Modernising Work Health and Safety Laws in Western Australia

Submission by the Construction, Forestry, Mining and Energy Union

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CFMEU
CONSTRUCTION

Modernising work health and safety laws in Western Australia

submission to the ministerial advisory panel

31 August 2018

by email: whsreform@dmirs.wa.gov.au

Introduction

The Construction, Forestry, Maritime, Mining and Energy Union - Construction and General Division, WA Divisional Branch (**CFMEU**) is Western Australia's principal trade union in the construction Industry. Safety is a critical part of the CFMEU's operations.

The CFMEU is affiliated to UnionsWA. We support UnionsWA's submission to the Ministerial Advisory Panel (**MAP**). This submission makes additional comments related to the construction industry where appropriate.

In Australia, the construction industry had the third highest rate of fatalities in the period between 2007 and 2016[1]. Fourteen construction industry workers were killed at work this year.[2]

This appalling safety record is in the context of an industry which is increasingly characterised by casualised workforces, fragmented labour hire structures and sham contracting.[3] These factors not only work to obfuscate workplace health and safety responsibility at a practical level but also give rise to workers being pressured not to raise safety concerns at all, for fear of jeopardising their ability to secure ongoing work.

Workers in many industries may legitimately fear dismissal after raising a safety issue but, given the project-based nature of the construction industry, it is far more likely that a construction worker will simply find themselves unable to secure work at the end of a project. Indeed, many large employers use sophisticated methods of discriminating against workers who are proactive in raising safety concerns, in relation to future employment.

The physically dangerous nature of the actual work and the industrial context described above means that the importance of engaging workers and their union in workplace health and safety processes cannot be underestimated.

For this reason, the CFMEU strongly supports amendments to the MAP Review, which we hope will improve worker consultation and representation in the Western Australian industrial landscape.

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1 Safe Work Australia, Fatality Statistics by Industry, https://www.safeworkaustralia.gov.au/statistics -and-research/statistics/fatalities/fatality-statistics-industry.

2 Ibid.

3 In 2011 the CFMEU undertook a detailed study of sham contracting in the building and construction industry, and estimated that between 9 and 16% of persons working in the industry were sham contractors: CFMEU Construction & General Division, *Race to the bottom: Sham contracting in Australia's Construction Industry*, March 2011.

1. The Legislative Framework

1.1. Psychological Health

1.1.1. The CFMEU supports UnionsWA's submissions, in that the model WHS Bill requires a clear head of power for the adoption of a regulation, and accompanying codes of practice for various risks to psychological health.

1.1.2. The current model WHS Bill is relatively limited in addressing psychological health in the workplace. While the definitions currently define "health" as including "psychological health", there are no specific references to psychological health hazards and associated risk minimisation within the body of the current regulatory structures. Similarly, existing codes tend to treat psychological health matters as issues that can be addressed through standard approaches to risk management.

1.1.3. The mental health of Fly-In, Fly Out (**FIFO**) workers is of particular concern. Studies suggest that the prevalence rate of mental health problems amongst the FIFO workforce has been estimated to be approximately 30 per cent, which is significantly higher than the national average of 20 per cent.[4]

1.1.4. In October 2015, the Queensland Government's Infrastructure, Planning and Natural Resources Committee released a report from its *"Inquiry into fly-in, fly-out and other long distance commuting work practices in regional Queensland"*.[5] The report recognised that the FIFO lifestyle can, for a range of reasons, exacerbate a person's predisposition to mental health problems.

1.1.5. Multiple factors associated with the FIFO lifestyle contribute to mental health problems, and can exacerbate a worker's predisposition to mental health problems, including separation from family, transitioning between home and work, maintaining meaningful relationships while missing out on key life events, and the living conditions at camp (including the low level of control over work and life while at work).

1.1.6. The tendency of workers not to seek help due to workplace culture or stigma regarding mental health difficulties is a significant contributing factor. Anecdotally, the Queensland Government's Committee was advised that workers can be reluctant to go to their employer to discuss any mental health problems as they felt the service was not confidential and feared that having a problem could put their job at risk.[6] Unions and organisations like Mates in Construction play a significant role in this regard.

1.1.7. One of the main sources of concern for FIFO workers is the length of rosters worked, with higher compression rosters negatively impacting on work-life balance, feelings of isolation and loneliness, higher levels of psychological distress and adverse effects on family relationships.[7]

1.1.8. The mental health impact on employees should be considered as a health and safety issue with legislative minimum standards for rosters and the strengthening of protections for workers suffering from mental health injuries.

Recommendation 1
Amend s 19(3) of the model WHS Bill to include the risks to psychological health

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4 Western Australia Legislative Assembly, Education and Health Standing Committee, *The impact of FIFO work practices on mental health*, final report, p i. See also, pp 16-22.

5 https://www.parliament.qld.gov.au/documents/committees/IPNRC/2015/FIFO/02-rpt-009-09Oct2015.pdf accessed on 23 August 2018.

6 Ibid. at pg [63].

7 Ibid.

1.2. WHS, the intersection with public health and the ability to cease work

1.2.1. While the principal focus of the model WHS laws is on the workplace itself, it is not always possible to separate workplace safety concerns from more general public health issues and attempts to do so can create artificial jurisdictional demarcations which increase the risk of inadequate responses by the regulator.

1.2.2. By way of example, the CFMEU regularly deals with workplaces that have asbestos exposure. Such exposure overlaps with the general public's health.

1.2.3. Despite the relatively strong existing regulatory arrangements concerning asbestos management, CFMEU officials and members commonly encounter difficulty in gaining simple, straightforward access to information regarding the presence and location of asbestos in and around workplaces.

1.2.4. In circumstances where workers have specific obligations to not affect the health of other persons, it is integral that those workers have the ability to cease work where there is a risk to another person as a result of the work.

Recommendation 2
Reform set out in Recommendation 16 in the MAP proposal document be implemented

2. Consultation, Representation and Participation

2.1. Consultation mechanisms in the construction industry

The formation of designated workgroups

2.1.1. The designation of workgroups is an essential pre-requisite to the election of Health and Safety Representatives (**HSRs**) under the model WHS Bill. It is imperative that the task of assigning workgroups is not discharged in a cursory manner and that employees have proper access to representation without the need to make specific requests for that representation to the employer (which may expose their union membership status/protections under freedom of association laws in an undesirable manner).

2.1.2. To ensure that the process of electing HSRs and Health and Safety Committees (**HSCs**) is conducted in a manner which is objectively fair, the Model WHS Bill, when enacted in Western Australia, should require a construction industry PCBU to consult with any relevant union which has industrial coverage within a proposed designation of workgroups.

Recommendation 3
Incorporate provisions into the model WHS Bill to require construction industry PCBUs to consult with any relevant union in relation to designation of workgroups

HSRs and HSCs

2.1.3. There are two primary mechanisms under the model WHS Bill which facilitate collaboration between employers and employees:

a) the election of HSRs (pursuant to Part 5, Division 3 of the model WHS Bill); and

b) the establishment of HRCs (pursuant to Part 5, Division 4 of the model WHS Bill).

2.1.4. The establishment and role of HSRs are central to the effective operation of the current regulatory regime. In the CFMEU's experience, workplaces with a strong safety culture (often categorised by strong union density) have active, independent HSRs capable and willing to exercise their powers and function under the relevant legislation.

2.1.5. It is also of critical importance that HSRs work co-operatively. This is particularly important on large scale commercial construction projects, where workplaces are often characterised by a number of workgroups working under multiple PCBUs (for example those separated by trades). Because of this, it is important that the model WHS Bill have a mechanism that allows HSRs to effectively act on issues that affect multiple workgroups.

2.1.6. The current model WHS Bill, however, generally limits the function of HSRs for a work group and may exercise powers and perform functions limited to matters that affect, or may affect workers in that group.[8]

2.1.7. While this approach may be appropriate when an issue arises with a relatively narrow focus on single workgroup concerns, the limitation becomes problematic when a safety issue affects workers more broadly.

2.1.8. The exceptions contained at s 69(2) of the model WHS Bill include where there is a:

a) serious risk emanating from an immediate or imminent exposure to a hazard affecting other workgroups (s 69(2)(a)); or

b) request from the member of another workgroup (s 69(2)(b)).

2.1.9. These restrictions are unduly artificial and can potentially encourage employers, PCBUs or both to exploit demarcation lines between HSRs, thereby avoiding workplace safety issues.

2.1.10. The MAP has sought to amend s 69(3) of the model WHS Bill by clarifying the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace. The CFMEU supports this proposed amendment.

2.1.11. Notwithstanding this, we are of the view that further reform of these structures should be considered by the MAP, to ensure:

a) the appropriate and effective representation for workers, a reform which requires the election of a lead HSR to cover the entire workplace, particularly in circumstances where multiple designated work groups exist (large commercial construction projects); and

b) HSCs are comprised of at least 50% worker representation (including elected HSRs from each work group), and no more than 50% management representation.

Recommendation 4
Reform as set out in Recommendation 12 of the MAP proposal document be implemented.

Recommendation 5
Commercial construction projects should be required to have a lead HSR to cover the entire workplace.

Recommendation 6
HSC's should be comprised of at least 50% worker representation (including elected HSRs from each work group) and no more than 50% management representation.

Training of HSRs

2.1.12 The requirement for PCBUs to support the training of HSRs is an important feature of any future regulatory regime. The ability for HSRs to choose their own training provider is critical in encouraging the independence of HSRs.

2.1.13 The importance of training is highlighted by the fact that the model WHS Bill places limitations on HSRs who have not received training. For example:

[8] s 69 Model Work Health and Safety Bill 2016 (as revised as at 21 March 2016).

a) s 90(4) of the model WHS Bill limits the ability for HSRs to issue provisional improvement notices where they have not completed initial training;

b) s 83(3) of the model WHS Bill provides an HSR with the right to direct an immediate cessation of work, without consultation with the PCBU where there is a serious and immediate or imminent risk and it is not reasonable to consult before giving the direction. However, this power is not activated where the HSR has not completed initial training (s 85((6)).

2.1.14 Where a workplace emergency occurs, these limitations can place HSRs in a position where they face an unsatisfactory conflict of duties. As an elected workplace representative, the HSR has a duty to exercise leadership and take action to stop the performance of unsafe work. However, in taking such action without the requisite training, the HSR runs the risk of acting outside their powers and are essentially rendered powerless. That is; the restrictions in ss 83(3) and 90(4) increase the likelihood that HSRs may not apply their duties at all.

2.1.15 As a result, it is not uncommon for unscrupulous employers, PCBU or both to purposefully delay training, including by vetoing the HSRs' choice of provider.

2.1.16 HSRs should be entitled to attend any training approved by the regulator, on the provision of reasonable notice.

Recommendation 7
Mandatory prescribed training for HSRs and HSC members must be conducted within a defined time limit (3 months) after the commencement of a project, ensuring that workers are entitled to a choice of provider approved by the regulator.

Recommendation 8
That s 72 be amended in the model WHS Bill to enshrine the right of a HSR to decide which training to attend

2.2. Issue Resolution

2.2.1. The model WHS Bill provides access to default resolution procedure.[9] However, the CFMEU considers the effectiveness of the issue resolution procedures is potentially deficient because:

a) the procedure fails to appropriately recognise the role of unions in the resolution of safety disputes;

b) s 81(3) should provide a straightforward mechanism for unions to assist workers and HSRs, but could be undermined by difficult PCBUs;

c) in circumstances where a matter is not resolved, there are no straightforward and effective mechanisms to break deadlocks or progress the dispute other than through the referral of an unresolved dispute to an inspector; and

d) internal and external review mechanisms exclude unions from participating in dispute resolution as initiating parties and are otherwise unnecessarily cumbersome procedurally.

2.2.2. In our experience, workplaces with active, well-supported and independent HSRs are often workplaces characterised by high levels of union density. It is not uncommon for HSRs to act in cooperation with union representatives. Often the elected HSR will also be a union delegate. In this regard, the legislation should facilitate cooperation between HSRs and union representatives and anticipate that HSRs and unions will commonly work together regarding workplace safety concerns.

[9] ss 80-82 of WHS Act; rr21-22 of WHS Regulation

2.2.3. There is ample evidence that indicates that workplaces with trade union HSRs and HSCs perform far better in terms of fewer accidents and incidents of ill health than non-union sites. Further, where trade unions are present, more meaningful worker consultation and representation occurs.[10] In the UK, empirical evidence shows that where trade union safety representatives work together with the employer, accident rates are up to 50% lower than where managers along made decisions.[11]

2.2.4. The model WHS Bill, however, fails to appropriately recognise the role of unions in the resolution of safety disputes. The issue resolution provisions in the model WHS Bill are also ambiguous and unnecessarily restrictive in outlining how union representatives participate in the resolution of workplace safety disputes and support HSRs in such matters. These are significant flaws in the regulatory structure, which are inconsistent with the practical reality as to how many safety matters are addressed in many Western Australian workplaces.

2.2.5. The role of unions is also important because, despite the functions and powers provided to HSRs in the model legislation, the relative power imbalance between such individuals and their employer often makes it impractical for an HSR to act as an initiating party in the commencement and resolution of a safety issue. In contrast, unions act independently of any employment relationship with the PCBU and have greater freedom to act decisively with respect to such matters, particularly where the cost of addressing the safety issue might have an economic impact on the business. Apart from the greater independence held by union representatives, in many workplaces the union, whether through local delegates or the work of officials, will be actively involved in the discussion of workplace safety matters in any event. The failure of the model WHS Bill to recognise the role for unions in the resolution of safety disputes is a significant flaw in the regulatory structure and is inconsistent with the practical reality as to how such matters are addressed in many Western Australian workplaces.

2.2.6. The current silence of the legislation with respect to union representation is, moreover, being used by uncooperative PCBUs to avoid engagement with unions about workplace safety concerns. This can lead to the unnecessary escalation of issues that might otherwise be resolvable under the model WHS Bill issue resolution procedures.

Sections 80 and 81(3) – representatives entering for the purpose of attending discussions with a view to resolving the issue

2.2.7. Section 80 of the model WHS Bill defines "parties" to an issue for the purpose of issue resolutions to include PCBUs (ss (1)(a) and (b)), HSRs where the issue affects a work group (s 80(1)(c)), and "if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative" (ss 1(d)).

2.2.8. Section 80 clearly fails to recognise union representation or other employee representation, except where a worker who is *not* in a work group appoints one. This failure is significant. It undermines the ability of workers to be represented by their union and disregards the concerns of workers where a HSR fails to act

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[10] See e.g. Lunt. J., Bates, S., Bennett, V. & Hopkinson, J. 2008. *Behavioural change and worker engagement practices within the construction sector*, Research Report RR660, Health and Safety Executive, available on the Health and Safety Executive home page: http://www.hse.gov.uk/research/rrhtm/rr660.htm at [40].

[11] Health & Safety Executive (HSE) 200, Discussion Paper – *Employee consultation and involvement in health and safety*. Available on the Internet, Health and Safety Executive (U.K) Homepage: http://www.hse.gov.uk/consult/disdocs/dde112.htm.

Recommendation 9
Section 80(1) of the model WHS Bill to be amended to include worker union representatives as parties to an issue, irrespective of whether a HSR is elected in an affected workgroup.

Recommendation 10
Unions to be able to initiate safety issue resolution procedures, together with the ability of HSRs and any worker or group of workers.

3. Compliance and Enforcement

3.1. Right of entry to investigate suspected breaches of health and safety

3.1.1. The MAP was tasked to advise the Minister for Mines and Petroleum; Commerce and Industrial Relations, the Hon Bill Johnston MLA on the development of a single harmonised and amalgamated *Work Health and Safety Act*.

3.1.2. Further the Minister for Mines and Petroleum; Commerce and Industrial Relations, the Hon Bill Johnston MLA established the Ministerial Review of the State Industrial Relations System (**Review**) to provide a comprehensive review of key aspects of the *Industrial Relations Act 1979* (WA) (**IR Act**).

3.1.3. Both the MAP and the Review considered regulatory regimes for trade unions to exercise right of entry to enter premises to investigate suspected breaches of health and safety. In relation to such regulatory regimes, the:

a) MAP recommended that Part 7 of the model WHS Bill provided in the 2011 version be enacted (see Recommendation 19) (**Part 7**); and

b) Review's Interim Report retained the existing regulatory regime provided by Part 2G of Part II of the IR Act with some amendments (**Division 2G**).

3.1.4 For the reasons below, Division 2G, with amendments, should continue to comprehensively regulate right of entry to the exclusion of Part 7 of the WHS Act.

Current regulatory regime

3.1.5 Under Division 2G, specifically s 49I of the IR Act, authorised representatives of a trade union are empowered with the right to enter and inspect any premises of investigating any suspected breach of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**).

3.1.6 As the Western Australian Industrial Relations Commission found in *Construction, Forestry, Mining and Energy Union of Workers v SNC-Lavalin (SA) Inc & Other*:[12]

> *…the right of entry prescribed by s 49I of the [IR Act], perhaps as complimentary to the scheme in Divisions 2F and 2G of the [IR Act] as a whole, [seem] to acknowledge the legitimate role of registered organisations in the process of observance and enforcement of awards, industrial agreements and other legislation to the workplace, as recognized in a long line of authority of industrial courts and tribunals throughout the various jurisdictions.*

Comparison between the Division 2G and Part 7

3.1.7 In the Review's Interim Report, a comparison between:

a) Division 2G;

b) 2011 Part 7; and

c) 2016 Part 7,

[12] [2004] WAIRC 10880; (2004) 85 WAIG 139 at [36] (Kenner C).

was undertaken. A copy of this comparison of regimes is **annexed** to these submission and marked as **A.**

3.1.8 As outlined in A, there would be a number of rights that would be diminished for trade unions if the 2011 Part 7 were to exclusively regulate right of entry, including but not limited to:

a) the requirement that only officials or employees of a trade union be able to be issued a WHS permit, whereas under Division 2G enables any person to be issued an authority.

b) the requirement under Part 7 to complete prescribed training, whereas Division 2G does not require any training;

c) the requirement under Part 7 of qualification matters, which necessarily require the "fit and proper" person test found in the FW Act, whereas Division 2G does not have such a test or requirement; and

d) Part 7 requiring post entry notice, whereas no notice of entry is required under Division 2G.

3.1.8 However, given the interaction between the IR Act the FW Act, Division 2G does not exhaustively regulate right of entry for *national system employees* or *national system employers* as defined in the FW Act. This gives rise to an anomaly. Currently, s 49H(1) of the IR Act provides:

An authorised representative of an organisation may enter, during working hours, any premises where relevant employees work, for the purpose of holding discussion at the premises with any of the relevant employees who wish to participate in those discussions.

Unless an award, order or industrial instrument provide otherwise, s 49H(3) of the IR Act requires that 24 hours' notice be given for entry under s 49H(1) of the IR Act.

3.1.9 The equivalent provision under the FW Act to s 49H(1) of the IR Act is s 484 of the FW Act, which does not enable entry during working hours, but limits entry to mealtimes or other breaks.[13]

3.1.10 It appears that this difficulty has led to the development of ss 121 and 122 of Part 7. Accordingly, to give full effect to the intention of s 49H of the IR Act and ss 121 and 122 of Part 7, s 49I of the IR Act should be amended to include:

(9) An authorised representative of an organisation may enter:

(a) during working hours; and

(b) after providing notice of the proposed entry to the:

(i) relevant person conducting a business or undertaking; and

(ii) person with management or control of the premises,

any premises to consult on work health and safety matters with, and provide advice on those matters to, 1 or more relevant workers who wish to participate in the discussions.

3.1.11 The above demonstrates that the tasks of the MAP and the Review were separate but intertwined in relation to right of entry.

3.1.12 Whilst, the MAP completed its role by considering the harmonised model WHS Bill, the Review comprehensively considered Division 2G as a regulatory framework.

3.1.13 Given the significant diminution of rights for trade unions, if Part 7 were to be preferred over Division 2G as a regulatory regime, the Minister should exclude Part 7 in its entirety and should enable Division 2G to continue to be the comprehensive regulatory regime.

[13] s 490(2) of the FW Act.

Recommendation 11
That right of entry to investigate breaches of health and safety breaches be regulated by the IR Act to the exclusion of Part 7 of the model WHS Act.

4 Prosecutions and Legal Proceedings

4.1 Union right to prosecute WHS

4.1.1 To make the cultural change necessary to arrest the consistent occurrences of fatalities and injuries in the workplace, it is critical that compliance should not be only reactive, but also proactive and preventative.

4.1.2 In the CFMEU's experience, it is extremely rare for a regulator to commence a prosecution or civil penalty proceeding for breaches of work health and safety laws where there has not been a significant injury or fatality. This is certainly the case where there has been no injury (e.g. cases of "near misses" or identified failures to provide a safe system of work).

4.1.3 In the Western Australian context, employers took the invitation to self-regulation as a means to avoid their commitment to their duty of care. This has led to an environment where there is far too much reliance on self-regulation and far too little use of sanctions where self-regulation has been ineffective.

4.1.4 The regulator has failed to take an aggressive approach to prosecutions, is underfunded, reactive and does not have the technical expertise to properly investigate and develop prosecutions to ensure success. Put simply, a clear and defined system of deterrence does not exist in the Western Australian health and safety system.

4.1.5 Under the model WHS Bill, only the regulator is able to bring proceedings. A request can be made to the regulator, and later the Department of Public Prosecutions **(DPP)**, if a prosecution is not brought for any offences other than Category 1 offences. However, trade unions, who represent affected workers, are unable to bring prosecution proceedings directly.

4.1.6 New South Wales is the only jurisdiction to retain access to union prosecutions. However, these provisions are restricted to situations where the DPP has declined to bring proceedings. The application of the provision is problematic, not least of all because of the reluctance of the DPP to involve themselves in OHS matters (which means that the requisite referral cannot be made) but because, where penalties are ordered, they are unable to be retained by the prosecuting trade union (which exacerbates internal resourcing limitations within the unions who may seek to prosecute).

The FSU matters

4.1.7 Between 1983 and 2011, union secretaries had standing to bring a prosecution under NSW laws. There is no evidence whatsoever that indicates that this ability was abused. To the contrary, all such proceedings were successful and lead to increased OH&S standards.[14]

4.1.8 The primary example of these successes was a number of prosecutions brought against three of Australia's largest banking corporations by the Financial Services Union (NSW Branch) (**FSU**) for failing to adequately protect workers against OH&S risks resulting from armed robberies.[15]

4.1.9 The relevant cases are as follows:

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[14] Unions New South Wales Submission on the Exposure Draft for A Model (Occupational Health and Safety) Act and State 1 Model Regulations, 9 November 2009. pg [6]

[15] Unions New South Wales Submission on the Exposure Draft for A Model (Occupational Health and Safety) Act and State 1 Model Regulations, 9 November 2009. pg [5]

a) *Financial Sector Union NSW Branch (Geoff Derrick) v ANZ Banking Group Ltd* [2003] NSWIRComm 406*;*

b) *Financial Sector Union NSW Branch (Geoff Derrick) v ANZ Banking Group Ltd* [2005] NSWIRComm 59*;*

c) *Financial Sector Union NSW Branch (Geoff Derrick) v Westpac Banking Corporation* [2006] NSWIRComm 76*;* and

d) *Financial Sector Union NSW Branch (P. Presdee) v Commonwealth Bank* [2005] NSWIRComm 389*.*

4.1.10 The cumulative facts of these matters are as follows:

a) in 1998, there were 180 armed robberies in NSW and in 86% of these incidents bank workers were either molested or assaulted;[16]

b) in all cases, the extent of the risk of exposure to armed robberies in each of the branches was known to the corporations and which in each case, failed to expedite measures to protect workers;[17]

c) in or about 2000, the FSU wrote to all NSW banking corporations requesting improvements to workplace design, in particular, the installation of full-height Anti-Jump Barriers to bank counters;[18]

d) from 2000 to 2003, the average number of bank robberies per annum was 79.5, which was 7.0% of the total number of banks operated by banking corporations;[19] and

e) critically, prior to the commencement of each prosecution, the regulator was informed of each of the incidents, but did not take any action against the banking corporations involved for breaches of OH&S legislation.[20] In fact, in the matter of *Financial Sector Union NSW Branch (Geoff Derrick) v Westpac Banking Corporation*[21], Staunton J observed:

> *….The (NSW) WorkCover Authority carried out and investigation into the robbery and did not take any action in relation to it…*

4.1.11 In response to the action taken by FSU, in the period between 2004 and 2007, the number of bank robberies fell to 28.5 per annum, a 64% reduction in these incidents with only 2.2% of the banks being affected.[22]

4.1.12 The Australian Council of Trade Unions (**ACTU**) in its submission to the Review of Model WHS Laws 2018 on 2 May 2018 (ACTU D. 67/2018) **(ACTU Review)** made the following remarks with respect to the importance of establishing the right for trade unions to commence prosecutions contraventions of health and safety legislation:

> *A right for trade unions to commence prosecutions operates as an important supplement to address circumstances in which regulators are unwilling or unable to prosecute contraventions. ….. the independent right of trade unions to prosecute WHS offences serves important functions, including*

16 Ibid.at 6

17 Ibid.at 6

18 Ibid.at 6

19 Ibid.at 6

20 Ibid.at 6

21 [2006] NSWIRComm 76.

22 Unions New South Wales Submission on the Exposure Draft for A Model (Occupational Health and Safety) Act and State 1 Model Regulations, 9 November 2009. pg [6]

a) *It maximises the efficient use of resources by permitting trade unions with extensive experience in a particular industry or workplace to deploy resources in a manner calculated to bring about organisational and cultural change to improve health and safety; and*

b) *It further encourages trade unions to be actively involved in WHS management and has the potential to encourage employers to actively involve trade unions in the management of WHS concerns.*

4.1.13 The CFMEU strongly supports the unqualified right to prosecute all criminal offences.

4.1.14 Notwithstanding this, in the absence of an unqualified right, there are a number of breaches of the WHS Act that relate to working people of which unions should have no restrictions to prosecute. These include, but are not limited to:

WHS Section	
33	Failure to comply with health and safety duty
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.

4.1.15 We strongly submit that the model WHS Bill be amended so that unions have standing to bring proceedings for offences under WHS legislation. Indeed, the enforcement of work health and safety laws for contraventions of work health and safety laws would be considerably strengthened by allowing unions to commence proceedings for the imposition of civil penalties where work health and safety laws are contravened. This would share the burden of regulatory enforcement in circumstances where persons more directly concerned in the events are motivated to take action, or where the regulator fails to take action.

Recommendation 12
That MAP recommendation 33 be expanded to give unions' further standing to prosecute breaches of the WHS Act.

4.2 Industrial Manslaughter

The Current Position

4.2.1 From 2003 to 2016, at least 3,414 workers lost their lives in work-related incidents in Australia.[23]

4.2.2 In 2017, 184 workers were killed at work, compared with 182 workers in 2016. As at 23 August 2018, 14 workers have been killed in the construction industry.[24]

4.2.3 Competitive pressures and work intensification have led to the proliferation of non-standard and precarious forms of employment, particularly in the transport and construction industries. These pressures often result in 'corner cutting' on WHS in order to meet deadlines, which can have fatal consequences for workers and others.[25]

4.2.4 Ever changing work relationships have also made establishing responsibility in the workplace much more difficult. In this environment, the current legislative framework (as proposed in the model WHS Bill) is insufficient to deter or adequately punish occupational fatalities.[26]

4.2.5 While the Western Australian jurisdiction currently has criminal manslaughter provisions in the *Criminal Code Act Compilation Act 1913* (WA) **(Criminal Code),** under which an officer responsible for a workplace death could in theory could be prosecuted, these provisions critically require proof of fault by a high level manager or director, which is inherently difficult to establish in large corporations with complex structures, such as in the construction industry).[27]

4.2.6 In these circumstances, it is particularly difficult to establish *mens rea*, otherwise known as the 'guilty mind' (as an essential element of criminal manslaughter) on the part of the high level manager or director in order to secure justice and drive genuine change.[28] Consequently, it is no surprise that successful prosecutions for workplace deaths under the Criminal Code have remained elusive.[29]

4.2.7 The ACTU Review considered the difficulty of securing criminal prosecutions under general criminal law provisions by referencing the ACT Standing Committee on Legal Affairs report,

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23 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018 Pg 55; Safe Work Australia, Fatality Statistics, accessed 20 April 2018.

24 Safe Work Australia, Fatality Statistics, accessed 23 August 2018.

25 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018 Pg 55; Underhill, E (2013) *"the Challenge to Workplace Health and Safety and the Changing Nature of Work and the Working Environment"* in Teicher, J, P Holland and R Gough *Australian Workplace Relation*s Cambridge University Press Sydney 2013.

26 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018 Pg 55.

27 Ibid.

28 Ibid. and Clough, J (2007) "A Glaring Omission? Corporate :liability for Negligent Manslaughter" 20 *Australian Journal of Labour Law* 29.

29 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018, p 56.

commission prior to the implementation of an industrial manslaughter offence in the ACT. The report stated:

Establishing the criminal liability of a corporation requires establishing the intent of the corporation (which cannot have a 'mind of its own') by attributing to it the actions, omissions or motives of a director or senior officer, being the guiding mind of the corporation. This has proven difficult in the past.

Prosecutions of corporations under the current law, even if successful, have been considered unsatisfactory because appropriate penalties are not available. Imprisonment is the only penalty for manslaughter. This is of no use where the offender is a corporation – a legal entity is not a natural person.

4.2.8 The ACTU Review went further, referencing K Wheelwright's 2016 text "*The Prosecution of Officers under the Model Work Health and Safety Legislation*[30] and stated:

The difficulty of achieving a successful prosecution under the general criminal law means that they cannot possibly act as an effective deterrent. Company officers and their legal representatives know full well that the likelihood of personal liability for an occupations death is so remote as to be non-existent. Those responsible for high-level decisions around unsafe work practices must feel that they will be held accountable for negligent breaches of Model Laws which cause death, otherwise their conduct is unlikely to change. It is well accepted that the real threat of personal prosecution provides significant motivation for officers of companies to take steps to comply with their obligations.

4.2.9 An additional issue associated with the current criminal manslaughter provisions under the Criminal Code is that they do not enable the imposition of fines on the guilty party.[31]

4.2.10 Anecdotal evidence (particularly in other jurisdictions where reasonably significant fines have been in force for a number of years) suggests financial penalties, on their own, are not an effective strategy or deterrent in ensuring better health and safety at work. Specifically, we consider that financial penalties:

a) do not ensure that the offenders restructure their workplace to comply with OHS standards;

b) do not ensure that the offenders restructure their workplace to comply with OHS standards;

c) only have an impact upon the financial returns of the corporation, and not on the motivation and/or behaviour of the responsible managers;

d) ensure any disciplinary action is ever taken against those who should be held responsible and accountable (especially if the hazards and risks were previously known to them);

e) require management to review their systems of operation so that the offence will not reoccur; and

f) can be easily avoided by restructuring the corporate structure or identities or by moving the organisation's assets to other corporate entities.[32]

The introduction of a new provision of industrial manslaughter

4.2.11 It is the CFMEU's submission that the introduction of industrial manslaughter provisions in the model WHS Bill are essential. The introduction of industrial manslaughter offences would

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30 Journal of Health, Safety and Environment, 32(1).

31 Ibid.

32 Ayers, Gerard 2013, *Corporate Manslaughter legislation (A Brief summary of Australia's* experience. Report prepared on behalf of the Australian Council of Trade Unions; Gunningham, N., & Johnstone, R. 1999, *Regulating Workplace Safety: systems and sanctions*. Oxford University Press, Oxford.

demonstrate the significance of workplace health and safety as a matter of public policy, and to help bring about cultural change in workplace health and safety practices.

4.2.12 The purpose of creating an offence of industrial manslaughter within the model WHS Bill would be to hold officers of a corporate entity responsible where such a person causes, or substantially contributes to, the death of another through a negligent act or omission.[33]

4.2.13 The proposition that the threat of personal prosecution is a substantial motivator to ensure compliance with work health and safety obligations is well-established.[34] Moreover, if law is a reflection of society's values, then criminal sanctions have both a moral and symbolic role to play. As renowned WHS academics Neil Gunningham and Richard Johnstone have stated: [35]

…symbolic or moral aims of criminal sanctions seek to apportion moral blame for criminal acts, and officially demonstrate society's intolerance of harmful behavior…we use the criminal law when our sensibilities are assaulted – when, in addition to redressing the particular problem, we want both to condemn the wrongdoers' conduct, and to stigmatize them. The criminal law both reflects existing public sentiments about the heinousness of certain activities, but can also be used to shape such perceptions, particularly if used in conjunction with media campaigns showing the reprehensible aspects of the behavior, while simultaneously emphasizing society's condemnation of that behavior…

4.2.14 Gunningham has also identified that regulation and personal liability, reinforced by credible enforcement, is the single most important motivator for a CEO, in relation to their responsibility in ensuring high-level OHS standards are both implemented and maintained at their organisations' workplace.[36]

4.2.15 Currently, the only jurisdictions which contain industrial manslaughter provisions are:

a) the ACT. The relevant legislative framework can be found within the *Crimes (Industrial Manslaughter) Act 2003* (ACT), which amended Part 2.5 of the *Criminal Code 2002* (ACT); and

b) Queensland, which introduced into industrial manslaughter provision into the *Work Health and Safety Act 2011* (Qld) (**Qld WHS Act**).

However, we note the Victorian Andrews Government's has committed to legislating an industrial manslaughter.

4.2.16 Under Part 2A, specifically s 34C and 34D of the Qld WHS Act, both the PCBU and/or a Senior Officer are criminally liable if:

a) a worker dies (or is injured and later dies) in the course of carrying out work;

b) the person conducting a business or undertaking (PCBU) or senior officer's conduct (either buy act or omission) causes the death of a worker; and

c) the PCBU or senior officer was negligent about causing the death of the worker by the conduct.

4.2.17 The ACTU Review explored how these provisions will practically work:

As noted by the Queensland Parliament Finance and Administration Committee, while the introduction of a new offence in WHS law will overlap to some degree with the existing criminal law, it is to be

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33 Australian Council of Trade Unions Submission into Review of Model WHS Laws 2018. 2 May 2018, p 56.

34 Bailey, T, J Woolley and S Raftery (2015) "Compliance and enforcement in Road Safety and Work Health and Safety: A Comparison of Approaches *Journal of Health, Safety and Environment*, 2015; 31(2); Clough, J (2007) "A Glaring Omission? Corporate Liability for Negligent Manslaughter" 20 *Australian Journal of Labour Law* 29; Purse, K and J Dorrian (2011) "Deterrenace and Enforcement of Occupational Health and Safety Law", *The International Journal of Comparative Labour Law and Industrial Relations* 27(1).

35 Ibid, at pp.193-194.

36 Gunningham, N. 1999, *CEO and Supervisor Drivers: Review of literature and current practice,* Report commissioned by the National Occupational Health and Safety Commission.

expected that in practice, conduct causing the death of the worker will be pursued under the WHS law unless the Police wish to progress the manslaughter charges instead…

…There is a question about how a new offence would interact with existing Category 1 offences. Under the current (Model Act) framework, a category 1 offence is committed where a person recklessly (i.e. through a rash or careless act or omission) exposes an individual to death or serious injury, regardless of the actual outcome. A new offence of industrial manslaughter would apply only in circumstances where the outcome of the conduct is that a worker dies, or is inured and later dies as a result of that injury. If the person's negligent conduct causes the death of the worker, the person may be prosecuted for industrial manslaughter. The standard of criminal negligence would apply, meaning that the prosecution must prove beyond reasonable doubt that the persons conduct departs so far from the standard of care expected to avoid danger to life, health and safety, and the conduct substantially contributed to the death.

4.2.18 Having regard to all of the above, the CFMEU strongly supports the adoption of the industrial manslaughter provisions analogous to the Qld WHS Act within the model WHS Bill. In particular, the offence should:

a) include both acts and omissions which substantially contributes to death;

b) apply to corporate duty-holders and officers who have the capacity to significantly affect health and safety outcomes. The cause of action should go not just to the immediate cause of a death, but also to the root cause of it;

c) carry significant penalties, including substantial periods of imprisonment; and

d) encompass circumstances where *any* person dies in the course of carrying out work. This would protect members of the public (such as the three pedestrians who were killed when a wall on the edge of a Grocon site collapsed in Melbourne in 2014), as well as ensure justice in industries such as construction where there are multiple contractors and sub-contractors engaged on a site/where multiple PCBUs exist under the model WHS Bill.

Recommendation 13
The model WHS Bill be amended to incorporate industrial manslaughter provisions analogous to the QLD WHS Act and encompass circumstances where *any* person dies in the course of carrying out work.

Attachment 8F Comparison of State and Federal Right of Entry Provisions (Occupational Safety and Health)

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
Who may exercise right of entry to investigate a suspected breach of OSH laws	• Any person who holds an authority under IR Act (referred to as an **authorised representative**) – s 49G and s 49J(3) • No requirement that the authorised representative be an official or employee of a union – s 49J(1) • No requirement that the authorised representative be a "fit and proper person" • No requirement that the authorised representative complete any training • Note, however, s 494(1) of the FW Act – if the occupier or employer is a constitutional corporation, the authorised representative must be a permit holder under the FW Act	• Section 131 – official[830] or employee of a union: ○ who has completed the prescribed training; and ○ who holds a WHS permit and either a permit under the FW Act or the relevant State or Territory industrial law • Note, however, s 494(1) of the FW Act – if the occupier or employer is a constitutional corporation, the WHS permit holder must be a permit holder under the FW Act	Same as 2016 provisions
Minimum notice to enter premises	No notice required (although there is a requirement to give notice for the production of records – see below)	• 24 hours' written notice, unless the WHS permit holder has obtained an exemption certificate[831] - s 117(5) and (6) • Exemption certificate must be issued if there is a serious risk to health or safety emanating from immediate or imminent exposure to a hazard – s 117(7)	• No prior notice required • WHS permit holder must, as soon as reasonably practicable after entering a workplace, give notice of the entry and suspected breach – s 119(1) • However, no requirement to give notice if it would defeat the purpose of entry, or unreasonably delay the WHS permit holder in an urgent case – s 119(2)

830 See definition of "official of a union" in s 116.

831 An exemption certificate is issued by the "authorising authority", which would presumably be the Occupational Safety and Health Tribunal in Western Australia.

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
Production and inspection of records	• At least 24 hours' written notice is required if the records are kept on the employer's premises – s 49I(6)(a) • At least 48 hours' written notice is required if the records are kept elsewhere – s 49I(6)(b) • Authorised representative may seek waiver of the requirement to give notice by obtaining a certificate from the WAIRC – s 49I(7) • Note, however, s 495 of the FW Act – if the occupier or employer is a constitutional corporation, the authorised representative must give at least 24 hours' notice to inspect an "employee record" as defined by s 12 of that Act	At least 24 hours' written notice to enter "any workplace" for the purpose of inspecting records – s 120(5)	Same as 2016 provisions[832]
Reasonable suspicion of breach	No express requirement that the authorised representative reasonably suspect that a breach has occurred	WHS permit holder must reasonably suspect that a breach has occurred or is occurring – s 117(2)	Same as 2016 provisions
Identity of employees	IR Act silent on whether employer can require authorised representative to disclose the names of employees	WHS permit holder is not required to disclose the name of any worker at the workplace – s 130	Same as 2016 provisions
Who the suspected breach must relate to	Suspected breach must relate to an employee who is a member or eligible to be a member of the union ("relevant employee") – s 49G	• Suspected breach can relate to a broad range of workers, including an employee or contractor – definition of "worker" in s 7 • Worker must be a member or eligible to be a member of the union – definition of "relevant worker" in s 116 • Union must also be entitled to represent	Same as 2016 provisions

[832] Note, however, that a WHS permit holder could inspect records without 24 hours' written notice where they have entered a workplace under s 117 and are exercising a right under s 118(1)(d), as opposed to a right under s 120.

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
		the industrial interests of the worker – definition of "relevant worker" in s 116	
Rights while on premises	Section 49I(2): • Inspect and make copies of relevant records • Inspect relevant work/material/machinery	Section 118: • Inspect and make copies of relevant records • Inspect relevant work/material/machinery • Consult with workers • Consult with the person conducting the business • Warn any person exposed to a serious risk to health or safety	Same as 2016 provisions
Residential premises	Authorised representative cannot enter any part of premises principally used for habitation by the employer and their household – s 49K	WHS permit holder cannot enter any part of workplace that is used only for residential purposes – s 129	Same as 2016 provisions
Entry to consult and advise workers	• Authorised representative may enter premises for the purpose of holding discussions with employees who wish to participate – s 49H(1) • At least 24 hours' written notice is required (unless industrial instrument applies which provides for no notice or different period of notice) – s 49H(2) and (3)	• WHS permit holder may enter workplace to consult on OSH matters with workers who wish to participate – s 121(1) • WHS permit holder may warn any person exposed to a serious risk to health or safety – s 121(2) • At least 24 hours' written notice is required – s 122	Same as 2016 provisions
OSH requirements	• No express requirement that authorised representative comply with reasonable OSH requirements of the occupier • Note, however, s 499 of the FW Act – if the occupier or employer is a constitutional corporation, the authorised representative must comply with reasonable OSH requirements of the occupier	WHS permit holder must comply with reasonable requests to comply with any OSH requirement that applies at the workplace – s 128	Same as 2016 provisions

Issue	IR Act	2016 Model Work Health Safety (WHS) provisions	2011 Model Work Health Safety (WHS) provisions
Prohibitions	Section 49O prescribes civil penalty provisions for a limited range of prohibited conduct, namely where: • an occupier refuses or intentionally and unduly delays an authorised representative entry • a person intentionally and unduly hinders or obstructs an authorised representative • a person purports to be an authorised representative without holding an authority under the IR Act Maximum penalty $5,000 for an employer or organisation and $1,000 for any other person – s 83E(1)	Sections 144-148 prescribe civil penalty provisions for a wide range of prohibited conduct, including where: • a person refuses or unduly delays a WHS permit holder entry – s 144 • a person hinders or obstructs a WHS permit holder – s 145 • a WHS permit holder hinders or obstructs any person, or disrupts work – s 146 • a WHS permit holder acts in an improper manner – s 146 • a person discloses information without authorisation – s 148 Maximum penalty $10,000 for an individual and $50,000 for a body corporate	Same as 2016 provisions
Disputes about right of entry	Dispute could be brought to the WAIRC by an employer or union pursuant to s 44 of the IR Act	• If a dispute arises, a party can ask the regulator to appoint an inspector to attend the workplace to assist – s 141 • Authorising authority may also deal with a dispute and make orders (including an order imposing conditions on a WHS entry permit, or an order suspending or revoking a permit) – s 142	Same as 2016 provisions