Recommendations of the 2018 Review of the Model Work Health and Safety Laws

Submission by the Australian Council of Trade Unions in response to Safe Work Australia's Consultation Regulation Impact Statement

ACTU Submission, 9 August 2019
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Contents

Introduction

Since 1927, the ACTU has been the only national confederation representing Australian unions. We have played a leading role in advocating for improved wages and conditions for Australian workers and have participated in the development of almost every regulatory measure concerning worker and trade union rights during that time. The ACTU consists of 43 affiliated unions and trades and labour councils from across the country, representing approximately 2 million workers from all major industries, occupations and sectors.

The protection and enhancement of every worker's fundamental right to a safe and healthy working life has always been, and remains, a core goal of the ACTU and its affiliates. The ACTU welcomes the opportunity to comment on the Recommendations of the 2018 Review of the Model Work Health and Safety Laws (**the Review**). The ACTU supports all 34 recommendations made by the Review, on the basis that they are reasonable, proportionate and sensible responses to identified problems and challenges in the operation of Australia's WHS regime.

The Model Work Health and Safety Act, Regulations and Codes of Practice (**the Model WHS Laws**) were developed in 2009-10 following an independent review process by the National Occupational Health and Safety Panel (**the National OHS Panel**). The ACTU supported and fully participated in the processes that led to the development of the harmonised Model WHS laws. The ACTU continues to support nationally consistent WHS laws, as long as they remain 'relevant and responsive' and do not compromise or reduce WHS protections or standards in any Australian jurisdiction. The ACTU 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.[1] While the WHS harmonisation process has resulted in much greater consistency in the WHS legal framework, inconsistences in law and practice between different jurisdictions persist. In particular, some jurisdictions now have an offence of industrial manslaughter and some do not; unions have retained a (limited) right to prosecute in NSW only; and there remain crucial differences in consultation and participation requirements, including rights for Health and Safety Representatives (**HSRs**).

[1] TWU, Submission 7, Senate Inquiry into the prevention, investigation and prosecution of industrial deaths in Australia, June 2018

In June/July 2019, the ACTU conducted a major 'Safe at Work Survey' of Australian workers.[2] Over 25,000 people participated: 58% of respondents were women and 41% were men, with 2.8% identifying as Aboriginal or Torres Strait Islander. Respondents were from a wide range of sectors, including health care, construction, education and training, manufacturing, finance, transport, retail and public services. The vast majority (78%) had suffered a physical and/or psychological injury at work. Over half (54%) told us they are aware of serious threats to their physical and mental health at work which are being tolerated or ignored by their employers, and 62% had witnessed a 'near miss' - an incident where a co-worker was nearly injured or killed.

A significant number (61%) had experienced poor mental health as a result of hazards in their workplace which their employer had failed to manage, and almost one in two (47%) said they had been abused, threatened, assaulted or exposed to traumatic events at work in the past 12 months. More than two thirds (67%) said they did not believe that their employer knew how to address mental health issues in the workplace.

The ACTU's Safe at Work survey results demonstrate clearly that reform to our WHS laws is urgently needed. The ACTU is particularly supportive of Recommendations relating to:

- Psychosocial risks (No. 2 and 20)
- Industrial manslaughter (No. 23b)
- Penalties and sentencing (No. 22, 23a, 25 and 26)
- Health and Safety Representative rights (No. 8 and 10)
- Worker representation, participation and consultation (No. 5 and 15)
- Risk management (No. 27)

The ACTU is disappointed that, in some areas, the Review did not make any (or sufficient) recommendations addressing identified problems. In particular, the ACTU is concerned that the Review did not recommend sufficient reforms to improve worker representation, participation and consultation in WHS matters, enable affected unions and families to prosecute for breaches of WHS laws, or implement a shifting burden of proof for WHS offences. The ACTU will continue to campaign for reform on these important issues.

We would be happy to provide further information on request, and we look forward to ongoing constructive engagement with this important consultation process. A number of the ACTU's

[2] Unless otherwise specified, the percentages provided in this submission are a percentage of those workers who answered the particular survey question

affiliated unions have made separate submissions and ACTU endorses and supports the content of those submissions.

Make Regulations dealing with psychological health (No. 2)

Introduction

A 'psychosocial risk' is a risk to health and safety arising from the psychological and social aspects of the design, planning, organisation and management of work, the work environment and equipment, and work relationships and interactions. The concept is complex and multifaceted, and includes *risks of harm* such as work demands, job control, job insecurity, and violence or harassment, *health outcomes* such as fatigue, burnout, cardiovascular and musculoskeletal disease, and '*pathogenic processes*' such as stress.[3] It is recognised that the changing nature of work has greatly increased psychosocial risks to health and safety.[4]

It is crucial to understand that psychosocial risks have the potential to damage both the *psychological* and *physical* health of workers, both directly and indirectly.[5] There is a significant body of evidence showing the link between psychosocial risks and a wide range of serious health impacts, including anxiety and depression, heart disease, musculoskeletal disorders and post-traumatic stress conditions.[6] Reflecting this increasing recognition, in May 2019 the World Health Organization included 'Burn out' (defined as a syndrome resulting from chronic workplace stress that has not been successfully managed) as an occupational phenomenon in the international classification of diseases.[7] In addition, there is evidence that psychosocial risks such as fatigue, job demands and lack of job control have a negative effect on health and safety practices and exacerbate the potential of physical injuries and near misses occurring.[8] Conversely, physical risks also impact on psychological health, including in the form of

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[3] R Weissbrodta et al, Labour inspections and the prevention of psychosocial risks at work: A realist synthesis, Safety Science 100 (2017) 110–124 at 111

[4] See for example Michael Quinlan, *Organisational restructuring/downsizing, OHS regulation and worker health and wellbeing*, International Journal of Law and Psychiatry (2007) Vol 30, 385–399

[5] World Health Organization, Guidance on the EU Risk Framework for Psychosocial Risk Management, 2008

[6] See for example Bailey, T., Dollard, M.F., McLinton, S., Richards, P., 2015. *Psychosocial safety climate,* psychosocial and physical factors in the aetiology of musculoskeletal disorder symptoms and workplace injury compensation claims. Work Stress 29 (2), 190–211; Butterworth, P, Leach, LS, McManus, S, & Stansfeld, SA, Common mental disorders, unemployment and psychosocial job quality: Is a poor job better than no job at all? Psychological medicine, (2013), 43(08), 1763-1772; European Agency for Safety and Health at Work, Second European Survey of Enterprises on New and Emerging Risks (ESENER-2), Overview Report: Managing Safety and Health at Work, European Risk Observatory, 2017

[7] https://www.who.int/mental_health/evidence/burn-out/en/

[8] See for example Turner, N, Chmiel, N, Hershcovis, MS & Walls, M 2010, *'Life on the line: Job demands, perceived co-worker support for safety, and hazardous work events*, Journal of Occupational Health Psychology, vol. 15 no. 4, pp. 482-493.

'secondary' psychological injuries which arise from the consequences of physical work-related injuries.[9]

Due to the complex and interrelated nature of these issues, it is crucial that regulatory and other measures are clear and detailed, and focus on harm *prevention* and safe systems of work, not only on the psychological health impacts on individuals.[10]

Preferred Option

The ACTU strongly supports ***Option 2 – Include requirements for managing psychosocial risks in the model WHS Regulations.***

As noted by the Review, psychological health and safety was one of the issues most frequently raised by stakeholders during consultation.[11] A recent study evaluating Australian WHS regulatory instruments related to psychosocial risk management concluded that, 'there is poor inclusion of risk assessment, preventive action and poor coverage of exposure factors and psychological health outcomes'.[12] A 2016 study found that duty-holders 'could easily overlook or under-rate the importance of psychosocial hazards', that the Model WHS Laws are 'lacking in clarity', and 'do not provide sufficient impetus for workplace parties to take psychosocial hazards seriously', and that overall there is 'reason to question the potential for the model WHS Act and regulations to reduce psychosocial hazards and their harmful effects'.[13]

It is clear that the current regulatory framework in Australia related to psychosocial hazards and mental health is not working and urgent reform is required. The Consultation RIS notes that SWA guidance[14] and other initiatives in this space are relatively new and suggests that there may be some benefit in waiting to let this information become 'embedded' in WHS practice and understanding. This approach is strongly rejected. In addition to concerns about the accuracy and completeness of existing guidance material, the ACTU submits that it is highly unlikely that non-binding guidance material can or will ever address current failures. Research shows that

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[9] See for example *Harris v State of Queensland* [2014] QDC 35
[10] National Research Centre for OHS Regulation Australian National University, Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks, RegNet Paper 7, (2016), pp 57-58
[11] Safe Work Australia, Consultation Regulation Impact Statement: Recommendations of the 2018 Review of the Model Work Health and Safety Laws, p 11
[12] Rachael Pottera et al, Analytical review of the Australian policy context for work-related psychological health and psychosocial risks, Safety Science 111 (2019) 37–48
[13] Above note 10 at pp 9 and 56
[14] Safe Work Australia's guidance: Work-related psychological health and safety: A systematic approach to meeting your duties was first published in June 2019.

workplaces 'do not sufficiently understand and incorporate psychosocial risks into strategic decision-making, and do not know how to manage them adequately'. This problem is particularly acute in smaller workplaces.[15] The European Survey on New and Emerging Risks finds that, along with meeting workforce expectations, reputation and better productivity, 'avoiding fines and sanctions and fulfilling legal obligations' were identified as 'major reasons for addressing health and safety issues' by a large majority of participating employers, and were associated with 'high levels of psychosocial risk management'.[16]

In the absence of clear, specific, binding regulation and detailed Codes of Practice, duty-holders are likely to continue to fail to effectively manage psychosocial risks.

Additional Reforms

The development of a new Regulation on psychosocial risks must be supported by:

- The development of new, detailed Code/s of Practice addressing different psychosocial risks in different sectors,
- Extension of the Risk Management process in Regulation 36 to all risks (Review Rec No. 27)
- Review of the notification provisions in the Model Act (Review Rec No. 20)
- Review of the accuracy and completeness of existing Codes and SWA guidance material dealing with psychosocial risks
- Additional research by SWA into psychosocial risks in Australia, including:
    - the impact of systems of work on psychosocial risks,
    - the effectiveness of workers compensation processes in responding to psychological injuries,
    - the effectiveness of different regulator interventions in relation to psychosocial risks, and
    - effective ways to identify, assess and control the risks of harm associated with various types of psychosocial hazards in different workplaces and sectors.

Effects of Problem

The results of the ACTU's Safe at Work survey clearly show that the current regulatory framework is failing to address psychosocial risks at work, and that this is impacting on workers negatively in

[15] Above note 3, at 111 and 117
[16] EU-OSHA, Management of occupational health and safety in European workplaces — evidence from the Second European Survey of Enterprises on New and Emerging Risks (ESENER-2), 2018 at 8, 31 and 36

various ways. Of the workers who reported experiencing a work-related injury, 59% had experienced a psychological injury, either alone or in addition to a physical injury. A significant number (61%) said that they had experienced mental illness (including stress, depression and anxiety) because of ongoing issues in the workplace which had not been addressed by their employer, and almost one in two (47%) said they had been abused, threatened, assaulted or exposed to traumatic events at work in the past 12 months. More than two thirds (67%) said their employer does not know how to address mental health issues at work; and about a quarter of those (24%) said their employer *never* takes mental health seriously, with almost half (47%) saying that their employer only takes mental health seriously sometimes. More than two thirds (67%) told us they though their employer did not know how to address occupational violence at work. In the last 12 months, workers told us they had experienced the following psychosocial hazards:

- two thirds (66%) had high workloads (too much to do, fast work pace or significant time pressure);
- almost half (49%) had experienced poor workplace relationships (e.g. bullying, aggression, harassment, conflict, lack of fairness and equality between workers)
- almost half (48%) had experienced lack of recognition or reward (e.g. no positive feedback, lack of opportunity for skills or career development or promotion, skills and experience or were under utilised)
- almost half (48%) had experienced long working hours
- almost half (47%) have exposure to traumatic events, distressing situations or distressed or aggressive clients/customers
- almost half (46%) had experienced lack of support in their job (e.g. lack of emotional support from supervisors, insufficient information or training, inadequate tools, equipment or resources)
- almost half (45%) have faced unfair and inconsistent practices by management (e.g. policies not applied equally between workers)
- over 40% have faced poor management when major changes happen at work (e.g. restructure, redundancy or downsizing)
- 38% work unsociable hours (e.g. very early morning or very late at night)

There is no shortage of evidence and examples highlighting the impact of unmanaged psychosocial risks on Australian workers. These impacts manifest in different ways in different types of workplaces, including the appallingly high rates of suicide among construction

workers,[17] stress and burn out among university staff and finance sector workers caused by high workloads and work intensification,[18] frequent occupational violence towards nurses and other healthcare workers,[19] and endemic rates of sexual harassment in industries such as hospitality, retail, transport, media, teaching and health, and male-dominated industries such as policing, maritime and STEM.[20]

The evidence shows that the current Model WHS Laws have failed to establish a minimum standard for the management of psychosocial hazards in Australian workplaces. This regulatory failure is placing a huge personal, financial and social cost primarily on workers and their families, but also on employers and the wider community.

Case Study – Sexual Harassment

The continuing high prevalence of sexual harassment in Australian workplaces presents a clear example of the failure of the current WHS regime to grapple effectively with psychosocial risks. Australian experts have noted that organisations face 'significant practical challenges' in implementing effective responses to sexual harassment, including variations in perceptions of what constitutes sexual harassment and the reluctance of targets to make formal complaints.[21]

Despite this, there is still no meaningful requirement on employers to implement proactive measures to prevent violence and harassment in the workplace, no detailed Code of Practice addressing violence and harassment, and regulator responses remain inadequate or non-existent. Due to these gaps in the WHS framework, sexual harassment is channeled into individual complaints processes,[22] rather than preventative and systematic WHS risk

[17] See for example: Heller T, Hawgood J, De Leo D 2007, Correlates of Suicide in Building Industry Workers Archives of Suicide Research 11:1, 105-117; Maheen H & Milner Allison, Suicide in the Construction Industry: Report submitted to MATES in Construction by Deakin University, MATES in Construction, Brisbane, 2017

[18] NTEU, State of the Uni Survey results, 2017; FSU, Submission to Consultation RIS, 2019

[19] See for example Delaney,J., Cleary, M., Jordan, R. & Horsfall, J. (2001). *An Exploratory Investigation into the Nursing Management of Aggression in Acute Psychiatric Settings*. Journal of Psychiatric and Mental Health Nursing, 8(1), 77-84; NSW Nurses and Midwives' Association, *Submission to 2018 Review of Model WHS Laws*, April 2018, p 28; HSU, *Submission to Consultation RIS*, 2019; WorkSafe Victoria Statistics: https://prod.wsvdigital.com.au/sites/default/files/2018-06/ISBN-Occupational-violence-and-aggression-against-healthcare-workers-brochure-2017-06-03.pdf

[20] ACTU, Submission 306 to AHRC National Inquiry into Sexual Harassment in Australian Workplaces, February 2019 at pp 10-11

[21] Paula McDonald, Sara Charlesworth and Tina Graham, *Developing a framework of effective prevention and response strategies in workplace sexual harassment* (2015) Asia Pacific Journal of Human Resources 53, 41-58 at 42

[22] The *Sex Discrimination Act 1984* (SDA) aims to eliminate sexual harassment and promote equality, yet it simply establishes a complaint process that relies on individuals coming forward and reporting harassment

management processes, which has limited the development of effective organisational responses.[23]

Between 18 September and 30 November 2018, the ACTU conducted a 'Sexual Harassment in Australian Workplaces' survey. Almost 10,000 people responded from all major sectors of the economy, from education and public services to mining, finance and media. The majority of respondents (68%) were women. More than half of survey respondents (54.8%) had experienced sexual harassment at their most recent workplace or at a previous workplace, and a majority (64%) had witnessed sexual harassment at their most recent workplace or at a previous workplace. Only 27% of those who experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all. Of those who complained, most (56%) were not at all satisfied with the outcome, 43% said their complaint was ignored or not taken seriously, and 45% said there were no consequences for the harasser. Significantly, respondents reported that ***less than half*** of their workplaces had proper preventative measures in place, including mandatory training for staff, a clear workplace policy, an effective complaints mechanism, or access to workplace health and safety processes.[24] These results reflect other data and research[25] which shows that sexual harassment is both prevalent and grossly under-reported, in Australia and internationally. [26]

On 28 February 2019, the ACTU and a number of affiliates lodged a submission to the Australian Human Rights Commission's national inquiry into sexual harassment,[27] along with a Joint Statement signed by over 100 organisations as part of the 'Power to Prevent' coalition, calling for (among other things) *stronger and clearer legal duties on employers to take proactive steps to prevent sexual harassment at work, and strong and effective regulators that have the full suite of*

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[23] Above note 19
[24] ACTU, *Sexual Harassment in Australian Workplaces: Survey Results*, 2018: https://www.actu.org.au/actu-media/media-releases/2018/sexual-harassment-1
[25] See for example: Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces' (2018); Australian Human Rights Commission, 'Working without fear: Results of the Sexual Harassment National Telephone Survey' (2012); Australian Human Rights Commission, 'Sexual harassment: Serious business: Results of the 2008 Sexual Harassment National Telephone Survey' (2008); Human Rights and Equal Opportunity Commission, 'Sexual Harassment - A Bad Business' (2002).
[26] Women and Equalities Committee, UK House of Commons, Sexual harassment in the workplace, Fifth Report of Session 2017–19 (2018)
[27] On 19 June 2018, the Sex Discrimination Commissioner announced that the Australian Human Rights Commission (**AHRC**) would be commencing a national inquiry into sexual harassment in the workplace. The Inquiry is considering the drivers and economic impact of sexual harassment and the adequacy of the existing legal framework: Australian Council of Trade Unions, Submission 306 to the Australian Human Rights Commission, 28 February 2019

regulatory tools and resources necessary to effectively tackle sexual harassment, including as a cultural, a systemic and a health and safety issue. [28]

Data limitations

It is important to note that our existing data results in an underestimation and misstatement of the scope and nature of the problem of psychosocial hazards and psychological ill health in Australian workplaces. Mental stress claims data is the only data available to assess the nature and prevalence of psychosocial stressors in Australian workplaces, and it is subject to some serious limitations.

In response to a recommendation of the Stop Bullying Inquiry,[29] Safe Work Australia now produces an annual 'Statement on Psychosocial Health and Safety and Bullying in Australian Workplaces'. SWA notes that the figures in these statements are an 'approximate measure of the psychosocial health and safety status of Australian workplaces over time and should be interpreted with caution'. [30] This is primarily because the data presented in these statements are drawn only from *accepted workers' compensation claims* caused by a psychosocial stressor (such as harassment or bullying, occupational violence or unreasonable work pressure) that has caused an injury or disease. Such claims are known as 'mental stress claims'. However, because the workers compensation regime fails to respond adequately to psychosocial stressors and psychological injury, most workers injured in this way are either not successful in their workers compensation claims or do not claim workers compensation at all. It is important to note that the SWA figures also only focus on the psychological harm caused by psychosocial hazards, not the physical health impacts.

The ACTU's 'Safe at Work' survey results reflect this, finding that the vast majority of workers (90%) who said they were psychologically injured by work did not make any claim for workers' compensation, despite the fact that over half of them (59%) had been unable to work for a period of time due to their injury. Of the small number of workers who did make a claim (9%), almost a third (30%) said their claim was rejected. These findings also reflect ABS data, which show that

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[28] Legal Aid Victoria, *We need a better system to prevent sexual harassment at work*, 28 February 2019 https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/power-to-prevent-joint-statement-ahrc-inquiry-sexual-harrassment-work.docx

[29] House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We just want it to stop* (2012) 189, [6.111]

[30] Safe Work Australia, Psychosocial health and safety and bullying in Australian workplaces: Indicators from accepted workers' compensation claims, Annual statement, 4th edition, 2017, p 1

approximately 84% of workers with a stress or other mental condition did not receive workers compensation.[31]

What is clear is that while mental stress claims only make up a small proportion of accepted claims, the time lost and cost associated with them are significantly higher compared with other types of workers' compensation claims.[32] The frequency rate of workers' compensation claims for harassment and/or bullying made by female employees was almost three times higher than the rate of these claims made by males, and the rate of claims made by females relating to work pressure and exposure to workplace or occupational violence were more than twice the rate of males.[33] The prevention of mental health conditions has been identified as one of six national priorities by the *Australian Work Health and Safety Strategy 2012–2022*, due in part to the high cost and complexity of mental stress claims.

Problems with Australia's regulatory framework

Prior to the introduction of the Model WHS laws, only Victoria's health and safety laws defined health to include psychological health. NSW's *Occupational Health and Safety Regulation 2001* required employers to identify some psychosocial hazards, including those arising from 'work practices, work systems and shift working arrangements, including hazardous processes, psychological hazards and fatigue related hazards' and workplace violence. In 2004, the Maxwell Report into WHS laws in Victoria recommended clarification of coverage of 'emerging' psychosocial occupational health risks, such as stress and bullying. Noting some of the difficulties workplace parties experience in recognising psychosocial hazards and risks and determining how to control them, the Maxwell Report acknowledges a '*gathering consensus that the most effective means of addressing psychosocial risks is to focus upon the creation of safe systems of work rather than upon vulnerable individuals*'.[34] More than 15 years later, this has still not been achieved by the WHS regime in Australia.

One of the key problems with Australia's current framework is that that the Model WHS Regulations and Codes of Practice do not address psychosocial risks specifically or adequately, and the unique ways in which psychosocial hazards manifest in different industries and occupations are not addressed. There is no Regulation at all addressing psychosocial hazards

[31] ABS 6324.0 Work-Related Injuries, Australia, July 2017 to June 2018, Table 9.1
[32] Safe Work Australia, *Australian Workers Compensation Statistics*, 2016-17, pp 5–-51
[33] Above note 16, p 2
[34] Chris Maxwell, *Occupational health and Safety Act Review*, March 2004 – pp 6-7 and 31-45. Noting that psychosocial hazards were already covered by the 'general language' of the Act, Maxwell recommended amendment to 'embrace the right to a healthy physical and psychosocial work environment.'

(apart from remote and isolated work), and although there are three Model Codes of Practice that reference psychosocial hazards, they are not dealt with in detail. While SWA (and every jurisdiction) has produced non-binding guidance material on various types of psychosocial risks, such material is advisory only, covers certain psychosocial hazards only and can be hard for PCBUs and others to locate and navigate.[35] Although bullying is (to some extent) addressed by Australian criminal and workplace laws, these frameworks are responsive, not preventative, and there are significant gaps in coverage. There are also problems with the incident notification provisions in the Model WHS Act. During the harmonisation process, a number of triggers designed to identify psychosocial risks were stripped from the Model Laws, including absences from work of more than 7 days. There are other limitations, including the fact that occupational violence incidents are not notifiable if they result in psychological harm only. Unless incidents, injuries and near misses involving psychosocial hazards are required to be reported by the regulatory framework, employers and WHS regulators are unlikely to take action to address them.[36]

The result of these gaps is that there is no clear legal duty on PCBUs requiring the management of psychosocial risks in Australian workplaces and no consistent, comprehensive national approach to these issues.

Model WHS Act

The Model WHS Laws establish 'broad duties and obligations in laws that apply to health and safety at work, which embrace psychosocial factors but without explicitly naming them.'[37] An important reform introduced by the Model WHS Act was the inclusion of 'psychological health' in the definition of 'health' (s 4). This means that the primary duty of a PCBU (s 19) is to ensure, so far as is reasonably practicable, that workers and other persons are not exposed to risks *to either physical or psychological* health and safety risks arising from the work carried out by the business or undertaking. A PCBU is obliged to maintain safe systems of work (s 19(3)(c)), provide access to adequate facilities for the welfare of workers (s 19(3)(d), and provide any information, training, instruction or supervision necessary to protect workers from risks to their health and safety (s 19(3)(f)). Workers and other persons at a workplace must take reasonable care that their

[35] For example Safe Work Australia's Guide for managing the risk of fatigue at work 2013 and Guide for Work-related psychological health and safety: A systematic approach to meeting your duties 2017; WorkSafe Victoria's Preventing and managing work-related stress: a guidebook for employers, June 2017; SafeWorkSA's Guide to Preventing and responding to work-related violence, 2018.
[36] Recommendation 20 of the 2018 Review seeks to address this concern and is strongly supported by the ACTU
[37] Elizabeth Bluff '*The Regulation and Governance of Psychosocial Risks at Work: A Comparative Analysis Across Countries'* (Part 3. Society, safety & health, Global Collaborative Research, 2016) 113-168, 117

behaviour does not adversely affect the health and safety of others (ss 28(b) and 29(b)). It is clear that the general duties in Australia's Model WHS Laws are technically broad enough to cover psychosocial hazards, however as outlined the evidence suggests that this duty is not being implemented in practice.

Model Regulations

The Model Regulations cover a number of specific types of risks such as airbourne contaminants and falling objects, and various types of hazardous and high-risk work, such as demolition and electrical work. Psychosocial hazards are not covered, except for remote or isolated work. While the Regulations technically also cover psychological harm due to the definition of 'health' in the Model Act, the clear and primary focus of the Regulations is the management of physical risks and the prevention of physical harm. This gap in the Regulations is compounded because as it currently stands, the detailed requirements for managing risks to health and safety that are set out in Part 3.1 of the Regulations, including the duty to implement risk control measures (s 36 of the Regulations), apply only to the risks explicitly set out in the Regulations, not all workplace risks. Recommendation 27 of the 2018 Review seeks to address this concern and is strongly supported by the ACTU (see below discussion).

Model Codes of Practice

Codes of Practice are not legally binding but can be admitted in court as evidence of whether or not a duty has been complied with (Model WHS Act ss 275, 275(4)). Like the Regulations, the Model Code of Practice on *How to manage work health and safety risks*[38] has a clear and primary focus on the management of physical hazards. While the Code references psychosocial hazards, it does not deal with these issues comprehensively or accurately. For example, the Code lists 'excessive time pressure, bullying, violence and work-related fatigue' as examples of psychosocial hazards which may cause psychological or physical injury or illness, then links to the (non-binding) *Guide for preventing and responding to workplace bullying* (published 31 August 2016), which contains confusing messages about the relationship between harassment, violence, discrimination and bullying at work, as well as the role of WHS regulators in these matters.[39] The

[38] https://www.safeworkaustralia.gov.au/node/4301

[39] For example, at page 7, the bullying guide states that: 'Unreasonable behaviour may involve unlawful discrimination or sexual harassment which, by itself, is not bullying'. This statement is not accurate: sexual harassment and unlawful discrimination may constitute a form of workplace bullying. The guide also refers readers to the Australian Human Rights Commission, the Fair Work Commission, and state and territory anti-discrimination, equal opportunity and human rights agencies for further assistance, which gives the clear impression that discrimination and sexual harassment are not WHS issues and that WHS regulators have no role to play in addressing them.

model Code of Practice on *Managing the work environment and facilities* covers psychosocial risks such as remote work, heat and noise, but largely focuses on the creation of a 'clean and safe' working environment that manages risks to *physical* health and safety. Similarly, the Model Code of Practice on *Hazardous Manual Tasks* focuses primarily on the physical hazards that present a risk of musculoskeletal injury, only briefly referencing psychosocial hazards such as high mental strain, high job demands, work organisation, limited staff numbers and tight deadlines.

Inspection and enforcement

Traditionally, WHS laws have protected workers from physically and visibly dangerous situations arising from working with machinery and hazardous substances, and regulators have been resourced and skilled accordingly. Studies have noted the challenge this legacy presents to inspectorates in responding effectively to psychosocial issues in contemporary workplaces, including ongoing gender imbalance in inspectorates and the technical focus of regulators.[40] While most Australian WHS regulators are now at least attempting to develop and improve their capacity to respond to psychosocial hazards, primarily through appointing specialist inspectors and developing (non-binding) guidance material,[41] significant additional resources and effort are required to ensure that psychosocial hazards are treated as serious health and safety issues in a consistent way across different Australian jurisdictions. There are a number of concerning indications that Australian WHS regulators do not currently have the capacity or resources to address psychosocial hazards appropriately:

- A 2011 Australian study found that psychosocial hazards remain a 'marginal area of inspectorate activity'.[42]
- Submissions to the 2012 Stop Bullying Inquiry noted evidence suggesting that while WHS law places an onus on employers to protect employees from physical and mental health risks resulting from poor workplace culture, it is 'extremely rare' for an employer to be prosecuted in connection with workplace bullying.[43]

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[40] John Graversgaard, 'Key role of labour inspection: how to inspect psycho-social problems in the workplace?' in Iavicoli, S. (ed), Stress at Work in Enlarging Europe. National Institute for Occupational Safety and Prevention (Rome 2004) 65–76.
[41] For example, Workplace Health and Safety Queensland's Mentally healthy workplaces toolkit; SafeWork NSW's Mental health @ work website; WorkSafe Victoria's WorkWell Toolkit and Western Australia's FIFO Code of Practice
[42] Richard Johnstone et al, 'OHS inspectors and psychosocial risk factors: Evidence from Australia', Safety Science (2011) Vol 49, 547–557
[43] House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We just want it to stop* (2012) 189, [6.111]

- In a 2018 interview, a SafeWork NSW spokesperson recently advised that sexual harassment complaints are referred to the NSW Anti-Discrimination Board. Although the spokesperson indicates that a SafeWork NSW inspector 'might' attend a workplace to 'identify any ongoing risks to workers and review the employer's policies and systems for dealing with workplace harassment and bullying', it is clear from these comments that SafeWork NSW considers other agencies better placed to handle sexual harassment complaints.[44]
- A 2019 submission to the National Inquiry into Sexual Harassment in Australian Workplaces by WA Work Safe states that 'as a safety regulator, WorkSafe is not sufficiently resourced and does not have the expertise to adequately address sexual harassment matters'.[45]

Research shows that resource limitations are the major problem facing regulators worldwide. This is particularly challenging in relation to psychosocial risks because their investigation is often more time consuming, complex and costly. The changing nature of work compounds and exacerbates these challenges.[46] It is imperative that a new regulation on psychosocial risks is supported by proper, long-term investment in education and capacity building for regulators, workers, employers and their representative organisations.[47] Given the high costs of harm caused by psychosocial hazards at work, this investment is likely to be offset by significant benefits to workers, workplaces, employers and the wider community.

State of knowledge on psychosocial hazards

Over the past two decades, recognition and understanding of psychosocial hazards and their potential to cause harm to workers has been steadily growing.[48] Most research deals with European workplaces and regulators, although there is some Australian and Canadian research. There has been an evolution in many countries from an initial focus on violence and harassment towards a broader understanding of the full range of psychosocial risks.[49] Research suggests that this evolution has been slow to unfold in Australia: a 2015 study suggests that a large number of

[44] OHS Alert, 'Harassment must be treated as major OHS issue: inquiry', 30 July 2018.
[45] Submission 204, Worksafe Western Australia Commissioner, 5 February 2019
[46] Quinlan, M., Johnstone, R., McNamara, M., 2009. Australian health and safety inspectors' perceptions and actions in relation to changed work arrangements. J. Ind. Relat. 51, 557–573.
[47] National Research Centre for OHS Regulation Australian National University, Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks, RegNet Paper 7, (2016), pp 57-58
[48] See for example European Agency for Safety and Health at Work, *Psychosocial risks in Europe: Prevalence and strategies for prevention*, 2014
[49] Above note 3

Australian businesses are not recognising or effectively responding to psychosocial hazards at work (some industries are worse than others), and where responses do exist, they focus on psychosocial hazards that present an obvious risk of physical harm, such as workplace violence and aggression.[50] A 2017 comparative study finds that Australian law has been slow to address psychosocial risks, and to the extent that it has, it has primarily focused on workplace bullying.[51]

In terms of the success (or otherwise) of regulatory frameworks and initiatives, studies identify 'loose definitions' of psychosocial risks and a failure to ensure 'a prevention approach grounded in the assessment and improvement of job designs, content and organisation', as key problems.[52]

The availability of research and evidence on effective ways to identify, assess and control the risks of harm associated with various types of psychosocial hazards – in Australia and internationally – is variable. For example, a Swiss study finds that there is 'very little' literature on how employers actually deal with psychosocial risks in workplaces.[53] Various initiatives have been developed to try to address gaps in knowledge regarding risk assessment and management, including the *European Framework for Psychosocial Risk Management* and the *British Management Standards* aimed at preventing stress at work. Aside from company size (bigger companies do better at managing psychosocial risks) there is little research into other workplace characteristics which are associated with better WHS outcomes on psychosocial risks.[54] Reflecting the stage of development of Australia's law and practice in this area, Australian studies tend to focus on gaps in the regulatory framework relating psychosocial hazards, rather than effective risk management approaches.[55]

Information on the effectiveness of regulator interventions is limited, but suggests that further investment and research in regulator capacity in regard to psychosocial hazards is crucial. For

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[50] Bluff, E 2015, *Work health and safety compliance in small and medium enterprises*. Report to Safe Work Australia, School of Regulation and Global Governance (RegNet), Canberra.
[51] Loïc Lerouge, Psychosocial Risks in Labour and Social Security Law; A Comparative Legal Overview from Europe, North America, Australia and Japan, Springer (2017)
[52] R Weissbrodta et al, Preventing psychosocial risks at work: An evaluation study of labour inspectorate interventions Safety Science 110 (2018) 355–362, at 355, 360
[53] R Weissbrodta et al, Preventing Psychosocial Risks: A Study of Employers' Perceptions and Practices, Industrial Relations (2018) 73-1.
[54] Above note 3 at 121
[55] See for example Rachael Pottera et al, *Analytical review of the Australian policy context for work-related psychological health and psychosocial risks*, Safety Science 111 (2019) 37–48; National Research Centre for OHS Regulation, Australian National University, Regnet Project 7, *Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks*, November 2016; Elizabeth Bluff *'The Regulation and Governance of Psychosocial Risks at Work: A Comparative Analysis Across Countries'* (Part 3. Society, safety & health, Global Collaborative Research, 2016) 113-168, at 117-131; Loïc Lerouge, *Psychosocial Risks in Labour and Social Security Law; A Comparative Legal Overview from Europe, North America, Australia and Japan*, Springer (2017)

example, two recent Swiss studies have found that workplace responses to labour inspectorate interventions regarding psychosocial risks at work 'are not well known', and although there is the possibility of positive outcomes with 'appropriate training and resources' for inspectorates, strong evidence is lacking and 'more evaluation studies are necessary'.[56] A European study shows that the effectiveness of inspection and enforcement have identified that inspectorate activity is an important driver for organisations to take action on psychosocial hazards, but there are limitations in regulator capacity, competency and methodology when it comes to psychosocial hazards.[57]

Practical Impact of Options

Detailed new regulation on psychosocial hazards would be a significant change in Australia's legal framework and would, hopefully, lead to significant changes in practice. It is hoped that over time, Option 2 (supported by proper resourcing to build regulator, worker and employer expertise and capacity) will result in duty-holders more effectively managing psychosocial risks, thereby reducing the harm caused to workers and associated costs to employers and the community. A number of countries already have mandatory legal obligations in relation to various psychosocial hazards, including Sweden, Denmark, Japan, Korea and some jurisdictions in the USA (e.g. New York State) and Canada (e.g. Ontario).[58] Sweden and Denmark in particular both have well-developed legal frameworks for regulating psychosocial risks. In Denmark, broad general duties are underpinned by a detailed, legally binding Executive Order (No. 559 of 2004), which requires that all aspects of work are planned, organised and performed so as to ensure health and safety, and having regard to an individual and overall assessment of the physical, ergonomic and psychosocial conditions of the work environment that may affect the physical or mental health of employees. The Executive Order also set out requirements for various specific psychosocial hazards, including sexual harassment, work in isolation and monotonous work.

Form and Content of Regulation

The purpose of the Model Regulations is to identify critical components of the general duties in the Model Act to ensure that those matters are addressed by duty-holders as a minimum requirement of compliance. The Model WHS Regulations set mandated minimum standards for the management of certain specific *hazards*; therefore the new Regulation should deal with

[56] Above note 52
[57] EU-OSHA (2012a) Management of Occupational Safety and Health: An Analysis of the Findings of the European Survey of Enterprises on New and Emerging Risks (ESENER) – Technical Report Annexes 1 and 2; EU-OSHA (2012b) Management of Psychosocial Risks at Work: An Analysis of the Findings of the European Survey of Enterprises on New and Emerging Risks (ESENER).
[58] Above note 37 at 117-131

'psychosocial risks' rather than 'psychological health'. The meaning of the term 'prescriptive' in the Consultation RIS is unclear. Regulations by their nature are always prescriptive. It is important that the new Regulation is detailed enough to provide meaningful guidance to duty-holders. It should include at least an indicative list of different types of psychosocial hazards.[59] The new Regulation should cover the full range of psychosocial hazards and the full range of health impacts, both physical and psychological. It is crucial that the Regulation requires the use of the hierarchy of controls, which requires duty-holders to combat risks at their source. It is also essential that the new Regulation is supported by a new Code or Codes of Practice which deal in detail with specific types of psychosocial hazards and the unique ways in which they manifest in different industries and occupations.

New International Standard 'Occupational health and safety management systems — Requirements with guidance for use' ISO 45001

We note that the new International Standard 'Occupational health and safety management systems — Requirements with guidance for use' ISO 45001 (now adopted as Australian Standard AS/NZS ISO 45001:2018) contains a hazard identification and assessment clause requiring organisations to *establish, implement and maintain a process(es) for hazard identification that is ongoing and proactive* that must take into account matters including *how work is organized, social factors (including workload, work hours, victimization, harassment and bullying), leadership and the culture in the organization;* and *the design of work areas, processes, installations, machinery/equipment, operating procedures and work organization, including their adaptation to the needs and capabilities of the workers involved.* Both ACCI and AIG are represented on the Standards Australia mirror committee SF-001, that decided to adopt this as an Australian Standard. It will be important that the new Regulation is aligned with this standard.

New ILO Convention on Violence and Harassment

The new Regulation and Code/s must also take into account Convention (no. 190) and Recommendation (no. 206), adopted by the ILO on 21 June 2019, which recognise the right of every worker to a world of work free from violence and harassment. If ratified, the instruments will place clear obligations on governments and employers to address violence and harassment as a WHS issue, recognising the need to move away from reliance on a reactive, individualistic

[59] Safe Work Australia's guidance: *Work-related psychological health and safety: A systematic approach to meeting your duties* contains a list of hazards that could be used as a starting point for the types of psychosocial hazards that should be covered

complaints model towards a systemic, collective, preventative approach.[60] The instruments provide a definition of 'violence and harassment',[61] as well as detailed employer and government obligations and guidance in relation to addressing violence and harassment in the world of work. In particular, Article 9 of Convention 190 requires States to adopt laws and regulations requiring employers to, so far as is reasonably practicable, develop and implement a workplace policy on violence and harassment, identify hazards and assess the risks of violence and harassment and take measures to prevent and control them, take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health, and provide workers and others with relevant training and information. Paragraph 8 of the Recommendation clarifies that the workplace risk assessment referred to in Article 9 should:

> *…take into account factors that increase the likelihood of violence and harassment, including psychosocial hazards and risks. Particular attention should be paid to the hazards and risks that: (a) arise from working conditions and arrangements, work organization and human resource management, as appropriate; (b) involve third parties such as clients, customers, service providers, users, patients and members of the public; and (c) arise from discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment.*

Under Article 19(5) of the ILO Constitution, member States are now required to bring the new Convention to the attention of their competent national authorities, including labour inspectorates, workplace health and safety regulators and anti-discrimination and human rights commissions. ILO Convention No. 190 will enter into force 12 months after two member States have ratified it, which seems likely to happen quickly in light of the large numbers of countries which voted for its adoption at the ILO, including the Australian Government and Australian Employers. The Department of Jobs has made a preliminary assessment that the Australian Government is likely to be 'largely compliant' with the requirements of the new standards. In our view there are some important changes to Australian law and practice that would need to occur to ensure full compliance with the new standards, including acceptance of Recommendations 2 and 20 of the Review as outlined in this submission.

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[60] For example Article 9 of the Convention requires member states to require that employers 'take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health'.
[61] International Labour Conference, Final record vote on the adoption of the Convention concerning the elimination of violence and harassment in the world of work, 108th Session, Geneva 2019

New arrangements for HSRs and work groups in small businesses (No. 7a)

Preferred Option

The ACTU does not have a strongly preferred option in this case. Default arrangements (Option 2) are not opposed, but there would need to be consideration of the way in which the issue resolution provisions would interact with the new requirements. The ACTU does not support any option which would have the effect of weakening the requirement on business to negotiate and agree on consultation structures with workers.

Effects of Problem

As acknowledged by the National OHS Panel, worker and union participation at all levels plays a pivotal role in the effective implementation of WHS legislation in Australia.[62] It is clear that the absence of consultation structures in workplaces exposes workers to a greater risk of harm, which imposes costs on workers, employers and the wider community. The number of workplaces without HSRs is very problematic for the effective operation of the Model WHS Laws, and smaller workplaces are less likely to have such structures than larger workplaces. Reforms that support the establishment of proper consultation structures in workplaces that are less likely to have them are supported by the ACTU. However, it is unclear if the proposed options will have this effect in practice. As noted by the Consultation RIS, there is insufficient evidence to determine whether the Model WHS Laws are acting as a barrier to the implementation of consultation arrangements in smaller workplaces. The ACTU does not agree that the current negotiation requirements are unreasonable or that the process for election of HSRs is unduly complex. The ACTU suggests that other factors, such as onerous right of entry provisions for permit holders, present a greater barrier to the establishment of consultation structures in smaller workplaces.

Practical Impact of Options

It is crucial that any new arrangements do not undermine genuine negotiation and agreement on the most effective and convenient structures for the workplace.

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[62] National OHS Panel Review, *Second Report*, Chapters 25 and 45

Clarify workplace entry of union officials providing assistance to an HSR (No. 8)

Preferred Option

The ACTU strongly supports Option 2.

In the National OHS Panel Report, the right of HSRs to seek assistance is discussed entirely separately from the right of entry provisions, under the section dealing with the *obligations* of PCBU's to HSRs.[63] The National OHS Panel notes that effective workplace participation and representation 'requires the active involvement of management' and the 'cooperation and commitment' of the PCBU. As such, the National OHS Panel recommended that the Model WHS Act: *'should provide that a person conducting a business or undertaking most directly involved in the engagement of the HSRs is required to allow a person assisting HSRs to have access to the workplace where that is necessary to enable the assistance to be provided.'* This discussion strongly suggests that it was never intended that the provisions relating to HSR assistance should be covered by any statutory right of entry regime, rather that there be a requirement on a PCBU to *allow* an assistant access where this is necessary to assist a HSR. In light of the proven benefits of representative participation, particularly when it comes to supporting HSRs, there can be no justification for limiting the ability of union representatives to consult and provide advice to HSRs should it be required.

Effects of Problem

Despite the benefits of worker involvement in WHS, there is no shortage of examples of HSRs being victimised for simply performing their role,[64] highlighting the need for the Model WHS Act to facilitate (not hinder) the ability of HSRs to access assistance when needed.

Of the 15,000 plus workers who answered the question in the ACTU Safe at Work Survey, (29%) were current or former HSRs. Of these, 90% said it would be helpful to have access to a union

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[63] National Review into Model Occupational Health and Safety Laws, Second Report to the Workplace Relations Ministers' Council, January 2009 at p 133

[64] For example, in *DPP v Patrick Stevedores Holdings Pty Ltd* [2018] VCC 2282 Patrick Stevedores Holdings Pty Ltd was convicted and fined $475,000, after the County Court found it guilty of six breaches of section 76 of the Victorian OHS Act for actions that one of its managers took against an elected health and safety representative and others in early 2009. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Fredon Industries Pty Ltd [2019] FCA 561*, the Federal Court has found that the timing of an electrician's dismissal raises 'serious questions' about whether the company took the action because of his HSR status or notification of a health and safety concern, and has granted his claim for interlocutory reinstatement while the matter is heard.

representative in the workplace to support or assist them in their role. Almost a quarter (24%) had stopped being an HSR either because they were not given enough time to perform the role properly, did not have enough support or assistance, were concerned about the backlash from their employer, or thought it would harm their career. Of all those workers who responded to the survey, 97% said that unions should have a role in supporting and assisting HSRs, 97% said that unions should have a role in WHS, 95% said that unions should be involved in educating and informing workers, HSRs, employers and companies about WHS issues and almost all (98%) believed that unions should be able to represent workers and HSRs in disputes with their employer or company about WHS issues.

Notably, there was a clear difference in the survey results between the experiences of union and non-union members in relation to consultation and participation on WHS issues. A majority of union members (60%) knew who their HSR was, compared with a minority (only 46%) of non-union members. Only 6% of union members did not have an HSR in their workplace, whereas 16% of non-union members did not have an HSR in their workplace. Tellingly, almost a quarter (23%) of non-union member respondents said that they were *never* consulted about safety at work, while only 15% of union members said the same. In addition, survey respondents – both union and non-union – were virtually unanimous in their support for an expanded role for unions in assisting them with WHS matters: 97% said that unions should have a role in WHS, 98% said that unions should be able to represent workers in disputes with employers about workplace health and safety, and 90% wanted unions to be able to respond immediately to a breach or suspected breach of safety in a workplace.

The Full Court decision in *Powell*[65] has created a perverse result, in that an assistant (who is also a union official) does not require a permit under WHS laws, but must hold a permit under the Fair Work Act. This unnecessary, unfair and unintended regulatory burden will require the expenditure of time, money and effort which would be better spent assisting HSRs. It presents the very real prospect that HSRs will be prevented from accessing the assistance they want and need because a PCBU is able to refuse entry solely on the basis that the assistant is a union official. This means that union officials are treated differently to other assistants who are not covered by the Fair Work Act right of entry regime, which is not only unfair and unjustified, but which flies in the face

[65] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89. The High Court has recently refused to grant special leave to appeal the decision so the legal process is now finalised: *Powell v Australian Building and Construction Commissioner & Anor; Victorian Workcover Authority v Australian Building and Construction Commissioner & Anor* [2017] HCATrans 239

of the evidence which overwhelmingly shows that HSRs need wand want assistance from their union, and that such union participation results in safer workplaces.

Practical Impact of Options

There is a broad body of evidence to suggest that worker representatives are one of the most effective means for making workplaces safer.[37] Studies suggest that there is a positive relationship between indicators of strong WHS performance and workplaces with joint arrangements or union involvement in worker representation, or both.[38] It is clear that the meaningful participation of workers, particularly through the HSR structure, is crucial to ensure safe and healthy workplaces. The Robens model of regulation cannot function effectively unless those with relevant knowledge and expertise participate effectively in WHS matters in the workplace. The business case for such participation is clear: it enhances decision-making by duty-holders and creates safer and more productive workplaces for all parties.[66] Representative participation (as compared with direct participation) has been found to be particularly important:

> *… joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when employers manage work health and safety without representative worker participation*.[67]

There is significant evidence pointing to the benefits of HSRs being properly trained, informed and supported, and the role of trade unions in particular in providing such information, training and support.[68] In making its recommendations relating to union officials' right of entry, the National WHS Review Panel noted the:

> *…considerable evidence that exists which underscores the value of trade unions being able to enter workplaces to assist, in various ways, in securing improved OHS*

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[66] See for example James Roughton and James Mercurio "Employee Participation" in Developing an Effective Safety Culture: A Leadership Approach (Butterworth-Heinemann, 2002) 116; and Felicity Lamm, Claire Massey and Martin Perry "Is there a link between Workplace Health and Safety and Firm Performance and Productivity?" (2007) 32(1) NZJER 72.

[67] Richard Johnstone and Michael Tooma Work Health and Safety Regulation in Australia: The Model Act (Federation Press, Sydney, 2012) at 139

[68] See for example: 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; Victoriya Pashorina-Nichols, *Occupational Health And Safety: Why And How Should Worker Participation Be Enhanced In New Zealand?* New Zealand Journal of Employment Relations, 41(2): 71-86 (2016); Felicity Lamm and David Walters "Regulating Occupational Health and Safety in Small Businesses" in Elizabeth Bluff, Neil Gunningham and Richard Johnstone (eds) OHS Regulation for a Changing World of Work (Federation Press, Sydney, 2004) 94 at 109–110.

*performance and effective outcomes, **particularly with respect to the provision of support to workers elected as health and safety representatives** (HSRs)*

[emphasis added]

This is reflected in international standards which mandate the involvement of workers and their representatives in WHS processes, including the ILO's *Occupational Safety and Health Convention 1981*. While employers raise concerns about the 'misuse' of the assistant provisions by union officials, there is little evidence of such misuse.

Option 2 will ensure that the HSRs can continue to access expert assistance when needed, without unnecessary and unfair regulatory impediments.

Requiring inspectors to deal with safety issue when cancelling a PIN (No 9)

Preferred Option

The ACTU supports Option 2.

Effects of Problem

Provisional Improvement Notices (**PINs**) are widely used and remain of fundamental importance in securing compliance with the Model WHS laws. The purpose of the WHS regime is to improve health and safety outcomes. The PIN process is intended to support this outcome. Inspectors may be asked by either party to review a PIN under s 100 of the Model WHS Act, and are authorised by s 206 to make 'minor changes' to a PIN to correct errors. Sections 98 and 208 provide that a PIN is not invalid simply because it contains a formal defect or irregularity that would not cause substantial injustice. These sections reflect the Maxwell Review recommendation that the Victorian OHS Act should contain provisions similar to those in the *Bankruptcy Act 1996*, which prevent invalidity of a form on the grounds of formal defects.[69] The National OHS Panel also recommended that inspectors be provided with powers to make minor amendments or modifications to notices, including to 'correct errors (e.g. date) or references **(e.g. to a section of an Act or regulation)**' where such changes do not 'substantially change the effect

[69] Maxwell Review, pp. 342–344.

of the notice' and are open to review[70] (emphasis added). The *Worker Representation and Participation Guide* is misleading, and inconsistent with the National OHS Panel report, in its use of 'incorrect section references' as an example of an error which could cause substantial injustice. A 'technical deficiency' should be understood as any deficiency which does not relate to the substance of the underlying safety issue, is not misleading and is not likely to cause 'substantial injustice'. Where errors in references to sections of the WHS Act do not cause substantial injustice, they should not invalidate the PIN or result in cancellation. HSRs are usually not lawyers and technical mistakes may sometimes be made. Where PINs otherwise meet the essential requirements of the legislation, inspectors should be encouraged to use their powers under s 102 to correct technical errors, such as incorrect section references (subject to the usual transparency and review processes), rather than resorting to PIN cancellation.

If a PIN is cancelled, the legislation should require the underlying safety issue to be resolved, as Option 2 proposes. When a PIN is cancelled by an inspector, another PIN cannot be issued on the same WHS issue. The cancellation of PINs for a technical deficiency (as defined above) in circumstances where the underlying safety issue remains unresolved, may lead to poor safety outcomes, additional regulatory burden and damaged relationships and trust between the regulator, PCBUs and workers and their representatives. Although parties are still able to pursue the underlying safety issue by requesting the assistance of an inspector under s 82, this places an extra and unnecessary layer of administration on the workplace parties. The legislation should place the onus on the regulator, once it has been notified of a safety issue, to take steps to address it, regardless of technical deficiencies in the PIN that do not relate to the substance of the underlying safety issue or cause substantial injustice.

Practical Impact of Options

The change proposed by Option 2 is sensible and will enhance the effectiveness of the PIN process. The cancellation of PINs on the grounds of technical deficiencies (which do not affect the underlying safety issue or cause substantive injustice) without the resolution of the underlying safety issue undermines the purpose of the legislation, and is unhelpful for workers as well as PCBUs, both of whom have an interest in the inspectorate providing meaningful and substantive assistance in resolving health and safety concerns.

The ACTU notes the need to ensure that the s 82 and s 100 processes interact effectively, but does not have a strong view on the way in which the amendments should be drafted. However, a

[70] Second Report, p 334

party should not be required by the process to make another request of the regulator for assistance.

HSR choice of training course (No 10)

Preferred Option

The ACTU strongly supports Option 2.

Effects of Problem

Of the current or former HSRs who responded to the ACTU's survey, a significant proportion (21.1%) had had a disagreement about their choice of training. Other disputes had occurred about time off to attend training (22.6%) and the cost of training (16%). These results reflect advice from affiliates that a significant number of disputes about choice of course are occurring, which is preventing HSRs from performing their role effectively.[71]

The purpose of s 72 of the Model Act is to place an *obligation* on PCBUs to train HSRs. It provides that a PCBU must, if requested by an HSR, allow the HSR to attend a course of training in work health and safety that is approved by the regulator and (subject to subsection (5)) **chosen by the health and safety representative, in consultation with the person conducting the business or undertaking.** The PCBU must, within no more than 3 months, allow the HSR paid time off work to attend, and pay the course fees and other reasonable costs. Subsection (5) goes on to provide that if agreement cannot be reached on these matters within 3 months, either party may ask the regulator to appoint an inspector to decide the matter.

The current construction of s 72(1)(c) and (5) of the Model Act is being interpreted as authorising a PCBU to reject a HSR's choice of course, even if the cost and location are reasonable and the regulator has approved the course, and suggest an entirely different course for consideration by the regulator.[72] This is deeply problematic and entirely inconsistent with the intention of these provisions. HSRs should be entitled to determine their preferred training provider, as long as the course is approved by the regulator and costs and timing are reasonable. Due to the construction of the current provisions, representatives face unacceptable delays in accessing training when a PCBU refuses to allow the representative to attend their chosen course. This is of particular concern because under the current provisions of the Model Act, HSRs are unable to

[71] For example, the submission of the TWU to this Consultation process details numerous such incidents.
[72] *Sydney Trains v SafeWorkNSW* [2017] NSWIRComm 1009 (**Sydney Trains**)

exercise their rights and powers until they have completed their training.[73] In practical terms, if a HSR's training is delayed, they are powerless to stop dangerous workplace practices until training can be agreed on. This is clearly problematic and may deter PCBU's from enrolling an HSR into training as soon as possible.

The current wording of s 72 not only lacks clarity [74] but fails to reflect the reasoning of the National OHS Panel, whose recommendations acknowledge that HSRs should indeed have a 'primary or overarching right'[75] to choose their training, and that consultation and dispute resolution should be limited to the details of the training, timing, payment and/or costs only. The National OHS Panel recommended that, following election, an HSR must attend training and the approved course may be **either the HSR's choice or as directed by an inspector**, although the training is to be at a time agreed with the PCBU. The National OHS Panel recommended that the annual refresher training should be a course approved by the regulator, and the HSR must first consult with, and **attempt** to reach agreement with the PCBU **as to the timing and costs** of the training, with any issue in relation to the details of the training or payment to be resolved in accordance with the issue resolution proceedings.[76]

Practical Impact of Options

The National OHS Panel found 'widespread support for HSRs to be entitled to such training as is necessary to enable them to properly and effectively perform their functions and exercise their rights and powers'.[77] It is generally accepted that well-trained HSRs provide benefits for all workplace parties and therefore PCBUs should cover reasonable costs and provide necessary time off for this purpose.

The position of HSR is a trusted, responsible and significant role. It is reasonable and appropriate to allow the HSR themselves to select the training best suited to them, as long as it is regulator approved, and cost and timing are reasonable and have been discussed with the PCBU. PCBUs should be able to raise concerns about timing and costs - but not the choice of course - with the regulator.

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[73] The ACTU supports an amendment to this provision to ensure that HSRs can exercise their full powers on election, regardless of training
[74] Sydney Trains at [66]
[75] Sydney Trains at [68]
[76] National OHS Panel Review, *Second Report*, pp 145-146
[77] Ibid, p 144

Option 2 will significantly reduce disputation and enhance the ability of HSRs to carry out their functions in an effective and timely manner.

Additional Reforms

The current Model Laws place some unnecessary and unjustifiable limits on access to HSR training and provide insufficient protection to HSRs against victimisation and interference – which as outlined remains a common occurrence. A number of improvements are required to address these problems, including the following in particular:

- An HSR should be authorised to direct that unsafe work cease and/or issue a PIN once they are elected, even if they have not yet completed the required training. As HSRs are directly elected by their peers, they should be legally entitled to carry out their duties immediately upon election.

- WHS Regulation 21 unnecessary limits HSR training to 5 days initially and 1 day per year each year after that.[78] HSRs should be entitled to attend any training approved by the regulator on the provision of reasonable notice.

- Feedback from our affiliates (supported by recent survey results) is that victimisation of and interference with HSRs remains widespread. One reform that would improve this situation is that a PCBU should be expressly prohibited from conducting or interfering in elections of HSRs, with penalties applicable for breaches.

- A worker should be able to cease or refuse work if it would expose the worker *or others* to a serious risk to health or safety. This would bring workers' rights into line with their obligations under ss 28 (a) and (b), which require a worker to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons, as well as themselves.

Referral of disputes to court or tribunal after 48 hours (No. 13)

Preferred Option

[78] Model WHS Regulations, Clause 21

The ACTU supports Option 2.

Effects of Problem

Unreasonable and unnecessary delays in the resolution of safety disputes are costly and dangerous. Of the HSRs who responded to the ACTU survey, almost a quarter (24%) had had a safety inspector attend their workplace to assist with resolving a disagreement. Of those, 23% said the dispute had not been resolved. Over half said access to a court or tribunal to resolve the disagreement would have been helpful. A large majority (81%) believed that if workers and the company disagree about a work health and safety issue and a safety inspector is not able to help them to resolve the disagreement, either party should be able to go to a court or tribunal to get it resolved.

Practical Impact of Options

It is important for the operation of the Model WHS Laws that parties are able to ask inspectors to resolve disputes fairly, effectively and efficiently. The ability for either party to notify a dispute that remains unresolved after 48 hours to the relevant court or tribunal in that jurisdiction will potentially lead to a quicker resolution of disputes, which will improve safety outcomes and reduce costs for business.

Remove 24-hour notice period for entry permit holders (No. 15)

Preferred Option

The ACTU strongly supports Option 2.

Effects of Problem

The ACTU Safe at Work survey found that 90% of workers believe that unions should be able to immediately enter workplaces to investigate work health and safety breaches or suspected breaches when they occur, and should not have to give 24 hours' notice.

Section 117 of the Model Act authorises a permit holder to enter a workplace to investigate a suspected contravention of the Model Act. The permit holder must 'reasonably suspect' that the contravention has occurred or is occurring. Up until 2016, s 119 required notice of entry to be provided to the PCBU as soon as reasonably practicable after entry. However, in 2016 an amendment was introduced deleting s 119 and requiring the permit holder to provide 24 hours to 14 days notice instead. No harmonised jurisdiction has implemented the amendment.

The 2016 notice provision is unnecessary and is causing confusion and disagreement. It is not reasonable that a permit holder should be required to provide notice before entering a workplace to investigate a suspected WHS contravention – this would defeat the purpose of the provision by providing a PCBU with the opportunity to hide or remove evidence of a breach. It also presents a risk that HSRs will not be able to access timely assistance to address unsafe or unhealthy working conditions, which presents a risk of harm to workers and others. This is particularly so given the frequent failure of PCBUs to genuinely consult with HSRs in workplaces and problems with the issue resolution provisions, both of which were noted by the Review.[79] This risk of harm is also heightened in workplaces which have no HSRs at all. Therefore the 2016 amendment, if implemented, would reduce protections for HSRs and workers and lower safety standards. This is entirely contrary to the aims of the Model Act and of harmonisation.

Practical Impact of Options

Restoring the Model Act to its pre-2016 provisions will not have any impact on business, because no jurisdiction has implemented the provisions. On the contrary, the change will remove confusion about the requirements and restore certainty about the process for inspection of suspected contraventions for all parties.

Additional Reforms

At a general level, the right of entry provisions in WHS Laws (and the way in which they interact with the Fair Work Act right of entry provisions) are unreasonably onerous, confusing and complex and in need of urgent review. Union officials should not be required to hold multiple permits and comply with different rules for different types of workplace entry. This problem is compounded when workplaces cross multiple jurisdictional boundaries. The permit system should be simple, seamless across jurisdictions and should not hinder union officials from performing their legitimate roles under the WHS Act or Fair Work Act.

Require production of documents and answers to questions after entry (No. 17)

Preferred Option

The ACTU supports Option 2.

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[79] Marie Boland, *Review of the model Work Health and Safety laws: Final report*, December 2018, pp 59-60 and 77

Effects of Problem

The provision of clear and appropriate powers for inspectors is critical to the effective operation of the Model WHS Laws. Currently, under s 171, an inspector must be undertaking a lawful entry before they are able to require the production of documents or answers to questions. The full extent of a contravention may not be clear until documents and information obtained is examined after the inspection. This means that an inspector may need to enter a workplace multiple times simply in order to request additional documents or information about the same incident or risk. Instead, this function could be performed off-premises, after an inspection, with less disruption to the operations of both the regulator and the PCBU. Rather than having to re-enter a workplace, the regulator should be authorised to request further information and documents remotely.

Option 2 is consistent with Article 12 of the ILO *Labour Inspection Convention 1947* (C81), under which inspectors must be empowered to make 'any enquiries that they consider necessary to be satisfied about compliance with the relevant legislation', including requiring the production of any books, registers or other documents. There is no limitation on when and how such requests must be made. However, the ACTU does not have a strong objection to the limitation of the powers to within 30 days of an inspection, or to those documents and information which relate to the reason the inspector first entered the workplace.

Industrial Manslaughter (No. 23b) and Enhance Category 1 offence (No. 23a)

Preferred Option

The ACTU strongly supports Option 4.

Effects of Problem

The ACTU's Safe at Work survey found that 16% of workers knew someone who had been killed at work or who had died from a work-related disease.

Maintaining the status quo is not an option. One industrial death is one too many, and there is no evidence to suggest that industrial deaths can or will be eliminated without additional or new regulatory measures. Every worker should be able to go to work and return home safely to their loved ones. It is unacceptable that between 2003 and 2016, 3,414 workers lost their lives in work-related incidents in Australia. As at 8 July, there have been 77 Australian workers already killed at work in 2019. These figures expressly exclude deaths caused by work-related diseases

such as black lung, silicosis and cancers (including those associated with exposure to diesel, welding fumes and asbestos) and suicide.[80] While the number of fatal work-related injuries has declined over time in Australia and most other developed countries, the state of the data continues to result in an underestimation of the true extent of work-related deaths.

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.[81] 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.[82] 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.[83]

While some industries are more badly affected than others, no industry is exempt. Over 40% of the Australian workforce is employed in some form of precarious or insecure employment.[84] These workers are more likely to be injured or killed 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. Competitive pressures and work intensification 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.[85] There are numerous examples from all jurisdictions of failures or withdrawals of prosecutions and manifestly inadequate financial penalties in cases of workplace death and serious injury.[86] While many

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[80] Safe Work Australia, *Work-related Traumatic Injury Fatalities data set*, 2016
[81] International Labour Organization (ILO), *Safety in numbers: Pointers for a global safety culture at work*, 2003
[82] SafeWork Australia, *The cost of work-related injury and illness for Australian employers, workers and the community: 2012-13*, 2015.
[83] 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
[84] ACTU, 'Australia's Insecure Work Crisis: Fixing it for the Future', (Report, May 2018) 5
[85] Johnstone, R and Tooma, M, *Submissions in relation to draft Model Work Health and Safety Regulations and Codes of Practice*, 18 March 2011
[86] See for example, *DPP v Esso Australia Pty Limited* [2001] VSC 263; *Comcare v John Holland Pty Ltd* [2012] FCA 449; http://www.abc.net.au/news/2014-11-21/grocon-fined-250000-over-fatal-wall-collapse/5908292; https://www.sbs.com.au/news/icac-scrutinises-safework-sa-investigation; https://www.theadvocate.com.au/story/5479622/gorrie-inquest-hears-no-prosecutions-over-penguin-mans-2014-death/; http://www.abc.net.au/news/2016-12-06/industrial-prosecutions-under-fire-in-case-of-cleaner-who-

companies do the right thing, it is too easy for others to avoid their legal and moral responsibility to keep workers safe. In this environment, the current legislative framework is insufficient to effectively prevent or prosecute work-related deaths.

Practical Impact of Options

Recommendations 23a and 23b of the Review are significant steps forward in strengthening the legal framework in relation to work-related deaths. As the Consultation RIS notes, the options proposed relate to the consequences of non-compliance with the Model WHS Laws, and so will not impose any new compliance burden on PCBUs or workers.

The ACTU agrees that the implementation of Option 4 will require further consideration, in consultation with stakeholders and legal experts, of the interaction between the new provision and the criminal laws in each jurisdiction.

Industrial Manslaughter Laws (No. 23b)

As noted by the Review, the current criminal law is limited in its ability to respond effectively to work-related deaths caused by negligence, particularly when it involves larger companies.[87] Therefore the current laws do not and cannot act as an effective deterrent or an incentive for better practices. In response to this identified problem, a number of jurisdictions have already introduced, or committed to introduce, new industrial manslaughter laws. 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 inconsistency across jurisdictions also creates confusion and uncertainty for PCBUs. The harmonisation of these provisions would have significant benefits in terms of clarity and consistency of the consequences of non-compliance across jurisdictions.

It has been proven following investigations into incidents which have seriously harmed and killed workers that there is no such thing as an 'accident': workplace deaths, injuries and illness are almost always preventable if proper risk management systems are developed and implemented.[88] 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

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fell/8096476; http://www.abc.net.au/news/2016-06-03/ryan-donoghue-prawn-trawler-death-inquest-findings/7475586; https://www.watoday.com.au/national/western-australia/young-workers-deaths-spark-update-of-out-of-date-wa-work-laws-20170712-gx9xtt.html

[87] See for example *R v A C Hatrick Chemicals Pty Ltd* (unreported, Supreme Court of Victoria, Hampel J, 29 November 1995)

[88] See for example the Report of the Longford Royal Commission, *The Esso Longford Gas Plant Accident* (1999).

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 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. This is not only grossly unfair, but it also fails to act as an effective deterrent or an incentive for better, safer corporate cultures. The community reasonably expects that when negligent failures by companies result in the death or a worker or other person, that they must be held accountable. The ACTU Safe at Work survey found that a large majority of workers (79%) think that penalties faced by employers or companies who seriously injure or kill workers are not significant enough to make them take safety seriously. Over 90% thought that employers or companies who caused the death of a worker through gross negligence should face serious jail time (up to 20 years).

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. It will promote awareness and understanding of existing duties to manage risks, and ensure that these duties are taken seriously. We note that the recent Senate Inquiry into industrial deaths also recommended a new offence of industrial manslaughter.[89]

Category 1 offences (No 23a)

There is no definition of 'reckless' in the Model Laws and the definition varies slightly in each jurisdiction's criminal laws. Generally, to prove an employer or individual was reckless, a prosecutor 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

[89] Senate Education and Employment References Committee, *Inquiry into The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, Final Report*, October 2018, Recommendation 13

would or could have placed a person at risk of serious injury and continued on regardless. This standard is unreasonably high and inappropriate for the aims and purposes of WHS legislation. 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 (i.e. a negligence-based standard).

Additional Reforms

Union prosecutions

The ACTU survey found that almost all workers (97%) thought that unions should be able to take employers and companies that break WHS laws to court.

The ACTU is concerned about the steep decline in prosecutions under WHS legislation over recent years.[90] 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.

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 example, union secretaries had standing to bring a prosecution under NSW WHS laws from 1983 until 2011, at which time the right was curtailed. There is absolutely no evidence of abuse of the right during that period of time. In fact, all prosecutions

[90] Marie Boland, *2018 Review of Model Laws Discussion Paper*, p 37

commenced by unions under the NSW legislation were successful. 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.[91]

Union-initiated prosecutions are subject to the same legal checks and balances as any other prosecution. 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.

For the above reasons, a state monopoly on prosecutions for breaches of WHS laws cannot be justified. 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.

Shifting Burden of Proof

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

[91] The ACTU's submission to the National OHS Panel 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.

case of an officer, to prevent the breach.[92] This is unreasonably onerous and has, predictably, made it more difficult for prosecutions to succeed. The deterrent effect of any penalty is almost entirely undermined if the legal framework makes it too hard to successful prosecute breaches.

In the ACTU's submission, 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. Before harmonisation, Queensland and NSW had a shifting burden of proof for duty of care offences. The 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. 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 submits that a shifting burden of proof is necessary and justified because of the public interest in ensuring the health and safety of people at work.[93] 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.

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[92] *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92
[93] *Davies v Health and Safety Executive* [2002] EWCA Crim 2949; *R v Wholesale Travel Group* (1991) 3 SCR 154

Prohibit insurance for WHS fines (No. 26)

Preferred Option

The ACTU strongly supports Option 2.

Effects of Problem

In Australia, directors and other company officers can obtain Directors & Officers' insurance for personal liability, including for civil and criminal breaches of WHS laws. Insurance clearly plays a very important role, but companies and individuals should not be able to insulate themselves entirely from the consequences of criminal breaches that risk the health or safety of workers or others. In particular, the deterrent and punitive intention of criminal penalties in the Model WHS laws is almost entirely undermined if insurance companies, rather than duty-holders themselves, are able to pay fines imposed by courts.[94] A number of public policy limitations on insurance coverage already exist; for example under the Corporations Act premiums cannot be paid by a company for liability imposed due to a willful breach of duty or breach of the prohibition on directions gaining a profit from their position,[95] and under existing insurance law, fines imposed for *intentional* criminal activity cannot be indemnified against. However, the legal position is less clear when it comes to criminal offences of strict liability (i.e. where there is no need to prove a guilty mind); the category into which WHS offences fall.

Under the Model WHS Laws, there is no provision expressly prohibiting contracts providing liability insurance against criminal penalties. While it would be arguable that such an insurance arrangement would be void on public policy grounds, this would depend on the facts of each case. 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, but does not specifically prohibit insurance for criminal liability. These issues are yet to be directly considered by the courts. At best, companies are paying for insurance cover that has no value. At worst, companies are paying to ensure that criminal penalties for negligent conduct risking harm or death to workers or others are absorbed as just another cost of doing business.

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[94] Vanessa Finch, *Personal Accountability and Corporate Control: The Role of Directors' and Officer' Liability Insurance*, The Modern Law Review, Vol. 57, No. 6 (Nov 1994), pp. 880-915 at 888; P Herzfeld, '*Still a troublesome area: legislative and common law restrictions on indemnity and insurance arrangements effected by companies on behalf of officers and employees*' (2009) 27(5) C&SLJ 267 at 268–9

[95] *Corporations Act 2001* (Cth) s 199A, 199B.

As a matter of practice, companies are able to, and frequently do, take out insurance which extends to cover criminal fines.[96] As a consequence, it is predominantly insurance companies rather than duty-holders paying fines following successful WHS prosecutions. Criminal sanctions are imposed for a number of reasons, including retribution, deterrence and rehabilitation. Indemnity means that none of these aims can ever be achieved, which completely undermines the incentive on companies and individuals to comply with the law. Commentators and courts have expressed serious concern about the availability of insurance covering fines for WHS offences.[97] In the 2013 case of *Hillman v Ferro Con*, a worker was killed (and another injured) during the construction of the Adelaide Desalination Water Plant. The court found that the company and a director had committed serious breaches of their safety obligations and imposed penalties. In doing so, the court expressed grave concerns that the director had obtained indemnity under a company insurance policy for criminal fines, thereby avoiding the majority of the penalty:

> *In my opinion [these] actions have also undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message his actions send … is that with insurance cover for criminal penalties for OHS offences there is little need to fear the consequences of very serious offending, even if an offence has fatal consequences…I add that the Court was faced with the reality that an insurance company had granted indemnity…and that the Court had no ability to challenge that fact…Whether such indemnities should be outlawed under the current Act and under the new Act are policy considerations for Parliament.*[98]

Practical Impact of Options

It is generally accepted that insuring against criminal penalties is contrary to the public interest. Despite this, the practice continues. There is significant uncertainty in regard to the legality of such insurance arrangements. Express prohibition of such arrangements will provide certainty and promote the public policy intention behind the Model WHS Laws. There will be no impact on PCBUs as this is a cost of non-compliance with the Model WHS Laws. Insurance companies will be impacted as they will no longer be able to charge premiums for insuring against WHS penalties.

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[96] http://www.mondaq.com/australia/x/232614/Insurance/Insurance+Cover+for+Statutory+Penalties
[97] See for example The Honourable T F Bathurst AC, Chief Justice of NSW, *Insurance Law: A View from the Bench*, 2013 http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_2013.09.19.pdf; N. Foster, *You can't do that! Directors insuring against criminal WHS penalties* (2012) 23 Insurance Law Journal 109
[98] *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22.

However, arguably these polices are already void and should not be generating profits for insurance companies in any case.

While no Australian jurisdiction expressly 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.[99] Feedback from New Zealand unions is that these provisions are operating effectively and have not had any unintended consequences. A company's capacity to pay is one of the factors that must be considered by a court in awarding fines (and other penalties) under New Zealand's WHS Act.

Clarify the risk management process in the model WHS Act (No. 27)

Preferred Option

The ACTU strongly supports Option 2.

However, we note that a similar result could be achieved more simply through an amendment to the Model Regulations rather than the Model Act; namely through the deletion of Regulations 32 and 33, which would ensure that risk management applies to all work-related risks and is not limited to those in the Model Regulations.

Effects of Problem

[99] Section 29 reads:
29 Insurance against fines unlawful
(1) To the extent that an insurance policy or a contract of insurance indemnifies or purports to indemnify a person for the person's liability to pay a fine or infringement fee under this Act,—
(a) the policy or contract is of no effect; and
(b) no court or tribunal has jurisdiction to grant relief in respect of the policy or contract, whether under sections 75 to 82 of the Contract and Commercial Law Act 2017 or otherwise.
(2) A person must not—
(a) enter into, or offer to enter into, a policy or contract described in subsection (1); or
(b) indemnify, or offer to indemnify, another person for the other person's liability to pay a fine or an infringement fee under this Act; or
(c) be indemnified, or agree to be indemnified, by another person for that person's liability to pay a fine or an infringement fee under this Act; or
(d) pay to another person, or receive from another person, an indemnity for a fine or an infringement fee under this Act.
(3) A person who contravenes subsection (2) commits an offence and is liable on conviction,—
(a) for an individual, to a fine not exceeding $50,000:
(b) for any other person, to a fine not exceeding $250,000.

Currently, the requirement in Regulation 36 to minimise risks (if they cannot be eliminated) by implementing one or more of a series of listed risk controls (known as 'the hierarchy of controls') applies only to the risks set out in the Model WHS Regulations, not all risks. Although risk management and the hierarchy of controls is essential to safe and healthy workplaces and forms an inherent part of the concept of reasonable practicability,[100] there is currently no express requirement on PCBUs to implement controls to minimise a risk, unless the risk is specifically listed in the Regulations. It is inconsistent and confusing that the requirements relating to risk management do not apply generally, whereas the requirements relating to issue resolution (Reg 22-23) and the provision of information, training and instruction (Reg 39) do. This is a defect in the drafting of the Model WHS Laws that requires urgent amendment.

The National OHS Panel's consideration of this topic is somewhat confusing. It is difficult to reconcile the findings of the National OHS Panel (and the Maxwell Review) that the risk management process is 'essential' to achieving a safe and healthy work environment and 'implicit' in the calculus of the reasonably practicable qualifier, with the statement that 'duty holders may not need to carry out the risk assessment where suitable control measures are immediately identifiable'.[101] However, it is not possible to identify relevant control measures – immediately or otherwise - without commencing a risk assessment process. The National OHS Panel also implies that the UK is an example of a law which does not require duty-holders to assess risks in all cases. However, this is not accurate. In UK health and safety law, the risk management process is contained in the Regulations, but applies to **all** risks. Clause 3 of the *Management of Health and Safety at Work Regulations 1999* is that 'every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work' as well as 'the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking'. Guidance on the HSE webpage states: *As part of managing the health and safety of your business you must control the risks in your workplace. To do this you need to think about what might cause harm to people and decide whether you are taking reasonable steps to prevent that harm. This is known as risk assessment and it is something you are required by law to carry out. If you have fewer than five employees you don't have to write anything down.*

Ultimately, although the National OHS Panel decides that the risk management process should not form part of the primary duty (and therefore not be located in the Model Act), it does *not*

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[100] Model Code of Practice: *How to manage work health and safety risks*; Safe Work Australia Guide: *How to determine what is reasonably practicable to meet a health and safety duty*.
[101] National OHS Panel Review, Second Report, pp 214 and 215

recommend that the risk management process should not be required by the Regulations to apply to *all* risks. Recommendation 136 reads:

> *The model Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls, but that the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.*

Over ten years ago, in our submission to the National OHS Panel, the ACTU observed that 'ignorance of what risk assessment entails is common' and 'efforts to undertake risk assessment are far from systematic even in critical situations.' This is still the feedback we are receiving from our affiliates. The silicosis crisis presents a clear example of the serious consequences of an industry-wide failure to apply risk management processes and implement controls in relation to a risk not specifically listed in the Model Regulations.[102]

Practical Impact of Options

Although risk management is implicit in the definition of reasonably practicable, widespread uncertainty about the meaning and application of this crucial concept means that it must *expressly* be required by the Regulations to be applied in all circumstances. If duty-holders are not applying risk management processes as set out in Regulation 36 in relation to all risks, they are not able to meet their obligations under the Model WHS Laws. With respect to the findings of the National OHS Panel, the ACTU does not agree that risks can be successfully managed without mandating hazard identification, risk assessment and risk control. The Model WHS Act should require PCBUs to implement a systematic process involving the identification of hazards, assessment of risks and the implementation of control measures to eliminate or minimise **all** risks. The application of the systemic process is the way in which effective WHS outcomes are achieved. In response to concerns raised by Maxwell (and adopted by the National OHS Panel), there is no evidence that the mandated risk management process in the Model Regulations has led duty holders to believe they can meet the duty by simply applying the process. There is also no evidence that pre-harmonisation provisions mandating risk management had this effect. For example, s.27A of the Queensland Act provided that, in the absence of regulations or other instrument, a duty holder must: 'identify hazards; assess risks that may result because of the hazards; work through a hierarchy of controls to choose and implement appropriate control measures; and monitor and review the control measures' in order to manage exposure to risks in

[102] https://www.abc.net.au/news/2018-10-10/stone-cutting-for-kitchen-benchtops-sparks-silicosis-crisis/10357342

the workplace. We note that WA's *Occupational Safety and Health Regulations 1996* currently include a general requirement for the identification of hazards. We have not received any feedback that this provision has resulted in a focus on process at the expense of outcomes.

As mentioned above, this important reform can be achieved through a simple amendment to the Model Regulations – there is no need to amend the Model Act as proposed in the Consultation RIS.

Conclusion

There is significant evidence, including the ACTU's Safe at Work survey results, demonstrating clearly that some key reforms to our Model WHS Laws are urgently needed. This Review presents a crucial opportunity for governments to work together to ensure that the Model Laws continue to achieve 'progressively higher standards of work health and safety'[103] and are effective in preventing death, injury and disease in Australian workplaces.

As outlined, the reforms proposed by the Review will streamline the operation of our WHS laws, promote the aims of harmonisation and deliver stronger health and safety outcomes in Australian workplaces, increasing certainty and clarity for workers, duty-holders and the community more broadly.

The ACTU calls on Australia's Workplace Relations Ministers to accept all 34 of the Review recommendations, to instruct Safe Work Australia to amend the Model Laws accordingly, and to work with States and Territories to implement the reforms promptly in each harmonised jurisdiction.

[103] Section 3(g) of the Model WHS Act

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