Submission to Safe Work Australia

2018 Review of the model WHS laws

April 2018

Australian Federation of Employers and Industries (AFEI)

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The Object of the Act

1. Work health safety (WHS) legislation should provide certainty for duty holders and focus on injury prevention and the practical and achievable management of foreseeable risks. Employers should be able to know that if they have appropriate risk management systems in place, sufficient for the nature of the operation, which are effectively implemented, kept up to date, they have complied. The action that is taken should be proportionate to the risks that need to be managed, tailored to the operation, the nature of the work undertaken and the people who work there. Further the Object should clarify that a person's duty to eliminate or minimise health and safety risks doesn't extend beyond the person's capacity to influence and control the relevant matter.
2. For this reason, a new statement of Object is needed to replace the policy stance and philosophy of the current model legislation aimed at changing behaviour through regulation and threat of prosecution to one of acceptance of self-responsibility, self-reliance, motivation and tangible incentives. The Object should promote a proportionate, evidence based approach for achieving safer and healthier places to work.

3. The Object also needs to better reflect the contemporary role of the regulator as an enabler, strongly customer focussed and service oriented, with comprehensive specific industry knowlegde providing expert assistance to PCBUs. This changed role, as enunciated by Safework NSW, for example, is already embodied in the guiding principles of a regulator who is responsive, supportive , engaging, customer focussed and accountable.[1]

4. These principles necessitate a regulator with the duty, and the capacity, to be an expert resource coaching employers through any issues their industry needs to deal with to deliver reasonably practicable safety and to advise what reasonably

[1] Safe Work NSW Our Approach to Work Health and Safety Regulation
http://www.safework.nsw.gov.au/__data/assets/pdf_file/0008/108368/SW08027-1016-344460.pdf

practicable measures will suffice to overcome them. Consequently the Object of the Work Health Safety Act (**the Act**) should reflect this changed philosophy to actively engage with stakeholders and develop solutions through a blend of inspector experience and collaboration with duty holders:

a. To promote a safe work environment for workers at their workplaces that protects them from injury or illness;

b. To engender acceptance that health and safety is an integral part of everyone's role in the workplace;

c. To provide a legislative framework that allows duty holders to know the reasonable, balanced, practical, finite and affordable health and safety standards required of them and the limits to their responsibilities;

d. To establish the regulator as strongly customer focussed and service oriented, who provides maximum assistance to duty holders in the form of practical solutions and is recognised for the quality, objectivity and scientific legitimacy of its advice;

e. To establish the regulator as an expert resource available to industry for the identification of hazards and risks, the development of practical solutions and the provision of advice and information in easy to understand language and format which makes it easier for duty holders to comply with their obligations;

f. To structurally separate all enforcement and prosecution functions relating to work health and safety from the information and advice functions, with the former being handled by the Office of Public Prosecutions and the latter by the regulator;

g. To encourage useful and efficient forms of workplace consultation and co-operation about risk management, which are completely separated from industrial relations issues and conflicts in the workplace, are geared to the size and/or sophistication of the employer, and are designed to assist the duty holder to develop efficient, practical, affordable, non-bureaucratic means of complying with the Act.

5. These align with regulator guiding principles to be responsive, engaging, supportive, customer focussed and accountable, as asserted by Safe Work NSW. In their Roadmap for 2022 SafeWork NSW recognises that there needs to be a new and genuine partnership between industry and the regulator. Another element of this new philosophy deals with the need for reasonability, practicality, affordability, clarity, certainty and finiteness as indicated in proposed Object (c) above.

6. Regulator advisors must become an expert resource in a particular industry or like industries for duty holders to help them identify hazards and risks and experienced based solutions. Many employers are small and lacking in the relevant resources to be able to meet the statutory requirements as currently expressed. Regardless of size, all duty holders should have access to responsive, straightforward help on what they need to do. Legislation in all its guises -- codes, guidance material and all other kinds of advice and documentation -- must be prepared with the goal in mind of ease of understanding, brevity, practicality and efficiency and minimising red tape. Consequently the regulator must be strongly customer focused, with a service oriented approach. These principles are conveyed in our recommended Object (d and e).

7. This has not been, and will not be, possible if the regulator is also the prosecutor. That function should be passed to an independent agency. Hence, new Object (f). Proposed new Object (f) seeks to uncouple the pursuit of safety from the certainty of criminal breach, a strategy which will secure vastly more by way of duty holder support and a positive commitment to safer workplaces. There should be a clear legislated delineation between the advisor and inspector functions and roles so that inspectors are responsible for compliance functions while the regulator's expert advisors are devoted to supporting duty holders in identifying risks and practical solutions There should be no potential for a reversion to the unhelpful regulator role which prevailed while the NSW Industrial Relations Commission held the view (until the High Court Kirk decision)[2] that

> *It is not for the prosecutor to inform the defendant how to avoid a dangerous operation or potentially dangerous operation.*[3]

8. The current legislated functions of the regulator emphasise its role in monitoring and enforcing compliance. The functions of the regulator should be recast to reflect its changed role as a customer focussed expert advisor in safety matters. This will require a restructuring of the advisor /assistance roles and the compliance and enforcement roles.

9. However this cannot be just about identifying non-compliance, it is important that regulators develop the industry specific expertise to assist with effective, practical and affordable solutions**.**

10. The current legislative and regulatory approach maintains this as the duty holder's responsibility while it has been abundantly clear that duty holders frequently do not have the knowledge or expertise to identify, let alone meet, compliance requirements. Hence leadership and an innovatory, responsive approach is required of the regulator.

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[2] Kirk v Industrial Relations Commission [2010] HCA 1

[3] Workcover Authority of NSW (Inspector Penfold) v Fernz [1999] NSWIRComm 177 (3 May 1999), (1999) IR 119 at [9]

11. With expert advisors specialising in a particular industry or like industries the accumulated experience from dealing with many workplaces would be a resource that most employers could not come close too.

12. It is clear that safety failure does happen, and it is also clear that even the multiple layers of duty holder obligations required by the Act cannot remove all hazards and risks. Realistic strategies, standards, and interpretation of the law are needed, and should be reflected in the functions and operations of the regulators.

13. The following responses to the Discussion Paper questions demonstrate why this change in legislative focus is required

14. AFEI made known these views at the inception of the Act. Our experience in working with employers over the time the Act has been in operation has continued our views and in fact has demonstrated to us that these legislative changes are essential.

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

15. As these four questions concern the Act's objectives as well as the tiered operation of the regulatory framework, they are answered together:

16. The model legislation was deliberately drafted to minimise prescriptive detail on how its requirements are to be achieved. The intention of the three tier structure was to provide more detailed compliance information in the codes of practice and guidance material. In practice, however, to prove compliance, organisations need to record their activity and this, when allied to the concept of progressively higher standards noted in the current Object of the Act, has meant more elaborate safety systems, record keeping and paperwork. With inadequate regulatory assistance offered regarding a proportional response, other than a restatement of the ambiguous and conceptually complicated "reasonably practicable" obligations, the perceived requirements have become more onerous, frequently with actual progress made toward improved safety being swamped by red tape.

17. The focus has been shifted from work and the workplace to capture duty holders at all points of the supply chain. This has added to uncertainty and confusion in safety management, debate about meaning, intent and scope and a concentration on process and procedure (e g which parties must be informed/ consulted with/ trained/provided with a SWMS etc) rather than a clearer focus on what actually has to be done to deal with hazards at work and to encourage workers to work safely.

18. The courts have been interpreting the Act and Regulations and identifying important aspects of compliance, which vary according to jurisdiction and the circumstances of each prosecution. Yet understanding what compliance means eludes many employers because of the complexity of the legislative framework, often its intentional non-specificity, and its engendering of complicated, detailed but ineffective safety systems in many workplaces.

19. All duty holders are expected to be continually vigilant and constantly seeking out and remedying any conceivable risk via a risk assessment process. The requirement to carry out a risk assessment has turned into a bureaucratic nightmare for many businesses. Yet the regulator is not required to be equally specific - in advance - in the guidance it provides about effective safety management, hazard identification, risk assessment and risk control. Consequently the process of assessing risk is probably the most inefficient part of the legal requirements since it can be interpreted as requiring all hazards to be assessed to the standard of the Code of Practice *How to Manage Work Health Safety Risks* or AS 4801:2001. There is no easy format in common use and most organisations seem to finish up with a risk rating rather than a solution.

20. Workplace safety can be complicated, but the purpose of safety is simple, and must be prioritised in simple messaging. What is happening, however, is that the actual requirements (e.g. identify hazards, control them) become clouded with duty holders attempting to understand their obligations which are concurrently overlapping, simultaneous and non - delegable. Instead of recognising this actual complexity, regulator messaging is frequently simplistic, and it creates insecurity and uncertainty for businesses. The legislative framework, and regulatory messaging as it currently operates does not encourage a shared approach to safety, encouraging self - reliance and self - responsibility.

21. For example, SafeWork's recent Facebook status on Chemicals made the statement, "*exposure to hazardous chemicals is always avoidable*". To put that in context, a farm worker will need to spray pesticides and other chemicals. Exposure to chemicals is not avoidable, unless chemicals are not used, or humans are removed from farms. The statement is a nonsense, and creates animosity amongst farm workers (and many others), who see the invalidity of the statement as an affront to logic and industry experience. "They don't know what they are

talking about" is the response, and this dilutes the value any future messaging may have.

22. The tiered relationship between the three instruments, Act, Model Work Health Safety Regulations (Regulations) and Codes of Practice (Codes) is logical. However, for duty holders the difficulties in overcoming complexities of definitional issues (eg PCBU/officer; extent of consultation or supervision and training), the breadth of duties, the uncertainty as to the extent of control, the safety industry's approach, and regulator messaging, has generated detrimental outcomes for both safety and for business.

23. When the legislative instruments become complicated to navigate, they will not be followed. This is critical to understand in a field where easy comprehension and speed is paramount. Employers are faced with a huge volume of compliance material, and must often make decisions in a very compressed timeframe to ensure business viability. What is required from the legislation and the regulators is a clear pathway, linking issues with resources.

24. What is missing is a direct indication where codes of practice (or equivalent measures to that standard) are part of the 'reasonably practicable' assessment and should guide proactive assessment of controls for high-risk activities. This is particularly noteworthy, for example, in the code of practice relating to confined spaces, which addresses a significantly high risk topic, but one potentially missed in the volume and breadth of material sources (Act, Regulations, Code, and industry 'knowledge' and other sources).Greater accessibility and clarity is important. For example, a schedule in the regulations could outline the activities covered by codes. Much time is wasted by employers attempting to locate a relevant code of practice. As is further discussed below regarding 'reasonably practicable', it is rare that a business will be able to calmly locate and review a code of practice when facing every risk, in a dynamic and pressured context.

25. For example, a worker needs to access the top rack of shelving, as something has fallen down, and the supervisor believes an important product has become stuck. No ladder on site is long enough, and the worker cannot stand on the forklift tines (common-knowledge in the workplace that this is a dangerous and prohibited practice). The worker cannot climb the racking as that is also a known prohibited practice. There is an old 'man cage' in the back of the warehouse. That appears to be the best way to lift a worker up, using the forklift, to inspect the area. Is it safe? What are the requirements relating to it? In context, the product in question is being picked up by a client in one hour. It will make or break a huge deal for the business. It is 4pm on a Friday before a long weekend. What will happen?

26. The worker will use the man cage but may not think everything through. In a workplace with a robust and mature safety culture, a risk assessment may be

carried out and the code of practice, or guidance material, consulted. The supervisor may not be highly computer literate. If there is any, even slight, barrier to quickly locating the code of practice, it is less likely to be reviewed. An old printed version, well out of date, may be consulted, and the job completed without sufficient review of safety implications.

27. There are a number of reasons for this outcome. Firstly the relevant section of the Regulations need to be known and understood. Secondly where codes are applicable, this may not be readily ascertainable and they are not always easily accessible. Most are located through SafeWork Australia, but if an employer does not know all of this from frequent and recent experience, it can be problematic. A schedule of applicable codes of practice, in the Regulations, may be a useful addition.

28. Second, the number, length and complexity of codes of practice is such that they are unmanageable or ineffective for many workplaces. They often lack the specificity and clarity for PCBUs to meet their work health and safety duties. There may be separate, but overlapping, codes at national and jurisdictional levels.

29. Third, what constitutes a code is ambiguous. For example, SafeWork NSW's website hosts the "Hazardous Manual Tasks" code of practice, and the "Managing the risks of plant in the workplace" code of practice. SafeWork Australia hosts the "General Guide for Industrial Lift Trucks", which may have crossover information with the plant code of practice. Businesses may rely on information which is not actually in a 'model code of practice', to their confusion and therefore detriment.

30. Businesses may be confused by the volume of available material, and its lack of simple and immediate access. Duty holders often engage safety industry consultants, at significant cost, to act as researchers and interpreters on issues which should be straight forward information, ready to hand. The value of clear legislation is in its clarity and ease of accessibility. To have information widely dispersed invites confusion and ambiguity, which can prejudice a business' ability to comply with its legal duties.

31. The regulators' priority should be to reduce this uncertainty and assist duty holders in the development of reasonable, balanced, practical, affordable industry-approved safety management systems and solutions which meet the needs of businesses of various sizes and levels of sophistication. This priority should be reflected in the legislation. As a start regulators should provide more examples of proportionate risk assessments designed to address specific hazards and particularly where the evidence shows there is a need for advice on how to comply in a balanced and effective way. Access to expert regulator advisors is an obvious benefit here.

32. This need for reform is well illustrated in the use of Safe Work Method Statements (SWMS). SWMS have been, and often continue to be, comprehensive accounts of a work task, which are rarely read or understood. They are signed without review, they typically have many faults. This is because they have been routinely utilised without full regard for their actual purpose and application.

33. A SWMS is only required by the Regulations for high risk construction work and energised electrical equipment. The compulsion to use SWMS should continue to be confined to high risk work. In high risk work they should be reviewed for relevance, as required in the Regulations, and adapted to the actual workplace conditions.

34. An example from the case, SafeWork NSW v Activate Fire [2017] at paragraph 169 illustrates:

> *"I am not satisfied that had Activate Fire undertaken the formal process of revising the SWMS after it became aware of the conditions in the roof space, as it was required to by the Regulations, that it would necessarily have included the control measure that the power to the administration wing should be isolated."*

35. However, SWMS are written for unnecessary activities, such as working on a cold day. A step in one such SWMS we have encountered identified 'working in cold weather' as a risk, with the risk control being to 'wear a jumper'. SWMS are often purchased from consultants as a pre-packaged marketing tool, designed to win tenders. Workers sign them without reading or understanding, unsurprisingly given that many SWMS are incomprehensible. Alternatively the worker has significant expertise from long experience and the SWMS cannot possibly capture all the worker knows in an abbreviated document.

36. SWMS must guide safe work practice ***where they are needed,*** not simply rote adherence to expectations of a safe workplace because there is written evidence of a safety system and work methods. They should encourage safety thinking in high risk work, and the regulations rewritten to support this outcome. The requirement to 'review' should make a principal contractor read the SWMS to make sure it is relevant and useful. However if the contractor has expertise unmatched by the principal, what useful contribution can the principal add beyond ticking a process box.

37. We do not consider that having safe work procedures always reduced to writing will produce a safer outcome. As the courts have found, PCBUs can have effective, workable safe systems in place which are not in written form, but they

are known and understood by workers who have been trained by oral instruction and on the job training, and reinforced with proper supervision.[4]

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

38. Regulators and the mental health industry approach psychological injury as it would a mild hot-water burn or trip-related injury with simple cause and effect (some stressor/ experience in the workplace) with complex guidance material identifying PCBU duties and the pathways they must utilise to find a solution. However, there is no such thing as a generalisable psychological workplace injury.

39. Trauma is well within the scope of current WHS legislation. For example, paramedics witnessing the aftermath of serious injury or fatal road accidents, and the after-effects of workplace violence perpetrated by an armed robber. These risks are already within the scope of risk identification and control provisions. Bullying is typically used to describe a raft of workplace experiences from the mundane to the criminal. Again, it is managed within the current scope of WHS legislation, in addition to being directed to the Fair Work[5] and criminal jurisdictions.

40. Psychosocial hazards at work – alleged high job demands, low job demands, low job control, low recognition and reward, poor workplace relationships etc – are all terms used to describe the very common experience occurring when individuals are not suited to, or don't like their work or the workplace (and often labelled as bullying). PCBUs have been increasingly restricted in their scope to manage this situation in the interests of the individual and the organisation. These alleged 'stressors" should never result in a work injury, and businesses

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[4] WorkCover Inspector Battie v Patrick Container Ports Pty Ltd [2014] NSWDC 171; Wollongong Glass P/L [2016] NSWDC 58

[5] AFEI objections to this jurisdiction include:

- Matters proceed without jurisdiction;
- Investigations are costly and have to be undertaken even in situations of unbridled assertions by claimants;
- Damaging consequences for employees who are alleged to be perpetrators and for the workplace;
- Little exercise of procedural controls by the FWC, even matters without merit can go for months;
- FWC involvement in the most trivial and minute detail of the workplace and its management;
- Multiple and concurrent avenues for employee complaint – bullying, adverse action, discrimination, workers compensation.

An example of the unnecessary and unproductive nature of this jurisdiction was where the FWC explains to two street market stall holders how to behave politely whilst gratuitously suggesting to market management to consider and implement policies on how workers on stalls should interact with each other within the marketplace.Page [2015] FWC 5955 (9 September 2015)

should be able to make suitable decisions to support all of their workers (for example, being able to end an unsuitable worker's employment before issues develop to the point of claiming injury).

41. Regulators, notably SafeWork NSW, have indicated that they intend to push for national legislative and policy reforms in this Review of the Act to significantly increase the PCBU duty to provide mentally healthy workplaces. The proposition is to replace the current risk based approach to work health and safety with a mentally healthy workplace definition or standard embedded in regulation. If this eventuates, it will expose duty holders to vast and highly uncertain obligations with attendant compliance difficulties, greater regulator enforcement powers and should be rejected.

42. Of major concern is the following statement:

> *There remains ambiguity within the NSW Act about the concept of mental health and mentally healthy workplaces as they are not defined. This situation presents challenges for interpretation and implementation of the legislation, as well as enforcement or breaches associated with mental health.*
>
> *A workplace mental health strategy must go beyond targeting compliance with individual psychosocial risks and clearly articulate what is required to create a mentally healthy workplace and why it is required.*[6]

43. SafeWork NSW uses the World Health Organisation definition of mental health:

> *"A state of well-being in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community."*[7]

44. This is vast and all-encompassing. Even with a modified, or different, definition of mental health it is unreasonable and unrealistic to require PCBUs to take measures in the workplace to achieve this "*state of well being*", or to ensure the mental health of all workers – and others to whom a duty is currently owed under s 19(2) of the Act. This latter is a significant issue, given the ongoing expansion of the application of the Act into areas of public health and public liability.

45. How is a mentally healthy workplace to be created and what will be the outcomes to be achieved? There is absolutely no certainty in how this is to be done. Even the academic research published by SafeWork NSW in support of its Discussion Paper could not provide clear and reliable evidence for the efficacy of the "*complex, integrated, multi-level, scalable interventions need to be developed,*

[6] SafeWork NSW Mentally Healthy Workplaces Discussion Paper

[7] ibid

implemented and evaluated" approach proposed to date by SafeWork NSW.[8] Along with this uncertainty and inadequate evidence base, inserting a specific legislative requirement to have a mentally healthy workplace would have major cost and compliance consequences for PCBUs.

46. Inserting a definition of, or requirements to achieve mentally healthy workplaces will also provide an additional liability for workers compensation claims and an additional avenue of dispute which could be utilised in other jurisdictions, such as discrimination and Fair Work.

47. While serious injury claims continue trending down (36 percent 2000 -01 to 2014 -15), serious claims involving claimed mental disorders have remained around 6, 500 per annum – around 6 per cent. Intra cranial and injury to nerves and spinal cord fell by 61 per cent and 95 per cent respectively. The median time lost for mental disorder has risen from 11.2 weeks in 2000-01 to 16 weeks in 2014-15. In comparison, time lost for spinal cord injuries dropped by over half, from 26 weeks to 12 weeks.[9] Mental disorders now account for more time off than spinal cord injuries.

48. Psychological injury claims are extremely costly in the workers compensation schemes. Typically they are not well managed by insurers, resulting in the worker being away from work (of any type) for lengthy periods. The cost to employers who are premium impacted is heavy, frequently in excess of $100,000. This is

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[8] The SafeWork NSW Mentally Healthy Workplaces Discussion Paper identifies alleged workplace psychosocial risks however asserts but cannot establish a causative relationship with mental ill health, nor can it provide evidence of effective interventions to remedy this perceived problem. Attachment 1, authored by Professor Nick Glozier of the Brain and Mind Centre, has two papers forming the fact base of the Paper. In these a broad range of alleged psychosocial risks in the workplace are identified. However "*considerable evidence*" supporting a causative relationship between them and mental ill-health is not. Professor Glozier even concluded:

> *the methodological issues in most studies preclude definite statements about casual (sic) inference.(*Attachment 1 page 14). and
>
> *our understanding of how these risks combine with each other, what thresholds are appropriate, interact with other risks in the workplace (such as trauma, discriminatory behaviour and physical demands), individual health, social, individual and other environmental risks is limited.(* Attachment 1 page 4*)*

In a further contradiction the Paper argues against identifying individual psychosocial risks, and that using an individual risk based approach is ineffective (pages 10; 25). Evidently employers are to "recognise" alleged psychosocial risks only in combination, yet an individual risk-based approach is not considered appropriate for psychosocial risk identification and management. More confusion arises in the "thresholds" section (page 12) which tells us the SafeWork NSW "*risk based approach to safety recognises that there are individual differences that may not be properly catered for."*

[9] Safe Work Australia Australian Workers'Compensation Statistics 2015-16

actual expenditure which has to be paid by the employer – they pay for a multiple of certain costs of the claim in addition to their usual premium payment.

49. From our day to day experience working with employers it is clear to us that the vast majority of psychological injury claims arise where an employee is ill suited to the job; in the context of employee performance management; imminent redundancy or where an employee disagrees with the stance management has taken on operational issues. PCBUs already have an obligation to do what is reasonably practicable to eliminate or minimise risk to worker health and safety from the risk of harm from psychological stressors at work. This should not be further extended.

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

50. Several legal systems operate within the WHS field, including public safety, privacy, workers compensation, industrial relations, medical records legislation, and discrimination legislation.

51. The restrictions and complexities imposed by these legal systems make compliance problematic. Employers are reluctant to act for fear of claims by employees, for example the dismissal and reinstatement of non - compliant workers (unfair dismissal, drug and alcohol testing, inherent requirements of job, procedural fairness) and other workplace legislation – discrimination, privacy (for example, restrictions on use of surveillance, disclosure of pre - existing conditions.)

52. Employer decisions based on safety concerns are always open to challenge. The Fair Work Commission **(FWC**) may find in favour of the employer but only where procedural fairness is demonstrably evident – a safety breach while a valid reason for dismissal is often not sufficient.[10] The FWC holds the view that not all breaches of workplace safety policies and procedures will result in dismissal. For there to be a valid reason, the FWC must be satisfied there was conduct which caused serious and imminent risk and the worker's conduct is wilful and deliberate. It sees a significant difference between a worker who has had an inadvertent lapse of concentration that results in a safety breach, and one who deliberately and

[10] For example: [2018] FWC 846 **Tas** *Brain v Nyrstar Hobart;* Harrington v Coates Hire Operations Pty Limited [2015] FWC 2598; M v G&S Engineering Services Pty Ltd [2013] FWC 5303 (13 August 2013)];Stutsel v Linfox Australia Pty Ltd [2011] FWA 844; IGA distribution (VIC)Pty Ltd v Cong Nguyen [2011] FWAFB4070; Glennon v Collins Food Group Ltd t/Sizzler Cairs [2011] FWA 6043;[2011] FWA 2295 **NT** *Kaur v Services Management International;*[2014] FWC 9331 **Qld** *Boal v BHP Coal;*[2016] FWC 2906 **Qld** *De Sola v ECB;*[2017] FWC 2238 **Vic** *Taylor v Qube Ports;*[2016] FWC 7095 **NSW** *Pirko & Bintoro v Toll Holdings;*[2018] FWC 654**Vic** *Palmer v USG Boral Building Products*

knowingly disregards a safety requirement. The Fair Work Regulations define "*serious misconduct*" to mean conduct that includes both of the following**:**

(a) "wilful and deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment";

and

(b) "conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business."

53. While an employer may assume that an employee whose conduct causes a serious and imminent risk to health and safety is guilty of serious misconduct, unless there is a "*wilful and deliberate*" element to that conduct, the FWC may not hold that view. Even where the employer's decision is upheld, the employer has been subjected to onerous and time - consuming litigation in justifying its actions, quite apart from the requisite initial investigations and providing procedural fairness. This is a high risk area for employers and not a straightforward matter of managing safety.

54. Similarly where an employer decides a zero tolerance drug and alcohol policy (which incorporates a testing regime) is needed in their operations, this decision may be subject to the FWC's review and reversal where it decides that such a standard and testing regime is unfair.

55. Employers face significant challenges in being able to manage drug and alcohol workplace risks. One significant challenge arises from the unreasonable positions taken in relation to drug and alcohol testing. Drug and alcohol testing has been viewed by unions and others as imposing an invasive and unjust obligation on employees. In the FWC, individual members and full benches have been concerned to guard against what they regard as inappropriate and unacceptable intrusion by the employer into the private affairs of its employees**.** This view has given way to a default position in cases where the onus is on employers to demonstrate the need for testing measures and the use of the correct procedures.[11]

[11][2018]FWC 594 Paul Harding v MMG Australia Limited (U2017/5867)

56. Employers must usually demonstrate that they:

- operate in a high risk or "safety critical" environment (e g mining, transport, use of heavy machinery);[12]
- have a properly constructed zero tolerance drug and alcohol policy and procedure which is understood and signed off by workers, in which they have been trained and kept up to date as to its requirements, which is applied consistently, and which the courts consider to be appropriate in the circumstances;[13]
- comply with procedural fairness requirements of the *Fair Work Act 2009* (Cth).[14]

57. In the workplace drug user 'rights' have a protected status. Yet employers are liable for every safety failure. Regulator guidance material also reflects a negative view of testing in the workplace. NSW WorkCover's Guide to Developing a Workplace Alcohol and Other Drugs Policy unhelpfully takes the superficial and political line that drug testing has a "number of significant limitations" and that a positive test for alcohol and other drugs "is not in itself evidence of impairment of ability to perform or intoxication".15 The bulk of the guide is concerned with employer provision of information, education, training, counselling and support and a detailed four step disciplinary procedure involving professional counselling through an employer provided EAP. All this would be of little assistance to an employer who in the event of a safety incident involving a drug affected worker attempted to rely on the defence that the worker did not appear to be impaired and thus remained at work.

58. An issue which causes significant risk for employers is in the convergence between workers compensation, WHS and employment law. A common situation faced by our members is where an employee was found to be unable to complete a key job task safely. Medical opinion was ambiguous, and the employer was faced with a difficult decision where there was no clear legal pathway to follow. The options were: breach safety duties and allow the worker to return to work, potentially terminate unlawfully, or breach workers compensation requirements.

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[12] Toms v Harbour City Ferries Pty Limited [2015] FCAFC 35**;** Sharp v BCS Infrastructure Support Pty Limited [2015] FWCFB 1033; Cunningham v Downer EDI Mining [2015] FWC 318

[13] DP World Brisbane v MUA [2014] FWCFB 7889; Cannon v Poultry Harvesting Pty Ltd [2015] FWC 3126

[14] Stephen Keenan v Leighton Boral Amey NSW Pty Ltd (U2015/2778); Cannon v Poultry Harvesting Pty Ltd [2015] FWC 3126 ; O'Hanlon v Alinta Energy Flinders Operating Services Pty Ltd T/A Alinta Energy [2015] FWC 1029; James Charles Debono v. TransAdelaide; Worden v. Diamond Offshore General Company; Stephen Vaughan v Anglo Coal (Drayton Management) Pty Ltd [2013] FWC 10101; [2017] FWC 3426 Vic Rust v Farstad Shipping (Indian Pacific) Pty Ltd, quashed in [2017] FWCFB 4738 ; [2017] FWC 4630 Tas Chapman v Tassal Group Limited; [2018] FWC 594 Vic Harding v MMG Australia

[15] Guide to developing a workplace alcohol and other drugs policy page 11
http://www.safework.nsw.gov.au/__data/assets/pdf_file/0003/49962/drugs_alcohol_workplace_guide_1359.pdf

59. We are relying on therapeutic practitioners to in effect make legal assessments. However, general practitioners are typically not interested in making legal assessments and are absolutely not minded to negate the wishes of their (often long-term) patients. As a result, there is a stalemate. An employer cannot risk injury to a worker. They cannot terminate employment in fear of an adverse action or unfair dismissal claim. The situation is untenable for small-medium employers and difficult for large employers where the range of suitable duties in their organisations is limited.

60. The Fair Work Commission has made it plain to employers that it has the expertise to decide cases where a worker challenges the employer's view of the inherent requirements of a job or the type of work which may be safely performed by a worker.[16]

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

61. In principle the model legislation should be reasonable, logical and clear. This should be the goal of harmonisation, not harmonisation for its own sake. If this outcome is achieved, it should not be undermined by jurisdictional departures from that standard.

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

62. There is no appropriate or clear boundary. There should be. We oppose the duty of care being owed to all other persons who may claim a detriment from work carried out "as part of the conduct of a business or undertaking". This is unacceptably broad and exposes duty holders under the Act to areas covered by public liability and matters of public health.

63. A major change was instigated when the Act was formulated to move the focus of the law away from work and the workplace, with the express intention of untying the link to employment. That was a mistake which has led to complexity, uncertainty and exposure to risk for duty holders. There is risk in everything but to ban all risk is unrealistic but intended to expand the scope of WHS prosecutions.

64. In response to express employer concerns at that time, the Explanatory Memorandum to the Act stated:

> *The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work; and these*

[16] *CSL Limited v Papaioannou* [2018] FWCFB 1005

elements are reflected in the model Bill by the careful drafting of obligations and the terms used in the Bill and also by suitably articulated objects.

65. Despite this, the extension of the application of the Act and obligations is evident in regulator prosecutions and subsequent case law. This extension is readily concluded by courts because of broad and all - encompassing duties of the PCBU, Officers, controllers of premises, and the reach of the definition of 'worker" and "others affected". S (19) (2) has created a wider duty that extends to almost any interaction "others" might have with the products and services of a PCBU, the public at large and the health and safety impacts of work undertaken by a PCBU. [17]

66. S19 (4) (f) of the model Act requires the PCBU to provide any " *information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking*".

67. Understanding and complying with such broadly cast duties is onerous and impractical for many PCBUs.

68. There should be a separation between the product /service delivered by the PCBU and the work and working environment involved in making the product or providing the service. If the business manufactures heaters, the manufacturing process has to be safe, in accordance with the Act. Other legislation will specify that the product must be safe for use by the consuming public. That is not the job of work health safety legislation.

69. A non expert PCBU should be at large to engage expert assistance and rely on that competent advice. The Act inappropriately removes the common law right to rely on skilled workers or experts. If an expert or specialist is engaged to undertake work, there should be a right to rely on their expertise or specialist knowledge and skill and their ability to operate safely in their own field of work and in the interests of themselves and those who may be affected by their work.

70. There is another very significant aspect to the boundary between general public health and safety protections and specific health and safety protections that are connected to work. This is the regulator's move to widen duty holder obligations further into the sphere of public health, well being and wellness. For example the NSW Get Healthy at Work Service.[18] A further example of this move into the public health sphere is seen in the research work program of the newly established SafeWork NSW Centre for WHS. Among the current and emerging WHS challenges it is researching is "health and wellness":

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[17] Recent examples of prosecutions include:
Boland v Safe is Safe Pty Ltd & Munro [2017] SAIRC 17;
Outback Ballooning Pty Ltd v Work Health Authority & Anor [2018] NTCA 2 (28 March 2018)**;**
SafeWork NSW v Millart Enterprises and Notlad Enterprises [2018] NSWDC 52 (19 March 2018);
Inspector Walker v Earthquake Promotions Pty Ltd (No 2) **[2014] NSWIRComm 5**

[18] http://www.gethealthyatwork.com.au/

> *In NSW, the work environment is constantly adapting, including changes to workplace organisation, work practices, and processes; and the crossover between our personal and professional lives. We need to examine these changes in terms of their immediate and long term effects on cognitive, mental, and physical health and wellness. This might include their effect on physical health issues such as diabetes, obesity and cancer; and on mental health and wellness issues, such as stress, depression, anxiety, nervousness, fatigue, and behaviour change. These challenges have a significant impact on affected individuals and their families, and on the NSW economy due to absenteeism, accidents and impaired performance.*[19]

71. In the strategies for mentally health workplaces, discussed above, there is an evident significant cost shifting exercise underway, with SafeWork NSW stating that the strategy is intended to '*move away from hospital based care with the objective of promoting recovery from mental illness while still fully participating in the community".*[20] This accords with the national mental health strategy to redirect resources for those with complex and chronic mental health conditions out of hospital and institutions and supported in their recovery in the community. [21] PCBUs, and employers in particular are to accept a greater liability and responsibility for those with mental illness, however caused. [22]

72. In the closely related area to safety regulation, the activities of the workers compensation authority in NSW, icare, (ICNSW) is moving even further along this path, ostensibly with the objective of reducing the likelihood of injury. This can be seen in the ICNSW Health and Community Engagement, whose primary aim is to allegedly "*break the cycle of disadvantage*" and whose General Manger is a "*strong advocate of challenging convention and disrupting the status quo in the pursuit of developing socially innovative solutions to address deep rooted problems with disadvantage*". [23]

73. A further example is ICNSW partnering with the Local Communities Services Association (LCSA) "*to address social issues, build resilience and improve services"* in disadvantaged communities.*[24]* Promoting ICNSW sponsorship of the LCSA 2017 conference, ICNSW tells us that:

> A *highlight at the conference will be Pentti Lemmetyinen, President of the Helsinki-based International Federation of Settlement & Neighbourhood Houses'*

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[19] Centre for Work Health and Safety Research Blueprint

[20] SafeWork NSW Mentally Healthy Workplaces in NSW Discussion Paper

[21] COAG National Action Plan on Mental Health 2006–2011; Report of the National Review of Mental Health Programmes and Services Volume 1 Strategic Directions Practical Solutions 1–2 years 30 November 2014;

[22] John Nagle icare Workers Insurance Group Executive *Changing workplace culture for better mental health* 26 October 2017

[23] Eugene McGarrell Linked in https://au.linkedin.com/in/emcgarrell accessed 10 October 2017

[24] https://www.icare.nsw.gov.au/news-and-stories/working-towards-community-connection accessed 8 October 2017

- a global grassroots movement for social justice - who will address delegates on social justice issues, such as diversity and inclusion, and the work of Neighbourhood Centres across Europe in effectively advocating for human rights.[25]

74. Regulator interest in moving employer obligations further into the area of public health and ostensible social well being was also addressed in our response to Question 5. However the further regulators distort work health safety and workers compensation legislation to expand employer obligations into the area of public health and safety, the further there will be a dilution of employer understanding and comprehension of what safety in their workplaces actually means. It will also mean a diversion of attention from areas of actual workplace risk to alleged risk arising from workers' (and others connected perhaps remotely to the PCBU's activities) lifestyle, personal choices and circumstances over which the employer/PCBU has no control or influence.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

75. No. The legislation coverage and the definition of the PCBU are already all encompassing. However the whole PCBU notion is confusing, leaving employers unable to clearly delineate the scope of their duties. It would improve safety outcomes to adopt the general approach of safety legislation such as that of Ontario or Alberta, Cananda, where the explicit duty holders and their explicit duties are more clearly specified.

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

76. The concept of 'reasonably practicable' is very important to examine, as it is the most influential aspect of WHS legislation. It is the pivotal element of any WHS prosecution, and while appearing to allow employers to defend their actions, can prove particularly onerous and often impossible to achieve.

77. Prosecutions occur after a death or serious injury, when there is typically little question regarding the worker's status or the injury circumstances. What is in question is the employer's culpability. Did the employer breach its primary duty

[25] Eugene McGarrell Linked in https://au.linkedin.com/in/emcgarrell accessed 10 October 2017

of care? This breach is established by the assessment that an employer was aware of the risk/hazard (reasonably foreseeable) or objectively should have been aware, and that controls were either missing, mismanaged, not relevant to the risk, or in other ways improperly assessed or established.

78. A recent NSW District Court decision[26] summarises its current interpretation of the primary duty of care and the meaning of reasonably practicable as follows:

> 18. *The state of knowledge applied to the definition of practicable is objective. It is that possessed by persons generally who are engaged in the relevant field of activity and not the actual knowledge of a specific defendant in particular circumstances: Laing O'Rourke (BMC) Pty Ltd v Kirwin [2011] WASCA 117 at [33].*
>
> 19. *The reasonably practicable requirement applies to matters which are within the power of the defendant to control, supervise and manage: Slivak v Lurgi (Aust) Pty Ltd (2001) 205 CLR 304 at [37] per Gleeson CJ, Gummow and Hayne JJ.*
>
> 20. *The s 19 duty requires knowledge of the risk emanating from the activities of the defendant: Slivak v Lurgi (Aust) Pty Ltd (2001) 205 CLR 304. Foreseeability of the risk to persons from the activity is an element of this question of knowledge. It would not generally be practicable to take measures to guard against a risk to safety that was not reasonably foreseeable: Genner Constructions Pty Ltd v WorkCover Authority of New South Wales [2001] NSWIRComm 267 at [68].*
>
> 21. *The statutory duty is not limited to simply preventing foreseeable risks of injury. The duty is to protect against all risks, if that is reasonably practicable. Reasonably practicable means something narrower than physically possible or feasible: Slivak at [53] per Gaudron J.*
>
> 22. *The words "reasonably practicable" indicate that the duty does not require a defendant to take every possible step that could be taken. The steps to be taken in performance of the duty are those that are reasonably practicable for the employer to achieve the provision of and maintenance of a safe working environment. Bare demonstration that a step might have had some effect on the safety of a working*

[26] SafeWork NSW v Cosentino Australia Pty Limited [2018] NSWDC 47

environment, does not without more demonstrate a breach of the duty: Baiada Poultry Pty Ltd v R (2012) 246 CLR 92 at [15] and [38] per French CJ, Gummow, Hayne and Crennan JJ.

23. *An employer must have a proactive approach to safety issues. The question is not did the employer envisage a particular danger, but rather should it have: WorkCover Authority of New South Wales v Kellogg (Aust) Pty Ltd [1999] NSWIRComm 453.*

79. The Court utilises these tests in assessing the circumstances and facts of the case it is deciding. These are the vital compliance elements that PCBUs must know to meet their obligations under the Act. Yet regulators do not spell out that this is how the legislation operates. Messaging is frequently a re-iteration of the provisions of the Act and the Regulations, not what the courts are requiring or what might be an acceptable solution to a particular risk.

80. For example, a factory has an area where three forklifts interact with up to 20 workers. The workers operate machinery, and the forklifts deliver products to those machines. The risk of a forklift striking a worker has been identified, and management must review the area to understand how the risk may be eliminated or reduced. They turn to the legislation. It is not an easy task.

81. Looking at Section 18 of the Act, the concept of reasonably practicable is outlined with regard to eliminating risk and/or minimising risks with controls. This intersects with the hierarchy of control for risks (adding a further level of complication).

82. Applying the list of reasonably practicable considerations in Section 18, to the example above:

18a: The likelihood. The likelihood of an incident occurring in this busy factory is high. A review of recent incidents shows two injuries caused by forklift incidents. Industry material and codes of practice make the incident risk obvious. Facebook is littered with SafeWork NSW posts and safety consultant messaging about forklift dangers. Therefore, the risk must be taken seriously.

18b: The degree of harm. The degree of harm is obvious, as above. Forklift incidents pose a high risk of serious injury or death. The employer must take this risk seriously.

18c: What the person knows or ought reasonably to have known about:

i) the hazard or the risk: The employer knows it is a very serious risk, and it is real. Complaints may have been made. The risk has

been logged in the risk register. Previous incidents make the risk clear.

ii) ways of eliminating the risk: The employer has considered various options. These include:

1. Shut the factory
2. Spend $300,000 to install automatic delivery systems, making all 20 workers redundant by removing workers from the process entirely.
3. Spend $50,000 to install improved lifting systems so only one forklift is required in the area at any time.
4. A new training program in risks for all workers, improve PPE, paint traffic management lines on the ground to direct forklift and people movement, put blue lights on forklifts (projecting onto the ground) so workers see them coming around corners.
5. Do nothing.

18d: Availability and suitability of controls etc: Looking at the options above. 1 would eliminate the risk but it is not thought suitable, as the factory is essential to business viability. Option 5 is not an option, given the duty of care. Options 2, 3 and 4 are possibilities. 4 should be done anyway. So the employer is left with the decision between 2 and 3.

18e: This is where it becomes complicated. This element asks for a risk management process to occur. Is "the cost grossly disproportionate to the risk?"

83. Thus, the prosecutor has enormous scope to criticise the employer, particularly with hindsight after the event. Note the outcome in *SafeWork NSW v Broadspectrum* [2018]:

> *"There were measures readily available to the defendant to have eliminated the risk. They are spelled out in the particulars of the charge. Supporting that is the fact that the defendant undertook corrective measures almost immediately after the incident. Further, the standards referred to offered guidance as to measures to be taken to protect the steel work in this situation."*

84. Hindsight is clear. However, measures to control the risk should only be introduced in a prosecution that were available at the time of the incident. [27] The risk of death from a forklift incident is clear, but that does not necessarily mean every potential cause of death/incident is obvious. It will be obvious after the fact.

[27] Nash v Resource Pacific Pty Ltd (No 3) [2018] NSWSC 45

And it may seem so obvious that a judge, far removed from the incident scenario, and basing their judgement on Section 18, will be led away from considerations which would allow a fair analysis of the employer's culpability.

85. Consequently the Act allows the prosecutor an advantage. The legislation remains open to interpretation by the courts, and duty holders will face continually moving goals, as in the event of a safety failure, with prosecutorial hindsight, some element of control will be found to be present, hazards will always readily be identified and reasonably practical measures will typically be found to have been readily available.

86. Case law demonstrates that the 'event focus' of prosecutions, with a concentration on particular incidents or risk scenarios, undertaken with hindsight, has removed the focus from producing good safety outcomes. This has left employers (and other duty holders) with absolutely no certainty about what risk management should entail.

87. The general duties in the Act are non-delegable.[28] No duty on one duty holder restricts the scope and extent of the duty on another duty holder in respect of the same matter (S16). Each duty holder bears the full responsibility and must meet the requisite standard. Control is not defined in the Act.

88. We are opposed to the model Act's imposition of overlapping duties on multiple parties, each of whom is simultaneously liable and may be prosecuted accordingly. In essence this is a regulatory legal convenience and not an appropriate policy or principle for improving safety outcomes.

89. Again, control is not defined in the model Act. The development of case law emphasises that it is difficult to articulate in a piece of legislation an appropriate principle for delineating duty, the limit to capacity to influence and control, hence the development of the legal convenience.

90. This approach may increase the instances of successful prosecution, but they have created uncertainty, confusion, duplication and wasted resources amongst multiple duty holders. This approach appears to be based on the belief that uncertainty is conducive to better health and safety outcomes, where theoretically every duty holder is doubling up on every other duty holder. However the reality is that the multiple overlapping duties with no limit to control breeds confusion and frustration, and leads ultimately to a failure of effective action. It does not improve effective safety management.

91. Clarification is necessary to accurately categorise what constitutes control (full or partial) and the limits to the duty holder's obligations (for example, contract provisions granting control to the contractor to be evidence of control). The

[28] Inspector Ching v Hy-Tec Industries Pty Ltd [2010] NSWIRComm 73 at [48-49]; Inspector Howard v Baulderstone Hornibrook *Pty Ltd* [2009] NSWIRComm 92 at [241-242]; SafeWork NSW v Cosentino Australia Pty Limited [2018] NSWDC 47

model Act should limit responsibility to where there is realistic capacity to risk manage. Overlapping and multiple duties should be minimized and duty holders should be able to establish (i) when they have control and (ii) when they do not have control and (iii) the extent of their duties when they have control.

92. Section 17(2) of the WHS Act (SA) further qualifies the general WHS duty of a duty holder to eliminate or minimise risks to health and safety, so far is reasonably practicable, with a 'control test' that is intended to strengthen the protection from a person being held criminally liable for something they cannot control:

> *17 (2) A person must comply with subsection (1) to the extent to which the person has the capacity to influence and control the matter or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity.*

93. 'Reasonably practicable' is defined at section 18 of the Work Health Safety Act 2012(SA) without variation from the Act. The inclusion of section 17(2) to the WHS Act (SA) effectively extends the definition of 'reasonably practicable' in relation to a duty holder's responsibility to manage risks. The Report of the *2014 Review of the South Australian Work Health and Safety Act 2012* (2014 Review) noted that section 17(2) was added during the passage of the WHS Bill (SA) and that it has no counterpart under other versions of the Act implemented in other jurisdictions. The Review did not recommend its removal.

94. A related aspect of the extent of control is the ability of the PCBU to rely on specialist or expert workers and contractors. This is curtailed by the legislation. If an expert or specialist is engaged to undertake work, there should be a right to rely on their expertise or specialist knowledge and skill and their ability to operate safely in their own field of work and in the interests of themselves and those who may be affected by their work. For example, imposing on a manufacturer the duty to ensure the safety of a specialist electrician employed by an electrical engineer or contractor engaged to perform specialist work beyond the manufacturer's knowledge and competence, may make it easier to prosecute both the manufacturer and the electrical engineer/contractor, but the result is unrealistic.

95. It is our view that overlapping obligations and responsibility for safety involving multiple duty holders with no clear delineation of the extent of control should have been avoided in the model Act and should now be rectified.

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

96. It is a clear and excessively comprehensive duty. The question, who is an officer is paramount, and poorly understood. It creates confusion and distress amongst those who have power in an organisation but may not be the director. For example, we have seen many cases where a low-level manager believed she/he was an officer. Again, this is the result of a legislative system with only two

identified duty holder classes: worker and officer/PCBU. It would be sensible to review the breadth of duties, elaborate on explicit duties and to link more explicitly to the Corporations Act, where this definition is derived.

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

97. The definition of a worker is sufficiently broad to be responsive to changes in the nature of work and work relationships.

98. For one class of workers, labour hire, despite frequently voiced concerns about the obligations of PCBUs and host employers, the legislation and its interpretation by the courts have made it abundantly clear that a 'person conducting a business or undertaking' will owe a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of all workers. [29] This broad duty of care cannot be delegated, but it can be shared and it will be enforced. For labour hire businesses this means that the business itself, as well as the host employer to whom the worker is supplied, will each retain responsibility for that primary health and safety duty as well as a further duty to consult, co-operate and co-ordinate activities with the host employer in respect of that worker.

99. The union movement's dislike of anything short of full time permanent employment and the use of contractors should not be seen as a reason to discriminate further against non full time or permanent employment via WHS legislation.

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

100. The model Act has retained only a very narrow general duty for workers – the common law standard:

> " *While at work, a worker must:*
> (a) *take reasonable care for his or her own health and safety*
> (b) *take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons and*
> (c) *co- operate with any reasonable instruction given by the person conducting the business or undertaking to comply with this Act"*

101. The timidity involved in the use of the word "cooperate" reflects a lack of commitment to the pursuit of a reasonable step that would contribute to improved safety. The duty on workers must be clear and unambiguous. In their own interests, employees need to understand that working safely and being vigilant about the risks that will inevitably be present, despite the best of safety management systems, are essential to their own and others' health and safety. The legislation should spell out that each individual has responsibilities for workplace safety and the limits to those responsibilities should be made clear.

[29] See for example *Boland v Big Mars Pty Ltd* [2016] SAIRC 11. The host employer was also prosecuted.

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

102. The primary purpose of the Act must be to make workplaces safe. This must be reflected in the duties outlined in the Act. The current all encompassing, overlapping duties and the apparently limitless requirement to risk assess has engendered counterproductive safety practices.

103. For example, a landscaper in suburban Sydney operates a business employing approximately 10 workers. They undertake 2-3 projects at any one time. Their safety system cost them approximately $10,000 to purchase and implement. It involves approximately 300 pages of information, forms, and materials.

104. The legislation requires businesses to identify and control risks. That is the core. Everything else should be related to this. Training must reflect these risks and controls. Planning, resourcing, incident management, etc., all revolve around identifying and controlling risks. What possible justification could allow a small organisation to spend such money and time on such a volume of safety?

105. The answer lies in tendering and contracts. Many large organisations, and government works, require certification to AS4801, or the Work Health and Safety Management Systems and Auditing Guidelines (5th edition). This requires large volumes of material, which detract from the basic duties.

106. Encouraged by the safety industry, safety managers and general managers become embroiled in setting objectives and targets, conducting business risk evaluations, and completing onerous training matrices, rather than focusing on high risks and how to prevent injuries. A clear solution is to outline the priority of legislated duty of care and minimising the over-inflated value of safety certification. As seen in SafeWork NSW v ProjectCorp Australia Pty Limited [30], having external safety certification is introduced in court cases as a potential mitigating factor. Only a mitigating factor, not actual evidence to support a case, because certification can never protect a worker. Compliance to AS-4801 or ISO-45001 will ensure a system of safety is in place, but not ensure basic safety practice is implemented. Rather in the same way that a person charged with drink driving may hold up a certificate from an alcohol rehabilitation course as proof of the intention not to re-offend, so a business may hold up external certification as proof of corporate responsibility.

107. To complicate matters, there are two streams of 'standards'. One involves technical standards, the other guidelines. Technical standards have merit, as they set clear parameters (critical for consistent construction standards etc.). The other, guideline materials (such as the soon to be extinct AS-4801) are not as

[30] SafeWork NSW v ProjectCorp Australia Pty Limited [2017] NSWDC 169

necessary or valuable. Rather, they serve the needs of the safety consulting industry, placing additional onus on PCBUs and detracting from basic compliance.

108. In *SafeWork NSW v Activate Fire*[31], Judge Scotting at paragraph 103 noted, "*Australian Standards are well recognised as a consensus of professional opinion and practical experience to sensible, safe precautions and a standard of reasonable conduct*." Scotting J refers to the technical wiring standards, not guidelines standards such as AS-4801. This distinction should be formalised in legislation, to avoid the costs and dangers associated with external certification being mistaken for safety compliance.

109. Australian/International Standards can be a distraction from effective safety compliance, as they can be achieved without actual compliance, and can also mask major issues. Certification exposes unsuspecting employers to prosecutions and workers to serious injury.

110. Australian/International Standards are also inaccessible to those not highly trained in safety language and context. This is onerous for small businesses, and trades/services where management are not expected to have high-level skills in written comprehension. As such, Standards create the requirement for the 'safety expert'. Model Codes of practice hold a similar risk, especially the construction work code of practice and forked trucks code of practice, which are not always readily comprehensible by those they are designed to support.

111. When the guidance material is more complex to follow than the Act and regulations, there is a problem, and the safety of workers will be threatened because businesses must focus so much time on interpreting the guidance material.

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

112. Frequently, regulation is used to extend the duties without producing a clear gain for safety. The Act and regulations on consultation are a prime example of this. Under the current legislative regime, employers have been burdened with complex and detailed consultation obligations. How to meet these onerous and unrealistic obligations is a continual issue for duty holders. Again, it has have created uncertainty, confusion, duplication and wasted resources amongst multiple duty holders. And as a result the rationale and effectiveness of consultation disappears.

113. The starting point for PCBUS is to identify the structure and extent of the undertaking's operations. They then must identify when and how other PCBUs

[31] Safe Work (NSW) v Activate Fire Pty Ltd; Safe Work (NSW) v Unity (NSW) Pty Ltd [2017] NSWDC 66

(and their workers) are involved in those operations. A PCBU cannot limit consultation to workers engaged or directed by them, but must also consult with those conducting other businesses or undertakings directly affected by, or that may have an affect, on the work.

114. This is not a "one off" exercise; a PCBU must continually assess who their operations may affect and what has to be done for their safety ,and involves co -ordination and co -operation.

115. The solution lies in clearly delineating who holds a duty and the extent of that duty.

116. Instead of adopting a "whole of life" catch-all approach, what is needed is a coherent core of duty holders with clearly defined and separate obligations, capable of addressing all situations rather than continuously expanding duty holder categories to address so-called 'regulatory gaps". This "whole of life" concept is highly uncertain, with multiple and overlapping duties and liabilities and no clarity about the boundaries of responsibility.

117. While there may be duties that should appropriately be articulated in relation to designers, manufacturers and suppliers, how are these to be identified by the "person in control of a business or undertaking" mechanism? What is it that the manufacturer actually controls? Is it the manufacture of a tool, a piece of plant or a kitchen cabinet that entails an obvious safety hazard, or a safety hazard that is only demonstrable after something goes wrong in another workplace, but where those gifted with 20:20 hindsight will readily be able to say the risk was foreseeable?

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

118. The Act is very specific about how PCBUs are to consult with workers, and there are heavy penalties for failing to comply with the minimum enormously bureaucratic requirements.

119. Consultation must be practical, affordable, efficient and useful. If it is going to be useful it needs to grow organically. Under the weight of the current exhaustive consultation requirements on how consultation is to be organised and where consultation on all and any WHS matter is required, time and significant resources have to be expended with little if any gain to safety outcomes. The current Object (b) should be replaced with our proposed (g) above which seeks to (i) make explicit that consultation does not need to be complicated and (ii) should be confined to WHS issues and not utilised as a means for furthering other workplace agendas.

120. Duty holders confront the difficult question - who must consult? An example being, again, residential homebuilders. Does the PCBU consult if there are 50

workers on a site, all being employed by sub-contractors and sub-sub-contractors? Does the PCBU simply have to ensure someone consults? Or does the PCBU have to directly consult with all workers? The intent of the legislation seems to be the latter, yet that leads to an impractical obligation.

121. At the core of this discussion is the concept of 'consultation', which is not a single concept. Consultation involves several different elements, and should be spelt out in guidance material:

- Workers' opportunity to raise safety issues (e.g. the back steps are very slippery).
- Communication channel to discuss safety risks (e.g. 'today we have a crane on site, so everyone must wear hard hats and stay away from zone x).
- Feedback channel (e.g. we painted a non-slip surface on the back steps).
- Reviewing safety practices (e.g. we have developed a new Safe Operating Procedure for the onion peeling machine, please review it. Will the procedure work for us?)
- Incident awareness (e.g. yesterday, John rolled his ankle falling off a ladder, which moved. The ladder had three points of contact but the subsoil under one point was not stable. Need to double check)
- Training and instruction (e.g. Three people weren't wearing PPE this morning. Reminder that PPE is critical. We don't do it for fashion, it's to stop you injuring yourself).

122. Every type of consultative practice needs its own format. In some workplaces committees work, in others they are completely counterproductive. Some through Health and Safety Representatives. Some through a noticeboard. Some through toolbox meetings.

123. Most companies will use a safety meeting / toolbox talk, as they can be relevant, quick, spontaneous, and immediate (e.g. let's cover all the safety issues before we start the job).

124. The legislation is narrow and does not give enough emphasis to encourage this communication flow. The HSR/Committee model may work for some large employers, but may completely detract from positive safety communication in many businesses.

125. The 'other agreed arrangements' is the lifeline of many companies, and saves lives. That is not an understatement. It must be retained as an option for all PCBUs.

126. Other than prescribing a duty to consult the Act should simply allow duty holders to decide the manner and extent to which they will go about meeting that duty. It should not have mandated the creation of committees, health and safety representatives and work groups. Instead it should provide duty holders with the

ability to retain flexibility to develop arrangements suiting their particular circumstances.

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

127. This response is not confined to the "changing nature of work" (however defined) which we do not consider generates a need for new or different WHS regulation.

128. Arrangements allowing for work groups to be determined for workers engaged in two or more businesses or undertakings should be by agreement only and not be imposed by legislation. While there may be instances where a multi-PCBU work group could be useful there will be many others where such a provision is used inappropriately, such as to provide roving representatives with unprecedented access to other businesses, sites and workers to which they have little or no connection. If we are to move forward in a way that encourages employers to adopt more collaborative approaches to health and safety at work, employers must be convinced that there are opportunities for constructive engagement and not merely another mechanism to assist trade union industrial and marketing campaigns.

129. The Act's provisions for the functions of HSRs and the PCBU obligations to HSRs provide HSR's with significant powers. Along with these statutory rights there is no corresponding responsibility. To the contrary, S 66 provides immunity for Health and Safety Representatives, and S68 (4) re-iterates that there are no duties attached to role of a health and Safety Representative.

130. S 61 (4) requires that "any resources, facilities and assistance" are to be provided to an HSR "that are reasonably necessary". Again, additional PCBU obligations are imposed without the need to any actual improvement in safety outcomes needed to justify these outlays. To avoid argument the standard should be what can be justified as necessary, simplicita.

131. S 68 (2) (g) provides that in performing a function the Health and Safety Representative may "whenever necessary, request the assistance of ***any*** person". This provision is unreasonably broad. It should be deleted. This is another provision likely to cause tension. Everywhere else the PCBU has all the liability but here the potential for conflict is disregarded.

Question 26 Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

132. We have no data on the effectiveness of inspectors. There are statistics on the number of visits, notices and penalties applied[32] but these provide no information as to whether the inspector's activities resulted in improved safety outcomes,

[32] SafeWorkAustralia Comparative Performance Monitoring Report

produced in a manner which the employer/PCBU considered was practical, effective and reasonable.

133. There is no indication of the level of industry specific knowledge among inspectors or their training/expertise and competence. Nor is there any public evaluation of the effectiveness of the approach taken by inspectors, the way in which they communicate and the extent to which they offer constructive advice and workable solutions, instead of non-specific, generic (at best) responses to breaches or a perceived failure.

134. Worksafe NSW publishes prosecution result summaries, notice and penalty rates and announces targeted campaigns in a strategy to promote its enforcement outcomes for prevention purposes. Practical, detailed information about what can be learnt from those cases/campaigns and solutions to eliminate or reduce risk is needed. It would be helpful to publish the defined outcomes for interventions and campaigns by inspectors and how the success of these are measured. As noted above, it is easy to say no person should ever be exposed to hazardous chemicals. PCBUs are left wondering, how? How do we stop that exposure?

135. Publishing analysis about inspectorate activities would provide greater transparency and enable duty holders to assess the extent to which these activities are consistent and proportionate. Importantly it would also enable measures to be attached to inspectorate initiatives and campaigns to see what is effective and what will actually help industry, and assist in conveying the message to industry that inspectorate work can be a positive resource.

136. We are strongly of the view that more could be achieved by separating the enforcement/ prosecutorial role of inspectors from the role of providing expert assistance to duty holders.

137. Inspectors would be tasked with constructively engaging with duty-holders to better understand the barriers may operate in specific workplaces and sectors to achieving sustainable safety and work collaboratively to achieve that outcome. If inspectors with all their experience cannot do it, how can a PCBU do it? It requires a legislative mindset to move away from punishing failure to looking for reasonable practicable safety.

138. For example, a SafeWork NSW inspector attends a factory where a worker has fallen from a ladder. The ladder collapses, and the inspector issues an improvement notice because there is no safe procedure in place, and no process for inspecting ladders. The improvement notice states:

> 1) *As a person conducting a business or undertaking at a workplace you must manage, in accordance with Part 3.1, risks to health and safety associated with a fall by a person from one level to another that is reasonably likely to cause injury to the person or any other person.*

2) *Your attention is drawn to clause 78 of the Work Health and Safety Regulation 2011.*

This is ambiguous and subjective. The PCBU looks at clause 78 and reads:

78 Management of risk of fall

(1) A person conducting a business or undertaking at a workplace must manage, in accordance with Part 3.1, risks to health and safety associated with a fall by a person from one level to another that is reasonably likely to cause injury to the person or any other person.

Note: WHS Act--section 19 (see clause 9).

(2) Subclause (1) includes the risk of a fall:

(a) in or on an elevated workplace from which a person could fall, or

(b) in the vicinity of an opening through which a person could fall, or

(c) in the vicinity of an edge over which a person could fall, or

(d) on a surface through which a person could fall, or

(e) in any other place from which a person could fall.

(3) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that any work that involves the risk of a fall to which subclause (1) applies is carried out on the ground or on a solid construction.

Maximum penalty:

(a) in the case of an individual--$6,000, or

(b) in the case of a body corporate--$30,000.

(4) A person conducting a business or undertaking must provide safe means of access to and exit from:

(a) the workplace, and

(b) any area within the workplace referred to in subclause (2).

Maximum penalty:

(a) in the case of an individual--$6,000, or

(b) in the case of a body corporate--$30,000.

(5) In this clause,
"solid construction" means an area that has:

(a) a surface that is structurally capable of supporting all persons and things that may be located or placed on it, and

(b) barriers around its perimeter and any openings to prevent a fall, and

(c) an even and readily negotiable surface and gradient, and

(d) a safe means of entry and exit.

139. How does this improvement notice help the PCBU to improve? The PCBU often engages in a dialogue with the inspector, trying to clarify what is required. Can we still use ladders? Do we need to install safety barriers around a ladder? What is relevant to the incident?

140. A safety consultant might easily identify that this improvement notice requires a safe work procedure to be drafted, or a ladder inspection checklist. This may not satisfy the inspector. It is a muddled confusion, and as a result, employers cannot meet their basic duties because the 'goalposts' are undefined.

Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

141. All jurisdictions appear to be in agreement in theory that the graduated approach to enforcement along with the pyramid of sanctions approach is the appropriate model. This approach recognises that regulatory tools such as education, assistance and cooperation are just as important to achieving compliance as the imposition of punitive sanctions. We endorse that approach and draw attention again to our proposal for splitting the enforcement and advisory aspects of building more effective safety performance across the economy.

142. While there is in theory adherence to the National Compliance and Enforcement Policy as guiding principles as to how the Act should be enforced, in practice there is a large amount of inconsistency in its application.

143. While sentencing courts have a range of sanctions available we take the view that more effective compliance will be achieved by these measures:

- Legislation that is re written to be reasonable, logical and clear and encourages self-responsibility and self-reliance;
- The explicit delineation of duty holder obligations and the boundaries to those obligations;
- The foundation stone of the legislation and the central role of the regulator should be advice and education and the development of industry specific solutions for particular safety issues, problems and risks.

144. What is clear is that there is now a prosecutor emphasis on targeting directors and managers for health and safety incidents. Further, prosecutors are now commencing prosecutions pursuant to general criminal law provisions in the relevant jurisdiction, when bringing an action against an individual. [33] Additionally, it is clear that the level of penalties applied is increasing. [34]

145. AFEI opposes the inclusion of dedicated **industrial** manslaughter offences in criminal or workplace health and safety legislation. Manslaughter prosecutions should apply in workplace fatalities subject to existing formulations and tests under the criminal law, without the creation of dedicated new offences of industrial manslaughter.

146. Further, in any work health safety prosecution there should be no reversal of the National Review into Model Occupational Health and Safety Laws) decision (and criminal law principle) that the prosecution bearing the onus of proof beyond reasonable doubt.

[33] *R v Colbert* [2017] SASCFC 29

[34] *Williamson v VH & MG Imports Pty Ltd [2017] QDC 56*

Australian Federation of Employers and Industries (AFEI)

The Australian Federation of Employers and Industries (AFEI), formed in 1903, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

With members of all sizes and across most industries and affiliated industry associations, our main role is to represent, advise and assist employers in all areas of workplace and industrial relations and human resources. AFEI provides advice and information on employment law and workplace regulation, human resources management, workplace health and safety and workers compensation.

AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.