

Modernising Work Health and Safety Laws in Western Australia

Submission by the Australian Manufacturing Workers' Union - WA Branch

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**The Australian Manufacturing Workers' Union –
WA Branch**



Modernising Work Health and Safety Laws in WA

31 August 2018

FOREWORD

The AMWU represents over 8,000 members in Western Australia. We cover workers across a diverse range of industries, including construction, mining, print and design, engineering and every form of manufacturing. Improving occupational health and safety (OSH) for our members has always been a key priority for our union, whether that be through legislative reform, on the ground empowerment of health and safety representatives or tripartite forums.

At the time it was introduced, the Occupational Safety and Health Act 1984 (WA) (the OSH Act) made significant advances in OSH in WA, by consolidating a number of industry-specific OSH acts and introducing for the first time mechanisms such as elected safety representatives and safety committees. However there has been no major legislative reform in this area since the OSH Act was introduced, and the AMWU welcomes the initiative of the McGowan Government in prioritizing an update of WA OSH legislation

Generally, the AMWU agrees with the harmonization recommendations proposed by the Ministerial Advisory Panel (MAP) in the *Modernising Work Health and Safety Laws in Western Australia* Report, and we acknowledge and thank the efforts of the MAP. We have attached the summary of MAP recommendations and the AMWU's position to each recommendation.

Our submission covers the following:

- Recommendation 33, which we agree with, but argue should be expanded for greater effect;
- Recommendation 19, which we disagreed with; and
- Issues that the MAP review did not cover, which in our view should be covered by OSH legislation in Western Australia.

Steve McCartney
State Secretary

Australian Manufacturing Workers' Union
West Australian Branch

Glenn McLaren
Assistant State Secretary

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UNION RIGHT TO PURSUE BREACHES/COMPLIANCE

Relevant recommendations:

- 33, MAP Report, page 66;
- 39. MAP Report, page 78;
- 44, MAP Report, page 88.

1. The Balancing Act of Deterrence

The best OSH legislation and standards in the world mean nothing if employers do not comply with them.

A prominent purpose of sanctions in any regulatory regime, whether they be prohibitions, fines or jail time, is to deter non-compliant behaviour.¹ It is a continual consideration in the minds of policy-makers and judges in sentencing on how to maximise the deterrent effect of sanctions and thus increase compliance. It is well-settled jurisprudence that appropriately weighting punishments is a factor in effective deterrence from undesirable behaviour. However, there is now considerable research that shows that increasing the *certainty*, or possibility of apprehension and punishment provides an even greater deterrent effect than the severity of the punishment.²

Plainly put, people are less likely to engage in undesirable behaviour if they think there is a higher chance that they will be caught. It's the rationale behind advertising booze buses, speed cameras and increased police presence around public events – it increases the likelihood of undesirable behaviour being picked up, and thus reduces offending.

2. WorkSafe

In an OSH regulatory regime deterrence is a fundamental goal. Currently under the OSH Act and the model WHS Bill, the Regulator is the 'police' of the system, as the only body that can enforce compliance with the OSH Act through criminal prosecution.

The AMWU strongly believes that the government should always play the main role in enforcing compliance with the relevant OSH statute. Workplace safety affects the entire community, and it is appropriate that it receives government attention and oversight. However, what this means is that when the Regulator does not receive sufficient resources, compliance suffers.

¹ Other purposes of sentencing and sanctions include punishment, protection, rehabilitation and denunciation: 'Considerations to be taken into account when sentencing', ALRC, <<https://www.alrc.gov.au/publications/considerations-be-taken-account-when-sentencing>>.

² 'Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment', Valerie Wright, The Sentencing Project, November 2010 <<https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>>; Durlauf, S.N. and D.S. Nagin (2010). 'The Deterrent Effect of Imprisonment.'; Briscoe, S. (2004). 'Raising the Bar: Can Increased Statutory Penalties Deter Drink-Drivers?' Accident Analysis and Prevention, 36: 919–929.

It is the AMWU's experience (that is unfortunately shared by many other unions in Western Australia) that the Regulator does not have the resources to:

- Proactively or reactively investigate workplaces, which reduces the likelihood of non-compliance being caught; or
- Prosecute breaches of the Act.

Former WorkSafe Commissioner Lex McCulloch recently gave evidence to the Legislative Council's Public Administration Committee Inquiry into WorkSafe ("WorkSafe Inquiry") that WorkSafe has jurisdiction over 225,000 registered businesses, and 1.2 million workers in Western Australia. Despite this large number, which is spread across the breadth of this state, WorkSafe only has the resources for 132 staff, 93 of which are Inspectors.³

It has been the regrettable experience of the AMWU's membership that the lack of funding to WorkSafe has resulted in visits from WorkSafe Inspectors dramatically dropping off, even when complaints have been made to the WorkSafe reporting line. The AMWU refers to its submission to the WorkSafe Inquiry, and the effect that this has on the morale and importance of OSH in the workplace.⁴

This drop in WorkSafe visits is also reflected in statistics tabled to the WorkSafe Inquiry. In the 2007-2008 financial year there were 12,173 work site visits. This has dropped every year since, with 7,558 visits in 2016-2017.⁵ This is despite the Western Australian labour force growing from 1,111,500 in 2007 to 1,351,500 in 2018.⁶

The AMWU echoes the reference by UnionsWA in their submission to the evidence given by the Community and Public Sector Union Civil Service Association (CPSU/CSA), to the WorkSafe Inquiry:⁷

A management reluctance to take on difficult cases or support prosecutions for Non-Compliance with Improvement Notices means that cases which are not guaranteed to result in a conviction but may nevertheless test the current laws and expose their inadequacies do not usually have the opportunity to be heard.

It is the AMWU's first preference that more funding be allocated to WorkSafe so that it may hire more Inspectors and staff and have to capacity to properly uphold the safety standards in the revenant OSH legislation across the State.

³ Evidence of Lex McCulloch (4 September 2017)

<[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/FDA35653FE E7DB7F482581A3001A40B0/\\$file/pc.wks.170904.tro.001.lm.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/FDA35653FE E7DB7F482581A3001A40B0/$file/pc.wks.170904.tro.001.lm.pdf) >

⁴ AMWU Written Submission to the WorkSafe Inquiry

<<http://www.parliament.wa.gov.au/parliament/commit.nsf/a7b778ee55fef62a4825772700174a2c/2b563dbe9933f0ef482581a1000c61d3?OpenDocument>>

⁵ Question 8, Department of Mines, Industry Regulation and Safety – WorkSafe Division – questions on notice from public hearing 2 October 2017

[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/33CF3A3F545 A1C94482581C400037FF8/\\$file/pc.wks.171025.aon.001.lm consolidated+redacted+version.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/33CF3A3F545 A1C94482581C400037FF8/$file/pc.wks.171025.aon.001.lm consolidated+redacted+version.pdf)

⁶ 6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, May 2018

⁷ CPSU Written Submission to the WorkSafe Inquiry

[http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/0A7B0F55D13 A18AB4825819900831D1F/\\$file/pc.wks.027.170731.sub.cpsu+csa.01.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/0A7B0F55D13 A18AB4825819900831D1F/$file/pc.wks.027.170731.sub.cpsu+csa.01.pdf)

In the absence of this funding, there is a very real need to open up the ability to prosecute contraventions of the Act beyond WorkSafe. In industrial relations, both the State and third parties have the standing to initiate applications. In the criminal jurisdiction, the State performs the primary role of enforcement and affected victims have no standing to pursue criminal sanctions. However, affected victims do have recourse to pursue alleged offenders through civil remedies. There is no reason why this should not be replicated in OSH by giving unions standing to represent its members in pursuing breaches of the Act.

3. The NSW Experience

The AMWU refers to the lived experience of NSW on how granting workers the ability to enforce OSH legislation as it applies to them, through their union, yielded significant benefits not just to the individual worker and their workplace, but to the development of OSH standards. In particular, the AMWU refers to the extensive success of the FSU in using OSH prosecutions to achieve better safety outcomes for their members.

The Financial Services Union (FSU) Bank Prosecutions

In the late 1990s and early 2000s there were a number of armed bank robberies in NSW. In response, the NSW branch of the FSU commenced proceedings against ANZ, Westpac and Commonwealth Bank for failing to ensure the safety of employees who were injured during armed robberies.

In *Secretary, Finance Sector Union of Australia, Commonwealth Bank Officers' Section, NSW Branch v Commonwealth Bank of Australia*,⁸ the FSU prosecuted Commonwealth Bank for breaching s 15(1) of the *Occupational Health and Safety Act 1983 (NSW)*.⁹ The case involved an armed robbery at the Commonwealth Bank Wellington branch, where four employees were injured. The charge related to Commonwealth's failure to conduct an adequate risk assessment of the Wellington branch; Commonwealth Bank had not conducted a risk assessment at the branch as the Bank had identified the branch as low risk for a hold-up. This was despite the FSU writing to the bank before the hold-up occurred to ask for a risk assessment.

The FSU was successful in its prosecution. Commonwealth subsequently installed anti-jump barriers and security cameras at the Wellington branch.

In *Derrick v Australian and New Zealand Banking Group Ltd*,¹⁰ the FSU brought a prosecution against ANZ for breaching s 8(1) of the *Occupational Health and Safety Act 2000 (NSW)*.¹¹ This case concerned how ANZ installed anti-jump barriers (AJBs) in its branches. The FSU had identified that allowing large gaps between AJBs and ceilings meant that robbers could access bank counters. Again, the FSU put ANZ on notice of the security risk, which was ignored by the

⁸ [2001] NSWIMC 97.

⁹ 15(1) – Every employer shall ensure the health, safety and welfare at work of all the employer's employees.

¹⁰ [2003] NSWIRComm 406.

¹¹ 8(1) - An employer must, so far as is reasonably practicable, ensure the health, safety and welfare at work of all the employees of the employer.

bank. In June 2002 there was an armed robbery at an ANZ branch in Brookdale, NSW, which was one of the branches the FSU had identified to ANZ as needing modification.

In *Derrick v ANZ Group Limited*, the FSU again prosecuted ANZ over inadequate AJB installation at its Peakhurst, NSW branch. There were two armed robberies in a three-month period, where offenders were able to jump over sales counter desks, where they then forced staff to allow access to cash. Once again, the FSU had put the ANZ on notice of the inadequate AJB installation prior to the hold-ups, but it had once again been ignored by the bank.

In *Presdee v Commonwealth Bank of Australia*¹² the FSU brought another successful prosecution against Commonwealth Bank in the wake of armed hold-ups of the bank's ATM facilities in Guildford and Woy Woy. In that case, the bank required staff to service the ATM machines outside of secured areas, where they could be easily seen by passers-by through the glass doors. In both robberies, bank staff were accosted by the offenders after they had smashed through the glass entrance doors with sledgehammers.

The FSU was successful in securing convictions and fines against all of the banks it prosecuted for OSH breaches. It should also be noted that in the *Presdee* matter, the Court recognised the "manifest involvement of unions in relation to workplace safety..."¹³ when reaching their decision to allocate part of the fine to the FSU.

It is also worth noting that despite the number of successful prosecutions by the FSU in NSW, the NSW Regulator are yet to commence any of their own proceedings against a bank for a breach of OSH legislation.

4. Union Standing in WA

Whilst the NSW experience shows how unions and workers can successfully use standing to prosecute criminal offences in OSH, the AMWU recognises that there is a school of thought that only the State should have the ability to bring criminal proceedings. The AMWU commends the MAP recommendation that unions be given standing to initiate proceedings for civil contraventions of the Act, as it strikes the right balance between opening up enforcement opportunities and ensuring that the heavy lifting of OSH enforcement remains the domain of the State.

However, the AMWU notes that the list of WHS provisions that actually have a civil penalty is limited, and does not actually capture the sections that affect Western Australian workers the most in their day to day work. Below is a list of the WHS provisions that should be amended so that they operate as a dual criminal/civil offence:¹⁴

WHS	
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¹² [2005] NSWIRComm 389.

¹³ *Ibid*, at [56].

¹⁴ There is precedent for dual criminal/civil sanctions in Australian legislation, see: *Telecommunications Act 1997* (Cth); *Corporations Act 2001* (Cth); *Environmental Protection and Biodiversity Conservation Act 1999* (Cth); *Commonwealth Authorities and Companies Act 1997* (Cth); *Foreign Acquisitions and Takeovers Act 1975* (ACT).

Section	
33	Failure to comply with health and safety duty – Category 3
38	Duty to notify of notifiable incidents
47	Duty to consult workers
52	Negotiations for agreement for work group
53	Notice to workers
56	Negotiation of agreement for work groups of multiple businesses
57	Notice to workers
61	Procedure for election of health and safety representatives
70	General obligations of person conducting a business or undertaking
71	Exceptions from obligations under s 70(1)
72	Obligation to train health and safety representatives
75	Health and Safety Committees
79	Duties of person conducting a business or undertaking
99	Offence to contravene a provisional improvement notice
104	Prohibition of discriminatory conduct
107	Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct
108	Prohibition of coercion or inducement
109	Misrepresentation
273	Person not to levy workers.

5. Jurisdiction

The AMWU submits that there should also be consideration of how civil contravention proceedings should be dealt with. Currently under the OSH Act the Regulator prosecutes breaches in the Magistrate’s Court. The AMWU has no issue with criminal proceedings remaining in the State Court system, however we submit that civil proceedings would be better suited in the proposed Work Health and Safety Tribunal (**WHS Tribunal**).

Under recommendation 39, the WHS Tribunal would be set up with almost identical powers and purpose as the OSH Tribunal; a body primarily of external review. The AMWU submits that there is an opportunity to expand the operation of the WHS Tribunal so that it can also deal with civil contraventions of the WHS model bill.

The WHS Tribunal is formed from the WAIRC, which is noted for the speed with which it deals with matters, and the emphasis it places on mediated outcomes that work for both parties. In OSH breaches and disputes, it is the AMWU’s view that the best outcome is not one where one party is beaten into submission, but an outcome that is within the parameters of the law, that has been reached and owned by both parties in such a way that they are better placed to resolve future disputes without external intervention. The WHS Tribunal is better placed to facilitate such outcomes in a fast, and easily accessible manner.

Recommendation 1: That the list of civil contraventions in the WHS Model Bill be expanded to include more offences.

Recommendation 2: That the jurisdiction of the WHS Tribunal be amended to include civil contraventions of the WHS Model Bill.

Recommendation 3: That where a union is successful in civil contravention proceedings, that the WHS Tribunal has the power to award any financial penalty to the union.

RIGHT OF ENTRY

Relevant recommendation: 19, MAP Report, page 40.

The right of union officials to enter workplaces for health and safety reasons is well established in Australia. Our records indicate that there has never been an application to revoke an AMWU official's WHS/OSH permit, and it is both our officials' and members' experience that OSH right of entry provides an invaluable enforcement, deterrent and educational opportunity for employers.

Current regime in Western Australia

In Western Australia OSH right of entry is currently covered under the *Industrial Relations Act 1979 (WA)* (IR Act). The IR Act's scheme is tried and tested, for both unions and employers, and has operated with no major issues for a number of decades.

In 2017 the Government commissioned a review of the IR Act, with the Interim Report published on 20 March 2018.¹⁵ In the Interim Report, the Reviewer helpfully compared the right of entry provisions in the IR Act against the 2011 and 2016 WHS Model Bill provisions.¹⁶

The AMWU's position is that any proposed right of entry provisions need to be no less beneficial than what is currently contained in the IR Act. As can be seen by the Interim Report's comparison, the 2011 WHS Model Bill contains more bureaucratic requirements around right of entry, which can be exploited to hinder the lawful exercise of OSH right of entry.

Of particular concern to the AMWU is the experience of other unions in jurisdictions which have adopted the harmonised legislation, of employers seeking to read a requirement of re-entry for multiple suspected safety contraventions into s 117 of the WHS Model Bill.

This possibility was opened up in *CFMEU v Bechtel Construction (Australia) Pty Ltd*,¹⁷ where the Federal Court considered the question of what would happen if a permit holder exercised a right of entry on OSH grounds, and during that exercise became aware of a separate suspected contravention. The Federal Court found that the question of whether the permit holder would have to leave and re-enter the site to investigate the subsequent OSH contravention was a serious and open one.

The AMWU submits that if such a requirement can be read into the WHS Model Bill provisions it would create an undesirable opportunity for less scrupulous employers to hinder union officials from investigating and rectifying genuine safety issues.

The AMWU also notes recommendation 68 of the Interim Report, that right of entry provisions should be amended to improve the ability of permit holders to take copies of records,

¹⁵ 'Ministerial Review of the State Industrial Relations System, Interim Report', March 2018, <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/ministerial_review_of_the_state_industrial_relations_system_interim_report.pdf>

¹⁶ Ibid, attachment 8F, page 510.

¹⁷ [2013] FCA 667.

documents and photographs. The AMWU continues to support this amendment subject to the contents of the final Ministerial Review into the IR Act.

Recommendation 4: That OSH Right of Entry in WA continues to be regulated by the IR Act.

Recommendation 5: That recommendation 68 of the Ritter Interim Report be implemented.

ISSUES NOT COVERED BY MAP

1. Training of HSRs

The AMWU is active in cultivating involvement of our HSRs and delegate structures on the shopfloor. The active involvement of workers is a critical feature of a good OSH system. HSRs are empowered by the OSH Act to inspect workplaces, carry out investigations, report hazards, act as the employee's spokesperson on OSH matters, as well as assist WorkSafe Inspectors on the job.

There is provision under the WHS Model Bill for initial training of HSRs, but not for subsequent training. It is not hard to understand that HSRs and their workplaces would benefit from HSRs having the recognised ability to undertake further training to expand on their skills and knowledge.

The AMWU refers to the *Occupational Health and Safety Act 2004* (VIC), which does enshrine the right of a HSR to attend training that may not be proscribed by the legislation, but is authorised by the Regulator. Section 69(1) relevantly provides:

69(1) An employer, any of whose employees are members of a designated work group must –

...

- (d) allow a health and safety representative for the designated work group to take such time off work with pay as is necessary or prescribed by the regulations for –*
 - (i) exercising his or her powers under this Part; or*
 - (ii) taking part in any course of training (other than a course of training covered by section 67) relating to occupational health and safety that is approved or conducted by the Authority and of which the employer is given at least 14 days' notice...*

The AMWU submits that an analogous section should be included in the WHS Act.

Recommendation 6: That the WHS Act contain a provision similar to s 69(1)(d) of the *Occupational Health and Safety Act 2004* (VIC).

2. Psychological Health

There has been increasing acceptance of psychological health and the role it plays in occupational health and safety. For our members, particularly workers on compressed rosters, in remote areas and/or in dangerous work, good mental health in the workplace is as important as the right personal protective equipment.

We commend recent Government initiatives such as the Education and Health Standing Committee Inquiry into the Mental Health Impacts of FIFO Arrangements, and the priority the McGowan Government has placed on both funding research into mental health in the workplace and developing appropriate regulatory responses.

In line with this, the AMWU submits that risks to psychological health should be codified in the new WHS Act in a similar way as proposed below:

(19)(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

(a) the provision and maintenance of a work environment without risks to physical or psychological health and safety; and

Recommendation 7: That risks to psychological health be recognised in the WHS Act.

3. Removal of the capacity to insure against penalties

The AMWU notes the experience of other jurisdictions that have adopted the harmonised legislation where PCBUs have insured against WHS breaches so that insurance companies pay the penalties.

This voids the deterrent effect of penalties. The AMWU notes that there is no prohibition against WHS penalty insurance in the WHS Bill. This can be contrasted with the *Health and Safety at Work Act 2015* (NZ), which provides at section 29:

29 Insurance against fines unlawful

(1) To the extent that an insurance policy or a contract of insurance indemnifies or purports to indemnify a person for the person's liability to pay a fine or infringement fee under this Act,—

(a) the policy or contract is of no effect; and

(b) no court or tribunal has jurisdiction to grant relief in respect of the policy or contract, whether under sections 75 to 82 of the Contract and Commercial Law Act 2017 or otherwise.

(2) A person must not—

(a) enter into, or offer to enter into, a policy or contract described in subsection (1); or

(b) indemnify, or offer to indemnify, another person for the other person's liability to pay a fine or an infringement fee under this Act; or

(c) be indemnified, or agree to be indemnified, by another person for that person's liability to pay a fine or an infringement fee under this Act; or

(d) pay to another person, or receive from another person, an indemnity for a fine or an infringement fee under this Act.

(3) A person who contravenes subsection (2) commits an offence and is liable on conviction,—

(a) for an individual, to a fine not exceeding \$50,000:

(b) for any other person, to a fine not exceeding \$250,000.

Recommendation 8: That the WHS Act contain express prohibitions against insurance policies for WHS penalties.

4. Sentencing Guidelines

There has been an unfortunate number of high profile workplace fatalities in Western Australia over the years. These fatalities have highlighted a number of deficiencies in how workplace fatalities are handled by a number of involved parties, and in particular have focused public attention on what appear to be manifestly inadequate penalties in light of the fatality and the range of available penalties.

The AMWU highlights the most recent fatality sentencing decision, of Axedale Holdings, who was fined \$160,000 for the deaths of two workers who were crushed by concrete panels that were not secured properly at a Jaxon Construction site in East Perth.¹⁸

Whilst it is entirely proper that judges retain discretion to assess individual cases on their facts, there is an argument to introduce sentencing guidelines to assist judges in determining Parliament's and the public's expectations on how particular offences should be treated.

The AMWU notes the success of the *Definitive Guideline for the Sentencing of Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences* (UK Sentencing Guideline), which was implemented in the UK in 2016. Since the introduction of the UK Sentencing Guideline, there has been a notable increase in both the number of fines for OSH breaches, but also an increase in the quantum of the fines.¹⁹

Recommendation 9: That a sentencing guideline be created for WHS, and preferably included in any relevant regulation.

5. Industrial Manslaughter

There has been increased focus around Australia on how workplace fatalities are prosecuted. This has manifested in the ACT and Queensland legislating industrial manslaughter offences, with the Victorian Government also signaling its intent to follow suit. There is also a Senate inquiry into the prevention, investigation and prosecution of industrial deaths in Australia, which is due to report back in October 2018.²⁰

Though it can be argued that there is already the option for companies or bosses who cause the death of a worker to go to jail, the reality is that in Western Australia these prosecutions do not happen under the current criminal code.

¹⁸ 'Trucking company fined over 'preventable' deaths of Irish construction workers', ABC News, 17 May 2018 < <http://www.abc.net.au/news/2018-05-17/company-sentenced-over-deaths-of-two-construction-workers-crush/9772342>>

¹⁹ 'Safety and health sentencing: two years on', Institute of Occupational Safety and Health, 2 February 2018 < <https://www.iosh.co.uk/News/Sentencing-guidelines-anniversary.aspx>>

²⁰ 'The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia', Senate Standing Committee on Education and Employment, < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialdeathsInAus>

The AMWU notes the Lyons Review²¹ commissioned by the Queensland Government in 2017 following the fatalities at Dreamworld. On the question of whether industrial manslaughter should be introduced, and in what form, the Reviewer noted:

As previously identified, there are long standing entrenched views from stakeholders regarding the offence of industrial manslaughter which are unlikely to change or resolve the debate. It is however the view of the Review that, following consultation and research, a case supporting the introduction of an offence of negligence causing death can be made. In particular, it is considered that, despite the view of some stakeholders, there is a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code only apply to individuals as opposed to corporations which makes it challenging to find a corporation criminally responsible. Additionally, a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect. In May 2017, the Queensland Government provided in principle support for this view.²²

The AMWU endorses the findings of the Lyons Review, and supports the introduction of a separate industrial manslaughter offence similar to the Queensland model for the following reasons:

- It gives the Regulator more options when dealing with workplace fatalities;
- It signals to the community that workplace fatalities are being taken seriously, and that employers should focus their efforts on preventing workplace fatalities; and
- In contrast with manslaughter under the criminal code, it is more targeted at piercing through the 'corporate veil' that traditionally shields directors and senior officers of companies.

Recommendation 10: That an industrial manslaughter offence similar to the Queensland model be included in the WHS Act.

²¹ 'Best Practice Review of Workplace Health and Safety Queensland' Final Report, 3 July 2017, <https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0016/143521/best-practice-review-of-whsq-final-report.pdf>

²² Ibid, page 113.

Summary of AMWU positions on Ministerial Advisory Panel Recommendations

#	Recommendation	Clauses	Comments
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).	Agreed.
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	Agreed.
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.	3(1).	Agreed.
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	Agreed.
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	Agreed.
6	Amend the meaning of supply to include the loan of an item.	6(1).	Agreed.
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	Agreed.

#	Recommendation	Clauses	Comments
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.	Agreed.
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a).	Agreed.
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36.	Agreed.
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	Agreed.
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	Agreed.
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a).	Agreed.
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).	Agreed.

#	Recommendation	Clauses	Comments
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76.	Agreed.
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	Agreed. The AMWU notes and strongly supports recommendation 16 to mirror the right of an employee to cease unsafe work where there is a risk posed to another person by the work as currently codified by s 26 of the OHS Act. Unsafe work can pose significant risk not just to the workers involved, but also to members of the public who are unrelated to the work or the company involved, and it is important to recognize the right of workers to protect their safety as well.
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.	Agreed.
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100.	<p>Agreed. HSRs are often referred to by WorkSafe as the 'on the ground [WorkSafe] Inspectors'. HSRs have the potential to significantly improve the safety of a workplace, and as such the AMWU supports any recommendation that enhances the communication, feedback and support that HSRs receive from WorkSafe and the relevant PCBU.</p> <p>This is a common-sense recommendation that should not provide any controversy.</p>
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	Disagreed. See submission for full comments.

#	Recommendation	Clauses	Comments
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.	Agreed.
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	Agreed.
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	Agreed.
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(i), 133(c)(ii), 137(1)(b)(i), 137(1)(d)(i), 138(2), 150(b), 150(c)(ii)	Agreed.
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	Agreed.

#	Recommendation	Clauses	Comments
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).	Agreed.
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	Agreed.
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	Agreed.
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.	Agreed.
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.	Agreed.

#	Recommendation	Clauses	Comments
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	Agreed.
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	Agreed.
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	Agreed.
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	Agreed. See submission for full comments.
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b).	Agreed.
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.	Agreed.

#	Recommendation	Clauses	Comments
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.	Agreed.
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2.	Agreed.
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	Agreed.
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	Agreed.

#	Recommendation	Clauses	Comments
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.	Agreed.
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.	Agreed.
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act.	Agreed.
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.	Agreed.
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	Agreed.