

Ms Marie Boland

Independent Reviewer, for Safe Work Australia and Ministers with responsibility for WHS

Dear Ms Boland,

**Submission to the 2018 Review of the model WHS laws**

This submission is from Ms Gabrielle Jess, PhD student at Queensland University of Technology, Brisbane and Dr Robin Price, CQUniversity, Brisbane and Gabrielle's supervisor for her Enforceable Undertakings research. Gabrielle undertook a Master of Business (Research) in which she examined Enforceable Undertakings in the Work Health and Safety area drawing on the Queensland model of enforceable undertakings. Her thesis, awarded late 2015, examined multiple stakeholder views: the WHS regulator; the business obligation holders and the affected third parties about their experience of the EU process. Gabrielle's thesis and an article written afterwards can be found on the QUT e-prints site [https://eprints.qut.edu.au/view/person/Jess,\\_Gabrielle.html](https://eprints.qut.edu.au/view/person/Jess,_Gabrielle.html).

Acknowledging the theoretical basis underpinning the research into enforceable undertakings, organisational justice which incorporates three justice constructs (distributive justice, procedural justice and interactional justice), and the completion of the thesis in 2015, we make this submission in relation to the use of Enforceable Undertakings as an alternative to prosecution for a breach of the WHS legislation.

Our responses relate to directly to:

**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?**

As an overall statement based on the sample business duty holders and injured third parties interviewed for the thesis, the EU was perceived as an instrument of cultural and behavioural shift in the workplaces that implemented them. They did perceive that the EU contributed to WHS improvements, and for some workplaces, if it had not been for the EU, the changes may have taken longer to be prioritised and to be implemented, if at all.

Multiple duty holders noted that the experience of the process was valuable and they gained professionally as well as personally from being involved. They saw significant improvements at the coalface because of the investment in OHS management systems and other individual level and workplace level changes that had occurred because of the EU activities.

The personal side of the whole process was mentioned by a number of participants as significant. The stress and the obligations to ensure that they met their workplace obligations were weighty for them. The impact of the incident on the affected third party was also personally stressful. One of the purposes of the EU is for senior management to be actively involved in the process and model the necessary responsibility and leadership at the organisational level. The extent to which this is achieved is unclear; however, based on those at the coalface doing the drafting, negotiations and designing of the EU, the parties may not

necessarily have the level of persuasiveness to bring all the organisation on board to achieve maximum WHS behavioural and cultural changes.

### **General observation**

Duty holders and one affected third party spoke positively about the professionalism of the regulatory staff during their engagement in the EU process. It was felt that the regulatory staff do an amazing job dealing with an area of high emotional and psychological stress for the businesses and the injured worker and their families. While the job entails working with the different stakeholders, the regulatory staff demonstrated tact and diplomacy and compassion. This facet of the role, dealing with complex and highly charged emotions and people's hurt and pain warrants mention. Recognising this in the EU environment is separate to policy and process matters.

### **Review – evaluation of the enforceable undertakings**

From the business obligation holder's perspective, the need for conducting a review of the policy environment and the EU is well overdue – one business duty holder felt that WHS had no idea how the EU works in practice nor sought to find out the business holder's perspectives. This review of the WHS Act therefore would be regarded as a welcome opportunity to seek out the various views and opinions of the range of stakeholders involved. It is hoped that a broad selection of parties, including business obligation holders, legal advisers, third parties, insurance companies, senior managers in organisations, WHS practitioners, workers and researchers contribute to this review.

### **Access to Information**

Some business representatives and an affected third party found it a challenge to navigate the website and locate information and materials directly related to the EU.

As the website is designed for general public usage, locating materials and guidelines and finding information easily is important. The EU has as an underpinning focus to be a public document. It would be valuable to consider how the location of information can be sourced quickly to ensure that the site has the range of documents necessary to help the general public and the various stakeholders understand what an EU is, how the process works and to ensure clarity around what it is and what an EU is not. More transparency in the available documents is important.

Affected third parties used the website to find out what an EU meant and to find out what it entailed. It is essential to ensure all parties that access information about the EU understand how the EU operates, to avoid confusion about its purpose and to promote the merits of the strategy to improve WHS. While the policy and the application process relates to the business obligation holders, the information is also in the public domain for a broader audience.

### *Suggested considerations*

Promote and publicise information about EUs and their purpose with greater transparency. Ensure there is transparency about the process along with the requirements that need to be

met when considering an EU. It is important to ensure the website and information is comprehensive as well as visible for ease of accessibility. The information also needs to be up to date.

### **Inconsistencies with staffing**

Staff turnover of the regulator was raised by business obligation holders as a problem. This related to having multiple views and comments fed back to the business holder when staff moved from managing their case and a new person took over the case. The effect was to cause confusion for the business obligation holder and frustration. Some business obligation holders noted that the changeover of staff was frequent.

It is acknowledged that the policies and process are documented and standards are in place for the regulator to work with applicants

### **Attitudes to the EU**

At the time of the research, business obligation holders expressed concerns for the value of the EU given the high 'costs' of an EU (human resources, financial commitment and the implementation of EU activities). Some comments related to the challenges of offering an EU and then having the resources to implement the EU over the lengthy period (of three years). The EU was, at the time of data collection, perceived as unattractive and the number of EUs being applied for diminished. It is noted that more recently 2015-2016 there has been a strong take-up of the EU.

The individuals who managed the EU process within businesses were personally affected by the process. Each understood the gravity of the responsibility they held for taking the EU forward for their organisation and achieving the outcome – completion. The responsibility for the business obligation holders often was in addition to their normal job responsibilities and this would be over a three-year period. Noting that this is a workplace issue, it can also be perceived as a shortcoming as the focus should be on the whole of the organisation and critically senior management and the business owner, who should be demonstrating strong leadership and promotion of the values being espoused through the EU and the WHS laws.

Understanding how the decisions are reached as to what ranks/rates as acceptable activities for the EU was an important area for the business obligation holder. Similarly, how the decisions would be made to accept or reject the activities put forward to the regulator caused confusion for the business obligation holders.

The cost of the EU process came in various forms – human resourcing (staff time and across an organisation various staff – this is inestimable over the three years), actual costs in the EU (but these tended to blow out beyond the basic budget considered), reporting, travel and implementation. In all cases, the cost expended was significantly more than the \$ value associated with prosecution.

Businesses felt that the EU process favoured medium to larger businesses due to resource requirements to manage the process. As an observation, small business comprises most of the

private sector and should have the same opportunity to avoid criminal conviction for WHS incidents as medium and large businesses.

The loss of face-to-face contact with the regulator due to changes in service delivery methods was a source of disappointment for businesses because the contact and discussions proved to be vital for the business representative's education and learning. Face-to-face contact built engagement and respect as well.

### **Reporting requirements and closure**

The increasing 'regulatory requirements' for documents once the EU process was being implemented – e.g. financial costs related to the process etc – demanded a lot of business' time to generate documents for reporting. There should be some format [online form perhaps] for expedient reporting. Businesses identified problems with the EU process but did not feel they had an opportunity to voice their views.

Closure is important – there is a need to ensure all businesses get the feedback of closure of the EU process. Some businesses spoken with were unaware just when their EU would be signed off as completed.

### *Suggested considerations*

When the EU process is deemed finalised, there should be an inspection by the regulator and a meeting between the regulator and business to obtain feedback from the business as to what could be better handled by the regulator. It should be made clear to the business that they have met the requirements of the EU and the process is completed.

### **Affected third parties**

Affected third parties viewed the EUs that related to their incident and one expressed the view that the community components of their EU were insulting. For example, in one case, the community component was lighting for social events and the third party felt that this was insulting as they had a lifetime injury and a painful future ahead of them. Ultimately, they wanted something more meaningful and relevant that would make a real WHS difference in the community.

Providing a voice to the injured party is a valuable approach to assisting them with the healing process – both from being an employee and personally. The two-people spoken with for this project had very different feelings about the process: one believed it was a positive experience being asked to provide suggestions for the EU, while the other did not understand the purpose of the EU process and thought it was a 'conspiracy and against him'.

The injured parties need education on the WHS system so that there is clarity around the EU process and an understanding of the separate processes around workers compensation,

rehabilitation and legal matters – so the injured party is clear about the distinctions of each area.

It is essential to manage the injured parties' perceptions and understanding of the process, as the potential for 'voice' to provide further harm is very real. Writing to injured parties and asking them to make suggestions for items for inclusion in an EU brings the incident back for the injured party. Depending on the literacy levels of the injured worker and their understanding of the process, and the fact that they get no further feedback on whether their ideas are adopted, it also has the potential to be a meaningless voice process. The injured parties' ideas and input should be fed back to the employer in a way that the usefulness of the ideas can be evaluated and considered.

### *Suggested considerations*

We recommend that consideration is given to embedding a restorative justice approach into the process. We see that there is potential to bring multiple parties to the table (mediated well) and provide everyone with an opportunity for voice and to hear the different perspectives – similar to what happens in adult conferencing and youth justice conferencing. The focus then would be on looking forward, reflecting on past actions/inactions and rectifying WHS at the workplace. At this session part of the process could be to look at possible options for the implementation of the undertakings and to provide parties with the opportunity to provide ideas and approaches, both workable and those less likely to succeed in a timelier way than the current backwards and forwards process that took up to a year.

We also think there would be value in getting offending businesses to present public seminars/ workshops to other businesses about their EU experience – as part of broader WHS education.