CFMEU

Submission to the 2018 review of the model WHS laws

MAY 2018

Introduction

The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) is Australia's principal trade union in the construction industry. Safety has always been at the core of the CFMMEU's business.

The CFMMEU is affiliated to the Australian Council of Trade Unions (**ACTU**). We support the ACTU's submission to the 2018 review of the model WHS laws. This submission is made by the **Construction & General Division** of the CFMMEU, and makes additional comments relevant to the construction industry.

The construction industry had the third highest rate of fatalities, on average nationally, in the period between 2007-2016[1]. Nine construction industry workers have been killed at work already this year (as at 30 April 2018)[2]. The deliberate or negligent use of non-confirming building products, and the use of building products in a manner which does not comply with the National Construction Code, is also widespread.

This appalling safety record is in the context of an industry which is increasingly characterised by casualised workforces, fragmented labour-hire structures and sham contracting[3]. These factors not only work to obfuscate WHS responsibility at a practical level, but also give rise to workers being pressured not to raise safety concerns at all, for fear of jeopardising their ability to secure ongoing work. A worker in many industries may legitimately fear dismissal after raising a safety issue but, given the project-based nature of the construction industry, it is far more likely that a construction worker will simply find themselves unable to secure work at the end of a project. Indeed, many large employers use sophisticated methods of discriminating against workers who are proactive in raising safety concerns, in relation to future employment.

The physically dangerous nature of the actual work, and the industrial context described above, mean that the importance of engaging workers and their union in workplace health and safety (**WHS**) processes cannot be gainsaid. For this reason, the CFMMEU strongly supports amendments to the Model Framework which improve worker consultation and representation as detailed in this submission.

[1] Safe Work Australia, *Fatality Statistics by Industry*, https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry

[2] Ibid

[3] In 2011 the CFMEU undertook a detailed study of sham contracting in the building and construction industry, and estimated that between 9 and 16% of persons working in the industry were sham contractors: CFMEU Construction & General Division, *Race to the bottom: Sham contracting in Australia's Construction Industry*, March 2011.

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PART 1: The Legislative Framework

1.1 The Construction Industry and the three-tiered approach

1.1.1 The CFMMEU broadly supports the three-tier approach currently utilised in the model WHS laws. The majority of practical problems arise not as a result of this approach, but because of the lack of effective compliance and enforcement of the existing obligations within the framework (we address this further below).

1.1.2 In the construction industry, WHS Regulations have been adopted in the Commonwealth, four state and two territory jurisdictions in relation to construction work. The practical regulation which sits within the regulatory framework includes:

(a) Safe Work Method Statements (**SWMS**) for high risk construction work, which must be prepared before work commences)[4];

(b) written WHS management plans, for high risk construction work, which PCBU's must prepare for each 'construction project[5]' before work on the project commences (r309); and

(c) the adoption of Codes of Practice, including (but not limited to) the Model Code of Practice for construction.

1.1.3 The importance of ensuring that construction workers and their representatives are properly consulted and engaged in the preparation and implementation of SWMS and WHS management plans, and the content and application of the Codes, cannot be understated. This is particularly so given that a PCBU (for the purposes of the legislation) could be a principal contractor, a head contractor or builder, a sub-contractor, or a worker engaged under an ABN / a self-employed person.

<u>Safe Work Method Statements</u>

1.1.4 In February 2017 a report was released by the Australian National University in relation to the efficacy of Safe Work Method Statements (SWMS) and WHS Management Plans in the Construction industry (**the ANU Report**)[6]. The ANU Report found that there are four "core problems" which relate to SWMS[7]:

(a) SWMS are used "for the purpose of legal risk and corporate risk management ('covering backsides'), which undermines their primary purpose as a tool to help supervisors and workers implement and monitor the control measures for high risk construction work";

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[4] r299 of the Model WHS Regulations

[5] A construction project is a project for which the cost of the work is $250,00 or more (in Cth, NSW, Qld and Tas), $450,000 (SA), $500,00 or more (NT), or where the project includes demolition or refurbishment of a structure containing loose-fill asbestos insulation (ACT)

[6] *The efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia* (21 February 2017) National Research Centre for OHS Regulation, Australian National University

[7] At 47

(b) SWMS contain additional information that is not required by WHS Regulations or advised in the construction code, which adds to their length and reduces their usability;

(c) SWMS are used for work that it not high risk (as defined); and

(d) Workers are not consulted in the preparation of SWMS, which is contrary to the consultation requirements of the WHS Act, and time pressures are cited as a key reason for lack of consultation.

1.1.5 The ANU Report goes on to note a number of concerns that helped inform the four "core problems", including:

(a) "SWMS being prepared by persons who are not performing the actual work; that is, by 'back office' employees, third party consultants or by head contractors;

(b) Generic SWMS are not amended to make them site specific, and contractors are expected to use head contractor templates which impose additional contents and different formats;

(c) There is a lack of substantive review of the content of subcontractors SWMS by the head contractor before work commences, with time pressures often cited;

(d) Unsurprisingly, the information about hazards, risks and controls in SWMS is often not reliable;

(e) Sometimes workers do not receive instruction and training in SWMS, do not read SWMS before signing them, and do not see SWMS again once signed; and

(f) Sometimes PCBU's do not check to ensure that work is done in accordance with SWMS, and do not routinely review SWMS in the course of high risk work and – as such – it can take an actual incident to trigger a review of the SWMS[8]".

1.1.6 These issues are commonly encountered by the CFMMEU and its members. Our ability to deal with them is central to the work the union does. Consultation with workers, and their union, is an overwhelmingly important factor in addressing these issues, and reducing the rate of workplace injuries and deaths in the industry.

1.1.7 Three of the recommendations made by the ANU Report are:

- Recommendation 3 - that the WHS regulators coordinate a set of initiatives to raise awareness, educate, inform and support the preparation and implementation of SWMS and plans by workplace parties, and involve key actors (including the CFMMEU as a worker representatives) in identifying, developing and implementing these initiatives;

- Recommendation 4 - that the WHS regulators establish specific procedures for inspecting and investigating matters involving SWMS and plans, and writing constructive

[8] Ibid

notices, which focus on the efficacy of risk control measures and the quality of processes for the preparation and implementation of SWMS and plans; and

- Recommendation 5 - that Safe Work Australia determine objectives and methods for an evaluation of the use and effectiveness of SWMS and plans to be completed within five years, and considering the impact of the recommended actions.

1.1.8 We support these recommendations.

RECOMMENDATION 1: Recommendations 3-5 in the Australian National University's study in relation to the efficacy of Safe Work Method Statements (SWMS) and WHS Management Plans in the Construction industry (the ANU Report) should be enacted.

The Model Codes

1.1.9 The scope and content of codes varies between jurisdictions. For example, the Queensland jurisdiction has adopted state-based codes which are more prescriptive that the model codes, and which work well. By contrast, codes which are less prescriptive (such as the current Western Australian code) are very basic and, for this reason, not generally used or referred to.

1.1.10 The various jurisdictions should be reviewing the content of their codes in representative, tripartite forums, including by looking to other jurisdictions to ensure that they are adopting best practice. Ideally the codes should be prescriptive, and enforceable via regulation.

1.1.11 In South Australia the relevant codes have not been adopted as approved codes of practice; the model codes are purely advisory and do not have evidentiary status. This was also the case in Queensland until the *Work Health and Safety and Other Legislation Amendment Bill 2017,* which clarified the status of codes of practice by restoring the previous requirements in s26(3) of the pre-harmonisation legislation which requires, where relevant, the safety measures in a code of practice to be followed unless equal to or better than measures can be demonstrated. We support this approach.

RECOMMENDATION 2: Safety measures in a Code of practice are to be followed unless equal to, or better than measures can be demonstrated. The various jurisdictions should be reviewing the content of their codes in representative, tripartite forums

1.2 Other relevant legislative obligations relating to construction

The Federal Safety Commissioner

1.2.1 In 2005 the Federal Safety Commissioner (FSC) was established and tasked with developing, implementing and administering a WHS accreditation scheme for Australian government building and construction work. Its aim was to influence and improve WHS performance in the industry. To this end, it has engaged Federal Safety Officers to audit business's management for the purposes of accreditation.

1.2.2 In our practical experience, the FSC is invisible in the industry and we query whether the WHS Accreditation scheme adds anything at all to the regulatory framework. The accreditation scheme does not assist in the elimination or minimisation of risk, including because:

(a) both workers and their unions are largely excluded from the FSC audit process. Direct requests for assistance or intervention in safety issues have been ignored;

(b) audits which do occur are "desktop" audits only, undertaken by persons who lack the relevant expertise to properly administer any effective audit function. The audits themselves are inconsistent[9]. Moreover, even if an effective paper audit is conducted, the FSC officers do not take any steps to ensure that the relevant paperwork (SWMS, WHS managements plans etc.) are being actually implemented and that work is not being conducted outside of SWMS;

(c) a recent Senate Standing Committee on Economics Inquiry into non-conforming building products found that the FSC does not have adequate resources or expertise to carry out its statutory function to audit compliance with the National Construction Code performance requirements into building materials[10];

(d) the accreditation scheme is voluntary, and an unaccredited company is only prevented from acting as a head contractor undertaking Commonwealth-funded projects; they are still able to act as a sub-contractor;

(e) employers who are known to have had multiple deaths on site, such as John Holland, continue to hold accreditation; and

(f) to the best of the union's knowledge, only two companies have lost their accreditation. However, the FSC has refused to publish the names of those companies, or otherwise identify them. This significantly undermines the utility of removing the company's accreditation.

1.2.3 Although not directly relevant, the Australian Building and Construction Commission (**ABCC**) has some capacity to impact on WHS outcomes in the industry. Clause 9(3) of the Building Code (which applied to Commonwealth Funded construction projects) requires code-covered entities to comply with WHS laws, including training requirements and strict compliance with procedures for the election of HSRs and right of entry requirements. The Commissioner is empowered to refer any code-covered entity who has failed to comply with the WHS obligations in the Building Code to the Minister, and the Minister is able to recommend that a sanction be imposed[11].

1.2.4 However, the ABCC has not made any positive contribution to safety in the industry. The Commissioner has made no recommendations relating to companies that have failed to comply with WHS laws; in part this is appears to because the ABCC will only act if there has been a court

[9] ANU report at p38-40

[10] *Interim report: aluminium composite cladding*, September 2017, xii; The FSC has staff of 28, and 27 consultants who are engaged to monitor the compliance of over 400 accredited builders, according to the Office of the Federal Safety Commissioner's *Regulator Performance Framework 2016-2017 Report*

[11] Cl9(3) and 18(1)(a)(i) of the Building Code

decision that a code-covered entity has contravened a WHS law. If WHS breaches are not prosecuted under the relevant WHS laws, no action will be taken.

1.2.5 Moreover, the CFMMEU's firm view is that the ABCC is a politically motivated vehicle for undermining the role of unions in the industry which has an adverse impact on work health and safety outcomes by – amongst other matters – restricting the inclusion of clauses in enterprise agreements that facilitate union and worker participation on work health and safety matters.

1.3 Psychological Health

1.3.1 The current laws are relatively outmoded in addressing psychological health in the workplace. While the definitions currently define "health" as including "psychological health" - there are no specific references to psychological health hazards and associated risk minimisation within the body of the current regulatory structures. Similarly, existing codes tend to treat psychological health matters as issues that can be addressed through standard approaches to risk management.

1.3.2 While at one level psychological hazards should not be treated differently to other workplace risks, this area of risk does have its own specialisation. For example, psychological hazards are often associated with workplace bullying. Psychological hazards can also be created through the improper use of workplace restructures or through the under-resourcing of staff. Appropriate initiatives and responses to remove and/or control psychological hazards can be varied and may involve employee focused solutions or changes to the way workers perform work such as reductions in work intensification or job redesign. Addressing psychological hazards also commonly involves the review of workplace procedures, workplace training and changes to policies.

1.3.3 The mental health of Fly-In, Fly Out (**FIFO**) is of particular concern. Studies suggest that the prevalence rate of mental health problems amongst the FIFO workforce has been estimated to be approximately 30 per cent, which is significantly higher than the national average of 20 per cent[12].

1.3.4 In October 2015 the Queensland Government's Infrastructure, Planning and Natural Resources Committee released a report from its *"Inquiry into fly-in, fly-out and other long distance commuting work practices in regional Queensland"*[13]. The report recognized that the FIFO lifestyle can, for a range of reasons, exacerbate a person's predisposition to mental health problems.

1.3.5 The multiple factors which are associated with the FIFO lifestyle that contribute to mental health problems, and which can exacerbate a worker's predisposition to mental health problems, include separation from family, transitioning between home and work, maintaining meaningful relationships while missing out on key life events, and the living conditions at camp (including the low level of control over work and life while at work).

[12] Western Australia Legislative Assembly, Education and Health Standing Committee, *The impact of FIFO work practices on mental health*, final report, p i. See also, pp 16-22.
[13] https://www.parliament.qld.gov.au/documents/committees/IPNRC/2015/FIFO/02-rpt-009-09Oct2015.pdf

1.3.6 The tendency of workers not to seek help, due to workplace culture or stigma regarding mental health difficulties, is a significant contributing factor. Anecdotally, the Queensland Government's Committee was advised that workers can be reluctant to go to their employer to discuss any mental health problems as they felt the service was not confidential and feared that having a problem could put their job at risk[14]. Unions and organisations like Mates in Construction play a significant role in this regard.

1.3.7 One of the main sources of concern for FIFO workers is the length of rosters worked, with higher compression rosters negatively impacting on work-life balance, feelings of isolation and loneliness, higher levels of psychological distress and adverse effects on family relationships[15].

1.3.8 The mental health impact on employees should be considered a health and safety issue with legislative minimum standards for rosters and the strengthening of protections for workers suffering from mental health injuries

RECOMMENDATION 3: The mental health impact on employees should be considered a health and safety issue with legislative minimum standards for FIFO rosters, and the strengthening of protections for workers suffering from mental health injuries.

1.4 The intersection between public health and safety and OHS protections

1.4.1 While the principal focus of the model WHS laws is on the workplace itself, it is not always possible to separate workplace safety concerns from more general public health issues and attempts to do so can create artificial jurisdictional demarcations which increase the risk of inadequate responses by regulators.

1.4.2 The CFMMEU regularly deals with concerns expressed by members and workplaces regarding asbestos exposure. These concerns commonly overlap with general public health concerns. Despite the relatively strong existing regulatory arrangements concerning asbestos management, CFMMEU officials and members commonly encounter difficulty in gaining simple, straightforward access to information regarding the presence and location of asbestos in and around workplaces.

RECOMMENDATION 4: There needs to be an increased level of transparency available to workers, workers' representatives and members of the public about the existence and nature workplace hazards, particularly hazards that might not be immediately apparent or that are associated with long latency periods (such as asbestos and other environmental contaminations).

[14] Ibid, at p63
[15] Ibid

PART 2: Consultation, Representation and Participation

2.1 Improving consultative mechanisms in the Construction Industry

The formation of designated work groups

2.1.1 The designation of workgroups are an essential pre-requisite to the election of HSRs under the Model Act. It is imperative that the task of assigning workgroups is not discharged in a cursory manner, and that employees have proper access to representation without the need to make specific requests for that representation to the employer (which may expose their union membership status in an undesirable manner).

2.1.2 To ensure that the process of electing HSRs and HSCs is conducted in a manner which is objectively fair, the Act should be amended to require a construction industry PCBU to consult with any union which have industrial coverage in a proposed designation of workgroups.

2.1.3 Problems associated with interactions between workgroups is discussed further below.

RECOMMENDATION 5: Construction industry PCBUs must consult with any relevant union in relation to the designation of workgroups.

Health and Safety Representatives (**HSRs**) and Health and Safety Committees (**HSCs**)

2.1.4 There are two primary mechanisms under the model Act which facilitate collaboration between employers and employees: the election of Health and Safety Representatives (**HSRs**) pursuant to Part 5, Division 3 of the Model Act, and the establishment of Health and Safety Committees (**HSCs**) under Part 5, Division 4 of the Model Act.

2.1.5 The role of HSRs is central to the effective operation of the current regulatory regime. Workplaces with a strong safety culture - often characterised by strong union density – commonly have active, independent HSRs capable and willing to exercise their powers and functions under the relevant legislation.

2.1.6 It is also important that HSRs work co-operatively together. This is especially necessary on commercial construction projects where sites are often characterised by a number of seemingly discrete workgroups (for example, those separated by trades). Because of this, it is important that the model legislation provide for a mechanism that allows HSRs to effectively act on issues that affect multiple workgroups.

2.1.7 The model Act, however, generally limits the functions of HSRs so that a HSR for a work group may exercise powers and perform functions only in relation to matters that affect, or may affect, workers in that group (s69 of the Model Act). While this approach may be appropriate when an issue arises with a relatively narrow focus on single workgroup concerns, the limitation becomes problematic when a safety issue affects workers more broadly, for example, if an issue is raised concerning a system of work that the PCBU has applied across multiple workgroups.

2.1.8 The exceptions contained at s69(2) of the Model Act include:

a. where there is a serious risk emanating from an immediate or imminent exposure to a hazard affecting other workgroups (s69(2)(a)); or

b. where there is a request from the member of another workgroup (s69(2)(b)).

2.1.9 These restrictions are unduly artificial and can encourage employers/PCBUs to exploit demarcation lines between HSRs, thereby avoiding workplace safety issues.

2.1.10 In the construction industry, uncooperative PCBUs seek to limit the ability for union representatives to act on behalf of HSRs and employees affected by workplace safety concerns. PCBUs often apply the legislation so as to deny recognition of the right for union representatives to take action in respect of safety matters where the matter effects several workgroups, but only one, or a limited number of HSRs have sought the assistance of the union in performing the HSRs duties.

2.1.11 Simple ways of helping to avoid these scenarios, and to help ensure appropriate and effective representation for workers, is to require the election of an overall health and safety representative where there are multiple designated work groups (including on commercial projects). This role should be a worker on the project, and elected by the other workers on the project.

2.1.12 Additionally, HSCs should be comprised of at least 50% worker representation (including elected HSRs from each work group), and no more than 50% management representation.

2.1.13 Further, because HSRs are vulnerable to discrimination, unions should have the right to notify safety issue/disputes, including where matters affect multiple workgroups and where HSRs have been elected.

RECOMMENDATION 6: Unions should have the right to notify safety issue/disputes on behalf of their members, including where matters affect multiple workgroups and where HSRs have been elected.

RECOMMENDATION 7: Commercial construction projects should be required to have an overall HSR elected by other workers on the project (across designated work groups).

RECOMMENDATION 8: Safety Committees should be comprised of at least 50% worker representation (including elected HSRs from each work group), and no more than 50% management representation.

Training of HSRs

2.1.14 The requirement for PCBUs to support the training of HSRs is an important feature of the current regulatory regime. The ability for HSRs to choose their own training provider remains a necessary feature in encouraging the independence of HSRs.

2.1.15 The importance of training is highlighted by fact that the Model Act places limitations on HSRs who have not received training. For example:

a. s90(4) of the Model Act limits the ability for HSRs to issue provisional improvement notices (PINs) where they have not completed initial training);

b. s83(3) of the Model Act provides an HSR with the right to direct an immediate cessation of work, without consultation with the PCBU, where there is a serious and immediate or imminent risk and it is not reasonable to consult before giving the direction. However this power is not activated where the HSR has not completed initial training (s85((6)).

2.1.16 Where a workplace emergency occurs these limitations can place HSRs in a position where they face an unsatisfactory conflict of duties. As an elected workplace representative, the HSR has a duty to exercise leadership and take action to stop the performance of unsafe work. However, in taking such action without the requisite training, the HSR runs the risk of acting outside their powers; they are essentially rendered powerless. That is; the restrictions in ss83(3) and 90(4) increase the likelihood that HSRs may not apply their duties at all.

2.1.17 Because of this, it is not uncommon for unscrupulous employers to purposefully delay training, including by vetoing the HSRs choice of provider.

2.1.18 HSRs should be entitled to attend any training approved by the regulator, on the provision of reasonable notice. We support the ACTU recommendation that the Model Laws should clarify that the requirement for consultation does not authorise a PCBU to veto a HSR's choice of provider, as long as the cost and location are reasonable and the regulator has approved the course.

2.1.19 Clause 21 of the Regulations also limits training to 5 days initially and 1 day per year each year after that. This is too restrictive. In South Australia, the Model WHS Act has been varied to increase HSRs training entitlement to three and two days training during the second and third year of their role respectively[16]. If re-elected, all training entitlements can also be re-taken as if the HSR had no training at all. As a minimum, these entitlements ought to be extended to other jurisdictions.

RECOMMENDATION 9: Mandatory prescribed training for HSRs and HSC members must be conducted within a defined time limit after the commencement of a project, ensuring that workers are entitled to a choice of provider approved by the regulator.

RECOMMENDATION 10: The restrictions around training for the exercise of HSR functions should be removed.

[16] s72(9), *Work Health and Safety Act 2012* (SA)

2.2 Issue Resolution

2.2.1 The model WHS laws provide access to a default dispute resolution procedure[17]. However, the effectiveness of the issue resolution procedures is deficient because:

(a) the procedure fails to appropriately recognise the role of unions in the resolution of safety disputes; and

(b) s81(3) should provide a straightforward mechanism for unions to assist workers and HSRs, but is being undermined by difficult PCBUs;

(c) where a matter does not resolve, there are no straightforward mechanisms to break deadlocks or progress the dispute other than through the referral of an unresolved dispute to an inspector; and

(d) internal and external review mechanisms exclude unions from participating in dispute resolution as initiating parties, and are otherwise unnecessarily cumbersome procedurally (discussed further in Part 3 below).

The Value of Unions

2.2.2 There is ample evidence that indicates that workplaces with trade union HSRs and HSCs perform far better in terms of fewer accidents and incidents of ill health than non-union sites. Further, where trade unions are present, more meaningful worker consultation and representation occurs[18]. In the UK, empirical evidence shows that – where trade union safety representatives work together with employer - accident rates are up to 50% lower than where managers along made decisions[19].

2.2.3 In our experience, workplaces with active, well-supported and independent HSRs are often workplaces characterised by high levels of union density. It is not uncommon for HSRs to act in cooperation with union representatives. Often the elected HSR will also be a union delegate. In this regard the legislation should facilitate cooperation between HSRs and union representatives - and anticipate that HSRs and unions will commonly work together regarding workplace safety concerns.

2.2.4 The model legislation, however, fails to appropriately recognise the role of unions in the resolution of safety disputes. The issue resolution provisions in the Model Act are also ambiguous and unnecessarily restrictive in outlining how union representatives participate in the resolution of workplace safety disputes and support HSRs in such matters. These are

[17] ss80-82 of WHS Act; rr21-22 of WHS Regulation

[18] See e.g. Lunt. J., Bates, S., Bennett, V. & Hopkinson, J. 2008. *Behavioural change and worker engagement practices within the construction sector*, Research Report RR660, Health and Safety Executive, available on the Health and Safety Executive home page: http://www.hse.gov.uk/research/rrhtm/rr660.htm at 40

[19] Health & Safety Executive (HSE) 200, Discussion Paper – *Employee consultation and involvement in health and safety*. Available on the Internet, Health and Safety Executive (U.K) Homepage: http://www.hse.gov.uk/consult/disdocs/dde112.htm

significant flaws in the regulatory structure, which are inconsistent with the practical reality as to how many safety matters are addressed in many Australian workplaces.

2.2.5 The role of unions is also important because - despite the functions and powers provided to HSRs in the model legislation - the relative power imbalance between such individuals and their employer often makes it impractical for an HSR to act as an initiating party in the commencement and resolution of a safety issue. In contrast union officials act independently of any employment relationship with the PCBU and have greater freedom to act decisively with respect to such matters - particularly where cost of addressing the safety issue might have an economic impact on the business. Apart from the greater independence held by union representatives, in many workplaces the union, whether through local delegates or the work of officials, will be actively involved in the discussion of workplace safety matters in any event. The failure of the template legislation to recognise the role for unions in the resolution of safety disputes is a significant flaw in the regulatory structure and is inconsistent with the practical reality as to how such matters are addressed in many Australian workplaces.

2.2.6 The current silence of the legislation about union representation is, moreover, being used by uncooperative PCBUs to avoiding engagement with unions about workplace safety concerns. This can lead to the unnecessary escalation of issues that might otherwise be resolvable under the model safety issue resolution procedures.

<u>Sections 80 and 81(3) – representatives entering for the purpose of attending discussions with a view to resolving the issue</u>

2.2.7 Section 80 of the Model Act defines "parties" to an issue for the purpose of issue resolutions to include PCBUs (ss(1)(a) and (b)), HSRs where the issue affects a work group (s80(1)(c)), and "if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative" (ss1(d)).

2.2.8 What s80 does not include is union representation – or other employee representation - except where a worker who is *not* in a work group appoints one. This failure is significant. It undermines the ability of workers to be represented by their union, and disregards concerns of workers where a HSR fails to act.

2.2.9 The union should be able to represent its members in issue resolution processes irrespective of whether a HSR is elected. Section 80(1) should be amended to add "(e) a workers representative".

RECOMMENDATION 11: Section 80(1) of the Model Act should be amended to include worker representatives as parties to an issue, irrespective of whether a HSR is elected in an affected workgroup. Unions should be able to initiate safety issue resolution procedures, together with the ability of HSRs and any worker, or group of workers.

2.2.10 PCBU's have also sought to create tension between s81(3) and s494(1) of the FW Act, which provides that persons must not exercise a state or territory right unless they are a permit holder.

2.2.11 The right at s81(3) should not be conflated with right of entry provisions under WHS laws, or the FW Act; it is a workplace right and ought to be treated as such.

2.2.12 Indeed, it is absurd for a dispute resolution procedure to exclude a union official from assisting in the dispute resolution process merely because they do not hold a federal permit. It undermines the right of parties to the issue to be represented in circumstances where that person is best placed to assist. There are also numerous circumstances where a worker may request the assistance of an expert, such as a hygienist, to attend on-site to assist the HSR in the performance of their duties - such experts would almost certainly not have WHS entry permits.

RECOMMENDATION 12: The Model legislation should be amended to make it clear that a representative for the purposes of issue resolution need not hold an entry permit.

Mechanisms for breaking deadlocks

2.2.13 The union is often faced by combative PCBU's who refuse to recognize the union's legitimate role in the resolution of safety disputes.

2.2.14 As the legislation stands now, although a party can refer an unresolved dispute to the regulator and have an inspector attend a site to assist in resolving an issue, an inspector cannot force the PCBU to comply with 81(3), or otherwise resolve an issue in dispute.

2.2.15 If, after the exhaustion of the issue resolution procedure, a matter is referred to an inspector and the inspector then refuses to exercise compliance powers, the issue resolution procedures operate as a dead end. In our experience, state government regulators and their inspectors are not free from political influence or from resourcing restrictions, and it is not uncommon for inspectors to fail to act despite workers having continuing concerns about ongoing workplace hazards.

2.2.16 In late 2017, Queensland legislated an additional s141A which enables inspectors to make a determination on the matters where WHS right of entry issues cannot be resolved (after reasonable efforts have been made) and remain in dispute by workplace parties. This includes whether there is a valid right to enter, and the WHS issues that have given rise to the parties for entry. Where the dispute relates to the refusal of a PCBU to allow a union access to a site, the inspector is able to issue a direction in writing that a PCBU immediately allow a WHS entry permit holder to enter the workplace if they are reasonably satisfied that the permit holder has a right of entry under division 2 or 3 of the Act. A person given such direction must comply with it, and this requirement is a civil penalty provision with a maximum penalty of 100 penalty units.

2.2.17 Mechanisms which support the resolution of disputes relating to right of entry at the workplace, and without the need for escalation to a tribunal or court, should be considered. However, any such measures would need to be tempered by a clear right of internal and external review, accessible by workers and their unions as initiating parties. We discuss this further below.

Section 68(2) of the Model Act – HSR requests for assistance

2.2.18 Section 68(2)(g) of the Model Act enables an HSR to request the assistance of "*any person*" in carrying out their functions. Despite this provision, PCBUs do not always recognise union representatives in assisting HSRs in the exercise of their functions.

2.2.19 There are many circumstances where some employers or PCBUs simply choose not to cooperate with an attempt to exercise the powers conferred on entry permit holders by Part 7 of the Act. The ability for HSRs to be assisted by union representatives, with respect to both on-site and representative activities, needs to be understood as an ordinary and expected practical application of the model WHS legislation. This needs to be explicitly outlined in the model legislation.

2.2.20 The model WHS laws are, however, ambiguous as to whether a person assisting an HSR in the performance of their duties must have a WHS entry permit. For example, s70(4) of the Model Act specifically excludes right of access for a person assisting an HSR where the person assisting has had their WHS entry permit revoked. Further, it is unclear under the model WHS laws whether any person assisting an HSR must in fact have a WHS entry permit in order to gain entry to workplace.

2.2.21 It is absurd that s70(4) could be read to mean that *any* person – irrespective of their relevant level of knowledge or expertise - could be invited onto a site *except* a union official with direct and relevant industrial experience and knowledge.

2.2.22 In *ABCC v Powell*, in which the Full Federal Court held that a union official must have an entry permit under the FW Act to enter a workplace to assist an HSR under the *Occupational Health and Safety Act 2004 (Vic)*[20]*. Powell* involved an entry made pursuant to s58(1)(f) of the Victorian (non-harmonised) legislation. Despite this, the practical effect of *Powell* has been the refusal of certain employers to allow representatives who do not hold entry permits under the FW Act onto site under s.81(3) for the purposes of attending discussions.

RECOMMENDATION 13: Sections 69 and 70 be amended so as to clarify that any person should be able to attend onsite to assist HSR, regardless of whether or not they are also permit-holders or former permit-holders.

2.3 Protections for HSRs

2.3.1 The role of HSRs is central to the effective operation of the current regulatory regime. However, HSRs are reliant on maintaining a continuing employment relationship and this creates a level of vulnerability for many workers taking on an HSR role.

2.3.2 The more vulnerable the workplace or the nature of work being performed, the more likely it is that elected HSRs will face significant barriers in exercising their powers. This is particularly

[20] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; an application by WorkSafe Victoria, and the union official involved, to the High Court of Australia for Special Leave was refused

problematic in workplaces characterised by high levels of casual labour or where significant numbers of employees are from non-English-speaking backgrounds, such as in the construction industry. The very real risk faced by HSRs is that they will simply not be engaged for ongoing work at the conclusion of a project.

2.3.3 While the model legislation outlines relatively strong protections against discriminatory, coercive and misleading conduct directed towards HSRs, the evidentiary burden of proof is too high. This appears manifest in the fact that, to the best of the CFMMEU's knowledge, no regulator has taken action on any matter under Part 6 of the Model Laws. A review should be undertaken as to why this is the case.

2.3.4 In some jurisdictions, the process of obtaining remedies with respect to such contraventions is also unduly complex. For example, in NSW such actions are required to be brought before the District Court. The District Court is not structured to provide simple, straightforward procedures for workers to obtain access to justice. Nor is the District Court a specialist jurisdiction with significant expertise in employment matters; for example access to conciliation is not a common procedure. These jurisdictional limitations act as significant barriers against the practical application of these remedies.

RECOMMENDATION 14: A review of the application and accessibility of matters brought under Part 6 of the Model Laws should be conducted, and strategies for the more effective enforcement of Part 6 should be considered as part of any review of the NCEP.

2.4 Workplace entry by WHS entry permit holders

Notification of suspected contravention

2.4.1 The right of entry for union officials to act on identified safety issues is a central provision of the model legislation. However, the Model Act imposes an unnecessary notification requirement which does not appropriately reflect the objects of the Model Act.

2.4.2 The CFMMEU's view is that the requirement for written notice to be provided is unnecessarily bureaucratic. The current system in Western Australia does not require it, and previous legislative schemes in various jurisdictions did not require it; there is no evidence that those schemes were not working effectively.

2.4.3 However, if notice is required, then the Model provisions (which require prior written notice) not only do not reflect the practice of any jurisdiction, but are also unnecessarily burdensome and undermine the objects of the Act.

2.4.4 Section 117(3) of the Model Laws provides that, before entering a workplace to inquire into a suspected contravention, the WHS permit holder must give notice of the proposed entry and the suspected contravention to the PCBU and the person with management or control of the workplace. The notice is required at least 24 hours ahead of the entry, and must specify where a WHS permit holder may go on exercising the right of entry, and how they must behave.

2.4.5 Section 117 was implemented following a review conducted by COAG in 2014. The basis of the change appears to relate to allegations that unions had misused the entry powers in some jurisdictions, including Queensland, which – at the time – had amended its WHS laws to require advance notice[21].

2.4.6 The concerns which led to the current s117 were politically motivated, and unjustified. Tellingly, the Queensland government have since repealed s117, and no other jurisdiction has sought to implement the advanced notice requirement. This, of itself, speaks to the illegitimacy of the alleged necessity of the notice requirement.

2.4.7 It is unsurprising to us that no jurisdiction has sought to implement s117; it serves no purpose other than to allow a PCBU or person with management or control of the workplace to obfuscate health and safety concerns prior to an entry being conducted.

2.4.8 If notice is to be required, the Model Act should be amended to return to the position where an entry to inquire into a suspected contravention is given as soon as is reasonably practicable after entering a workplace, provided that giving the notice would not defeat the purpose of the entry, or unreasonably delay the WHS permit holder in an urgent case. This is the current status in many jurisdictions.

2.4.9 Uncooperative PCBUs have commonly sought to characterise these provisions as requiring right of entry holders to provide such notice *at the time of entry*. However, this argument was settled recently in the Full Federal Court decision of *Ramsay v Menso*[22]. In that matter, the Full Court rejected the submission that a notice of entry must be completed and provided prior to, or at the time of entry onto a site when considering ss117 and 119 of the Queensland legislation.

2.4.10 In *Menso*, the majority of the Full Bench noted:

> "…s 119(1) clearly states that the permit holder must give a notice to the occupier as soon as reasonably practicable ***after*** entry. We reject the submission that a notice of entry must be completed (and provided) prior to, or at the time of, entry on to a site. The legislation simply does not support the interpretation advanced by the respondents and favoured by his Honour. As a practical matter, a notice of entry is not likely to be a simple document. It is to contain a description of the suspected contraventions as well as other matters. Such a document could not usually be produced in two or three minutes. Given the requirement that it be given to the relevant recipient as soon as is reasonably practicable after entry, one might infer that an entrant in good faith would prepare such document in advance of entry[23].

2.4.11 This decision is consistent with a practical, sensible application of right of entry laws. If notice is to be required, then the Model Laws should be amended to make it clear that the requirement is that it be provided as soon as reasonably practical *after* entry (except where giving the notice would defeat the purpose of the entry to the workplace or unreasonably delay the permit holder in an urgent case).

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[21] See Issues paper at 26; Council of Australian Governments, Department of the Prime Minister and Cabinet, Improving the model work health and safety laws (2017) p 10

[22] [2018] FCAFC 55

[23] At [32]

2.4.12 The full extent of the hazards identified during an inspection may also not be immediately clear prior to that inspection. This supports the proposition that notice be provided as soon as practicable after the entry. Indeed, in the vast majority of cases, contraventions are unlikely to be isolated to one area. For example, our experience is that - if there is inadequate (or no) scaffolding in a particular part of a worksite where work from heights is required - it is overwhelmingly likely that other areas of the site where work from heights is required are similarly in breach.

RECOMMENDATION 15: The Model Act should be amended to remove the requirement for written notice in relation to suspected contraventions. However if a notice requirement is retained, it should be given as soon as is reasonably practicable *after* entering a workplace, except where giving the notice would defeat the purpose of the entry to the workplace or unreasonably delay the permit holder in an urgent case.

South Australian notification

2.4.13 We note that, in South Australia, WHS permit holders are additionally required to contact the regulator before exercising WHS right of entry under s117 of the SA Act.

2.4.14 At best, the requirement is unnecessarily bureaucratic and amounts to double-handling; at worst it has the potential to effectively facilitate significant WHS contraventions continuing while unions go through the process of contacting SafeWork and waiting for an inspector to attend (if an inspector is requested).

2.4.15 In practice, permit holders in SA meet the requirements by calling a SafeWork hotline and informing the operator of the nature of the suspected contravention and the site involved. Safe Work does not appear to have a role in approving or granting permission for the entry, although the permit holder is given the option of requesting an inspector to attend the inspection. If an inspector does not attend the inspection, the permit holder is required to provide a report to Safe Work Australia following the entry.

2.4.16 It is not uncommon for a permit holder to meet the legilsative obligation by leaving a message on an answering machine. This is because SafeWork are under-resourced, and because their office hours commence at 8.30am which is well after the start time of most construction sites.

2.4.17 The additional SA requirements have little to commend them and they ought to be removed.

RECOMMENDATION 16: The provisions in SA requiring notice to be given to SafeWork prior to entry to inspect suspected contraventions are unnecessarily bureaucratic and ought to be removed.

Minor irregularities in form and process

2.4.18 Some PCBUs commonly challenge union right of entry in an effort to frustrate union participation in workplace safety matters. As a result, the model WHS law right of entry provisions have become the subject of litigious applications concerning what are often minor,

technical issues. The aim behind such applications is to characterise the ordinary workplace behaviours of unions as being somehow "unlawful" and thereby establish a broader narrative in which union activity with respect to safety matters is perceived as being wrongful and having a negative impact on workplaces.

2.4.19 Uncooperative, litigious PCBUs also commonly seek to exploit minor discrepancies or irregularities in right of entry notices. In *Ramsay v Menso* the right of entry certificate referred to the right of entry holder's second name as "*Tony*" rather than "*Anthony.*" The PCBU claimed the error invalidated the permit holders right of entry. This restrictive interpretation of WHS right of entry provisions was upheld by the Court at first instance. On appeal, however, the Full Court emphasised the practical nature of WHS right of entry provisions:

> *"… Notwithstanding the closely-regulated environment of industrial and employment legislation, provisions related to entry onto worksites and the regulation thereof should be construed conformably with the language used by Parliament, practically and with an eye to common sense, so that they can be implemented in a clear way on a day-to-day basis at worksites. A commonsense interpretation of "full name" in the context of union officials seeking access to a building site would, for example, encompass "Tony Stott" as well as "Anthony Stott" to identify the second appellant and "Andrew Ramsay" to identify the first appellant."*

2.4.20 Right of entry must not be a battleground focused on limiting union access to workplaces. Litigious WHS Act contravention applications by employers should be actively discouraged. The legislative framework should explicitly identify right of entry as an ordinary and necessary activity in the tripartite regulation of work health and safety by employers, government - together with workers and unions as workers' representatives. While it is difficult to legislate a requirement for PCBUs to exercise common sense, more can be done to avoid such unnecessary conflicts.

2.4.21 If notice is required, it should be limited to identifying the nature of a suspected contravention. In particular, where notices are required to identify specifics which enable an employer to identify particular workers (for example where a notice refers to a particular level of a construction site and there are a small number of employees in that area) workers are left vulnerable to discriminatory retaliation.

RECOMMENDATION 17: Notices in relation to suspected contraventions should be limited to identifying the nature of the suspected contravention. Consideration should be given to otherwise amending the Model Act in such a way so as to ensure that minor mis-descriptions and irregularities do not undermine the legitimate inspection of suspected contraventions, or invalidate right of entry notices.

<u>Re-entry for suspected contraventions</u>

2.4.22 In *CFMEU v Bechtel Construction (Australia) Pty Ltd*[24] the Federal Court questioned whether a WHS permit holder who has entered a site under the *Fair Work Act 2009* would need to

[24] [2013] FCA 667

physically leave and re-enter a site under WHS provisions to investigate a suspected WHS contravention. The court said:

> Even though s 117 of the WHS Act contemplates that the permit holder must reasonably suspect before entering the workplace that a contravention has occurred or is occurring, I am satisfied that there is a serious question about the construction of s 117 in the sense that a permit holder under the WHS Act who has lawfully entered the Site under an s 484 notice (issued under the Fair Work Act 2009), might become aware of safety circumstances which cause him or her to reasonably suspect a contravention has occurred or is occurring. Such a person might not need to leave the Site and then exercise a right of entry on the basis of a reasonably held suspicion, in place, before then re-entering the worksite. Bechtel says that such a person who becomes aware of safety concerns and who is lawfully on-site would be entitled to meet with the employees in the breaks and discuss safety issues. Whatever the proper construction and operation of the provision might be, and its application to the facts of the case, there is nevertheless a serious question to be tried about that matter.[25]

2.4.23 Following *Bechtel*, there is some doubt about whether a permit holder, who has exercised a right of entry under section 117 of the Model WHS Act because of a reasonably formed suspicion that there may have been a contravention of the Act (or otherwise lawfully present on a construction site), can exercise the powers contained under section 118 of the Act where the permit holder has formed a further reasonable suspicion of the presence of a second subsequent contravention while on site.

2.4.24 It is clearly absurd – and contrary to the efficient investigation of safety concerns – to require a permit holder to leave the premises and then re-enter the premises to investigate the second suspected contravention because the relevant suspicion was formed "after entering the workplace" and not "before entering the workplace." The focus of any entry is to ensure the safety of workers; the effect of *Bechtel* is to effectively allow a potential breach of WHS obligations to continue unnecessarily for a purely bureaucratic reason.

2.4.25 The removal of the notice requirement would correct this situation. Otherwise, the lack of legislative clarity should be eliminated by making it clear that a WHS permit holder can enter the workplace and access the powers contained in section 118 of the Act, so long as a reasonable suspicion is formed, regardless of whether the suspicion was formed before entering the workplace or whilst the permit holder is lawfully inside the workplace.

RECOMMENDATION 18: Permit holders be specifically able to investigate suspected contraventions after entering a workplace, based on matters observed whilst on site after lawful entry, irrespective of whether or not they were known at the time of the initial entry.

<u>Recording suspected breaches via video or photographs etc</u>

2.4.26 Neither the Model Act nor the *Fair Work Act 2009* contain any express provision entitling permit holders to use sound or vision recording whilst exercising statutory rights of entry which are related to suspected OHS contraventions, or otherwise.

[25] At [34]

2.4.27 Section 118(1) of the Model WHS Act does set out the things that a WHS permit holder can do, in relation to entry to the workplace pursuant to section 117 of the Act. It appears that s 118(1) is intended to be an exhaustive list of the things a WHS permit holder can do whilst at the workplace[26]. Those things include:

(a) inspecting things relevant to the suspected contravention*;*
(b) consulting relevant workers[27] in relation to *the suspected contravention;*
(c) consulting the PCBU about the suspected contravention;
(d) requiring the PCBU to allow the official to inspect and copy documents relevant to the suspected contravention;[28]
(e) warning any person the official reasonably believes to be exposed to a serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard of that risk.

2.4.28 It is not clear whether the WHS permit holder is empowered to collect evidence of the suspected contravention by taking notes, photographs or audio or video recordings.

2.4.29 In contrast, s.165 of the WHS includes an express power in an inspection under the WHS Act upon entering premises to *'take … recordings (including photographs, films, audio, video, digital or other recordings'* (ss154(1)(d)).

2.4.30 On a number of occasions builders in all jurisdictions have purported to refuse entry to permit holders on the basis of an argument that it was not permitted to record the inspection, in circumstances where the permit holder intended to make video and audio recordings of their inspection. This issue appears to turn on two issues:

(a) whether the things that a WHS permit holder can do as set out in s 118(1) are exhaustive; and

(b) if so, whether photographing or filming matters relevant to the suspected contravention fall within an 'inspection' under s 118(1)(a).

2.4.31 It is likely that the matters set out in section 118(1) of the Model WHS Act constitute an exhaustive list according to law. It therefore follows that in order to be lawful activities for a permit holder exercising their s 117 rights, photographing or recording will need to fall within the concept of 'inspection' under s 118(1)(a).

2.4.32 A difficulty regarding this definitional question is the distinction between the powers set out in s 118(1) of the Model WHS Act and those conferred on an inspector. Section 165(1) of the Model WHS Act specifically allows an inspector to, amongst other things, "take measurements, conduct

[26] For example in *Kirby v JKC Australia LNG Pty Ltd* [2015] FCA 1070, in an interlocutory application, the fact that ss118(1)(a)-(e) do not refer to recording sound or vision appears to have led White J to reject the suggestion – even at a prima facie case level –that sound and vision recording by use of the GoPro camera was permitted under the WHS Act (at [43] – [49])

[27] Noting that definition in *WHS Act* s 116 confines consultations to workers who fall within the union's constitutional coverage.

[28] These documents are those kept at the workplace or accessible from a computer kept at the workplace. If the documents are employee records (which term is defined by s 6 of the *Privacy Act* 1988 (Cth)) or documents not held by the PCBU but another person, notice must be given in accordance with s 120 of the *WHS Act.*

tests and make sketches or recordings, (including photographs, films, audio, video, digital or other recordings)". It is arguable that, if it was intended a WHS permit holder to have the ability to - amongst other things - make recordings, the Act would have set this out specifically as it did for inspectors.

2.4.33 A practical solution to this problem would be to amend section 118(1)(a) of the Act and include similar language to that used in s165(1).

2.4.34 It would be absurd if a WHS permit holder was unable to collect evidence of their observations. On a strict reading of 'inspect', in its current form, this would prevent a WHS permit holder making a handwritten notes about what they have observed. It would also potentially hinder an investigation into a suspected contravention. A WHS permit holder would be unable to adequately investigate a suspected contravention, without making any record (whether photographic or handwritten).

2.4.35 Furthermore, if a WHS permit holder is not allowed to make a record of their observations whether by photography or otherwise, it is likely that valuable evidence of a contravention will be lost and the ability for the regulator to enforce the provisions of the Act will be severely undermined.

RECOMMENDATION 19: Permit holders be specifically able to record, and take photographs, of matters constituting a suspected contravention. Section 118(1)(a) of the Model Act should be amended to include similar language to that used in s165(1).

Proposed increases in fines for misuse of right of entry by permit holders

2.4.36 The 2014 COAG review also amended the Model Act so as to increase penalties for contraventions of WHS permit conditions from $10,000 to $20,000. We note that South Australia is the only jurisdiction to have increased the fine to a maximum of $20,000.

2.4.37 The CFMMEU opposes this increase. Again, the amendment is politically motivated. Many of the reported alleged "contraventions" relied upon by those promoting the containment of union right of entry powers relate to minor issues often arising through opportunistic litigation by PCBUs, and other parties seeking to limit the participation of unions in the resolution of safety issues. The absurd scenario in *Bechtel* is an example of this.

2.4.38 Increasing fines for permit holders will only serve as an encouragement for antagonistic PCBUs to tie unions down in inappropriate litigation. Moreover, by focussing only on the actions of permit holders, the measure actively ignores the ongoing, systematic actions taken by PCBUs to deny entry to permit holders.

RECOMMENDATION 20: The Model Act should be amended to remove the increase to penalties for contraventions of WHS permit conditions to $20,000. Otherwise, any consideration of penalties should also consider the actions of PCBU's in denying entry to permit holders.

PART 3: Compliance and Enforcement

3.1 The Regulator and Inspectors

3.1.1 The CFMMEU's experience for over a decade has been that state regulators have become increasingly unwilling to take action with respect to work health and safety prosecutions. For example, recently in the NSW construction industry SafeWork has begun promoting the issuing of on-the-spot fines relating to fall from heights hazards as an alternative to prosecutions.

3.1.2 Such lack of activity on the part of regulator is concerning, particularly in circumstances where falls from heights is the leading cause of industrial deaths nationwide.

3.1.3 There should also be straightforward access to remedies, including prompt and effective conciliation mechanisms, available to workers. An important part of ensuring this is giving unions standing to initiate internal and external review mechanisms, and to commence prosecutions (discussed further below).

3.1.4 We support the ACTU's recommendation that SWA should commence an urgent and comprehensive review of the National Compliance and Enforcement Policy, in consultation with stakeholders.

3.1.5 In relation to construction regulation, the ANU Study noted a "need for WHS regulators to establish specific procedures for inspecting and investigating matters involving SWMS and plans, and writing constructive notices" which "focus on the efficacy of risk control measures and processes for the preparation and implementation of SWMS and plans"[29]. We agree.

RECOMMENDATION 21: The Model Act and NCEP should be reviewed so as to ensure that there are straightforward access to remedies, including prompt and effective conciliation mechanisms, available to workers and their union representatives.

RECOMMENDATION 22: WHS Regulators should establish specific procedures for inspecting and investigating matters involving SWMS and safety plans, and writing constructive notices which focus on the efficacy of risk control measures and processes for the preparation and implementation of SWMS and plans.

3.2 Internal and External Review

3.2.1 Where an inspector acts inappropriately, or refuses to act at all, the issue resolution procedures come to a halt. The legislation does not include an effective mechanism through which a party, whether an HSR, an worker, or a union can satisfactorily access an appeal body.

[29] At (v)

3.2.2 Unions are excluded from acting as initiating parties in applications for internal and external review. Despite the functions and powers provided to HSRs in the legislation, the relative power imbalance between such individuals and their employer often makes it impractical for an HSR to act as an initiating party in the commencement and resolution of a safety issue. In contrast, union officials act independently of any employment relationship with the PCBU and have greater freedom to act decisively with respect to such matters - particularly where cost of addressing the safety issue might have an economic impact on the business.

3.2.3 Apart from the greater independence held by union representatives, in many workplaces the union, whether through local delegates or the work of officials, will be actively involved in the discussion of workplace safety matters in any event.

3.2.4 The problems manifest is this approach are displayed in the following commonly encountered example:

> *Construction workers, through their union representatives, approach an inspector seeking that a prohibition notice be issued pursuant to s195 of the Model Act due to hazards creating fall from height risks.*
>
> *On attending the worksite, the inspector chooses not to issue a prohibition notice. The workers remain of the opinion that the hazards present unacceptable risks.*
>
> *The workers are engaged through labour hire arrangements to a subcontractor. The workers and their HSRs our fearful for their job security should they take action to initiate a review themselves. Four months ago, a worker notified management of a safety concern and found they were not subsequently rostered for further work.*
>
> *The workers ask their union to commence a review application on their behalf.*

3.2.5 The decision of the inspector not to issue a notice is a reviewable matter pursuant to s223(1) of the Model Act (Item 9). While a worker, or an HSR, are eligible persons for the purposes of seeking an internal/external review, the union does not have standing to bring such an application. As a result the safety issue remains unresolved - work continues despite the ongoing presence of the fall from height hazards.

3.2.6 Deficiencies in the current legislative regime means that those regulators - whether through poor administration or due to political or other external influence – who are unwilling to satisfactorily exercise their powers can effectively shut down the resolution of safety issues.

3.2.7 The Burrill Lake case study demonstrates the existence of significant gaps in the legislation in providing access to adequate remedies for dispute resolution:

Burrill Lake asbestos case study

In November 2017, in evidence before the NSW Legislative Council Law & Justice Committee, Peter Dunphy, then Executive Director of SafeWork, indicated that unions had access to the internal and external review processes of the WHS Act for the purposes of the review of decisions.

Later that month, the CFMEU sought an internal review through SafeWork of a decision by an inspector not to take action with respect to a complaint concerning asbestos contamination in and around the Burrill Creek Princes Highway worksite on the south coast of NSW.

In correspondence with the CFMEU, the regulator stated that the legislation does "*not include unions as an eligible person to apply for internal review under section 223 of the Act."* The CFMEU subsequently applied for an external review by the Industrial Relations Commission of New South Wales in matter number 386654/2017.

The regulator advised the Commission that it would oppose the matter being heard on the grounds that unions were not eligible to apply for external reviews under the NSW legislation.

3.2.8 Such disputes ought to be capable of being resolved, in the Industrial Magistrates Court (or comparable informal forum), with enforcement penalties attached to proven breaches.

RECOMMENDATION 23: That Model Act should be amended to identify unions as eligible persons for the purposes of initiating internal and external reviews.

PART 4: Prosecutions and Legal Proceedings

4.1 Instituting Legal Proceedings

4.1.1 New South Wales is the only jurisdiction to retain access to union prosecutions. However these provisions are restricted in that s230 of the NSW Act limits such prosecutions to situations where the Director of Public Prosecutions (DPP) has declined to bring proceedings[30].

4.1.2 The application of the provision has been problematic because of the reluctance of the DPP to involve themselves in OHS matters; this means that the requisite referral cannot be made.

4.1.3 Further, whereas historically the NSW legislation enabled unions to apply to have fines paid to the industrial organisation itself, this option is no longer available. The removal of these provisions acts as a disincentive for unions to bring prosecutions. In context of growing inaction on the part of state regulators, these restrictions should be removed.

RECOMMENDATION 24: The model legislation should be amended to reinstate ability for union prosecutions to be brought with respect to work health and safety matters. This right should not be encumbered by a requirement that prosecutions can only proceed after state prosecutors have refused to bring proceedings. Further, unions bringing prosecutions should have the ability to apply to have fines paid to the union upon successful prosecution.

4.2 Industrial Manslaughter

4.2.1 The CFMMEU supports the introduction of an offence of industrial manslaughter where the actions or omissions of a PCBU of its the officers cause a person's death and where the actions or omissions amount to a gross breach of the relevant duty of care owed by the PCBU to the deceased. We support the ACTU's submissions in relation to this issue.

4.2.2 The federal government has recently been vocal about pursuing criminal sanctions against AMP for corporate misbehaviour in the banking sector. There is no reason why blue collar workers should not be able to have full access to criminal sanction where their lives are ended as a result of the actions, or inactions, of a PCBU or its officers.

4.2.3 The CFMMEU will be making further submissions on this matter as part of the current Senate Education and Employment References Committee's Inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia.

RECOMMENDATION 25: The Model Act should be amended to include a specific industrial manslaughter offence of causing the death of a worker or another person in the workplace through a negligent act or omission.

[30] s230(3) of the *Work Health and Safety Act 2011* (NSW)

APPENDIX A: List of Recommendations

PART 1: The Legislative Framework

RECOMMENDATION 1: Recommendations 3-5 in the Australian National University's study in relation to the efficacy of Safe Work Method Statements (SWMS) and WHS Management Plans in the Construction industry (the ANU Report) should be enacted.

RECOMMENDATION 2: Safety measures in a Code of practice are to be followed unless equal to, or better than, measures can be demonstrated. The various jurisdictions should be reviewing the content of their codes in representative, tripartite forums

RECOMMENDATION 3: The mental health impact on employees should be considered a health and safety issue with legislative minimum standards for FIFO rosters, and the strengthening of protections for workers suffering from mental health injuries.

RECOMMENDATION 4: There needs to be an increased level of transparency available to workers, workers' representatives and members of the public about the existence and nature workplace hazards, particularly hazards that might not be immediately apparent or that are associated with long latency periods (such as asbestos and other environmental contaminations).

PART 2: Consultation, Representation and Participation

Improving consultative mechanisms in the Construction Industry

RECOMMENDATION 5: Construction industry PCBUs must consult with any relevant union in relation to the designation of workgroups.

RECOMMENDATION 6: Unions should have the right to notify safety issues/disputes on behalf of their members, including where matters affect multiple workgroups and where HSRs have been elected.

RECOMMENDATION 7: Commercial construction projects should be required to have an overall HSR elected by other workers on the project (across designated work groups).

RECOMMENDATION 8: Safety Committees should be comprised of at least 50% worker representation (including elected HSRs from each work group), and no more than 50% management representation.

RECOMMENDATION 9: Mandatory prescribed training for HSRs and HSC members must be conducted within a defined time limit after the commencement of a project, ensuring that workers are entitled to a choice of provider approved by the regulator.

RECOMMENDATION 10: The restrictions around training for the exercise of HSR functions should be removed.

Issue Resolution

RECOMMENDATION 11: Section 80(1) of the Model Act should be amended to include worker representatives as parties to an issue, irrespective of whether a HSR is elected in an affected workgroup. Unions should be able to initiate safety issue resolution procedures, together with the ability of HSRs and any worker, or group of workers.

RECOMMENDATION 12: The Model legislation should be amended to make it clear that a representative for the purposes of issue resolution need not hold an entry permit.

RECOMMENDATION 13: Sections 69 and 70 be amended so as to clarify that any person should be able to attend onsite to assist HSR, regardless of whether or not they are also permit-holders or former permit-holders.

Protections for HSRs

RECOMMENDATION 14: A review of the application and accessibility of matters brought under Part 6 of the Model Laws should be conducted, and strategies for the more effective enforcement of Part 6 should be considered as part of any review of the NCEP.

Workplace entry by WHS entry permit holders

RECOMMENDATION 15: The Model Act should be amended to remove the requirement for written notice in relation to suspected contraventions. However if a notice requirement is retained, it should be given as soon as is reasonably practicable *after* entering a workplace, except where giving the notice would defeat the purpose of the entry to the workplace or unreasonably delay the permit holder in an urgent case.

RECOMMENDATION 16: The provisions in SA requiring notice to be given to SafeWork prior to entry to inspect suspected contraventions are unnecessarily bureaucratic and ought to be removed.

RECOMMENDATION 17: Notices in relation to suspected contraventions should be limited to identifying the nature of the suspected contravention. Consideration should be given to otherwise amending the Model Act in such a way so as to ensure that minor mis-descriptions and irregularities do not undermine the legitimate inspection of suspected contraventions, or invalidate right of entry notices.

RECOMMENDATION 18: That permit holders be specifically able to investigate suspected contraventions after entering a workplace, based on matters observed whilst on site after lawful entry, irrespective of whether or not they were known at the time of the initial entry.

RECOMMENDATION 19: That permit holders be specifically able to record, and take photographs, of matters constituting a suspected contravention. Section 118(1)(a) of the Model Act should be amended to include similar language to that used in s165(1).

RECOMMENDATION 20: The Model Act should be amended to remove the increase to penalties for contraventions of WHS permit conditions to $20,000. Otherwise, any consideration to penalties should also consider the actions of PCBU's in denying entry to permit holders.

PART 3: Compliance and Enforcement

RECOMMENDATION 21: The Model Act and NCEP should be reviewed so as to ensure that there are straightforward access to remedies, including prompt and effective conciliation mechanisms, available to workers and their union representatives.

RECOMMENDATION 22: WHS Regulators should establish specific procedures for inspecting and investigating matters involving SWMS and safety plans, and writing constructive notices which focus on the efficacy of risk control measures and processes for the preparation and implementation of SWMS and plans.

RECOMMENDATION 23: That Model Act should be amended to identify unions as eligible persons for the purposes of initiating internal and external reviews.

PART 4: Prosecutions and Legal Proceedings

RECOMMENDATION 24: The model legislation should be amended to reinstate ability for union prosecutions to be brought with respect to work health and safety matters. This right should not be encumbered by a requirement that prosecutions can only proceed after state prosecutors have refused to bring proceedings. Further, unions bringing prosecutions should have the ability to apply to have fines paid to the union upon successful prosecution.

RECOMMENDATION 25: The Model Act should be amended to include a specific industrial manslaughter offence of causing the death of a worker or another person in the workplace through a negligent act or omission.