Inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths

Submission by the Australian Council of Trade Unions to the *Senate Education and Employment References Committee*

ACTU Submission, 2 July 2018
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Introduction

The ACTU is the only peak body representing working Australians through over 40 affiliated unions and trades and labour councils.

The ACTU welcomes this important Senate Inquiry and the opportunity to make a submission.

A number of the ACTU's affiliated unions have made separate submissions to this Inquiry, and the ACTU endorses the content of those submissions. In addition, the ACTU recently made a submission to the 2018 Review of Model Workplace Health and Safety (**WHS**) laws, making 44 recommendations aimed at strengthening the capacity of the Model WHS laws to respond to changing work arrangements and better prevent injury and death at work. The submission is directly relevant to the current Inquiry and is **attached** for the Committee's reference.

Workplace health and safety is a fundamental human right. Every worker should be able to go to work and return home safely to their loved ones. From 2003 to 2016, at least 3,414 workers lost their lives in work-related incidents in Australia. In 2017, there were 187 Australian workers killed at work, compared with 182 workers in 2016. As at 28 June, there have been 70 Australian workers killed at work already this year.[1] While the number of fatal work injuries has declined over time in most developed countries, limitations in data collection continue to result in an underestimation of the true extent of work-related deaths, including those arising from work-related diseases such as cancer and cardio-vascular disease. Any death at work is unacceptable, and there is no evidence to suggest that industrial deaths can or will be eliminated without additional or new regulatory measures.

Work-related injury, illness and disease continue to impose a significant cost on the community. It is estimated that there are 2.2 million work-related deaths world-wide and that workplace injury, illness and death cost the global economy some $US1,250,000 million or 4% of world GDP.[2] The total cost of work-related injury and disease in Australia was $AU61.8 billion in 2012-13, including the cost of productivity loss, additional hours of work, insurance, loss of earnings and funeral, carer, compensation, medical, litigation and prosecution costs.[3] Employers bear 5% of these costs, workers bear 77% and the community 18%. These figures do not include the suffering, social dislocation and economic hardship endured by the families of those affected by work-related deaths.[4]

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[1] Safe Work Australia, Fatality Statistics, accessed 2 July 2018
[2] International Labour Organization (ILO), *Safety in numbers: Pointers for a global safety culture at work*, 2003
[3] SafeWork Australia, *The cost of work-related injury and illness for Australian employers, workers and the community: 2012-13*, 2015.
[4] Quinlan, M., Matthews, L, Bohle, P, *Employer and Union Responses to Traumatic Death at Work: Evidence from Australia New Zealand Journal of Employment Relations, 40(3): 1-23*

Competitive pressures and work intensification have led to the proliferation of non-standard and precarious forms of employment, particularly in the transport, construction and agriculture industries. These pressures often result in 'corner-cutting' on WHS in order to meet deadlines, which can have fatal consequences for workers and others. Changing work relationships and complex industry structures such as supply chains have made locating WHS duty-holders, and holding them accountable, much more difficult.[5]

In this environment, the current legislative framework is insufficient to effectively prevent or prosecute occupational fatalities and a number of reforms are required.

Terms of Reference

On 26 March 2018, the Senate referred the inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia to the Education and Employment References Committee for inquiry and report by 20 September 2018, with particular reference to:

i) *the effectiveness and extent of the harmonisation of workplace safety legislation between the states, territories and Commonwealth;*

ii) *jurisdictional issues surrounding workplace investigations which cross state and territory boundaries;*

iii) *issues relating to reporting, monitoring and chains of responsibility between states, territories and the Commonwealth;*

iv) *safety implications relating to the increased use of temporary and labour hire workers;*

v) *the role of employers and unions in creating a safe-work culture;*

vi) *the effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death; and*

vii) *any other related matters.*

This submission addresses these matters.

[5] Johnstone, R and Tooma, M, *Submissions in relation to draft Model Work Health and Safety Regulations and Codes of Practice*, 18 March 2011

Executive Summary

There is no quick fix or single solution to the problem of work-related deaths. A package of reforms is needed, including amendments to WHS laws, improvements to regulator practices, reforms to tackle corporate phoenixing and a review of government licensing and procurement rules.

The ACTU's key concerns with the current WHS framework are as follows:

- Inadequate penalty regime:
    - The maximum penalties in WHS Model Laws are too low, for example when compared with those applicable for corporate crime;
    - Courts frequently award penalties lower than the available maximum, even for the most serious breaches causing death;
    - The ability of companies to insure against WHS penalties and 'phoenix' to avoid fines further undermines the effectiveness of penalties.
- Inadequate national enforcement, monitoring and compliance strategy by regulators – particularly in relation to non-standard workplaces and cross-border incidents. The balance between education/encouragement and hard enforcement activity is not appropriate to prevent workplace injury and death. An urgent review is needed.
- Inadequate consultation and participation mechanisms for workers and unions, particularly in insecure and precarious work environments.
- Under-reporting and inadequate data collection, which impedes effective early intervention and prevention measures by regulators and social partners.
- Inadequate legal mechanisms:
    - Unions should be authorised to commence both civil and criminal prosecutions for WHS breaches;
    - A partial reverse onus of proof should be introduced, by removing the 'so far as reasonably practicable' qualifier from the primary duty of care and relocating it as a defence, with the onus on the defendant to prove that reasonably practicable steps have been taken;
    - A new offence of corporate manslaughter should be introduced;
    - Amendments should be made to strengthen officers' duties, including changing the definition of 'officer' to ensure those responsible for WHS breaches are covered;
    - The standard for a Category 1 offence should include 'negligence' as well as recklessness;
    - WHS disputes should only be heard by courts and tribunals with expertise in WHS and industrial matters;

- Sentencing guidelines should be developed in order to ensure consistent and appropriate sentencing for serious WHS breaches across jurisdictions.

Reform to address these problems with the WHS regime must be complemented by reforms in other areas to hold corporations accountable for reckless or negligent practices that cause work-related deaths, including:

- Reforms to Corporations Law to limit the ability of companies to liquidate to avoid WHS penalties, and to hold officers who engage in these practices to account;
- Government licensing and procurement consequences for corporations who repeatedly breach their WHS obligations.

The effectiveness and extent of the harmonisation of workplace safety legislation between the states, territories and Commonwealth

The Model Work Health and Safety Act, Regulations and Codes of Practice - collectively referred to in this submission as 'the Model WHS laws' - were developed in 2009-10 following an independent review process by the National Occupational Health and Safety Panel. The ACTU supported and fully participated in the processes that led to the development of the harmonised Model WHS laws. Strong, nationally consistent WHS standards are in the public interest. The ACTU continues to support nationally consistent WHS laws, as long as they do not compromise or reduce WHS protections or standards in any Australian jurisdiction. The ACTU also supports the maintenance of special regimes where the WHS risks are particularly high and/or unique, for example the electricity sector or transport industry, so long as protections are at least as good as the Model WHS laws. For example, given the disproportionately high number of deaths in the transport industry, the ACTU strongly supports the reinstatement of the Road Safety Remuneration Tribunal.[6]

A fatal injury at work in Australia may initiate a number of regulatory and judicial responses, including a police investigation, a workers' compensation claim, an investigation by the regulator, a prosecution, a common law claim and a coronial investigation. There are differences in the way these processes operate from jurisdiction to jurisdiction. The WHS harmonisation process has resulted in much greater consistency in the WHS legal framework. However, inconsistences in law and practice between different jurisdictions persist. Notably in the context of this inquiry, some jurisdictions have an offence of corporate manslaughter and some do not. Unions have retained a (limited) right to prosecute in NSW only. There are also some differences in consultation and participation requirements, including rights for health and safety representatives.

[6] The submission of the TWU to this Inquiry addresses this matter in detail.

There remain differences between jurisdictions in the approach to fatal injury investigations and proceedings. In some smaller jurisdictions such as the ACT, the Australian Federal Police, as opposed to the regulator, play the major role in the investigation and prosecution process. This may simply be because of resourcing issues. There is a need to ensure consistency in investigation processes, including by making sure that differences do not arise simply because regulators are under-resourced or because of different practices between WHS regulators and police law enforcement agencies. There must also be consistency, clarity and certainty regarding the prosecution policy of WHS regulators. This should include setting out exactly where ultimate responsibility resides for the decision to commence or not commence a prosecution. At present there is some uncertainty, at least in relation to criminal prosecutions for workplace fatalities, as to whether the decision ultimately rests with the relevant regulator (acting on advice from the DPP) or whether the views of the DPP are determinative, particularly given that under the Model WHS Act, both the regulator and the Director have standing to commence proceedings (s 230), and in practice in the Commonwealth jurisdiction at least, proceedings are regularly brought in the name of the Director. Families of deceased workers need to know with absolute certainty who is making the prosecution decisions and on what basis. There also remain differences between jurisdictions in relation to the conduct of coronial inquests into workplace fatalities. These processes need to be examined and to the greatest extent possible, harmonised to ensure that there are no inferior procedural or substantive rights accorded to families who are involved in a coronial inquiry merely because they happen to be in one jurisdiction rather than another. These issues are discussed in more detail below.

Jurisdictional issues surrounding workplace investigations which cross state and territory boundaries

There is a need to strengthen the WHS regime's capacity to effectively investigate, monitor and enforce compliance when cross-border issues arise. In light of technological advances and the increasing complexity and interconnectedness of work arrangements, such issues are increasingly likely to occur. Two studies of work-related fatalities that occurred in New South Wales and Victoria between 1984 and 1990 found that incidents that involved multi-jurisdictional coverage, such as road transport deaths, were more likely to fall between the cracks or attract less extensive investigation and prosecutorial follow-ups.[7] There are currently a number of regulators enforcing WHS legislation around the country. Nationally, the powers of inspectors and investigators are similar. However, there are differences in approach as well as levels of resource and expertise from jurisdiction to jurisdiction.

[7] Quinlan. M, Matthews. L, Fitzpatrick. S and Bohle. P, *Investigation and prosecution following workplace fatalities: Responding to the needs of families*, The Economic and Labour Relations Review, Vol. 25(2) 253– 270 (2014)

The extent to which the Model Laws would apply outside of a jurisdiction is not entirely clear. Provisions of the Model Laws which are not criminal offences do not automatically have extra-territorial application. PCBUs have WHS duties in relation to 'any place where a worker goes, or is likely to be, while at work, including a vehicle, vessel, aircraft or other mobile structure, any waters and any installation on land, on the bed of any waters or floating on any waters'. In the ACTU's submission, Entry Permit Holders (**EPHs**) and Inspectors must have powers to inquire into potential breaches, regardless of their location. The ACTU recommends amendments to confirm that the powers of EPHs and Inspectors in Parts 7, 9 and 10 of the Model WHS Act have extra-territorial application, to the extent that a jurisdiction's legislative powers allows. In addition, EPHs should be recognised nationally, across jurisdictional borders. EPHs should not be required to hold multiple entry permits in order to perform their functions effectively. It is inefficient and inconsistent with the policy intention of national harmonisation of WHS laws. This amendment is required to strengthen the WHS regime's capacity to effectively monitor and enforce compliance when cross-border issues arise.

The ACTU also supports the development of a detailed, overarching national regulatory strategy and methodology (including a strategic national approach to investigations and prosecutions) to assist regulators to determine their priorities, achieve a more appropriate and effective balance between positive motivators and deterrence, and take a consistent national approach. A process and mechanism for regular and meaningful consultation and information sharing between the regulators should be established, and specifically for managing cross-border matters, including the most appropriate means by which investigative powers relevant to an inquiry being undertaken by a regulator in one jurisdiction can be exercised in a second jurisdiction.

At a general level, an increase in the capacity of WHS inspectorates is required. As the population and workforce grows in size and working arrangements continue to increase in complexity, the number of workplaces without HSRs or union representation is also likely to increase, along with the number of cross-border incidents. Regulators should plan to increase the capacity of their inspectorates (including improving the quality and training of inspectors), and the number of workplace inspections, to manage this. Inspections should be based on a proactive strategic plan and focused on sectors and workplaces identified as problematic or high-risk. A consistent approach should be taken in similar fact situations and circumstances to achieve consistent outcomes.

Issues relating to reporting, monitoring and chains of responsibility between states, territories and the Commonwealth

Case study – Austral Fisheries

The death of young Northern Territory seafarer Ryan Donoghue raises a number of serious issues relating to reporting, monitoring and chains of responsibility between states, territories and the

Commonwealth, the effectiveness of penalties and the failure of regulators to provide information or conduct adequate inspections to ensure compliance.

Ryan was a 20 year old crew member on a prawn trawler in the Gulf of Carpentaria operated by Austral Fisheries Pty Ltd (**Austral Fisheries**), a well-established company with a $100m annual turnover. Ryan was electrocuted and killed while using an angle-grinder aboard the trawler. The vessel was inspected in Cairns by Maritime Safety Queensland Officers and Senior Electrical Safety Inspectors. The inspection found that the socket was not protected by a safety switch, known as a 'residual current device' (**RCD**). The Coroner found that not only was Ryan's death preventable, it was similar to an earlier death on a fishing trawler 'from which no lessons seemed to have been learned'. The Coroner investigating the earlier death had made nine recommendations, including the use of appropriate clothing and footwear, training, supervision and regular pre-season inspection of all fishing vessels, including their electrical systems. The recommendations were not followed. The Coroner investigating Ryan's death found that Ryan 'would be alive today, had those recommendations been followed, even in part'. The Coroner found that Austral Fisheries did not follow their own Safety Management System and failed to reduce the risk of electrocution as low as reasonably practical or at all.

In addition to the failure of the regulators to take steps to prevent the death of Ryan Donoghue, the response after his death was also inadequate. Initially, there was a dispute between the Northern Territory and Queensland Work Health and Safety authorities regarding jurisdiction. After a number of months, it was determined that Queensland had jurisdiction. Queensland Work Health and Safety's investigation found that there had been no substantial failure by the employer. The Queensland Department of Transport and Main Roads found that possible offences had been committed, but that the vessel was not within the jurisdiction of Queensland at the time. Neither the Australian Maritime Safety Authority nor WorkSafe NT took any action. The matter was only followed up after the Coroner referred the matter back to NT WorkSafe for 'further and better' action. NT WorkSafe eventually commenced a prosecution but has recently dropped charges against Austral in exchange for an enforceable undertaking.[8]

Nationally Consistent Enforcement

The overwhelming and consistent feedback from our affiliates is that regulators in all jurisdictions are disproportionately focusing on 'positive motivators' at the expense of deterring non-compliance

[8]http://www.abc.net.au/news/2018-06-22/austral-fisheries-over-prawn-trawler-death-charge-dropped/9899732?pfmredir=sm

through monitoring and enforcement activities. The National Compliance and Enforcement Plan (**NCEP**) sets out the approach regulators are supposed to take to WHS compliance and enforcement, including the criteria used to guide enforcement decisions. In principle, the ACTU supports a national policy setting out a consistent set of principles and operating protocols to guide compliance and enforcement. However, the ACTU has serious concerns about the adequacy and effectiveness of the NCEP as currently drafted. Firstly, the NCEP lacks detail and specificity. It does not provide adequate guidance on when and how the available compliance and enforcement tools should be used in practice. Secondly, the NCEP does not set out a comprehensive, effective enforcement strategy or methodology.

The NCEP states that *'regulators seek to use an effective mix of positive motivators, compliance monitoring and deterrents to encourage and secure the highest possible levels of compliance with work health and safety laws'*. The adoption of the constructive compliance model is reflective of a trend in policy development in regulatory bodies in many other like-minded countries. The ACTU does not oppose in principle the graduated compliance enforcement model. However, the balance between positive motivators and deterrence must be appropriate. Voluntary compliance is being allowed over too long a period - the effectiveness of voluntary compliance activities should be more carefully monitored and outcomes documented. Importantly, a stronger response is needed when duty-holders repeatedly breach WHS laws. In particular, there are not enough prosecutions being undertaken. To be an effective deterrent, there must be a 'credible risk' of prosecution and this is not currently the case. For example, in Victoria less than 1% of accepted WorkCover claims result in a prosecution of an employer for failing to maintain a safe and healthy workplace. Enforcement activity needs to be undertaken more often and earlier, in accordance with a clear strategic plan setting out priority areas for focus and performance indicators and targets. While education and encouragement are undoubtedly important, they can never be a substitute for strong and consistent enforcement of the rules by the regulator.

The NCEP should clearly articulate a national regulatory strategy to be adopted by regulators to determine their priorities for compliance and enforcement activities, including a strategic national approach to prosecutions. Currently, the NCEP places the obligation to develop such a strategy on individual regulators. This approach does not do anything to encourage a consistent national approach or effective targeting of high-hazard, high-risk industries, occupations and sectors and common injury types. The NCEP must also include mechanisms and measurable indicators to ensure that regulators better understand how to achieve an appropriate balance between education and encouragement on the one hand, and enforcement activity on the other. The NCEP should set out more clearly the processes, expectations and consequences for non-compliance. The focus of the regulators should be on sectors and industries where there are large numbers of vulnerable employees (e.g. low paid and with limited capacity to complain), and deterrence should be prioritised.

Prosecutions should target serious and repeated breaches, and/or breaches by high-profile or influential duty-holders and market-leaders, and details should be prominently publicised.

Data collection and classification

The data kept by regulators on prosecutions is inadequate. Regulators should keep a common, publicly available database of completed prosecutions, including information about the date of the prosecution, the nature of the entity prosecuted, the type of issue giving rise to the prosecution, the provision of the Model Act under which the prosecution was taken, the court in which the prosecution took place, the plea entered by the defendant, and the sentence imposed by the court. The database should also include links to all written court decisions.

There is also a number of problems with the collection and classification of data relating to deaths at work, including the discrepancy between the categories of 'notifiable fatalities' and 'traumatic deaths at work', complete exclusion of non-traumatic injuries from the work fatalities data – for example work-related cancers (Mesothelioma Registry is the one exception), cardiovascular disease etc, and the regulators' reliance on workers compensation data to inform enforcement activity, when this is neither comprehensive nor reliable. The submission of the AMWU addresses these matters in detail. Adequate data collection and classification is crucial to enable regulators and social partners to take effective action to prevent death and injury at work.

Safety implications relating to the increased use of temporary and labour hire workers

Over 40% of the Australian workforce is employed in some form of precarious or insecure employment. These workers are more likely to be injured at work for a range of reasons, including inadequate training and induction, fear of reprisals for speaking out about safety concerns, lack of access to participation and consultation processes, lack of regulatory oversight, poor supervision, inadequate access to effective safety systems and exposure to frequent restructures and down-sizing. Precarious workers experience a range of sub-standard working conditions in Australia, from lack of rights to participation and consultation and job insecurity at best, to slavery-like conditions in certain sectors and industries at worst.

WHS failures in precarious employment situations are primarily a result of a failure of enforcement, not the adequacy of existing laws. However, improvements can and must be made to the Model WHS laws to better assist duty-holders operating in complex work environments to understand and comply with their duties. The Model Laws must make it clear that powerful actors (such as retailers and head contractors) at the top of complex industry structures (such as labour hire arrangements, contractor arrangements, supply chains, joint ventures, alliances and franchise arrangements) are required to identify who is performing work right down to the bottom of these structures and to consult, cooperate and coordinate with workers and other duty-holders to identify and eliminate the WHS risks facing all

these workers. A number of suggested amendments are outlined in the ACTU's submission to the 2018 Review of Model WHS laws to address this issue, including an amendment to s 19 of the Model Act to ensure that labour-hire and supply chain arrangements are effectively covered by the primary duty of care, and updates to the Model Codes and Regulations to better explain the scope and nature of the primary duty of care as it applies in practice to 'non-standard' employment arrangements.

The role of employers and unions in creating a safe-work culture

Worker and union participation at all levels plays a pivotal role in the effective implementation of WHS legislation in Australia. The National WHS Review acknowledged that effective participation and representation of workers are crucial elements in improving WHS performance. A recent Harvard University study confirms that unionisation is associated with significantly lower workplace fatality rates.[9] The consequences of inadequate consultation and participation of workers and unions in WHS matters can be fatal. In its submission to the Model WHS Laws review, the ACTU recommends a number of improvements to the powers of Health and Safety Representatives (**HSRs**) and union Entry Permit Holders (**EPHs**) to strengthen their capacity to represent workers in a changing work environment. In particular, reforms are needed to ensure that HSRs are able to operate without interference, including accessing appropriate training of their choice, and to improve the functioning of Health and Safety Committees. The ACTU refers the Committee to these recommendations.

In the specific context of industrial deaths, other relevant parties should also be empowered to play a role, in particular the families of those killed at work. In 2017, the Queensland Parliament passed laws to establish the Persons Affected by Work-Related Fatalities and Serious Incidents Consultative Committee. This committee has the legislative mandate to give advice to the Queensland Government about the information and support needs of persons affected by work-related fatalities and serious incidents. Families have long advocated for a greater voice in how Government responds to families and injured workers. The ACTU welcomes the establishment of this Committee and recommends that all jurisdictions be required to establish such a body.

The effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death

The need for regulatory change in Australia arises from repeated failures or withdrawals of prosecutions and the awarding of manifestly inadequate financial penalties in cases of workplace death and serious injury. There are many examples:

[9] Zoorob M, *Does 'right to work' imperil the right to health? The effect of labour unions on workplace fatalities*, *Occupational Environmental Medical*, Published Online First: 13 June 2018. doi: 10.1136/oemed-2017-104747

- On 25 September 1998, an explosion occurred at the Esso natural gas plant at Longford in Gippsland. Two workers were killed and eight injured. Esso was prosecuted, found guilty and fined $2 million.[10] This was the largest fine for a workplace offence at the time, but realistically was a drop in the ocean for the company, whose Bass Strait operations generated a similar amount each day.
- The submission of the CFMEU to this inquiry details repeated WHS breaches by the John Holland Group causing death and serious injury. In a case involving a death at the Mount Whaleback mine in Western Australia, the court commented on the insignificant nature of the maximum penalty available under WHS laws, noting that large corporations such as John Holland might be expected by the community to be subjected to substantially higher penalties for WHS breaches causing loss of life.[11]
- In 2013, three pedestrians were killed when a section of a wall on Grocon's CUB construction site on Swanston Street in Melbourne collapsed in high-winds. Grocon, a multi-million dollar corporation, faced a maximum fine of only $305,000 when the case against it was heard in the Magistrates Court rather than the County Court. Ultimately, Grocon was fined only $250,000 for failing to ensure the structural integrity of the wall.[12]
- WHS regulators are being subjected to ongoing criticism in numerous jurisdictions around the country for failing to take adequate or appropriate preventative and/or response action following death and serious injury at work.[13]

Model WHS Act

Currently under the Model laws, there are three categories of offences for failure to meet a WHS duty. Category 1 is a crime. It applies when a duty holder, without reasonable excuse, engages in conduct that recklessly exposes a person to a risk of death or serious injury or illness. The maximum penalty is five years' imprisonment for individuals and monetary penalties of up to $3 million for corporations, $600,000 for officers, and $300,000 for workers and other persons.

Categories 2 and 3 offences do not have the element of recklessness and there is no capacity to rely on a 'reasonable excuse'. A Category 2 offence occurs when a duty holder fails to comply with a

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[10] *DPP v Esso Australia Pty Limited* [2001] VSC 263
[11] *Comcare v John Holland Pty Ltd* [2012] FCA 449
[12] http://www.abc.net.au/news/2014-11-21/grocon-fined-250000-over-fatal-wall-collapse/5908292
[13] For example, in South Australia - https://www.sbs.com.au/news/icac-scrutinises-safework-sa-investigation; Tasmania - https://www.theadvocate.com.au/story/5479622/gorrie-inquest-hears-no-prosecutions-over-penguin-mans-2014-death/; the ACT - http://www.abc.net.au/news/2016-12-06/industrial-prosecutions-under-fire-in-case-of-cleaner-who-fell/8096476; NT - http://www.abc.net.au/news/2016-06-03/ryan-donoghue-prawn-trawler-death-inquest-findings/7475586; and WA - https://www.watoday.com.au/national/western-australia/young-workers-deaths-spark-update-of-out-of-date-wa-work-laws-20170712-gx9xtt.html

health and safety duty that exposes a person to risk of death or serious injury or illness. A Category 3 offence occurs when a duty holder fails to comply with a health and safety duty. Penalties for Category 2 and 3 offences are monetary only. For a corporation, a maximum of $1.5m for Category 2 offences and of $300,000 for Category 3 offences. For an individual as a PCBU or officer, a maximum of $300,000 for Category 2 and of $100,000 for Category 3 offences. For an individual as a worker or other, a maximum of $150,000 for Category 2 and $50,000 for Category 3.

Volunteers cannot be liable for a failure to comply with a health and safety duty except in their capacity as a worker or other person at a workplace. An unincorporated association is not liable for prosecution although its officers (other than volunteers) may be prosecuted for a failure to comply with an officer's duty, and its members may owe duties in their capacities as workers or other persons.

All three offences in the Model Laws focus on the duty to *manage* risks, rather than the *outcome* of failures to meet such duties. The ACTU agrees that it is appropriate for Australia's WHS regime to focus on risk-management, by placing a strict duty on persons conducting businesses or undertaking to manage WHS risks, regardless of the outcome of those failures. However, in circumstances where the consequence of negligent acts or omissions is the death of an individual or individuals, a specific offence focused on the outcome is also appropriate and necessary.

Fines

Monetary penalties are likely to continue to be the principal sanction for offences under the Model WHS laws, so it is essential that they are set at appropriate levels. The level at which penalties are currently set in legislation does not act as an effective deterrent, particularly for large and profitable companies. Penalties under the Model laws do not meet community expectations and must be reviewed and substantially increased to ensure that they are appropriate given the grave consequences of WHS breaches, and commensurate with penalties applicable in other jurisdictions such as environmental and consumer law. Consideration should be given to increased penalties for larger sized businesses and/or repeat offenders.

Large businesses in particular must bear penalties which are appropriate to their size, in order to achieve specific and general deterrence. Courts should be able to impose larger penalties depending on the size of the business which has committed the offence, based for example on a percentage of annual turnover. This would be consistent with the approach taken by other corporate regulators. For example, the Australian Competition and Consumer Commission has recently announced an intention

to seek bigger fines for big business in an attempt to change corporate culture.[14] Under new laws before Parliament, the penalty for consumer breaches by a company will rise from $1.1 million to $10 million, or 10 per cent of turnover. Fines for individuals will increase from $220,000 to $500,000. While it is absolutely appropriate that companies are heavily penalised for misleading consumers, it is totally inappropriate that penalties imposed for breaches causing death and harm to workers and others are comparably so low.

The inadequate deterrent effect of low maximum penalties available under the Model WHS laws is exacerbated by the fact the level of fines imposed by courts is consistently low, even for the most serious of breaches. For example, in NSW from 2014-16, penalties for breaches resulting in fatality have averaged just 12% of the maximum fine. This is further compounded by the lack of capacity for unions to pursue legal action for breaches of the Model laws, the failure of the current national enforcement strategy, the absence of an offence of corporate manslaughter, and the ability for companies to insure against, or liquidate in order to avoid, any fines that are imposed. This is discussed in more detail below.

Insurance again WHS fines

The deterrent effect of penalties is almost entirely undermined if insurance companies, rather than duty-holders themselves, are able to pay fines. Under the Model laws, there is no provision expressly prohibiting contracts providing liability insurance against WHS penalties. Section 272 provides that a term of any agreement or contract that purports to exclude, limit, modify or transfer any duty owed under the Act is void. However, it is not clear whether a contract for directors' and officers' liability insurance indemnifying for penalties under the Model laws would be a contravention of s 272, and this matter is yet to be considered by the courts. As a matter of practice, corporations are readily able to, and frequently do, insure against WHS penalties. As a consequence, it is predominantly insurance companies rather than duty-holders paying fines following successful prosecutions. While no Australian jurisdiction currently prohibits contracts providing liability insurance against WHS penalties, s 29 of New Zealand's *Health and Safety at Work Act 2015* provides a precedent. In New Zealand, an insurance policy or a contract of insurance which indemnifies or purports to indemnify a person for the person's liability to pay a WHS fine or infringement fee is of no effect, and persons seeking to enter into such a contract commit an offence. The ACTU recommends that the Model WHS Act include a new offence prohibiting contracts providing liability insurance against WHS penalties and fines.

[14] http://www.abc.net.au/news/2018-02-20/larger-fines-for-big-business-tops-accc-priority-list/9465346

Phoenixing

In many industries, it is far too easy for companies to hide behind the 'corporate veil', including 'phoenixing' to avoid their liabilities for a WHS offence (see the recent example of AB Recycling). There is little point in establishing offences and penalties for WHS breaches if the companies and individuals responsible for breaches can easily escape accountability. Current levels of coordination between relevant regulators and policy and legal responses are not sufficient to stop companies phoenixing to avoid their legal obligations. Strategies, mechanisms and forums to improve cooperation between WHS regulators and other relevant regulatory bodies, including ASIC, must be considered. Government must consider a range of initiatives[15] to strengthen the ability of regulators to enforce the Model laws against companies likely to go into liquidation or otherwise seek to avoid liability, including specific phoenixing offences and penalties, bans on being a director if liability for a serious breach is established by a court, personal liability for directors and shareholders where a company becomes insolvent because of a failure to maintain a safe work place, and amendments to ensure penalties administered for safety breaches are enforced through a range of government options, including tracking the operations of a company and its directors through mechanisms such as Director Identification Numbers, and government licensing and procurement consequences (see below).

Comcare Licensing and Government Procurement

Case Study – John Holland

The John Holland Group of companies (**JHG**) is a significant player in the Australian construction industry. Major construction contracts worth hundreds of millions of dollars have been awarded to the JHG by the Commonwealth Government over the last ten years. Since 2007, it has held a self-insurance licence under the Comcare scheme. This allows it to manage all its own workers' compensation claims and accept liability for compensation payments in cases of work-related injury or death. The licence is granted by a Commonwealth agency called the Safety Rehabilitation and Compensation Commission. Over recent years, JHG has been repeatedly prosecuted and penalised for WHS breaches caused by systemic WHS failures, including four fatalities. Despite this, JHG continues to enjoy its privileged status as a Commonwealth self-insurance licence holder and recipient of lucrative Commonwealth government contracts.

Case Study – McConnell Dowell

[15] Hedges, Jasper and Anderson, Helen L. and Ramsay, Ian and Welsh, Michelle Anne, *No 'Silver Bullet': A Multifaceted Approach to Curbing Harmful Phoenix Activity*, Company and Securities Law Journal, Vol. 35, No. 4, pp. 277-282, 2017.

Another example which illustrates the failings of the current framework is the death of 32 year old Tim Macpherson at the Barangaroo Ferry Hub construction site. The Ferry Hub was a major, government-funded piece of public infrastructure. In around 2015, the NSW Minister for Transport and Infrastructure put the project out to tender and McConnell Dowell, after winning the tender, sub-contracted Brady Marine & Civil Pty Ltd to use a barge called the *Maeve Anne* to assist in the construction phase. On 30 May 2016, the barge was issued a prohibition notice by the Australian Maritime Safety Authority and taken offline, because it did not have the required safety certification under maritime laws. Between June and October 2016, the barge was issued with exemptions by NSW Roads and Maritime Services and the Australian Maritime Safety Authority so that it could continue to operate on the project. In November 2016, McConnell Dowell refused two MUA officials permission to enter the site under NSW WHS legislation. On 1 March 2017, Tim Macpherson was struck and killed while working aboard the *Maeve Anne*. On 7 March 2017 the MUA inspected the *Maeve Anne* under NSW WHS legislation, and multiple deficiencies were identified.

These case studies illustrate numerous shortcomings with the current legal and regulatory environment, including inadequate preventative and response action by the regulators and the failure of government procurement standards. Government must ensure that corporations receiving substantial public funding must comply with at least basic WHS standards. Corporations which repeatedly breach WHS duties and cause death and serious injury through their negligence must have their licenses suspended or cancelled, and must not be permitted to tender for government work.

Enforceable Undertakings

Enforceable undertakings should be prohibited when the contravention is connected to a fatality, involves reckless conduct or where the applicant has a recent prior conviction connected to a work-related fatality, or more than two prior convictions arising from separate investigations.

Category 1 offences

To prove an employer or individual was reckless, a regulator must prove "foresight on the part of the offender that the conduct (to be) engaged in would probably have the consequence that another person at the workplace was placed, or could be placed, in danger of serious injury" (*Orbit Drilling Pty Ltd v R* [2012] VSCA 82, [24]) and that the offender displayed "indifference as to whether or not those consequences occur" (*R v Nuri* [1990] RV 641, 643). That is, the regulator must prove the accused knew their act or omission would have or could have placed a person at risk of serious injury and continued regardless. It has proven too difficult to prove the standard of recklessness required for a Category 1 offence. It should not be necessary to prove both foresight and indifference in order to secure a Category 1 prosecution. It should be sufficient to prove a failure to take reasonable steps to ensure the health and safety of workers and others. The ACTU recommends that the standard

should instead (or alternatively) be 'negligence'. It should also be clarified that Category 1 and Category 2 offences in the alternative can be pursued in any one prosecution.

Corporate Manslaughter

Common Law

Principles governing corporate criminal liability in Australia derive mainly from the common law. The general principle is that a corporation is 'personally' liable for the mental state and conduct of a 'guiding mind' (the board of directors, managing director or another person to whom a function of the board had been fully delegated) acting on the corporation's behalf.[16] In addition, where an employee or agent acting within the actual or apparent scope of his or her employment commits the physical element of the offence, a company may be held criminally liable if it had expressly, tacitly or impliedly authorised or permitted the commission of the offence.

Liability of a corporation depends on whether the acts in question were the actions of persons representing the directing mind and will of the enterprise. The court in the key case on this issue, *Tesco Supermarkets Ltd v Nattrass*, held that the acts of the manager of one store in a supermarket chain could not be considered to be the acts of the corporation, because the manager was too far down the chain of command to be part of the 'nerve-centre' of the corporation. The board of directors had not delegated any of their functions that far down the chain of command and so 'remained in control'.[17] Some significant public policy problems arise from the doctrine in this decision, including the fact that the Board's retention of 'control' insulated the corporation from criminal liability for the acts of any person outside the inner circle. This presents a significant problem in the context of WHS duties, which are generally not managed at the Board level. Breaches of WHS duties generally occur at the level of middle management, often caused by unrealistic work targets set by senior leaders. The *Tesco* principle means that companies with large and complex operations are – through a legal technicality – able to avoid criminal liability, whereas smaller businesses and individuals can be held to account. This result is highly unfair and undesirable.[18] The current legal framework is also incapable of responding when no particular person is at fault, but rather a poor workplace culture has created a situation where an incident causing death or serious injury was bound to happen.

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[16] *Tesco Supermarkets Ltd v Nattrass,* which has been followed in many Australian decisions, including *Trade Practices Commission* v *Tubemakers of Australia Ltd* and *Entwells Pty Ltd* v *National and General Insurance Co Ltd*

[17] Hill. J, *Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?*, Journal of Business Law 1 (2003)

[18] Compare *R v Denbo Pty Ltd*, in which a small family company was successfully prosecuted under the Victorian Crimes Act, with *DPP Reference No 1 of 1992* [1992] 2 VR 405, in which the majority of charges failed following the collapse of a wall at a local swimming pool which resulted in serious injury to a number of school children due to the complexity of demonstrating, in the context of a large bureaucracy, that the City Engineer was both responsible for the disaster and the 'directing mind and will' of the Council.

Commonwealth Criminal Code

Part 2.5 of the Commonwealth Criminal Code (**the Code**), which commenced operation in late 2001, provides a statutory framework for corporate criminal responsibility at the federal level. The provisions have general application to all Australian Commonwealth offences, although a number of important offences have been exempted from the regime. The regime was a significant reform in corporate liability law, because it recognises concepts of organisational due diligence and responsibility, and the importance of maintaining a good corporate culture, rather than simply focusing on directors' individual responsibilities.

The reforms were implemented following the findings of a sub-committee of the Standing Committee of Attorneys-General from Commonwealth, State and Territory Governments (**the Committee**). Significantly, the Committee concluded that the *Tesco* principle was 'no longer appropriate' to underpin corporate criminal liability because of more disintegrated and complex governance structures and delegation to middle managers.[19] The concept of 'corporate culture' was considered by the Committee to mirror the notion of 'intent' as it relates to personal responsibility, and to be a fair and reasonable way in which corporations could be held liable for their policies and practices. Relevantly, the Explanatory Memorandum for the Code explains that the provisions were intended to overcome the problems in *Tesco*, by covering management practices such as where employees are given production deadlines which cannot be met without breaches of safety legislation, and impliedly threatened with dismissal if they do not comply.

Under the Code, the physical element of an offence will be attributed to a body corporate where it is committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment. The fault element of intention, knowledge or recklessness will be attributed to a company if the 'company expressly, tacitly or impliedly authorises or permits the commission of an offence', which is proved when:

- the corporation's board of directors intentionally or knowingly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- a high managerial agent of the corporation intentionally or knowingly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the offence provision;

[19] Standing Committee of Attorneys-General, Criminal Law Officers Committee, Model Criminal Code, Chapter 2, Final Report: General Principles of Criminal Responsibility (AGPS, Canberra, 1993), Part 5.

- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

'Corporate culture' is defined in the Code to mean an attitude, policy, rule or practice existing in the corporation generally or in the part of the corporation where the relevant offence was committed. Significantly in the context of WHS risk management, the conduct of any number of a corporation's employees, agents or officers can be aggregated. Negligence may be proved by the fact that the prohibited conduct was substantially attributable to inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers or a failure to provide adequate systems for conveying relevant information to the relevant persons in the body corporate.

Why is a new offence of corporate manslaughter needed?

In the absence of an offence of corporate manslaughter, criminal prosecutions of medium and large corporations are effectively impossible, and therefore the current laws do not and cannot act as an effective deterrent or incentive for better practices.

A new offence of corporate manslaughter is necessary to ensure that corporations which cause, or substantially contribute to, the death of a person through a negligent act or omission, are held accountable and incentivised to improve unsafe practices and corporate cultures. Corporations are not merely private ventures, they have a relationship with society more broadly and perform various socially important functions. They have the potential to impact on the well-being of the community in profound ways. This justifies the need for regulation which recognises this profound social impact and protects the community from adverse effects (such as work-related death) when it is caused by negligent or reckless corporate behaviour.

While individual liability is crucial, it is essential that the capacity to prosecute at an organisational level also exists given the pressing social nature of these matters. Under the current framework, corporations are able distance themselves from offences and avoid consequences. Individuals are allowed to become scapegoats for poor and unsafe workplace corporate cultures. This is not only grossly unfair, but it also fails to act as an effective deterrent or an incentive for better, safer corporate cultures.

A new offence would complement and strengthen the existing personal liability provisions in the Model Act by acting as a strong deterrent against the worst kind of WHS failures – namely those that result in the death of a worker or other person. The creation of the new offence would convey in no uncertain terms the important message that WHS failures can and do have the most serious of consequences and, if this occurs, corporations will be held accountable. A new offence of corporate manslaughter would be highly effective in promoting awareness and understanding of existing duties to manage risks, and in ensuring that these duties are taken seriously. In the ACTU's strong submission, a new offence of corporate manslaughter - if effectively publicised and prosecuted - will

become a valuable tool to assist in the deterrence of the negligent conduct that is leading to workplace fatalities.

Existing corporate manslaughter laws

Two Australian jurisdictions have already introduced corporate manslaughter provisions following parliamentary inquiries,[20] and another has indicated its intention to do so.

In 2004, the ACT became the first jurisdiction in Australia to introduce an offence of corporate manslaughter via the *Crimes (Industrial manslaughter) Act 2003*, which added a new Part 2.5 to their Criminal Code. 'Industrial manslaughter' is defined as causing the death of a worker while either being reckless about causing serious harm to that worker or any other worker; or being negligent about causing the death of that or any other worker.

On 12 October 2017, the Queensland Parliament introduced new corporate manslaughter provisions into their WHS legislation. Under these laws, a PCBU found guilty of corporate manslaughter may be liable for a fine of up to $10 million, while an individual may be liable to a term of up to 20 years' imprisonment. There are two new criminal offences of corporate manslaughter: for a PCBU and/or a senior officer, if a worker dies (or is injured and later dies) in the course of carrying out work and the PCBU or senior officer's conduct (either by act or omission) causes the death of the worker; or the PCBU or senior officer was negligent about causing the death of the worker by the conduct. A 'senior officer' is defined as an executive officer of a corporation (i.e. a person who is concerned with, or takes part in, the corporation's management); or for a non-corporation, the holder of an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of a PCBU's functions.

On 26 May 2018, the Victorian Premier announced his plans to introduce corporate manslaughter offences in Victoria if re-elected. The new Victorian offences would attract maximum penalties of 20 years' imprisonment for individuals or a fine of up to approximately $16 million for corporations. Each of these penalties is significantly higher than the existing maximum penalties under the Victorian *Occupational Health and Safety Act 2004* for reckless endangerment—currently set at five years' imprisonment or a fine of approximately $285,000 for individuals and a fine of approximately $3.2 million for corporations. The offences appear likely cover circumstances in which a member of the public (not just a worker) has died. If elected, the Victorian Government has signaled an intention to

[20] ACT Standing Committee on Legal Affairs, *Crimes (Industrial manslaughter) Amendment Bill 2002*, Report No. 6, September 2003; Queensland Parliament Finance and Administration Committee, *Work Health and Safety and Other Legislation Amendment Bill 2017*, Report No. 46, 55th Parliament, October 2017

establish an Implementation Taskforce, including business and unions, to consult on the detail of the proposed laws.

In light of the number of jurisdictions which have already, or are likely to, introduce new corporate manslaughter provisions, an amendment should be made to the Model Laws to introduce a new offence of corporate manslaughter. It is not fair that the family of a worker killed at work may or may not have access to justice depending on the jurisdiction they happen to be in. The ACTU submits that this reform is essential in order to change workplace cultures (particularly in medium and larger companies which currently cannot be held accountable) and prevent workplace deaths.

Operation of the provisions

A new offence of corporate manslaughter should be included in WHS laws, rather than the criminal law. The framework for placing duties on workplace actors, including importantly those beyond the traditional employment relationship, is already established in WHS law. The Model WHS Act should be amended to include a specific offence of causing the death of a worker or another person in the workplace through a negligent act or omission. The offence should apply to duty-holders and officers and should be subject to appropriate penalties, including substantial periods of imprisonment.

The ACTU recommends the adoption of provisions based on the existing Queensland provisions, with the amendment that the offence should include *any person* killed by the negligence of the PCBU. This would be consistent with a PCBU's duty under s 19(2) of the Model Act and would cover situations like the fatal wall collapse at the Grocon site in Carlton, Victoria in 2014, which killed three pedestrians. It also addresses the challenges present in the building and construction industry, which is characterised by numerous principal contractors and subcontractors working alongside each other at a worksite. In such circumstances, it is reasonably foreseeable that a PCBU may negligently cause the death of a worker who carries out work for *another* PCBU.

While the introduction of a new offence in WHS law will overlap with the existing criminal law when an individual is prosecuted, it is to be expected that in practice, an individual causing the death of a worker will be pursued under the WHS law, unless the police wish to progress charges under the criminal law instead. As there is no effective way in which to prosecute a medium or large corporation under the criminal law currently, WHS law would in practice always be used.

There is a question about how a new offence would interact with existing Category 1 offences. Under the current framework, a Category 1 offence is committed where a person exposes an individual to death or serious injury, regardless of the actual outcome. A new offence of corporate manslaughter would apply only in circumstances where the *outcome* of the conduct is that a worker dies, or is injured and later dies as a result of that injury. If the person or corporation's negligent conduct causes the death of the worker, the person or corporation may be prosecuted for corporate manslaughter. The standard of criminal negligence would apply, meaning that the prosecution must prove beyond

reasonable doubt that the person or corporation's conduct departed so far from the standard of care expected to avoid danger to life, health and safety, and the conduct substantially contributed to the death.

Strengthening personal liability under the WHS Act

As accepted by the National WHS Review Panel, personal criminal liability of company officers with involvement in relevant decisions plays a key role in encouraging company compliance with WHS obligations. Prior to harmonisation, almost all Australian jurisdictions provided for some form of personal liability for breaches of WHS duties of care. Four of those regimes (NSW, Queensland, South Australia and Tasmania) placed the onus on the accused to prove a defence of 'due diligence' or similar. The definitions of 'officer' varied between jurisdictions. During the harmonisation process, the ACTU supported a model similar to the pre-harmonisation NSW provisions, which deemed a 'director' and those concerned in the management of the corporation to be liable for the offence of the corporation, unless they could make out the defences of due diligence or not being in a position to influence the contravention. The onus of proving a failure to meet the standard of due diligence was on the prosecution.

Although provisions for personal liability are included in the Model laws, the Model laws did not adopt the ACTU's preferred model. Instead, s 27(1) of the Model Act places a positive duty on an officer of a corporation to ensure that the PCBU complies with its duties under the legislation. That duty is qualified by a requirement to exercise due diligence, and the officer is liable for their own conduct or omission, not that of the corporation. Section 27(5) of the Model Act sets out the elements of the duty of due diligence in the WHS context, which essentially codifies the content of the due diligence obligation as interpreted by the courts. The National Review Panel justified this model on the basis that it was more likely 'to ensure appropriate, proactive, steps are taken by an officer for compliance by the company with the duties of care placed on the company'. The ACTU submits that the NSW formulation was appropriate and adequate; but does not oppose the 'positive duty' formula in the Model Laws.

To the ACTU's knowledge, there have been no successful prosecutions of officers under the Model Laws to date. In the ACTU's submission, there are four aspects of the personal liability regime that require reconsideration. Firstly, the definition of 'officer' should be amended so that it captures all senior managers who significantly impact on WHS outcomes. Secondly, the list of matters in the definition of due diligence should be *inclusive*, not exclusive. Thirdly, due diligence should be a defence to the duty of care offences, not a qualifier to the primary duty, and the onus of proof should be on the defendant to make it out. Fourthly, the Model Regulations and Codes should be updated to include detailed information for directors and senior managers on how they can meet their obligations and what 'due diligence' means. These matters are discussed in further detail below.

The definition of 'officer'

The Model Act defines 'officer' by reference to the definition in s 9 of the *Corporations Act 2001* (Cth). The key criterion is whether the person makes decisions affecting *the whole, or a substantial part of*, the business or undertaking. The Corporations Act definition is more extensive and detailed than the definition in the pre-harmonised NSW legislation, but in the ACTU's submission, it is not necessarily more appropriate. This is because elements of the Corporations Act definition focus on management as it relates to the 'financial affairs' of a company. While this is clearly appropriate in the context of a legislative regime which imposes a number of financial management obligations on companies, it fails to effectively target senior decision-makers involved in health and safety governance in an organisation. It is of course completely inappropriate for managers who do not significantly influence WHS outcomes to be held personally liable for breaches of the Model Laws, and provisions need to be carefully drafted to ensure that such people are excluded and have a strong and clear defence available in the event that allegations are made. The inadequacy of the current definition is demonstrated by the case of *Mckie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq) [2015] ACTIC 1*. In that case, a worker died when his truck connected with powerlines. The court considered whether the project manager was an 'officer' within the meaning of the Model Act. The court held that it is the person's influence over the PCBU as a whole, not just over the particular project, undertaking, function or event relevant to the alleged breach of duty that must be assessed. Indicators such as the following were considered relevant to the question of whether or not the project manager was an 'officer' or not:

- Responsibility for hiring and firing employees;
- Capacity to allocate corporate funds;
- Capacity to direct the type of contracts to be pursued by the business;
- Responsibility for signing off on tenders;
- Responsibility for determining corporate structures and setting company policy;
- Attendance at Board meetings;
- Responsibility for compliance with legal obligations.

The project manager was a well-qualified engineer and a senior manager in the company with substantial ability to influence the safety and health of workers and others on the project he managed. He had been personally served with a prohibition notice regarding work near power lines in August 2008 on another project. The court found that the project manager was fully aware of the risks associated with the live overhead power lines above the site he managed but failed to exercise due diligence in respect to safety compliance. Despite this, the court held that there was no evidence of any involvement in the matters listed at paragraph 56 (i)-(vii) above, and therefore he had an operational role only and was not an 'officer' within the meaning of the Model Act. This decision indicates that the current definition is excluding the very senior decision-makers whose behavior the Model Laws are seeking to change. The purpose of these provisions is to improve WHS outcomes using the incentive of personal criminal liability. However, the exclusion of key decision-makers from the definition of officer seriously undermines this goal. The definition of officer must capture people with a significant level of influence over WHS outcomes; otherwise the purpose of the provision is defeated.

The ACTU recommends that the use of the Corporations Act to define an 'officer' for the purposes of the Model Act be reconsidered. Use of the earlier NSW formulation, or alternatively, a new definition focused on *the capacity of the person to significantly affect health and safety outcomes* should be developed in consultation with stakeholders, should be considered.

Due Diligence and a partial Reverse Onus of Proof

The National Review Panel explained that the standard of due diligence:

…should be a high one, requiring ongoing enquiry and vigilance, to ensure that the resources and systems of the entity are adequate to comply with the duty of care of the entity—and are operating effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

The ACTU supports this statement. The due diligence formulation should be retained, but as a defence to an alleged breach, with the onus on the accused to prove it on the balance or probabilities. (See the discussion below regarding partial reverse onus of proof). Also, the definition of due diligence in the Model Act should be an inclusive list, not an exhaustive list, to allow for consideration of other matters that may need to be considered in a particular case. For example, in addition to the matters listed in s 27(5) of the Model Act, courts have also referred to the need for an officer to demonstrate that they had laid down a proper system for dealing with the issues and provided adequate supervision to ensure the system was carried out, and other cases have suggested that officers are required to personally respond to incidents that are drawn to their attention. Courts should not be prevented by the drafting of s 27(5) from considering such additional matters where relevant in the circumstances of a case.

Regulations and Codes

There is no guidance provided in the Regulations or Codes on what proactive performance indicators would assist officers to meet their obligations under the Model Act. Officers fall into different categories and have different responsibilities within an organisation, for example, human resources, legal, finances, strategic leadership etc. Officers responsible for ensuring adequate staffing, for example, must consider different matters to officers responsible for financial management. The ACTU recommends that the Regulations and Codes be updated in consultation with stakeholders to ensure that they address the different roles and responsibilities of different categories of officer, as well as standards for reporting on an organisation's health and safety compliance and performance.

Union prosecutions

The ACTU is concerned about the steep decline in prosecutions under WHS legislation over recent years. Under the Model Laws, unions cannot bring prosecutions and the Minister cannot authorise a prosecution by an individual. A request can be made to the regulator, and later the DPP, if a

prosecution is not brought for any offences other than Category 1 offences. The ACTU strongly submits that unions must have standing to bring proceedings for offences under the Model Act in circumstances where they have a member concerned in the breach in question. There should be no requirement for the regulator or the DPP to review a decision to commence a prosecution (as there currently is in NSW), as long as an Australian legal practitioner lodges the application on behalf of the union. Additionally, a court should not be prohibited from allowing the moiety portion of any penalty to be directed to the industrial organisation, where it can be shown that the fine will used in accordance with the rules to better the interests of members. The Model laws should include a limitation period of 3 years for the commencement of proceedings for offences. This would ensure that proceedings are commenced in a timely manner, but provide sufficient time to investigate and prepare complex proceedings. A variation to the standard time limit should be able to be sought in special circumstances.

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.
A qualified right of private prosecution (i.e. by a person other than a public official) for criminal matters already exists at common law. In the ACTU's strong submission, it is reasonable, justified and necessary to confer a right of prosecution on workers affected by a breach of the Model Laws and their unions. WHS law is not traditional criminal law, and unions are equipped with a deep knowledge of the WHS issues confronting particular workplaces, industries and sectors. Additionally, the inspectorate may have limited visibility of WHS breaches, particularly in 'non-standard' workplaces, and limited resources to pursue all breaches worthy of prosecution. The option of union prosecutions also addresses the potential conflict of interest presented by a state regulator having to enforce compliance by government PCBUs. There is strong evidence that union prosecutions are effective in bringing about cultural and organisational change and do not present a risk of misuse. For these reasons, a state monopoly on prosecutions for breaches of WHS laws cannot be justified. Union secretaries had standing to bring a prosecution under NSW laws from 1983 until 2011, when the right was curtailed. There is absolutely no evidence of abuse of the right during that period of time. In fact, all prosecutions commenced by unions under the NSW legislation were successful.
Union-initiated prosecutions are subject to the same legal checks and balances as any other prosecution. Prosecutions are invariably conducted by experienced legal practitioners who have professional obligations as officers of the Court that require adherence to the obligations applying to prosecutors in all criminal proceedings. The conduct of prosecutions is also subject to the supervision of the Court. If a prosecution is instituted or maintained or conducted in an improper manner, the Court can take appropriate action to dismiss the proceedings and order the union to pay costs. In the usual way, cases which are frivolous or vexatious are not permitted to proceed, and courts determine the merits of all matters which do proceed in accordance with established and transparent principles. The cost, complexity, delays and risk associated with legal proceedings operate in the usual way to deter unmeritorious actions.

In both NSW and NZ, the right of prosecution has been used by union secretaries sparingly and successfully and has resulted in systemic and industry-wide improvements in safety standards, conferring a significant and lasting benefit on workers, duty-holders and the public more broadly. In particular, trade unions have been able to assist in bringing cases that addressing emerging areas of concern such as psychological injuries, repetitive strain injuries and the commission of criminal acts in the workplace, and in relation to high-risk sectors.[21]

The ACTU submits that the pre-harmonised NSW legislation struck an appropriate balance between the promotion of workplace safety, the encouragement of participation in WHS management and the appropriate protection of defendants. Unions are already empowered to commence proceedings seeking the imposition of penalties for contraventions of industrial laws affecting the interests of their members. For example, trade unions have the capacity to bring proceedings for contraventions of the *Fair Work Act 2009*. While these proceedings involve the imposition of civil rather than criminal sanctions, contraventions can give rise to very substantial monetary penalties. This has not undermined the capacity of employers and unions to work together to ensure compliance with industrial laws.

Partial Reverse Onus of Proof

Generally, a person cannot be convicted of committing an offence unless the prosecution can prove a 'guilty mind'. However, a number of laws, including the Model Act [s 12F(2)], impose 'absolute' or 'strict' liability for offences, meaning that proof of a guilty mind or fault is not required. The creation of offences of absolute or strict liability is common under corporate, environmental and WHS legislation for example, which seek to deter certain behaviour for a compelling social purpose, such as protecting the health and safety of people at work. Under the Model Laws, strict liability applies to non-compliance with a duty of care, qualified by a standard of reasonable practicality. The ACTU submits that both the way in which the primary duty of care is framed, and which party should bear the burden of proving that the standard of reasonable practicality has been met, require reconsideration.

Under the Model Laws, the regulator is required to prove all elements of a breach, including that the duty-holder has *not* taken reasonably practicable measures, or exercised due diligence in the case of an officer, to prevent the breach. This is unreasonably onerous and has, predictably, made it more

[21] The ACTU's submission to the National Review details case studies of union prosecutions in NSW, including on behalf of teachers and banking workers. Unions have had the right to prosecute in New Zealand for approximately 15 years. During that time, only a handful of prosecutions have proceeded to final determination, including two successful prosecutions in the forestry industry after 13 forestry workers died in one year: http://www.scoop.co.nz/stories/AK1508/S00251/ctu-wins-second- forestry-private-prosecution.htm; https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11522865.

difficult for prosecutions to succeed. The National Review Panel justified the removal of the reverse onus (and the right to union prosecutions) that had previously existed for NSW and Queensland workers by referring to 'substantial' increases in the size and range of penalties in the Model Laws. Notwithstanding the ACTU's view that penalties (both the maximums in the Model Act and the levels awarded by courts) are manifestly inadequate to deter breaches, particularly for larger corporations, the deterrent effect of any penalty is almost entirely undermined if the legal framework makes it too hard to successful prosecute breaches. In *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92, the judge considered the meaning of reasonably practicable in the context of a prosecution of PCBU for a breach of their duty to ensure the safety of workers. The judge held that the prosecution needed to prove the following elements beyond a reasonable doubt:

- That a risk arose from work carried out as part of the business or undertaking; and
- That the measure particularised in the summons would cause that risk to be eliminated or minimised; and
- In all the circumstances (including but not limited to those listed in the legislation) it was reasonably practicable for the PCBU to adopt the measure.

In the ACTU's submission, it is unreasonably onerous for the prosecution to bear the burden of proving these *all* these matters beyond a reasonable doubt. The onus of demonstrating that it was not reasonably practicable to reduce or eliminate the risk occasioning the offence must be borne by the defendant. The matters required to prove whether or not a duty-holder has taken reasonably practicable measures are matters entirely within the duty-holder's knowledge. The duty-holder is in the best position to provide evidence of the conduct engaged in and the reasons for it. While no Australian jurisdiction currently has a partial reverse onus of proof for duty of care offences, Queensland and NSW previously had such provisions. Under the model in those jurisdictions, the prosecutor was still required to prove non-compliance with the elements of the offence beyond a reasonable doubt, but the onus was on the defendant to make out a defence on the balance of probabilities. The NSW legislation did not include the qualifier of reasonable practicability in the duty of care, but included it as a defence to duty of care offences. The onus was on a duty-holder to prove (on the balance of probabilities) that it was not reasonably practicable to comply with the law or that the offence resulted from causes outside the defendant's control. In Queensland, a duty-holder could seek to prove (on the balance of probabilities) that it had applied a relevant Code or Regulation or taken other reasonable precautions and exercised proper diligence to prevent the contravention. In the UK, the *Health and Safety at Work etc Act 1974* places a similar onus on an employer to make out a defence on the balance of probabilities.

The ACTU recognises that this is a contentious matter. The right to be considered innocent until proven guilty is a fundamental aspect of the right to a fair trial. However, like most human rights, it can be limited if the limitation is reasonable, necessary, justified and proportionate in the circumstances. The ACTU submits that the partial reverse onus is necessary and justified in this case

because of the public interest in ensuring the health and safety of people at work. The measure is proportionate and reasonable in light of the practical difficulty of achieving successful prosecutions when the PCBU has, by definition, all or most of the relevant evidence regarding its own conduct in its possession or control. It is not unfair or unreasonable to require a PCBU to demonstrate to a court how and why it had a reasonable excuse for non-compliance.

Courts have considered the reasonableness of a partial reverse onus when it is associated with legislation aimed at achieving a compelling social purpose. For example, the English Court of Appeal has considered whether the reverse onus in UK WHS Act was incompatible with the presumption of innocence enshrined in the European Charter of Human Rights. In *Davies v Health and Safety Executive* [2002] EWCA Crim 2949, the Court found the imposition of the legal burden of proof on employers was justified, necessary and proportionate having regard to the social and economic purposes of the legislation, that duty holders are persons who have chosen to engage in work or commercial activity and that the facts relied upon in support of the defence will be within the knowledge of the defendant. In *R v Wholesale Travel Group* (1991) 3 SCR 154, the Canadian Supreme Court explained why a reverse onus of proof was justified, fair and reasonable in the context of regulatory legislation creating criminal offences:

> *If the false advertiser, the corporate polluter and manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on the balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society.*

In addition, the earlier NSW model was repeatedly endorsed by a series of inquiries into WHS legislation in that State, including the 1995 Federal Industry Commission Report, the 1997 McCallum Report, the Report of the 1998 NSW Parliamentary Inquiry and the Stein Report. The ACTU recommends amendment of the Model Act to place the onus of demonstrating that it was not reasonably practicable to reduce or eliminate a risk giving rise to a WHS duty of care offence on a defendant.

Specialist Courts and Tribunals

There are significant differences between jurisdictions in relation to the type of court in which prosecutions are conducted. Prosecutions for offences under the Model laws should be heard in specialist courts by judges with expertise and experience in industrial and WHS matters. This approach would enable the effective identification and consideration of systemic failings that may be occurring in a workplace, industry or sector, which is vital to the effective enforcement of WHS matters. General criminal courts are traditionally concerned with a particular act or omission of an individual, making them less suited to the determination of offences involving systemic failings and the liability of corporate employers. Proceedings brought in courts with appropriate expertise are likely

to be more efficient and cost-effective and improve the quality and consistency of the interpretation of the Model laws and sentencing outcomes. The use of courts with appropriate expertise benefits all persons involved in proceedings under occupational health and safety legislation, including prosecutors, victims and their families and defendants.

Sentencing Guidelines

The inadequacy of penalties imposed in matters involved serious injury or death at work have already been discussed in this submission. The main objects of the sentencing process are specific and general deterrence. Although the prosecution process is similar across jurisdictions, there are substantial differences between jurisdictions in terms of the courts that hear WHS matters, the maximum penalties available and the options available under general sentencing legislation (if any). For example, in New South Wales, the Commonwealth and the ACT, a court may decide to make an order without a conviction, and can dismiss the charge, or discharge the person on condition that the person enter into a good behaviour bond for a term not exceeding two years or enter into an agreement to participate in an intervention program. On the other hand, in Queensland where a court finds the charges to be proved, there is a conviction. The court has, however, a discretion not to record the conviction, and can also impose penalties, including fines and the kinds of non-pecuniary sanctions set out in sections 236 to 241 of the Model Act. Notwithstanding the fact that the court does not record a conviction, the fact that the defendant was 'convicted' may be taken into account by subsequent sentencing courts, and by the prosecuting authorities in later proceedings.

The ACTU considers that national sentencing guidelines (developed in consultation with stakeholders) to guide the consistent administration of justice under the WHS regime would be valuable. Such guidelines should aim to ensure that sentencing properly and consistently reflects the culpability of the offender and the seriousness of the harm caused.

In the UK, the Sentencing Council is currently consulting on proposed new sentencing guidelines for manslaughter offences. The Sentencing Council is proposing that where an employer has had a long-standing disregard for the safety of employees and is motivated by cost cutting, they can expect a prison sentence of 10 to 18 years should a worker be killed as a result. The Sentencing Council expects that in some gross negligence cases, sentences will increase, for example where a death was caused by an employer's long-standing and serious disregard for the safety of employees which was motivated by cost-cutting.

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