

## Resolution

### SUBJECT: Harmonisation of OHS Laws

Occupational health and safety (OHS) has been at the forefront of union activity in Australia for more than a century and a half. Over that time, the union movement has worked collectively to address health and safety issues affecting workers ranging from the need for civilised working hours to the need for protection from exposure to asbestos. The current OHS laws that are in place to protect workers exist as a result of a series of effective campaigns, which have been conducted by unions and their members. This is reflected in many of the current OHS provisions across Australian jurisdictions, which ensure that workers; their elected health and safety representatives (HSRs); and their unions have rights in order to protect workers' health and safety.

All workers have the right to go to work and come home safely. Congress strongly believes that all Australian workers should have the same level of protection when it comes to their health and safety, regardless of the jurisdiction they work in. The transition to a harmonised OHS system must not leave any worker worse off and must deliver Australian workers the high standards that they deserve. It should not simply be used as an exercise to reduce "burdensome regulation and red tape"<sup>1</sup> for business.

Congress notes the issues detailed in the appendix to this motion and expresses outrage over the fact that the framework for the model OHS laws endorsed by the Workplace Relations Ministers Council (WRMC) on 18 May 2009 will fall well short of its own goal of ensuring that Australia has the world's best standards in OHS. Further, Congress believes this decision effectively breaks the commitment made by the Council of Australian Governments (COAG) that in developing harmonised OHS legislation there would be "no reduction or compromise in standards for legitimate safety concerns"<sup>2</sup>.

Congress rejects those aspects of the framework endorsed by the WRMC that will diminish the rights of workers, HSRs and unions to protect the health and safety of workers when employers and regulators fail to do so.

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<sup>1</sup> COAG Communiqué, 10 February 2006.

<sup>2</sup> COAG Communiqué, 13 April 2007.

Accordingly, unions will continue to actively campaign in order to ensure that Australian workers are protected by the best possible harmonised OHS laws.

Congress notes that the WRMC Communiqué from 18 May 2009 stated that “the development of the model OHS Act and its regulations will involve extensive stakeholder consultation, including the release of an exposure draft bill for public consultation. Matters raised during these consultation processes will help to shape the final products for WRMC’s decision”.

Accordingly, Congress calls upon the Federal, State and Territory governments to engage in a meaningful dialogue with the ACTU and its affiliates in order to draft model OHS laws that are consistent with the principles identified by the ACTU; and that will genuinely result in the highest level of protection for the health and safety of all Australian workers.

This includes, but is not limited to, provisions for:

- Genuine consultation with workers on OHS issues and rights for elected HSRs;
- The right for workers and their unions to initiate prosecutions and to have OHS disputes conciliated and arbitrated where the relevant authorities have failed to act;
- Risk management;
- Employers to bear the onus of proof in prosecutions;
- The right for union officials to enter workplaces and investigate suspected OHS breaches without notice; and
- A genuinely tripartite approach to OHS matters.

Congress endorses a thorough and sustained national campaign, to be conducted by the ACTU in conjunction with TLCs and affiliated unions, to ensure the model OHS laws contain the highest health and safety standards. Unions undertake to inform Australian workers about the threats posed to their health and safety as a result of the approach taken by the WRMC to developing model OHS laws.

This campaign will challenge these threats and assert the right of all workers to have the highest standards of OHS protections, which includes the provisions outlined above. The campaign will include political, media and industrial components directed at the Federal, State and Territory governments to ensure that all workers have the right to a healthy and safe workplace. Congress notes and endorses the actions to be taken by individual unions at workplaces across the country as part of this campaign.

Further, Congress regards this campaign as an urgent priority for the ACTU and as such it must be appropriately resourced.

# Appendix

## INTRODUCTION

1. The ACTU Executive has considered the matter of the harmonisation of occupational health and safety (OHS) laws through the Council of Australian Governments (COAG) and Workplace Relations Ministers Council (WRMC) processes on a number of occasions. It was resolved that the union movement actively campaign for a system that results in the highest possible protections for workers and does not compromise the hard won rights and entitlements that currently exist in a number of jurisdictions.
2. Despite making our position known relevant Ministers, on 18 May 2009 the WRMC adopted a framework for model OHS laws that creates the preconditions for a harmonised system where workers in various jurisdictions would be worse off.
3. The motion regarding the harmonisation of OHS laws is to:
  - o Reaffirm our commitment to the priority OHS issues;
  - o Call for the outstanding matters in these areas to be addressed;
  - o Call for genuine and detailed negotiations over the content of the model OHS laws; and
  - o Commit to a sustained national campaign to ensure that the harmonisation of OHS laws does not leave any worker worse off and results in the best outcome for Australian workers.

## THE PRIORITY ISSUES

4. Following the release of the two reports from the national review into OHS laws, which contained recommendations for a model OHS law, the ACTU identified a number of issues that must be addressed to ensure that the harmonisation process results in the highest OHS standards and that no worker is worse off. The ACTU is calling on the Federal, State and Territory governments to enter into genuine and detailed negotiations to address these matters as a priority. The priority issues relate to:
  - o The requirement for genuine consultation with workers on OHS issues and rights for elected health and safety representatives (HSRs), including access to training, support, powers and protection;
  - o The right for injured workers and their unions to initiate prosecutions where the relevant authorities have failed to do so;
  - o A risk management approach to OHS laws;
  - o Employers to bear the onus of proof in prosecutions;

- The right for union officials to enter workplaces; and
- A genuinely tripartite approach to OHS matters at the Federal, State and Territory level, which must be enshrined in legislation.

## CONSULTATION AND HEALTH AND SAFETY REPRESENTATIVES

5. Workers have a right to be consulted and represented in relation to all matters that affect their health and safety at work. Further, there is extensive international and Australian evidence on the value of workers' involvement in improving OHS outcomes, increasing awareness about OHS; and in identifying and resolving OHS issues.
6. HSRs are fundamental to representing the interests of workers and in achieving improvements to OHS in the workplace. Studies also show that the presence of HSRs in the workplace lifts the general standard of OHS management.

### Outstanding Matters in Relation to Consultation and HSRs

7. Based on the WRMC decision, employers would only be required to consult "affected workers" who are "directly involved" as far as reasonably practicable.<sup>3</sup> This limits consultation about health and safety matters to a defined group of workers. Health and safety issues affecting one group of workers may have a flow-on affect to other areas of a business. Therefore, it makes no sense to exclude the views of other HSRs, Health and Safety Committees (HSCs) or other workers. "As far as reasonably practicable" limits an employer's obligation to consult - an obligation that should be unconditional.
8. The chairperson of HSCs needs to be mandated as an employee to ensure these committees remain genuine vehicles for consulting with employees and ensuring that workplaces are healthy and safe.
9. The WRMC decision does not provide a time-limit to determine the make up of workgroups for the election of HSRs.<sup>4</sup> In mobile or temporary workplaces where work is often short-term, but potentially high-risk, this could mean workgroups are never set up, or that the process becomes unreasonably lengthy. A maximum time-limit of fourteen days for decisions regarding a request for a workgroup to be established must be set.
10. HSRs must have the right to choose their training provider and attend the course of their choice, upon giving their employer fourteen days notice prior to the commencement of the course. Any requirement to seek the agreement of the employer, or to take into account the operations of the business,<sup>5</sup> should be rejected as it could be used to restrict and delay a HSR exercising their right to do the training of their choice.
11. HSRs must have a right, expressed as a power, to seek the assistance of any person to assist them with any OHS matter. This is fundamental to

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<sup>3</sup> Recommendation 96

<sup>4</sup> Recommendation 103

<sup>5</sup> Recommendations 110 and 111

ensuring that HSRs have access to support, advice and assistance from both inside and outside their workplace. The right must not be restricted to the resolution of OHS issues alone. Recommendation 107 does not adequately address this issue and the WRMC failed to rectify this problem.

12. An unreasonable restriction has been placed on the right of democratically elected HSRs to issue Provisional Improvement Notices (PINs) and direct the cessation of work until they have completed an approved training course.<sup>6</sup> Apart from restricting a HSR from exercising their powers, this condition has the potential to be abused by employers who seek to indefinitely postpone the “agreed time” for training, which would prevent HSRs from exercising key powers.
13. A qualification has been placed on the right of HSRs to be protected from civil liability<sup>7</sup> to when they acted in “good faith” in performing or omitting to perform their role, or exercising their rights or powers. The term “good faith” is a subjective judgment, which can be misused to intimidate HSRs. HSRs must have full protection from civil liability.
14. An entitlement to seek the disqualification of an elected HSR has been afforded to parties other than the workers who elected them.<sup>8</sup> Only a majority of the workers who constitute the workgroup that elected the HSR should have that right.
15. The mandatory requirement to establish a Health and Safety Committee where there are 20 or more workers has been removed, which is unacceptable.<sup>9</sup>
16. Conciliation and arbitration of OHS disputes that can not be resolved by negotiation or with the involvement of an inspector/regulator must be a key feature of the dispute settlement process.<sup>10</sup>
17. A restrictive limitation of “reasonable grounds” has been placed on the right of HSRs to direct workers to cease work.<sup>11</sup> This right should be consistent with the definition of “reasonable concern” contained in the *Fair Work Act 2009*, a right that others at work are entitled to.

## RIGHT TO PROSECUTE

17. Victims of industrial incidents and their representatives must be entitled to pursue justice, especially where a regulator fails to do so. It is entirely appropriate for an organisation representing victims of breaches of an Act to be able initiate prosecutions on behalf of those victims. In fact, in NSW there is a long standing precedent of some 60 years in this respect.
18. The number of union initiated prosecutions has been relatively low and limited to circumstances where the regulatory authority has declined to prosecute and the workers concerned felt that important questions of principle were involved. In some instances, union initiated prosecutions

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<sup>6</sup> Recommendation 110

<sup>7</sup> Recommendation 112

<sup>8</sup> Recommendation 113

<sup>9</sup> Recommendation 114

<sup>10</sup> Recommendation 120

<sup>11</sup> Recommendation 122

have been adopted by the regulator and of them have been successful. Further, many have resulted in improvements to OHS that have benefitted workers around the nation. For example, the introduction of devices to protect bank workers in the event of armed hold ups following a successful prosecution initiated by the Finance Sector Union. A recent report by the Honourable Justice Paul Stein QC in NSW found no evidence that unions had abused the right to initiate prosecutions.

### **Outstanding Matters in Relation to the Right to Prosecute**

19. The right of victims and their representatives to initiate prosecutions has not been adopted by the WRMC,<sup>12</sup> which leaves a significant hole in the enforcement and compliance framework, reduces the rigor of the system and risks poorer OHS outcomes for workers.

### **RISK MANAGEMENT**

20. Risk management is critical for implementing effective OHS management systems. Deficiencies in risk assessments have been the focus of recent attention in relation to a number of serious incidents; the most significant example being the inadequacy of risk assessment prior to the Beaconsfield mine collapse.

### **Outstanding Matters in Relation to Risk Management**

21. The hierarchy of controls and risk assessment must be prescribed in the principle Act, not relegated to subordinate regulations,<sup>13</sup> which is the position adopted by the WRMC.

### **ONUS OF PROOF**

22. It is of vital importance for the defendant to bear the onus of proof in relation to the defences available under OHS legislation. Any other approach will significantly compromise the prospects of the effective enforcement of the general duties imposed by OHS legislation and inhibit the achievement of its objectives.
23. In such cases, the defendant (whether employer, designer, supplier, manufacturer or person in control of work premises) will be in the best position to testify as to what has been done, what other available measures could have been taken; and about the expense, difficulty or inconvenience involved in adopting measures that would have reduced or eliminated risks to safety. Therefore, whatever the relationship is between the general duties and the defences in OHS legislation, it is critical that the legislation makes it clear that the defendant bears the onus of proof in relation to the question of reasonable practicability or the absence of control.

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<sup>12</sup> Recommendation 223

<sup>13</sup> Recommendations 9 and 136

## Outstanding Matters in Relation to Onus of Proof

24. The WRMC adopted the recommendation that the prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.<sup>14</sup> This makes it significantly more difficult for prosecutors to prepare a prosecution and has the potential to greatly reduce the number of prosecutions that are pursued for breaches of the Act.
25. The WRMC has recommended that "gross negligence" be removed from the range of offences and that "reckless endangerment" be kept.<sup>15</sup> This undermines the long standing claim of unions in relation to industrial manslaughter legislation. Gross negligence only considers the extent to which someone departed from what a "reasonable person" would do and encapsulates inaction, which is the primary cause of most workplace deaths. "Recklessness" generally relies on there having been action taken.

## RIGHT OF ENTRY

26. The ILO highlights the crucial role of unions in securing safer, healthier work and "argues strongly for a strengthening of collective voice as the primary means of improving working conditions, and protecting workers' health".
27. Unions perform a critical role in OHS in terms of monitoring compliance, providing an avenue for workers to report problems anonymously, resolving problems with management; and in identifying serious breaches of OHS legislation that require intervention.

## Outstanding Matters

28. The WRMC has recommended that union right of entry in relation to OHS matters be "consistent" with the *Fair Work Act 2009*.<sup>16</sup> Clarification is required regarding the meaning of "consistent".
29. The rights and powers of union officials to investigate suspected OHS breaches has been changed to "inquire into", which will have a detrimental impact on their capacity to effectively deal with such breaches.<sup>17</sup> Powers in this respect must be consistent with the provisions of the NSW OHS Act.

## TRIPARTISM

30. The importance of a genuinely tripartite approach to OHS can not be overstated. Tripartism has a long history in Australia, which is widely recognised as being a successful approach for improving OHS standards. This was a principle recommendation in the seminal UK Robens Report in 1972. It is also recognised by the International Labor Organisation (ILO) through Occupational Safety and Health Convention No. 155, which

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<sup>14</sup> Recommendation 62

<sup>15</sup> Recommendation 55

<sup>16</sup> Recommendations 204, 208, 214, 215, 219 and 221

<sup>17</sup> Recommendations 211

Australia has ratified. In fact, tripartism underpins the structure of the ILO. A strong and robust OHS framework must be built on a genuinely tripartite approach.

### Outstanding Matters in Relation to Tripartism

31. The WRMC has not made any provisions for a reference to tripartism at Federal, State and Territory level to be included in the objects of the model OHS laws.<sup>18</sup>
32. The WRMC rejected the recommendation that a tripartite advisory panel should oversee the use of enforceable undertakings as an alternative to prosecutions.<sup>19</sup> This will result in a lack of transparency and accountability in this area. Consequently, the victims of work-related incidents and their families can have no confidence that justice will be served in such cases.

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<sup>18</sup> Recommendation 80

<sup>19</sup> Recommendation 152