:

> Sensational stories on TV and in the daily media, stirred up by headline-hungry unionists, have painted NZ forestry in a very poor light…

30.15. From the September edition of the *NZ Logger*

> Unions wants control more than safety. …The media exposure to date on the issue of forestry workers safety shows clearly that the union movement has only one goal in mind: it is desperate to grow membership in forestry
>
> …when workplace accidents and deaths are up for public debate the union is completely focused on showcasing making workers appear weak, ineffective and in need of union representation to save themselves.

30.16. From the October edition of *NZ Logger*:

> When unions, led by the CTU, turned media attendant from mining to forestry on work safety issues, there was no doubt that they looked at the forest industry and a major potential source of new members.

30.17. All of these messages in the industry magazine are to ensure workers realise the hostility employers in the industry have to them joining unions.

The evidence

30.18. The saddest thing about the narrative of suspicion towards workers' attempts to make their work safe is that it runs directly counter to the international evidence of what actually works to address health and safety issues at work.

30.19. Johnstone and Tooma (2012) have an important summary of the research regarding worker participation at 137-138:

> 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. This evidence comes from a number of countries, including from countries where there is no statutory basis for worker participation. The research shows that participatory mechanisms that enable higher levels of worker involvement are better than those that provide for more limited involvement. Many of the studies prove that there is a relationship between objective indicators of work health and safety performance (such as injury rates or exposure to hazards) in workplaces that have implemented structures for worker participation, such as the presence of trade unions, joint health and safety committees, or union or worker health and safety representatives. International research supports the argument that joint arrangements involving employer representatives and workers, and trade union representation at the workplace, are associated with better work health and safety outcomes than where representative worker participation is absent. Other studies provide more indirect evidence of the impact of worker representation on work health and safety management practices, and suggest that participatory workplace arrangements lead to improved work health and safety management practices and compliance with work health and safety regulatory standards. Despite their diversity in terms of methods and other details, taken collectively these studies support the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when

> employers manage work health and safety without representative worker participation.

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

31.1. Despite the evidence, the issue of worker participation and representation in health and safety is inherently controversial. As the Taskforce noted at [99] and [100]:

> 99. The Taskforce heard in meetings and submissions that there are low levels of employee participation in processes for identifying and managing workplace health and safety issues. There was a high degree of agreement that this essential component needs improving.
>
> 100. Management awareness and culture were identified as barriers to engagement. Many managers were also seen as uninterested in employees' input on health and safety practice. Employees complained about health and safety strategies and systems being absent, or run without adequate employee or representative consultation (e.g. management-heavy health and safety committees). Further, employees reported that management was frequently unresponsive or defensive when health and safety issues were raised directly with them. Some reported being fearful of recriminations through pay docking (e.g. if damaged machinery was reported) or losing their jobs. Seasonal, contractual and otherwise vulnerable workers were noted as particularly unlikely to report events.

31.2. The contested nature of worker participation affects what elements of the system should be in primary legislation versus delegated legislation. The Legislative Advisory Council Guidelines state at [10.1.2]:

> The distinction between primary legislation and delegated legislation is often regarded as the division between principle and detail, or between policy and its implementation. On that analysis, matters of principle and policy are usually found in primary legislation, while detail and implementation are ordinarily the domain of delegated legislation. This is because the politicised Parliamentary process surrounding the passage of primary legislation, and the public participation in that process, is the appropriate forum for the principle and policy of a legislative scheme to be debated and resolved. …
>
> However, the distinction between principle and detail and policy and implementation can be both confusing and circular, not least because there is a significant overlap between those general descriptions. For example, Acts sometimes contain matters of detail and, conversely, delegated legislation may contain matters of principle. Also, the concept of "policy" has a number of facets, ranging from high-level policy (for example, setting out a basic rule at a high level of generality: a matter that would usually be found in an Act) to matters of low-level policy (for example, specifying what items should be included in a form: a matter more appropriate for inclusion in delegated legislation)….
>
> Clarifying the true nature of the policy will give useful guidance as to whether it is policy that should be included in an Act or in delegated legislation. For example, is the policy something that would give rise to widespread public interest? If so, then

> serious consideration should be given to including that matter in an Act. Conversely, if the policy is of a purely administrative, technical, or non-controversial nature, it may well be a matter that could properly be dealt with in delegated legislation.
>
> In deciding whether a matter is likely to be controversial, it may be helpful to consider what the likely public and political reaction to the matter would be if it were publicised in the news media.

31.3. Certain critical elements of Part 3 have the potential to be controversial including the purpose of and process for setting up work groups, requirements for training of health and safety representatives and the makeup and processes of health and safety committees. In several instances, the devolution to regulation represents a backwards step from the current law.

S.38 We submit that controversial aspects of the worker participation framework should be set out in primary legislation. We discuss these aspects below in our submission at part 35 (regarding elections), part 36 (on training requirements) and 49 (on health and safety committees).

32. Outline of Part 3 (cl 60)

32.1. We question the value of cl 60 as it is currently phrased: It provides little more than a list of the content of Part 3. If this drafting approach is to be used (and it is not the New Zealand style) then it should be used consistently with a clause at the beginning of each part setting out the content

32.2. A clause setting out the intended purpose would be more useful and would assist the Courts as an aid to interpreting Part 3. The Taskforce set out a very useful set of principles of worker participation at [264]:

> a. the workplace rather than the employment relationship should be the focus for workplace health and safety systems – so all workers present in a workplace are covered by the system, including temporary, casual and contract workers
> b. workers should actively participate in developing, implementing and monitoring the workplace health and safety system that is present in their workplace
> c. all workers have a right to participate through an independent range of representation mechanisms of their own choosing, including workplace health and safety representatives, committees and unions where they are present in a workplace
> d. workers should be encouraged to take active responsibility for their own actions and those of co-workers
> e. workers should be provided with appropriate training, time, facilities and support to enable them to participate in the workplace health and safety system that is present in their workplace.

S.39 We submit that these principles should be adapted as a purpose section for Part 3. This would assist in determining appropriate worker participation arrangements in workplaces (whether expressed by regulation, codes of practice, guidelines or actual practice).

33. Engagement with workers (cl 61-63) and worker participation practices (cl 64)

33.1. As discussed at part 30 of our submission above, effective collectivised worker participation and representation is critical to effective health and safety management. As identified by the Royal Commission and Taskforce, it is also an area where New Zealand has failed badly in many sectors.

33.2. Belatedly, some New Zealand businesses appear to be realising the value of worker participation. It was heartening to read the June 2013 letter from the Business Leaders Health and Safety Forum to senior cabinet ministers stating:[18]

> Ministers you may wonder if business leaders have concerns about the Taskforce's recommendations on worker participation, increased costs and increased penalties. We want to reassure you that our members are not concerned about these recommendations being implemented as part of a comprehensive and balanced approach.
>
> Evidence tells us that meaningful worker participation (that includes representative unions, where relevant) is a core requirement for high-performing safety systems.

33.3. The subpart of the Bill relating to engagement with workers and worker participation practices is useful but fails to adequately deal with matters particular to the New Zealand context.

Worker engagement (cls 61-63)

33.4. Although oddly expressed (it is unclear to us why cl 61 and 62 are separated) the overall provisions for worker participation seem reasonable on their face.

33.5. It is awkward to include the term "reasonably practicable" since this is not meant in the same sense as it is used at cl 17. Further it is not used in the

[18] http://www.mbie.govt.nz/pdf-library/what-we-do/workplace-health-and-safety-reform/appendix-two.pdf

Model WHS Act and unnecessary given that the nature of engagement requires only a reasonable opportunity for workers to put their views.

S.40 We submit that "so far as reasonably practicable" should be deleted from cl 61(1).

33.6. However, insufficient thought has gone into the specific New Zealand context and the obligations of many of the parties (employers, unions and employees) under the duty of good faith in s 4 of the Employment Relations Act 2000. This duty places additional engagement duties on each of these parties and it is awkward (to say the least) to have a two-track system of worker engagement.

33.7. As we submit at part 14 above, having a core duty of good faith covering all parties required to consult, co-operate and collaborate would go a considerable distance towards fixing this inconsistency.

S.41 We submit that the duty of good faith is very relevant to the question of the nature of engagement with workers (and their representatives) under cl 62. Therefore it should be specifically referenced under the nature of the engagement.

33.8. Further, it should be recognised that, particularly in workplaces with low internal health and safety expertise, workers may need to consult with those with greater health and safety expertise to ensure that they understand the health and safety issues being raised, can express their views and contribute to the decision-making process as effectively as possible. This ability to seek advice is a core component of natural justice and, given the potential significance of these issues, very important.

S.42 We submit therefore that the nature of engagement under cl 62 must include a requirement that workers be given a reasonable opportunity to seek advice on the matter. The logical place for this requirement would be cl 62(1)(b) before current cl 62(1)(b)(i).

S.43 Cl 62(2) states that "If the workers are represented by a health and safety representative, the engagement must involve that representative." We support this but submit it is unwise and illogical not to also state that the engagement must also include both health and safety committees and unions if the workers are represented by them as well.

33.9. Further to the discussion at part 12 of our submission above, we are concerned that the discrete transaction language used in relation to the requirement for engagement misleads parties as to the ongoing, systematic engagement required.

S.44 We submit that to reinforce the ongoing and systematic nature of the engagement required:

- Cl 62(1)(1) should be amended to state (addition in bold) "that relevant information about the matter be shared with workers **at the earliest possible opportunity**; and"
- Cl 63(a) should be amended to state (addition in bold) "Engagement with workers under this subpart is required **on an ongoing basis** in relation to the following work health and safety matters:"

Worker participation practices (cl 64)

33.10. We support the addition of worker participation practices to complement the Model WHS Act approach.

S.45 We submit that despite the use of the non-exhaustive 'including" at cl 64(3) that the list of factors should give more guidance to workers and PCBUs. For example, the factors ought to include "the composition of the workforce include any issues of language, literacy or numeracy faced by the workers."

34. Health and safety representatives generally

34.1. We append a summary of a major survey of health and safety representatives undertaken by the CTU in November 2012 to inform our submission to the Taskforce. More than 1,200 health and safety representatives completed the survey.

34.2. The survey found that:

- Unrealistic expectations, deadlines, taking short cuts to complete a job and fatigue have been identified as key factors that cause illness and injury at work.
- 13% of reps report bullying by managers when they have attempted to raise health and safety issues at work.
- Reps perform a wide range of tasks but are often not given adequate time during their work hours to undertake their role effectively.
- Too often reps are not elected and are appointed. This does nothing to foster positive democratic workplace relationships.
- Many reps have received the statutory minimum amount of training and long gaps have then ensued. Reps require on-going training to feel more confident in their role.
- Very few Hazard Notices are issued.

34.3. The results of the survey point to key ingredients needed in a robust worker participation scheme including protections against discrimination, adequate resourcing, strong election processes and robust training requirements.

34.4. The CTU is aware of submissions from various organisations that seek to portray a significant actual or potential problem with health and safety representatives misusing their powers, in particular to pursue 'industrial agendas.'[19] This is given as a reason to limit the powers given to health and safety representatives. However, the submissions do not provide any evidence (anecdotal or otherwise) that this has, is, or is likely to occur. The true problem is the opposite.

34.5. The CTU contacted the South Australian regulator, SafeWork SA, for its experience of the way reps have used their powers. SafeWork SA advised that in their experience, accusations that reps abuse their power is not substantiated in any way. SafeWork SA provided us with a report that

[19]See for example the Federated Farmers submission on the Bill at [8.6] and [9.1].

concluded that, quite contrarily, the major issue with reps was that reps often experienced abuse and harassment from employers and PCBUs.[20]

34.6. A second report was also provided, entitled *Working Together*.[21] This report is a review of the effectiveness of the health and safety representative and workplace health and safety committee system in South Australia. It found that in many organisations health and safety representatives are treated with respect and this is one of the hallmarks of effective consultation. However, in other organisations health and safety representatives are treated with suspicion and contempt and in some of these organisations they are subject to discrimination and intimidation. The report noted that consequences of this harassing behaviour can be personally and organisationally devastating. As result, it was recommended that project be undertaken to reduce the incidence of discrimination and intimidation of health and safety representatives.

34.7. The Australian findings are supported by the CTU survey, which found that 158 reps had been victimised, harassed, or discriminated against for raising a health and safety issue. 87.5% of those reps had experienced this from a person in authority such as a manager, supervisor, or employer.

34.8. The Select Committee should closely scrutinise submitters' arguments in favour of limiting or restricting the powers of health and safety representatives.

35. Requirements for conducting elections of health and safety representatives (cl 68)

35.1. Clause 68 holds simply that the election of health and safety representatives must comply with any prescribed requirements.

[20] Consultation doesn't happen by accident: A Report to SafeWork SA on successful consultation about work, health & safety. Jane Clarke Centre for Work + Life, University of South Australia.
[21] Working Together
A review of the effectiveness of the health and safety representative and workplace health and safety committee system in South Australia. Final report and recommendations of the Consultative Arrangements Working Party. prepared by Verna Blewett PhD New Horizon Consulting Pty Ltd September 2001

35.2. This is a considerable step backwards from the default provisions of s 2(3) of Sch 1A of the current Act, which recognise 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).

35.3. We note the results of our appended 2012 survey of health and safety representatives which found that 37% of health and safety representatives had been appointed to their position by their employer or a manager without a contested election.

35.4. For the reasons set out above at part 30 of our submission above, this is likely to lead to worse worker participation and outcomes. More should be done to facilitate free and fair elections for health and safety representatives.

S.46 We submit that cl 68 should specify that elections are conducted by workers and their representatives unless they ask that the PCBU or PCBUs facilitate the election.

S.47 We submit that cl 61 should also contain restrictions on undue influence or attempted undue influence by the PCBU on the election.

36. Training for health and safety representatives (cl 80)

36.1. We are extremely concerned by the removal of specified training requirements in the Bill.

36.2. The CTU developed a two-day training course for worker representatives in 2002 and entered into a joint venture with the Accident Compensation Corporation. In doing this, the CTU has accepted responsibility to act on behalf of all workers and not just union members. We 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.

36.3. 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. An independent evaluation confirmed participant views.[22] This evaluation said the training contributed to a "sea change" of interest in health and safety occurring in workplaces.

36.4. The key findings of a detailed study commissioned by ACC from Research New Zealand in 2008 were that:[23]

> Based on the results of this study (both the surveys, as well as the Case Studies) there is sufficient evidence to suggest that many Health and Safety Representatives have been able to take the learnings from the training courses they have attended and apply them in their workplace. Specifically, many appear to be:
>
> - Promoting a greater awareness and knowledge of health and safety issues to their fellow workers (e.g. run courses/meetings, pin up posters, etc. on key subject topics such as hazard identification, incident reporting, etc.).
> - Working collaboratively with their employers to develop plans that build awareness and knowledge amongst employees and reduce/remove health and safety hazards in the work environment, as well as contributing towards their companies written policies and health and safety procedures.
> - Some are participating in the investigation of incidents and injuries, using the Work Safe Cycle Model and WorkSafe tools to do so, and making recommendations to their employers regarding managing the hazard(s) that contributed to the injury or incident.
> - Most are, or expect to be in the near future, involved in training new employees on health and safety in the workplace.
> - Some have been able to assist in the return to work process of injured fellow employees.
> - All but a very few individuals feel that the training has improved their knowledge and skills to be a Health and Safety Representative.
>
> That said, where the training courses do not appear to be delivering optimally is in the areas of Health and Safety Representatives' detailed understanding of the amended Health and Safety in Employment Act (2002) or the ACC Scheme. A significant number of those surveyed could not describe what was covered by the training in relation to the Act or the ACC Scheme, and this appears to have implications as to whether or not they are engaging in injury and incident investigations.
>
> The research also found that the majority of the Representatives who were surveyed were not having any issues or difficulties in their role and that they were being well supported by their employers. Aside from the fact that the Representatives do not seem to have a good understanding of the Act or the ACC Scheme the research found that there are three main issues, in relation to other inhibitors that can have an impact on Representatives' abilities to be effective in their roles. Of note, all of these are workplace related:
>
> - Time constraints, as a result of trying to achieve a balance between the Health and Safety Representatives' main job role and their health and safety related responsibilities.
> - Lack of support from their employers (though, as noted, this was not found to be a frequent issue).
> - Difficulties in changing entrenched behaviours of other employees, and/or getting them to take a greater interest in the health and safety management process.

[22] Innovation & Systems Limited

36.5. The New Zealand evaluations are consistent with a meta-analysis conducted for the International Labour Organisation which concluded that research evidence demonstrates a strong link between arrangements for worker representation and consultation and improved health and safety outcomes.[24] 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
- 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.

36.6. This analysis points to the fact that 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.

36.7. As the Research New Zealand study shows, a common problem in New Zealand workplaces is that Health and Safety Representatives are often not permitted time, or given support, to undertake their statutory functions. Our survey shows that 21% of health and safety representatives did not get time away from their normal duties to perform their health and safety role (see appendix). Representatives need a reasonable level of respect, time and resources in the workplace in order to undertake the role effectively. In some workplaces that is working well; in others the reps are expected to carry out

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

their health and safety duties in addition to their normal workload, in their own time and with no access to support or facilities.

36.8. In addition, uncertainty about resources for training is problematic. The former Department of Labour never adequately funded training and with the proposed changes to ACC, there is uncertainty about the future funding of health and safety representative training and there is no obligation on employers to provide it. Without regular training refreshment, research evidence suggests that workplace activity tends to tail off and the representative's feelings of adequacy and support also diminish, particularly if they are facing challenges to their role.[25]

36.9. All health and safety training material should be reviewed by Worksafe to ensure that it includes training in the appropriate Codes of Practice for particular industries. The training material needs to outline workers' rights rather than being confined to technical detail along.

S.48 <u>The CTU submits further training should be made available for those who would like to be involved in setting industry standards. Under a tripartite arrangement this higher level training would be necessary for health and safety representatives and union delegates and officials who would represent worker interests in the standard setting and risk assessment processes.</u>

36.10. We note the Royal Commission's support for this: [26]

> Health and safety representatives need to be well trained…. ACC's funding has dropped substantially in recent years. DOL has provided more money, but has not been able to meet the entire shortfall. The Government should ensure sufficient funding is available to train health and safety representatives.

36.11. The Royal Commission goes on to state that: [27]

[25] Walters, D.R., Kirby, P and Daly, F (2001). *The impact of trade union education and training in health and safety on the workplace activity of health and safety representatives* Health and Safety Executive Contract Research Reports, No 321/2001.
[26] *Report of the Royal Commission on the Pike River Coal Mine Tragedy*, Chapter 30, para 42.
[27] I *Report of the Royal Commission on the Pike River Coal Mine Tragedy*. Vol 2, p.249

> The number of people completing ACC-funded health and safety representative courses dropped from 9735 in 2008–09 to 4153 in 2010–11 mainly as a result of a 44% funding cut in 2009–10.

36.12. Demand far outstrips supply for health and safety representative training. In our experience, many workers outside of the five core industries (targeted in the ACC contract for training with the CTU) are unable to be offered the training they seek. Funding should be increased and training made mandatory on employers.

36.13. The effective of training programmes would be significantly increased if follow-up support for trained representatives was funded, including support for the continued information and interaction with representatives from a worker perspective. Currently there is no follow up available except in unionised sites by overstretched staff. Follow up support for health and safety representatives would significantly enhance the utility of the training.

Removal of specified training requirements

36.14. Section 19E(1) of the current Act states "An employer must allow a health and safety representative 2 days' paid leave each year to attend health and safety training approved under section 19G."

36.15. By contrast, cl 80 of the Bill is considerably less prescriptive:

> **80 Requirement to allow health and safety representatives to attend certain training**
> (1) If a health and safety representative has been elected to represent workers who carry out work for a business or undertaking, the PCBU must comply with any prescribed requirements relating to access to training for health and safety representatives (including any requirement to meet the costs of that training).
> (2) Any time off work that a health and safety representative is given to attend training must be with the pay that he or she would otherwise be entitled to receive for performing his or her normal duties during that period.
> (3) Subsection (2) does not apply in respect of any day for which the eligible employee is paid weekly compensation under the Accident Compensation Act 2001.
> (4) A person who contravenes subsection (1) commits an offence and is liable on conviction,—
> (a) for an individual, to a fine not exceeding $10,000:
> (b) for any other person, to a fine not exceeding $50,000.

36.16. Clause 72 of the Model WHS Act requires the PCBU to allow a health and representative to attend any approved course chosen by the representative (in consultation with the PCBU) as soon as practicable after the request is made (but in any case in three months at the latest). The PCBU must pay

the representatives usual pay along with the course fees and reasonable costs.

36.17. Although the amount of training is not specified in the Model WHS Act, the Model WHS Regulation 21 specifies a minimum of 5 days training should be provided during the first year and a 1 day refresher thereafter.

S.49 We submit that cl 80 of the Bill should be based on cl 72 of the Model WHS Act with the inclusion of the specified allowance of at least two days training per year. Subject to drafting refinements, the clause may look something like this:

> **80 Obligation to train health and safety representatives**
>
> (1) The person conducting a business or undertaking must, if requested by a health and safety representative for a work group for that business or undertaking, allow the health and safety representative to attend a course of training in work health and safety that is—
>
> (a) approved by the regulator; and
>
> (b) a course that the health and safety representative is entitled under the regulations to attend; and
>
> (c) subject to subsection (5), chosen by the health and safety representative, in consultation with the person conducting the business or undertaking.
>
> (2) The person conducting the business or undertaking must:
>
> (a) as soon as practicable within the period of 3 months after the request is made, allow the health and safety representative time off work to attend the course of training; and
>
> (b) pay the course fees and any other reasonable costs associated with the health and safety representative's attendance at the course of training.
>
> (3) The person conducting the business or undertaking must allow a health and safety representative at least 2 days' paid leave per year to attend health and safety training.
>
> (4) Any time that a health and safety representative is given off work to attend the course of training must be with the pay that he or she would otherwise be entitled to receive for performing his or her normal duties during that period.
>
> (5) If agreement cannot be reached between the person conducting the business or undertaking and the health and safety representative within the time required by subsection (2) as to the matters set out in subsections (1)(c) and (2), either party may ask the regulator to appoint an inspector to decide the matter.
>
> (6) The inspector may decide the matter in accordance with this section.
>
> (7) A person conducting a business or undertaking must allow a health and safety representative to attend a course decided by the inspector and pay the costs decided by the inspector under subsection (6).
>
> Maximum penalty:
>
> In the case of an individual—$10 000.

In the case of a body corporate—$50 000.

37. Work groups (cl 66-68) and the removal of the default system of worker participation

37.1. We are concerned by the introduction of the concept of work groups to New Zealand health and safety law coupled with the general restriction on the exercise of health and safety representatives' functions and powers to their workgroup only (see cl 76 of the Bill).

37.2. One of our concerns is that the formation of work groups may be a protracted and enervating process that saps the enthusiasm of the workers, unions and PCBUs for health and safety issues. A second is that it does not suit the nature of modern New Zealand workplaces.

37.3. 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.

S.50 We submit that a default provision should be retained where workers have requested a health and safety representative system and negotiations have failed to resolve an impasse within 6 months.

37.4. As we explain below, we think that impasse and delay are more likely given the proposed implementation of workgroups against the advice of the Taskforce and the Minister of Labour.

37.5. The Australian model of negotiating work groups appears complex and cumbersome (see Model WHS Act cl 51-59 and Model WHS Regulations 16 and 17).

37.6. 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)….

37.7. The complexity of setting up work groups is not only a concern for workers and their representatives. The Cabinet Paper 'Improving Health and Safety ant Work: An Effective Regulatory Framework' notes at [88]:

> 88 I agree with the Taskforce that we should not adopt some of the detail in the Model Law, such as provisions on establishing designated work groups. I consider these procedural details are unnecessarily prescriptive for our legislation and could impose unnecessary compliance costs on businesses.

37.8. 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 –

37.8.1. Two railway track gangs, one employed by KiwiRail and one contracted to do the same work, meet on the tracks. The KiwiRail gang has a health and safety representative, the contractor gang does not. The KiwiRail health and safety representative notices that the contractors do not have adequate tools, safety gear, and are failing to follow safe work practices. Under the work group system proposed, the health and safety representative would have limited or no power to take action with regard to the other gang and the only legal choice may be to refuse to work with them rather than resolve the issues at stake.

37.8.2. The composition of the workforce on a building site may change dramatically, even day-to-day, as different aspects of the project require different crews of contractors and subcontractors (builders, joiners, carpenters, electricians, plumbers, glazers, etc.). When does the negotiation as to workgroups occur in this multiple PCBU environment? At the commencement of the project? At the beginning of each workday?

37.9. An element of our existing system which continues to work well is cooperation and sharing of knowledge between health and safety representatives along with the ability to stand in for one another. More

confident health and safety representatives can mentor less experienced ones.

37.10. The New Zealand system of collective and overlapping responsibility for health and safety representatives is not broken and there is a strong risk that work groups that do not select confident and knowledgeable health and safety representatives may suffer worse health and safety outcomes.

S.51 We recommend that work groups are not implemented in a New Zealand context. They are likely to be overly bureaucratic and a brake on workers' ability to engage.

S.52 Instead we propose adaption of s 19B(1) and (5) along with 19C(5) of the current Act. These sections state:

> 19B(1) Every employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work.
>
> 19B(5) In subsection (1), reasonable opportunities means opportunities that are reasonable in the circumstances, having regard to relevant matters such as—
>
> > (a) the number of employees employed by the employer; and
> >
> > (b) the number of different places of work for the employees and the distance between them; and
> >
> > (c) the likely potential sources or causes of harm in the place of work; and
> >
> > (d) the nature of the work that is performed and the way that it is arranged or managed by the employer; and
> >
> > (e) the nature of the employment arrangements, including the extent and regularity of employment of seasonal or temporary employees; and
> >
> > (f) the willingness of employees and unions to develop employee participation systems; and
> >
> > (g) the overriding duty to act in good faith.
>
> 19C(5) A system may allow for more than 1 health and safety representative or health and safety committee and, in that case, each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.

S.53 If the Government decides to proceed with work groups several changes are necessary to ameliorate the worst possible effects.

S.54 First and most importantly, we submit that health and safety representatives' powers must not be generally limited to their particular work group. If work groups are persisted with they should be regarded only as an electorate for elections of representatives, not as an area binding jurisdiction.

37.11. Second, the purpose of work groups is insufficiently set out in both the Bill and the Model WHS Act. Much of this information is contained in the Model WHS Regulations 16 and 17. However, given that this section sets out principles not procedure, we think it would sit better in primary legislation - see part 33 of our submission above. Model WHS Regulations 16 and 17 are as follows:

> **16 Negotiations for and determination of work groups**
> Negotiations for and determination of work groups and variations of work groups must be directed at ensuring that the workers are grouped in a way that:
> (a) most effectively and conveniently enables the interests of the workers, in relation to work health and safety, to be represented; and
> (b) has regard to the need for a health and safety representative for the work group to be readily accessible to each worker in the work group.
>
> **17 Matters to be taken into account in negotiations**
> For the purposes of sections 52(6) and 56(4) of the Act, negotiations for and determination of work groups and variation of agreements concerning work groups must take into account all relevant matters, including the following:
> (a) the number of workers;
> (b) the views of workers in relation to the determination and variation of work groups;
> (c) the nature of each type of work carried out by the workers;
> (d) the number and grouping of workers who carry out the same or similar types of work;
> (e) the areas or places where each type of work is carried out;
> (f) the extent to which any worker must move from place to place while at work;
> (g) the diversity of workers and their work;
> (h) the nature of any hazards at the workplace or workplaces;
> (i) the nature of any risks to health and safety at the workplace or workplaces;
> (j) the nature of the engagement of each worker, for example as an employee or as a contractor;
> (k) the pattern of work carried out by workers, for example whether the work is full-time, part-time, casual or short-term;
> (l) the times at which work is carried out;
> (m) any arrangements at the workplace or workplaces relating to overtime or shift work.

S.55 We submit that the content of Model WHS Regulations 16 and 17 should be included in the Bill (as new cls 67A and 67B).

38. Health and safety representatives' functions (cl 69)

38.1. The functions of health and safety representatives (cl 69) are significantly different from the default functions set out in s 2 of sch 1A of the current Act. Some of these changes are useful but we do not support the Australian distinction between the system-wide functions of Health and Safety Committees and the more individualised functions of health and safety representatives. The table below summarises the functions of health and safety representatives under the old and new systems alongside the functions of health and safety committees:

Default functions of health and safety representative under current Act (s 2 sch 1A)	**Functions of health and safety representative under Bill (cl 69)**	**Functions of health and safety committee under Bill (cl 89)**
The following functions of health and safety representatives are examples of functions that the parties may wish to consider including in an agreed employee participation system developed under section 19C but are mandatory functions for a health and safety representative elected under Part 3 of this schedule: (a) to foster positive health and safety management practices in the place of work: (b) to identify and bring to the employer's attention hazards in the place of work and discuss with the employer ways that the hazards may be dealt with: (c) to consult with inspectors on health and safety issues: (d) to promote the interests of employees in a health and safety context generally and in particular those employees who have been harmed at work, including in relation to arrangements for rehabilitation and return to work:	The functions of a health and safety representative for a work group are— (a) to represent the workers in the work group in matters relating to health and safety: (b) to investigate complaints from workers in the work group regarding health and safety: (c) if requested by a worker in the work group, to represent the worker in relation to a matter relating to health and safety (including a complaint): (d) to monitor the measures taken by the PCBU that are relevant to health and safety: (e) to inquire into anything that appears to be a risk to the health or safety of workers in the work group arising from the conduct of the business or undertaking: (f) to make recommendations relating to work health and safety: (g) to provide feedback to the PCBU about whether the requirements of this Act or	The functions of a health and safety committee are— (a) to facilitate co-operation between the PCBU and workers in instigating, developing, and carrying out measures designed to ensure the workers' health and safety at work; and (b) to assist in developing any standards, rules, policies, or procedures relating to health and safety that are to be followed or complied with at the workplace; and (c) to make recommendations relating to work health and safety; and (d) to perform any other functions that are— (i) agreed between the PCBU and the committee; or (ii) prescribed by regulations.

(e) to carry out any functions conferred on the representative by— (i) a system of employee participation (if a system is developed under section 19C); or (ii) the employer with the agreement of the representative or a union representing the representative, including any functions referred to in a code of practice.	regulations are being complied with: (h) to promote the interests of workers in the work group who have been harmed at work, including in relation to arrangements for rehabilitation and return to work.	

38.2. As the table shows, the primary role of health and safety representatives under the Bill shifts from a general proactive worker representation to a more reactive one centred on the members of their workgroup. Many of their proactive functions are shifted to the health and safety committee.

38.3. It is significant that health and safety representatives and committees need not coexist under the worker participation practices and worker engagement framework. Therefore it is imperative that each is able to work effectively in the absence of the other.

S.56 Health and safety representatives should be given the mandate to continue to undertake system-wide and proactive work. We submit that their functions should include:

- To foster positive health and safety management practices in the place of work:
- To promote the interests of employees in a health and safety context generally; and
- To assist in developing any standards, rules, policies, or procedures relating to health and safety that are to be followed or complied with at the workplace.

39. Powers and rights of health and safety representatives (cls 70-76, 78, 81-84)

39.1. Health and safety representatives have the following powers and rights:

- To be involved in worker engagement processes in relation to health and safety matters (cl 63). See part 32 above;
- To inspect the workplace (cl 71);
- To receive information relating to health and safety matters from the PBCU (cl 72);
- To be accompanied or assisted by another person (cl 73). See part 41 below;
- To consult the regulator or a health and safety inspector about any work health and safety issue (cl 75);
- To accompany a health and safety inspector who has entered the workplace (cl 74);
- To attend an interview between an inspector or the PCBU and a worker regarding work health and safety matters with the consent of the worker being interviewed (cl 70). See part 40 below.
- To issue provisional improvement notices (cls 92-104). See part 42 below; and
- To direct cessation of unsafe work (cl 107). See part 43 below.

39.2. These rights are complemented by corresponding obligations on the PCBU to facilitate or permit their exercise (cl 78). Health and safety representatives are not obliged to exercise their powers and are protected from civil or criminal liability for any act done in actual or intended performance of their functions or powers and in good faith (cls 83 and 84).

40. Health and safety representative may attend interview (cl 70)

40.1. We support the right of health and safety representatives to be present at interviews between workers and PCBUs or inspectors with the workers' consent. This is a core protection of worker's rights to representation and

natural justice by allowing a health and safety representative to provide additional information or even to speak on their behalf.

40.2. The change from the Model WHS Act (and the exposure draft of the Bill) that only allows health and safety representatives to attend interviews with the consent of seemingly *all* of the workers concerned is inappropriate therefore. If a worker wishes to be assisted or represented by a health and safety representative it should not be for their colleagues to deny them this right.

S.57 We submit that "the consent of the workers concerned" in cl 70(2) should be replaced by "the consent of any of the workers concerned."

40.3. The right of an inspector in cl 70(3)(b) to refuse to allow a health and safety representative to be present at an interview with a worker "if the inspector believes that the presence of the health and safety rep would prejudice the maintenance of the law is problematical for similar reasons." A worker may be denied representation because of this decision.

S.58 We submit that the decision to exclude a health and safety representative should be a reviewable decision under cl 151, and it should not override the workers right to be represented in that meeting.

S.59 We submit cl 70(3)(b) should expressly state that the worker may be represented by another person (such as another health and safety representative, union official or lawyer (other than a lawyer representing the PCBU)).

41. Assistance by other persons and rights of access (cls 73, 78 and 79)

41.1. Under cl 73 of the Bill, "a health and safety representative may, for the purposes of performing or exercising his or her functions… be accompanied or assisted by another person." This is useful and is accompanied by a corresponding duty under cl 78(1)(h) for the PCBU to allow a person assisting the health and safety representative to have access to the workplace if that is necessary to enable the assistance to be provide.

41.2. Under cl 79(1)(c) the PCBU may refuse on reasonable grounds to grant access to the workplace to a person assisting a health and safety representative.

41.3. These provisions are unnecessary and unwieldy.

41.4. A PCBU may have significant incentives to deny expert helpers access to worksites such as to cover up their failure to comply with health and safety duties. This is a much more significant risk than imagined health and safety breaches by the assisting party (who has duties under cl 41 to take reasonable care of their own and others' health and safety).

S.60 We submit that cl 71(1)(c) allowing the PCBU to refuse access to persons assisting health and safety representatives should be removed.

S.61 We submit that if the provisions allowing PCBUs to refuse access remain in the Bill then a clause should also be included stating that a PCBU who denies access to a person assisting a health and safety representative should also be required to provide written reasons as soon as possible.

41.5. Also missing from the Bill is an important clause of the Model WHS Act relating to access. Cl 71(6) states:

> (6) If access is refused to a person assisting a health and safety representative [under the equivalent to the Bill's cl 79(1)(c)], the health and safety representative may ask the regulator to assist in the matter.

S.62 We submit that a new cl 79(1)(d) should be included as follows:

> (d) If access is refused to a person assisting a health and safety representative under s 79(1)(c), the health and safety representative may ask the regulator to assist in the matter.

42. Provisional improvement notices (cls 92-104)

42.1. We support the call from the Taskforce to introduce of a new power for health and safety representatives to issue provisional improvement notices ('PINs').

42.2. The PINs framework is well balanced. It provides a clear pathway for the issuance and review of PINs along with penalties for ignoring the notices.

42.3. Our discussions with Australian regulators (such as WorkSafe SA) indicates that there is no issue of provisional improvement notices being issued maliciously.

S.63 We support the implementation of the provisional improvement notice framework. The prompt issuance of guidance similar to the Australian guidance will be helpful to all parties in understanding the use of PINs.

43. Right to cease or direct cessation of unsafe work (cls 105-109)

43.1. We strongly support the right for health and safety representatives to give notice of cessation of work on behalf of workers they represent in appropriate situations.

43.2. Clause 106(1) of the Bill allows the cessation of unsafe work where the worker "believes that carrying out the work would expose the worker, or any other person, to a serious risk to the worker's or other person's health and safety" and cl 107(1) provides a similar power for a health and safety representative on behalf of workers collectively.

43.3. This contrasts with s 28A(1) of the current Act which permits a worker to cease work "if the employee believes that the work that the employee is required to perform is likely to cause serious harm to him or her."

43.4. The difficulty with the proposed provision is that serious risk is not defined in the Bill. It is unclear whether "serious" refers to the probability of harm occurring or the severity of that harm or either one.

S.64 We submit that "serious" in serious risk clearly relates to both meanings (probability or severity) and that "serious risk" should be defined in the interpretation section to this effect.

44. Industry health and safety representatives

44.1. There are significant barriers to participation in health and safety for large numbers of workers including in small workplaces, in de-unionised workplaces, in temporary or contract employment, or for workers with language or literacy deficits. These barriers exacerbates the risk of injury that these workers face.

44.2. The introduction of health and safety centres and industry health and safety representatives and a new process for resolving health and safety issues could make significant improvements in this area.

44.3. Industry health and safety representatives would represent workers in certain sectors or high risk industries (e.g. where the supply chain is complex, where there is significant turnover of staff, or where temporary or untrained staff are used). Regulations would refine the type of employment arrangements where Industry health and safety representatives are appropriate.

44.4. The primary role of the industry health and safety representatives should be to support health and safety representatives in their duties. Industry health and safety representatives should also have powers to enter into workplaces at the request of workers where no health and safety representative structure exists, or where they have good reason to believe a significant hazard exists, and assist workers in resolving health and safety issues with their employer, and in setting up representative structures.

44.5. A similar role has been piloted in the UK and have been found to be effective in reducing injury at work.[28] There are also industry health and safety representatives operating in Queensland and New South Wales.

44.6. Moreover, this concept is not without precedent in NZ. In the 6 year period leading up to 1992, the ACC funded Workplace Health and Safety Centres running out of the CTU. The programme ran the biggest health and safety training service in New Zealand at that time. It ran the programme out of six

[28] HSE commissioned report on the pilot of Health and Safety Advisors, York Consulting, United Kingdom

regional health and safety centres which provided the training, information, research and technical advice. It also funded industry health and safety officers.

44.7. Industry health and safety representatives were also introduced into the mining industry in New Zealand following the Pike River Tragedy. Section 19ZU of the current Act allows for the appointment of industry health and safety representatives and these requirements are continued by cls 13-22 of Sch 2 of the Bill.

S.65 We submit that regionally based health and safety centres should be introduced. These centres would be government-funded yet independent, and report to the WorkSafe Board. The centres would fund and employ industry health and safety representatives to advise and mediate on health and safety issues in any workplace.

45. Restrictions on health and safety representatives use of functions, powers and information (cls 81-82)

45.1. The Bill forbids health and safety representatives from exercising their functions and powers or using information gained in the course of their role for purposes other than health and safety purposes.

45.2. We oppose this provision. There is no equivalent in the Model Law.

45.3. This proposal ties directly into the false narrative discussed in part 30 of our submission above that workers are misusing health and safety powers. As we note at part 34, the problem is that health and safety representatives are not using their existing powers sufficiently.

45.4. There are many issues that are both health and safety and industrial issues such as staffing levels and crowd control. A mischievous PCBU could argue that the HSR was raising them as an industrial matter rather than a health and safety matter. This could be a particular problem in cases where health and safety representatives are also union delegates.

S.66 Cls 81 and 82 should be deleted, or expressed positively such as:

A health and safety representative is authorised to perform functions and exercise powers under this part for health and safety purposes.

46. Immunity of health and safety representatives (cl 84)

46.1. The CTU supports this immunity as a crucial protection for workers doing what is often a thankless and challenging task. Removal of this immunity would make finding and retaining good health and safety representatives very difficult.

46.2. The generic reference to 'good faith' makes it unclear what manner of good faith is intended (see discussion under part 14 of our submission above).

S.67 We submit that the meaning of 'good faith' should be clarified in cl 84.

46.3. We suggest below at part 49 of our submission that worker representatives on health and safety committees should be health and safety representatives however as set out in the Bill this is not required.

46.4. We are concerned that worker representatives on health and safety committees may be impossible to find if they too are not protected from prosecution. The threat of prosecution may be used by PCBUs to cow members of the health and safety committee.

S.68 We submit that, if worker representatives on the health and safety committee are not to be health and safety representatives then the immunity from suit in cl 84 must also be extended to worker-nominated health and safety committee members.

47. Removal of health and safety representatives (cl 85-86)

47.1. The CTU is opposed to the power of the regulator to remove health and safety representatives. This power is drafted too widely and with insufficient structural or procedural safeguards.

S.69 We submit that cls 85 and 86 should not be enacted.

47.2. If a disqualification provision is thought necessary this should be based on Australian best practice- s 56 of the Victorian OHS Act 2004.[29] It is clearer and provides more protection for health and safety representatives than those in the Model WHS Act. Most importantly it requires intent on the part of the health and safety representative and the regulator must take into account the level of harm to the PCBU and the past record of the health and safety representative.

47.3. The Victorian OHS Act 2004 and the Model WHS Act vest the power of disqualification in a tribunal or court rather than the regulator. This makes sense as it is possible that an inspector might have a poor relationship with a particular health and safety representative or that an inspector might be subject to pressure from an employer to remove an active health and safety representative. We suggest that the court responsible for health and safety legislation is used here.

S.70 If a disqualification provision is thought necessary then we submit that cls 85 and 86 should be replaced by a new clause (based on s 56 of the Victorian OSH Act) as follows:

> (1) An employer may apply to the court to have a health and safety representative disqualified on the ground that the representative has done any of the following things intending to cause harm to the PCBU or the undertaking of the PCBU—
>
> > (a) issued a provisional improvement notice to the PCBU or an employee of the PCBU in circumstances where the representative could not reasonably have held the belief referred to in section 95;
> >
> > (b) issued a direction to cease work under section 107;
> >
> > (c) exercised any other power under this Part;
>
> (2) If the court is satisfied that the ground in sub-section (1) is established, it may disqualify the health and safety representative for a specified period or permanently.
>
> (3) For the purpose of determining what (if any) action to take under sub-section (2), the court must take into account—
>
> > (a) what (if any) harm was caused to the PCBU or the undertaking of the PCBU by or as a result of the action of the health and safety representative; and
> >
> > (b) the past record of the health and safety representative in exercising powers under this Part

[29] The Victoria OHS Act 2004 is available at: http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/750e0d9e0b2b387fca256f71001fa7be/$FILE/04-107A.pdf

48. Lists of health and safety representatives

48.1. Clause 74 of the Model WHS Act requires a PCBU to ensure that a list of each health and safety representative and deputy for each work group is prepared, kept up to date, and displayed in a readily accessible manner. Additionally, this list must be provided to the regulator, allowing them to generate a register of current health and safety representatives if needed. This clause was omitted from the Bill for unclear reasons.

48.2. It would provide health and safety representatives with visibility to other workers, and would further legitimise the importance of their role. Further, it assists in linking inspectors with health and safety representatives onsite when they inspect the workplace.

S.71 The CTU submits this clause should be incorporated into the Bill.

49. Health and Safety Committees (cl 88-91)

49.1. We strongly oppose changes proposed around health and safety committees. These changes will convert the committees from a genuine vehicle for worker participation and voice to, in many instances, a PCBU-dominated 'rubber-stamp.' Given the importance of the health and safety committees' role under the Bill this is intolerable.

49.2. The default worker participation system provisions in sch 1A of the current Act state that health and safety committees must be made up of at least half health and safety representatives.

49.3. This contrasts with the proposals in the Bill which enable a committee to be established at the behest of a PCBU, a health and safety representative or 5 or more workers.

49.4. Clause 88 provides no process for how the workers and the PCBU come to an agreement for the constitution of the health and safety committee.

49.5. Committee members do not have a right to training nor the powers of a health and safety representative (including the power to issue PINs and order

work to cease). This is a gaping hole in the legislation and it is open to abuse by employers who can set up a health and safety committee that is employer-dominated; meets irregularly; has few powers; is made up of people without adequate training.

S.72 We submit that health and safety committees should only be established on the same basis as set out in s 4(2)(b) of schedule 1A of the HSE Act. That is, the committee is a requirement of the default system (or as decided by the workers in a way that is not inconsistent with the default system) and elected health and safety representatives must comprise at least half of the members of the committee. Management will be able to appoint the remaining members but where any other workers are to be involved to represent workers then they too should be elected.

S.73 All members of health and safety committee must be entitled to training.

50. Adverse, coercive or misleading conduct provisions (cls 110-119)

50.1. The CTU supports the addition of Subpart 6-Prohibition of adverse, coercive, or misleading conduct, although with some significant reservations. The definitions of prohibited health and safety reason, and misleading conduct have been imported directly from the Model Act.[30] We support these definitions.

Meaning of adverse conduct – employee distinction

50.2. Unlike the Model WHS Act, the formulation of adverse conduct in the Bill reintroduces the concept of 'employee' into the Health and Safety Reform Bill. An employee is excluded from bringing civil proceedings in the District Court against their employer or former employer for adverse or coercive conduct. Instead, an employee's remedies lie under the personal grievance provisions of the Employment Relations Act 2000.

[30] Although with some minor changes to terminology such as "prohibited health and safety reason" (Health and Safety Reform Bill) and "prohibited reason" (the Model Act).

50.3. We disagree with this departure from the Model WHS Act for a number of reasons.

50.4. First, the split creates significant and unnecessary confusion about filing civil proceedings and jurisdiction. For example, a worker (who is not an employee) may file civil proceedings in relation to a *person* who engages in adverse conduct. An employee cannot bring civil proceedings in relation to their employer if their employer engages in adverse conduct; that worker may only rely on employment law provisions in relation to their employer who engages in adverse conduct. But, an employee may bring civil proceedings in relation to a *person* that is **not** their employer who engages in adverse conduct.

50.5. Second, an application to the District Court to bring civil proceedings in relation to a person engaging in or inducing adverse or coercive conduct must be brought within 1 year. An employee must raise a personal grievance within 90 days or risk having it ruled out of time. This means there are different rules for employees bringing a claim against their employer than there are for workers bringing a claim against anyone that is not their employer.

50.6. Third, the amendments made to the Employment Relations Act in Part 6, subpart 3 of the Bill do not import the penalties for adverse conduct into the Employment Relations Act 2000. The CTU is concerned that the remedies granted in the Employment Relations Authority tend to be low. Penalties are capped at $20,000 for a company[31], lost wages are awarded for a maximum of three months subject to a discretionary uplift[32] and more than half of the awards for stress, hurt, and humiliation are below $5,000. These remedies are significantly out of step those under the Bill – up to $500,000 – in relation to the same offences. Awards in the Employment Relations Authority are subject to abatement for contributory conduct by the employee.[33] Employers

[31] Employment Relations Act 2000, s 35(2)(b).
[32] Employment Relation Act 2000 s 128.
[33] Employment Relations Act 2000, s 124.

are therefore much less liable to their employees for coercive or adverse conduct than any other person.

50.7. An example illustrates the problems with the proposed approach. An employee is employed by a Labour Hire Agency. The employee is contracted to work on a building site through the Labour Hire Agency by a person ('the contractor'). The employee proposes to be a health and safety representative on that building site[34]. The contractor (a corporation) does not like this, and subjects the worker to detriment by advising the Labour Hire Agency that the employee can no longer work on the building site, but other workers engaged by that contractor to do the same job are able to continue working as long as they do not try to become health and safety representatives.[35] The Labour Hire Agency then hears about the employee's proposal to be a health and safety representative and the contractor's response, and dismisses the employee to serve as a warning to all other workers. The employee would have 90 days to bring a personal grievance for unjustified dismissal against the Labour Hire Agency, however, the employee would have one year to file civil proceedings against the contractor in the District Court. The employee may be awarded up to $500,000 against the contractor, but may receive a modest award from the Employment Relations Authority for the Labour Hire Agency's behaviour.

S.74 We submit that the distinction between employees and other workers in clauses 110 and 117 of the Bill should be removed.

S.75 If the distinction remains, redrafting of the amendments to the Employment Relations Act 2000 (Part 6, subpart 3 of the Bill) should be made to address the issues raised above. Employees should be given the choice of procedures under the Act.

Definition of adverse conduct not wide enough

50.8. Because of the split jurisdiction, employees have weaker protections.

[34] Prohibited health and safety reason cl 111(a).
[35] Clause 110(1)(a)(v).

S.76 If the split jurisdiction is retained then the same definition of adverse conduct should be used in both the Health and Safety at Work Act and the Employment Relations Act 2000.

How is misleading conduct regulated?

50.9. It is unclear why civil proceedings may be brought for adverse or coercive conduct, but that civil proceedings for misleading conduct are not permitted under clause 117. Misleading conduct remains a criminal offence under the Act, and prosecutions may be brought by the Regulator under cl 164. A private prosecution may be brought if the Regulator has not brought a prosecution for the same 'matter' however, given the problems associated with private prosecutions highlighted in this submission, it would be more appropriate to also allow for civil proceedings where a party has engaged in misleading conduct.

S.77 We submit that civil proceedings ought to be available for misleading conduct.

51. Reform of the Protected Disclosures Act 2000

51.1. Johnstone and Tooma (2012) believe that the adverse conduct provisions may not be adequate in the Australian context. They note at 190:

> The anti-victimisation protections described earlier in this chapter are intended to foster an environment where people can refuse work or raise a health and safety concern without fear of retribution. This is the traditional view of the approach to take to foster reporting of incidents – creating severe consequences to deter discriminatory conduct by businesses. But that approach is arguably naive in that the effectiveness of those provisions depends entirely on the effectiveness of their external enforcement. In a highly unionised environment, a worker who is discriminated against for raising a health and safety concern will have recourse to their union which, in addition to applying industrial influence, has standing in its own right as an eligible person under s 112(6)(b) of the Model Act to make an application on behalf of the worker in civil proceedings in relation to the discriminatory or coercive conduct. But that merely improves the protections available to an already well-protected group of workers. Where the workplace is not unionised, any protections against discriminatory conduct rely on a claim or complaint by the affected workers themselves. Unless the workers are engaged in a broader workplace dispute with the business or undertaking, they are unlikely to jeopardise their careers or work prospects by making use of such provisions. This is in a sense no different from any other industrial protection afforded to workers but the consequences to the worker from a failure to report a hazard for fear of retribution is far greater than from failure to take action in relation to an individual industrial right.

> A more proactive approach is needed, where workers can raise a work health and safety concern knowing that their identity as the whistle blower will be protected from the business they work for. This can only be achieved if it is done through an independent third party – typically through an anonymous hotline or equivalent. Those concerns can then be independently investigated. If the claim is validated by the investigation, the outcome of the investigation is then reported on an anonymous basis to the officers of the business or undertaking so that the PCBU can take the relevant corrective action. If the claim is not validated, it is not reported in its own right but might form part of the statistics furnished to the PCBU as part of a report from the third party.

51.2. If Johnstone and Tooma are correct about the Australian framework then the weakened New Zealand provisions are even less likely to provide comfort to New Zealand workers considering disclosure of serious health and safety issues.

51.3. In our submission on the Immigration Amendment Bill (No 2) we noted an increasing chorus of criticism of the operation of the Protected Disclosure Act 2000 in relation to private sector wrongdoing.[36]

S.78 We reiterate our submission under the Immigration Amendment Bill (No 2) that the Law Commission be asked to undertake a review of the Protected Disclosures Act 2000 to ensure that it remains fit for purpose. Specific issues that the Law Commission ought to consider include:

- The definition of "serious wrongdoing" and its application to private sector organisations including in relation to health and safety issues;
- The extension of a requirement to have whistleblowing policy and procedure from state sector entities to private sector entities or certain categories of private sector entities (such as high hazard workplaces);

S.79 We submit that WorkSafe should urgently set up an anonymous health and safety concern hotline. This was recommended by the Taskforce (at for example at [196 (d)(ii)] and [268]-[270]. Doing so may require amendments to the Protected Disclosures Act 2000.

[36] See section 6 of our submission. Available at http://union.org.nz/policy/ctu-submission-immigration-amendment-bill-no-2

52. Issue resolution (cls 120-121)

52.1. These clauses impose duties on the parties (including their representatives) to make reasonable efforts to achieve a final, timely and effective resolution of an issue. It is based on the Model WHS Act.

52.2. However, new to the New Zealand Bill is the provision in cl 121(3) that "The inspector may, after providing assistance to the parties…, decide the issue if it is of a type specified in regulations."

52.3. This statement is ambiguous and could be read narrowly (there will be a list of issues in regulation that an inspector may decide) or broadly (if the issue is covered by regulations then the inspector may decide).

S.80 We submit that a broad interpretation is problematical given the lack of specified appeal rights for many instances where the inspector may exercise these decision making powers.[37] It would be better to clarify this position further by amending cl 121(3) as follows (proposed changes in bold):

> The inspector may, after providing assistance to the parties…, decide the issue if it is of a type specified in **regulation x of the General Concepts Regulations [or wherever it is appropriate].**

52.4. Another useful safeguard would be to include a decision made by an inspector under cl 121(3) in the definition of reviewable decision under cl 151. We include this proposal in our recommendations relating to the reviews and appeals section below.

[37] Though judicial review is likely to be available in most instances.

PART 4- ENFORCEMENT AND OTHER MATTERS

53. Case study- company lawyers and interviews

53.1. The idea that a company lawyer or company appointed "support person" can be in the room also representing workers during interviews regarding a workplace accident should be challenged.

53.2. In any criminal investigation those being interviewed are entitled to be represented but it is unrealistic to this a company engaged lawyer or representative can do this. It has been the practice of MBIE inspectors to allow company lawyers or representatives to also represent workers in investigations and we believe we have evidence that this has tainted the investigation.

53.3. In the case of the death of forestry worker A, several workers were interviewed with a representative also present in the room on the insistence of the employer. Prior to the interviews there is extensive correspondence between the employer lawyer and the inspector about these interviews with the lawyer dictating who will be interview, when they will be interviewed, how long they will be released for the interview and that a company representative (purported to be acting as a worker support person) will be present. Despite concerns expressed by the inspector that this was not the best way to conduct the interviews and concern about the timing, the interviews were conducted in the manner set by the company lawyer without any direct contact with the workers prior to the interview. At each interview, in front of the "support person" workers were asked if they minded him being present. The meetings were held "within cell phone range of the lawyer in case the representative needed advice during the interviews".

53.4. It is our view that during the session of interviewed, some of the answers volunteered by workers appeared to subsequently correct possible areas of health and safety failings mentioned in previous interviews.

53.5. Whether this is the case or not, the practice in our view is not best practice and puts pressure on workers to support their employer in an investigation

regardless of the circumstances. In many instances acting for both worker and company may breach of the company lawyer's professional obligations.[38]

53.6. Lawyers present during interviews also became an issue in the Department interviews of miners that worked at the Pike River Mine. The company lawyers were "offered" to all workers at the mine as "support" during these interviews. Many miners told the union they felt uncomfortable both having the company lawyers in the room but also rejecting the offer that they be there. These worker should not have been put in that position. The Companies lawyers have subsequently in our view, not played a role conducive to supporting the inquiry into the risks at the Pike River Mine.

54. Powers and duties of health and safety inspectors and medical practitioners (cls 181-204)

54.1. The CTU supports stronger powers for health and safety inspectors and medical practitioners in so far as the powers create a more effective compliance and enforcement regime. However, these powers must be balanced against workers' rights.

54.2. Section 31(6) of the current Act created an express right to silence if the answers a person gave to the examination or inquiry would tend to incriminate that person. This no longer features in the Bill, rather the right to silence is created by reference back to s 60 of the Evidence Act 2006. This section provides immunity against self-incrimination if the person is required to provide specific information in the course of a proceeding, or by a person exercising a statutory power or duty, or by a police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence.

S.81 <u>The CTU strongly supports the retention of the right against self-incrimination for workers.</u>

[38]For further analysis of these duties see Greg Lloyd (2013) MBIE investigations: Duty owed to workers by Employers, Lawyers and Inspectors. New Zealand Labour Lawyers Network conference paper.

54.3. The CTU is concerned that an issue that arose under the current Act provisions may not be remedied in this Bill. Under the provisions in the current Act, an interview could only be held with a natural person under s 31(1)(f). There was no power for the inspector to nominate or require the employer to nominate a natural person to undergo an interview when the employer is not a natural person. Even though that section referred to employers or persons, the CTU is concerned that issue will persist – there is no power for the inspector to nominate or require the PCBU nominate a natural person to undergo an interview where the PCBU is not a natural person.

S.82 The CTU submits that the inspector should be empowered to nominate or require the PCBU to nominate a natural person to undergo an interview when the PCBU is not a natural person.

54.4. The CTU also believes the vulnerability of workers during investigations needs to be addressed, particularly where workers do not have the benefit of union representation. Workers are unlikely to have in-depth understanding of their rights and obligations under health and safety legislation and it is possible that, with influence from a PCBU or officer, the worker would do what they are told without knowing whether the instruction is given for their benefit or for the benefit of the PCBU or officer.

S.83 The CTU submits there need be an exclusion of the PCBU or officer, through a lawyer or otherwise, from being present during an inspector's interview with a worker.

54.5. The CTU is concerned about the language used in clause 200, where a health and safety medical practitioner may exercise his or her powers if a worker has been or may have been exposed to a 'significant hazard'. Significant hazard is defined in clause 200(3), and takes a different meaning to the definition of 'hazard' as in the interpretation clause. It includes death, and notifiable injury or illness (with some limitations). It does not include notifiable incidents (such as exposure to an escape of gas). This seems inconsistent and may mean that there is no ability for testing where workers

have been exposed to hazards that have (at least) the potential for severe negative health consequences that do not fit under the 'notifiable injury or illness' definition – e.g. that do not require immediate treatment (clause 200(3)(b)), or that is detectable soon after the exposure to the hazard (clause 200(3)(c)). An example that would not be covered by the testing provisions would be where a worker has been exposed to high levels of carbon dioxide in a tunnel, however, that exposure has not resulted in an injury or illness that requires immediate treatment, but the effects of which could be readily detectable on testing.

S.84 We submit that the clause 200(3) definition of 'significant hazard' should include notifiable incidents as well.

54.6. The CTU is concerned about the lack of inclusion of rights of workers in cls 200 and 201. We believe there should be a provision requiring testing to be undertaken in the least intrusive and invasive method possible that is scientifically valid. Provision should also be made for protection of the privacy and dignity of those being tested, and for workers to receive pay if they are suspended under clause 201 of the Bill. Workers and health and safety representatives should be entitled to receive results of testing once carried out.

S.85 We submit that rights to privacy, dignity and no disadvantage in relation to health testing should be included in the Bill.

55. Reviews and appeals (cls 151-156)

55.1. Clauses 151 to 155 create a procedure for some of an inspector's decisions to be internally reviewed by WorkSafe. A reviewable decision includes a decision made by an inspector to issue a notice, extend the time to comply with an improvement notice, a decision in respect of a provisional improvement notice, or of a type prescribed by regulations.

S.86 We submit that the definition of reviewable decisions under cl 151 should be extended to include:

- A decision to exclude a health and safety representative under cl 70;
- A decision to remove a health and safety representative under cls 85-86; and
- A decision made by an inspector under cl 121(3).

55.2. Clauses 151 to 155 should be more prescriptive in their requirements as to procedural fairness. The only procedural safeguard is that of cl 153(2), whereby the Bill states that the person who made the decision must not be the one to review it.

S.87 The CTU submits that the clause should be more specific; The Chief Inspector should be the one to review the decision. It is appropriate for the decision to be reviewed by a warranted inspector. The CTU also submits that the Chief Inspector should comply with natural justice requirements.

S.88 The CTU submits that the definition of appealable decision should use the same language as cl 153. The definition of appealable decision in cl 152 uses he words "cancel or vary" whereas clause 153 uses the words "set aside" and "vary".

56. Jurisdiction of District Court

56.1. The District Court is not the best forum to hear health and safety matters.

56.2. As the Cabinet Paper 'Improving Health and Safety at Work: An Effective Regulatory Framework' notes at [71]:[39]

> Currently workplace health and safety matters are heard in the District Court. District Court judges do not deal with health and safety cases regularly enough to develop specialist knowledge in the area. Data from the last 20 years indicates that a judge will hear an average of 15 HSE Act cases over that period of time. Thirty judges have only ever heard one HSE case, and 100 judges have heard fewer than 10. The two judges with the most HSE experience have presided over 72 cases each.

56.3. Given these figures, it is difficult to see how the majority of District Court judges will be able to develop sufficient specialism to decide these cases

[39] The Taskforce noted the same point at [406].

expertly. For an example of the issues with inadequate specialism see the discussion of sentencing below at part 62 of our submission.

56.4. The Taskforce suggested the possible transfer of health and safety matters to the Employment Court at [405]:

> 405. The Taskforce considers that there is a need to develop a specific health and safety capacity in the judiciary. One approach is a smaller group of judges who should hear workplace health and safety cases in the Employment Court, and for the Employment Court to have expanded functions so that it covers workplace health and safety. This would recognise that health and safety obligations are an intrinsic part of a good employment relationship. It would also have the advantage of establishing judicial expertise in health and safety matters.

56.5. We support this transfer though we acknowledge that it is not a straightforward one.

56.6. The Employment Court has a number of disadvantages relative to the District Court in relation to health and safety matters. Specifically:

- The Employment Court currently has a civil jurisdiction only based on employment relationship. The Employment Court Judges would need to obtain necessary skills and warrants to undertake criminal trials;
- The Employment Court's appellate line to the Court of Appeal bypasses the High Court where health and safety appeals are currently heard and the leading judgments have been issued from;
- The Employment Court currently sits in Auckland, Wellington and Christchurch only compared to 50+ locations where the District Court sits.[40] Defendants (and litigants in civil matters) would need to travel to the main centres or arrangements for special sittings would need to be agreed.

[40] See http://www.courtsofnz.govt.nz/district/district/the-courts/map but note recent closures and restructuring

56.7. We think these disadvantages are significantly outweighed by the greater specialism facilitated by a transfer to the Employment Court. Additionally:

- We think the Taskforce's point around the crossover between health and safety duties is well made. Currently there is an uncomfortable overlap between health and safety law and the implied contractual term that employers will provide their employees with a safe system of work. Uniting the jurisdiction may allow judges to reconcile these duties more neatly;

- Uniting the health and safety and employment jurisdictions fixes the gnarly problem of split jurisdiction for adverse conduct discussed at part 50 of our submissions above.

- Expanding the Employment Court's jurisdiction to encompass criminal matters may assist in other aspects of employment law. For example, s 351 Immigration Act currently criminalises the exploitation of illegal migrants and the Immigration Amendment Bill (No 2) currently before the Committee would also criminalise the exploitation of legal migrants. The CTU advocates for the extension of criminal sanctions to other severe breaches of employment standards. As the experts in employment standards this jurisdiction sits most comfortably by far with the Employment Court.

56.8. According to MBIE statistics[41] there were 97 prosecutions in 2008/09, 109 in 2009/10 and 76 in 2010/11. The number of private prosecutions under the current Act has been small (and to date only *South Pacific Meats Ltd v New Zealand Meat Workers Union Inc* [2012] NZHC 2424 was successful).

[41] See Ministry of Business Innovation and Employment (September 2012) *the State of Workplace Health and Safety in New Zealand* http://www.business.govt.nz/healthandsafetygroup/research/health-and-safety-data/pdf-and-documents-library/sowh-2012.pdf at 8.

56.9. The Employment Court has five judges and typically hears between 175-260 claims per year.[42] Assuming health and safety cases are comparable to general claims in the Employment Court this would equate to approximately two additional judges' per year needed.

S.89 We submit that health and safety matters should be heard in the Employment Court in the first instance with the necessary amendments to their jurisdiction under the Employment Relations Act 2000 and additional resourcing to allow this to occur include for the employment court to travel.

57. Outline of our submissions relating to offences and sentencing

57.1. There are five interrelated aspects of the Bill which bear comment in relation to these issues:

- Adequacy of maximum sentences and consistency with other offences. See parts 58-60 of our submission;
- Effective corporate liability for offences. See part 61;
- The role of sentencing criteria and the interaction with the Sentencing Act 2003. See part 62;
- Other powers of the court. See part 63; and
- Additional orders that the Court may make (other than prison sentences and fines). See part 64.

58. Sentencing generally

58.1. The CTU supports the increase in maximum penalties for breaches of health and safety duties. We concur with the Taskforce (see [384]-[390] of the Taskforce Report) that these are necessary given what have historically been

[42] Data taken from Ministry of Justice (2012) Civil Fees Review Consultation Paper http://www.justice.govt.nz/services/court-fees/2012-civil-fees-review/documents/2012-public-consultation-paper

weak consequences for breaches and the need to incentivise better attention to health and safety and discourage poor behaviour.

58.2. Sentences are very important motivation levers for corporations. As the High Court noted in *Department of Labour v de Spa & Co Ltd* [1994] 1 ERNZ 339 (HC) at 346:

> No room must be left in the community for the view that it is easier to wait until an accident happens, pay the fine and do better in the future.

58.3. Although the maximum penalties under the Bill have increased significantly on those in the current Act it is important to consider their effect in practice. Johnstone and Tooma (2012) note at 258 that:

> [A] critique of the current approaches to enforcement by the Australian work health and safety regulators … is that enforcement is too heavily slanted towards advice and persuasion, with too little a focus on deterrence and other forms of punishment. Partly this is a problem with the structure of the Model Act itself. While the maximum financial penalties available to the courts appear to be large, in fact, they are a moderate advance on the maximum penalties in the pre-Model Act work health and safety statutes. Category 1 offences will be extremely rare, because recklessness will be very difficult to prove, and so for the vast majority of offences, the maximum penalties for corporations will be $1,500,000 if the offence results in the risk of exposure to serious injury or disease; and $500,000 for all other offences against the general duties. These are not the 'mega' penalties that are required to ensure an effective 'responsive' approach to enforcement, particularly for large corporations….

59. Reckless conduct in respect of a health and safety duty (cl 42)

59.1. Reckless conduct in respect of a health and safety duty (cl 42) is the most serious category of offence and is most likely to be charged when a worker or other person has died as a result of a person's actions or inactions. Under the Bill, this offence is punishable by fines of up to $3 million for a PCBU and a maximum of five years' imprisonment.

Recklessness

59.2. To be convicted of an offence under cl 42 the regulator must prove that a person was "reckless as to the risk to an individual of death or serious injury or illness" (cl 42(1)(c)).

59.3. This is a considerably higher threshold than that for manslaughter. As Bauer (2011) notes at 47:[43]

> In contrast to many other offences the consequences of the offending are unintended and may result from a relatively minor unlawful act, or rather unusual circumstances. Manslaughter encompasses a wide range of offending, with a corresponding range of culpability, from full inadvertence to situations little short of murder. For example, death may result from sheer carelessness, an opportunistic or impulsive push to the ground, wounding with a weapon or from a planned and prolonged attack.

59.4. The high threshold for cl 42 is an anomaly that should be fixed.

S.90 <u>We submit that the test of recklessness in cl 42 should be broadened to include negligent or wilful conduct.</u>

Adequacy of penalty

59.5. It is important to note upfront that New Zealand is not well served by a coherent and cogent system of sentences for different crimes. The Law Commission published a study paper in September 2013 entitled "Maximum Penalties for Criminal Offences." After detailed analysis, the paper concluded at [6.55] that:

> The way in which maximum penalties have been developed has resulted in a large number of manifestly irrational and unjustified penalties that are, relatively speaking, both too high and too low. They provide very poor guidance to the courts as to the appropriate level of punishment in the worst class of case and, to the extent they guide day to day sentencing practice, may well be resulting in injustice.

59.6. Bearing this caveat in mind, the maximum sentences for breaches of the health and safety duties are manifestly inadequate in comparison to other sorts of crimes.

59.7. It is instructive to review the maximum sentences available for some other crimes leading to death or serious injury or involving mistreatment of workers or corporate malfeasance along with other crimes with a five year maximum sentence.[44]

[43] Nadine Baier (2011) 'Fitting the Time to the Crime: Sentencing for Homicide' (LLB (Hons) Dissertion, University of Otago).
[44] The list gives examples only and does not include all crimes which may fall in any of these categories.

Crime	Act and section	Current maximum prison term
Murder	Crimes Act 1961 s 172	Life
Manslaughter	Crimes Act 1961 s 177	Life
Attempted murder	Crimes Act 1961 s 173	14 years
Aggravated wounding	Crimes Act 1961 s 191(1)	14 years
Wounding with intent to cause grievous bodily harm	Crimes Act 1961 s 188(1)	14 years
Destroying property knowing danger to life	Crimes Act 1961 s 268(2)	10 years
Driving recklessly or dangerously causing death	Land Transport Act 1998 s 36AA	10 years
Wounding with intent to injure or with reckless disregard	Crimes Act 1961 s 188(2)	7 years
Exploitation of persons not legally entitled to work[45]	Immigration Act 2009 s 351(1)(b)	7 years
Threats of widespread harm to people or property	Crimes Act 1961 s 307A	7 years
Damaging a computer system	Crimes Act 1961 s 250(2)	7 years
Destroying property with disregard for other property	Crimes Act 1961 s 269(3)	7 years
Taking, obtaining or copying trade secrets	Crimes Act 1961 s 230	5 years
Waste or diversion of electricity, gas or water	Crimes Act 1961 s 271	5 years
Counterfeiting corporate seals	Crimes Act 1961 s 262	5 years

59.8. Given the range of other penalties under New Zealand criminal law, a five year maximum sentence is very difficult to justify. It is immoral that we should penalise damage to a computer system more gravely than the reckless killing of a worker.

S.91 <u>We submit that the maximum term of imprisonment under cl 42 should be raised to 10 years.</u>

60. Offence of failing to comply with a health and safety duty that exposes individual to risk of death or serious injury (cl 43)

60.1. As Johnstone and Tooma (2012) note in the quotation at [58.3] above, the bringing of charges under cl 42 will be exceedingly rare given the high threshold of recklessness (along with negligence or wilful conduct if extended).

[45] The Immigration Amendment Bill (No 2) currently before the Committee proposes to extend this crime to include the exploitation of legal migrants.

60.2. As a result, the huge majority of offences prosecuted will be those under cl 43 and cl 44. These are the workhorse provisions of the Bill and therefore it is critical to strike the correct balance in their application.

60.3. The major problem with cl 43 is the absence of a possible custodial sentence as a maximum. Breaches of health and safety duties punishable under cl 43 will often be those that have led to death or serious injury or illness.

60.4. It is difficult therefore to see why the maximum sentence for breach of cl 43 is so far out of step with other similar offences. Some further examples help to illustrate this:

Crime	Act and section	Current maximum prison term
Injuring by unlawful act	Crimes Act 1961 s 190	3 years
Causing injury or death while not under the influence of alcohol or drugs	Land Transport Act 1998 s 62	3 years
Aggravated careless use of a vehicle causing injury or death	Land Transport Act 1998 s 39(1)	3 years

S.92 We submit that a breach of cl 43 should be punishable for natural persons by a maximum term of imprisonment of 3 years.

61. Corporate liability and manslaughter

61.1. Corporations do not have moral imperatives towards the preservation of life and health built into their decision-making processes and these must be imposed by law. A famous example of this problem is the design of the Ford Pinto the 1970s. Bazerman and Tenbrunsel (2011) summarise:[46]

> The Ford Pinto, a compact car produced during the 1970s, became notorious for its tendency in rear-end collisions to leak fuel and explode into flames. More than two dozen people were killed or injured in Pinto fires before the company issued a recall to correct the problem. Scrutiny of the decision process behind the model's launch revealed that under intense competition from Volkswagen and other small-car manufacturers, Ford had rushed the Pinto into production. Engineers had discovered the potential danger of ruptured fuel tanks in preproduction crash tests, but the assembly line was ready to go, and the company's leaders decided to proceed. Many saw the decision as evidence of the callousness, greed, and mendacity of Ford's leaders—in short, their deep unethicality.
>
> But looking at their decision through a modern lens—one that takes into account a growing understanding of how cognitive biases distort ethical decision making—we

[46] Bazerman, M.H. and Tenbrunsel, A.E (April 2011) 'Ethical Failures' *Harvard Business Review* 58-65 at 59.

> come to a different conclusion. We suspect that few if any of the executives involved in the Pinto decision believed that they were making an unethical choice. Why? Apparently because they thought of it as purely a business decision rather than an ethical one.
>
> Taking an approach heralded as rational in most business school curricula, they conducted a formal cost-benefit analysis—putting dollar amounts on a redesign, potential lawsuits, and even lives—and determined that it would be cheaper to pay off lawsuits than to make the repair. That methodical process colored how they viewed and made their choice. The moral dimension was not part of the equation.

61.2. The challenge in incentivising the right behaviour in corporations is that, in the famous phrasing of Baron Thurlow, "corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like."[47]

61.3. The Taskforce considered the question of corporate liability very carefully. While lengthy, their discussion and conclusions at [369]-[383] of their Report are worth restating:

> 369. The Taskforce recommends extending the existing manslaughter offence to corporations and revising the corporate liability framework that applies to all offences (including manslaughter).
>
> 370. The possible introduction of an offence of corporate manslaughter was raised with the Royal Commission, and the topic is discussed in its final report. The Royal Commission noted that such an offence had been introduced in the UK. It allowed the prosecution of companies and organisations when serious management failures resulted in death, reflecting community outrage at serious health and safety failures by management. The Royal Commission said that the New Zealand regime should be reviewed and increased penalties for companies should be considered, "as should the introduction of an offence of corporate manslaughter".
>
> 371. Having considered this matter at length, the Taskforce does not support the introduction of new law on corporate manslaughter. The reason for this is that other jurisdictions have had very limited success in establishing an effective approach to the offence….
>
> 376. The Taskforce considers that New Zealand can do better than this. It recognises the benefits of substantially raising the profile of corporate offending. Accordingly, we recommend:
>
> a. strengthening occupational health and safety laws (including enhanced duties for individual decision-makers and revised offences for failures to comply with duties)
> b. extending the existing manslaughter offence to corporations and revising the corporate liability framework that applies to all offences (including manslaughter).
>
> 377. At present corporations cannot be prosecuted for manslaughter but they can be prosecuted for other offences against a person, such as wounding and injuring with intent or with reckless disregard. There is no good reason for maintaining this distinction.
>
> 378. However, merely extending the existing manslaughter offence to corporations would have very little impact in practice. That is because it would be subject to existing corporate liability rules.
>
> 379. Those rules generally make it very difficult to convict a corporation for core Crimes Act offences. To give rise to liability, an act or omission constituting the offence must be committed by a single individual who is acting on behalf of the company and is its "directing mind and will" (that is, a senior executive or manager who is able to make significant decisions on the company's behalf). The acts or omissions of more than one individual cannot be aggregated to establish the necessary ingredients of the offence. Nor can the acts or omissions of other company employees give rise to corporate liability, even if they have resulted from a corporate

[47] See http://en.wikiquote.org/wiki/Edward_Thurlow,_1st_Baron_Thurlow

> ethos or from corporate system failures. In a larger corporation, where decision-making is generally diffused, it is very difficult to attribute the offence to the actions or omissions of any single individual who can be regarded as the company's "directing mind and will".
>
> 380. It would be possible to create a new offence of corporate manslaughter framed in such a way as to address these difficulties. We note that this has been done, for example, in the UK and the Australian Capital Territory (ACT). However, we do not favour such an approach. It would end up making it easier to convict a corporation of manslaughter than of some other offence against a person (such as wounding with reckless disregard) even when each offence resulted from the same type of conduct. That would simply replace one anomaly in the law with another.
>
> 381. In the Taskforce's view, therefore, the existing manslaughter offence should be extended to corporations, and the general rules relating to corporate liability should be revised at the same time. This would be the most effective way to maximise the denunciatory and deterrent effect of the criminal law in influencing the behaviour of corporations. Without that more general revision of the law, little change is likely to result. The Canadian Criminal Code, as amended in 2003, revised its corporate liability rules and provides one useful model that might be considered.
>
> 382. The Taskforce notes that, in order to be effective, the revised law would need to address two issues. First, it would need to allow the attribution of criminal liability to a corporation as a result of the acts and omissions of a greater range of officers and employees within that corporation, provided they are acting within the scope of their authority. Second, it would need to provide that liability could be attributed to a corporation if two or more individuals of the required seniority within the company engaged in conduct that, if it had been the conduct of only one of them, would have made them personally liable for the offence. This would allow conduct and states of mind to be aggregated for the purposes of attributing corporate liability in a way not permitted under current New Zealand aw.
>
> 383. The Taskforce considers that MoJ should begin policy work now to determine the range of options for a revised generic corporate-liability framework and to identify the preferred approach.

61.4. We agree with the Taskforce's suggested approach here. We are concerned that this work is not being given sufficient priority within the Ministry of Justice. Those responsible at the Ministry of Justice will (feebly) only confirm that work is underway and a report is due later in the year.

61.5. The likely result of delay is that changes to the liability framework will come into effect piecemeal. The latter changes will not be part of the comprehensive education programme alongside the roll-out of the Bill.

S.93 <u>We submit that the extension of manslaughter to include corporate liability along with a revised corporate liability framework must be treated as a matter of urgent policy making and legislative priority. Amendments to the Crimes Act 1961 should come into force at the same time as the Bill.</u>

62. Sentencing criteria (cl 169)

62.1. There are several challenges to setting out an effective sentencing scheme for health and safety offences. The framework must be robust, easy to apply

(particularly in the absence of a more specialised primary jurisdiction than the District Court as discussed above) and deliver a reasonable outcome to the offender, the victim and the community.

62.2. A starting point with health and safety offences is the importance of deterrence. In *Department of Labour v Street Smart Ltd* (2008) 5 NZELR 603 (HC), Duffy J observed at [59]:

> There are good policy reasons, which accord with the purpose and scheme of the Health and Safety in Employment Act, for ensuring that where employers infringe, penalties must bite, and not be at a 'licence fee' level.

62.3. There have been a number of significant legislative changes (notably the introduction of the Sentencing Act 2002 and the insertion of s 51A by the Health and Safety in Employment Amendment Act 2002) since the current Act came into force on 1 April 1993.

62.4. Sentences for breaches of the current Act have trended upwards as a result of these changes but in each case have been followed by what Paterson J memorably termed 'the honeymoon period' in *Fairfax Industries Ltd v Department of Labour* [1996] 2 ERNZ 551 (HC) while employers and the courts come to terms with the changed regime.

62.5. In relation to the 2002 changes, it was not until the benchmark judgment of the full High Court in *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELE 93 that the impact of the amendments was considered authoritatively. The High Court's guidance in that case led to a substantial increase in subsequent sentences handed down by the District Courts in cases under the current Act.[48]

62.6. Some of the six year 'honeymoon period' between the changes coming into force and being fully considered by the High Court may well come down to delay in the Department of Labour choosing to appeal these points.

[48] See Alan Woodfield, Andrea Menclova and Stephen Hickson (2012)0 'Changing Guidelines and Health and Safety in Employment Sentences in New Zealand: An Empirical Analysis' NZAE Conference Paper 2012 for further detail.

62.7. However it poses a conundrum in relation to further changes. The benefit of further changes (and some appear sensible) must be weighed against the inevitable 'honeymoon period.'

62.8. Section 51A of the current Act states:

> **51A Sentencing criteria**
> (1) This section applies when the court is determining how to sentence or otherwise deal with a person convicted of an offence under this Act.
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
> (a) sections 7 to 10 of that Act; and
> (b) the requirements of sections 35 and 40 of that Act relating to the financial capacity of the person to pay any fine or sentence of reparation imposed; and
> (c) the degree of harm, if any, that has occurred; and
> (d) the safety record of the person (which includes but is not limited to warnings and notices referred to in section 56C) to the extent that it shows whether any aggravating factor is absent; and
> (e) whether the person has—
> (i) pleaded guilty:
> (ii) shown remorse for the offence and any harm caused by the offence:
> (iii) co-operated with the authorities in relation to the investigation and prosecution of the offence:
> (iv) taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.
> (3) This section does not limit the Sentencing Act 2002.

62.9. Whereas proposed cl 169 states:

> **169 Sentencing criteria**
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 42, 43, or 44.
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
> (a) sections 7 to 10 of that Act; and
> (b) the purpose of this Act; and
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
> (d) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
> (e) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
> (f) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

62.10. Cl 169 removes the following from the list of concerns that the Court "must have particular regard for-"

- the degree of harm, if any that has occurred;
- whether the person has pleaded guilty;
- whether the person has shown remorse for the offence and any harm caused by the offence:

- whether the person has co-operated with the authorities in relation to the investigation and prosecution of the offence:

- whether the person has taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.

62.11. The first four of these 'missing' factors are specifically covered by ss 7-10 of the Sentencing Act 2002.[49]

62.12. Remedial action is not specifically covered although under s 10(1) and (2) of the Sentencing Act 2002 the Court will take into account "any offer of amends, whether financial or by means of the performance of any work or service, made by on behalf of the offender to the victim" and "any agreement between the offender and the victim as to how the offender may remedy the wrong, loss or damage caused by the offender or ensure that the offending will not continue or recur."

62.13. There are several new elements to the consideration under cl 169 not present in s 51A including:

- the purpose of the Bill;

- the risk and potential for illness, injury, or death that could have occurred; and

- the degree of departure from prevailing standards in the person's sector or industry.

62.14. While not explicitly stated in s 51A all of these factors were explicitly taken into account in *Department of Labour v Hanham & Philp Contractors Ltd*. The Courts will always take a purposive approach to legislative interpretation (rendering a specific reference to the purpose section of the Bill superfluous).

[49] See, respectively: s 9(1)(d) "the extent of any loss, damage or harm resulting from the offence;" s 9(2)(b) "whether and when the offender pleaded guilty;" s 9(2)(f) "any remorse shown by the offender…;" s 9(2)(fa) "that the offender has taken steps during the proceedings... to shorten the proceedings or reduce their cost;" and s 10(1)(a)

Risk and industry standards are specifically mentioned as factors that must be considered at [54] of the judgment.

62.15. Both s 51A and cl 169 have problems of logical inconsistency. The courts are to "have particular regard for" a number of named factors of which:

- some duplicate factors set out in the Sentencing Act 2002;
- some partially duplicate Sentencing Act 2002 factors;
- and some of which have no Sentencing Act 2002 analogues;
- alongside the whole purposes and principles sections of the Sentencing Act 2002 (many elements of which will never apply to health and safety offences).

62.16. Given the clumsy drafting, judges may struggle to weigh these factors up.

62.17. The change to the sentencing criteria will have undesirable consequences. The delay in the issuance of guideline judgements is undesirable and may mean that sentences are inconsistent for several years pending the issuance of a guideline sentencing judgement.

S.94 We submit that the existing s 51A should be retained on the basis that this would retain the jurisprudence developed under *Department of Labour v Hanham & Philp Contractors Ltd*. Alternatively, a version of the sentencing guidelines might be developed that codifies the approach used in *Hanham v Philps.*

S.95 If the Committee proceeds with the amendments as proposed and the District Court retains responsibility then WorkSafe should consider bringing a case sentenced under the new framework before the High Court as soon as possible to establish new sentencing guidelines.

62.18. Our position on this point follows that of the Taskforce, who noted at [391]:

> 391. Woodfield et al also said that "it is clearly evident that the judiciary is willing to impose more severe sentences if provided with clearly structured criteria by higher courts". If that is so, there should be no hesitation in the new agency making appeals to the High Court seeking increases in fine levels, where appropriate.

63. Other powers of the Court (cls 142, 148(3), and 170-176)

63.1. Clauses 148(3) and 170 - 176 create a series of useful court orders:

- Directions that a person who contravenes an enforceable undertaking pay costs of the proceedings, and the costs in monitoring compliance with the enforceable undertaking in the future,
- Adverse publicity orders,
- Restoration orders,
- Work health and safety project and training orders,
- Injunctions, and
- Enforceable undertakings.

63.2. We strongly support the creation of new powers for the courts.

63.3. However, while in principle it is good to increase the range of methods to respond to breaches, the Courts must still be seen to be strong in driving compliance. As stated by Johnstone and Tooma (2012):

> At the heart of the theory of interactive enforcement and compliance using a hierarchy of sanctions is a paradox – the greater the capacity of the regulator to escalate to the top of the hierarchy of sanctions, and the greater the available sanctions at the top of the pyramid, the more duty holders will participate in co-operative activity at the lower regions of the hierarchy.

S.96 Therefore, as well as the court orders listed above, the CTU submits that the Court should be empowered with even stronger court order powers. Additional powers should include the power to order seizure of assets, to order that PCBUs cease work until health and safety management is reformed, or (for the most incorrigible PCBUs) an order of dissolution of a corporate entity.

64. Private prosecutions (cl 162-167)

64.1. The Bill imports much of the wording of the private prosecution provisions of the current Act.

64.2. The CTU supports the retention of the right to take private prosecutions where the state fails or chooses not to. The retention of the ability to bring a private prosecution provides another avenue of redress for victims of health and safety breaches, acts as a safeguard against official inertia, and provides an alternative course of action in those cases where the case is not of sufficient public interest for the state to pursue a prosecution.

64.3. The limited exercise of the right to private prosecutions has shown that the provisions are too restrictive and often resulted in an interested party having no ability to challenge all parties responsible for all breaches of the current Act.

64.4. The CTU strongly supports the extension of the timeframe for the bringing of private prosecutions from six months under s 54B of the current Act to two years under cl 167 of the Bill. However this does not go far enough. There should be a strengthening of the private prosecution provisions in two ways:

- According to the fundamental legal principle of open justice, a decision by WorkSafe not to prosecute a defendant ought to be publically notified by way of a register of WorkSafe investigations that includes a list of possible defendants and whether decisions have been made by regulators to prosecute or not have been made;

- The restriction on private prosecution of any defendant where the regulator takes enforcement or prosecution action against <u>that</u> defendant not any <u>other</u> defendant and immunity from prosecution ought to be restricted to particular breaches rather than matters; and

Notification of decisions not to prosecute

64.5. The current (s 54) and proposed (cl 163) system, whereby the regulator has a reactive duty to notify an interested party of whether a decision has been reached to take enforcement or prosecution action is cumbersome and against the principle of open justice.

S.97 <u>We submit that the current reactive system should be replaced with a publically accessible online register of matters that WorkSafe is investigating</u>

or has investigated. Each matter would be accompanied by sufficient detail to be identifiable by an interested party including a list of possible defendants, and whether WorkSafe or any other regulator had made a decision to pursue or not to pursue enforcement or prosecution action against that defendant.

64.6. Where the publication of a possible defendant's identity would be highly prejudicial, the regulator may decide on application or its own motion to suppress the name of the possible defendant but this mechanism must not be allowed to thwart the effective application of private prosecutions.

64.7. This proposal would ensure that those who have been cleared by the regulatory bodies from further action have their names 'cleared' publically in as timely a fashion as possible.

64.8. If the notification of action system is built into the investigation, enforcement and prosecution functions of the regulators it will be more administratively efficient than the current system.

64.9. Rights to private prosecution in relation to general criminal matters are comparatively unfettered so long as they do not constitute an abuse of process (see s 26 of the Criminal Procedure Act 2011). It is procedurally unwieldy and in some instances unfair to make the right of private prosecution in relation to health and safety duties contingent upon notification of interest (see cl 165(1)(c) of the Bill). It is difficult to see a reason for this requirement.

Restrictions on when a private prosecution can be commenced

64.10. Under the current provisions, any person other than the regulator or regulatory agencies may commence a prosecution. However, if the regulator or a regulatory agency takes enforcement action against or prosecute any "possible defendant", no private prosecution can be brought under the Act by any other person against the same or any other possible defendant in respect of the same "matter".

64.11. There are three significant issues with the wording of these provisions. First, if any one defendant is prosecuted by the regulator but there are a number of possible defendants (people who could be charged under the Act) who are not prosecuted, then there is no recourse for a person to bring a private prosecution against the other possible defendants. Those person have a 'free pass' for their breaches of the Act.

64.12. Second, this problem is compounded further by the greater number of possible duty holders under the Bill. For example, a decision made by a Regulator to prosecute a PCBU but no culpable officers would rule out the possibility of a private prosecution against an officer, regardless of the level of the officer's culpability.

64.13. Third, the definition of "matter" in cl 162 is as a failure to comply with the current Act or Bill's provisions or a series of such failures. This means there is a significant difference between the use of the word "matter" and "charge". If there have been a series of breaches, and a charge is brought for only one of these, a person would be barred from bringing a private prosecution against any of the other breaches, again creating a 'free pass' for other breaches.

64.14. The use of the word "matter" is also problematic because of the use of plea bargaining whereby some charges are dropped if a guilty plea is obtained for another charge or charges. The use of tools such as improvement notices is included as 'enforcement' and a failure to comply with an improvement notice could be seen as the same "matter" as the issuing of the improvement notice - therefore barring any private prosecution even if the state does not prosecute the failure to comply.

64.15. The only option left open to someone who thinks further charges should have been laid or further defendants should have been prosecuted is judicial review. However, as the decision of the state to prosecute is a discretionary one, the Court has specified that it is likely only to be in 'exceptional cases' that a court would intervene where a decision has been made.[50] Moreover,

[50] *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96

not only is judicial review excessively difficult, but the time and cost involved with this option would render it unfeasible.

S.98 The CTU submits that the following amendments to cl 165 are necessary (amended text in bold):

> **165 Private prosecutions**
>
> (1) A person other than the regulator may file a charging document in respect of an offence under this Act if—
>
> > (a) the regulator has not taken enforcement action against that defendant in respect of the same breach; and
> >
> > (b) a regulatory agency has not taken prosecution action under any other Act against **that** defendant in respect of the same incident, situation, or set of circumstances; and
> >
> > **(c) The regulator has given public notice that neither the regulator nor a regulatory agency—**
> >
> > > (i) has taken enforcement action or prosecution action against that defendant in respect of the same matter; and
> > >
> > > (ii) will take enforcement action or prosecution action.
>
> (2) Despite subsection (1)(b), a person other than the regulator may file a charging document even though a regulatory agency has taken prosecution action if—
>
> > (a) the person has leave of the court; and
> >
> > (b) subsections (1)(a) and (c) are complied with.

65. Limitation period for prosecutions (cl 167)

S.99 The CTU supports the extension of the timeframe for the bringing of private prosecutions from six months under s 54B of the current Act to two years under cl 167 of the Bill. However we do not believe this goes far enough.

65.1. Also, in light of the longer timeframe for bringing prosecutions, the Bill proposes to remove the provisions of the current Act allowing interested parties (s 54C) or the regulator (s 54D) to seek an extension of time for filing a charging document.

65.2. We appreciate the arguments from an administrative and human rights perspective against undue delay in bringing proceedings such as the right to

be tried without undue delay (s 25(b) of the New Zealand Bill of Rights Act 1990).

65.3. However, these arguments must be balanced against the interests of victims, workers and the State in ensuring that wrongdoers are punished for breaches of the health and safety duties. It is also instructive to compare the health and safety framework with the general law.

65.4. A cl 42 offence is a category three offence under the taxonomy set out in s 6 of the Criminal Procedure Act 2011. Since a cl 42 offence is punishable by a maximum sentence of more than two years the position under s 25(2)(b) of the Criminal Procedure Act 2011 would be that there is *no time limit* for bringing proceedings were it not for the alternative timeframes set out under the Bill.

65.5. Since cl 43 and cl 44 offences are not punishable by jail time (though note the CTU's proposal that cl 43 offences should be punishable by a maximum of three years' imprisonment) they are category one offences in the Criminal Procedure Act 2011 taxonomy. Given the maximum fine levels, both offences fall into *the time limit of 5 years* set out in s 25(3)(c).

65.6. It is disappointing to see health and safety offences treated more leniently than other criminal offences.

65.7. The two year timeframe without any possibility of extension may have perverse consequences for private litigants also. In a complex case, the regulators may take most or all of the time period to reach a decision not to take action. A scenario is readily imaginable where a party has only days to file a charging document in an extremely complex case. This would effectively render the right of private prosecution nugatory.

S.100 <u>We submit that private litigants should be given three years to file charging documents in relation to health and safety offences (a three year timeframe also squares with that in the general employment law jurisdictions).</u>

S.101 The extension of time for private litigants where the Court considers that it is unreasonable to expect them to respond is an important procedural safeguard and should be retained.

PART 5- MISCELLANEOUS PROVISIONS

66. Case study- fragmentation of regulators

66.1. Victor Ripia was killed in a logging truck accident on a forestry road. The CTU have the police investigation into this death. It is very technical. The accident occurred at 8.19 am but was not discovered until a passing driver noticed it at 10.55am. It is inconclusive as to cause and his death and was referred to the coroner.

66.2. Despite this occurring in a workplace, MBIE did not carry out an investigation into this accident to determine if the health and safety obligations of all parties had been complied with in relation to his death. There was general confusion between the agencies when the CTU sought any report relating to the accident with MBIE and the police passing the request between each other unclear who was doing what. Finally it was clear the only investigation was by the police under the transport regulations without consideration for the health and safety duties except for his immediate employer and then only superficially.

66.3. It appears the provisions in the Act that require the Principal (in this case there could be a few – the forest owner, the firm contracting his employer and the Mill and the felling contractor) were not even been considered.

66.4. No one in that forest had a system to check drivers arrived safely on their journey – two trucks left loaded after Victor and arrived before him on a one way road – no one went to look for him –he lay for hours. The RT in his cab did not work.

66.5. There is a memorandum of understanding between the police and MBIE on these type of accidents. According to that this accident should have been investigated by MBIE as it was not on a public road. The memorandum ends with a table setting out the areas of business focus and expertise of the two agencies. Neither side of the table lists the investigation of health and safety practices and systems as an area of specialisation that would be essential and utilised in a logging truck accident on a forestry road.

67. Relationship of WorkSafe with other agencies (cls 205-210)

67.1. We are concerned at the potential complexity and confusion of relationships between agencies in the work health and safety system. The large number of agencies is indicated by the definition of "regulatory agency" in cl 12 which in addition to WorkSafe includes the Civil Aviation Authority, the Police, the New Zealand Transport Agency, Maritime New Zealand, the Environmental Protection Authority ('EPA'), local authorities, the Fire Service, medical officers of health, the Ministry of Health, ACC, government departments responsible for the Building Act 2004 and the Crown Minerals Act 1991, plus any prescribed agencies and agencies designated under this Act.

67.2. There is considerable room for this to create complexity, inconsistency of regulators' approaches, slowness in response, and matters falling between regulators in the arrangements people in the workplace actually experience.

67.3. The Taskforce specifically addressed this issue. It reported at [282] that

> Submitters were consistent in their view that the regulators do not collaborate effectively. They found the current division of regulatory activities confusing. They often received conflicting or duplicate messages from the agencies about how to manage risks and their relative priorities. This reflects overlapping mandates of multiple regulators.

67.4. The recommended resolution to this problem was to give WorkSafe "a clear leadership role" by making it a "single point of responsibility for workplace health and safety." There would still be other agencies in the system, particularly in transport safety, but WorkSafe would delegate its responsibility to them using service-level agreements which, as the Taskforce noted at [291] would provide:

> [C]lear expectations about how the delegations are delivered in terms of both activity and outcomes sought. The delegates' performance should be monitored by the new agency. This will result in better-aligned capability and compliance efforts between agencies, and ensure that compliance activities are mutually reinforcing.

67.5. In addition, operational coordination would be put in place through joint action by chief executives of the agencies.

67.6. Instead the Bill allows for a long and potentially growing list of agencies among which WorkSafe may be in some sense the "first among equals" but

the degree of autonomy between agencies and the sheer number of them will make any coordination and consistency difficult.

67.7. We note that cl 205 makes WorkSafe the regulator in any area that is not covered by another regulator, which in a statutory sense ensures there are no gaps in coverage, but does not necessarily clarify ambiguity of coverage in a way that giving WorkSafe the primary responsibility would do. Under cl 208 it can perform functions in other areas only by consent of other regulators, so it is not the primary agency as contemplated.

67.8. WorkSafe is subordinate to ACC in injury prevention, being dependent on ACC funding and subject to the requirements of s 263(3) of the Accident Compensation Act 2001 that efforts in this area lead to reduction in levies. This requirement may be inconsistent with health and safety priorities. An obvious example is that there are many types of occupational disease that ACC does not in practice cover, and therefore has no interest in reducing levies.

67.9. We understand there will be meetings between chief executives to assist coordination, but without giving clear responsibility to a lead organisation these could succeed or fail depending on the degree of commitment of, and the relationships between, the particular people holding those positions at any given time.

67.10. All the regulators (under s 10(k) of the WorkSafe New Zealand Act 2013 for WorkSafe, and under cl 206(h) of this Bill for other regulators) will have a function to “promote and co-ordinate the implementation of work health and safety initiatives by establishing partnerships or collaborating with other agencies or interested persons in a coherent, efficient, and effective way”. On the whole, this is commendable. However all regulators are expected to “co-ordinate” these inter-agency activities. When everyone has responsibility it can easily end up that no-one *takes* responsibility, and that tensions or disputes arise as to whose responsibility initiatives should be.

67.11. Joint policy directives under cl 210 and the Health and Safety at Work Strategy (cl 211) both provide means of co-ordination of agencies, but there

is still a very large operational element, including matters such as compliance and intervention strategies, priorities, and the importance placed on aspects such as worker participation and consultation, which could vary between agencies for idiosyncratic reasons. There may well be justifiable differences between agencies in how they carry out their roles, but they should be for good reason from a work health and safety 'system' viewpoint and coordinated sufficiently that differences do not give rise to inconsistencies, confusion and wasteful duplication which could easily be the case.

67.12. Prominent academics in the field of regulation, Julia Black and Robert Baldwin[51] warn regarding fragmentation of regulators that:

> A further difficulty for risk-based regulators can arise when their powers are fragmented or shared. Thus, another factor that may have reduced the effectiveness of the UK's financial services risk-based regulatory regime in the lead up to the credit crisis was the way in which regulatory powers were distributed between the Treasury, the Bank of England and the FSA. This arrangement exemplifies the common position in which many risks and social or economic problems are controlled by networks of regulators rather than by bodies enjoying the luxury of a regulatory monopoly, networks in which regulation is "decentered" rather than simple and focused (Black 2001). If attention is paid to institutional environments, the challenges of working within networks have to be taken on board. For risk-based regulators, these challenges may prove considerable, and it may be necessary to cope with divergence between the various networked regulators' aims, objectives, and institutional environments; variations in regulatory cultures; differences incapacities, skills, and resources; and varying capacities to modify their operations (p.195)

67.13. We remain concerned at the split of policy and regulation from WorkSafe, leaving it with MBIE, which again may work against coherence. Black and Baldwin warn at 207 that the:

> Need for the really responsive risk regulator is to react to change by developing new rules and tools that will assist in detecting undesirable risk creation and in producing compliance with relevant requirements. The institutional environment may inhibit this, however, as the regulator may not have rule-making powers…

67.14. With regard to "designated agencies" under cls 207-209, we are concerned that there is no requirement for involving workers and their representatives in their boards, advisory groups or otherwise. By contrast, for WorkSafe the Minister must at least have regard to the need to have on its board "persons who have, collectively, knowledge and experience of, and capability in… perspectives of workers" (s 7(2) of the WorkSafe New Zealand Act 2013). The Board can establish a tripartite advisory group (s 8). These are weak

[51] Black, J., & Baldwin, R. (2010). Really Responsive Risk-Based Regulation. *Law & Policy*, *32*(2), 181–213

nods towards tripartism, and we advocate that it should be much stronger, but the designated agencies do not even have these weak requirements.

S.102 We submit that the functions of both WorkSafe and other regulators should include in their functions, as recommended by the Taskforce [206(f)]: "to promote and support effective worker participation". In addition, for all regulators there should be provisions for worker representation on their boards and for tripartite advisory boards on technical matters.

S.103 We also submit that the functions of WorkSafe and other regulators should give WorkSafe a clear lead role. We suggest adoption of the Taskforce recommendation at [506(g)] that WorkSafe should have a function to "promote, support and co-ordinate work health and safety activities across appropriate government and non-government agencies". For other regulators the corresponding function should be to "collaborate with WorkSafe and with other appropriate government and non-government agencies in taking a consistent approach to promoting and supporting work health and safety activities."

68. Health and Safety at Work Strategy (cls 211-212)

68.1. These clauses require the Minister to publish a "Health and Safety at Work Strategy", setting out the overall direction in improving the health and safety of workers. The Minister must develop it jointly with WorkSafe and the Minister may amend or replace it at any time. The process of its development requires consultation with regulatory agencies and "with other persons who have an interest in work health and safety in New Zealand or with organisations representing those persons."

S.104 We submit that consultation under this section should expressly include the social partners; Business NZ and the CTU. It also should include unions more generally.

68.2. Clause 211(5)(b) requires ACC's injury prevention priorities to be taken into account when developing the Health and Safety at Work Strategy. The CTU is concerned that this will imply in the Accident Compensation Act 2001

requirements that injury prevention programmes must target actual or projected levies.

S.105 We submit that cl 211 should explicitly state that the Health and Safety at Work Strategy can set out an overall direction that is not bound by reducing ACC levy rates.

69. Information sharing between agencies (cls 213-216)

69.1. These clauses permit information sharing between regulators. Cl 214 also establishes that WorkSafe should be notified of all notifiable events, which is vital for it to play a role of ensuring there are no gaps in the system.

69.2. The clauses also create obligations on regulators and medical officers of health to notify WorkSafe of notifiable events, diseases or hazardous substances injuries (cls 213, 215). However there is no general ability to *require* information from other agencies or relevant persons such as hospitals, those testing for hazards, or PCBUs. While we recognise that great caution is needed in exercising such powers, and that the information should be anonymised where that does not defeat the purpose of collecting it, reliable information is also vital for purposes such as focusing the regulators' efforts, for harm prevention, for identifying new or growing risks, and for finding root causes of health or safety events. Some information can also be used for enforcement although care needs to be taken in mixing these purposes.

S.106 We submit that regulators should have sufficient powers to require the provision of information from other agencies and relevant persons, subject to giving full consideration to privacy and confidentiality.

S.107 Clause 216 allows the Coroner to call on the regulator to provide a report on any fatal workplace accident. There is also a problem that Coroners' findings and recommendations frequently go unheeded by relevant authorities.

S.108 We submit there should also be requirement for relevant regulators to consider the recommendations made by a Coroner with regard to a fatal

workplace accident and to report on their intentions as to implementing those recommendations.

70. Funding levy (cls 217-218)

70.1. Clauses 217 and 218 import the language of section 59 of the current Act into the Bill. The language is almost identical, save for the fact section 59 is now split into two clauses (seemingly for clarity).

70.2. These clauses retain the requirement for employers, self-employed, and share-holder employees to pay a funding levy to cover certain costs associated with WorkSafe (or a designated agency) carrying out certain functions, and the costs associated with collecting the levy. The levy is collected by ACC and is deemed part of ACC's Work Account, although is then paid by ACC to WorkSafe on a monthly basis.

70.3. Clause 218 states that before a levy is set, the Minister must consult with WorkSafe and ACC.

S.109 As with ACC levy setting consultation, we submit that the Minister should be required to hold public consultation, or (at a minimum) be required to consult with social partners such as Business NZ and the CTU.

70.4. The CTU is also concerned about what the levy may be used for under clause 217(7). It is unclear whether the levy may be used for important health and safety functions such as the training of Health and Safety Representatives or paying for the costs of advisory group members.

S.110 The CTU submits this list should be expanded or amended for clarity.

70.5. The CTU notes this levy is still paid by employers, self-employed persons, and share-holder employees, rather than PCBUs. We also note that this requirement means workers who aren't employees are paying a levy for their own health and safety, despite the clause 28 restriction on levies not being imposed on workers for anything done or provided in relation to health and safety.

S.111 The CTU submits that this levy should be paid by all PCBUs rather than employers. Further work should be undertaken to determine the most effective way to do so.

71. Regulation, codes of practice and safe work instrument making powers (cls 221-236).

71.1. The clearer formulation of regulation-making powers in the Bill is much better than the tortured framework of the current Act.

71.2. Consultation requirements in relation to the regulations and the safe work instruments are inadequately specified. The Bill repeats the framing of consultation in the current Act at cl 226 (in relation to regulations apart from exemptions for the armed forces) and cl 234 (in relation to safe work instruments):

> The Minister must not recommend the making of any [regulations or safe work instrument] without first consulting persons and organisations that the Minister considers appropriate having regard to the subject matter of the proposed [regulations or safe work instrument].

71.3. The duty to consult should include a specific duty to consult unions for two major reasons:

- Tripartism between employers, unions as workers representatives and Government results in more robust regulatory systems and better outcomes;
- In recognition of this, the Government has signed binding international commitments to undertake tripartism in relation to occupational health.

Tripartism is best practice

71.4. The Robens Model is strongly predicated on tripartism throughout the system. As the Royal Commission noted at[52]

> [I]n international best practice responsibility [for health and safety] is shared between employers, workers and regulators. This approach is at the heart of the 1972 Robens report, which identified that:

[52] Royal Commission Report Volume 2, Chapter 25, at [17].

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

71.5. Tripartism represents international best practice for several reasons. The benefits of tripartism have been summarised by Ayres and Braithwaite[53] as follows:

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

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

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

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

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

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

> **Tripartism throughout the system**
>
> 178. Our vision is that tripartism is inculcated throughout the workplace health and safety system. Tripartism involves the government regulator, employers and unions

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

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

New Zealand has committed to tripartism

71.7. New Zealand has ratified International Labour Organisation Convention 155 on Occupational Health and we are bound by its provisions. These include significant obligations of tripartism in relation to occupational health policy setting.

71.8. Part III of Convention 155 states in part:

Article 4

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.

2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

Article 5

The policy referred to in Article 4 of this Convention shall take account of the following main spheres of action in so far as they affect occupational safety and health and the working environment:

(a) design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (workplaces, working environment, tools, machinery and equipment, chemical, physical and biological substances and agents, work processes);

(b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers;

(c) training, including necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;

(d) communication and co-operation at the levels of the working group and the undertaking and at all other appropriate levels up to and including the national level;

(e) the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with the policy referred to in Article 4 of this Convention.

Article 6

The formulation of the policy referred to in Article 4 of this Convention shall indicate the respective functions and responsibilities in respect of occupational safety and health and the working environment of public authorities, employers, workers and others, taking account both of the complementary character of such responsibilities and of national conditions and practice.

71.9. Given these commitments, particularly art 4 and art 5(d), it is mandatory for the Government to consult with the CTU as the most representative body of workers regarding all aspects of workplace health and safety.

S.112 We submit that cl 226 (in relation to regulations apart from exemptions for the armed forces) and cl 234 (in relation to safe work instruments) should be amended as follows (amendments in bold):

> The Minister must not recommend the making of any [regulations or safe work instrument] without first consulting:
>
> **(a) the New Zealand Council of Trade Unions and Business New Zealand;**
>
> **(b) Relevant unions and employer groups operating in the industry or industries; and**
>
> (c) **such other** persons and organisations that the Minister considers appropriate having regard to the subject matter of the proposed [regulations or safe work instrument].

71.10. This argument applies with equal force to the issuance of EPA notices under cl 273.

S.113 We submit that a new s 76B(1)(d) should be added to proposed s 76 of the Hazardous Substances and New Organisms Act 1996 as follows:

> (d) consultation must include the New Zealand Council of Trade Unions, Business New Zealand along with relevant unions and employer groups operating in the industry or industries where the hazardous substances to which the EPA notice applies are or may be used in a workplace.

Further regulations needed

71.11. We note the comments of the Taskforce at [426]-[429]

> 426. However, the Taskforce does consider that there should be regulation-making powers that provide for mandatory health and safety management systems, such as in high-risk areas. The Taskforce also considers that the new agency needs to develop regulations, ACoPs and guidance material for SMEs and low-risk industries on how to implement a fit-for-purpose health and safety management system. These should also address how PCBUs should fulfil their risk management obligations, including how PCBUs take into account the risks associated with their workforces and the characteristics of the work they control. For example, the

regulations, ACoPs and guidance material could highlight the need for PCBUs to address the risks associated with:

a. young and old workers, workers who are new to roles, and temporary, casual and seasonal workers
b. fatigue generally, and long hours of work leading to fatigue specifically
c. workers with LLN [Language, Literacy and Numeracy] issues
d. the use of performance pay systems
e. the financial condition of a company or the competitive environment that a company faces
f. new and emerging technologies.

427. The Taskforce is also concerned that there is a lack of clarity about how accident investigations should be undertaken, and there are inconsistent practices across firms as a result. We consider that there would be value in the new agency setting out expectations for accident investigations, through either an ACoP or guidance material.

428. Managers and supervisors have a central role to play in implementing health and safety management systems. However, concerns have been raised about the capacity and capabilities of managers and supervisors to meet the legal expectations currently placed on them. Our recommendations for the new workplace health and safety legislation would strengthen these expectations (see paragraphs 490 to 492 below). In order to provide clarity on the expectations of managers and supervisors, the Taskforce considers that the new agency should:

a. develop a stand-alone ACoP or guidance material that clarifies the general expectations of how managers and supervisors should fulfil their duties
b. include content in broader ACoPs and guidance material for high-risk industries and specific high-risk situations, which clarifies more specific expectations of managers and supervisors in fulfilling their duties in a high-risk context.

Support for addressing occupational health issues

429. The Taskforce considers that regulations, ACoPs and guidance material on health and safety management systems should address *health* risks and hazards in a similar manner to *safety* risks and hazards. Whilst specialist knowledge or expertise may be required to identify and address many health risks and hazards successfully, this is not the case in all situations. There needs to be a focus by the new agency and PCBUs on the monitoring of exposures to identified health risks and hazards. This will ensure that PCBUs manage their risks and evaluate the effectiveness of their management techniques. This focus on lead indicators will also enable PCBUs to take early action to protect workers' health.

430. The Taskforce considers that the new agency should support PCBUs by including content in regulations, ACoPs and guidance material on health and safety management systems about how to deal with common occupational health risks and hazards.

71.12. We strongly support the development of the regulations, ACoPs and guidance materials identified by the Taskforce. We are concerned that the regulation making powers listed in cl 222 in particular may not be adequate to cover each of these issues.

S.114 We submit that, for the avoidance of doubt, specific regulation-making powers should be included in cl 222 relating to:

- Contracting, pay and remuneration systems that may cause or increase hazards or risks at work;
- Fatigue generally and long hours of work leading to fatigue specifically.

71.13. Regulation-making powers are drafted overly narrowly in relation to worker engagement, participation and representation in cl 224. As drafted, cl 224 appears to restrict the making of regulations relating to worker engagement and worker participation practices (depending on how widely the general regulation-making power in cl 224(d) is read). It may be that the omission of regulation-making powers relating to worker participation practices is an oversight since these do not appear in the Model WHS Act.

S.115 We submit that, for the avoidance of doubt, regulation-making powers should be included in cl 222 relating to:

- Worker engagement; and
- Worker participation practices.

Drafting errors

71.14. Two apparent transcription errors have found their way into the proposed cl 221:

- Cl 221(c)(iii) does not logically relate to cl 221(c). Rather it appears that, as in the Model WHS Act provision on which it is based (Sch 1, cl 1.3) it should be a separate cl 221(iv).
- Cl 221(g)(iv) relates to provisions regarding the police vetting of childcare workers (replicating this function in the current Act). However the Vulnerable Children Bill currently before the House provides a complete code relating to the vetting of the children's workforce and the provisions have accordingly been removed from the Bill except in this instance.

S.116 The drafting errors in cl 222(c)(iii) and cl 221(g)(iv) should be corrected.

PART 6- AMENDMENTS TO OTHER ACTS

72. Accident Compensation Act 2006 (cls 240-251)

72.1. The amendments to the Accident Compensation Act 2006 make three principle changes:

- removing the experience rating levy discount for 'good' employers;
- creating an express power for ACC to develop workplace incentive programmes; and
- prescribing the relationship between ACC and WorkSafe.

72.2. Clause 244 of the Bill amends the Accident Compensation Act 2001 by inserting a power for the ACC to develop and establish workplace incentive programmes and the process for doing so. The CTU is concerned that there is no requirement that workers or unions be consulted or engaged with in developing these workplace incentive programmes. It appears that only levy payers are required to be consulted, and even these poor consultation processes can be side stepped by the Minister under cl 174C. There seems to be no limit on the Minister using this power. Given the recommendations of the Taskforce and the requirements of ILO Convention 155, workers and unions should be involved in health and safety measures on all levels – including in the creation and development of incentive programmes.

S.117 We submit that ACC and the Minister should be required to consult with workers and unions when developing the workplace incentive programmes. Moreover, ACC and the Minister should also explicitly be required to consider any real or potential adverse side effects of the incentive programmes, such as misuse of ACC services, the extent of reporting of health and safety matters, and fair compensation of workers.

72.3. The CTU remains opposed to experience rating based on an individual employer's performance. International research has shown there is (at best) weak evidence that experience rating has any positive effect on health and safety behaviours or injury prevention. Instead of positive outcomes,

numerous studies refer to the perverse incentives often uncovered when experience rating is examined closely, such as employers encouraging employees not to lodge claims for injuries, or to say they occurred outside of work. Perverse incentives have been found to such an extent that experience-rating was abandoned in South Australia in 2010.[54]

72.4. When ACC was questioned on what measures it was taking to ensure the perverse incentives were not encouraged in New Zealand, ACC had no measure by which perverse incentives were monitored. ACC confirmed by email:

> We are currently looking at ways in which we may be able to identify whether claims are being suppressed i.e. no ACC claim is being lodged, as well as expanding the methods used to identify whether claims are being intentionally misreported i.e. workplace injuries being reported and non-workplace injuries.

72.5. Moreover, the one review of experience rating that has been conducted within the ACC scheme, resulted in a conclusion that it is not possible to know if experience rating has had an impact on claims experience or if there has been any change in injury prevention efforts or return to work efforts. The conclusion of the report is that experience rating makes levies "fairer" across employers. It may be "fairer" for some employers but it is not for workers adversely affected by it and it is for workers that the ACC scheme is supposed to be designed. This conclusion confirms that experience rating is not working as an injury prevention tool, it is retrospective, and serves only to make levies more "fair", despite the fact ACC lacks the ability to know whether the scheme is being perversely manipulated. The Bill should take the opportunity to remove experience rating and ensure that "lead indicator" Injury Prevention Programmes such as the Fleet Safety Incentive Programme (FSIP) and the Workplace Safety Evaluation (WSE) programme should be encouraged and further spending should be allocated to developing appropriate programmes for other high-risk industries such as Forestry.

S.118 Clause 245 of the Bill removes the experience rating discount for employers with no qualifying claims. We support this and recommend that the

[54] Purse, K. (2012). Experience Rating: an Australian post mortem. *Policy and Practice in Health and Safety,* 10(1), 45-61.

Committee go further and remove experience rating in its entirety from the ACC scheme.

72.6. Clause 249 of the Bill purports to create another raft of new sections in the Accident Compensation Act 2006, largely focusing on the relationship between WorkSafe and ACC. We support the requirement for ACC and WorkSafe to have a workplace injury prevention action plan in place and the 'partnership' this creates between the two agencies. However, we believe that unions and workers should be involved in the development, amendment and review of the action plan.

S.119 Currently, in these provisions there is no requirement for these agencies to consult with or engage on a tripartite basis. Given the recommendations of the Taskforce, the CTU submits that this should be remedied.

72.7. We are also concerned that the injury prevention programmes run jointly with or by ACC must always be cost-effective in terms of reduction of actual or projected levy rates (s 263(3)(a) of the Accident Compensation Act 2001 and repeated again in cl 249 of the Bill).

72.8. First, this requirement reverses the clear priority given to health and safety in cl 3(2) of the Bill, which requires regard to be had to the principle that workers should be given the highest level of protection against harm. The CTU submits that "highest level of protection" does not mean "highest level of protection that can be shown to save money for levy payers". The requirement for injury prevention to be cost-effective in terms of levy rates is also inconsistent with the broader recognised need to reduce workplace injuries, illness and deaths. Fatalities can be of very low cost to the Accident Compensation Corporation and under these criteria, injury prevention programmes could not target workplace deaths.

72.9. Second, this requirement is no good when there is inadequate data and reporting in the first place, particularly of occupational disease. It would be hard to show that an incentive programme would be effective in reducing levies for occupational disease claims because of the inherent difficulties associated with these illnesses (e.g. under-reporting of occupational disease

and long latency periods). The effect these incentive programmes have on actual or projected levies may not be realised for 30 or more years. Moreover, effective injury prevention programmes may result in increased awareness of ACC cover and entitlements, and therefore result in an increase in actual or projected levy rates. This is a good thing, in that it focuses on the proper needs and entitlements of injured and ill workers. However, educative injury prevention programmes such as this would not be permitted by these changes to the Accident Compensation Act 2001.

72.10. The CTU submits that s 263(3)(a) of the Accident Compensation Act 2001 should be repealed, and cl 264B(2)(a)(i) should be removed from clause 249 of the Bill.

72.11. Of other concerns, we note the Bill does not incorporate other recommendations made by the Taskforce in relation to ACC. These recommendations included amendments to the Accident Compensation Act 2001 to include considerations the ACC must have regard to when levy setting. The Taskforce suggested ACC should consider:

a. Alternative means for setting levies to include measures such as exposure hours

b. How levies account for contract workers and casual employees

c. The extent to which levies reflect work related travel and risks to the public.

73. Hazardous Substances New Organisms Act 1996 (cls 252-294)

73.1. The Bill makes significant changes to the hazardous substances regime that have wider implications on the environment and communities and that these changes have not been clearly signalled to interested parties and experts on hazardous substances. From a democratic scrutiny perspective, this appears to be a misuse of the omnibus provisions of the standing orders.

S.120 We submit that the Committee should recommend that changes to the Hazardous Substances New Organisms Act 1996 should be considered in a separate Bill to facilitate adequate consultation and scrutiny.

S.121 Although having a strong interest in the matter, the CTU does not have particular expertise in relation to hazardous substances and urges the Committee to engage the expert community more fully in relation to these matters. We have concerns about the following points:

- The weakening of hazardous substance controls and importation rules. The CTU opposes these changes as there will be less control on the importation of hazardous substances that will invariably turn up in workplaces and present significant risks.

- The shift from regulations to EPA notices for various hazardous substance issues. Our concern with this change is that regulation of controversial substances may be done in a less public manner. This has implications for the process for amendments, any public notification of changes, reporting, and the creation of offences. Under the amendments, the EPA will determine their own methodology relating to approvals and determinations in consultation with industry.

- The removal of the approved handlers and test certifiers regime from primary legislation, into regulation.

74. Employment Relations Act 2000 (cls 295-304)

74.1. Changes to the Employment Relations Act 2000 are covered by the discussion around adverse conduct provisions above at section 46 above.

75. WorkSafe New Zealand Act 2013 (cls 305-312)

75.1. Clause 309 amends WorkSafe's main objective from "to promote and contribute to securing the health and safety of workers and workplaces" to "to promote and contribute to *a* balanced framework for securing the health and safety of workers and workplaces."

75.2. We strongly oppose this. The words “a balanced framework” are meaningless. It is not at all apparent what must be weighed up to determine “balance”. Nor it is apparent what a “framework” is.

75.3. The words divert WorkSafe from the real task which is securing the health and safety of workers. Instead it only needs to “promote and contribute to” this ill-defined “balanced framework”. It muddies rather than clarifies WorkSafe’s task, where maximum clarity is paramount.

75.4. If reference is intended to the purpose of this Bill then it should be explicit but we think it is unnecessary to do so. Clarity is much more important.

S.122 We submit that WorkSafe’s main objective should not be changed.

APPENDIX 1: SUMMARY OF CTU SURVEY OF HEALTH AND SAFETY REPRESENTATIVES SEPTEMBER 2012

The New Zealand Council of Trade Unions survey of Health and Safety Representatives was completed by 1,204 people who have been trained as health and safety representatives ("reps") with the CTU. An invitation to complete the survey was emailed to 12,000 such people.

Summary Points

- Unrealistic expectations, deadlines, taking short cuts to complete a job and fatigue have been identified as key factors that cause illness and injury at work.
- 13% of reps report bullying by managers when they have attempted to raise health and safety issues at work.
- Reps perform a wide range of tasks but are often not given adequate time during their work hours to undertake their role effectively.
- Too often reps are not elected and are appointed. This does nothing to foster positive democratic workplace relationships.
- Many reps have received the statutory minimum amount of training and long gaps have then ensued. Reps require on-going training to feel more confident in their role.
- Very few Hazard Notices are issued suggesting the power to issue Hazard Notices is not abused by reps.

The reps

This survey had one of the largest response rates of any survey that the CTU has conducted. Of the 1,204 reps who responded:

- There are equal numbers of male and female health and safety reps.
- Health and Safety reps, who are also union members, are more experienced in the role than non-union members. 52% of union members who are also reps have been in the role more than 3 years compared with only 36% of non-union members.
- 61% of union members were nominated and elected by fellow workers whereas only 24% of non-union members were selected in this way.
- Contractors, labour hire and casual workers were under-represented and management and professionals are over-represented.
- Similarly, 54% of union members said they felt "very confident" in their role whereas only 35% of non-union members felt very confident.

Results

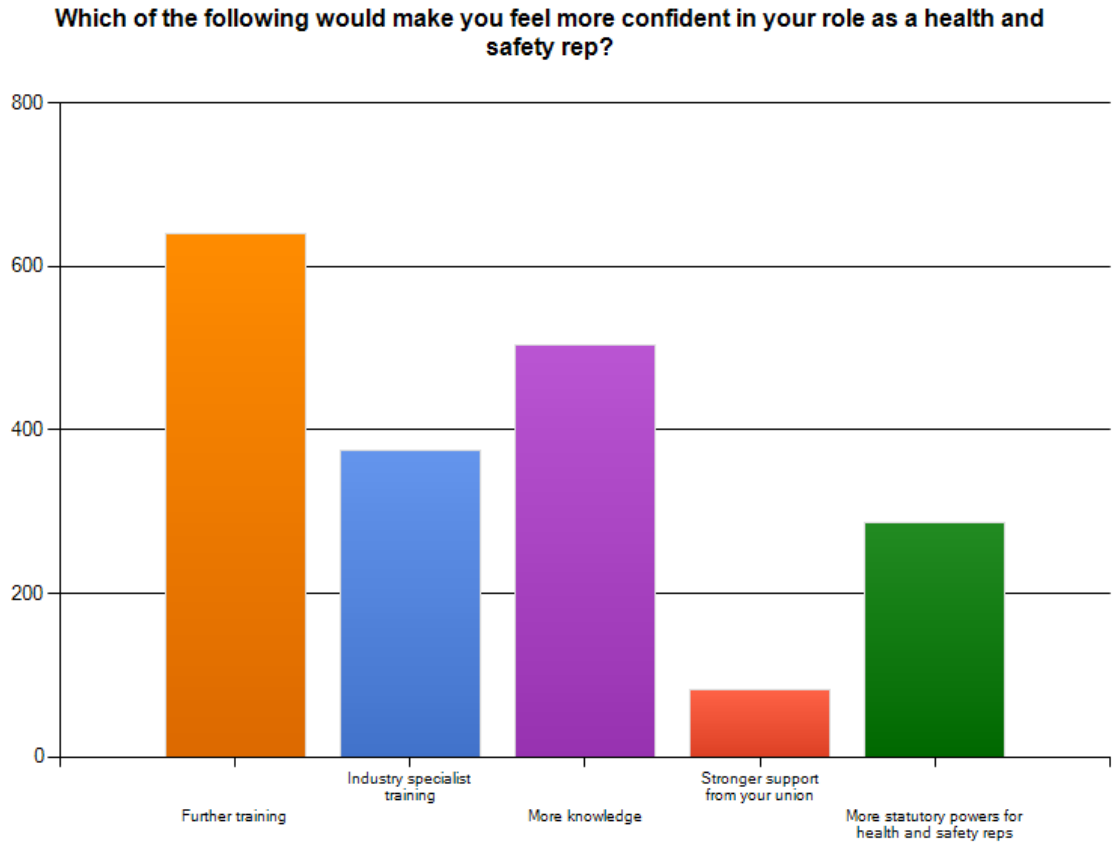
Among those who responded, the reps surveyed are mostly experienced in their role as 63% had been in the role for more than 3 years. [55]

[55] 11% did not respond to this question

As noted in our submission, effectiveness of employee participation depends on a number of conditions including demonstrable senior management commitment to a participative approach and effective autonomous worker representation. The majority of the reps had been elected to the role either after nominating themselves or being nominated by another worker. However nearly 40%, or slightly more than 400 representatives, said that they had been appointed by an employer or manager without an election, some said they did the job because no one else would do it and others because 'it is in my job description'. This indicates that a high proportion of representatives who are not strictly 'representative' in a democratic sense.

Most reps feel confident carrying out their role. However a quarter of people surveyed simply felt ok about it. Further training was identified as the way to increase confidence by 60% of those surveyed: see Figure One.

Figure One:

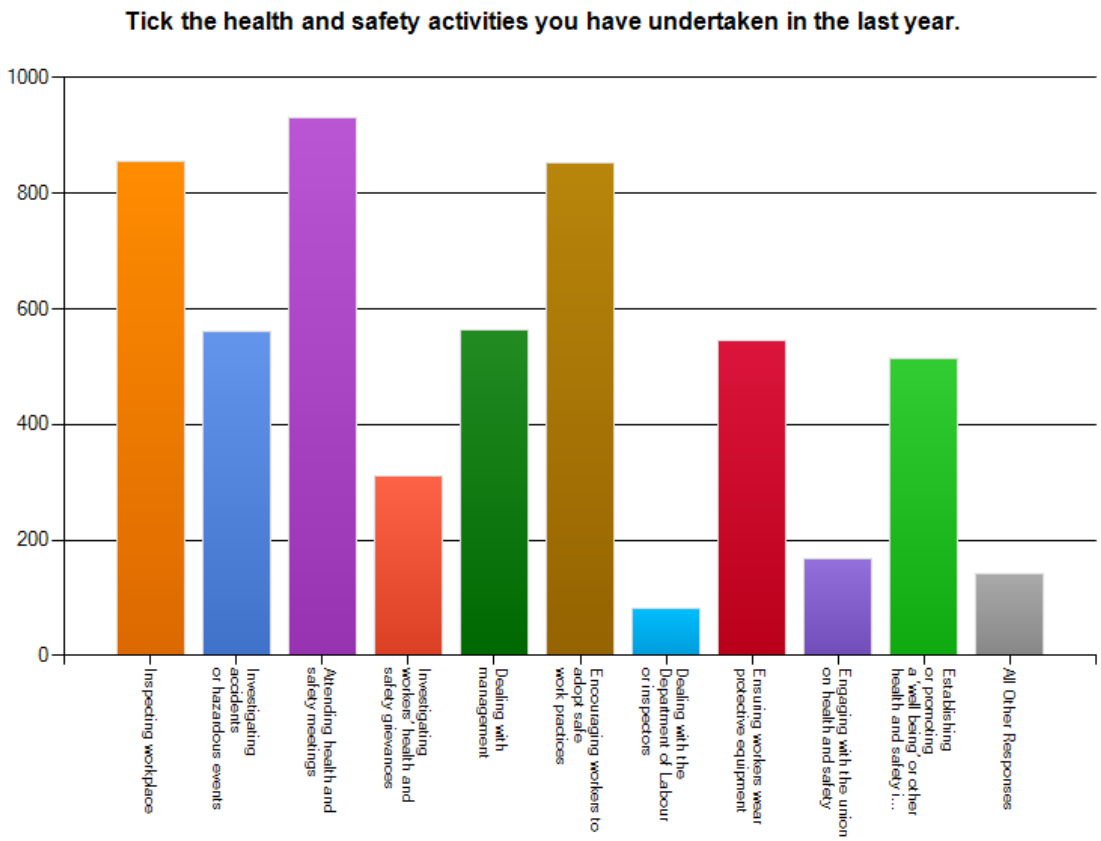


If health and safety were treated as an integral part of the employer's business, it would be expected that representatives would be given time off from their normal duties to perform their health and safety role. Time is essential to effectively perform the role. However less than half of reps said they get time off from their normal work duties to perform the role and a disturbingly large proportion, 21%, said they did not get time off, 33.5% said that they 'sometimes' get time off.

38.9%of reps spend less than 30 minutes per week on their role with the rest spending 30 minutes to 2 hours. Meetings form a large part of the work of the rep with investigations and

encouraging workers to wear protective equipment being important undertakings: see Figure Two.

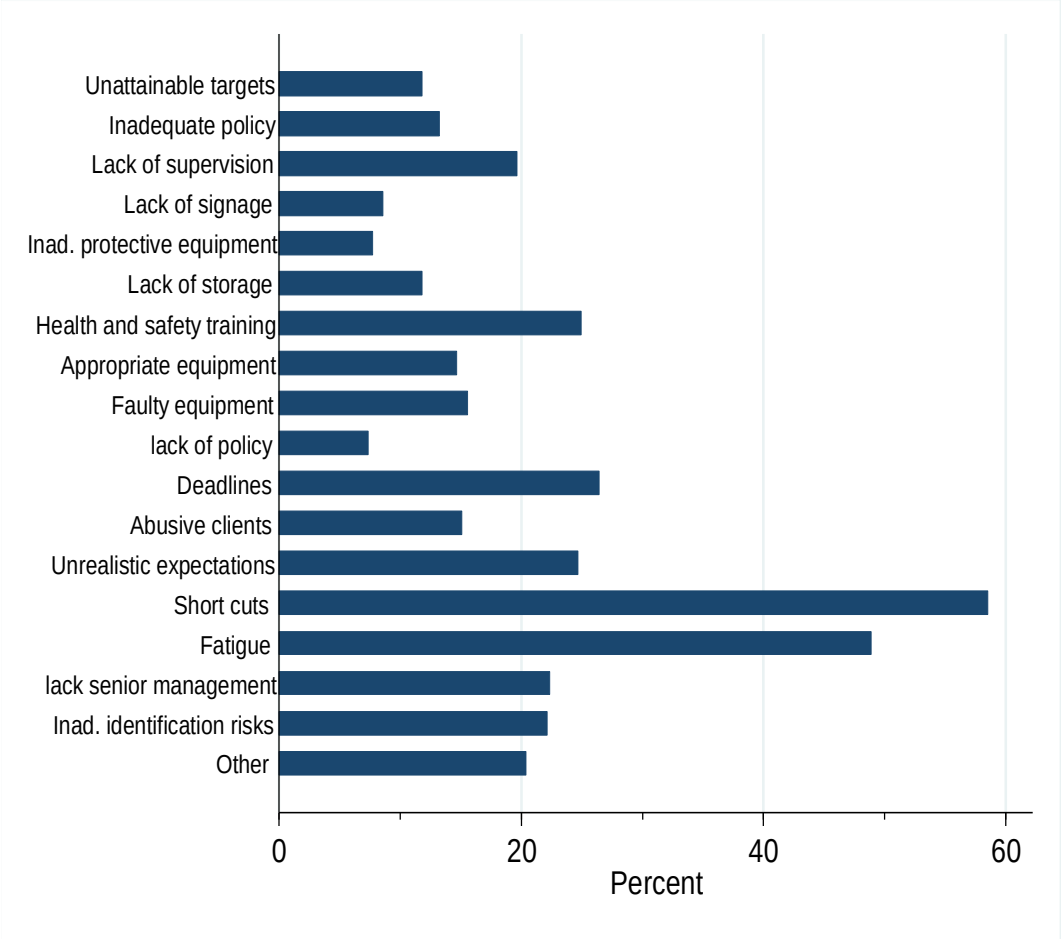
Figure Two:



When given options, most reps identified taking short cuts to complete a job and fatigue or working long hours as contributing to illness and injury at work: see Figure Three and the quotes at the end of this report.

Figure Three

In your opinion, which of the following have contributed to injury or illness at your workplace? (tick as many as applicable)

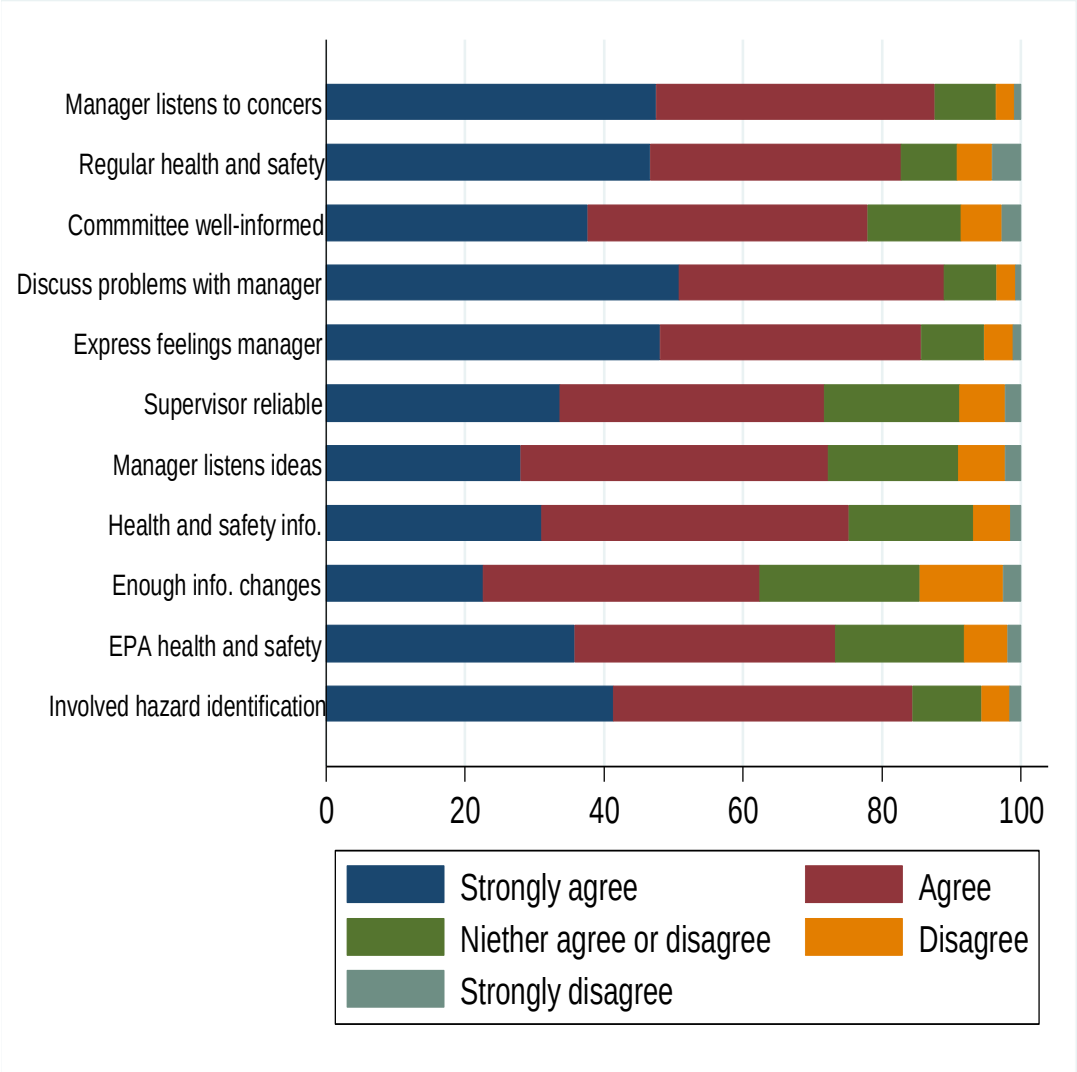


There is a relatively equal spread of reps trained at levels one, two and three but most received their last training more than 4 years ago. Only 27% of reps had received their last training less than 2 years ago. 71% undertook training of two days in duration which indicates that they have completed the statutory requirement under the HSE Act to issue Hazard Notices. Union training was the most common course, however many people listed the CTU training as a separate category to 'union training' per se. Nearly 20% of health and safety training was undertaken by employers which could indicate a lack of independence in terms of empowerment to issue Hazard Notices.

No further training had been received by over half of the reps. Those who had received more training, had been trained for more than two days and mostly this training had been provided by their employer. When people said that they were unable to attend a training course it was mainly due to being too busy at work. Most reps communicate with managers with relative ease. However a few have great difficulty: see Figure Four.

Figure Four:

How strongly do you agree with the following statements?



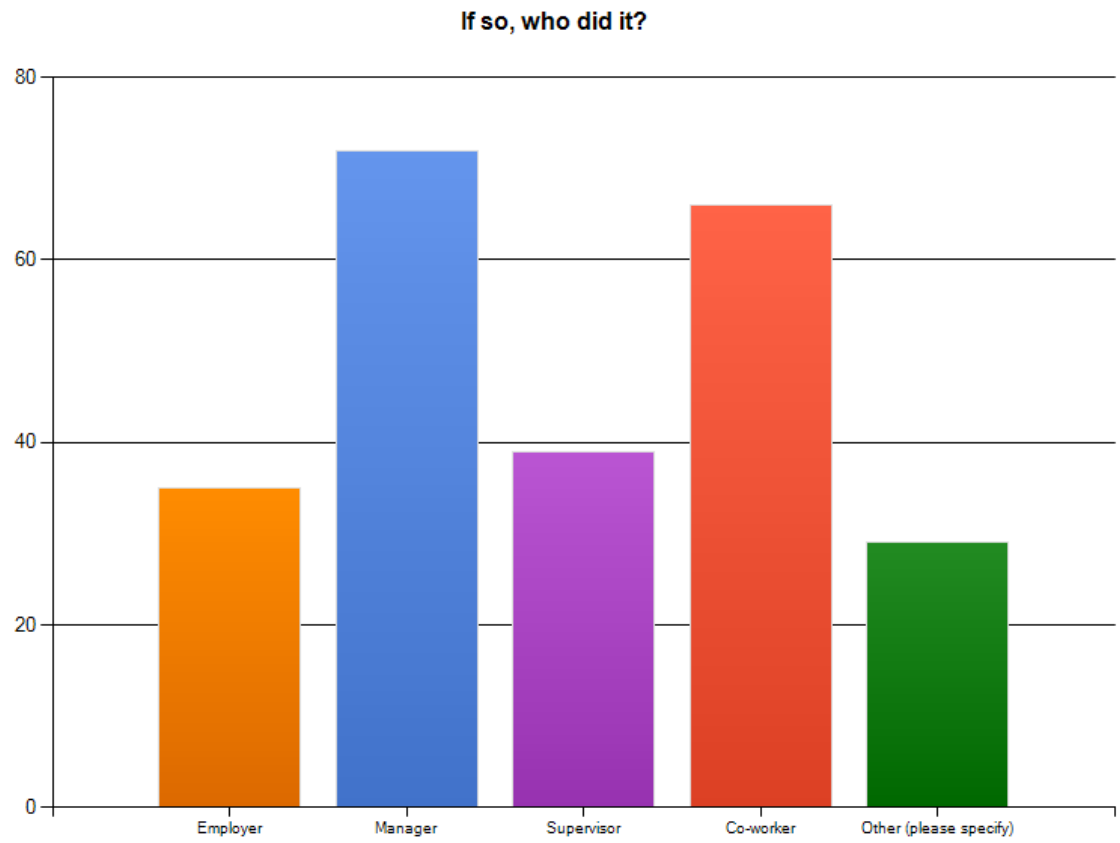
Most reps have not issued a Hazard Notice (72%). However 287 people had issued notices and when they did, they had more often than not issued 3 or more notices. Where a rep had issued a Hazard Notice, 77% of the time the issue was resolved to the rep's satisfaction. It is extremely rare that a Labour Inspector was involved after the issuing of the notice. There were only 20 times where this has happened.

68% of union members have issued at least one hazard notice compared with 32% of non-union members. 74% who had issued a hazard notice said that the matters referred to in the notice were not resolved to their satisfaction compared with 24% of the non-union members.

Reps need to be able to carry out their role without personal disadvantage, but 158 reps had been victimised, harassed or discriminated against for raising a health and safety issue. Of those reps 87.5% had experienced this from a person in authority like a manager, supervisor or employer, but 39.5% of the time it was from a co-worker. See Figure Five.

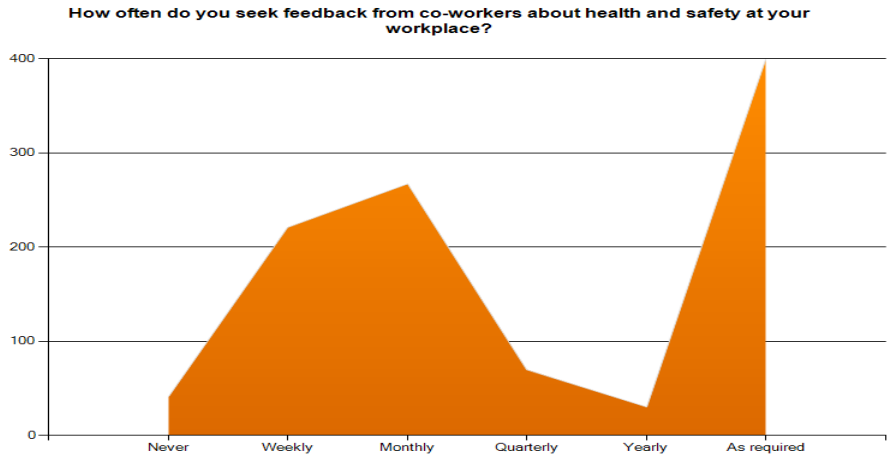
Figure Five:

Have you been bullied, victimized, harassed or discriminated against for raising a health and safety issue?



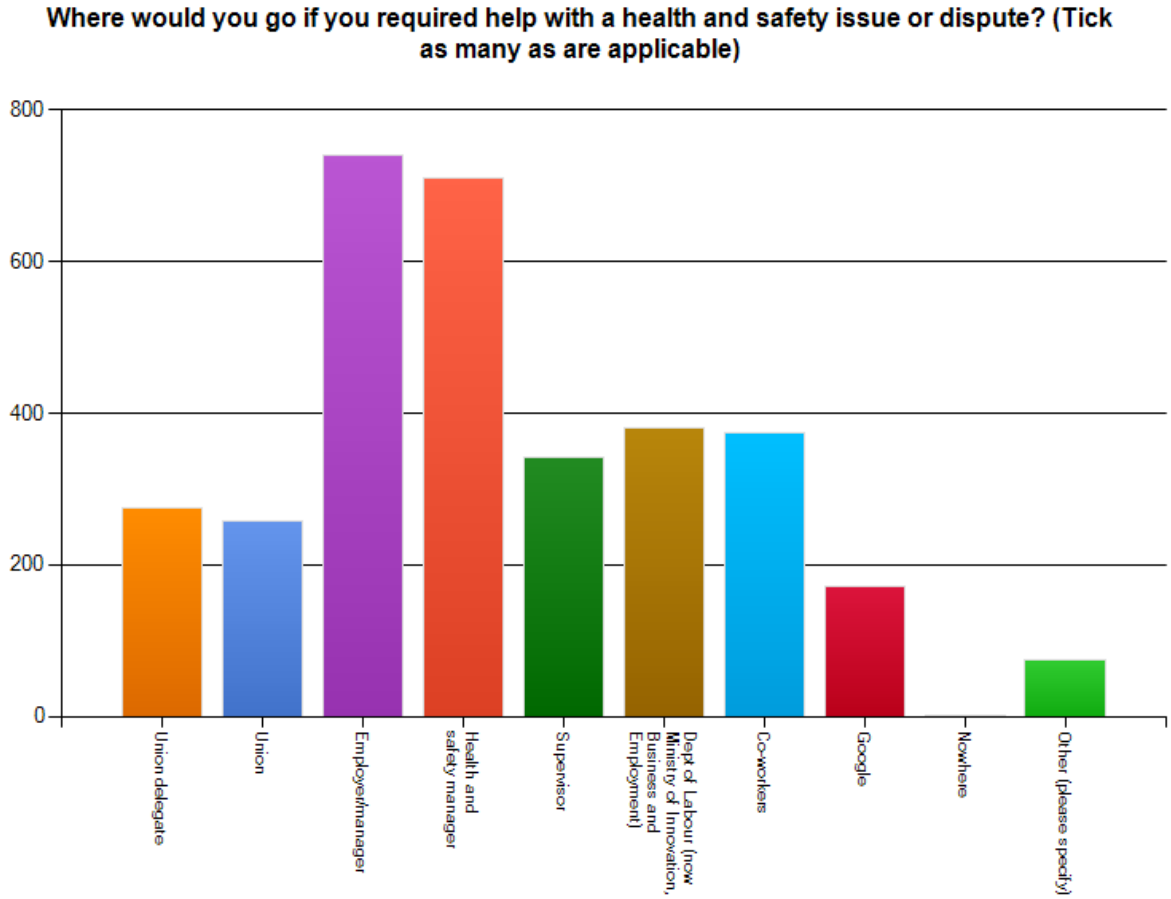
The largest group of reps seeks feedback from co-workers about health and safety 'as required'. However, the combined results of seeking feedback regularly (monthly and weekly) shows that regular feedback is obtained more often than ad hoc feedback: see Figure Six.

Figure Six:



When help is required most reps will turn to their manager, but half of those surveyed went to their union delegate or union. See Figure Seven.

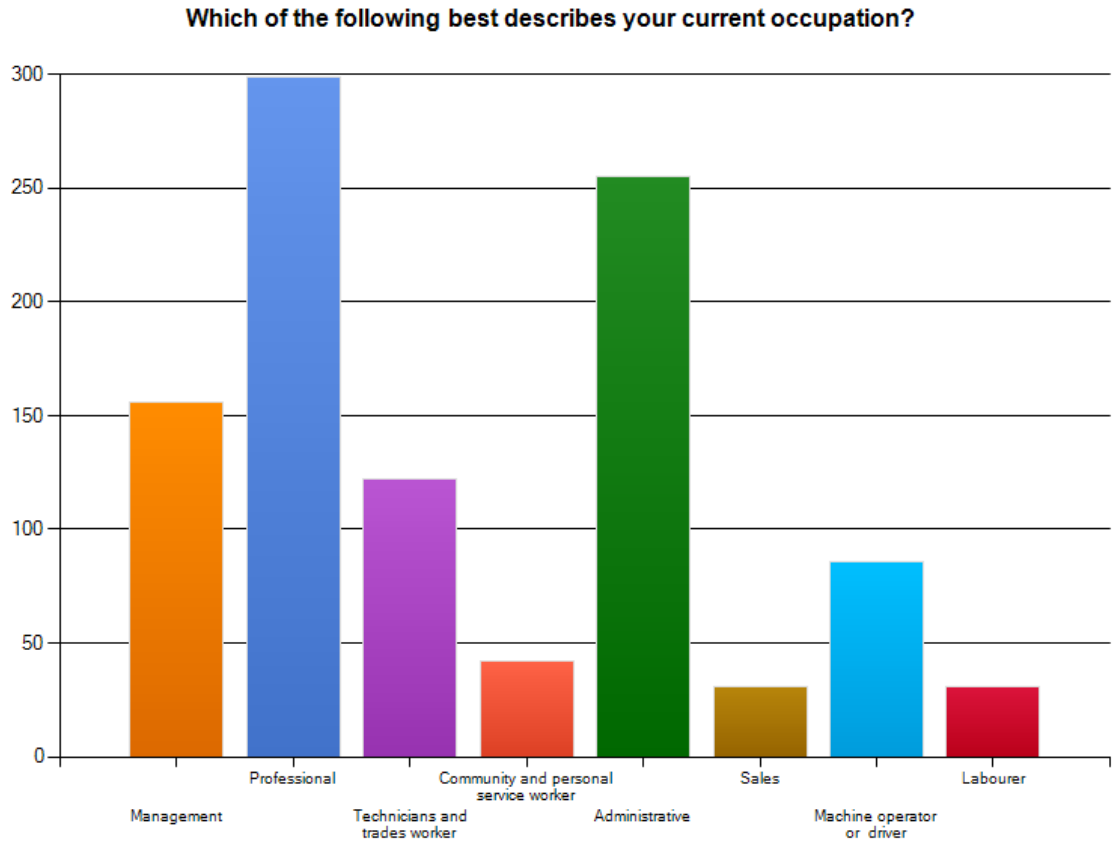
Figure Seven:



The gender split of health and safety reps who completed the survey is half male and half female of whom 735 were born in New Zealand. Most health and safety reps work fulltime (91%) and are permanent (98%) staff. Most reps have a regular daytime schedule (74%). The majority of the co-workers of the reps are fixed-term employees, however 30% were casual, labour hire, contractor or subcontractors.

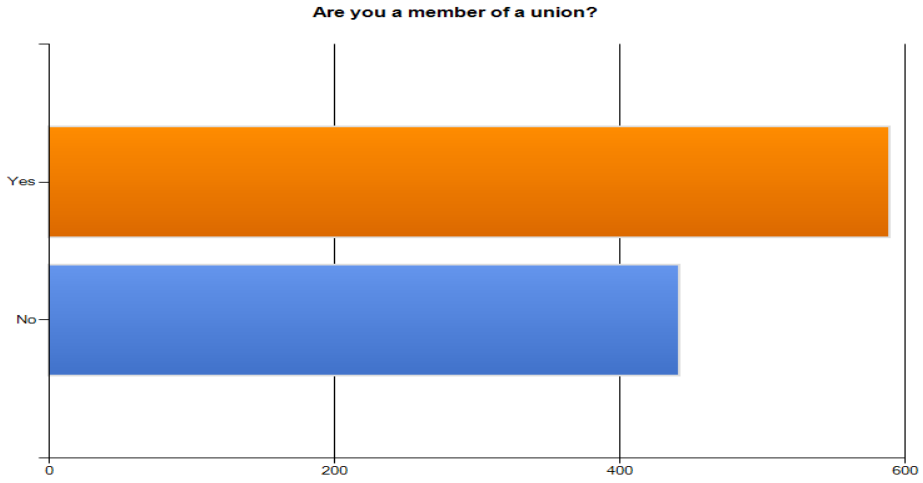
Most of the reps who returned the survey were either professionals, management or administrative workers, and only 30 were labourers and 87 machine operators and drivers. This perhaps suggests that access to a computer at work made it more likely that a survey would be completed. See Figure Eight.

Figure Eight:



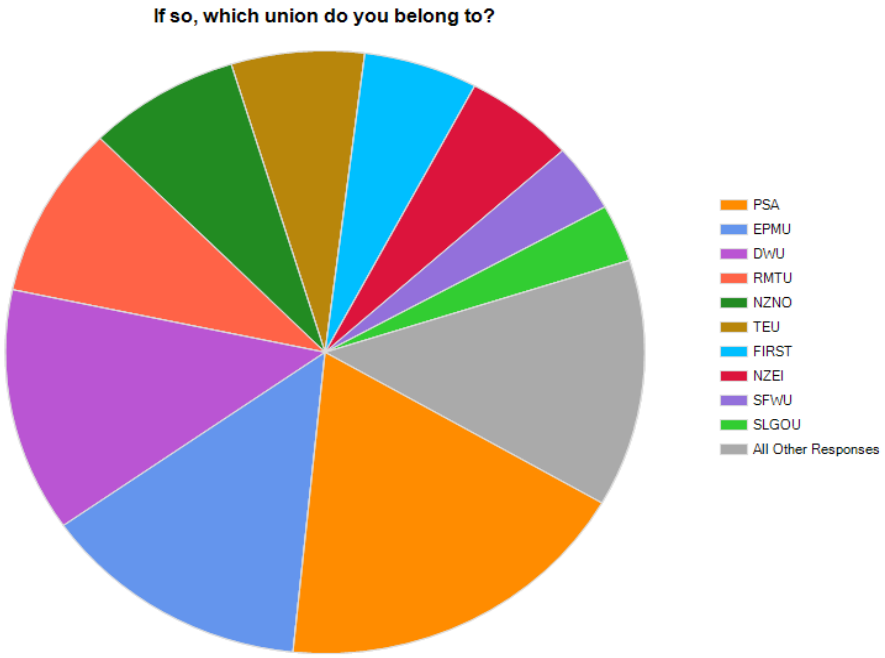
Union membership is high among surveyed health and safety reps (compared to the proportion in the New Zealand workforce). As Figure Nine shows, 57.1% are members of unions. However consultation with unions could improve as two thirds of responding reps did not consult with their union about health and safety.

Figure Nine:



Of those who are members of unions many surveyed reps were from the NZ Police Association and the NZ Medical Lab workers union. Others are identified in Figure Ten.

Figure Ten:



In an additional question, respondents were given the opportunity to have their say about the cause of injury. The full results are available on the CTU website, an indicative selection is below.

Question: In your opinion, what is the cause of the majority of incidents causing injury or illness in your workplace?

"Lack of staff to do the job. Working undermanned. Bad weather. Trying to get the job done in short time. Staff willing to come to work when they are unwell. Lack of sick leave and annual leave."
"Pressure from management to do unsafe jobs."

"People trying to 'make do' without or with substandard equipment so as not to cause a bother. Especially those in a trainee role. Stress caused by unfairness and negative management attitudes towards some people."

"Profit and more profit – There is no reason or incentive for companies to comply to H&S – Whistle blowers are ridiculed and eventually leave the company."

"Not all near misses or incidents are reported as they either don't get followed up or depending on who you are you get disciplined or it is swept under the carpet. Companies are more concerned about stats as the staff see it and when it comes down to getting something fixed it takes too long but yet we get told there is no price on health and safety."

"Men not trained for the job, unskilled labour working in a dangerous workplace, lack of, or no, on-site training, no safety gear supplied, lack of safety knowledge from company, excessive work hours, dead line pushed too hard forcing accidents."

"In my opinion putting unnecessary pressure on staff to complete tasks with haste which in some cases temporarily puts safe practices aside just to get the job done. All of our staff members are aware of the dangers and hazards in their place of work but now and then you will get injury from a

staff member and I would ask them what happened and all they would say is: "Just being too quick".''

“Production focussed mindsets from both workers and management. Complacency.”

“Body stressing and contractors who are trying to complete projects in a shorter timeframe.”

“Fatigue with having to meet deadlines and not being allowed to work overtime to meet those deadlines. Not taking micro breaks from computers because of those deadlines.”

“Contractors not having systems in place to audit their work sites, safety equipment ie power leads not having electrical compliance tags, harness not inspected. Expect the principal to monitor and police H&S, only responding when an issue is raised. Pressure to complete work in the shortest time possible. Management not taking health and safety seriously, will have all the paper work in place to meet but take the time to develop a culture of safety at the coal face. Trying to complete a job in the cheapest way possible, particularly contractors tendering, building safety into the job will increase the price submitted. Lack of commitment to identify and control hazards.

“Mistakes, unworkable work practices, that can’t be used if work is to be done, but as long as the work gets done, management is happy. The moment an incident occurs these unworkable rules are used to discipline those involved.

“Familiarity within work environments, tools not up to standard for task, management unwilling to listen to staff "at the coal face", companies baulk at H&S initiatives as soon as the word money is used, workers being too lazy to contribute to H&S policies, people sitting in offices making decisions and rules surrounding a workplace they have never been to - thereby endangering staff.”

“Employers increasing the workload on individual employees by not employing the correct number of people to do a job safely. Rushing and lack of proper training are the leading causes in my opinion. These are generally the result of management cost-cutting measures.”

“People’s attitude towards health and safety, it's made out to be a tick box excercise until someone gets hurt then the finger-pointing and potshots start about how H&S is a joke and load of crap.”

“A desire to please the management, so people work long hours, work at the weekend, ignore H&S guidance in the belief that is what the company wants. It isn't.”

“Staff failing to take personal responsibility. Staff failing to say 'no'. This could be through fear?”

“Management not understanding the processes - we actually go through. Putting a bandaid on instead of actually knowing the root cause of the problem or incident. Also management just paying lip service to the processes and not actually understanding the way things actually work on the shop floor.

“Long hours of work - night shift seven days a week.”

“Inside work, pressure to get jobs done on a minimal amount of time. Wages are tight and employers need to make good return to keep job security.

Management not enforcing take five. Not actively engaging reps to take part in inspections, management not actively enforcing safety inspection findings because they know there are not the resources to make short term improvements.

“Accidents, lack of support by management for team leaders when "shortcuts" are being taken or bad work practices are being performed.

Illness ... coersion by management on workers to come to work when ill by implying someone is not "pulling their weight" or threatening to require a medical certificate for what is an illness that only requires bed rest and over-the-counter medication to get better ie influenza or colds

“Rotation shift work. It’s a proven fact that night shift upsets the body big time. Tiredness would be the biggest thing we keep an serious eye on.”

“Being over-confident, lack of skilled workers/ leaders/ people frightened to stand up to the boss, drug/alchol testing means accidents go unreported.”

“Too many shortcuts being taken to meet production deadlines.”

“Stress. Workers do not think of consequences of their actions when under duress and stress. They take risks with equipment from time restraints put on them.

“Pressure to get work completed with lack of appropriate tools and staff.”

“Negative and "she'll be right" attitudes to safety. Some people think that near miss reporting is a negative thing where it clearly isn't.”

“Poor support from management who generally ignore Health and Safety.”

“Stress due to shift work.”

Subtley being pushed by managers and supervisors to hurry on tasks and breakdowns to minimise downtime. Staff are constantly rushing instead of planning jobs for themselves. We work 24/7 shifts therefore more care is needed at night.

“Apathy - most workers think it will happen to someone else. Not reporting repeat incidences, then finally someone else suffers a worse fate. **C**ontractors taking short cuts (not following permit to work). People who are charged with the responsibility to follow the permit to work but they just fill it in as a paper exercise.

“Under-staffing - overworked staff who struggle to get annual leave and 4 days off per fortnight, lack of adequate protective equipment, lack of sleep due to lack of staff and having to work 7 or 8 sleep overs in a fortnight. We constantly struggle to get adequate supplies of protective equipment and are now 'rationed' so we don't use too much as it is costly!

“Fatigue and stress, particularly as fewer and fewer workers are required to do more and more work.”

“Most accidents I have been involved with are management’s refusal to listen to the serious requests of staff and reps. We have a H&S policy and procedure that are token and a commitment which is really only "risk minimisation" or ‘'butt-covering" rather than a real concern for safety.”

“Tired staff, not rotated in jobs enough. Too long in one area doing the same movements all the time, pain and strain injuries.”

“Safety is seen as a means that middle management can use to victimise employees who are prepared to use their system to try and ensure that everyone has a level playing field to when it comes to their approach to the way tasks are done in a safe and productive manner. Because of inconsistent recording of safety there is now a growing group who believe, if nothing is said, there will be no repercussions and therefore no ongoing vitimisation of themselves and other like-minded employees.”

“Middle managers and supervisors being so keen to show senior management that they are meeting productivity targets that they sideline H&S whenever they can get away with it and pressurise employees to work unsafely or they turn a blind eye to unsafe practices because it would slow down production or cost money if they were to make the necessary changes to keep people safe. Senior management are generally unaware that this is going on as they rely upon the supervisors and middle managers for accurate information. It's all ok until there is an accident or incident and then the supervisors and middle managers duck for cover and try to blame the employee rather than take responsibility for allowing or encouraging unsafe behaviours or processes.”

“Our work environment is cramped and we have many people working in a limited space which causes injuries. Shortage of staff creates more pressure to complete the mountain of work. Management make the staff feel like they are clumsy fools when we report an injury so some do not get reported and as a result continuous repetitive movement creates a even worse problem.

“Employees failing to follow instructions and their training, taking shortcuts or ignoring obvious hazards, being pressured to work and safely, failing to speak up or report a trivial accident and hazards, poor literacy and understanding. Employers failing to have adequate health and safety systems or focusing on compliance (paper-based) rather than the actual performance, poor educational and lack of understanding of obligations and failure or reluctance to find out what is required (number 8 wire mentality) failure to maintain knowledge of current industry best practice or standards, do not deliberately set out to have unsafe workplaces but allow commercial and other pressures to override, ultimately cannot see it is important, little chance of being caught and although concerned about levels of fines ultimately these are imposed on their companies rather than themselves personally.”

“People not evaluating the potential risk before undertaking a task. The time to evaluate (and keep safe) must be factored into each job.”

”Also giving staff confidence to say “no” to situations they feel maybe dangerous.”

“Overwork, unreasonable deadlines, stress.”

“Staff in the job a long time not understanding the times have changed. Not realising that we all need to assess work situations to keep staff aware of hazards or potential hazards. Getting middle management to buy in to H&S. Upper management is now awesome.”

“An imbalance in the focus on productive work vs safe work leading to deliberate short cutting of safe practice and poor judgement as a result of high workplace stress. Many of the reporting documents are too clumsy and time-consuming for workers even those with good literacy, they appear to be more about covering the boss's arse than keeping workers safe.”

“Unrealistic performance expectations from employers coupled with lack of focus on H&S in favour of production, or employee productivity.”

“Lack of foresight or awareness of what could happen by not following the correct procedure. People are more concerned with getting the job done than with getting the job done safely.”

“Bad practice through urgency. Outsiders to the workplace. Lack of money in a household causing minor sickness to be tolerated by staff and brought to the workplace.”

APPENDIX 2: SUMMARY OF RECOMMENDATIONS

PART 1- HEALTH AND SAFETY AT WORK

Purpose (cl 3)

S.1 We submit that a new cl 3(1)(i)should be inserted as follows:

> Successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of persons doing the work and the PCBU's involved in that place of work.

S.2 We submit that reference to "unsafe systems of work" should be added to cl 3(2) (amendment in bold):

> Clause 3(2) In furthering subsection (1)(a), regard should be had to the principle that workers and other persons should be given the highest level of protection against harm in their health, safety and welfare from hazards and risks arising from work **or from unsafe systems of work** or from specified types of plant as is reasonably practicable.

Application of Part 3 to prisoners (cl 11)

S.3 We submit that cl 11 should be deleted.

Interpretation (cl 12)

S.4 We submit that a non-exhaustive definition of "illness or injury" would assist with both of these issues as follows:

> **"Illness or injury,"** includes:
>
> physical or mental harm caused by work-related stress; and
>
> illness or injury that does not usually occur, or usually is not easily detectable, until a significant time after exposure to the hazard.

S.5 We submit that the first part of the definition of hazard in cl 12 should be amended as follows:

> **hazard-**
>
> (a)....Means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of death, illness or injury; and

Meaning of PCBU (cl 13)

S.6 The CTU strongly supports the widening of duties to workers and other persons in the workplace from 'employers' to 'persons conducting a business or undertaking.'

S.7 We submit that a better approach than a blanket exemption for home occupiers would be to decide which duties or penalties are too onerous for them to comply with and exempt them from these specifically. This may be done by primary legislation or through regulation (as envisioned by cl 13(1)(b)(iv)).

S.8 We submit that cl 13(1)(b) should be amended to ensure that only workers and officers who are natural persons working for the PCBU but not operating a business or undertaking in their own right are excluded.

Meaning of worker (cl 14)

S.9 We submit that the words "unless the context requires otherwise" should be deleted from clause 14(1). It is unclear what that means and there is no similar qualification in the Model WHS Act.

Meaning of supply (cl 16)

S.10 We submit that the meaning of 'supply' in cl 16 should be broadened to include the supply of services.

S.11 We submit that the definition of supply in the Bill should include 'loan.'

Reasonably practicable (cl 17)

S.12 The CTU supports the move to a test of 'reasonable practicability.'

S.13 We submit that cl 17(e) should be amended by separating it out from the list of relevant matters to stand alone as cl 17(2) to read:

> Whether after assessing the extent of the risk and the available ways of eliminating or minimising the risk in s 17(1) if the cost associated with these available ways is grossly disproportionate to the risk.

Subpart 4- Key principles relating to duties

S.14 We submit that Subpart 4 fits more logically in Part 2- Health and Safety Duties and should be moved to that Part.

Duty to manage risk (cl 22) and systematic risk identification

S.15 We recommend that cl 22 is reworded to retain this important function as follows (suggested additions and amendments in bold):

> **22 Duty to manage risk**
>
> A duty imposed on a person under this Act to ensure health and safety requires the person—
>
> **(a) to ensure that there are effective methods in place to systematically identify existing hazards and risks at work; and**
>
> **(b) to ensure that there are effective methods in place to systematically identify (if possible before, and otherwise as, they arise) new hazards and risks at work;**
>
> **(c) to regularly assessing each hazard or risk identified,**
>
> **(d)** to eliminate risks to health and safety, so far as is reasonably practicable; and
>
> **(e)** if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

Duties non-transferable (cl 24) may be shared (cl 26) and cannot be contracted out of (cl 29)

S.16 The CTU strongly supports these clauses as a fundamental underpinning to the wider concept of PCBU.

Duty to consult with other duty holders (cl 27)

S.17 The CTU strongly supports the requirement that each person with a duty in relation to the same matter "must, so far as reasonably practicable, consult, co-operate with and co-ordinate activities with all other persons who have a duty in relation to the same matter."

S.18 We submit that the duty to consult other duty holders should be subject to express requirements to deal fairly with each other, not to mislead or deceive one another and to be active and constructive in discharging the duty.

S.19 We recommend also that a guideline for duty holders on ways in which they can most effectively discharge their shared duties be developed and issued as soon as possible.

PCBU must not levy workers (cl 28)

S.20 The CTU strongly supports the banning of levies or charges for health and safety (including in particular protective clothing or equipment).

PART 2- HEALTH AND SAFETY DUTIES

Primary duty of care (cl 30)

S.21 We submit that the primary duty of care should be expressed as applying "without limitation." Additionally, the primary and further duties should be placed in separate subparts to make the latters' subordinate status clear.

Further duties of PCBUs in labour hire situations

S.22 We submit that further duties ought to be imposed upon labour hire companies to ensure that they understand and meet their obligations under the Bill through either an additional clause or regulations. Examples might include:

- Labour hire PCBUs must ensure that workers are given an adequate health and safety induction to the workplace;
- Labour hire PCBUs must ensure that there are adequate worker participation practices at the workplace to allow workers they employ or engage to be engaged with in relation to health and safety matters; and
- Labour hire PCBUs must ensure that all workers supplied to a workplace have all needed authorisations to undertake the necessary work.

Duty of self-employed persons (cl 31)

S.23 We submit that cl 31 should be transferred back into a subclause of cl 30 and the explanatory note included to clarify (as intended) that a self-employed person is both a PCBU and a worker.

Duty of officers (cl 39)

S.24 We submit that the exclusion for Ministers of the Crown is inappropriate and should be removed from the Bill.

S.25 We submit that the definition of officer ought to include (per the Model WHS Act):

> a person:
>
> (i) who has the capacity to affect significantly the corporation's financial standing; or
>
> (ii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper

performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)….

S.26 Alternately, the full definition of director could be incorporated by reference to s 126 of the Companies Act 1993 (and in particular, s 126(1)).

S.27 We submit that the definition of officer should include persons who participate in the making of decisions that affect the whole or a substantial part of the business of the PCBU. This should be framed in such a way as it does not discourage worker engagement or participation.

S.28 We submit that cl 57(2) of the Bill should be amended to insert "or officer" after worker to permit the potential introduction of licensing for officers (following policy and capacity development)

Duties of workers (cl 40)

S.29 We support the imposition of duties on workers in the manner that those duties are set out in the Bill.

Reckless conduct in respect of a health and safety duty (cl 42)

S.90 We submit that the test of recklessness in cl 42 should be broadened to include negligent or wilful conduct.

S.91 We submit that the maximum term of imprisonment under cl 42 should be raised to 10 years.

Offence of failing to comply with a health and safety duty that exposes individual to risk of death or serious injury (cl 43)

S.92 We submit that a breach of cl 43 should be punishable for natural persons by a maximum term of imprisonment of 3 years.

Notifiable events and preservation of sites (cls 18-20, 51-59)

S.30. We submit that there are a number of amendments that could be made to the definition of notifiable incident to ameliorate this problem:

- The definition of "serious risk" should be clarified in the interpretation section;
- The word "normally" should be inserted into cl 18(b) to read "…normally requires the person to be" hospitalised, and into cl 18(c) to read "…normally requires the person to have medical treatment…"
- The word "immediate" should also be removed from cl 18(b); and
- The prerequisite in cl 18(1)(c) for medical treatment being sought within 48 hours should be increased to at least 7 days.

S.31 We submit that consideration should be given to extending this list to other diseases typically regarded as having an occupational cause, such as those listed in sch 2 of the Accident Compensation Act 2001.

S.32 We submit that there should also be a duty also imposed on the PCBU to notify the person with management or control of the workplace of the occurrence of a notifiable event so that they preserve the site as required by the Bill.

S.33 We submit that cl 53 should be amended to make it clear that, like cl 17, the cost associated with preserving the site should only be considered where the cost is grossly disproportionate.

S.34 We submit that the exemption in cl 54(2)(b) should be removed. Alternatively, a body should only be removed after receiving authorisation from the Inspector *or* a Coroner once sufficient evidence has been gathered.

Occupational health and disease

S.35 The CTU recommends the United Kingdom approach should be adopted in New Zealand as a starting point.

Liability of volunteers and volunteer associations (cls 46-48) and volunteer associations and PCBUs (cl 13)

S.36 We submit that a volunteer association should be considered a PCBU if it employs or engages any person to carry out work for the volunteer association. The provision could be qualified with the use of "normally" or "typically" engages any person if this is thought too onerous.

Authorisations (cls 54-59)

S.37 We submit the Bill should be amended to clarify that WorkSafe will retain accountability over any person or agency that WorkSafe authorises or delegates any of its functions or powers to.

PART 3- ENGAGEMENT, WORKER PARTICIPATION AND REPRESENTATION

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

S.38 We submit that controversial aspects of the worker participation framework should be set out in primary legislation.

Outline of Part 3 (cl 60)

S.39 We submit that the worker participation principles set out by the Taskforce should be adapted as a purpose section for Part 3.

Engagement with workers (cl 61-63) and worker participation practices (cl 64)

S.40 We submit that "so far as reasonably practicable" should be deleted from cl 61(1).

S.41 We submit that the duty of good faith is very relevant to the question of the nature of engagement with workers (and their representatives) under cl 62. Therefore it should be specifically referenced under the nature of the engagement.

S.42 We submit therefore that the nature of engagement under cl 62 must include a requirement that workers be given a reasonable opportunity to seek advice on the matter. The logical place for this requirement would be cl 62(1)(b) before current cl 62(1)(b)(i).

S.43 Cl 62(2) states that "If the workers are represented by a health and safety representative, the engagement must involve that representative." We support this but submit it is unwise and illogical not to also state that the engagement must also include both health and safety committees and unions if the workers are represented by them as well.

S.44 We submit that to reinforce the ongoing and systematic nature of the engagement required:

- Cl 62(1)(1) should be amended to state (addition in bold) "that relevant information about the matter be shared with workers **at the earliest possible opportunity**; and"
- Cl 63(a) should be amended to state (addition in bold) "Engagement with workers under this subpart is required **on an ongoing basis** in relation to the following work health and safety matters:"

S.45 We submit that despite the use of the non-exhaustive 'including" at cl 64(3) that the list of factors should give more guidance to workers and PCBUs. For example, the factors ought to include "the composition of the workforce include any issues of language, literacy or numeracy faced by the workers."

Requirements for conducting elections of health and safety representatives (cl 68)

S.46 We submit that cl 68 should specify that elections are conducted by workers and their representatives unless they ask that the PCBU or PCBUs facilitate the election.

S.47 We submit that cl 61 should also contain restrictions on undue influence or attempted undue influence by the PCBU on the election.

Training for health and safety representatives (cl 80)

S.48 The CTU submits further training should be made available for those who would like to be involved in setting industry standards. Under a tripartite arrangement this higher level training would be necessary for health and safety representatives and union delegates and officials who would represent worker interests in the standard setting and risk assessment processes.

S.49 We submit that cl 80 of the Bill should be based on cl 72 of the Model WHS Act with the inclusion of the specified allowance of at least two days training per year. Subject to drafting refinements, the clause may look something like this:

> **80 Obligation to train health and safety representatives**
>
> (1) The person conducting a business or undertaking must, if requested by a health and safety representative for a work group for that business or undertaking, allow the health and safety representative to attend a course of training in work health and safety that is—
>
> (a) approved by the regulator; and
>
> (b) a course that the health and safety representative is entitled under the regulations to attend; and
>
> (c) subject to subsection (5), chosen by the health and safety representative, in consultation with the person conducting the business or undertaking.
>
> (2) The person conducting the business or undertaking must:

(a) as soon as practicable within the period of 3 months after the request is made, allow the health and safety representative time off work to attend the course of training; and

(b) pay the course fees and any other reasonable costs associated with the health and safety representative's attendance at the course of training.

(3) The person conducting the business or undertaking must allow a health and safety representative at least 2 days' paid leave per year to attend health and safety training.

(4) Any time that a health and safety representative is given off work to attend the course of training must be with the pay that he or she would otherwise be entitled to receive for performing his or her normal duties during that period.

(5) If agreement cannot be reached between the person conducting the business or undertaking and the health and safety representative within the time required by subsection (2) as to the matters set out in subsections (1)(c) and (2), either party may ask the regulator to appoint an inspector to decide the matter.

(6) The inspector may decide the matter in accordance with this section.

(7) A person conducting a business or undertaking must allow a health and safety representative to attend a course decided by the inspector and pay the costs decided by the inspector under subsection (6).

Maximum penalty:

In the case of an individual—$10 000.

In the case of a body corporate—$50 000.

Work groups (cl 66-68) and the removal of the default system of worker participation

S.50 We submit that a default provision should be retained where workers have requested a health and safety representative system and negotiations have failed to resolve an impasse within 6 months.

S.51 We recommend that work groups are not implemented in a New Zealand context. They are likely to be overly bureaucratic and a brake on workers' ability to engage.

S.52 Instead we propose adaption of s 19B(1) and (5) along with 19C(5) of the current Act. These sections state:

19B(1) Every employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work.

19B(5) In subsection (1), reasonable opportunities means opportunities that are reasonable in the circumstances, having regard to relevant matters such as—

(a) the number of employees employed by the employer; and

(b) the number of different places of work for the employees and the distance between them; and

(c) the likely potential sources or causes of harm in the place of work; and

(d) the nature of the work that is performed and the way that it is arranged or managed by the employer; and

(e) the nature of the employment arrangements, including the extent and regularity of employment of seasonal or temporary employees; and

(f) the willingness of employees and unions to develop employee participation systems; and

(g) the overriding duty to act in good faith.

19C(5) A system may allow for more than 1 health and safety representative or health and safety committee and, in that case, each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.

S.53 If the Government decides to proceed with work groups several changes are necessary to ameliorate the worst possible effects.

S.54 First and most importantly, we submit that health and safety representatives' powers must not be generally limited to their particular work group. If work groups are persisted with they should be regarded only as an electorate for elections of representatives, not as an area binding jurisdiction.

S.55 We submit that the content of Model WHS Regulations 16 and 17 should be included in the Bill (as new cls 67A and 67B).

Health and safety representatives' functions (cl 69)

S.56 Health and safety representatives should be given the mandate to continue to undertake system-wide and proactive work. We submit that their functions should include:

- To foster positive health and safety management practices in the place of work:
- To promote the interests of employees in a health and safety context generally; and
- To assist in developing any standards, rules, policies, or procedures relating to health and safety that are to be followed or complied with at the workplace.

Health and safety representative may attend interview (cl 70)

S.57 We submit that "the consent of the workers concerned" in cl 70(2) should be replaced by "the consent of any of the workers concerned."

S.58 We submit that the decision to exclude a health and safety representative should be a reviewable decision under cl 151, and it should not override the workers right to be represented in that meeting.

S.59 We submit cl 70(3)(b) should expressly state that the worker may be represented by another person (such as another health and safety representative, union official or lawyer (other than a lawyer representing the PCBU)).

Assistance by other persons and rights of access (cls 73, 78 and 79)

S.60 We submit that cl 71(1)(c) allowing the PCBU to refuse access to persons assisting health and safety representatives should be removed.

S.61 We submit that if the provisions allowing PCBUs to refuse access remain in the Bill then a clause should also be included stating that a PCBU who denies access to a person assisting a health and safety representative should also be required to provide written reasons as soon as possible.

S.62 We submit that a new cl 79(1)(d) should be included as follows:

> (d) If access is refused to a person assisting a health and safety representative under s 79(1)(c), the health and safety representative may ask the regulator to assist in the matter.

Provisional improvement notices (cls 92-104)

S.63 We support the implementation of the provisional improvement notice framework. The prompt issuance of guidance similar to the Australian guidance will be helpful to all parties in understanding the use of PINs.

Right to cease or direct cessation of unsafe work (cls 105-109)

S.64 We submit that "serious" in serious risk clearly relates to both meanings (probability or severity) and that "serious risk" should be defined in the interpretation section to this effect.

Industry health and safety representatives

S.65 We submit that regionally based health and safety centres should be introduced. These centres would be government-funded yet independent, and report to the WorkSafe Board. The centres would fund and employ industry health and safety representatives to advise and mediate on health and safety issues in any workplace.

Restrictions on health and safety representatives use of functions, powers and information (cls 81-82)

S.66 Cls 81 and 82 should be deleted, or expressed positively such as:

> A health and safety representative is authorised to perform functions and exercise powers under this part for health and safety purposes.

Immunity of health and safety representatives (cl 84)

S.67 We submit that the meaning of 'good faith' should be clarified in cl 84.

S.68 We submit that, if worker representatives on the health and safety committee are not to be health and safety representatives then the immunity from suit in cl 84 must also be extended to worker-nominated health and safety committee members.

Removal of health and safety representatives (cl 85-86)

S.69 We submit that cls 85 and 86 should not be enacted.

S.70 If a disqualification provision is thought necessary then we submit that cls 85 and 86 should be replaced by a new clause (based on s 56 of the Victorian OSH Act) as follows:

> (1) An employer may apply to the court to have a health and safety representative disqualified on the ground that the representative has done any of the following things intending to cause harm to the PCBU or the undertaking of the PCBU—
>
> > (a) issued a provisional improvement notice to the PCBU or an employee of the PCBU in circumstances where the representative could not reasonably have held the belief referred to in section 95;
> >
> > (b) issued a direction to cease work under section 107;
> >
> > (c) exercised any other power under this Part;

(2) If the court is satisfied that the ground in sub-section (1) is established, it may disqualify the health and safety representative for a specified period or permanently.

(3) For the purpose of determining what (if any) action to take under sub-section (2), the court must take into account—

(a) what (if any) harm was caused to the PCBU or the undertaking of the PCBU by or as a result of the action of the health and safety representative; and

(b) the past record of the health and safety representative in exercising powers under this Part

Lists of health and safety representatives

S.71 The CTU submits a clause requiring PCBUs to keep lists of health and safety representative and share these with the workers and regulator should be incorporated into the Bill.

Health and Safety Committees (cl 88-91)

S.72 We submit that health and safety committees should only be established on the same basis as set out in s 4(2)(b) of schedule 1A of the HSE Act. That is, the committee is a requirement of the default system (or as decided by the workers in a way that is not inconsistent with the default system) and elected health and safety representatives must comprise at least half of the members of the committee. Management will be able to appoint the remaining members but where any other workers are to be involved to represent workers then they too should be elected.

S.73 All members of health and safety committee must be entitled to training.

Adverse, coercive or misleading conduct provisions (cls 110-119)

S.74 We submit that the distinction between employees and other workers in clauses 110 and 117 of the Bill should be removed.

S.75 If the distinction remains, redrafting of the amendments to the Employment Relations Act 2000 (Part 6, subpart 3 of the Bill) should be made to address the issues raised above. Employees should be given the choice of procedures under the Act.

S.76 If the split jurisdiction is retained then the same definition of adverse conduct should be used in both the Health and Safety at Work Act and the Employment Relations Act 2000.

S.77 We submit that civil proceedings ought to be available for misleading conduct.

Reform of the Protected Disclosures Act 2000

S.78 We reiterate our submission under the Immigration Amendment Bill (No 2) that the Law Commission be asked to undertake a review of the Protected Disclosures Act 2000 to ensure that it remains fit for purpose. Specific issues that the Law Commission ought to consider include:

- The definition of “serious wrongdoing” and its application to private sector organisations including in relation to health and safety issues;

- The extension of a requirement to have whistleblowing policy and procedure from state sector entities to private sector entities or certain categories of private sector entities (such as high hazard workplaces);

S.79 We submit that WorkSafe should urgently set up an anonymous health and safety concern hotline.

Issue resolution (cls 120-121)

S.80 We submit that a broad interpretation is problematical given the lack of specified appeal rights for many instances where the inspector may exercise these decision making powers. It would be better to clarify this position further by amending cl 121(3) as follows (proposed changes in bold):

> The inspector may, after providing assistance to the parties…, decide the issue if it is of a type specified in **regulation x of the General Concepts Regulations [or wherever it is appropriate].**

PART 4- ENFORCEMENT AND OTHER MATTERS

Powers and duties of health and safety inspectors and medical practitioners (cls 181-204)

S.81 The CTU strongly supports the retention of the right against self-incrimination for workers.

S.82 The CTU submits that the inspector should be empowered to nominate or require the PCBU to nominate a natural person to undergo an interview when the PCBU is not a natural person.

S.83 The CTU submits there need be an exclusion of the PCBU or officer, through a lawyer or otherwise, from being present during an inspector's interview with a worker.

S.84 We submit that the clause 200(3) definition of 'significant hazard' should include notifiable incidents as well.

S.85 We submit that rights to privacy, dignity and no disadvantage in relation to health testing should be included in the Bill.

Reviews and appeals (cls 151-156)

S.86 We submit that the definition of reviewable decisions under cl 151 should be extended to include:

- A decision to exclude a health and safety representative under cl 70;
- A decision to remove a health and safety representative under cls 85-86; and
- A decision made by an inspector under cl 121(3).

S.87 The CTU submits that the clause should be more specific: The Chief Inspector should be the one to review the decision. It is appropriate for the decision to be reviewed by a warranted inspector. The CTU also submits that the Chief Inspector should comply with natural justice requirements.

S.88 The CTU submits that the definition of appealable decision should use the same language as cl 153. The definition of appealable decision in cl 152

uses he words “cancel or vary” whereas clause 153 uses the words “set aside” and “vary”.

Jurisdiction of District Court

S.89 We submit that health and safety matters should be heard in the Employment Court in the first instance with the necessary amendments to their jurisdiction under the Employment Relations Act 2000 and additional resourcing to allow this to occur include for the employment court to travel.

Corporate liability and manslaughter

S.93 We submit that the extension of manslaughter to include corporate liability along with a revised corporate liability framework must be treated as a matter of urgent policy making and legislative priority. Amendments to the Crimes Act 1961 should come into force at the same time as the Bill.

Sentencing criteria (cl 169)

S.94 We submit that the existing s 51A should be retained on the basis that this would retain the jurisprudence developed under *Department of Labour v Hanham & Philp Contractors Ltd*. Alternatively, a version of the sentencing guidelines might be developed that codifies the approach used in *Hanham v Philps.*

S.95 If the Committee proceeds with the amendments as proposed and the District Court retains responsibility then WorkSafe should consider bringing a case sentenced under the new framework before the High Court as soon as possible to establish new sentencing guidelines.

Other powers of the Court (cls 142, 148(3), and 170-176)

S.96 We strongly support the new powers of the courts. Along with the powers under the Bill, the CTU submits that the Court should be empowered with even stronger court order powers. Additional powers should include the power to order seizure of assets, to order that PCBUs cease work until health and safety management is reformed, or (for the most incorrigible PCBUs) an order of dissolution of a corporate entity.

Private prosecutions (cl 162-167)

S.97 We submit that the current reactive system should be replaced with a publically accessible online register of matters that WorkSafe is investigating or has investigated. Each matter would be accompanied by sufficient detail to be identifiable by an interested party including a list of possible defendants, and whether WorkSafe or any other regulator had made a decision to pursue or not to pursue enforcement or prosecution action against that defendant.

S.98 The CTU submits that the following amendments to cl 165 are necessary (amended text in bold):

> **165 Private prosecutions**
>
> (1) A person other than the regulator may file a charging document in respect of an offence under this Act if—

(a) the regulator has not taken enforcement action against **that** defendant in respect of the same **breach**; and

(b) a regulatory agency has not taken prosecution action under any other Act against **that** defendant in respect of the same incident, situation, or set of circumstances; and

(c) **The regulator has given public notice** that neither the regulator nor a regulatory agency—

(i) has taken enforcement action or prosecution action against that defendant in respect of the same matter; and

(ii) will take enforcement action or prosecution action.

(2) Despite subsection (1)(b), a person other than the regulator may file a charging document even though a regulatory agency has taken prosecution action if—

(a) the person has leave of the court; and

(b) subsections (1)(a) and (c) are complied with.

Limitation period for prosecutions (cl 167)

S.99 The CTU supports the extension of the timeframe for the bringing of private prosecutions from six months under s 54B of the current Act to two years under cl 167 of the Bill. However we do not believe this goes far enough.

S.100 We submit that private litigants should be given three years to file charging documents in relation to health and safety offences (a three year timeframe also squares with that in the general employment law jurisdictions).

S.101 The extension of time for private litigants where the Court considers that it is unreasonable to expect them to respond is an important procedural safeguard and should be retained.

PART 5- MISCELLANEOUS PROVISIONS

Relationship of WorkSafe with other agencies (cls 205-210)

S.102 We submit that the functions of both WorkSafe and other regulators should include in their functions, as recommended by the Taskforce: “to promote and support effective worker participation”. In addition, for all regulators there should be provisions for worker representation on their boards and for tripartite advisory boards on technical matters.

S.103 We also submit that the functions of WorkSafe and other regulators should give WorkSafe a clear lead role. We suggest adoption of the Taskforce recommendation that WorkSafe should have a function to “promote, support and co-ordinate work health and safety activities across appropriate government and non-government agencies”. For other regulators the corresponding function should be to “collaborate with WorkSafe and with other appropriate government and non-government agencies in taking a consistent approach to promoting and supporting work health and safety activities.”

Health and Safety at Work Strategy (cls 211-212)

S.104 We submit that consultation under this section should expressly include the social partners; Business NZ and the CTU. It also should include unions more generally.

S.105 We submit that cl 211 should explicitly state that the Health and Safety at Work Strategy can set out an overall direction that is not bound by reducing ACC levy rates.

Information sharing between agencies (cls 213-216)

S.106 We submit that regulators should have sufficient powers to require the provision of information from other agencies and relevant persons, subject to giving full consideration to privacy and confidentiality.

S.107 Clause 216 allows the Coroner to call on the regulator to provide a report on any fatal workplace accident. There is also a problem that Coroners' findings and recommendations frequently go unheeded by relevant authorities.

S.108 We submit there should also be requirement for relevant regulators to consider the recommendations made by a Coroner with regard to a fatal workplace accident and to report on their intentions as to implementing those recommendations.

Funding levy (cls 217-218)

S.109 As with ACC levy setting consultation, we submit that the Minister should be required to hold public consultation, or (at a minimum) be required to consult with social partners such as Business NZ and the CTU.

S.110 The CTU submits this list should be expanded or amended for clarity.

S.111 The CTU submits that this levy should be paid by all PCBUs rather than employers. Further work should be undertaken to determine the most effective way to do so.

Regulation, codes of practice and safe work instrument making powers (cls 221-236).

S.112 We submit that cl 226 (in relation to regulations apart from exemptions for the armed forces) and cl 234 (in relation to safe work instruments) should be amended as follows (amendments in bold):

> The Minister must not recommend the making of any [regulations or safe work instrument] without first consulting:
>
> **(a) the New Zealand Council of Trade Unions and Business New Zealand;**
>
> **(b) Relevant unions and employer groups operating in the industry or industries; and**
>
> (c) **such other** persons and organisations that the Minister considers appropriate having regard to the subject matter of the proposed [regulations or safe work instrument].

S.113 We submit that a new s 76B(1)(d) should be added to proposed s 76 of the Hazardous Substances and New Organisms Act 1996 as follows:

> (d)..... consultation must include the New Zealand Council of Trade Unions, Business New Zealand along with relevant unions and employer groups operating in the industry or industries where the hazardous substances to which the EPA notice applies are or may be used in a workplace.

S.114 We submit that, for the avoidance of doubt, specific regulation-making powers should be included in cl 222 relating to:

- Contracting, pay and remuneration systems that may cause or increase hazards or risks at work;
- Fatigue generally and long hours of work leading to fatigue specifically.

S.115 We submit that, for the avoidance of doubt, regulation-making powers should be included in cl 222 relating to:

- Worker engagement; and
- Worker participation practices.

S.116 The drafting errors in cl 222(c)(iii) and cl 221(g)(iv) should be corrected.

PART 6- AMENDMENTS TO OTHER ACTS

Accident Compensation Act 2006 (cls 240-251)

S.117 We submit that ACC and the Minister should be required to consult with workers and unions when developing the workplace incentive programmes. Moreover, ACC and the Minister should also explicitly be required to consider any real or potential adverse side effects of the incentive programmes, such as misuse of ACC services, the extent of reporting of health and safety matters, and fair compensation of workers.

S.118 Clause 245 of the Bill removes the experience rating discount for employers with no qualifying claims. We support this and recommend that the Committee go further and remove experience rating in its entirety from the ACC scheme.

S.119 Currently, in these provisions there is no requirement for these agencies to consult with or engage on a tripartite basis. Given the recommendations of the Taskforce, the CTU submits that this should be remedied.

Hazardous Substances New Organisms Act 1996 (cls 252-294)

S.120 We submit that the Committee should recommend that changes to the Hazardous Substances New Organisms Act 1996 should be considered in a separate Bill to facilitate adequate consultation and scrutiny.

S.121 Although having a strong interest in the matter, the CTU does not have particular expertise in relation to hazardous substances and urges the Committee to engage the expert community more fully in relation to these matters. We have concerns about the following points:

- The weakening of hazardous substance controls and importation rules. The CTU opposes these changes as there will be less control on the importation of hazardous substances that will invariably turn up in workplaces and present significant risks.
- The shift from regulations to EPA notices for various hazardous substance issues. Our concern with this change is that regulation of controversial substances may be done in a less public manner. This has implications for the process for amendments, any public notification of changes, reporting, and the creation of offences. Under the amendments, the EPA will determine their own methodology relating to approvals and determinations in consultation with industry.

- The removal of the approved handlers and test certifiers regime from primary legislation, into regulation.

WorkSafe New Zealand Act 2013 (cls 305-312)

S.122 We submit that WorkSafe's main objective should not be changed.