> ***"Work shouldn't be dangerous. We should be making things, not making orphans. Our strategy will use the full union rep toolbox – from negotiation, to representation, to action – to organise for decent, safe and healthy work"*** Sharan Burrow, ITUC general secretary *April 2018*

It is worth reaffirming the relevant UN and ILO Conventions when discussing the applicability of the Model Laws framework now and in the future.

> **The basic framework Universal Declaration on Human Rights (UN, 1948)**
> Everyone has the right to life, to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".
>
> **C155 Occupational Safety and Health Convention, 1981:** Article 19 Representatives of workers in the undertaking, co-operate with the employer in the field of occupational safety and health. The 3 basic rights are:
> - The right to know about the workplace hazards
> - The right to refuse to work in hazardous conditions
> - The right to participate in the decisions concerning health and safety.

Australian law has reaffirmed that health and safety rights are fundamental workplace rights. By referring to dialogue, Justice Murphy in his 2013 judgement reaffirmed the concepts of industrial democracy, participation and consultation.

> Federal Court Judge Justice Murphy found in AMWU v Visy Pty Ltd (3) [2013] FCA 526 that an employees' rights or duties under the OHS Act[1], as an employee or health and safety representative, are workplace rights under the Fair Work Act [section 340]. Justice Murphy [para 168] said:
>
> *"The OHS Act plainly contemplates that a health and safety representative may have a different view from the employer as to the appropriate resolution of a particular health and safety issue.* ***The right to advocate such a different view is an important workplace right and the dialogue it promotes serves an important occupational health and safety function****. In my opinion, actions taken by a health and safety representative in asserting a particular position on a health and safety issue should not lightly be treated as constituting uncooperative or obstructive conduct."*

Theme of current discussions – the changing nature of work

Factors which exert positive influence on health and safety performance include[2]

- Managerial commitment
- Active inspectorate
- Trained workers
- Participation of workers
- Trained worker representatives with the support of their industrial organisations

[1] Comment: there is nothing to suggest in the judgement that this would not apply to the WHS Act
[2] *The role of worker representation and Consultation in managing health and safety in The construction industry,* David Walters Cardiff Work Environment Research Centre Cardiff University, ILO 2010 GB.298/STM/1/1

The effectiveness of all of these players is under significant performance pressures, which are likely to increase, from rapid technological change, flexible and insecure employment conditions and the moribund state of our industrial relations systems.

Managerial commitment – if three out of the four scenarios predicted in the CSIRO Workplace Safety Futures Report[3] come to fruition the ability of managers to influence health and safety performance will be considerably undermined. An increase in automated work, technology driven job creation and an increase in workers having multiple employers/freelancing or portfolios all increase the distance between those performing the work and those who organise, arrange or control the type of work and its organisation. The "reach" and power and influence of direct managers may be limited. However, those with the controlling influence of these work arrangements will become more powerful but will no doubt continue to argue that those whose working lives they dictate are the most powerful. Clearly this is a false and intentionally inaccurate portrayal of who has access to power and the ability to change circumstances.

Active inspectorate – the effectiveness of regulators, compliance and enforcement of <u>current</u> practices is likely to be further eroded as:

- Inspectorates and enforcement bodies have always been better at enforcement and compliance for immediate or direct risks. Despite well known controls inspectorates still struggle with multifactorial risks eg musculoskeletal disorders. As the prevalence of risks to health appear to increase, eg psychosocial hazards and resultant illness increase, the need for some changes to the Model laws will become increasingly necessary e.g. revers onus, limitation of concept of so far as reasonably practicable [SFARP]. The scope of general risk management requirements to cover all risks etc.
- Changes in the way workers are engaged means that the current focus of prosecutors and regulators on individual workplaces will not change how supply chains of goods and labour behave. The AMWU has no evidence that regulators are even experimenting with the approach outlined by Howe and Johnston [4]

Trained workers – our VET training is failing both workers and employers. On site training has been diminishing eg apprenticeships and traineeships with an increased reliance a fractured VET sector[5]. Economic systems that rely on long supply chains mean that workers at the end of the supply chain potentially get less access to good quality training.

Participation of workers: this requirement under the WHS Act is offended habitually. PCBUs and regulators are reluctant to engage workers in these conversations despite the good evidence that this improves worker participation and health and safety protections. As has been submitted by the union movement for decades the Model Laws need to provide various structural mechanisms to enhance worker participation. Regulators must redress their current failures in enforcing regarded Part 5 of the Model Act.

[3] SWA Safety Futures Report
[4] Howe and Johnston
[5] *For example, TAFE funding has dropped 30% in a decade, with funding per contact hour dropping 14.8% between 2006 and 2015. TAFE has seen a collapse in enrolments, funding and teaching staff. Some Victorian TAFEs have seen 40% drops in enrolment and the Victorian TAFE system has lost 3300 educators in the past five years,* ACTU Submission Page 37.

Elected and trained worker representatives - The capacity for workers to negotiate or advocate for their own health and safety is often compromised by the employment arrangements. These constraints can be limited by the proposals contained in this submission.

Role of Regulators

Many difficulties arise with the Model Law framework due to the lack of strategic enforcement or lack of willingness of the jurisdictions to behave as a regulator. Currently there exists amongst regulators "pervasive ideology" that education is the cure for all non compliance. The approach is well summarised below:

We need to focus on shifting the regulator from the hug and pat approach to actual real workplace audits and Inspectors having the gumption to take action.

It is recognised that there is a lack of research evidence which distinguishes the relative effectiveness of different regulatory practice but it is clear that:

- advice given face to face and/or from trusted sources is effective
- strong evidence that actual citations and penalties reduce injuries[6]
- the regulatory pyramid enshrined in the NCEP works best when it is "tall".

As Johnstone discussed:

> *So at the heart of responsive regulation and particularly the two pyramids I've talked about - the hierarchy of sanctions and the hierarchy of regulatory strategies - is a paradox and the paradox is that the greater the image of invincibility of the regulator and the greater its capacity to escalate to the top of the hierarchy either of sanctions or of regulatory strategies, and the tougher the sanctions at the top, the more likely firm are, or the industry in the case of strategies, the more likely there is to be participation in cooperative compliance at the bottom. So the tougher the sanctions at the top and the more likely it is that the regulator will move to the top of the pyramid, the more likely it is that compliance will take place at the bottom[7].*
>
> *John Braithwaite discussed restorative justice in health and safety and talked about restorative justice playing at the bottom of the enforcement pyramid and at the top you have significant mega penalties, and the kinds of penalties he was talking about were penalties of $100 million dollars for contraventions, but major discounts where a firm had a robust approach to systematic health and safety management. So, when we talk about large penalties at the top, we are talking about significantly greater penalties than we currently find in the health and safety legislation.[8]*

The Regulators are ignoring regulation theory and in turn the theoretical basis for National Compliance and Enforcement Policy. The AMWU does not disapprove of education and information but it is useless for those PCBUs and work arrangements that rely on a "short term" dollar investment. How does education change those PCBUs in the two last categories?

- Committed
- Compliant
- Complacent
- Criminal.

[6] Tompe, E et al, Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety, Scand J Work Environ Health 2007;33(2):85–95
[7] Johnstone R, Rethinking Responsive Regulations, Transcript SWA, October 2014
[8] Ibid

Responsive regulation relies upon the involvement of workers to promote deliberation, dialogue and trust building government. For health and safety that means:

- a seat at the negotiating table [at all policy and regulator bodies, access to H&S committees and representation, with powers]
- have the same capacity to sue or bring prosecutions as the regulator [union right to prosecute, HSR rights to training, HSR ability to perform all their functions] [9]

The current acceptance by government and many in the business community that the impediments to good health and safety outcomes are:

- red tape and regulation
- informed, trained and supported workers and their representatives and
- organised labour

are contrary to responsive regulation [see above].

This submission recommends changes that facilitate an easier application of the framework to our current and future health and safety hazards. Current impediments, which will be discussed, are not insurmountable.

As the ACTU explains:

> *The union movement believes the future of work is what we make it. If we leave things to the 'free market' and the interests of business, that future will be bleak for many, but with strong institutions, reform of the industrial relations system, support from government and a prominent role for unions and civil society, we can co-manage technological change towards a future that benefits us all.*[10]

[9] Johnstone ibid
[10] ACTU Submission to Senate Select Committee The Future of Work and Workers Inquiry February 2018, page 4

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?

The basic structure of Act, Regulations and Codes is supported. Particularly the AMWU expresses strong support for the following sections of the Act

- Section 47 and 48 – minor amendment required to s48.1.b.ii
- Section 52
- Section 68, especially the basic tenet of representation and rights of HSRs
- Section 70 – minor amendment required for section 70.c
- Section 72 – with amendment to include the provisions of Vic OHS Act Section 69.1.d.ii which allows a HSR to attend training that is not set out in Regulation but which is authorised by the Regulator
- Section 72 – insert minor amendment to Section 72.1. to include the provisions of Vic OHS Act Section 67.3.c and 67.5. A consequential amendment is then required to section 72.a with the deletion of the words "as soon as practicable within a period of 3 months" Subsequent to that change the WHS Regulations need to be amended to define what matters require consultation ie the timing and location but not the course provider as all courses are approved by the Regulator.
- Section 84 – with addition of "or others" after "expose the worker"
- Sections 84 and 95 – with the deletion of Sections 85.6 and 90.3
- Sections 117 -121.

So far as reasonably practicable [SFARP]
The Model laws are limited by the repeated application of the *so far as reasonably practicable* [SFARP] concept **[See Appendix 2 for Recommendations re WHS regulations and Recommendation 6]**

Numbers of the difficulties outlined in our submission could be addressed by a "reverse Onus" approach as the qualifiers of SFARP would disappear from the Act and make "what compliance looks like" much easier for many workplaces. Prior to the introduction of the Model laws, NSW and Queensland Acts SFARP was used as a defence.

The AMWU supports the 2008 ACTU Submission to the National Review into Model Occupational Health and Safety Laws, paras 105 to 108

> *Duties should not to be limited by the phrase 'so far as reasonably practicable' in the model laws. This defence appropriately remains open to an employer in a court.*

This approach has been supported by many including Michael Tooma[11]

> *This is consistent with the approach both in discrimination law, and the Fair Work Act General Protections, in which it is acknowledged that the operator of a business has better access to information about the operational needs of the business. The survey of 624 employers from across Australia also found that more than six in 10 doubt the proposed model Act will achieve "true harmonisation", and a whopping 89 per cent believe the Federal Government should intervene and introduce national - as opposed to model - OHS laws.*

[11] *OHS Alert November 10 2010*

> *Tooma says the most surprising finding of the survey was that 67 per cent of respondents believe "employers should have the onus of proving reasonable practicability in the event of a prosecution for breach of the duty of care". He says the result seems out of step with the demands of peak employer groups, but suggests the provision - which exists in NSW and Queensland - is a bit of a non-issue. "I have said for some time that this issue has been exaggerated on both sides of the argument," he says. "Reverse onus works well in the UK, Canada and Singapore. The real issue is how the law is applied in practice by the regulators."*

And the UK Law Health and Safety at Work Act 1974.

> **Section 40 Onus of proving limits of what is practicable etc.**
> *In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement*

Recommendation 1
Introduction of "reverse onus" approach of the Model WHS laws – consistent with the approach in two of the largest jurisdictions had prior to the introduction of Model laws [and with "parent" legislation such as the UK Health and Safety at Work Act 1974].

The AMWU supports the introduction of Industrial Manslaughter Legislation – using the recent Queensland law as a template. Industrial Manslaughter laws are likely to improve the capacity of regulators to enforce laws. Manslaughter legislation will introduce tougher sanctions and therefore there is more likely to be cooperative compliance at the bottom[12].

Recommendation 2
Adopt industrial manslaughter legislation.
Insert "negligence" to Section 31.1 for Category One offences.
For a full discussion of this Recommendation se ACTU Submission and the 2017 Queensland Review.

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

Limitation to generic approach to risk management:
At the time of drafting the Model WHS laws submitters noted that the removal of express risk management provisions was a retrograde step. The AMWU had supported the Queensland provision of Section 27A, but this was not adopted.

WHS Regulation 32 provides that the risk management requirements of the WHS Regulations apply to those with a duty under these Regs. The Risk management requirements do not apply to all risks to health and safety. As outlined by Johnstone and Tooma [13]

[12] Ibid Johnstone Responsive Regulation
[13] Submission 258 Johnstone and Tooma to Model WHS Regulations March 2011

> *there is no statutory requirement to take a generic approach to identify, assess and control hazards which fall outside the hazards specifically addressed in the regulations*.
> This is a very serious deficiency in the draft Model Regulations. This deficiency is exacerbated by the very conservative approach that has been taken to the hazards addressed in the draft Model Regulations and in the tranche of draft Codes of Practice that have been released for comment. It would appear that the drafters of the draft Model Regulations and Codes are very much picking the lowest hanging fruit and addressing the issues in which there is currently a fair degree of agreement. Inevitably this means that new and emerging hazards have been given low priority. Many of these hazards are not in fact 'new' – for example, stress, fatigue, and harassment.

Chapter 3 Part 1 must apply to all PCBUs, just as Chapter 2 applies to all PCBUs.

Recommendation 3: Delete WHS Regulations 32 and 33, to ensure that risk management applies to all work related risks, and is not limited to those in the WHS Regulations.

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

During the recent technical review of Model Codes, SWA responded to a number of the ACTU concerns regarding the use of "should" in Codes. SWA applied the following reasoning to the inclusion of "should":

- As the duty in the Regulation is subject to SPARF, it does not go without saying that this will be required in all cases
- As the duty is subject to SFARP [under the Act] ……may not be required in all cases
- As the duty is subject to SFARP what is reasonably practicable will depend on range of factors including which PCBU has control or influence
- While Codes of Practice have evidentiary status in a prosecution, it is very clear that there is no obligation in the Act or regulations to consult or comply with a Code of practice [note: there is no reference to "state of knowledge" in SWA agency response]
- The duty to provide adequate facilities is qualified by SFARP, the assessment of what is reasonably practicable depends on the circumstances [note: these SWA comments relate to the provision of access to basic human health requirements ie hydration and sanitation]
- The hierarchy of control depends on what is SFARP [which depends on circumstances] [note Reg 36 is under the WHS Act duty for a PCBU which is qualified by SFARP and then Reg 36 is qualified by SFARP in Reg 35 then multiple times in Reg 36 – no wonder people – duty holders, inspectors and others find it difficult to navigate these Regulations].

The above indicates that the test of SFARP has to be applied so many times that Codes are extremely difficult to read, understand and don't provide clear advice to duty holders on how to met their obligations under the Act.

The 2017 Queensland Review noted that [emphasis added]

> *While both the 1995 and 2011 work health and safety regimes provide a framework where compliance with a code of practice can be used as evidence that a duty holder has complied with their safety obligations, the regimes are markedly different in relation to their enforceability.*

> *The WHS Act 1995 made it explicitly clear that a code of practice had to be followed as a minimum and in doing so provided a specific provision that improvement notices could be issued against.*
>
> *Conversely, while the WHS Act 2011 continues to promote codes of practice as the minimum standard (this is evidenced by the application of codes of practice to court proceedings),* ***there is no stand alone provision that enables failure to reach this minimum standard to be enforceable by inspectors****. While there is an ability for inspectors to refer to codes of practice in compliance notice directions (which would have the effect of making following a code of practice mandatory), this power is discretionary and requires a link back to an overarching duty of the WHS Act 2011 or Regulations, a somewhat more convoluted process than in the WHS Act 1995.*
>
> *Given the strong stakeholder support for the role of codes of practice,* ***it is appropriate to clarify their status to give certainty to employers, unions and the regulator. The aim is to ensure that codes of practice operate in a manner which assists all industry participants to manage work health and safety risks, including the inspectorate.***
>
> *It is the view of the Review that a specific legislative provision, such as existed in the WHS Act 1995, is required to make it clear that codes of practice are the minimum standard and provide a clearer avenue for enforcement action by inspectors. Additionally, an approach similar to the WHS Act 1995 would eliminate the suggested need by unions for requirements in codes of practice to be brought up into the WHS Regulations 2011 - a review process that was commenced to facilitate enforcement action and provide clarity to duty holders regarding their obligations.*

Additionally the UK approach is similar to what existed in Queensland prior to harmonisation of the WHS Laws. UK Section 17 HSW Act 1974, Use of approved codes of practice in criminal proceedings.[14]

> *(2)Any provision of the code of practice which appears to the court to be relevant to the requirement or prohibition alleged to have been contravened shall be admissible in evidence in the proceedings; and if it is proved that there was at any material time a failure to observe any provision of the code which appears to the court to be relevant to any matter which it is necessary for the prosecution to prove in order to establish a contravention of that requirement or prohibition, that matter shall be taken as proved unless the court is satisfied that the requirement or prohibition was in respect of that matter complied with otherwise than by way of observance of that provision of the code.*

As the AMWU submitted to SWA in 2014:

> *Prior to the adoption of the Model WHS package, reverse onus and deemed to comply provisions applied to Codes of Practice in NSW and Queensland respectively. WHS Codes of Practice outline to duty holders* what is considered reasonably practicable to control the risks identified. As reported in OHS Alert, Barry Sherriff noted that the model Codes "are not imposing obligations" and "The Codes provide valuable information on hazards, risks and risk-control measures, and might be considered by courts "in determining whether you've done what you ought". **"They're actually there to help."** [15] [emphasis added]

[14] UK Section 17 HSW Act 1974, Use of approved codes of practice in criminal proceedings.
[15] OHS Alert Tuesday 30 October 2012

The 2004 Maxwell Review[16] and the 2017 Queensland Review articulated the difficulties faced by PCBUs, inspectors and workplaces generally on "what compliance looks like". The solutions proposed in these two reviews need to be heeded. The recent reversion to the previous status of Codes of Practice in Queensland and the expansion of the number of Compliance Codes in Victoria is supported.

The current SWA review of Model Codes was a technical review only; the AMWU supports the recommendations of the 2017 Queensland review:

> *In addition to providing clarity regarding the legislative status of codes of practice, it is prudent to ensure the content of codes of practice remains relevant and responsive to emerging safety issues, changes in industry work practices and technological advances. To this end, codes or practice must be regularly reviewed and updated in consultations with key industry stakeholders. For consistency, such reviews should be conducted every five years as is the case for the model codes of practice administered by Safe Work Australia (SWA).*

Recommendation 4: Adopt new Section 26A Queensland Work Health and Safety and Other Legislation Amendment Act 2017.

Recommendation 5: WHS Act to require a mandatory review of each Code of Practice in operation every five years.

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?

Appendix 2 contains a critique of the use of *so far as reasonably practicable*, as an overarching framework and inappropriate application within the current WHS framework.

Others have observed that SFARP is complex: Gunningham et al[17] noted that:

> *'Reasonably practicable' is a complex legal phrase which does not in itself inform the reader or duty holder what it constitutes. It forms a complex standard, which a reader may or may not know whether they comply with. In many cases its use could be removed, so that the piece reads 'the [PCBU] needs to ensure that the hazards are removed or minimised to a sufficient extent'.*

The proposal by Gunningham et al is consistent with recent changes in Victoria for the language framework in Compliance Codes:

> ***Must** indicates a legal requirement that has to be complied with*
> ***Needs to is** used to indicate a recommended course of action in accordance with duties and obligations under health and safety legislation*
> ***Should** is used to indicate a recommended optional course of action*

[16] Chris Maxwell, Occupational Health And Safety Act Review (March 2004)
[17] Gunningham, N et al *The Efficacy of Codes of Practice and Guidance Material Report to Safe Work Australia*, National Research Centre for Occupational Health and Safety Regulation, September 2015

Recommendation 6: Remove *so far as reasonably practicable in WHS Regulations and Codes of Practice* and use the Victorian approach to language within Codes.

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?

There is a lack of understanding amongst duty holders that health extends to the preservation of psychological health. In some AMWU workplaces, "bullying and harassing workers" is a management style and in others such as remote work or FIFO or DIDO the very organisation of the work creates mental health risks.

- *The biggest issue I have is workplace bullying, our manager & some of the section heads (supervisors) have caused a great deal of angst amongst the workers, so much so, that some have left because of it.* [18]

Lack of Regulation to control Psychological risks

Despite the inclusion of psychological health in the definition of health there is no provision anywhere in the regulations for the implementation of risk control measures to prevent the occurrence of psychological illness. This is in stark contrast to the requirement, correctly so, for the control of risks relating to musculoskeletal disorders [MSDs]. The causation of MSDs is multifactorial and MSDs are a grouping not a diagnosis. A corresponding categorisation can be applied to psychological injury/illness i.e. prevention of mental health conditions and the control of risk to psychological health.

Modern working arrangements create a heightened exposure to psychosocial hazards. Outsourcing, privatisation, corporatisation and competitive tendering of previously stable full time jobs has led to a large increase in the number of workers in insecure employment arrangements.

An ANU Report commissioned by SWA[19] notes that there are many examples of mandatory obligations aimed at controlling work related psychological risks. The Report noted that there is little evidence on what are the best mandatory regimes -

> *The limited studies of the effect of psychosocial legal obligations – for Europe generally, and for Sweden and Canada – suggest that legal obligations may help raise the profile of psychosocial hazards and contribute to the motivation in workplaces to take action on psychosocial hazards, which is likely to include establishing policies or procedures. These studies do not enable any conclusions to be drawn about the strengths or weaknesses of particular regimes, but they do suggest that organisational commitment and capacity, including resources, knowledge and skills, are predictors of organisational effort to address psychosocial hazards. To the extent that evidence exists, and it is limited, the studies suggest that legal obligations contribute to motivation more than to capacity.*

The AMWU notes that Australia has been discussing a Code of Practice for the Prevention of Psychological Injuries since 2010-11[20].

[18] AMWU HSR response to 2018 survey

[19] *Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks*, Report to Safe Work Australia, National Research Centre for OHS Regulation, Australian National University, November 2016. Page 6

Health and Safety Professionals are also calling for a Code of Practice

> *Alena Titterton, Chair of the Research and Thought Leadership Working Group for the Safety Institute's Women in Safety & Health Network, supported Dr Johnstone's call for a code of practice "We have codes of practice for managing risks associated with hazards like confined spaces, electrical work, noise, plant and equipment and working at heights. It's time we more openly addressed these other equally important issues that affect psychological health if we are going to successfully change this workplace culture issue."*

Usually when inspectors attend a workplace to deal with psychological hazards eg bullying or harassment, the inspectorate requests a copy of the any workplace policy or procedures to deal with Bullying/Harassment/Stress. If these exist, the inspectorate is satisfied and no further action is taken. This is grossly inadequate as it only focuses on one administrative approach to one group of risks but ignores risks such as work intensification, excessive hours of work, lack of supervisory support, lack of procedural justice etc. It also fails to ensure compliance with the laws, ie minimisation of exposure to risk.

Without an overall risk management obligation the WHS Regulations provide no motivation for Regulators or PCBUs to control these risks. The only motivator is successful workers compensation claims; but claims for psychological injury are regularly contested and notoriously difficult to process in many jurisdictions. ISCRR noted that SWA estimates that at least 30% of claims for psychological injury are rejected. [21]

Recommendation 7: insert into Section 19(3) addition to (a) *including the risks to psychological health.* This would create a clear head of power for the adoption of a Regulation and accompanying Codes of practice for various risks to psychological health*: see below*.

Recommendation 8: Develop a new regulation and supporting codes of practice to address psychosocial hazards, which must include an obligation on PCBUs to assess and control psychosocial hazards.

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)?

The AMWU supports the extension of the WHS Act to the offshore regime. The ACTU and its affiliates have consistently called for the application of best practice law to offshore industries:

- WHS laws governing offshore industries should align with those governing onshore industries, unless there is justifiable, industry specific reason not to
- Minimum standards and draft Model Work Health and Safety regulations should be extended throughout the offshore oil and gas industry via regulation, where those standards are applicable in industry generally, or in the offshore oil and gas industry internationally. [22]

Recommendation 9: Adopt the approach section 4 of the NSW Work Health and Safety (Mines and Petroleum Sites) Act 2013 for other industry specific legislation.

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[20] Hansard, May 28, 2012, Education, Employment And Workplace Relations Legislation Committee, page 93
[21] ISCRR *Work related injury and Illness in Australia,* 2004 -2014 page 24
[22] OHS Offshore: Protecting our Oil & Gas Workers, ACTU 2015

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

The current Commonwealth WHS Laws apply to Regional Processing Centres, yet despite notification to Comcare there has been a lack of enforcement activity to ensure that those people held in the RPC are protected by the WHS framework.

The Australian Lawyers Alliance and other commentators clearly outline the responsibilities of the Federal government:

> *The Work, Health and Safety Act2011 (Cth) ('WHS Act') places a statutory duty of care upon the Department of Immigration and Border Protection ('DIBP') as the legal person conducting the business or undertaking ('PCBU'), to ensure the health and safety of workers and 'other persons' such as detainees. A duty of care also exists at common law. This duty extends to identifying, eliminating or minimising risks to health and safety, and reporting 'notifiable incidents' (as defined in the WHS Act) to Comcare. Comcare in turn is obliged to investigate incidents and make recommendations to increase health and safety. It also has enforcement powers.*
>
> *Comcare, in turn, appears to have made inconsistent assessments as to the types of cases it should be investigating as notifiable incidents. Comcare has advised that: "the duty lies in the first instance to determine whether an incident arises out of the conduct of the PCBU's business or undertaking". This is a question of fact to be determined in each case. Comcare's current practice when receiving a notification from a PCBU is to evaluate whether the PCBU was required to notify Comcare of the incident under s38… The evaluation does not determine whether or how Comcare will respond to the incident. Comcare has largely failed to impose any penalties on the DIBP for lack of compliance with the WHS Act as far as the ALA is aware* [23]

Recommendation 10: The WHS Act in all jurisdictions to authorise extraterritorial application of the Act, including the ability to obtain records and issue notices outside of the state [as per the June 2017 NSW Statutory Review].

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?

No comment

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?

The limitation of Part 3.1 of the WHS Regulations to only those risks in the Regulations and the omission of "control at source' from the objects of the WHS Act means that inspectorates are restricted in the application of the Hierarchy of Control to emerging or re-emerging risks.

Recommendation 11: insert the following into the objects of the Act – *to eliminate at source, risks to health, safety and welfare of workers and other persons at work.*

[23] https://www.lawyersalliance.com.au/documents/item/583 accessed 29/03/2018

Heat - The current approach by regulations and regulators to the prevention of heat related ill health is failing workers and workplaces. In 2016 the Queensland Coroner recommended adoption of an industry code of practice. SWA and regulators have responded with Guidance[24]!

With climate change the incidence of heat related ill health will increase. It is a deadly exposure -eg 13 workers died due to heat exposure (5 in QLD) between 2005 –2014. Every summer heat wave workplaces struggle with how to deal with hot climatic conditions. The AMWU publications and social media posts on working in hot climatic conditions are one of our most read and popular.

Any regulation to prevent heat related illness should be modelled on the Regulation to prevent musculoskeletal disorders

Recommendation 12: Adopt a WHS Regulation for the Prevention of Heat related ill health. The regulation should use the same approach as Regs 60 &61.

Recommendation 13: Adopt a WHS Regulation on the Prevention of Occupational Violence [see ACTU submission]

Biological Hazards-Model WHS regulations are silent on infectious risks eg legionella and animal borne diseases. This is one area where workplace parties often do not understand the jurisdictional arrangements ie legionella is covered by Health Regulations. The Regulations could be broad and ensure that, were applicable, PCBUs are required to make available vaccinations – similar to the Health Monitoring Regulations.

Recommendation 14: Adopt a WHS Regulation on Biological Hazards

Due Diligence - As argued by Professor Johnstone and Michael Tooma in submission 258[25] to the Model WHS regulations there is a need for a Regulation and supporting Code of Practice regarding Due Diligence

> *10. While the definition represents a codification of the current judicial interpretation of due diligence, no additional guidance is provided in relation to that duty in the regulations or in a code of practice.*
>
> *11. If the purpose of regulations is to identify critical components of the general duties imposed by the Act to ensure that those matters are addressed by duty holders as a minimum requirement of compliance with their legal obligations, shouldn't officers receive similar guidance?*
>
> *14. In that context, one might expect that the regulations would specify that in exercising due diligence, an officer with financial responsibilities must have regard to:*
> *(1) the allocation of resources to projects having regard to the size, complexity and risks associated with projects;*
> *(2) the allocation of resources to preventative maintenance of plant and equipment;*
> *(3) the allocation of resources to training of workers; and*
> *(4) the allocation of resources to verify the effectiveness of the system.*

[24] Inquest into the death of Glenn Richard NEWPORT, 2013/166, John Hutton, Coroner, 20th April 2016

[25] Submission 258 Model WHS Regulations, Johnstone and Tooma 8 March 2011

20. In that context, the regulations should impose an obligation for the collection of proactive information regarding the effectiveness of the system – that is, positive performance indicators. A code of practice should be developed on reporting of health and safety performance to assist industry with consistent definition of positive performance indicators.

21. Finally the due diligence obligation contains a requirement in relation to verification of implementation of the system and legal compliance. One would expect regulations to provide for officers who advise in relation to legal compliance matters to take into account a number of facts when instituting processes to verify legal compliance as part of their due diligence obligation. Some of those factors may include:

(1) nature and type of licenses requires
(2) reporting obligations.

Recommendation 15: Adopt a WHS Regulation and supporting Code of Practice regarding Due diligence [for in depth discussion see Submission 258 to Model WHS Regulations].

Dusts: The recent recognition of workers suffering from pneumoconiosis and silicosis highlights a significant flaw in the Model Laws. Aside from the Asbestos Regulations, there is no Regulation or Code of Practice that addresses dust hazards.

Exposure to silica dust is prevalent throughout construction and building industries, this includes large infrastructure work such as tunnelling operations. Work by the WA inspectorate reported dust exposures in the laboratories servicing the resource sector and AMWU members have been exposed in foundries.[26] The emergence of fulminating silicosis in the domestic building workers is particularly confronting.[27]

Additionally there are dusts which cause allergic type response that should also be covered – eg bakers' lung.

Despite various parliamentary inquiries into coal workers pneumoconiosis[28] independent investigations and calls for action from the specialist medical community, there has been no national response.

As discussed in Appendix 2, a regulation is used because:

- there is recognition of the high risk nature of the work: via data on deaths, injury or illness rates or

[26] Occupational Health & Safety > Australian & New Zealand Journal of Health, Safety and Environment > 2016 Volume 32(1)

[27] Hoy et al, Artificial stone-associated silicosis: a rapidly emerging occupational lung disease, Hoy Occup Environ Med 2018; 75:3–5.

[28] For example: Queensland Coal Workers' Pneumoconiosis Select Committee March 2017;

Zosky et al, *Coal workers' pneumoconiosis: an Australian perspective*, MJA 204 (11) j 20 June 2016;

Senate 2016 *Black Lung: "It has buggered my life"*

- there are known and effective risk control measures which met the requirements of the SFARP test ie likelihood and degree of harm are known, there exist suitable and available risk control measures and the cost is not disproportionate to the risk.

These criteria clearly apply to certain dust exposures.

Recommendation 16: Adopt a Regulation and Code of Practice for the Prevention of Dust Related Lung disease.

Reproductive health, Pregnancy, Breastfeeding, Return to work after giving birth

The AMWU supports the development of a Code of Practice which details the specific workplace health and safety hazards and risks which can arise in relation to reproductive health, pregnancy, breastfeeding mothers and mothers returning to the workplace after giving birth. The Code of Practice should provide information on the reproductive hazards associated with manual tasks, night work, biological agents, and the provision of appropriate facilities and equipment.

There is a need for such a Code of Practice because the current framework does not explicitly deal with the "*pregnant worker*". The pregnant worker is a subset of the range of reproductive, fertility and parenting issues that work may have a negative impact upon:

- Risks to fertility (including those which may also affect men as well as women);
- Risks to the health of pregnant workers (some of which may also affect the foetus);
- Risks to the health of the unborn foetus;
- Risks to children from chemicals transmitted during breastfeeding.

Model Code of Practice dealing with specific hazards have limited references to the pregnant worker e.g.

- Manual Handling refers to *pregnant workers* - page 30
- Managing the Work Environment and Facilities, includes one reference to *workers with any particular needs (for example, pregnant or lactating women)*
- Managing Risks of Hazardous Chemicals when discussing Safety Data Sheets refers to *warnings for pregnant women* but makes no references to the risks from chemical exposures that may be increased for pregnant women i.e. increased ventilation rate and hence increased likelihood of breathing in more of any harmful air borne contaminants.

None of these Codes refer to the circumstances of workers fertility.

In 2002 NSW WorkCover issued guidance information on *Pregnancy and Work.* No equivalent document has been produced under the Model WHS Act processes. It is a useful document and a similar document would be of considerable assistance to workplaces. Even the very general advice provided in this document has not been replicated in Model Codes or Guidance material -- for example Managing Risks of Plant or provision of PPE etc.

In general, pregnant employees should be provided with appropriate equipment and work environments to ensure their health, safety and welfare at work. It is not discriminatory to provide specific rights or privileges for a pregnant employee. Especially towards the end of the pregnancy, adjustments to how work is carried out may be required.

Providing appropriate equipment for employees may mean that specific equipment, such as safety clothing, would need to be provided for a pregnant woman, depending on the circumstances. Well-fitting protective equipment (e.g. face masks and shields, overalls) is necessary for adequate protection against dust, fumes, and spillages. Adjustable equipment, lighting, seating, work benches, can increase flexibility in meeting individual needs. For example, a chair to sit on if her work usually involves standing for long periods and the work can safely be performed while seated. Equipment should take account of the ergonomic requirements, and the state of health, of the person who may use or wear it.

Steps needed to ensure an employee's welfare will vary from workplace to workplace, and according to the type of work carried out, the number of employees, and what is feasible under the circumstances. It could include seating, access to clean and private toilet and other facilities, running water, drinking water, adequate rest breaks, and/or access to a refrigerator for storage of expressed breast milk.

Anti Discrimination laws allow for discrimination if the inherent requirements of the job cannot be met. Unfortunately sometimes the inherent requirements are viewed as immovable and unable to be adjusted to the "worker". There are actually very few circumstances where the job cannot be redesigned, even in the short term, to accommodate the pregnant worker.

Recommendation 17: Adoption of a WHS Code of practice – Reproductive health, Pregnancy, Breastfeeding, Return to work after giving birth.

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?

> *"Unfortunately, Australia is a global pacesetter when it comes to reliance on non-standard working arrangements"*[29].

The WHS laws were developed so that the "changing nature of work and employment arrangements" was addressed. The AMWU considers that overall the framework is adequate and this view is supported by legal experts such as Professors Forsyth[30] and Johnstone[31] .

Underhill and Quinlan have proposed a model to explain the phenomenon of poorer outcomes for insecure workers: "pressures, disorganisation and regulatory failure". [32]

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[29] Ibid, ACTU submission page 11 and The Conversation *Precarious employment is rising rapidly among men: new research,* April 13 2018

[30] Forsyth A, Victorian Inquiry into the Labour Hire Industry and Insecure Work, Final Report August 2016, Recommendations 5&6

[31] Johnstone R, Regulating Occupational Health and Safety for Contingent and Precarious Workers: The Proposed Australian 'Primary' Duty of Care, National Research Centre for OHS Regulation, August 2009
Johnstone R et al, Protective Legal Regulation for home based workers in Australia textile clothing and footwear supply chains< J Ind Relations 2015, Vol 57(4) 585-603
Johnstone R, Regulating Health and safety in "Vertically Disintegrated" Work Arrangements: the example of supply chains, The Evolving Project of Labour Law, Chapter 9, 2017

[32] Underhill E & Quinlan M, *Improving the effectiveness of OHS regulation in the Australian labour hire sector* International Symposium on Regulating OHS for Precarious Workers, Deakin University, Melbourne, June 2011

Effort/ Reward Pressures	Dis organization	Regulatory Failure	Spill-over Effects
Insecure jobs (fear o losing job)	Short tenure, inexperience	Poor knowledge of legal rights, obligations	Extra tasks, workload shifting
Contingent, irregula payment	Poor induction, training & supervision	Limited access to OHS, workers comp rights	Eroded pay, security, entitlements
Long or irregular work hours	Ineffective procedures & communication	Fractured or dispute legal obligations	Eroded work quality, public health
Multiple jobs (may work for sever employers)	Ineffective OHS Management systems / inabilit to organise	Non-compliance & regulator oversight (stretched resources	Work-life conflict

AMWU members experience is varied regarding H&S protections afforded to casual and labour hire workers. In 2015, as part of our evidence gathering for FWC Case[33], the AMWU distributed on line survey to AMWU health and safety representatives. The were 156 responses with 92% from workplaces where casuals/labour hire were employed [target workplaces for the survey]

- Thirty seven percent of respondents indicated that casual/labour hire workers did not receive the same training as permanent workers and 16% were unsure. 76% were provided with appropriate safety gear or personal protective gear, with 13% of respondents unsure.
- Casual/labour hire workers were reluctant to speak up or report health and safety issues – 39% answered no and 22% sometimes
- 70% of respondents did not notice any difference in the pressures on casual/labour hire workers but 25% specified issues associated with different pressures between workers
- Over one third of respondents, 38%, answered that workers had to be 100% fit before they could return to work [also relevant to Recommendation]

In summary: insecure work is a health and safety risk in itself – there is an increased risk of injury, more severe injuries and workers experience greater difficulties in returning to work post injury. It is of upmost importance that these workers are protected by WHS laws.

The terms of reference for the Review into occupational health and safety laws referred to the changing nature of work which includes supply chains – of goods, services and labour.

33 Matter No: AM2014/196 and 197 *Fair Work Act 2009 Section 156 - 4 yearly review of modern awards (Manufacturing and Associated Industries and Occupations Award 2010 and Ors., Sally Taylor, AMWU. Para 119*

The AMWU understood that the Model Laws addressed the issue of provision of legal duties along supply chains. Johnstone [34] carefully outlines the salient features of Part 2 of the Model WHS Act ie

- there does not have to be a contractual relationship between the PCBU and the worker, for a duty to be owed to the worker
- PCBU will owe s19 duty to all workers below them in the chain
- A duty cannot be transferred – s14
- s 46 establishes a horizontal duty to consult
- s 47 establishes a vertical duty to consult.

Disturbingly, this interpretation does not appear to be fully supported by regulators [35] or SWA agency[36]. The former cite the difficulties in procuring evidence to support enforcement activity and the later judge that Section 19(1) is unlikely to incur a duty on a PCBU to workers down a supply chain or that work performed by workers of a PCBU further down a supply chain is work 'carried out as part of' the principal PCBU.

Recommendation 18: The review clarify that PCBUs at the head of the supply chain be required to identify all those working along the supply chain in order to eliminate or minimise the risk to health and safety. Additionally the review clarifies that the duties to consult along the supply chain, apply vertically and horizontally.

Consultation and Cooperation for insecure labour arrangements
Further to the above, there is little to indicate what compliance looks like for duty holders across or down supply chains. The Code of Practice How to Consult on Work Health and Safety refers to contractors and on hire workers [Para 4.4] and some general advice [Para 1.1]. There is no explanation of the requirements as outlined by Johnstone[37], that might provide guidance to a PCBU in relation to the duty to 'others' and to workers down the supply chain. Johnstone and Tooma in their submission to Model WHS Regulations provided clear suggestions on what should and could be included.

Recommendation 19: Adopt a Code of Practice to assist duty holders to identify the major WHS problems associated with each type of working relationship eg labour hire.

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

Based on the following section of an article by Richard Johnstone, the AMWU recommends amendment of Section 5.4

> *while it is clear the intention of the National Review that a contractor or subcontractor in a contractual chain can be a worker and be owed a duty by all PCBUs further up the chain, and at the same time be a PCBU and owe duties to those further down the chain, the clumsy drafting of Section 5.4 has failed to express the intention clearly.*

[34] Johnstone R, Regulating Health and safety in "Vertically Disintegrated" Work Arrangements: the example of supply chains, The Evolving Project of Labour Law, Chapter 9, 2017
[35] Private communications 2017/8
[36] Email 02/05/2017
[37] Ibid pages 135-136

We argue the courts should interpret Section 5.4 to exclude from the definition of PCBU "workers" who are natural persons , who are 'solely' working within the PCBUs organisation and who do not operate a business [for example, a contractor] 'in their own right'. Section 5.4 should be redrafted at the earliest opportunity to capture the intention of the National Review and clearly put the issue beyond doubt.

Recommendation 20: Amend Section 5.4 to replace 'person' with 'individual'.

Interpretation of PCBUs duties

The general duty of care applies to all workers and focus on the "*work or workplace"* rather than a focus on an individual worker. Unfortunately there is an increasing tendency to require "*workers to be fit for purpose*" rather than the work being "*fit for the worker".*

Injured or ill workers, whether work related on non work related, are increasingly being caught in an interpretation by PCBUs that a worker must be *"risk free"* to ensure the PCBU fulfils their duty of care. The objects of Model WHS Act refer to the protection of workers health and safety through the elimination or minimisation of risks *arising from the work*. General duties are prefaced by, so far as reasonably practicable [for PCBUs] and reasonable care [for workers]. Neither of these duties implies explicitly or implicitly that a human being can be "*risk free*".

The AMWU is regularly required to advice workers regarding their rights when a PCBU has claimed that:

- *We can't let her/him work here --- we have a duty of care*
- *She/he is injured …we have a duty of care*
- *She/he is not fully fit for work, not 100% fit… we have a duty of care*
- *She/he has to see our doctor…….we have a duty of care.*

The excuse of not being able to meet a "duty of care" is a legitimate method of discrimination. The article "Blue Collar Blues" draws attention to practices which the AMWU knows are common, especially in Queensland[38]. The inherent requirements of the job include being able to repeatedly carry weights up stairs to be deemed fit for work.

In many parts of Australia blue collar middle aged men, who due to the nature of their work are likely to have experience past injury – "……. a lot of companies don't want to touch you because you are know to have injuries…'[39]

Workers in these circumstances are placed under considerable pressures which lead to attendance at non private medical appointments and the disclosure of private, irrelevant medical information.

The emergence of new technology easily facilitates surveillance and tracking of workers, including the collection of personal and private information and images, including information relating to worker health, fitness and wellbeing.

AMWU supports the following broad principles in relation to the collection of workers personal and private information by PCBUs or third parties:

[38] Ibid page 34
[39] Blue Collar Blues AFR March 29- April2 2018, pages 34-35

- Informed consent
- limiting the collection of information
- providing notice to workers about the potential collection, use and disclosure of personal information
- disclosing personal information
- keeping personal information accurate, complete and up-to-date
- keeping personal information secure
- providing access to personal information.

Reference: The Australian Privacy Principles (APPs), which are contained in schedule 1 of the Privacy Act 1988

Recommendation 21: Amend the Model WHS Act to provide workers the same protection that citizens are afforded under health privacy legislation. Where a worker's private information is collected it must not be used to the detriment of the worker. Information to be kept for 12 months only.

Transfer of duties to workers

Despite the legal framework, Australian PCBUs persistent in transferring, at the work site level, the responsibility for health and safety onto those least able to change or control work eg individual workers, independent contractors. In distinct contrast to a safe work, safe place approach, PCBUs continue with safe worker approach. This is rarely challenged by inspectorates and as far as the AMWU is aware no regulator has used its compliance powers to challenge the popularisation of this interpretation of the law.

This poster was viewed in 2018 which, not so subtly, informs workers they need to take active measures to control risks- the "hazard managers"!

The AMWU is unware of any occasion when a duty holder has been required to remove misleading information or training materials that distort the duties of care under the Model laws. As Section 14 is in Division 1 Part 2 it is not covered by Sections 30 to 33. Section 14 is a duty not a principle and therefore a breach needs a penalty attached. Where is incentive to encourage compliance with Section 14? This is incredibly important with labour hire, long supply chains, franchises etc.

Recommendation 22: A penalty must apply for a breach of Section 14, therefore move section 14 to Division 2.

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

The AMWU disputes the current usage of SFARP in the Regulations and Codes of Practice. See comment reverse onus and Appendix 2.

It is not unusual for SFARP to be reduced to an issue of cost or as justification for the use of lower order controls eg over reliance on gloves and glasses. That then sets up the scenario so the PCBU invokes section 28 and uses the alleged breach as evidence for disciplinary action. For example:

> *During the repair of faulty machinery one worker suffered crush and tendon injuries. Despite the investigation showing systemic problems with lack of training, conflicting SOPs and lack of full risk assessment on the recently introduced plant, two workers, one the online supervisor, were issued with first and final warnings*.[40]

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

Section 27 of the WHS Act is supported. **See Recommendation 15 – Code of Practice Due Diligence**

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?

The definition of worker is sufficient. The AMWU does not have any examples where the definition has caused difficulties, except for concerns that those who work in the gig economy are not covered by the Model laws.

Recommendation 23: Define gig economy workers as a prescribed class of worker under section 7.

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

To determine if Section 28.d has been breached evidence is required to show that the policy or procedure has been notified to workers.

The underlying assumption in this section is that workers "control work". In the context of insecure work/gig economy this section is likely to be used to water down the obligations of a PCBU eg the person is hired to do a task, using a long contract that includes some details about health and safety. The worker will be in breach if the worker has not "read the fine print".

These comments from AMWU HSRs April 2018 are relevant:

[40] Workplace details can be provided on request

- *Limited consultation from management on safety policy and procedure*
- *There's seems to be less incentive for employers to apply commitment to decent safety standards, expecting workers to take onus on completing or just relying on the workers comp system to deal with any issues when injury occurs*
- *The laws need to empower workers and protect them and not reflect big business model*
- *I find that most people in my workplace don't want to create waves so they don't get involved*
- *Using safety as a form of discipline*
- *Workers feeling pressure to not work safety due to workloads*
- *Health & Safety can become a scapegoat when management don't want to handle something.*

The AMWU continues to support the Victorian OHS Act 2004 section 25 as the appropriate duty for workers ie delete section 28 (d).

Section 84 Worker right to cease unsafe work:
Given the obligation [an obligation which is supported] on workers to "take reasonable care that his or her acts or omissions do not reasonably affect the health and safety of other persons", it is incongruous that workers do not have the right to refuse to carry out work that would expose others to imminent and serious risk. A worker can be in breach of section 28 if they fail to cease work that is imminently dangerous to others.

Recommendation 24:
Adopt Victorian OHS 2004 s.25 as the appropriate duty for workers ie delete section 28 (d).

Section 84 insert "of others persons" after would expose the workers.

Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?

This provision is strongly supported, especially given the diversity of employment arrangements and numbers of persons who have interactions with worksites and work processes – service economy etc.

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

Our industries still maim a disproportionate number of workers (see introduction). The risks faced are well known. For example, in the April 2018 survey of HSRs, the most common health and safety issues identified:

- Most Common: Manual handling, machinery safety including lockout procedures etc., chemicals, working heights, general workplace conditions and facilities, management attitudes;
- Next most common: heat, traffic management, noise, dust, lack training.

This is consistent with issues raised in training conducted by the AMWU and in surveys conducted 10- 20 years ago.

Importantly in our industries, solutions, that met the SFARP test, are generally available. As stated by a HSR to April 2018 –

- *Have issued a PIN in Height Safety and then the company set about going around in circles to provide a solution. And in the end I organised the solution.*

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?

Compliance with these provisions is very patchy. PCBUs need to articulate why they fail to adhere to the law and regulators need to articulate why they view this part of the law as unnecessary to be enforced. Given the clear evidence that consultation and representation improves health and safety outcomes, it is totally inexcusable that regulators view these parts of the Model Laws as optional.

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?

The AMWU strongly supports the consultation, representation and participation provisions of the WHS Act. It can never been underestimated the value of the role of **HSR in improving the lives of themselves and others** – many of our HSR witness that a safe workplace is also more productive.

The text and examples below show that AMWU HSRs have a sophisticated and proactive approach to improving health and safety. The Model laws require some amendments to encourage and facilitate an extension of these behaviours and attitudes to more workplaces.

HSRs, as elected representatives for their work group, are an expression of workforce participation. As a member organisation the AMWU provides resources and assistance to members and HSRs. HSRs are a component of the structural and process voice that is greatly facilitated by being a member of an industrial organisation[41] .

The AMWU has dedicated personnel who conduct training of HSRs. Union delegates and organisers provide advice and where required workplace support to HSR and consequently to PCBUs as our contribution to improving work health and safety. The AMWU publishes fact sheets, H&S booklet, quarterly H&S newsletter, telephone HelpDesk and regular social media bulletins.

The AMWU National HSR committee has deliberated on effective health and safety representation and workforce participation. The deliberation occurred prior to this Review even being discussed. Their thoughts and advice are extremely positive, hopeful and instructive. For example:

Some PCBUs representatives at the work site level:

- don't actually know the law as well as a trained HSR
- try to move responsibility onto individuals

[41] https://www.fwc.gov.au/documents/awrs/employee-voice-and-organisational-performance.pdf

- in some cases deal with health and safety issues as disciplinary issues
- are adept at communicating with complacent rather than knowledgeable workers and HSR
- In contrast, PCBUs that actively engages workers and HSR around H&S issues have better health and safety and are more productive.

Active HSRs can and do create good relationship with their employer. In these worksites employers actively discuss H&S with HSRs, the union and members. The key ingredients for HSR successes include:

Understanding the Role of Health and Safety Rep:

- want to improve H&S
- use the Act to improve H&S
- successful HSR are a benefit for employers – safer more productive work
- essential that HSR are active – HSR elected by the members voted in for a reason
- essential that PCBU provide adequate paid time for HSR to conduct work inspections and investigations.

Health and Safety Rep Training:

- essential good information and in depth understanding of the law
- need for HSR to attend union approved HSR training
- need to have workgroup behind HSR – many ways to create awareness amongst workforce
- HSRs are here elected to represent the H&S interests of the work group/ that message is essential in the training of HSRs
- essential that HSR attend refresher training for re-motivation and reconnecting with other HSRs
- need for succession planning and new HSRs
- RTOs varying quality – some very thorough, others poor cursory training that avoid discussion of the rights and powers of HSR.

HSR need to engage with workforce – as they are elected from workforce.

- Ensuring that HSRs are elected by a fair and transparent mechanisms
- Many ways to achieve e.g. regular meetings of members on H&S /talking the workgroups when issuing PINs/ having members attend Health and Safety Committee meetings as guest /HSR report back on tasks for H&S Committees.
- HSR to take in witness when talking with PCBU.

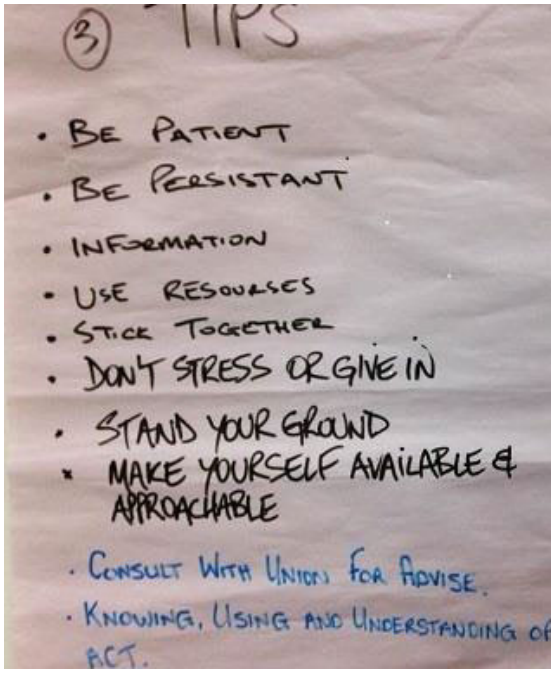
HSR need to build relationships with their PCBU. This may require persistence and/or use of powers available to HSRs. Often trained HSR needs to educate management and encourage them to recognise the benefits of good communication and consultation.

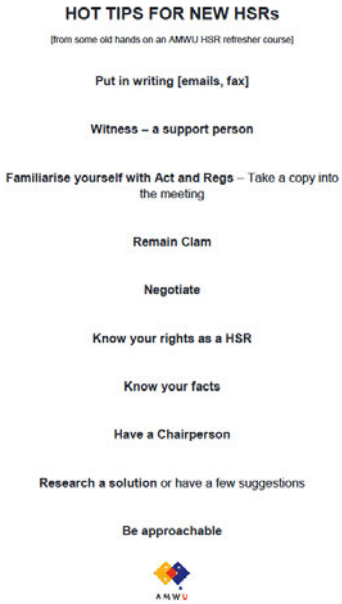
Workers can be disengaged and HSR can help address this by reinforcing with PCBUs that:

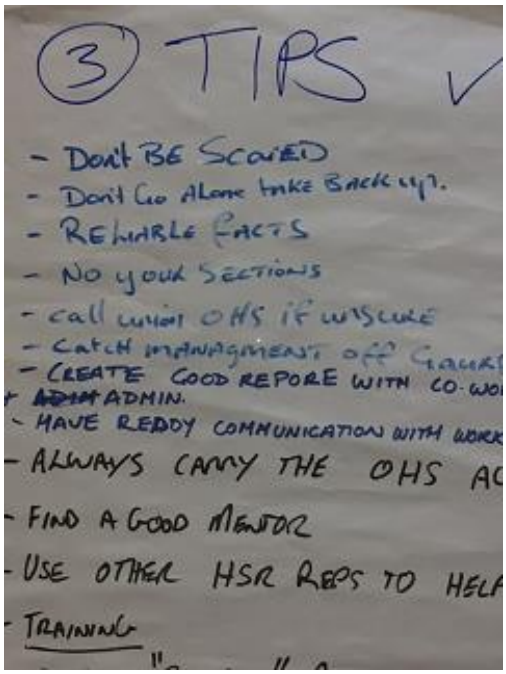
- all information is distributed to workers on the floor
- improving the communicating information - mtg minutes, tool box talks, pictorial messaging very important e.g. posters
- involvement of workers in drafting JSAs/SWPs
- ensuring that workers are not asked to sign off JSAs etc. without being involved
- providing regular forums where workers able to relate their safety concerns
- building relationships with management -- scheduling of meetings with management, meetings to include HSRs.

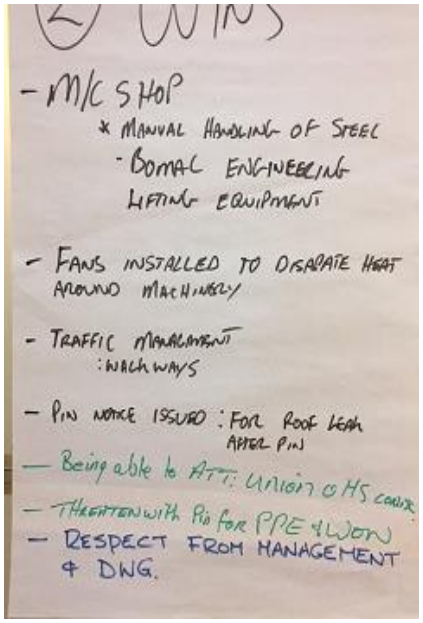
Government Health and Safety Inspectors need to enforce consultation, especially companies that are repeat offenders – inspectors must be independent.

Our experienced HSRs provide advice on how to be an effective HSR









The challenges and the joys of being elected to the role of HSR

HSRs have existed in AMWU workshops, in varying numbers, for decades -- these two statements from AMWU HSR are testament to the wonderful work our elected representatives commit to every day:

HSR 1

I am the health and safety representative for mechanical services work group at Company X. I have been doing this for six years, I would strongly urge that any review does not remove any powers that Health and Safety representatives have and the reasoning behind this submission is that I believe that the reason behind this act is for the employees and employer to work together through negotiation and discussion to provide the best possible health and safety in their respective workplaces.

In my opinion the people who set up the law and its regulations have done so in this manner to equalise any differences (whether they be real or not) during these negotiations. Also that the law recognises that Health and Safety representatives will require advise and support from others outside their workplace, training and flexibility in their workplace to carry out these duties.

I also firmly believe that a safe workplace is also more productive and a couple of achievements that have occurred here through such negotiations is that now all mechanical personal are qualified dogmen and that the equipment and processes that we as a group developed have not only reduced injuries but have improved production change overs and reduced downtime. We have also developed equipment and processes on all our production lines, all have resulted in product and cost improvements. This did not happen here until the employer knew that they had to negotiate in good faith with someone who was prepared to act by using the law and regulations as they stand. Previously equipment was acquired without consultation which resulted in injuries.

In my time as Health and Safety representative here the hardest things I have had to do is issuing provisional improvement notices and cease works. The stress that this creates on someone who is the sole income for their family such as myself is enormous and it is the fact that the law equalises the two parties in negotiations and that the results benefit all, makes it possible for me to be a Health and Safety representative.

HSR 2

Changing a culture using the Act took years and a lot of skill and patience. As required in a step by step process. I managed to get the employer to manage their H&S responsibilities in the workplace improving the standard of H&S for every employee. After training I had to get myself educated enough to be competent and using laws and regulations and all the guidance books and codes as applicable to my workplace, consultation was important. It was a real education process bringing about the change for all employees for the better. It meant learning what the law was in relation to what the issue was to be addressed and applying that law in a reasonable way so the employer would then understand that if it meant preventing injury and disease including psychological injury.

It certainly wasn't a straight forward process there was a lot of resistance. But it did work and the employer/ management reps and supervisors got themselves educated so they could better understand the benefit for the business and its employees, the ripple effects were rewarding for all employees, empowering.

The principles of health and safety protection - all these laws helped to raise the bar in H&S in the workplace, example asbestos, plant, consultation , employees feeling safe to raise issues, knowing that hazards raised can get fixed, bullying, smoking, policies, education and training, procedures, drug & alcohol manual handling, cranes, better PPE, risk assessment, workplace inspections, depression, getting systems working, safe systems of work, resolving issues smoothly and timely, OH&S works, the laws in the Act and the Regs work. I hope this helps this very important issue

HSR survey 2018

HSRs were notified, by email, of a survey the AMWU was conducting. We had a response rate of 24%.

The survey was disaggregated into Victorian HSRs and those covered by the Model Laws – Western Australian HSRs were not surveyed.

The most important health and safety issues reported by HSRs was similar across both groups: manual handling, machine safety, general workplace conditions and facilities [eg rough floor surfaces, slips, job procedures, hygiene], chemicals, working from heights, management attitudes; the next most common were dust, noise, training, traffic managements and heat.

A common and persistent refrain from workers and HSRs is the lack of expertise amongst managers and others. The following observation, which the union movement has been hearing for decades, has been ignored and dismissed by many policy makers and regulators. [See question 25 for further discussion]

- *I think managers' need to do a mandatory ohs course because they never seem to be on the same page* [42]

There was a diversity of comment regarding management attitudes:

Proactive H&S approach:

- *It's satisfying when management is generally on the same page. Something gets done!*
- *Management has been corroborating with discussions and solving Safety issues Can take my problems to the company safe team to have fixed in some cases*
- *XXXX as an employer have very good safety standards and processes for developing safety.to the point that they have just implemented 1/4ly meeting for all HSR's across all sites to get together and discuss a wide variety of issues. Having said that, as a maintenance crew, we are still vigilant to ensure the standards stay high.. not just for us but all XXXX employees including production, office staff, on site contractors etc.*
- *We always try to work within the framework of our company, and seek resolution of issues without the need to resort to the issuing of PIN's. Unfortunately, this can lead to longer timeframes than we would like, but these issues are generally of a low impact nature*

[42] AMWU HSR in 2018 Survey

- *Worked with the safety person at work, some things got done via safety meetings when they weren't cancelled.*

Minimal compliance approach:

- *Improved respect and open communication between management and employees, with a genuine desire to resolve or prevent safety issues would be a ongoing desire to keep our workplaces safe , not just a tick the box approach to cover themselves legally*
- *I have sought advice from WH&S Qld website & AMWU. Health & Safety can become a scapegoat when management don't want to handle something.*
- *I have just stepped down from rep because I felt management only needed me there as a number or show.*
- *Limited consultation from management on safety policy and procedure*
- *Safety advisors on my site rarely take notice of HSR it seems to be a waste of time having us.*

The majority of both groups reported being respected by management in their role as a HSR – 78% and 76% respectively felt "somewhat to very supported" by management. However this does leave around 1 in 5 HSRs feeling unsupported.

Differences were reported with regards to compliance with consultation requirements:
Model Law HSRs reported a 10% lower satisfaction with management's preparedness to take into account views of workers and HSRs and before making decisions that impact on health and safety. There was a similar difference when asked whether they as a HSR felt harassed or intimidated by management.

Rights of HSR:
The Victorian Act does not limit the rights of HSRs to issues PINs or Cease works. The union movement has consistently noted that there is no evidence to support the limitation of this right**.** From our survey it is clear that Victorian managers are much more receptive to taking action after a cease work or PIN has been issued – nearly 100% had fixed the problem vs 70% in Model laws states. This suggests that the issue is not the HSR but rather the attitude of management. See Recommendation below

Forty percent of Model law HSRs had *not* been able to exercise their right of choose for HSR training course. This was three times the number of Victorian HSRs who had not been given the right to choose. The reasons given included:

Been set for us
Company booked us in with one as soon as possible
company found a cheaper one
Company organised
Company organized
Company picked it they don't like unions
Council picked. And told me where to go
Directed to that one
Employer organised & took first available from our union
Employer organised the course.
I don't think it matters who delivers the training
I was placed on the course by the company

it was a standard week long course and I am new
It was chosen by the employer
it was organised
It was organised by my employer
Management questioned why you would want to do union course and argued criteria is the same
My employer use the same training contactor for all employees

These survey results, in conjunction with the everyday exchanges at workplaces between HSRs and their management are strong evidence that amendment of the Model laws is required.

Recommendation 25:
AMWU reaffirms our previous proposals regarding the Act and Regulations:

- **HSR right to issue PIN and direct a cease work** for imminently unsafe work to apply from the date of election to the role of HSR
- **the right of HSRs to choice of training provider on the condition that at least 14 days notice is given to the relevant PCBU** of attendance at an approved course and the ability for the regulator to assist in any disagreement about the attendance at an approved course [a right which exists in Victoria and throughout the vehicle industry for decades]
- **adopt the South Australian approach to HSR training - 5 days training in the first year, 3 days training in the second year and 2 days training in the 3rd year of their 3 year tenure.**

Recommendation 26: as per AMWU submissions to the Model Panel and WRMC:

- **remove the reference to Entry Permit holders in Section 71[4].** The incorporation of this provision was opposed as it confuses the right of assistance to a Health and Safety Representative with the right of workers to request for an investigation or consult with their union about WHS matters
- **remove the right of the regulator to make application for disqualification of a HSR -** HSRs should not be subject to ambiguous requirements which discourage them from exercising their powers to improve health and safety at the workplace
- **remove the words 'improper purpose' from section 65 and replaced with "intent to cause harm".**

The Model Review discussion paper does not mention Health and Safety Committees. There are a number of shortcomings and inconsistencies in the Model Laws when applied to Section 76. Currently, if there is no HSR, workers negotiating the establishment of a health and safety committee have no access to support or representation.

Some PCBUs have been manipulating Health and Safety Committees to ensure that the Committee functions as an extension of management rather than a consultative structure:

- conducting phoney elections for H&S committees and calling those elected "worker committee members" – who have no standing or powers under the Model laws
- committee members also rarely receive any training, even on the basic principle's of the legal framework
- removal of H&S committee members because the member witnessed a safety incident and did not act to prevent it [this is contrary to the decision of Justice Murphy in of the Federal Court AMWU v Visy Pty Ltd (3) [2013] FCA 526]

- regular cancellation of meetings without rescheduling.

Recommendation 27: move Section 52.5 to the head of Part 5, thus allowing workers the right of access to a worker representative during the

- **Negotiation of work groups**
- **Negotiation of consultation arrangements**
- **Procedures for election of HSRs**
- **Establishment of H&S Committees.**

Recommendation 28: Amend Sections 76 and 79 to require

- **PCBUs to facilitate attendance at H&S committees –** this is of particular relevance to shift workers, workers working off site
- **H&S committee meeting cannot be cancelled or postponed without a reasonable excuse** – failure to provide a reasonable excuse the PCBU be liable to a fine of 100 penalty units.

Recommendation 29: Amend WHS Regulations to include a provision for the Minimum requirements for the constitution of a committee such as functions, timing of meetings, processes, chair and minutes.

Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

Occupational health and safety research links insecure work with poor safety and negative impacts on the short and long term health of workers. The mechanisms for this relationship are multifactorial and complex. [43]

> *Also, precarious employees suffer adverse health effects through the action of material or social deprivation and hazardous work environments. Thus, the experience of various kinds of precarious jobs and the insecurity and vulnerability associated with them is likely to be associated to more hazardous working conditions and to higher income inequality.*
> *For example, temporary employees are exposed to hazardous working conditions, work more often in painful and tiring positions, are more exposed to intense noise, perform more frequent repetitive movements, have less freedom to choose when to take personal leave and are far less likely to be represented on health and safety committees.*
> *A systematic review of studies of temporary employment and health suggests that temporary workers suffer from a higher risk of occupational injuries compared with permanent employees.*[44]

As the Model Laws are currently drafted, the right to be represented in predicated on the ability to negotiate a work group. If the worker(s) are not able to form a work group eg transient workforce, changing work site or employer arrangements. This means that one of the basic tenets of good health and safety performance, representation is increasingly being denied to various classes of workers.

[43] See figures 1 and 2 in Employment Conditions and Health Inequalities Final Report to the WHO Commission on Social Determinants of Health (CSDH) Employment Conditions Knowledge Network (EMCONET). Benach, J, Muntaner,C, & Santana, V. (Chairs) September 2007
[44] Ibid Executive Summary

Representation cannot be limited to those with the ability to negotiate work groups. There needs to be a variety of forms of representation available that do not undermine the basic principles of the Model Laws.

It is not uncommon for labour hire workers[45] and other non permanent workers to be excluded from the consultation and representation provisions of the Model Laws. To the AMWUs knowledge there has never been a prosecution and it is an uphill battle to get a regulator to consider enforcement activity for breaches of Part 5 of the Model Laws.

The basic principles of the Model laws are sound -- consultation, participation and representation. What needs to occur is application across all forms of employment through amendment and broadening of the methods where these basic requirements are delivered.

To address this there needs to be:

- Consistent application of the provisions within the Model Laws, including through the strategic use of enforcement and compliance activity by regulators
- Adoption of methods used overseas such as industry, regional or roving health and safety representatives
- Extension of industry concepts such as check inspectors found in Australian Mining[46] - the findings of the Walters are particularly pertinent - *"Overall, the study highlights the positive role representatives and unions can play in health and safety even in hostile labour relations climates"*
- Extension of initiatives such as the Queensland Labour Hire Licensing Act 2017 to all jurisdictions. The Queensland Act establishes a mandatory labour hire licensing scheme to protect labour hire workers and promote the integrity of the labour hire industry. All Regulators need to develop strategic compliance activity which supports and Labour Hire licencing regimes.
- Amendment of EPH provisions to allow for permit holders to order immediately unsafe work cease. At workplaces where there are no trained HSRs the advice provided by EPH often is ignored putting those workers at risk of harm.

Roving Health and Safety Representatives:
The introduction of roving or industry representatives would address the following problems

- lack of WHS skill levels in small and medium enterprises or where mobile workforce – HSR would be required to have Certificate VI in OHS
- many argue there is a lack of education of workers and others, regional/roving HSRs have been shown in other countries to be very useful educators[47]
- Roving HSRs provide a measure of protection for workers who are concerned for future job prospects, unwilling or unable to raise health and safety issues with their PCBU. These types of workers will be able to raise with a qualified , experienced advisor who can then raise the matters with the PCBU
- Roving HSRs also create options for PCBUs that doesn't require interaction with a regulator.

[45] Labour hire inquiries in Victoria, Queensland and South Australia all noted difficulties for labour hire workers. As a result legislative changes have been introduced.
[46] Walters et al, Safeguarding Workers: A Study of Health and Safety Representatives in the Queensland Coalmining Industry, 1990-2013, Ind Relations Quarterly Review, 71-3, 2016
[47] Kai Frick

Provisions could be made along the following lines:

These H&S Reps will be know as Roving Health and Safety Representatives and as such will have access to the workplace, for the purposes of investigating and following up H&S issues raised by workers:

(a) Roving Health and Safety Representatives shall be allowed to visit, inspect and consult with workers and PCBUS in workplaces in the geographical or industrial sector
(b) The primary role of the Roving Health and Safety Representatives is to (i)promote greater consultation on Health and Safety including the election of H&S Reps and the establishment of Health and Safety Committees, (ii) improve the health and safety knowledge of PCBUs and workers, (iii) to act as a visiting H&S Rep to inspect, investigate and make recommendations for workplace change for health and safety benefits.
(c) Roving Health and Safety Representative shall have (i) the same functions and rights as a Health and Safety Representative, as defined in Part 5 of the WHS Act (ii) at least three years experience in the industry and(iii) have completed HSRs training (iv) shall submit an oral report at the time of the visit and a written report to the PCBU and workers at the workplace, within seven days of the visit.
(e) management and others at the workplace, shall afford every assistance and facility to the Roving Health and Safety Representative.

Or alternatively replicate the powers available in Check inspectors in the mining industry as a model. Check inspectors have stood the test of time, since 1938.

Recommendation 30: Adopt of facilitative provisions in WHS Act for Roving health and safety representatives: see detailed proposal above.

Recommendation 31: Regulators take a much more proactive and strategic approach to enforcement and compliance along supply chains.

Labour hire is particularly prevalent in our industries. Labour hire arrangements are appropriate in many circumstances eg maintenance shut downs. But the widespread usage of labour hire arrangements has effectively seen the contracting out of general duty of care by host PCBUs and a transfer of costs to those at a lower level in the supply chain.

At sites where "seasonal" or "temporary" employment arrangements are made directly between the employer and workers; these workers get guaranteed access to relevant training and competency required for the job. The host PCBU is not cost shifting.

Recommendation 32: Labour hire needs to be defined as high risk work which would require introduction of provision of training that is funded by the host PCBU.

Recommendation 33: Amend section 273 to outlaw the placing of a levy on prospective workers and move this Section to Division 2 or Part 2.

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?

Participation in workplace consultative arrangements is difficult for insecure workers for a variety of reasons:

- *Workers concerned about their job security often do not speak up about health and safety issues as they may be unlikely to get another placement, their work can be terminated easily and they may not be familiar with the reporting arrangements on site*
- *Workers who are not always at the work site are forgotten about or not included in consultative arrangements i.e. election of H&S Reps, representation on H&S Committees or direct consultation with the employer. In labour hire, the triangulation between host and direct employer muddies the chains of responsibilities. In work with large seasonal component, the consultative structures may include only the permanent workers: the large variation and temporary nature of the workforce makes it more difficult and time consuming to involve temporary workers.*
- *Culture of creating and maintaining divisions between categories of workers e.g. contractors, labour hire, temporary workers. Informal reporting mechanisms only function when workers know each other or are familiar with each other's concerns.*
- *Workers may be less knowledgeable about their rights to participate in health and safety. An understanding of health and safety rights is one of the benefits of union membership. In our experience non-unionised workers are often uninformed about the health and safety rights, the solutions to risks and the processes that can be utilised to improve working conditions.*

Workers may well be jeopardising their employment or their visa conditions. AMWU HSRs made these comments about the difficulties faced by casual workers [AMWU HSR Survey 2015]

- *They don't want to rock the boat and not have the contract extended*
- *The pressure is that they are looking for permanent work security and when the contract done they are dismissed*
- *A lot of casuals feel they need to be very flexible to be able to keep their positions*
- *If casuals don't do as they are told they don't get asked back. It is common for contractors to say "they will move us on", "if I rock the boat I will be out of here"*
- *The precarious nature of their employment makes them hesitant to report issues*
- *The threat 'your time is limited" is rarely applied to permanent workforces, for a casual worker, it's every time you speak up. Labour hire and casual positions are destroying a lot of workplaces. A fear tactic is rampant in most of these places especially now that there isn't a great deal of work around*
- *we have a large turn over of casual labour hire staff because they don't get offered full time employment and some have been casual for many years but work over 40 hours w*
- *we are to afraid to say anything against the company for fear of not getting any wo*
- *many feel insecure about their future and are afraid to complain about things in general*
- *if raise health and safety issues will most likely not get any more work*

As noted above these difficulties are not insurmountable with a suite of initiatives to improve access to support and representation for insecure workers.

See Recommendations for Section 118; Roving HSRs; Codes of Practice for Consultation requirements for PCBUs – both horizontally and vertically; Code of Practice for Labour Hire; and strategic engagement with labour hire licencing arrangements.

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

The AMWU supports the issue resolution procedures. They are a fair and proper method for the resolution of WHS matters where consultation has failed.

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?

As far as the AMWU is aware, no regulator has bought any prosecutions related to Part 6 despite having been notified of numerous potential breaches. In this void the AMWU supports the ability of Unions to bring both criminal and civil matters which arise from contraventions of this part

> *HSR issued a PIN, dismissed directly after issuing the PIN, the regulator was contacted in relation to a potential breach Part 6[48], the inspector attended and said "there is nothing we can do" and walked away*

Recommendation 34: amend Part 6 to allow unions to bring both criminal and civil matters.

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

The right of union officials to enter workplaces for reasons of health and safety has existed in NSW since 1996, Victoria since 2004 and prior to the WHS Act in Queensland, NT and ACT. In Western Australia the OSH Act of 1984 is recognised in the 1979 IR Act.

According to AMWU records there has been no revocation or application to revoke an AMWU official's entry permit for reasons of breach of a WHS/OHS permit. At any one time the AMWU has around 140 officials with right of entry permits.

It has been our officials' experience that health and safety risks are identified and controlled as a result of their visits and discussions with PCBUs. In fact, after initially "feeling a bit put out" managers are often happy to get free H&S advice. Many managers prefer the union official to a government inspector.

It is also of considerable importance to note that Federal Court Judge Justice Murphy found in AMWU v Visy Pty Ltd (3) [2013] FCA 526 that an employees rights or duties under the OHS act, as an employee or health and safety representative, are workplace rights under the Fair Work Act [section 340]. Justice Murphy [para 168] said:

> *"The OHS Act plainly contemplates that a health and safety representative may have a different view from the employer as to the appropriate resolution of a particular health and safety issue.* ***The right to advocate such a different view is an important workplace***

[48] Details of the workplace available on request

> ***right and the dialogue it promotes serves an important occupational health and safety function****. In my opinion, actions taken by a health and safety representative in asserting a particular position on a health and safety issue should not lightly be treated as constituting uncooperative or obstructive conduct."*

For insecure workers the ability to exercise their rights under Model Laws is extremely difficult – workers may well be jeopardising their employment or for some their visa conditions. For example AMWU HSRs comments re the difficulties faced by casual workers:

- *They don't want to rock the boat and not have the contract extended*
- *The pressure is that they are looking for permanent work security and when the contract done they are dismissed*
- *A lot of casuals feel they need to be very flexible to be able to keep their positions*
- *If casuals don't do as they are told they don't get asked back. It is common for contractors to say "they will move us on", "if I rock the boat I will be out of here"*
- *The precarious nature of their employment makes them hesitant to report issues*
- *The threat 'your time is limited" is rarely applied to permanent workforces, for a casual worker, it's every time you speak up. Labour hire and casual positions are destroying a lot of workplaces. A fear tactic is rampant in most of these places especially now that there isn't a great deal of work around*
- *we have a large turn over of casual labour hire staff because they don't get offered full time employment and some have been casual for many years but work over 40 hours we are to afraid to say anything against the company for fear of not getting any wo*
- *many feel insecure about their future and are afraid to complain about things in general*
- *if raise health and safety issues will most likely not get any more work.*

As insecure work is a recognised risk to health and safety and an impediment to speaking up, the AMWU supports amendment of the WHS Act and regulations which would allow Union officials to direct cessation of work which poses an immediate or imminent risk to workers. The Entry Permit Holder would be required to raise the issue directly with the relevant PCBU(s) and have the right to call on an inspector to assist in minimising any outstanding health and safety risks.

The Commonwealth WHS Act recognises EPH issued by other jurisdictions. All Model laws need the same provision.

> *WHS entry permit means a WHS entry permit issued under Part 7 or the equivalent Part of a corresponding WHS law.*
> *Corresponding WHS law means each of the following:*
> *(a) the Work Health and Safety Act 2011 of New South Wales;*
> *(b) the Work Health and Safety Act 2011 of Victoria;*
> *(c) the Work Health and Safety Act 2011 of Queensland;*
> *(d) the Work Health and Safety Act 2011 of Western Australia;*
> *(e) the Work Health and Safety Act 2011 of South Australia;*
> *(f) the Work Health and Safety Act 2011 of Tasmania;*
> *(g) the Work Health and Safety Act 2011 of the Australian Capital Territory;*
> *(h) the Work Health and Safety Act 2011 of the Northern Territory;*
> *(i) any other law of a State or Territory prescribed by the regulations.*

Recommendation 35: Amend the Model WHS Act to adopt Section 4 WHS EPH in the Commonwealth WHS Act 2011.

Provision of documents to EPH: Section 118.1.d is interpreted by NSW Regulator[49] in the following way:-

> *Section 118 of the WHS Act 2011 relevantly states the following: -* ***While at the workplace*** *under this Division…….*
>
> *Consequently, your right to request to view and to make copies of documents is therefore restricted to, when you are at the workplace and does not extend to requesting production of documents at a later date.*

This is cumbersome and places unnecessary burdens on all parties when PCBUs can be afforded the opportunity to plan and manage the collection and provisions of data and documents. At the same time this frees up the resources of the Entry Permit Holder.

The AMWU supports the recommendation of Johnstone[50] that Section 117 be amended to enable a permit holder who has lawfully entered a workplace under another law to remain on the premises to investigate a contravention of the WHS Act. See ACTU submission [51]

Recommendation 36: as part of a suite of changes include:

- **Amend Section 118 to include ability of the EPH to direct a cessation of work which poses an immediate or imminent risk to workers including a requirement to notify relevant PCBUs and the WHS inspectorate**
- **Amend Section 117 to enable a permit holder who has lawfully entered a workplace under another law to remain on the premises to investigate a contravention of the WHS laws**
- **Amend Section 118.1.d allows an EPH to require a PCBU to send relevant information or documents electronically or other means by a set date following a request.**

Unions have consistently argued for the right of unions to prosecute. As outlined in paras 211 to 222 of the ACTU Submission to the National Review into Model Occupational Health and Safety laws this right lead to positive changes in NSW.

> *217. The necessity for including an independent right for trade unions to prosecute offences under occupational health and safety legislation is underlined by the marked inconsistency in prosecution practices between jurisdictions. There are remarkable disparities in the number of prosecutions commenced in the various States.102 These disparities cannot be accounted for by differences in rates of workplace injury and reveal an aversion to prosecution on the part of authorities in some States.103 A right for trade unions to commence prosecutions operates as an important supplement to address circumstances in which regulators are unwilling to prosecute contraventions of occupational health and safety legislation.*

[49] Email advice to AMWU on 13/12/2016 at 5.09pm
[50] Johnstone R, *Legal Construction of Key Sections of the Model Work Health and Safety Act,* National Research Centre for Occupational Health and Safety Regulation, June 2016
[51] also CFMEU v Bechtel Construction (Australia) Pty Lt6f [2013] FCA 667 at [34]

> *218. The experience in New South Wales has been that the capacity of unions to commence prosecutions under occupational health and safety legislation has worked well and has enabled prosecutions to occur in circumstances in which regulators have been unable or unwilling to prosecute.*
> *In particular, trade unions have been able to assist in bringing cases that aid the development of the law relating to occupational health and safety to recognise emerging areas of concern such an psychological injuries, repetitive strain injuries and the commission of criminal acts in the workplace.*

The situation has not changed. The inclusion of union right to prosecute would enhance the enforcement and compliance pyramid by making it "taller". [52]

The rate of prosecutions has declined in all jurisdictions and the evidence, which appears to be ignored by regulators that enforcement activity leads to changed behaviour, the need for the right of unions to prosecute is greater.

The AMWU supports amendment of Sections 230 and 260 in the following manner

Insert into Section 230 Prosecutions

1. (c) A union which is concerned in the matter to which the proceedings relate

Section 260 Proceeding may be brought ~~by the regulator or an inspector~~

Proceedings for a contravention of a WHS civil penalty provision may only be brought by:

(c) A union

Recommendation 37 –amend Sections 230 and 260 to allow for unions to bring both criminal and civil matters.

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

Considerable literature exists which provide options for the removal of barriers to engaging with SMEs. For example Cowley and Else[53] listed the following barriers:

- limited development in the area of safety management
- limited access to external health and safety resources and
- infrequent inspection
- preoccupation with economic survival to consider OHS a significant issue and are more inclined to take risks due to tighter economic pressures
- information vacuum" and many small businesses act on the basis of personal experience and information obtained through personal contacts
- lack of information not only influences the likelihood that an employer will control risk, but it also influences the *level* of control that will be applied.

[52] Ibid Johnstone SWA

[53] The application of a social marketing model to increase the uptake of OHS risk control measures by small business , Stephen Cowley & Dennis Else, University of Ballarat

Small business has difficulties with the risk management approach due to a lack of a systemic approach to prevention. Small business tends to view compliance as matter of individual responsibility using a safe person framework. Regular reports note that small business respond to direct, personal and verbal advice from respected peers or independent sources of information.

Thus far Australian regulators have been timid when considering innovative approaches to "proactively" encourage prevention. Most regulators provide some ad hoc services, information via websites, seminars and workplace visits which are accessible but not required. There is no overarching and consistent approach to address the lack of training and skills of SMEs or micro businesses. As noted by an AMWU HSR in 2018 survey:

> *I think managers' need to do a mandatory ohs course because they never seem to be on the same page*

There is no reason why approaches such as the following could not work in Australia:

- Danish requirements for training of SMEs i.e mandatory training of five days per year and then 1.5 annually, the content of which is decided by the SME themselves; the provision of very specific sector advice and a starter kit is provided to all new enterprises.
- In South Korea due to a limited capability of government to deal with increasing numbers vulnerable workers and small enterprises in 2012 the government in collaboration with universities, established free medical services at 5 centres for SMEs; using government funds to provide online education for foreman and providing financial assistance to improve the work environment.[54]

Recommendation 38: insert a requirement that PCBUs to have access to suitably qualified advice on health and safety matters which includes training for senior managers in any sixe PCBU. Additionally all regulators and policy makers must address the skill shortage and lack of sectoral assistance available to enterprises – large, small and micro.

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?

> ***We need to focus on shifting the regulator from <u>the hug and pat</u> approach to actual real workplace audits and Inspectors having the gumption to take action.***
> ***Inspectors need to cause PCBUs to stop and think that better safety will not only save money but may well produce benefits like fewer hurt workers.[55]***

About the same number of respondents to 2018 AMWU [56]survey in Victoria and Model Law jurisdictions had sought assistance from an Inspector – about 40%.

However, 27% of HSRs under the Model laws judged the inspectors' response as not at all or only slightly helpful. This contrasts with 11% of Victorian HSRs.

[54] Presentations form respective government representatives at ASEM Conference Singapore 2012
[55] Electronic communication from AMWU official, February 2018
[56] ibid

Comments included:

- *The Company I work for is a self insurer; they need to much more proactive in Health and Safety. It's a constant struggle to get basic things fixed. They are not a small business but a very large one. Safework NSW doesn't enforce health and Safety laws. There have been no fines issued for some very serious breaches. I believe inspectors have constraints on them. We have been lucky no one has been killed. It a falls back on a few volunteers to push the workers complaint it's a struggle it would be much worse if what right's we do have a stripped back any further*
- *Comcare are under staffed. They are generally only interested in assisting if very serious issues. Anything about procedure or complying with the Act Comcare will let slide, they only act after serious incidents occur.*
- *We are still looking for assistance with working in cold minus 30 degrees conditions*
- *I have little confidence in our regulator at present, and the current xxxx managements way of dealing with issues*
- *To ask inspector for help would be to get myself in a very precarious position*
- *They once came because my manager was not happy how we voted for HSR within our group. We had to revote with the same result. He did not want me to take on that role. Inspector did not help me*
- *Had to call on numerous occasions for advice! Always (except for once) calls were anonymous. Was told by superiors that it's on my head if I call Inspector for advice as we were told to do in our training. Management then said you must have heard wrong!! I've been safety officer and emergency response on shutdowns prior to this job. I have demonic managers and supervisors*
- *Would be good if inspector meet with HSR when on sight.*

The last comment is one heard regularly – inspectorates apparently find it difficult to be compliant with Section 164.2.c of the Act.

There are consistent concerns raised about how inspectorates perform their tasks; for example

- the inability to observe and act on risks that are outside of the original reason for the visit eg walking past electrical leads in water whilst inspecting a site following a finger amputation
- breaching worker confidentiality with a PCBU – a worker makes an anonymous inquiry to the inspectorate, the inspectorate then phones the site to inform the PCBU about consultation thus breaching the request for anonymity
- don't follow up at a workplace if the complaint is anonymous

No-one will speak up in these circumstances – the message is clear to everyone on the site – not even the inspector has your back.

Policy makers and regulators must understand that even in workplaces where there is strong managerial commitment to prevention, including openness to feedback from workers, there can be an underlying reluctance to raise or report issues. The AMWU has members in numbers of these types of workplaces. These sites are characterised by strong managerial commitment and active HSRs who raise issues on behalf of their work group members. Reluctance to report directly to managers is not an issue as workers have a trusted conduit. These sites have very good health and safety performance.

AMWU members/HSRs have never expected that the inspectorate would always agree with their assessment of risks – however HSRs do expect to be heard, to be respected and for regulators to appreciate that sometimes taking on the role of a representative can be detrimental to their personal circumstances. HSRs play a vital role and the basic protection of the laws must be afforded to them.

Regulators need to improve their strategic enforcement activity to ensure that maximum impact is obtained.

> *Inspectors should then focus their WHS inspection and enforcement strategy on the companies (and their officers) that affect (i) how markets operate and (ii) the incentives shaping compliance. The key provisions here are the PCBUs' primary duty, the officers' duty, and the duty to consult, cooperate and coordinate.*
> *Inspectors can use the various enforcement tools discussed earlier in this chapter to craft comprehensive agreements that, for example, get the commitment of the lead businesses at the top of the supply chain to:*
>
> - *cascade WHS information down through the chain;*
> - *require information (about which workers are working in which activities,*
> - *and where) to be sent up the chain to them from PCBUs lower in*
> - *the chain;*
> - *require systematic WHS management to be implemented throughout*
> - *the chain;*
> - *conduct audits of systematic WHS management measures lower in*
> - *the chain;*
> - *require firms lower in the chain to conduct audits of PCBUs below them; and*
> - *train all workers.* [57]

AMWU workplaces have experienced difficulties with the inspectorate failing to understand or take action according to the Model laws.

- A HSR issued a PIN, the PCBU did not comply or seek a review from the Regulator within 7 days, the HSR notified the regulator of breach of Section 99 but the inspector still cancelled the PIN without jurisdiction
- Inspectors have cancelled PINs, HSR taken the issue to internal review which has supported the applicant ie supported the HSR, but following that there was no action taken by the regulator to either reinstate the PIN or effect the decision under Section 224.

There is nothing in the WHS Laws to compel the regulator to follow their own recommendations that come out of internal review.

Recommendation 39:

- **amend to require regulator complies with recommendation from internal review**
- **Inspectors ensure that their activities are in compliance with the Act**
- **Inspectors must actively support and interact with HSRs**

[57] Johnstone R. Regulating Health and Safety in 'Vertically Disintegrated' Work Arrangements: The Example of Supply Chains, Chapter 9 The Evolving Project of Labour Law

- **Amend section 164 to require an inspector to issue their written report of a visit to and HSRs**
- **Amend Section 165 to clarify that inspectors powers can be used outside of the workplace and aren't dependent 'on entry' to the workplace**
- **Amend Part 12 Division 2 to compel the regulator to take action to address issues raised in and decisions from internal review [pending that there is no external review]**
- **Amend section 226 to provide for a direction when the regulator has erred**
- **Regulators adopt a strategic approach to enforcement activity by targeting those PCBUs that influence supply chain behaviours.**

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effective?

The Model laws must allow for review of decisions. The inclusion of such provisions is strongly supported.

However, the processes and forms that regulators have created are complex; these bodies do not assist those making an application. The AMWU very willingly assists members but a worker representative is not included in the list of eligible persons.

Recommendation 40:
Expand the definition of eligible person in Section 223 to include workers representative for all items except 5 and 6.

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

No comment

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

It is very difficult to comment here, as Regulators aren't generally not open or transparent about cooperative relationships between regulators. In the past some state based consultative groups received reports about cross border campaigns and projects such as Regulators in Harmony. That level of transparency is a thing of the past.

The AMWU strongly supports regulators taking a more active and strategic approach; some jurisdictions would benefit greatly such cooperation and learning eg Comcare.

Recommendation 41: HOWSA must be transparent and include the social partners.

Question 30: Have you any comments on the incident notification provisions?

With the introduction of the Model Laws the NSW OHS Regulations 2001 were superseded. The AMWU supports the reinstatement of that incident notification regulation, with some additions

All of the proposed amendments relate to significant risks to work or public health:

- robbery with risk of serious injury and/or use of threatened use of a weapon
- serious assault and serious threats including and exposure to trauma
- treatment as an inpatient
- off work for continuous 7 days
- exposure to prohibited or carcinogenic substance
- risk blood borne diseases.

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?

Regulators hug and pat approach

From our experience and on examination of trend in prosecutions are examined over the last decade, Australian regulators have been strongly influenced by the lower order of control approach - educate, talk, provide advice but very reluctant to move further up the pyramid.

Refer to ACTU submission

In 2016 the Victorian Government commissioned a review of the Victorian Compliance & Enforcement Policy[58]. Some of the recommendations and analysis can equally be applied to the National Compliance & Enforcement Policy and the AMWU refers this Review to these sections of the Report:

- Page 56 comment by E. Bluff
- Page 76: comment by VACC - the AMWU supports the observation that the National C&E policy fails to provide adequate guidance on the tools available
- Page 83: comment by Ai Group re the inadequacy of claims data for targeted enforcement and compliance
- Page 89: observation of lack of evidence re formal evaluation of effective interventions – this is applicable across all jurisdictions -
- Page 105: public consultations highlighted the lack of enforcement actions regarding consultation. Consultation is an important principle of the Model laws but as far as the AMWU is aware there has never been any enforcement action taken by regulators
- Page 106: Ai Group submission noting the importance of genuine consultation when inspectors visit workplaces
- Page 115: despite manual handling being at the top of claims data yet The Victorian Review found that manual handling did not feature in the top 5 most commonly issued notices by the inspectorate – the Victorian regulator is “in step” with other regulators!

[58] Independent Review of Occupational Health and safety Compliance and Enforcement in Victoria, November 2016

- Page 118: the HSE has Topic Inspection Packs, inspector checklists and compliance checklists. All regulators need to take this approach

Recommendation 42: The NECP and the approach of Regulators needs considerable revision with particular attention to Victorian Review Recommendations 4, 7, 9, 10, 13 and 14. All Regulators must take heed of the following *"an effective regulator will look at processes for targeting and triaging, with review and reflection and target prosecutions relating risk, not just based on fatalities' or serious injuries"*[59].

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

See above and below

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?

The advice from regulatory experts strongly suggests that the current penalties available are way short of optimum levels:

> *Ten years ago in a book of essays, John Braithwaite discussed restorative justice in health and safety and talked about restorative justice playing at the bottom of the enforcement pyramid and at the top you have significant mega penalties, and the kinds of penalties he was talking about were penalties of $100 million dollars for contraventions, but major discounts where a firm had a robust approach to systematic health and safety management. So, when we talk about large penalties at the top, we are talking about significantly greater penalties than we currently find in the health and safety legislation.*[60]

Any cursory look at the level of penalties imposed for breaches indicates that there is a continued problem of Courts failing to understand the importance of penalties in this area, as a mechanism to improving performance across sectors and industries. Selected random examples:

- injured worker received traumatic brain injury and three skull fractures, and was in a coma for four days. He has ongoing medical and psychological difficulties. --Fine was 10% of maximum penalty.
- worker sustained injury, including skull, cheek and vertebral fracture and a brain bleed – Fine 4% of maximum penalty
- the worker had difficulty connecting the hydraulic lines and in attempting to connect the final line he inadvertently struck the remote leaver causing the crane to quickly rotate towards him, pinning him against the stabiliser leg, causing fatal crush injuries.—Fine 12% of maximum penalties
- a worker was seriously injured at a construction site when he fell approximately 3-4 metres through an unguarded stairwell void. – Fine $75,000
- worker suffered serious injuries when he fell approximately 3.8 metres while installing roof sheeting on a roof of a workshop.- Fine $62,000

[59] Ibid Page 124
[60] Ibid Johnstone SWA

The current penalty regimes and the level of fines issued do not reflect community values. For example, in NSW the average cost per speeding fine increased by over 53% from 2010 to 2014, rising from $151 to $231. Currently exceed speed over 10 km/h incurs a $269 fine. For a person on a salary of average weekly earnings of about $1,500 per week, such a fine is 17% of gross weekly earnings. How many of the above fines were 17% of turnover of the duty holder?

Additionally, all of the above were related to "well known" hazards [nothing new and emerging about falls from heights] where the solutions are well known, available and suitable. Such a low levels of penalty make a mockery of a "tall enforcement pyramid".

The pyramid has been completely absent for musculoskeletal, psychological or work related cancers – when there are no sanctions ever applied at the top, it is logical that there is little participation in cooperative compliance at the bottom.

In a recent address Mr. Rod Sims of the ACCC[61] noted that how fine structures send a bigger message to smaller businesses than larger business.

> *Put simply: large businesses should bear penalties which are commensurate to their size, in order to achieve specific and general deterrence. Making this happen is a huge priority and challenge for the ACCC in 2018.*

The AMWU notes that this problem is not isolated to the ACCC. Most of the fines levied in current WHS prosecutions would make no impact on the profit loss statements of large PCBUs.

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

The AMWU considers that prosecutions for offences under the WHS Acts should be heard in specialist courts having expertise and experience in dealing with WHS and industrial regulation.

The history of prosecutions in various Australian and overseas jurisdictions can be characterised by an ongoing battle to ensure that such offences are treated with the seriousness they deserve The conferral of jurisdiction to hear prosecution under health & safety legislation upon the general criminal courts has undermined these efforts.

The approach and procedures of the general criminal courts a less suited to the determination of offences involving systemic failures and liability of corporate entities.

Proceedings in specialist courts are likely to be significantly faster and less costly than criminal court proceedings. The use of specialist courts benefits all persons involved in the proceedings.

The recent in changes in Queensland are supported.

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

Sentencing Guidelines are supported: these are imperative to educate the judiciary.

[61] Mr Rod Sims, Chairman, Conference: CEDA, Sydney 20 February 2018

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

Enforceable undertakings must never be used when there has been a fatality or serious injury, unless agreed to by the relevant worker or workers family in the case of a deceased worker.

The AMWU supports Recommendation 37 from the 2017 Queensland Review and draws attention to the Australian Law Reform Commissions specific recommendations as to the required terms of the EU. [62]

Recommendation 43: If the regulator is considering an Enforceable Undertaking, the family of the deceased or the injured worker must be consulted prior to a decision being made; if consent is not given then the Regulator must go to prosecution. Clarify in the *Guidelines for the acceptance of an enforceable undertaking* the general exceptions and definition of 'serious injury'.

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

The WHS Act needs to adopt the approach taken by the NZ Health and Safety at Work Act 2015.

> *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.*

Recommendation 44: Amend Model Laws to prohibit insurance against fines, based on the New Zealand 2015 Act – see Recommendation 47 of the 2017 Queensland Review.

ADDITIONAL COMMENT
ILO Convention 155, to which Australia is a signatory, consistently refers to most representative organisations of employers and workers. The application of this principle is ignored by some jurisdictions and as a result leaves Australia in potential breach of the Convention.

[62] Ibid, Victorian Review, page 67

The AMWU strongly supports the establishment and implementation of peak H&S consultative bodies, with representatives from employer and worker organisations. As outlined in our submission to the National Review into Model OHS laws the AMWU considers that one of the best models for such bodies was the SafeWork SA Advisory Committee under **the original** South Australia Work Health and Safety Act 2012, Schedule 2—Local tripartite consultation arrangements Part 1—The SafeWork SA Advisory Council – historical version 1.1.2013 to 26.6.2013.

Recommendation 45:
All jurisdictions establish consultative bodies based on the SafeWork SA Advisory Council Schedule 2 of the original 2012 South Australia WHS Act.

Recommendations from SWA Commissioned Research - National Research Centre for Occupational Health and Safety Regulation.

Safe Work Australia commissioned work in 2015 to examine how the Model Laws were being implemented. Unfortunately for some projects it was too early as there were limited cases available for review.

The AMWU does not have the expertise or time to critically review the currency of the Reports from the National Research Centre for Occupational Health and Safety Regulation and some of the jurisdictional behaviour has changed since 2015-16.

Recommendation 46
The SWA commissioned research made numerous suggestions – the AMWU supports the following which have not been discussed in the body of our submission:

- Recos 1, 4 6 - *Legal Construction of Key Sections of the Model WHS Act* – June 2016
- Recos: 1, 2, 3 & 4 - *Sentencing of Work Health and Safety Offenders* – June 2016. Given the importance of this Report and the Review of the Model Laws needs to commission an update, prior to making any decisions regarding sentencing guidelines, interpretation of key duties in the Model Laws and that
- All jurisdictions required to respond to all of the Recommendations of *Regulator Compliance Support, Inspection and Enforcement*, July 2015 in an effort to clarify the current approach of regulators, which as observed in these papers is not always transparent or publically available. The AMWU notes that previous projects such as Regulators in Harmony appear to be "past news" and the "closed door" approach of HOWSA means that those who are being regulated are "locked out".

Recommendation 47: see Appendix 2 for changes to WHS Regulations

"We must never accept that injury, illness, or death is the cost of doing business. Workers are the backbone of our economy, and no one's prosperity should come at the expense of their safety. Today, let us celebrate our workers by upholding their basic right to clock out and return home at the end of each shift."[63]

[63] Proclamation Workers Memorial Day, 28th April 2014, President Obama USA

AMWU Recommendations

Recommendation 1
Introduce "reverse onus" approach in the Model WHS laws.

Recommendation 2
Adopt industrial manslaughter legislation.
Insert "negligence" to Section 31.1 for Category One offences. For a full discussion of this Recommendation se ACTU Submission and the 2017 Queensland Review.

Recommendation 3:
Delete WHS Regulations 32 and 33, to ensure that risk management applies to all work related risks, and is not limited to those in the WHS Regulations.

Recommendation 4:
Adopt new Section 26A Queensland Work Health and Safety and Other Legislation Amendment Act 2017.

Recommendation 5:
WHS Act to require a mandatory review of each Code of Practice in operation every five years.

Recommendation 6:
Remove *so far as reasonably practicable in WHS Regulations and Codes of Practice* and use the Victorian approach to language within Compliance Codes.

Recommendation 7:
Insert into Section 19(3) addition to (a) – *including the risks to psychological health.* This then creates a clear head of power for the adoption of a Regulation and accompanying Codes of practice for various risks to psychological health*: s*.

Recommendation 8:
Develop a new regulation and supporting codes of practice to address psychosocial hazards, which must include an obligation on PCBUs to assess and control psychosocial hazards.

Recommendation 9:
The WHS Act in all jurisdictions to authorise extraterritorial application of the Act, including the ability to obtain records and issue notices outside of the state [as per the June 2017 NSW Statutory Review].

Recommendation 10:
The WHS Act in all jurisdictions to authorise extraterritorial application of the Act, including the ability to obtain records and issue notices outside of the state [as per the June 2017 NSW Statutory Review].

Recommendation 11:
Insert the following into the objects of the Act – *to eliminate at source, risks to health safety and welfare of workers and other persons at work and recommendation at Question 2.*

Recommendation 12:
Adopt a WHS Regulation for the Prevention of Heat related ill health. The regulation should use the same approach as Regs 60 &61.

Recommendation 13:
Adopt a WHS Regulation on the Prevention of Occupational Violence [see ACTU submission].

Recommendation 14:
Adopt a WHS Regulation and supporting Code of Practice regarding Due diligence [for in depth discussion see Submission 258 to Model WHS Regulations].

Recommendation 15:
Adopt a WHS Regulation on Biological Hazards

Recommendation 16:
Adopt a WHS Code of practice – Reproductive health, Pregnancy, Breastfeeding, Return to work after giving birth.

Recommendation 17:
The review clarify that PCBUs at the head of the supply chain be required to identify those working along the supply chain in order to eliminate or minimise, so far as reasonably practicable, risk to health and safety. Additionally the review clarifies that the duties to consult along the supply chain, apply vertically and horizontally.

Recommendation 18:
Adopt a Code of Practice to assist duty holders to identify the major WHS problems associated with each type of working relationship eg labour hire.

Recommendation 19:
Amend the Model WHS Act to provide workers the same protection that citizens are afforded under health privacy legislation, except when required by workers compensation law or a court order. Where a worker's private information is collected it must not be used to the detriment of the worker.

Recommendation 20:
Amend Section 5.4 to replace 'person' with 'individual'.

Recommendation 21:
Amend the Model WHS Act to provide workers the same protection that citizens are afforded under health privacy legislation. Where a worker's private information is collected it must not be used to the detriment of the worker. Information to be kept for 12 months only.

Recommendation 22:
A penalty must apply for a breach of Section 14, therefore move section 14 to Division 2.

Recommendation 23:
Gig economy workers be a prescribed class of worker under section 7.

Recommendation 24:
Adopt Victorian OHS 2004 s.25 as the appropriate duty for workers ie delete section 28 (d).
Section 84 insert "of others persons" after would expose the workers.

Recommendation 20:
AMWU reaffirms our previous proposals regarding amendment of the Act and Regulations:

- Amend the Act so that HSR right to issue PIN and direct a cease work for imminently unsafe work to apply from the date of election to the role of HSR
- Amend the Act to ensure the right of HSRs to choice of training provider on the condition that at least 14 days notice is given to their PCBU of attendance at an approved course and the ability for the regulator to assist in any disagreement about the attendance at an approved course [a right which exists in Victoria and throughout the vehicle industry for decades]
- Amend the Regulations to ensure HSR to have the right to 5 days training in the first year, 3 days training in the second year and 2 days training in the 3rd year of their 3 year tenure.

Recommendation 25:
AMWU reaffirms our previous proposals regarding the Act and Regulations:

- HSR right to issue PIN and direct a cease work for imminently unsafe work to apply from the date of election to the role of HSR
- the right of HSRs to choice of training provider on the condition that at least 14 days notice is given to the relevant PCBU of attendance at an approved course and the ability for the regulator to assist in any disagreement about the attendance at an approved course [a right which exists in Victoria and throughout the vehicle industry for decades]
- adopt the South Australian approach to HSR - 5 days training in the first year, 3 days training in the second year and 2 days training in the 3rd year of their 3 year tenure.

Recommendation 26: as per AMWU submissions to the Model Panel and WRMC:

- remove the reference to Entry Permit holders in Section 71[4]. The incorporation of this provision was opposed as it confuses the right of assistance to a Health and Safety Representative with the right of workers to request for an investigation or consult with their union about WHS matters
- remove the right of the regulator to make application for disqualification of a HSR - HSRs should not be subject to ambiguous requirements which discourage them from exercising their powers to improve health and safety at the workplace
- Remove the words 'improper purpose' from section 65 and replaced with "intent to cause harm".

Recommendation 27:
Move Section 52.5 to the head of Part 5, thus allowing workers the right of access to a worker representative during the

- Negotiation of work groups
- Negotiation of consultation arrangements
- Procedures for election of HSRs
- Establishment of H&S Committees.

Recommendation 28: Amend Sections 76 & 79 to require

- PCBUs to facilitate attendance at H&S committees – this is of particular relevance to shift workers, workers working off site
- H&S committee meeting cannot be cancelled or postponed without a reasonable excuse – failure to provide a reasonable excuse the PCBU be liable to a fine of 100 penalty units.

Recommendation 29:
Amend WHS Regulations to include a provision for the Minimum requirements for the constitution of a committee such as functions, timing of meetings, processes, chair and minutes.

Recommendation 30:
Adopt facilitative provisions in WHS Act for Roving health and safety representatives.

Recommendation 31:
Regulators take a much more proactive and strategic approach to enforcement and compliance along supply chains.

Recommendation 32:
Labour hire needs to be defined as high risk work which would require introduction of provision of training that is funded by the host PCBU.

Recommendation 33:
Amend section 273 to outlaw the placing of a levy on prospective workers and move this Section to Division 2 or Part 2.

Recommendation 34:
Amend Part 6 to allow unions to bring both criminal and civil matters.

Recommendation 35:
Amend the Model WHS Act to adopt Section 4 WHS EPH in the Commonwealth WHS Act 2011.

Recommendation 36: as part of a suite of changes include:

- Amend Section 118 to include ability of the EPH to direct a cessation of work which poses an immediate or imminent risk to workers including a requirement to notify relevant PCBUs and the WHS inspectorate
- Amend Section 117 to enable a permit holder who has lawfully entered a workplace under another law to remain on the premises to investigate a contravention of the WHS laws
- Amend Section 118.1.d allows an EPH to require a PCBU to send relevant information or documents electronically or other means by a set date following a request.

Recommendation 37:
Amend Sections 230 and 260 to allow for unions to bring both criminal and civil matters**.**

Recommendation 38:
Insert a requirement that PCBUs to have access to suitably qualified advice on health and safety matters which includes training for senior managers in any sixe PCBU. Additionally all regulators and policy makers must address the skill shortage and lack of sectoral assistance available to enterprises – large, small and micro.

Recommendation 39:

- Amend Model Laws to require regulator complies with recommendation from internal review
- Ensure Inspectors activities are in compliance with the Act
- Inspectors must actively support and interact with HSRs
- Amend section 164 to require an inspector to issue their written report of a visit to and HSRs
- Amend Section 165 to clarify that inspectors powers can be used outside of the workplace and are not dependent 'on entry' to the workplace
- Amend Part 12 Division 2 to compel the regulator to take action to address issues raised in and decisions from internal review [pending that there is no external review]
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Recommendation 42:
The NECP and the approach of Regulators needs considerable revision with particular attention to Victorian Review Recommendations 4, 7, 9, 10, 13 and 14. All Regulators must take heed of the following *"an effective regulator will look at processes for targeting and triaging, with review and reflection and target prosecutions relating risk, not just based on fatalities' or serious injuries"*[64].

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Recommendation 44:
Amend Model Laws to prohibit insurance against fines, based on the New Zealand 2015 Act – see Recommendation 47 of the 2017 Queensland Review.

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All jurisdictions establish consultative bodies based on the SafeWork SA Advisory Council Schedule 2 of the original 2012 South Australia WHS Act.

[64] Ibid Page 124

Recommendation 46

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Recommendation 47:

See Appendix 2 for changes to WHS Regulations.

Appendix 1

Discussion paper – Chapter 2 Setting the Scene

It is disappointing that Chapter 2 of the Discussion paper is such a narrow assessment of health and safety performance.

Serious workers compensation claims data do show a fall in incidence rates but this data is well recognised as a poor indicator of health and safety performance.

Workers compensation data is not even a consistent measure as

- eligibility for workers compensation changes over time[65]
- eligibility and accessibility to workers compensation is not consistent across jurisdictions[66]
- the administration of workers compensation systems is not consistent across jurisdictions
- multiple factors impact on whether a worker accesses workers compensation benefits, for example-SafeWork Australia and other research show that casual workers[those without access to leave entitlements] have a higher incidence rate of injury and are less likely to apply for workers compensation[67]

ISCRR[68] review refers ABS AWRI survey of 2010 discusses the limitations:

> *Between 2006 and 2014, the incidence of work-related injury in Australia declined from 63.6 to 42.6 per 1,000 workers. This suggests that in general, Australian workplaces have become safer over the past decade.*
> *With a national ratio of two WRIs to every workers' compensation claim (1.9 in 2010 and 2.0 in 2014), an estimated one-half of WRIs are covered as a workers' compensation claim. There was substantial variation between jurisdictions. At all points, Victoria recorded the highest ratio at 3.5 WRIs in 2014. This figure was 3.4 in 2010 and 2.6 in 2006. In contrast, for every accepted workers' compensation claim in New South Wales, there were between 1.5 and 1.7 WRIs. This indicates that a smaller proportion of WRIs are accepted into the Victorian workers' compensation scheme than in other states. Queensland had the second highest ratio at 2.4 to 2.6 over the study period. New South Wales (1.5-1.7), Western Australia (1.2-1.7), and South Australia (1.2-1.9) had the lowest ratios.* [Page 17]
> *The impact of changes to legislation affecting access to workers' compensation is also apparent in the data. For example, New South Wales introduced the Workers Compensation Legislation Amendment Act 2012, which mostly came into effect on 19 June 2012 with all changes implemented by 1 January 2013. One impact of this*

[65] ISCRR work related injury and Illness in Australia, 2004 -2014 page 12 – *this finding demonstrates the sensitivity of claims data to changes in workers compensation policy and practice*….
[66] Ibid , page 17 noting that the proportion of work related injuries that become workers compensation claims varies between state – in 2014, 1.5 injuries per claim in NSW but 3.5 injuries per claim in Victoria
[67] SafeWork Australia Media Release 30 July 2012 Higher Injury Rates For Casual Workers; Various publications by Underhill, E, and Quinlan, M; Final Report to the WHO Commission on Social Determinants of Health (CSDH) Employment Conditions Knowledge Network (EMCONET) Joan Benach, Carles Muntaner, Vilma Santana (Chairs), September 2009.
[68] *Work-related injury and illness in Australia, 2004 to 2014 What is the incidence of work-related conditions and their impact on time lost from work by state and territory, age, gender and injury type?* Tyler et al, June 2016 ISCRR Research Report: 118-0616-R02

> *legislation was to limit access to compensation for some workers (Markey, Holley, O'Neill, & Thornthwaite, 2013). The amendment coincided with a 21.5% reduction in claims (n = 26,606) and a 23.6% reduction in incidence (down 9.3 claims per 1,000 covered workers) between 2012 and 2013. This finding demonstrates the sensitivity of claims data to changes in workers' compensation policy and practice, and reinforces arguments that number and incidence of workers' compensation claims are an inaccurate workplace safety (O'Neill et al., 2013)..[page 12]*

Workers compensation data does not capture chronic disease and is a gross underestimation of our most prevalent work related diseases – asbestos related illness.

The prevalence of asbestos related diseases in Australia is particularly instructive in understanding how limited data collection can lead to imprecise analysis. The Global Burden of Disease estimates that in 2016 there were 4,048 deaths related to asbestos exposures -

a. Cancer 3,971 – laryngeal, lung, ovarian and mesothelioma
b. Asbestosis 77
c. 34% of all lung cancer deaths[69].

The changing nature of employment relationships and fragmentation of the labour market these disparities are becoming more important. Insecure workers, eg those working as causal, labour hire, fixed term contracts, in the gig economy , under ABNs, temporary visa workers are less likely to apply for workers compensation and therefore will not be counted in any such statistics. Under employment is a feature of our labour market and it may have a considerable impact on the propensity to apply for workers compensation.

A summary of current trends can be found in the Centre for Future Work submission Senate Select Committee on the Future of Work and Workers[70]. Understanding these demographics is essential for an assessment of the limitations and/or benefits of the structure of and compliance with WHS Laws.

> *Current labour market data provides more insight into the profound insecurity which presently characterizes the world of work in Australia. Figure 1 disaggregates Australia's working age population, based on average data for the year ending in August 2017. There were close to 20 million working-age Australians. An average of over 12 million were employed. That included 2.1 million self-employed individuals: most of whom work in small, often unincorporated businesses with no other employees. These positions are characterised by low and insecure incomes, and do not provide normal entitlements and protections (such as sick and holiday leave or superannuation benefits). On average, 10 million Australians held paying jobs in 2015. But close to one-third of those (3.16 million) were part-time. And of*

[69] GBD, Institute for Health Metrics and Evaluation, University of Washington. Tim Driscoll, ASEA Conference 2017

[70] Submission to: Senate Select Committee on the Future of Work and Workers by Jim Stanford, Ph.D., Economist and Director Centre for Future Work at the Australia Institute January 2018 and https://theconversation.com/precarious-employment-is-rising-rapidly-among-men-new-research

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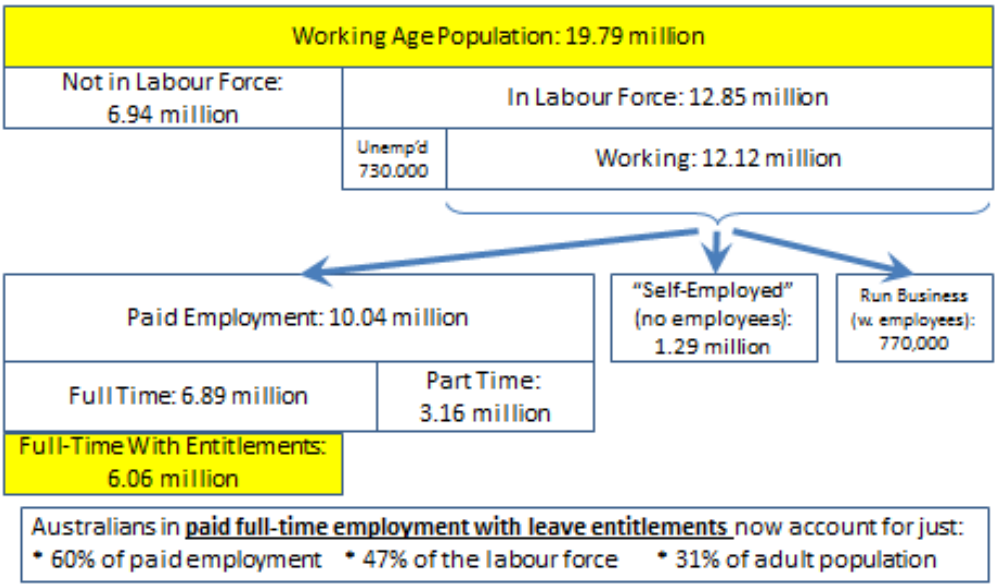
the remaining full-time jobs, over 800,000 had no leave entitlements (for illness, vacation, or family reasons); absence of entitlements generally indicates that a job is casual or temporary.

Figure 1.The Prevalence of Insecure Work



Source: Centre for Future Work from ABS Catalogue 6291.0.55.003 Tables 24a & EQ04.
Twelve-month average data ending August 2017. Some totals do not add due to rounding.
Self-employed incl. unpaid family workers.

Therefore, by the time we reach the bottom of Figure 1, we see that barely 6 million Australians held a paying full-time job with basic entitlements. That represents less than half of the labour force, and less than one-third of the working-age population. So the widespread view that stable, decent work is hard to find in Australia today is fully verified by labour market statistics.

SWA reports recognise the disparity between claiming for workers compensation and work related injury experience[71]. Migrant workers face significant difficulties in applying for and receiving workers compensation

The analysis of the scenarios demonstrates that consistent with the findings of the Senate Report, the entitlements of migrant workers or their dependants to workers' compensation in the event of a workplace injury are somewhat uncertain. This is particularly the case in scenarios where workers have a work right at the time they are injured but subsequently lose that work right.
Further, whilst it is apparent that migrant workers and their dependants do have rights to workers' compensation, it is likely that there are significant practical barriers

[71] SWA, Factors affecting applications for workers' compensation, August 2009, for example *Injured employees without paid leave entitlements were three times as likely to think they were not eligible for workers' compensation as employees with paid leave entitlements.*
SWA, The impact of employment conditions on work-related injuries in Australia, August 2009 eg *finding of Part-time workers recorded a frequency rate of work-related injury more than twice the rate for full-time workers: 74 injuries per million hours worked compared to 35 for full-time workers.*

in them accessing these rights. The complexity of workers' compensation law and the existence of differences between jurisdictions are examples[72]

Cost of work related illness and injury: According to SWA[73] the cost of work related illness and injury in 2012-13 were $61.8 Billion which was equivalent to 4.1% of GDP. There were an estimated 11.5 million people in the working population at that time ie the cost of work related illness and injury was $5,370 per employed person.

In 2015-2016 Australian health care expenditure was estimated at 10.3% of GDP[74] ie although different years, as a round figure the cost of injury and illness is about 40% of what we spend on health care.

Comparisons with non work related illness is very instructive --The incidence rate of work related Traumatic Brain Injury in Victoria is equivalent to the three times the rate of new HIV infections:

> "*The annual incidence was estimated at 19.8/100,000 workers. The rate for males was 1.43 times that for females …For both sexes, the most common injury mechanism was struck by/against, followed by falls*" [75]
> The New HIV infection rate in 2012 was 6.2/100,000 population[76].

The HIV data deservedly received attention from the media, governments, medical institutions etc. Work related traumatic brain injury may never have been the subject of a media release.

These costs should be are incentive enough to motivate regulators, governments, PCBUS and the working community to legislate for the best framework possible and to implement that framework strategically for the highest impact possible

The AMWU recommends that the Final Report does not rely solely on workers compensation data for assessing Australia's health and safety performance.

[72] SWA , March 2018, Entitlement of Migrant Workers to Workers' Compensation and A National Disgrace: The Exploitation of Temporary Work Visa Holders, The Senate Education and Employment References Committee, March 2016

[73] https://www.safeworkaustralia.gov.au/doc/cost-work-related-injury-and-illness-australian-employers-workers-and-community-2012-13

[74] Australia spent $170.4 billion in 2015-2016, which accounted for 10.3% of total spending on all goods and services in the economy (known as gross domestic product or GDP). This averaged out to $7,096 in 2015–16 https://www.aihw.gov.au/getmedia/3a34cf2c-c715-43a8-be44-0cf53349fd9d/20592.pdf.aspx?inline=true

[75] Vicky C Chang, Rasa Ruseckaite, Alex Collie, Angela Colantonio, *Examining the epidemiology of work-related traumatic brain injury through a sex/gender lens: analysis of workers' compensation claims in Victoria, Australia* ,*Occup Environ Med* doi:10.1136/oemed-2014-102097

[76] http://www.ashm.org.au/images/Media/ASR2013.pdf

Appendix2

So Far as Reasonably Practicable

The 2017 Queensland Review [77] discusses the complexity and the consequent difficulties for the inspectorate when needing to consider SFARP throughout the Act and Regulations:

> *Many regulation offences under the WHS Act 2011 are drafted with great complexity. For example, managing risks from hazardous manual tasks requires a PCBU to manage those risks under part 3.1 of the WHS Regulation 2011. Part 3.1 has 12 sections which intersect and the notion of SFARP is raised eight times. An inspector, when considering whether to issue an improvement notice, must also have regard to all matters impacting the musculoskeletal hazard including the seven matters listed in subsection 60(2) of the Regulation. Having done this, the requirement must then be linked to the elements of s.19 of the WHS Act 2011, which in turn requires consideration of the elements of s.18 (reasonably practicable) and section 17 (management of risks).*

The lack of prosecutions and persistence of high incidence of claims for musculoskeletal disorders and psychological illness is likely to be related to an inability of regulators to navigate the number of qualifiers on duties. This makes it nearly impossible to issue notices or conduct prosecutions because of the number of qualifiers and hence inability to show noncompliance.

Adoption of the SFARP approach relies on breaching the general duty of care –the terminology "state of knowledge" was regularly used to describe the importance of the information in Codes or Practice and/or guidance material. The reference to "state of knowledge" appears to be absent from current discussions regarding Regulations and Codes of Practice.

THE WHS Act & SFARP

The Model WHS Act qualifies the duty of all duty holders, except workers and other persons at the workplace, by the phrase *so far as reasonably practicable* (SFARP). SFARP is defined in Section 18 and applies throughout the Act.

It is unclear why the requirements to notify workers of the outcomes of negotiations under Sections 53 and 57 are qualified by SFARP. What and how can "hazard or risk" as defined and used in in Section 18 be applied to a requirement to notify someone?

The drafters of the WHS Act have confused the dictionary meaning of practicability with the Act definition of SFARP. The Victorian Act does not qualify with SFARP sections relating to the negotiation of designated work groups.

The Regulations

On many occasions SFARP has been used inappropriately in the regulations.
The basis for our comment comes from an understanding that the role of regulation is to inform the duty holder and the regulators inspectorate of what is SFARP i.e. a regulation is used because

[77] Best Practice Review Of Workplace Health And Safety Queensland Final Report Lyons, July 2017, page 55

- There is recognition of the high risk nature of the work: via data on deaths, injury or illness rates or
- There are known and effective risk control measures which met the requirements of the SFARP test ie likelihood and degree of harm are known, there exist suitable and available risk control measures and the cost is not disproportionate to the risk.

Given the above, there should be no impediments to a duty holder being able to meet the requirements of the regulation and the qualifier SFARP must be deleted.

Where there is variety of known and effective risk control measures the usage of the qualifier, SFARP, may be appropriate. A clear example is the duty to provide basic health requirements. The duty to provide drinking water or sanitation *ie the what* - cannot be subject to the qualifier, however, *how the basic amenities are provided* - via connection to water mains or a portable water cooler/toilets in a building or portable toilet - can be qualified.

It is sometimes the case that the drafters of the Regulations mistake the dictionary meaning of practicability with the Act definition of SFARP

Recommendation 47: Amend Regulations 39, 40, 41, 151, 189, 204, 209, 215, 219, 294, 343, 397, 398, 428, 470 and 454 – see below.

The circumstances where the usage of SFARP requires change can be grouped as:

- Inappropriate usage for fundamental requirements
- Inappropriate usage for known risk control provisions
- Inappropriate usage for duties already qualified by SFARP
- Inconsistent usage of SFARP

<u>Inappropriate Usage of SFARP for General Workplace Management & Facilities</u>

These are fundamental requirements; a worker cannot fulfil their obligations under section 28 without the information or training to perform the work safety and the provision of facilities cannot be subject to SFARP test. It is not possible to mandate how the facility e.g. drinking water, is provided but what has to be provided must be mandatory i.e. drinking water must be provided.
SFARP needs to be removed from the following regulations:

Reg 39(3)

A person conducting a business or undertaking must ensure, ~~so far as is reasonably practicable~~ that the information, training and instruction is …….

Reg 40

Duty in relation to general workplace facilities
A person conducting a business or undertaking must, ~~so far as is reasonably practicable~~, ensure that.

Reg 41

Duty to provide and maintain adequate and accessible facilities

(1) A person conducting a business or undertaking must, ~~so far as is reasonably practicable~~, ensure the provision of adequate facilities for workers, including toilets, drinking water, washing facilities and eating facilities.

Reg 41 (2)

Duty to provide and maintain adequate and accessible facilities

A person conducting a business or undertaking must, ~~so far as is reasonably practicable~~, ensure that the facilities provided under sub-regulation (1) are maintained so as to be:…….

Known Risk Control Provisions

The following provisions must have SFARP test removed – these risk controls are well known, available and suitable. There is no need for further qualification.

Reg 151 Untested electrical equipment not to be used

A person conducting a business or undertaking must ensure, ~~so far as is reasonably practicable,~~ that electrical equipment is not used if the equipment ……..

Reg 189 Guarding

(1) This regulation applies if a designer of plant uses guarding as a measure to control risk.

(2) The designer must, ~~so far as is reasonably practicable,~~ ensure that the guarding designed for that purpose will prevent access to the danger point or danger area of the plant.

(5) If the plant to be guarded contains moving parts and those parts may break or cause workpieces to be ejected from the plant, the designer must ensure, ~~so far as is reasonably practicable,~~ that the guarding will control any risk from those broken or ejected parts and workpieces.

Reg 204 Control of risks arising from installation or commissioning (plant)

(1) A person with management or control of plant at a workplace must ensure that the plant is not commissioned unless the person has established, ~~so far as is reasonably practicable~~, that it is safe to commission the plant.

(2) A person with management or control of plant at a workplace must ensure that the plant is not decommissioned or dismantled unless the person has established, ~~so far as is reasonably practicable~~, that it is safe to decommission or dismantle the plant.

(4) A person with management or control of plant at a workplace must ensure, ~~so far as is reasonably practicable,~~ that a person who installs, assembles, constructs, commissions or decommissions or dismantles the plant is provided with all information necessary to eliminate or minimise risks to health or safety

Reg 209 Guarding and insulation from heat and cold

A person with management or control of plant at a workplace must ensure, ~~so far as is reasonably practicable,~~ that any pipe or other part of the plant associated with heat or cold is guarded or insulated so that the plant is without risks to the health and safety of any person

Reg 215 Powered mobile plant—specific controls

(2) The person must ensure, ~~so far as is reasonably practicable,~~ that a suitable combination of operator protective devices is provided, maintained and used.

(3) The person must ensure~~, so far as is reasonably practicable,~~ that no person other than the operator rides on powered mobile plant unless the person is

provided with a level of protection that is equivalent to that provided to the operator

Reg 219(2) Plant that lifts or suspends loads

(3) *If* ~~it is not reasonably practicable to use~~ the plant ~~that it's~~ is not specifically designed to lift or suspend the loads for which it is to be used, the person must ensure that:

(5) A person must ensure*,* ~~so far as is reasonably practicable,~~ that no loads are suspended or travel over a person unless the plant is …….

(6) A person with management or control of plant at a workplace must ensure ~~*so far as is reasonably practicable*~~ that loads are lifted or suspended in a way that ensures that the load remains under control during the activity.

Reg 294 Person who commissions work must consult with designer

(1) A person conducting a business or undertaking that commissions construction work on a structure must, ~~so far as is reasonably practicable,~~ consult with the designer of the whole or any part of the structure about how to ensure that risks to health and safety arising from the design during the construction work.

Reg 343 Pipeline operator's duties

(4) The operator of a pipeline used to transfer a hazardous chemical must ensure ~~so far as is reasonably practicable~~ that the chemical transferred is identified by a label, sign or another way on or near the pipeline.

Reg 397 Cleaning methods

(1) A person conducting a business or undertaking at a workplace must ensure ~~so far as is reasonably practicable~~ that a lead process area at the workplace is kept clean

Reg 398(2) Prohibition on eating, drinking and smoking

(2) A person conducting a business or undertaking at a workplace must provide workers with an eating and drinking area that ~~so far as is reasonably practicable~~ cannot be contaminated with lead from a lead process.

Reg 428 Transfer of asbestos register by person relinquishing management or control

If a person with management or control of a workplace plans to relinquish management or control of the workplace, the person must ensure ~~so far as is reasonably practicable~~ that a copy of the asbestos register is given to the person, if any, assuming management or control of the workplace.

Duty Already Qualified by SFARP

The usage of SFARP is redundant as the duty is already qualified – what does a double qualification on a provision mean?

Reg 470(2) Limiting access to asbestos removal area

(2) The person must ensure ~~so far as is reasonably practicable~~ that no-one other than the following has access to an asbestos removal area……..

Reg 454 Emergency procedure

(2) The persons must ensure ~~so far as is reasonably practicable~~ that ……:

Reg Removal of friable asbestos

(1) A licensed removalist removing friable asbestos must ensure *so far as is reasonably practicable* that ……

Inconsistent Usage of SFARP

There is an inconsistency between the designer duties to control exposure to noise and hazardous manual tasks. The intent of the WHS Act is to control at source. Therefore for risks such as hazardous manual handling and noise above the exposure standard any new plant must be designed to meet those standards. This is achievable for these risks of MSDs or noise induced deafness have been taken into account in the definitions of these risks.

Regulation 61(1) requires that the plant or structure is designed to eliminate the need for any hazardous manual task. The same approach must be taken in Regulation 59.

Reword Regulation 59 (1) – A designer of plant must ensure that the plant is designed to eliminate noise emissions above the exposure standard for noise~~. so that its noise emissions is as low so far as is reasonably practicable~~ .