



# FIRST STATUTORY REVIEW OF THE WORK HEALTH AND SAFETY LEGISLATION

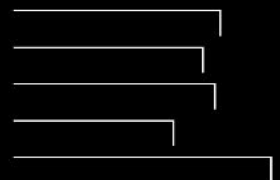
---

31 December 2016

**DON'T  
RISK**

**2<sup>ND</sup> RATE  
SAFETY**

Contact:  
Shay Deguara  
Unions NSW



## Contents

Introduction .....	3
<b>Unions NSW 9 Point Plan to Improve the WHS Act .....</b>	<b>5</b>
<b>1. Tripartite Consultation.....</b>	<b>5</b>
2. Best Practice- Proactive Risk Management and Consultation .....	6
<b>3. Incident Reporting.....</b>	<b>8</b>
<b>4. Consultation .....</b>	<b>10</b>
4.1 Worker Support.....	10
4.2 Consultation Support Package and Guidance .....	11
4.3 Health and Safety Committees .....	12
4.4 Roving Reps .....	13
4.5 Best Practice Approach to Skills Development .....	13
<b>5. Enforcement .....</b>	<b>14</b>
5.1 Strict Liability.....	14
5.2 Prosecutions .....	14
5.3 Entry Permit Holder and Discrimination Provisions .....	15
5.4 Industry Check Inspectors.....	16
5.5 Union Right to Prosecute .....	16
5.6 Enforceable Undertakings.....	17
5.7 Individual Culpability .....	17
6. Safety Court and Sentencing Guidelines .....	18
7. Primacy of OHS rights over privacy .....	18
8. Changing Nature of and Organisation of Work.....	19
9. New, Emerging and Existing Hazards- Psychological and Biological .....	20
<b>Appendix A- Answers to Consultation Questions .....</b>	<b>22</b>
<b>Appendix B: Reported summaries from SafeWork prosecutions in 2015 and 2016. ....</b>	<b>63</b>

## Introduction

1. Unions NSW is the peak council of Trade Unions in NSW and represents 60 different affiliates and over 600,000 union members. Our members cover every occupation and every industry from retail and hospitality, to mining, engineering, construction and public services, disability services, health and education to name just a few.
2. Unions NSW welcomes the opportunity to make this submission to the review. The Work Health and Safety Act is a vital piece of legislation that every worker in NSW relies upon its terms to be the highest standard possible in what ever workplace they work. Regardless of the employer every worker should expect to be provided with safe work, adequate training, time, equipment and resources in order to do the job safely with dignity and respect.
3. Unions NSW submits that this review is a missed opportunity for the workers of NSW. The Work Health and Safety Act is legislation designed to uphold worker's human rights to a safe work as per ILO Convention 155 and other human rights conventions. Instead we have seen this review pose questions that highlight aspects of the legislation as a cost to business, and appears to be leading in its questions to favour reductions in protections for workers. This should not be acceptable for any worker.
4. None of these laws were introduced without organised labour highlighting the cost to working people and their families of failures of safety which often has involved significant loss of life, and subsequent mobilisation in order to improve workplace conditions. The conditions were not provided through generosity and benevolence of big business, but often opposed due to safety laws ability to put a floor on downward competition on the basis of safety. We are at one of these points again where the federal government is pursuing an agenda of "zombie" laws passed only by the discredited Campbell Newman government, where these cuts to workers' protections exist only in the model law provisions but not enacted in any Parliament with the repeal of these laws in Queensland.
5. SafeWork Australia has acknowledged why the focus of this review on business cost rather than improvements is a lost opportunity through their publications. Business only bears less than 1 in 20 dollars of the cost of injury. Safe Work Australia's *The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community 2012–13*<sup>i</sup>, utilises modelling from the Productivity Commission (Industry Commission prior) to calculate contributions from the community, the worker and their family and the employer. Despite employers contributing through improved safety and workers compensation, this contribution only equates to less than 5% of the cost of injury.
6. Therefore even if utilising an economic rationalist, utilitarian or user pays system, the current work health and safety system allows for employers who utilise labour to do so with considerable

95% discount from the cost that they should pay for hiring workers with inadequate safety systems in place.

7. The cost to employers is discounted further when you consider the ongoing premium reductions to workers compensation, paid for by cyclical reductions to workers benefits when schemes investment management profile becomes inadequate after state jurisdictions continually lower premiums.
8. This cost is further reduced when we consider the lack of enforcement and restorative justice that occurs in NSW, and the relatively minor penalties issued for the most severe consequences of failed safety, workplace fatalities, where penalties for breaches resulting in fatality have averaged in the last two years just 12% of the maximum fine.
9. This is a lost opportunity for an adequate review of the legislation, as since the enactment of the WHS Act on 1 January 2012, many of the provisions have generally not been adopted en masse nor enforced. Workers have identified minimal support from the regulator for undertaking safety roles such as Health and Safety Representatives, or their union representatives have found inspectors lacking understanding of the provisions allowing these important representatives to undertake their role.
10. The last five years have also been a lost opportunity, as whilst the whole country has adopted proactive elements of the WHS Strategy, NSW has simply relied upon amendments to the Workers Compensation legislation to transfer the burden of workplace injury and fatality statistics to other jurisdictions, whilst also relying on the transformation of industry from heavy industry to service based economy with lesser risk profile.
11. The review is also a lost opportunity as by focussing solely on those provisions unique to NSW is to expose those elements that were preserved from the previous OHS Act that were beneficial to workers, to yet another round of undermining without independent scrutiny. The this sole focus on the NSW variations does not prepare NSW as a jurisdiction to reach a common accord as to how to improve the model laws to make workplaces safer.
12. The harmonisation process has been a negative experience for many safety professionals and the workers of NSW. Many provisions have been watered down, or amended to provide less useful application. Since the adoption we have also seen ideologically driven governments “chip away” at the model laws through pandering to lowest common denominator businesses.
13. Unions NSW has a plan to improve the current legislation for workers and restore the balance. Unions NSW proposes to do this by restoring several old provisions that worked well for workers

and installing new provisions to deal with new and old safety problems. This is followed by the answer to the questions provided in Appendix A.

## Unions NSW 9 Point Plan to Improve the WHS Act

### 1. Tripartite Consultation

14. Formal tripartite consultation is the glue that binds the workplace legislation together. In the absence of tripartite consultation since 2012, we have seen no improvements to workplace conditions, no updating of existing codes of practice, epic failures such as multiple construction incidents, followed by fleeting “blitzes” and on the workers compensation side of affairs no maintenance of items as basic as IMC lists, or Regulations that have minimal practical application.

15. The harmonised WHS legislation required tripartite consultation as per ILO Convention 144 Tripartite Consultation at a state or territory level. The following provision was included in Schedule 2 of the model WHS Act.

16. The model Act refers to :

*“Schedule 2—The regulator and local tripartite consultation arrangements and other local arrangements*

*Note*

*See the jurisdictional note in the Appendix.*

*....*

*Schedule 2 A jurisdiction may use this Schedule to establish the regulator and to provide for local consultation arrangements and for local arrangements for the collection of money and the provision of data.”*

17. This schedule was not utilised for this purpose in NSW as there was the WorkCover Board and the Occupational Health and Safety and Workers Compensation Advisory Council enacted through the Workplace Injury Management and Workers Compensation Act of 1998. The minutes of the SafeWork Australia meeting establish NSW’s commitment to tripartite consultation by referring to the provisions in the WIMWC Act 1998. However, when the Workers Compensations Amendment Act 2012 was passed on June 19, 2012 with the Safety Return to Work and Support Board Act 2012, tripartite consultation was abolished for workers compensation as well as occupational health and safety.

18. Despite repeated correspondence with the Government regarding this issue, there has yet to be an acknowledgement from the government that safety laws are generally managed by state labour inspectorates in Australia due to the federated nature and constitutional basis of the state safety laws. Unions NSW is committed to tripartite consultation as per the ILO Convention 144 Tripartite Consultation, and have remained so regardless of the flavour of the government. Since the abolition of tri-partite consultation the Office of Better Regulation has hired a consultant to provide them with a model of consultation that provides no accountability or consistency on consultation.

### **Recommendation**

That Schedule 2 is amended to restore formalised statutory tripartite consultation with the regulator, the employers groups and trade unions.

## **2. Best Practice- Proactive Risk Management and Consultation**

19. Section 3 Objects of the Occupational Health and Safety Act 2000 provided a blue print for proactive health and safety.

*“Section 3 (e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,”*

20. This provided a proactive duty on employers to undertake risk management across a range of hazards. Currently when asked inspectors may tell of a range of answers regarding risk management requirements. These include:

- “there is a general requirement for risk management to occur under Section 17”,
- that there is a code of practice *“How to Manage WHS Risks”*, and
- that the risk assessment may or may not be written down.

21. These responses fail to require the same level of proactive consultation with the workforce and constant adjustment of mechanisms to eliminate and minimise the risk as was previously the case under a strict liability risk management approach of the OHS legislation. Additionally except for a handful of high risk activities the risk assessment does not even need to be written down as evidence for a penalty offence and is often rarely consulted with the workforce with sufficient timeliness to enable risk minimisation by those who conduct the work activity.

22. Formerly there was a provision that required hazards called “emerging” in the 1990s to be risk managed, but these same hazards are still titled emerging despite having emerged and have a lesser requirement for management. These include bodily fluids, the risk of violence, psychological hazards and fatigue related hazards. In examples such as the NSW Health, dealing with violence in emergency wards culminated last year in two workers being shot at Nepean

Hospital. The requirement to undertake a risk assessment would have already been present in the previous legislation, with possible mitigating controls already in place to prevent the risk. What has happened instead is that NSW Health refused after years of correspondence and agitation until this incident to deal with the risk of violence in a systematic way, and pushed responsibility back to the Local Health Districts who then argued that the costs involved prohibited major changes from occurring. Unions had to agitate with the Minister in order to start a process to address violence issues.

23. As an example of what NSW has lost for proactive risk management and practical guidance for small business, Clause 8 of the OHS Regulation 2001 required:

*“(2) In particular (and without limiting the generality of subclause (1)), the employer must take reasonable care to identify hazards arising from:*

*(a) the work premises, and*

***(b) work practices, work systems and shift working arrangements (including hazardous processes, psychological hazards and fatigue related hazards), and***

*(c) plant (including the transport, installation, erection, commissioning, use, repair, maintenance, dismantling, storage or disposal of plant), and*

*(c1) dangerous goods (including the storage or handling of dangerous goods), and*

*(d) hazardous substances (including the production, handling, use, storage, transport or disposal of hazardous substances), and*

*(e) the presence of asbestos installed in a place of work, and*

*(f) manual handling (including the potential for occupational overuse injuries), and*

*(g) the layout and condition of a place of work (including lighting conditions and workstation design), and*

***(h) biological organisms, products or substances, and***

*(i) the physical working environment (including the potential for any one or more of the following:*

*(i) electrocution,*

*(ii) drowning,*

*(iii) fire or explosion,*

*(iv) people slipping, tripping or falling,*

*(v) contact with moving or stationary objects,*

*(vi) exposure to noise, heat, cold, vibration, radiation, static electricity or a contaminated atmosphere,*

*(vii) the presence of a confined space), and*

***(j) the potential for workplace violence.”***

***(emphasis added)***

24. Unions NSW proposes the re-installation of the requirement to undertake written risk assessments prior to work being undertaken, and that there is a requirement to disclose risk assessments to workers involved in undertaking the work. This will re install better practices than what is occurring at present, with a lesser degree of risk management to when there was a general requirement for all hazards.

**Recommendation**

That the requirement to undertake a written risk assessment of all hazards at work is re-installed, with these required to be undertaken prior to the work being undertaken.

**Recommendation**

That all written risk assessments are provided to workers undertaking the work involved with the risk assessment.

### 3. Incident Reporting

25. Incident reporting has been a key component for the self-regulatory system the Robens style laws of the 1983 Act. However, incident reporting requirements are being systematically gamed by large employers and several medical practices. Systems such as early intervention schemes are used to provide workers with the impression to workers that they are making a workers compensation claim, where the worker gets access to additional physio and medical assistance at a minimal cost to the employer, but without formally notifying of a workers compensation claim.
26. Corporate reward systems such as “X million hours with no injury”, and extensive company medical systems have been identified by companies as cost effective mechanisms to avoid the notification requirements despite, their independently identified negative health and financial outcomes for workers and their negative approach to preventative safety.
27. A clear example is the requirement to notify when a worker is required to have immediate treatment as an in-patient in a hospital (Section 36 (a) WHS Act 2011). This enables large employers to set up a system whereby workers are ferried to a GP clinic whereby they are provided with an x ray or scan, physiotherapy, chiropractor and often other interventions, and then sent home on special or training leave, so that they do not trigger the notifiable incident requirement or serious injury under the workers compensation system. The risk is the same and the injury may be the same but the worker is “looked after” within limits as long as the worker does not make a workers compensation claim that then comes onto the books. The problem lies for the worker if the injury is complicated or becomes complicated requiring further secondary or tertiary interventions without medical payments under workers compensation due to delays in making claims, and the inability to access injured workers protections.
28. As notifiable incidents trigger legislative requirements as well as performance criteria in a number of government contracts, this practice undermines safety for the workers involved, but also for entire industries that operate under this system. These systems reduce the standard of notification reducing preventative investigations, and it prevents workers from reviewing risk measures under Clause 38 Review of Control Measures. These systems also prevent the regulator undertaking appropriate investigative and regulatory actions to prevent further events from occurring in the

future. It also creates an unfair position for other more honest operators in applying for government contractors due to distorted safety statistics.

29. Many HSRs report not being informed about notifiable incidents until after the worker returns from injury and asks them what has been done to prevent the risk from occurring again. Whilst they have a statutory role in reviewing risk controls under the legislation they are not afforded this right<sup>ii</sup>.
30. Unions NSW proposes a system to reduce the risk of systematic under-reporting whereby mandatory reporting is required for all incidents, injuries and near hits not only to the Regulator, but to the Health and Safety Representatives in the workplace and consultative committees but with a grading system. This would enable closing the loop on workplace incident notification.
31. Additionally the types of reportable incidents have been reduced from the OHS Act 2000. Formerly there was a requirement to notify when workers were physically and psychologically injured where the worker would be unfit for 7 days or unable to perform their usual place of work or perform their usual duties<sup>iii</sup>. This would circumvent the occurrence of workers being put on “special or training” leave to avoid notification to SafeWork.
32. Similarly incidents of violence and robbery were required to be notified to the Regulator.
33. It has been reported to Unions NSW that the Gross Incurred Cost of psychological injuries under the Treasury Managed Fund is nearing \$60,000 per psychological injury claim<sup>iv</sup>. This figure should not only send a sense of urgency to the administrators of the Treasury Managed Fund but also to Government for failing to manage psychological risks adequately to prevent injury, or the injuries are managed appropriately once they occur. The hazards causing these illnesses and other emerging injuries arising from a shift from heavy industry to service industries must be managed appropriately in a systematic way from SafeWork. This will not occur unless the regulator is notified once these types of injuries are detected or notified to the PCBU.
34. The previous provisions included:

*“341 Notification of incidents-additional incidents to be notified*

*In accordance with section 86 (1) (b) of the Act, any incident listed below occurring at or in relation to a place of work is, if it is an incident that presents a risk to health or safety and is not immediately threatening to life, declared to be an incident that is required to be notified to WorkCover:*

***(a) an injury to a person (supported by a medical certificate) that results in the person being unfit, for a continuous period of at least 7 days, to attend the person’s usual place of work, to perform his or her usual duties at his or her place of work or, in the case of a non-employee, to carry out his or her usual activities,***

- (b) an illness of a person (supported by a medical certificate) that is related to work processes and results in the person being unfit, for a continuous period of at least 7 days, to attend the person's usual place of work or to perform his or her usual duties at that place of work,***
  - (c) damage to any plant, equipment, building or structure or other thing that impedes safe operation,*
  - (d) an uncontrolled explosion or fire,*
  - (e) an uncontrolled escape of gas, dangerous goods (within the meaning of the ADG Code) or steam,*
  - (f) a spill or incident resulting in exposure or potential exposure of a person to a notifiable or prohibited carcinogenic substance (as defined in Part 6.3),*
  - (g) removal of workers from lead risk work (as defined in Part 7.6) due to excessive blood lead levels,*
  - (h) exposure to bodily fluids that presents a risk of transmission of blood-borne diseases,***
  - (i) the use or threatened use of a weapon that involves a risk of serious injury to, or illness of, a person,***
    - (i1) a robbery that involves a risk of serious injury to, or illness of, a person,*
    - (i2) electric shock that involves a risk of serious injury to a person,*
    - (j) any other incident that involves a risk of:*
      - (i) explosion or fire, or*
      - (ii) escape of gas, dangerous goods (within the meaning of the ADG Code) or steam, or*
      - (iii) serious injury to, or illness of, a person, or***
      - (iv) substantial property damage,"*
- (emphasis added)**

#### **Recommendation**

All incidents, injuries and near hits should be reported to the regulator and Health and Safety Representatives with a grading undertaken dependent on the level of risk or type of hazard.

#### **Recommendation**

The notifiable requirements for serious injury or illness, all psychological injuries, exposure to workplace violence, workplace bullying, work stress injuries and bodily fluids are reinstated.

## **4. Consultation**

### **4.1 Worker Support**

35. There has been a poor practice by the Regulator of shifting from an OHS Committee system to the more proactive Health and Safety Representative system. Unlike in Victoria, the regulator has failed to support proactive Health and Safety Representatives who put their own livelihood on the line to stand up for safety of their fellow workers. Unions NSW regularly has reports of Health and Safety Representatives being stood down, dismissed, run through legal processes in the courts, without the assistance of SafeWork. SafeWork has openly taken a position that they are not a

contradictor in these matters, despite the HSR not having the same access to legal representation as most employers. Examples of HSRs being discriminated against without penalty to the employer include a number in the construction industry, maritime industry, retail, manufacturing, transport and even the public service. These matters often end up in tribunals in lengthy hearings but could be resolved with the intervention of SafeWork Authority earlier on. What makes this position more concerning is that the WHS Act provides for exclusive regulation of discrimination matters with the regulator (Section 260 WHS Act). Therefore the regulator cannot be a casual bystander sitting on the fence and is required to intervene to ensure workers' representational rights are protected.

36. Additionally in relation to external reviews the Regulator takes a view that they will intervene in matters that seek to review an inspectors' decision, where as they will not intervene in matters that seek to benefit the position of a HSR. This conflict has seen a peculiar manifestation whereby a volunteer with the Rural Fire Service has been required to seek leave to intervene into an external review about their own right as a worker (under the WHS Act 2011) to seek HSR representation, and has been required to do so self-represented<sup>v</sup>. Volunteers are workers under the WHS Act yet cannot effectively join their union presenting issues of representation for them without a regulator supporting them. Unions NSW proposes that SafeWork amend its position on these disputes to take an active role in supporting all workers seeking to improve their workplace at work and in the courts. This position should one of presumed support. For SafeWork to take a neutral view when the PCBU is represented by a group of lawyers and whilst workers seeking to enforce the objects of the act are not represented, is simply ensuring a partisan result.

### **Recommendation**

That legislative basis for the Regulator be modified and the SafeWork Authority modify their current "neutral" position with regard to supporting HSRs to one of "presumed support".

## **4.2 Consultation Support Package and Guidance**

37. Despite utilising a consultant and undertaking a project that has lasted nearly 2 years, the program that has been developed to support Health and Safety Representatives is not yet complete and does not address the main issues raised by workers' representatives.
38. There needs to be a greater support package developed that includes dynamic practical training not designed by corporate safety managers, but by workers representatives. There needs to be a commitment of support from the inspectorate that describes what service levels should be expected from the inspectorate when HSRs contact them for assistance. There also needs to be better guidance describing how to form workgroups and undertake the various functions of HSRs and get around obstacles that are posed in issue resolution.

39. A number of examples can be provided where large employers (often self-insurers who should have exemplar safety) use various legal tactics to delay and frustrate Health and Safety Representatives, removing the focus from workplace issues to accessing representative rights. Health and Safety Representatives should have clear guidance on SafeWork publications advising how to negotiate these delays, and what speed and supportive response the regulator will take.
40. Victorian WorkSafe had an annual Health and Safety Representative Conference in conjunction with the Trades Hall. This conference is well attended and updates the skills of health and safety representatives with 1900 attending in the 2016 conference. The Trades Hall involvement is essential in order to rally interest and support, whilst setting a worker friendly agenda.

#### **Recommendation**

That a support package is produced in consultation with workers representatives to assist HSRs with expectations from the regulator regarding service levels from the regulator and methods of dealing with frustrations in issue resolution.

#### **Recommendation**

SafeWork consult with Unions NSW regarding jointly holding a Health and Safety Representative Conference.

### **4.3 Health and Safety Committees**

41. A number of aspects of the Safety Committee have been eroded from the harmonisation process. The process of election of employee representatives has been eroded, and the removal of committee training has eroded the competence, trust in and effectiveness of this type of consultative model. Additionally in a number of organisations the chair is no longer from the worker representatives which causes at times an agenda that sees very little of substance raised or progressed.
42. Health and Safety Committees still have a place but they need to be supported by the Regulator and amended in this review.

#### **Recommendation**

That an adequate training program is established for health and safety committee members.

#### **Recommendation**

That Section 76 is amended to require a worker representative to be elected as chair person.

#### 4.4 Roving Reps

43. Best Practice in United Kingdom and several European jurisdictions<sup>vi</sup> has indicated that roving safety representatives are successful in raising the standard, particularly in industries that allow minimal barriers to entry and populated by small businesses. In situations such as shopping centres and other conglomerations of similar work in small businesses, they also offer the opportunity to reduce costs by the sharing of reps amongst PCBUs.
44. The provisions for shared HSRs require agreement by the PCBUs and do not allow for workers to organise it on their own. Unions have effectively organised multiple PCBU consultative structures in construction, health, transport, manufacturing and other industries by negotiating with the principal to bring the other PCBUs and their worker representatives under their consultative arrangements. This makes sense when the consequences of the work of one PCBU can kill or injure workers of another PCBU. This does not work however, when there is a disagreement to do so, particularly from a PCBU with uneven bargaining power and an obstructive attitude towards worker representation. The current provisions allow roving reps under directions of an inspector, but there should be a presumption to allow worker initiation of multiple PCBU workgroup representations “roving reps” without veto from employers, particularly in organisations without effective consultative mechanisms.

##### **Recommendation**

That there should be a presumption to allow multiple PCBU “roving reps” in small to medium businesses without veto power from the PCBUs where there is an absence of effective consultation structures.

#### 4.5 Best Practice Approach to Skills Development

45. Unions NSW undertook a visitation recently with Canadian public and private sector unions in Ontario. In Canada, Health and Safety Representatives can progress beyond simple rank and file Health and Safety Representative to pursue assisted development in the area of health and safety. For example in the automotive manufacture industry the Health and Safety Representatives have a program that enables them to develop their skills and undertake industrial ergonomics programs, toxicology and industrial hygiene programs. Worker representatives can consult and negotiate at the same level of knowledge as the paid for consultants around the table who may have little exposure to the workplace hazards and systems, that the HSRs have. A similar program could be commenced in NSW on a scholarship basis similar to what occurs with the insurance companies for their claims managers.

##### **Recommendation**

Health and Safety Representatives should be supported to increase their knowledge beyond that of the HSR course through the development of a scholarship program in a related field.

## 5. Enforcement

### 5.1 Strict Liability

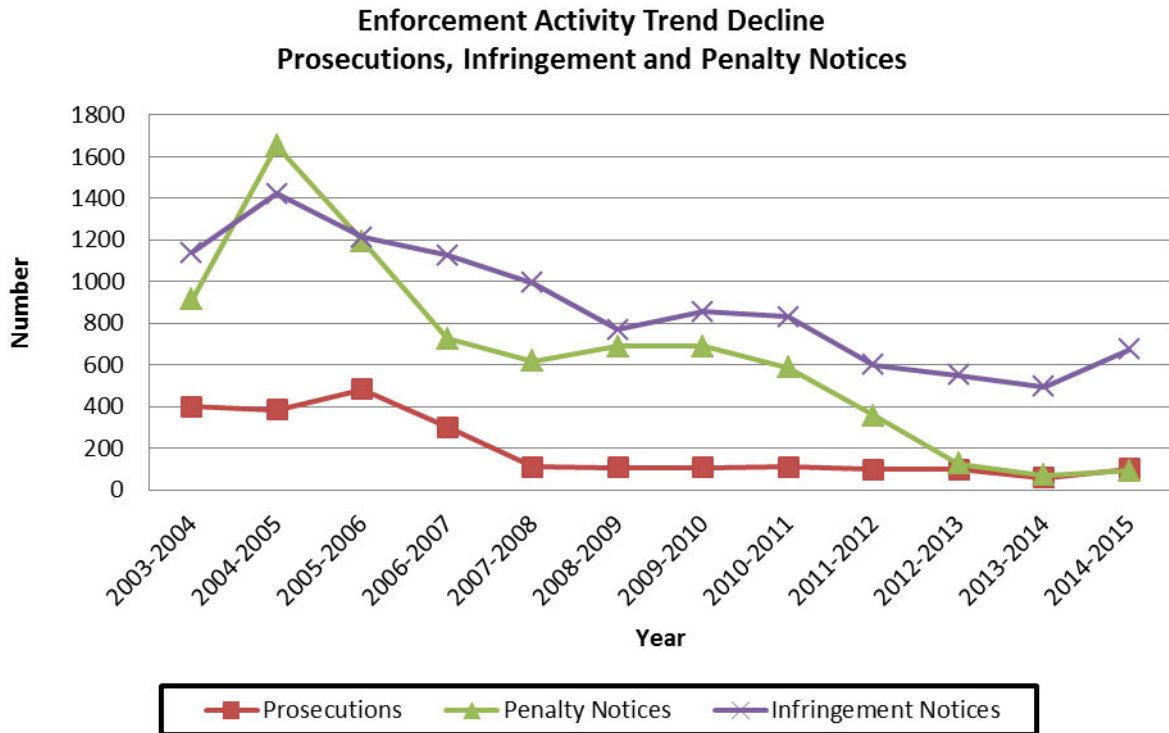
46. Despite Section 12A a majority of the duties are qualified with the reasonably practicable qualifier. This means that each element of the offence must be argued with regard to the subsections of the Section 18 definition of reasonably practicable. This argument is not solely restricted to the court room for prosecutions but writ large in consultations across the state where workers have to justify what the employer should reasonably know, what is known about the hazard, its consequence and likelihood of the hazard. This scenario is meant to be balanced with the Section 19 primary duty of care, but with enforcement levels so low it is likely that PCBU's can get away with breaches on average with minimal likelihood of negative consequence.
47. There is a need to restore strict liability to all the duty provisions including the consultation duties. This removes the inertia for positive safety change that is occurring every day in the workplace and then favours performance basis for the legislation.
48. See the answer to Questions 10 as to how this can be done to differentiate between natural persons and corporate entities which arguably have different rights in relation to strict liability.

#### **Recommendation**

That the reasonably practicable qualifier is removed from all the duties to create a position of certainty for all in the workplace.

### 5.2 Prosecutions

49. Prosecutions remain at a historic low trough that has occurred since the incumbency of the previous management of Safety at WorkCover. Despite the regulator making an effort to lead the nation in enforcement in the early 2000s with a subsequent radical decline in incidence rates, and NSW leading the largest decline in workplace injuries and fatalities, the more recent change in approach by SafeWork has only hindered proactive safety by duty holders. It is now quite common when a PCBU has a potential safety breach with their workforce to contact SafeWork to get the issue resolved in their favour if it is being disputed by the workers. Previously it was workers who could rely on a proactive approach by Inspectors ensuring a higher level of safety through their actions.
50. Additionally many targets of prosecutions have been at the sub-contractor level rather than attempting to tame the behaviour of the principal contractors where greater difference can be made.



Source: WorkCover Annual Report Series

#### 51. Recommendation

Unions NSW proposes a review of the current investigative and prosecution policies that dictate what is prosecuted with inclusion of worker and victim representatives to ensure that:

- a) proactive ground breaking prosecutions are undertaken
- b) appropriate restorative justice is achieved
- c) focus can be provided on emerging issues and poor performers

### 5.3 Entry Permit Holder and Discrimination Provisions

52. There are currently civil penalties provisions whereby unions are restricted from the bringing WHS right of entry breaches and discrimination provisions to the court for enforcement as per Section 260. The regulator has no history of enforcing these provisions despite a number of alleged breaches occurring in the last 5 years.

#### Recommendation

These provisions should be amended to criminal provisions.

#### Recommendation

These provisions should be amended to enable workers and their representatives to bring a prosecution for breached of these provisions.

## 5.4 Industry Check Inspectors

53. We have made recommendations following the Pike River Royal Commission to expand the span of industry check inspectors into broader industries in consultation with Unions NSW<sup>vii</sup>.

### Recommendation

That SafeWork work with Unions NSW to develop a check inspector system whereby several safety experts from each high risk industry undertake the SafeWork inspector training program and be provided with additional powers as an authorised officer.

## 5.5 Union Right to Prosecute

54. All union prosecutions have brought about positive safety change in the industry they pursued. All have been undertaken with a responsible approach taken that has utilised the same legal representation as is used by the Regulator. These matters have resulted in changed policy and behaviour by PCBU's, that was not occurring prior to the initiation of the prosecution. The process implemented by Parliament for reviewing union prosecutions appears to become overly complicated as far as timeframes and provides an administrative burden, for the ability to undertake enforcement action that the regulator has failed to do. The union bares the costs of a failed prosecution as a costs jurisdiction and a failure to improve safety. Unfortunately however, there is a balancing act between accessing information in a timely manner for a union prosecution, and waiting to see if the SafeWork Authority will decide to undertake a prosecution. The SafeWork Authority also refuses to advise as to whether they are pursuing an investigation until they decide they are not, due to the GIP Act not requiring them to do so.

55. Of the several matters prepared for prosecution by unions in the last five years that Unions NSW is aware of, unions were able to negotiate an improved safety outcomes with the possible threat of a prosecution going forth. This is an advantage of the union having the right to prosecute, as it creates better enforcement and improved safety outcomes regardless of whether a prosecution is initiated. Of concern was that the WorkCover Regulator had not undertaken an investigation in at least two of the incidents. Union prosecutions require PCBU's to take safety more seriously if the regulator does not have the appropriate resources to undertake regulatory action.

56. The union prosecutions undertaken to date were labour intensive actions and were not done for the money as reported, as the entire exercise was a negative cash flow. In many occasions the Union had allocated the money from the moiety to safety programs assisting members and duty holders achieve better prevention, and to the victims of the incident. However, as many of the prosecutions were of government agencies, it seems like a perverse result that the penalty of a union prosecution, as is currently established should benefit the offender and not the members who are the victim of the safety breach. Unions NSW seeks the following amendments to ensure that union prosecutions can invigorate a proactive approach to health and safety again in NSW.

### Recommendation

That the Union Right to Prosecute is amended to enable prosecution without requirement to seek review of SafeWork and the ODP, if representation is from a suitable person as governed by the Legal Professions Act who is involved in lodging the application.

#### **Recommendation**

That Section 230 (6) be amended to allow the moiety portion of the penalty to be directed to the industrial organisation if the union can provide to the courts satisfaction that the fine will be utilised within the rules of the organisation to better the interests of members.

### **5.6 Enforceable Undertakings**

57. The current approach to enforceable undertakings appears to differ from their advertised intention<sup>viii</sup>.
58. For example, North Sydney Local Health District's enforceable undertaking is a clear example of this failure. The District exposed subcontractors to a potential asbestos exposure when there was a failure to disclose adequate asbestos records and supervise these contractors<sup>ix</sup>. These workers will now need to spend many decades wondering whether they will suffer a painful death with mesothelioma. What makes the enforceable undertaking more controversial is that the unions have been raising on behalf of workers in the health sector the failure to manage asbestos for a number of years. This has included getting national media stories about asbestos sufferers from the same worksite that the incident occurred in after inaction by NSW Health and the Minister. Despite there being a regular state-wide consultation forum resulting from the media and calls for the Minister to act, this incident nor the enforceable undertaking were raised with the unions or local staff.
59. The PCBU has prior and since undertaken similar potential breaches of asbestos exposure across the health network. The unions are attempting through consultation to get more constructive remedies for the hospital asbestos management issues than simply providing a fitness program for older workers and Bunnings classes. Actual enforcement or an undertaking that required a change in behaviour for asbestos management would have been of greater assistance than this enforceable undertaking. This is a lost opportunity that could have been avoided if the regulator was required to talk to worker representatives.

#### **Recommendation**

Unions NSW proposes that a requirement is included in the legislation in Part 11 to require consultations with affected workers and their representatives prior to an enforceable undertaking to be offered.

### **5.7 Individual Culpability**

60. In many industries in NSW it is easier to "phoenix" a company and its potential liabilities when the company commits a WHS offence. With the merging of Fair Trading and SafeWork there are now

a range of building licenses and other tickets, payroll tax and workers compensation premiums that can be suspended or hiked to ensure the penalty is undertaken and the deterrent effect occurs. Unions NSW recommended utilising all the government licensing systems to prevent operators of a company liable for a safety offence to be prohibited from working in NSW without paying these fines.

### **Recommendation**

That SafeWork, unions and victims groups establish a project group to amend the penalty regime to enable greater adherence to penalties administered for safety breaches with a full range of government options including following the operations of the company and its directors.

## **6. Safety Court and Sentencing Guidelines**

61. In the last two years the average penalty provided for fatalities has average 12% of the maximum penalty available (see Appendix 2). This is inadequate in any jurisdiction. See question 32 for our recommendations to address this issue including establishment of a specialist safety court jurisdiction in the Industrial Relations Commission and also the establishment of sentencing guidelines.
62. Currently there are at least 5 forums that can deal with a safety issue including, the Local Court, Industrial Relations Commission, District Court, Supreme Court and the Civil and Administrative Tribunal. This is inadequate and is unique to this jurisdiction.

## **7. Primacy of OHS rights over privacy**

8. A number of provisions including Section 271 list a number of Acts from around the country that provide an exemption for the privacy and confidentiality provisions. Included are a number of current and former OHS legislations in pre-harmonisation form. This is because a person's right to safety was seen as a more important right than their privacy under the older legislation. This right to access for people undertaking genuine safety actions has always been balanced by restrictions for what and how the information is used.
9. The current harmonised legislation allows a reversal of the hierarchy of rights but in a perverse manner.
10. The right to confidentiality and privacy is used as an obstruction to worker representatives and workers obtaining important safety information about workplace hazards and incidents, and safety information about clients' behaviour management".

11. Yet despite this the rights of the worker to withhold personal information such as diagnosed mental illness, prescriptions, other injuries and illnesses in other laws, these rights are being subverted with workplace safety policies that remove these rights to privacy. This access through compliance with section 28, is regularly used to disadvantage and discriminate against workers in their employment all in the name of providing a safer workplace.
12. The WHS legislation conflates this problem by making it harder for worker's representatives to access information to assist improve safety, yet tacitly authorising the PCBU to hold this information that causes harm.

### **Recommendation**

That all privacy and confidentiality provisions are amended to allow the primacy of the right to have safe work, balanced with the prohibitions for the misuse of this information, so that safety rights override privacy provisions.

## **8. Changing Nature of and Organisation of Work**

13. Most studies of work now describe a workforce where over 40% is employed under some form of precarious employment. These workers often suffer from poor supervision, poor safety induction and training, and inadequate access to effective safety systems. A number of inquiries have also described poor access to workers compensation. Whilst the current mutuality of duties allows the regulator to pursue multiple businesses, there are a number of examples where this is simply not practicable (Section 16 of the WHS Act). Most experts into labour hire have recommended instead an approach that requires proactive compliance through a licensing scheme.
14. The only constant in these arrangements becomes the employment agent, the host employer and labour company. Safety is put at risk as workers are literally considered disposable, and without long term consequence unless a severe injury occurs by many PCBU's. Whilst South Australia has regulated Employment Agents<sup>x</sup>, there is a need for NSW to work with other states at COAG to commence a national licensing scheme for labour hire arrangements so that the hosts and labour hire company are forced to take a more proactive role on safety and other workplace rights. Similar schemes have been recommended by South Australia<sup>xi</sup>, Queensland<sup>xii</sup> and Victorian<sup>xiii</sup> labour hire inquiries arising from large scale exploitation in a number of industries.
15. Additionally similar to the construction industry with large amounts of precarious work often considered over 95% on sites, there is a need to have a basic safety induction card for workers in industries with high levels of precarious employment.

### **Recommendation**

That NSW pursue a safety license for labour hire operators in NSW through amendments to the NSW legislation.

## **Recommendation**

In industries with a high percentage of precarious work, that the NSW government introduce a safety induction ticket as a pre-requisite for working in that industry.

## **9. New, Emerging and Existing Hazards- Psychological and Biological**

16. For the last four decades the workplace has been shifting in Australia from heavy male blue collar industries to a service based economy that has a range of different hazards. Psychological, biological and other emerging issues that arise from changing work are being failed by the current system of Health and Safety Regulation, which focuses narrowly on traditional physical hazards and not on emerging physical, psychological or systematic hazards.
17. Despite the progress made with the OHS Act 2000 NSW and several targeted union and WorkCover prosecutions, there has been minimal work done in NSW for the last ten years by the NSW regulator on issues such as workplace bullying, occupational violence, work stress, shift and fatigue management. The only inclusion of the psychological hazards in the entire body of the WHS legislation is in Section 4 under the definition of “health”, referring to physical and psychological health.
18. Unfortunately due to the nature of psychological hazards the recuperation process is slow and return to work is long. Treasury Managed Fund for example has reported that work pressure causes claims that average a Gross Incurred Cost of nearly \$60,000. Whereas for the industries that the TMF represents, being injured by “another person” which may include workplace violence and bullying has a toll of over 25% of the all claims in the sector. Prevention should be seen as a key to minimise the extent of psychological injury<sup>xiv</sup>.
19. A number of Australian mental health groups are looking into the adoption of the National Standard of Canada for Psychological Health and Safety in the Workplace. This was adopted after a number of years of consulting with experts, industry, workers and the government. It provides an evidence based auditable approach to undertaking management of psychological health and safety. At present there is no minimum standard for the treatment of workers psychological safety at work. National Codes of Practice have been researched and put forward at a national level, yet have been rejected on party grounds. Unions NSW is calling for the adoption of the Canadian Standard called up into the WHS Regulations.
20. Biological hazards are prevalent in a range of law enforcement, health, agricultural, community services, sport and recreation, hospitality, and other customer service roles. Despite regular exposure at work, there is no systematic method of managing the risks posed by workplace exposure to biological hazards. Instead we have a range of complicated requirements from

different agencies including SafeWork, NSW Health, NSW Agriculture (in whatever form it is titled), Local Government, various emergency services and even Quarantine (Border Force).

21. Unions have been calling for the establishment of a WHS Regulation to require risk management of workplace psychological hazards and workplace biological hazards. The combination of the adoption of the Canadian Standard and a proactive requirement in the Regulation will lead to more progress in psychological safety, and reduce the toll of workers who are unable to return to work.

**Recommendation**

That NSW adapt and adopt the National Standard of Canada for Psychological Health and Safety in the Workplace through calling it up in the WHS Regulations

**Recommendation**

That a Regulation is established requiring the risk management of psychological and biological hazards at work.

## Appendix A- Answers to Consultation Questions

1.If you wish all or some of your feedback to remain confidential, please indicate below and BRD will take this into consideration.

No (subject to clearance on covering letter)

### 2. Contact information.

Unions NSW  
WHS Unit  
Level 3, 4 Goulburn Street,  
Sydney, NSW 2000  
Ph 98815917  
Email whs@unionsnsw.org.au

### 3.Tick the box that applies to you (type of submission).

Peak Council of Unions

### 4. Are the objects of the Act still valid?

There are several of the objectives that are no longer valid as the jurisdictions are failing to uphold these objectives and should be replaced with more practical achievable objectives.

*h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.*

Harmonisation has become a “dirty word” in health and safety. Instead of a rising tide to bring all states up to the same level, the harmonisation process has become a process whereby partisan governments utilise numbers on SafeWork Australia, and technical voting aspects with an un-elected HOWSA caucus to undermine the model legislation. This undermines the legislation in every state due to this objective as very few attempts to improve health and safety at work have been achieved under this system. Whilst harmonisation was heralded as a benefit to business, it has not been so for workers in NSW.

Instead we have effectively optional risk management, outside of the high risk activities, we have a lesser duty of care due to the replacement of “strict” liability with conditional liability that authorises businesses to undermine safety on basis of spurious cost arguments, and a handbrake on enforcement or development of new codes of practice, discouraging greater preventative safety work in this area.

Unions NSW suggests including here that the objective should be enhanced by the inclusion of,

*“and by undertaking trials and modifications to NSW jurisdiction that allow for better injury prevention and maintaining a pro-active role of business and undertakings through formalised tri partite consultative mechanism.”*

### 5. Are the terms of the Act appropriate for achieving the stated objectives?

No as explained in Question 4

6. Could the objectives of the Act be achieved in ways that do not cost business as much time, resources or financial expenditure?

This question is based on a false premise and is inherently biased. Many businesses do fail due to poor safety, safety incidents and safety should not be seen as a negative cost but capital investment.

The WHS Act is a human rights act to ensure that industry does not injure workers and others through the course of their undertaking. The cost born by business is minor compared to the cost born by workers and the community. The Productivity Commission and Safe Work Australia have estimated the total cost of injury born by the employer to be less than 5% with the majority born by the worker and then the community<sup>xv</sup>.

The objectives of the Act are to assist the courts and community in understanding what is meant by specific parts of the Act. If the objectives are undermined, then this undermines the purpose of improving occupational health and safety.

As per the answer in Question 4, the objectives are not being met at present. The objectives should be improved by better addressing emerging issues such as psychological hazards such as occupational violence, work stressors, and workplace bullying, fatigue, supply chains arrangements, biological hazards and also precarious work.

The objectives should enshrine the role of risk management and proactive requirement to address health and safety risks.

Additionally there are no service or expectation standards to govern the enforcement of the legislation. Whilst there are strict liability provisions, the most important provisions are without strict liability with the reasonably practicable qualifier. Unlike other parts of the law there is no practice to enforce laws at a level to meet community expectations that penalty follows breach.

Tripartite Consultation is implied by the objectives and was in Schedule 2 until the 2012 amendments to the Safety Return to Work and Support Board. Now there is simply no tripartite structure in existence in NSW contrary to the requirements of the ILO conventions and the Model Act provisions<sup>xvi</sup>.

7. Are any of the objectives causing unnecessary costs for business?

This is another biased question.

There is no evidence of the objectives unnecessary costing business, and instead business is benefitting from a national safety system, not having incidents that are often a cause of business failure in SMEs. If business can mount a weak argument that there is a cost, this cost is far outbalanced by the cost of failing to undertake this objective that is paid for primarily by workers.

8. Are the NSW-specific definitions in section 4 of the Act working effectively?

Yes, but please note that the title Person Conducting the Business or Undertaking (definition is referred to Section 5) is misleading and causes significant confusion. This gives the body corporate a title that gives the impression of a natural person, yet most people new to the legislation believe that the PCBU is the officer, which is often a position, or alternatively workers.

Additionally the definition surrounding the organisation that is a voluntary organisation and their duties causes confusion depending on whether they employ workers. In training with a number of volunteer officers and workers who believed that they were exempt, it was identified that they were in fact owing a duty to all the volunteers despite their best efforts to hide the employment relationship.

### **Recommendation**

A more appropriate name than Person Conducting Business or Undertaking (PCBU) may be the business entity.

### **Recommendation**

Remove the exemption for volunteer organisations that do not employ people under Section 5 subsections 7 and 8.

9. Are these definitions clear? Please provide examples of circumstances where any definitions are not clear.

Yes, except for those in the above answer.

10. Do you have any comments about how the strict liability provision is working?

The strict liability offences are working well as they create certainty for workers and business about the standard and expectations that must be applied. However, the provisions without strict liability are not working because there are very few provisions that are strict liability in the legislation. Most of the duties and significant responsibilities are qualified with “reasonably practical”. The reasonably practical qualifier removes strict liability from all the elements of the offence and replaces it with a matrix of variables or even sub-elements that become necessary to prove in order to prove the offence. It actually then becomes a question for all workplace parties about whether what is being done meets a legal standard rather than achieves a desired performance outcome of ensuring against risk of injury or death.

There is discussion in the legal community regarding the appropriateness of strict liability for natural persons. This is despite a range of strict liability jurisdictions across a range of criminal and civil areas applying to individuals. Unions NSW proposes that as the cost of workplace injuries and disease to workers, communities and families is far too much to allow uncertainty, and the weight of consequence far outweighs the rights of corporations to a legal process that favours them and affords them greater liberties than that of the injured worker.

Whilst Unions NSW has a policy for strict liability for health and safety offences to assist in realising the seriousness of Work Health and Safety, we do not believe that the current Parliament will adopt this approach. Unions NSW instead recommends re-instating strict liability duties by removing the “reasonably practical” qualifier in the duties of the legislation for corporations.

As a compromise two tiered defence system should then be installed allowing individuals and corporations to be treated differently. This will allow corporations to be treated with the reverse onus that creates certainty for everyone that all the elements of the offence must be performed in the positive to avoid prosecution.

The second tier for natural persons will be provided with the reasonable practicable qualifier, that must be proven in offences against them.

The previous defence regime in Section 28 of the OHS Act 2000 should apply as the model for corporations.

### **Recommendation**

That a two tiered strict liability regime is implemented for natural persons and corporations with health and safety duties, implementing a reverse onus defence for corporations.

11. Do you have any comment regarding the provision that prevents duplication of incident notifications where they must be notified to the Resources Regulator?

With respect to the inspectorates in both jurisdictions, there appears to be the opportunity for the operators of a mine to be selective depending on the type of hazard. SafeWork NSW and Mines Regulator have a MOU to regulate safety for each regulator's employment. In a recent example the advice provided by the countervailing inspector showed a lack of understanding of the hazard and the countervailing legislation for which the worker was operating. This is because Mines Inspectors are typically previous Mine Engineers/Managers, whereas SafeWork Inspectors have training in general hazards. If notifying only the mines inspectorate of a hazard that occurs above ground that fits into a category of a notifiable incident but not typical for the type of work that is done in a mine, the issue may not get the same attention as if the notification was provided to the SafeWork Inspector. Additionally there is usually a protocol to notify the Industry Check Inspectors in Mines workplaces that must be maintained.

With technology both should be notified with no added impost on the business.

### **Recommendation**

That the exemption should be removed to allow both regulators to be notified.

12. Do you have any comment to make regarding the IRC being the forum that can receive and decide whether to disqualify a HSR?

There is a link between entry permit holders who assist Health and Safety Representatives and the Health and Safety Representatives, in that they are both worker representatives. This question should be read in conjunction with question 19.

### **Disqualification of HSRs**

The IRC is a pragmatic jurisdiction, with greater ability for lay representation. HSRs are workers who do not put aside money for the ability to be represented in court. The IRC does not require costs and therefore enables greater access for HSRs.

The IRC also has knowledge of the operation of other similar industrial and representative law such as Section 210 of the IR Act 1996 and has a realistic perspective of the role of representative responsibilities.

HSRs such as voluntary fire-fighters are already attending the IRC unrepresented and to move the jurisdiction will only compound the difficulties for paid and unpaid workers to undertake HSR roles under the WHS Act.

The IRC is also governed by rules of the Industrial Relations Act and as a result they can conciliate on matters prior to full arbitration. This enables matters to be resolved without requiring lawyers. The IRC can deal with matters in a variety of ways through behaviour amending recommendations and orders after conciliation and/or arbitration.

The IRC has industry experience and does not require the same level of contextual development prior to the argument of disputed facts and law. As a result the IRC is not only cost effective but more efficient in its resolution of matters.

The IRC has industrial experience that allows the tribunal to judge on what is a reasonable activity by the HSR prior to their disqualification, as well as the important role that reps take.

The IRC also participates in the Sections 223 and 229 external reviews which includes a range of HSR formation and HSR activity based grounds for external review.

### **Recommendation**

That the IRC remain as the jurisdiction to deal with all HSR disputes.

13. Are the additional provisions that have been inserted for health and safety committee's in coal mines working well?

There should be no diminishment from the existing provisions and Unions NSW refers to the Construction Forestry, Mining and Energy Union (Mining Division) for improvements.

14. Are the provisions relating to prisoners, working well?

These provisions create ambiguity and confusion. As part of Corrective Services Industries, inmates are encouraged to undertake vocational training, undertake community work placement and also undertake production for corrective service industries and external companies whilst in custody. This work also often occurs collocated with workers who are not in custody. If we are to simulate the work environment for inmate trainees for their return to the workplace and the community, or even place these workers in community detention through work placement, then we should be encouraging these workers to develop their work safety skills including the full range of consultation. Currently when work is unsafe, inmates utilise alternative mechanisms to secure safe work including attempting to get transferred to other work program or simply call in sick, which is not productive for the Corrective Services Industry or the State of NSW and costs the state millions of dollars in lost productivity.

### **Recommendation**

SafeWork review with the PSA POVB, the NSW Teachers Federation, Corrective Services Industries Board and Justice Action the adequacy and extent of this exclusion.

15. Are the organisations listed to clarify who is an emergency services worker, appropriate?

No see next question.

This provision should be clarified via notes to be in the case of an emergency operation that the consultation requirements are reduced. Many of the listed organisations carry the poor consultation into everyday operations and as a result suffer significant psychological risks.

16. Are there any other organisations that should be listed?

Potentially the following categories should be listed after consultation with their representative bodies.

- Police Special Constables- Public Service Association in relation to the premises that they secure (these are not deemed police force under some legislation)
- National Parks Officers – particularly to do with search and rescue and wild fire scenarios- Public Service Association of NSW and Australian Workers Union
- Paid Council Lifeguards- United Services Union and United Voice
- Surf Life Savers- SLSNSW if they do not fall under the existing categories
- Unions and their officers undertaking industrial action over safety issues regularly, as organising around safety issues makes up a core component of affiliate work to improve work health and safety- Unions are also authorised in other parts of the Act to undertake these actions such as warn people and consult with people over safety, yet are not excluded- Unions NSW
- NSW Health in certain circumstances such as pandemics- ASMOF, HSU, NSWNMA, PSA of NSW
- NSW Agriculture officers (Primary Industries) in certain scenarios such as biological outbreaks- PSA of NSW
- Local Land Services (Livestock zoonotic outbreaks)- PSA of NSW

17. Are there any organisations listed, that should not be?

No

18. Do you have any comment to make regarding the District Court being the forum that can receive applications about civil proceedings in relation to discriminatory, coercive and misleading conduct?

Currently there has been no prosecution for discrimination under the WHS Act in NSW. The only case that Unions NSW is aware of by a regulator was WorkSafe Victoria vs. Patricks<sup>xvii</sup>. The jurisdiction for civil penalty action under the WHS Act 2011 (NSW) is stated in Section 262 is limited to the regulator or an Inspector. Despite a number of examples whereby Health and Safety Representatives have been sacked, stood down, or performance managed for undertaking a safety action, SafeWork NSW has not undertaken any civil prosecution. In fact there is evidence suggesting SafeWork in its previous forms and currently has undertaken to discriminate against workers in its own organisation for raising safety issues. This limitation as to only the regulator being able to undertake civil action is limiting and leaves workers vulnerable for taking any role in health and safety.

The District Court has only limited exposure to the discrimination provisions, unfair dismissal provisions, nor contextual understanding of modern safety systems or standards. Unions NSW states that the obvious provision for this type of matter is in the Industrial Relations Commission as they already run similar matters under Section 210 of the Industrial Relations Act 1996. Due to amendments to the Industrial Court, a new jurisdiction that will now need to be called the “*safety court jurisdiction*” to avoid attending the Supreme Court with its perverse costs of justice.

Additionally trade unions on behalf of affected workers should be able to run these matters as unions run these matters on a regular basis to ensure that worker representatives can be assured that they can undertake their role with independence and without fear.

Section 262 relates to payment of monetary penalties. In less than 5% of Fair Work unfair dismissal matters the worker is able to gain a reinstatement<sup>xviii</sup>. Therefore provisions should be made not only to allow secretaries of unions to undertake civil prosecutions but also as in several of the prosecutions such as those undertaken by the Finance Sector Union against the banks, that the victims can be paid the penalty so that it can be assigned to aspects that improve safety but also those that can be used to compensate the workers affected<sup>xix</sup>.

#### **Recommendation**

That a new safety court jurisdiction is established in the Industrial Relations Commission.

#### **Recommendation**

That discrimination matters can be brought to the Industrial Relations Commission – safety court jurisdiction

#### **Recommendation**

That trade unions be authorised to run discrimination matters

#### **Recommendation**

That Section 262 is amended to allow the penalty to be provided to the prosecutor to be applied to appropriate safety outcomes or the victim.

### **19. Do you wish to comment about the IRC being the Authorising Authority for NSW?**

The IRC is operating effectively as the Authorising Authority for these provisions. The problem lies in the ability of the Regulator to dispense their responsibility Section 141 to assist to resolve a dispute despite the limited capacity for the union to enforce the provision, due to the statutory bar in Section 260.

#### **Authorising Authority**

Unions have endured significant frustration due to the failure of the WorkCover and then Safe Work Authority to undertake enforcement activity around issues where they are not the authorising authority, yet they have a residual jurisdiction or sole jurisdiction to undertake an action with the authorising authority.

An example of this is in relation to right of entry breaches, and discrimination matters.

Unions NSW understands that union officials exercising their right of entry for OH&S purposes have a significant effect on OH&S compliance. Workers are effectively represented in voicing their OH&S concerns, and employers will respond by resolving OH&S issues out of fear that the union will either involve an Inspector from the Regulator, or (in NSW) initiate proceedings against the employer in the event of a significant breach.

Unions are growing increasingly frustrated with the inconsistent assistance provided by SafeWork Inspectors in relation to PCBU's hindering or obstructing an Entry Permit Holder's right of entry. This has even involved an incident where the inspector made entry more difficult through their own actions to a preserved site of a fatality, potentially causing a breach of the legislation.

The legislation states:

***"141 Application for assistance of inspector to resolve dispute***

*If a dispute arises about the exercise or purported exercise by a WHS entry permit holder of a right of entry under this Act, any party to the dispute may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute.*

***142 Authorising authority may deal with a dispute about a right of entry under this Act***

*(1) The authorising authority may deal with a dispute about the exercise or purported exercise by a WHS entry permit holder of a right of entry under this Act (including a dispute about whether a request under section 128 is reasonable).*

*(2) The authorising authority may deal with the dispute in any manner it thinks fit, including by means of mediation, conciliation or arbitration.*

*(3) If the authorising authority deals with the dispute by arbitration, it may make one or more of the following orders:*

*(a) an order imposing conditions on a WHS entry permit,*

*(b) an order suspending a WHS entry permit,*

*(c) an order revoking a WHS entry permit,*

*(d) an order about the future issue of WHS entry permits to one or more persons,*

*(e) any other order it considers appropriate.*

*(4) The authorising authority may deal with the dispute:*

*(a) on its own initiative, or*

*(b) on application by any of the following to whom the dispute relates:*

*(i) a WHS entry permit holder,*

*(ii) the relevant union,*

*(iii) the relevant person conducting a business or undertaking,*

*(iv) any other person in relation to whom the WHS entry permit holder has exercised or purported to exercise the right of entry,*

*(v) any other person affected by the exercise or purported exercise of the right of entry by a WHS entry permit holder,*

*(vi) the regulator.*

*(5) In dealing with a dispute, the authorising authority must not confer any rights on the WHS entry permit holder that are additional to, or inconsistent with, rights exercisable by the WHS entry permit holder under this Part.*

***143 Contravening order made to deal with dispute***

*A person must not contravene an order under section 142 (3).*

*WHS civil penalty provision.*

*Maximum penalty:*

- (a) in the case of an individual--\$10,000, or*
- (b) in the case of a body corporate--\$50,000."*

Yet in a number of examples workers representatives have been frustrated in that the SafeWork Inspector has failed to undertake other enforcement action to enable timely entry to the workplace such as issuance of notices. Examples exist that can be provided, where SafeWork has refused to use notices to enable entry permit holder to enter after a notifiable incident of a structural collapse. The Entry Permit Holder was unable to enter the workplace and undertake the appropriate evidence gathering and the SafeWork Inspector failed to enforce a prohibition notice on the structural collapse. This example could have been prosecuted as there was a risk that a worker could have been killed. Instead no prosecution occurred from SafeWork and the entry did not occur until after the scene was tampered. Entry permit holders do not have prohibition notice powers. It is also argued that entry permit holders and their union do not have the ability to undertake a prosecution for a breach of the right of entry provisions as these are deemed civil penalties (section 260). The Inspectors often advise that they have minimal training in the rights of an entry permit holder as opposed to their own rights. On another occasion an inspector has hindered and obstructed a WHS entry permit holder from undertaking an investigation on a scene of a fatality, where the secretary of the industrial organisation of the WHS EPH would have the option of undertaking a prosecution. The regulator has a poor history of enforcing right of entry provisions despite the beneficial nature of thousands of workers representatives educating workers on safety and coordinating improved safety outcomes at work. The major right of entry prosecutions under the previous OHS legislation have occurred in manufacturing in the federal jurisdiction, in the state jurisdiction in distribution<sup>xx</sup>, construction, and in manufacturing.

The provision prohibiting the undertaking of prosecutions by unions are indicated at:

*"260 Proceedings may be brought by the regulator or an inspector*

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

- (a) the regulator, or*
- (b) an inspector with the written authorisation of the regulator (either generally or in a particular case)."*

As SafeWork Inspectors have limited knowledge of the rights of unions Entry Permit Holders in undertaking important safety work, and have a proven history of not enforcing these provisions as a right of workers to seek representation there needs to be an amendment. Unions would therefore recommend that the provisions be extended to enable secretaries of industrial organisations of unions to undertake prosecutions for civil penalty provisions, particularly with regard to worker and HSR rights and discrimination against workers, and also with regard to entry permit holder matters.

### **Recommendation**

That the civil penalties for hindering and obstructing an Entry Permit Holder be converted back to criminal penalties as they were under the OHS Act 2000.

**Recommendation**

That the jurisdiction for civil penalty disputes be extended to secretaries of industrial organisations.

**Recommendation**

That the IRC be the jurisdiction to hear all right of entry matters and prosecutions with the installation of a new safety court powers on the IRC to prevent unnecessary cost of the Supreme Court.

20. Do you wish to comment on the Industrial Relations Act 1996 being named as the relevant state or industrial law in NSW?

This is a peculiar question.

The Sections referring to the Industrial Relations Act 1996 all proceed with “Fair Work Act or”.

The Industrial Relations Act 1996 is the only relevant state Industrial Act and the other states when they referred powers also preserved for aspects of industry, but mainly public services a relevant equivalent industrial legislation, barring of course Victoria.

The Fair Work Act has only limited provisions for adjudication of safety matters.

21. Is the definition of ‘authorised person’ working well? If no, please provide details and examples about how this could be improved for your particular circumstance.

Currently this provision mainly applies to delegations to officers of the Mines Inspectorate. There are opportunities to increase safety outcomes by delegation to safety professionals and industry participants. The check inspector system in the coal mines industry works well and has been mentioned in the Pike River Coal Mine Royal Commission<sup>xxi</sup> as improving safety outcomes as an alternative when the regulator fails. Whilst not all powers are delegated, a similar system would work well to assist workers in industries where there is a high risk, such as stevedoring, agriculture, transport and logistics, manufacturing, construction, and government and health.

Currently in a number of these industries large numbers of notifiable incidents are reported yet not investigated by inspectors. If there were trained “check inspectors” in these industries, they could undertake many of the investigative tasks to prevent these incidents occurring again, but also to implement proactive improvements to the entire industry in proactive programs.

**Recommendation**

That SafeWork work with Unions NSW to develop a check inspector system whereby several professionals from each high risk industry undertake the SafeWork inspector training program and be provided with additional powers as an authorised officer.

22. Are the classes of persons that the regulator may appoint as an inspector, working well?

No see above.

23. Are the provisions for Inspectors to obtain a search warrant to obtain information about a suspected WHS breach clear?

No comment, refer to the PSA SafeWork Inspectors Vocational Branch.

24. Do the references to the Law Enforcement (Powers and Responsibilities) Act 2002 provide suitable powers for the WHS Inspector and NSW Police to cooperate and obtain information about a suspected WHS breach?

No comment, refer to the SafeWork Inspectors Vocational Branch- PSA of NSW and Police Association of NSW.

25. Are any other provisions needed for the WHS Inspector and NSW Police to cooperate and obtain information about a suspected WHS breach via a search warrant?

No comment, refer to the SafeWork Inspectors Vocational Branch- PSA of NSW and Police Association of NSW.

26. Do you wish to comment on the provisions that NSW currently provides for an Inspector to obtain a person's name and address?

This is appropriate. When an incident occurs there is often a reluctance to speak to an inspector, especially for workers who may feel intimidated by the presence of the employer or employer's lawyers who seem to arrive before the inspector.

27. Do you wish to comment on the provision regarding a person who fails to prove that the name or address they provided to an Inspector, is correct?

No they are adequate.

28. Do you have any comment to make regarding the District Court being the forum that can receive applications by the regulator, about non-compliance with notices?

As per comment elsewhere a special jurisdiction of the Industrial Relations Commission should be established titled the "safety court jurisdiction".

The court that hears prosecutions for the breach of duty should also be the court that hears non-compliance with notices.

29. Do you wish to comment about the District Court being the nominated forum to receive and hear an application for orders where a person is alleged to have contravened a WHS undertaking in NSW?

As per comment elsewhere a special jurisdiction of the Industrial Relations Commission should be established titled the safety court jurisdiction.

The court that hears prosecutions for the breach of duty should also be the court that hears non-compliance with notices.

See Unions NSW recommendations regarding the formation of enforceable undertakings.

30. Do you wish to comment about the IRC being the nominated external body to receive and decide an application for review of a reviewable decision made by the regulator?

As stated elsewhere the IRC has the contextual understanding of the industrial workplace. The range of matters that can be reviewed externally described in Section 223 provide similar subject matter as the IRC already deals with. The IRC is a low cost jurisdiction allowing the matters that are dealt with to be low cost for the worker and the PCBU and can be dealt with under the rules of the IRC expeditiously utilising conciliation and arbitration as deemed necessary by the commission. The Fair Work Commission has limited jurisdiction to when a matter is contained in the enterprise agreement, and does not have reference to the external review provisions of the WHS Act. The IRC allows lay representation that reduces costs for everyone and primarily aims to resolve disputes in a timely manner.

### **Recommendation**

The IRC should remain as the jurisdiction for Section 229 external reviews.

31. Do you wish to comment about the IRC being the nominated external body to receive and hear an application for review of a decision made, or taken to have been made, on an internal review by the regulator?

As per question 30.

### **Recommendation**

The IRC should remain as the jurisdiction for Section 229 external reviews.

32. Is the forum for proceedings for an offence against the WHS laws (except category 3 offences) being the Local Court or the District Court in its summary jurisdiction, working well?

No

This jurisdiction is not working well for a number of reasons.

### **Record of reasons**

The Local Court has virtually no public reporting system for the reasoning and the District Court jurisdiction has a poor system of reporting of judicial reasoning when compared to the system of reporting of reasons under the Industrial Relations Commission. The reporting of reasons enables the industry participants to learn from their mistakes as to what can be improved from a certain incident. It also provides a better legal understanding by comprehensive case references establishing a legal context.

### **Poor Deterrent Effect**

Dr Peggy Trompf has undertaken research into the prosecutions of fatalities under the Industrial Court 1998-2008 citing that the average penalty for a fatality, although rising at the end was 18%<sup>xxii</sup> of the maximum. Unfortunately when you review the reported prosecutions on the SafeWork website these have not improved and have instead decreased in value and also percentage on average. For example in Appendix B, which lists the prosecutions off the SafeWork website in the last two years, the average

penalty is now at 12% of the maximum penalty available when the matter goes through the district court. As most of the defendants have no possibility of incarceration due to their status as a corporation, and an ability to shift corporate structure and phoenix liabilities, it can be argued that the NSW government is going soft on this criminal legislation.

There appears to be also a significant delay from when an incident occurs to when it is finalised. The decisions often appear to read so as to put the corporate criminal in a different light to a criminal who kills someone as a natural person despite the same outcome.

Unions NSW proposes two avenues to address these problems.

### **Recommendation**

That the IRC is established as the jurisdiction for safety matters with a safety court jurisdiction established.

### **Recommendation**

That sentencing guidelines are established after consultation with prosecutors, unions and victims groups to properly guide courts on administering justice under industrial safety regime.

33. Is the requirement for proceedings about category 3 offences to be dealt with summarily, working well?

Local Court does not appear to be the correct jurisdiction for dealing with these matters. Refer to answers regarding safety jurisdiction of the Industrial Relations Commission.

34. Are the provisions of the Industrial Relations Act 1996 that relate to appeals under the Act working well?

This provision is complicated due to the transfer of the Industrial Court to the Supreme Court. They have not been tested so this question cannot be effectively answered.

35. Do you wish to comment about the provision for the secretary of a union to bring proceedings for an offence against the Act?

The provisions should remain but should be amended, as there have been great improvements made to safety as a result of unions' WHS prosecutions.

The amendments to be made should include the removal of the Section 230 (3) and amendment of Section 231.

The current provisions are unworkable and experience would indicate that the timeframes are not likely to assist.

### **Recommendation**

That SafeWork, the ODPP and Unions NSW agree on an alternative section that will allow a more workable process.

On the issue of Unions's right to prosecute, Unions have typically undertaken prosecutions based on hazards that are emerging in the industry but not regulated by the regulator. The following is from the Unions NSW submission for the National Harmonised Occupational Health and Safety Laws to Safe Work Australia in 2008. It demonstrates a number of the case studies.

*"Unions NSW at various parts of this submission has stated strong support for a model OHS Act to include provisions whereby Unions can commence proceedings against employers for breaches of the Act. This is in addition to the powers vested in an Inspector acting for the Regulator, the Regulator in its own right or, when it is directed by the Minister. S.106 of the NSW Occupational Health and Safety Act 2000 provides a model which, with some amendments, accommodates this issue.*

#### **Authority to prosecute**

- (1) Proceedings for an offence against this Act or the regulations may be instituted only:*
- (a) with the written consent of a Minister of the Crown, or*
  - (b) with the written consent of an officer prescribed by the regulations, or*
  - (c) by an inspector, or*
  - (d) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate.*
- (2) In proceedings for an offence against this Act or the regulations, a consent to institute the proceedings, purporting to have been signed by a Minister or a prescribed officer, is evidence of that consent without proof of the signature of the Minister or prescribed officer.*

*The NSW experience has shown that unions who have undertaken prosecutions, fall into a number of categories, which in a number of cases, are different to the normal NSW Regulator type prosecution. A number of prosecutions by Unions have resulted from the Regulator's failure or refusal to commence a prosecution.*

*In a number of instances unions have successfully pursued prosecutions which have involved illness related to an incident which has occurred while work was being undertaken. A number of these cases have set precedents in NSW OH&S Case law. These include the following:*

#### **Public Service Association and Professional Officers' Association Amalgamated Union of NSW (Maurice Michael O'Sullivan) v The Crown in the Right of the State of New South Wales (Department of Education and Training) [2003] NSWIRComm 74**

*The defendant defended the charges and unsuccessfully appealed against charges proven before the Court. This successful prosecution involved an assault on a member of the union employed as a Teacher's Aide Special, employed at a School for students with intellectual and physical disabilities. The worker was assaulted by a school student and subsequently diagnosed with post traumatic stress disorder resulting from this and a subsequent assault, and was eventually medically retired from her employment.*

*The evidence presented proved that the Department did not undertake a risk assessment on the student, nor seek any information about the student from other organisations who had experience with him, which included other NSW Government Departments. Further evidence*

*proved the absence of emergency personal communication devices which could have prevented the assault.*

*The case also established that staffing numbers were relevant to workplace OH&S, and that Industrial action undertaken by one group of workers on the day the offence took place was not a defence within the meaning of s.28 of the NSW Occupational Health and Safety Act 1983.*

**Public Service Association and Professional Officers Association Amalgamated Union of NSW (Janet Good) v Tourism NSW [1998] NSWIRC 2507**

*The defendant pleaded guilty in the first prosecution undertaken in NSW involving an occupational overuse injury. The offence concerned a clerk who contracted the injury as a consequence of the employer's failure to provide adequate information on injury prevention. The defendant, prior to the injury, was informed of the risk and ways of improving the clerk's workstation but had not done so at the time of the offence.*

**Public Service Association and Professional Officers' Association Amalgamated Union of NSW (Maurice Michael O'Sullivan) v Roads and Traffic Authority (RTA) of NSW [2002] NSWIRComm 214**

*The defendant pleaded guilty to the offence. This successful prosecution involved a member of the union who suffered second degree burns to his upper body resulting from a Liquid Petroleum Gas (LPG) explosion at a site under the control of the RTA.*

*The RTA did not inform the worker of changes to the LPG powered public barbeque at the site, from a one to two cylinder unit, nor did it inform him on how to change over the dual cylinders. The RTA failed to conduct a risk assessment of the new arrangement.*

*The worker could not communicate with his work depot for instructions and, after suffering 2nd. burns to his upper body drove for 80 kilometres before he was able to arrange for first aid or assistance. The communications equipment fitted to the work vehicle was out of range of his works depot, a fact that had been repeatedly reported to the RTA.*

*The RTA was found to have a comprehensive 'paper system' for managing OH&S, but it was not effective in a practical and operational sense. This case led to the RTA reorganising and properly resourcing its management of OH&S.*

**Public Service Association and Professional Officers' Association Amalgamated Union of NSW (John Cahill) v State of New South Wales (NSW Police) No 2 [2005] NSWIRComm 400**

*The defendant defended the charges brought by the Union. This successful prosecution involved a member of the Union being exposed to elevated sound pressure resulting in a traumatic injury to his hearing in one ear. The injury was caused by another worker as a consequence of a practical joke. This prosecution exposed a number of failures, and presented expert evidence that the current Regulatory measures safeguarding hearing in the workplace was deficient. This evidence was acknowledged by the Judge in his decision.*

**Public Service Association and Professional Officers' Association Amalgamated Union of NSW (John Cahill) v State of New South Wales (Department of Education and Training and Department of Juvenile Justice) [2007] NSWIRComm 105**

*Established that the workplace was a psychological unsafe workplace and explored the severe psychological effects to workers from exposure to uncontrolled violence.*

*The Financial Sector Union (NSW Branch) ('FSU') has successfully brought prosecutions against three Australia's largest banking corporations for failing to adequately protect workers against OH&S risks resulting from armed robberies.*

*The cases are:*

**Financial Sector Union NSW Branch (Geoff Derrick) v ANZ Banking Group Ltd [2003] NSWIRComm 406**

**Financial Sector Union NSW Branch (Geoff Derrick) v ANZ Banking Group Ltd [2005] NSWIRComm 59**

**Financial Sector Union NSW Branch (Geoff Derrick) v Westpac Banking Corporation [2006] NSWIRComm 76**

**Financial Sector Union (NSW Branch) (P. Presdee) v Commonwealth Bank [2005] NSWIRC 389**

*The background to these prosecutions, and the impact of the prosecutions is of considerable importance in supporting a Trade Union's right to prosecute employers for breaches of OH&S legislation. In 1998 there were 180 armed robberies in NSW, and in 85% of these incidents bank workers were either molested or assaulted. In all cases, the extent of the risk of exposure to armed robberies in each of the branches was known to the corporations and which in each case, failed to expedite measures to protect bank workers.*

*One prosecution followed after five similar incidents which had occurred at five separate branches of the same banking corporation.*

*In 2000, the FSU wrote to all NSW banking corporations requesting improvements to workplace design and in particular the installation of full-height Anti-Jump Barriers to bank counters. From 2000-2003, the average number of bank robberies per annum was 79.75, which is 7.9% of the total number of banks operated by all banking corporations. In the FSU's experience, it is important to note that the NSW Regulator was informed of each of the incidents one of which resulted in a prosecution undertaken by the FSU, but the Regulator did not take any action against the banking corporations involved. In **Financial Sector Union NSW Branch (Geoff Derrick) v Westpac Banking Corporation [2006] NSWIRComm 76**, the presiding Judge observed that "...The (NSW) WorkCover Authority carried out an investigation into the robbery and did not take any action in relation to it. ..."*

*In response to the action taken by the FSU, In the period 2004-2007 the number of bank robberies had fallen to 28.75 per annum, a 64% reduction in these incidents with only 2.2% of banks being affected. Of further significance, and despite the action taken by the FSU, the NSW Regulator, and other State and Territory Regulators, have yet to commence proceedings against a banking corporation for breaches of OH&S legislation. This is despite the fact that some 4016 workers were molested or assaulted during armed robberies between 1998 and 2005.*

*Another hallmark successful prosecution was initiated by the Maritime Union of Australia (MUA) **Maritime Union of Australia (Robert Coombs) v Patrick Stevedores Holdings Pty Ltd [2005] NSWIRComm 56***

*The charges were defended by the employer who employed expert witnesses in their defence. The successful prosecution involved occupational overuse injuries suffered by union members employed as straddle crane drivers.*

### **Union driven Regulator prosecutions**

*On at least one occasion, following an investigation and issue of improvement notices by an Inspector of the NSW Regulator and subsequent additional offences at a workplace, the Union who had requested the Regulator inspect the workplace was advised that no prosecution action would be taken by the Inspector. The Union then informed the Inspector that if the Regulator*

*withdrew the Union would prosecute the employer and call the Inspector as a witness. The Regulator subsequently reviewed their original decision and successfully prosecuted the employer for six breaches of the NSW Occupational Health and Safety Act 1983. The case in question is cited below.*

**WorkCover NSW Inspector Keniry v The Crown in Right of the State of New South Wales (Department of Community Services) [2002] NSWIRComm 349.**

*Unions NSW is very aware that a number of employer/industry associations are very opposed to Unions being empowered to prosecute employers for breaches of the NSW Occupational Health and Safety Act 2000, irrespective of the small number of prosecutions undertaken. A number of articles have appeared in the NSW media either questioning this power generally or suggesting that the prosecutions brought against employers are frivolous or unfair and, alleging that prosecutions pursued by Unions are little more than revenue raising exercises. The NSW Regulator has also been the subject of similar, if less vindictive complaints, particularly from the small business lobby and mining industry. Unions NSW strongly believe that the legal right to prosecute employers is in fact an additional deterrent to employers who attempt to evade their OH&S legal responsibilities and de facto, it is an additional enforcement arm to the NSW Regulator's activities. In addition, the prosecutions have had positive effects resulting in significant improvement to the OH&S of workers in the defendant employment. Unions NSW also wish to point out that the a decision on the part of a NSW Union to prosecute is not taken lightly because an investigation, the collection of evidence and the organizing of expert and other witnesses is a significant resource issue for the majority of NSW Unions who have taken this action. The evidence to date demonstrates that the current right to prosecute has not been abused by any Union since its introduction in 1983. Union prosecutions have clearly led, in a number of cases to significant reforms to OHS in those industries and/or employers effected by the prosecution. However, Unions NSW do not underestimate the effectiveness of Union prosecutions (despite the media responses and criticism) which is of even greater significance given that the total number of prosecutions undertaken in the period 2001-2008 has been approximately 1% of the total number of prosecutions commenced by the NSW Regulator (2057) in a lesser period. Virtually all prosecutions undertaken have occurred since 1997. Unions NSW, or our affiliates who have commenced proceedings against employers under the NSW Occupational Health and Safety Act 2000 have never been given any formal grounds or reasons, or excuses for why the NSW Regulator did not take action against employers in matters which the Regulator investigated. We can speculate on this matter, but in the absence of any official reasons and, given the background to some of the cases quoted, it is difficult to offer further comment at this stage. Unions NSW support the model OHS Act including provisions for Inspectors employed or appointed by the Regulator in each jurisdiction to have the power to bring proceedings against an offender. Part 7 of the NSW Occupational Health and Safety Act 2000 is in Unions NSW view the preferred model provision.*

*(NSW CaseLaw – Industrial Relations Commission Statistics. 2001-2008)*

*Unions NSW is not opposed, in principle, to individuals commencing a prosecution on their own behalf. However, the practical implications for including such a provision would need to be considered, such as meeting the day to day legal costs involved in*

*gathering evidence and preparing and presenting a case before the Court, irrespective of the fact that costs would be granted to the prosecutor if the defendant was found guilty of an offence.*

*If the defendant was found not guilty, the individual worker would be required to meet the costs of the defendant as well as their own costs. In addition, if such a right was prescribed in a model OHS Act, other rights and powers may have to be vested on an individual or his/her agent (e.g. right of entry.) in order to obtain evidence.*

36. Do you wish to comment on the penalty notice scheme being made under the Fines Act 1996?

Appropriate but should be increased. The range of notices should include a general duty provision penalty notice and a penalty for operating without a required license e.g. asbestos. The MBA and Unions NSW are both in agreement regarding the expansion of penalty clauses including operating without a license.

As far as the penalty levels, these should all uniformly be raised to the level of 20% of the maximum penalty for that provision as per Section 243.

Refer to Question 76.

37. Do you wish to comment on the provisions for sharing information by the NSW WHS Regulators?

No

38. Do you have any comment regarding ongoing reviews of the Act?

Legislation should be reviewed to deal with emerging issues. Whilst machine guarding was an issue during the industrial revolution and unfortunately still remains an issue, a range of new industrial hazards have emerged including industrial chemicals, manual handling, fatigue, carcinogens, psychological hazards and many more.

Whilst we do not speak for employers, employers made statements during the harmonisation process in states that were raising their standards that the changes from the harmonisation process were a burden on employers due to the volume of changes. The Victorian Government refused to join the harmonised legislation despite the Victorian Government drafting the laws based on similar sections and clauses in the Victorian legislation. It is generally easier to deal with incremental change than a total new system when introducing legislation that is aimed at changing behaviour. Therefore Unions NSW welcomes a regular review.

39. What is/isn't working well for small business in relation to the NSW-specific provisions of the WHS laws?

Here again, where is the equivalent question for workers. Unions NSW restates our position that the legislation has not been implemented fully to be able to work well or not, and has a poor enforcement rate, so any claims of over regulation must be considered false claims.

Small business is unlikely to advocate for the following due their ideological approach that WHS is a cost, but the following provides a practical example of how the laws could be amended to assist.

Small business however, should be disappointed at the myopic enforcement of WHS laws in NSW. Large corporations that are often able to influence behaviour through their contractual arrangements with subcontractors are often not pursued for enforcement measures, yet their sub-contractors are.

There needs to be better provisions for identifying and pursuing the entire supply chain and not just the direct employer of a worker. This is the intention of Sections 15 and 16 of the WHS Act.

An example of this was a diarised conversation with from a Unions NSW officer and a deliberately unnamed inspector who was complaining about the difficulties for Lend Lease in supervising so many contractors who were labour hire. The same issue was raised in the media in August this year when it was identified that the Barangaroo work site had a higher than normal notifiable incident reporting rate<sup>xxiii</sup>.

Another example of how the WHS laws are not working for NSW small business is the problem that arises for small business for non-completion when a safety issue causes delays. An example of this occurred when at Bondi Junction in a worksite this year a 400kg piece of concrete fell off a building's 21<sup>st</sup> story missing a worker on the ground by a metre. The SafeWork Authority were notified and decided not to issue a prohibition notice. The worker's did what they were entitled to do and ceased work until SafeWork attended and they did a safety inspection. Further loose concrete panels were identified, as a design fault had emerged between the Australian engineering, Chinese manufacturing and the local installation on the building. The real cost to the small businesses in this situation was the trauma to the workers involved, and also that the builder tried to implement penalties on the business working on the ground for non-completion whilst the site was shut down due to another contractor's failure.

Unions NSW states that all workers and small businesses should not suffer penalty for attempting to implement safer work practices.

### **Recommendation**

That the WHS Act is amended to better enable the regulator to enforce provisions with the entire supply chain, especially where contracting out arrangements, or sub contracting arrangements enable principal contractors to reduce their responsibility at the expense of smaller companies.

### **Recommendation**

That the Section 105 should be amended to also include a provision that prohibits detriment against a small business from a principal contractor for adhering to or attempting to improve WHS at work.

## **40. What has/hasn't improved for PCBUs or workers operating in more than one jurisdiction?**

### **Photo Identification on Licenses**

The benefits of the multi jurisdiction provisions have come more from the pre legislative harmonisation program in the period of 2005-2008. Examples of the benefits include construction white cards in multi jurisdictions which was a pre IGA harmonisation initiative.

What has not improved is the need to have harmonisation before we can improve further aspects of work health and safety administration. For example, high risk cards have photos on them in NSW, which has occurred after several ICAC investigations where builders acquired licenses through improper manners. However, construction white cards, and a range of other tickets such as asbestos removal licenses do not require a photo card. Both the MBA NSW, a range of other peak builder groups and Unions NSW and affiliates have asked for photo id on all construction induction cards and to bring it under one license, yet we are told that this is a harmonised induction card and therefore we need to get approval from Safe Work Australia. Unions and business representatives have also asked why all the cards can't be combined on one photo identification.

Despite the obvious governance issues of cards remaining photo free, neither the industry partners requests nor the series of incidents where labour hire, foreign guest workers, or other types of precarious workers are supplied with random white cards, has been able to secure that a photo should be present on the card to prevent fraud and improve safety.

### **Health and Safety Representatives**

Health and Safety Representatives training from NSW is recognised in the Comcare jurisdiction, yet NSW does not recognise the training from another jurisdiction. This creates additional burden for the worker who must go through the same course twice whilst work builds up if working interstate as a HSR, and causes obvious issues for the business who must pay for the training and time away from work. Workers Compensation is recognised whilst working interstate, yet workers' rights to be represented interstate are not. Mutual recognition of HSR courses would reduce costs and time for workers and business alike.

### **Entry Permit Holder Training**

Comcare recognises NSW entry permit training, whereas NSW does not recognise any other jurisdiction. One secretary of a national union advised that they had undertaken the same course 5 times in the different states, despite being on the skills council for their industry, and Standards Australia technical group for their industry trade standards, and previously a safety trainer. Mutual recognition amongst harmonised states of interstate EPH training would reduce expense for Entry Permit Holders supporting workers in multiple states.

### **Recommendation**

That NSW establish a new requirement for photo identification for all ticketed qualifications and that these are combined into one safety license.

### **Recommendation**

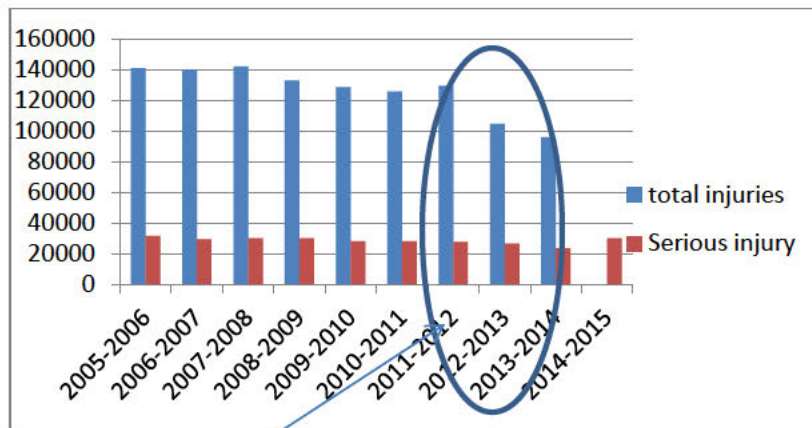
That a single safety photo license is established detailing all relevant tickets/ qualifications and expiries for each worker.

### **Recommendation**

That mutual recognition of interstate harmonised health and safety representative and entry permit holder training be recognised in NSW.

41. Are there differences between how the NSW regulators are applying the legislation compared to other states, territories and the commonwealth? If yes, please provide a detailed response.

While the government has relied upon cuts in the workers compensation scheme liability to paint a picture of reduced injuries, thus destroying the lives of many workers<sup>xxiv</sup>, the Government has also dropped the ball in terms of stopping workers from getting injured in the first place, as evidenced by the two charts below.<sup>xxv</sup>

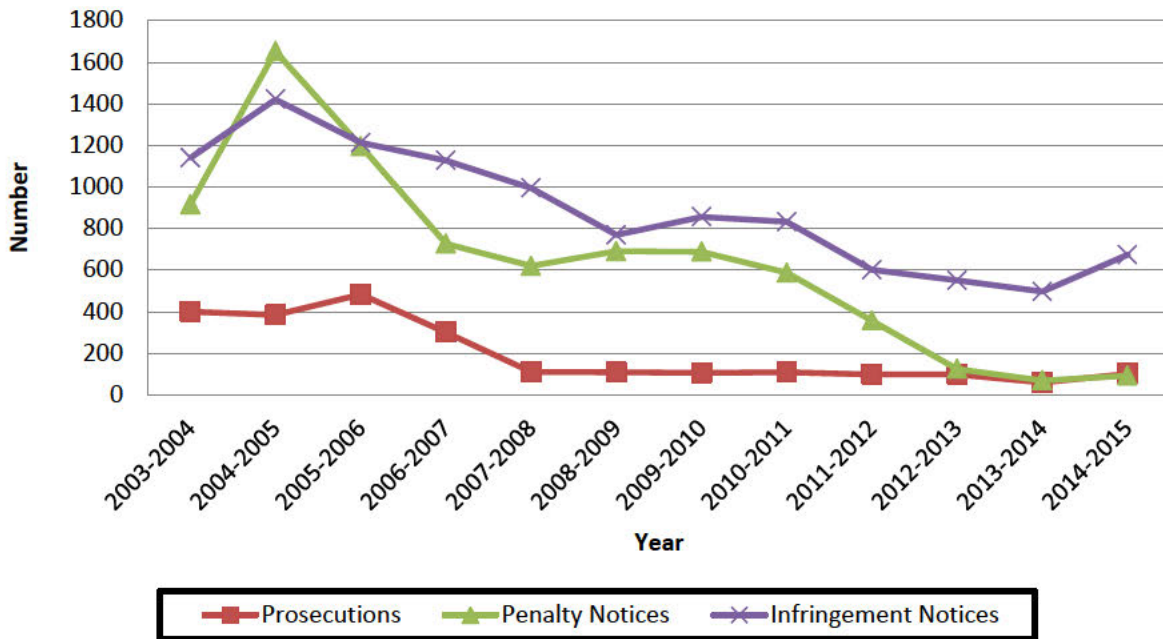


Source: WorkCover Annual Reports 2005-6 to 2014-2015.

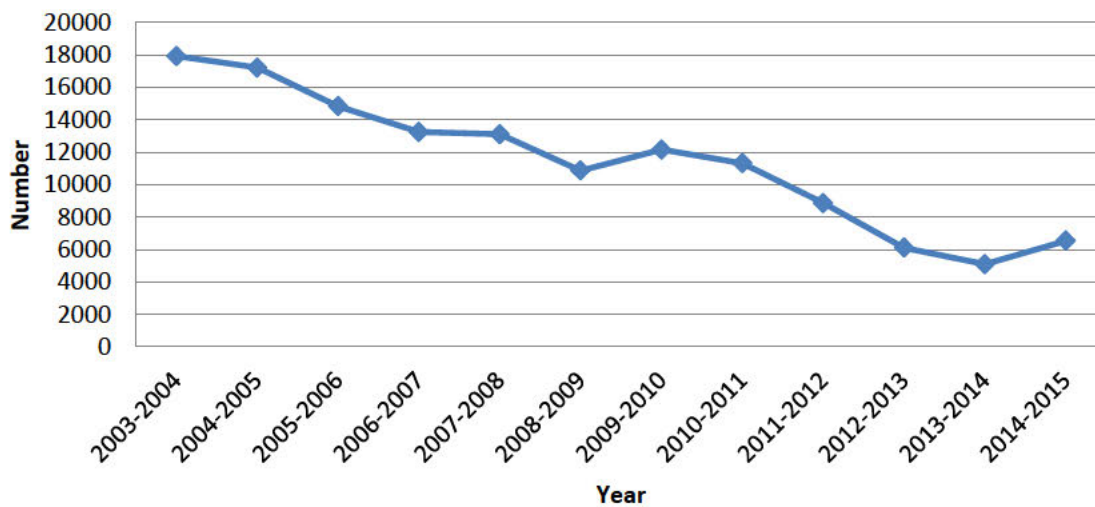
Indicates drop in injury rates because of changes to workers compensation liability that is the statistical basis for injury data.

These charts demonstrate an emaciated enforcement pattern, that creates a risk that large catastrophic incidents may occur, through development of poor practice that is not acted upon. Professor Michael Quinlan from University of NSW has pointed to a series of regulatory failures that have lead to major incidents or “disasters”. The lack of proactive enforcement is noted in a number of incidents<sup>xxvi</sup>.

**Enforcement Activity Trend Decline  
Prosecutions, Infringement and Penalty Notices**



**Enforcement Activity Trend Decline  
Improvement Notices**



The following table is from the Comparative Performance Monitoring Report. Whilst the report generally demonstrates a decline in activity, especially aligning with changes in government, the activities of two states should be compared to NSW. NSW for population has only one comparator in Victoria and in Victoria they have had on most measures higher rates of enforcement.

Whilst it is hard to compare injury statistics because they are based on imperfect comparators of workers compensation liability and different industry composition, the employers have pointed to Victorian's historic lower rate of injuries than NSW.

ACT also provides an example of how proactive enforcement can make a difference. In ACT they doubled their inspectorate in just over one year. They increased their interventions. Despite an increase in construction activity in the Territory they worked with unions and industry and reduced the injury rate by 25% in one year<sup>xxvii</sup>. This was through a proactive random and scheduled program of safety audits at a number of sites in that Territory.





**Indicator 13 – Work health and safety compliance and enforcement activity by jurisdiction**

NSW Gov	Vic Seacare	Qld <sup>a</sup> Total Aus	WA NZ	SA	Tas	NT	ACT	Aus
------------	----------------	-------------------------------	----------	----	-----	----	-----	-----

Number of workplace visits: proactive	2009–10	8 915 <sup>b</sup> 28 104	<sup>b</sup> 25 733	<sup>c</sup> 7 045	7 208	4 218	55	u/a	195	43	<b>81 516</b>	12 905	
	2010–11	<u>9 736</u>	<sup>b</sup> 24 934	<u><sup>b</sup>22 544</u>	<sup>c</sup> 6 609	8 732	5 360	<u>54</u>	<u>761</u>	<u>1 526</u>	40	<b>80 296</b>	12 065
	2011–12	6 577	<sup>b</sup> 21 945	<sup>b</sup> 26 343	<sup>c</sup> 5 228	<u>9 201</u>	<u>4 442</u>	946	433	3 324	49	<b>78 488</b>	13 224
	2012–13	10 162	<sup>b</sup> 21 040	<sup>b</sup> 27 839	<sup>c</sup> 5,243	8 409	3 224	935	195	3 091	43	<b>80 181</b>	8 872
	2013–14	19 505	<sup>b</sup> 22 721	<sup>b</sup> 24 208	<sup>c</sup> 5,662	8 915	3 439	1 514	490	2 856	57	<b>89 367</b>	11 927
Number of workshops/presentations/seminars/forums: proactive	2009–10	631 u/a	5 115	<sup>d</sup> 323	295	222	20	u/a	85	2	<b>6 693</b>	603	
	2010–11	<u>3 015</u>	u/a	<u><sup>e</sup>4 129</u>	<sup>d</sup> 335	334	191	<u>49</u>	<u>161</u>	<u>763</u>	4	<b>8 981</b>	355
	2011–12	1 065	u/a	<sup>e</sup> 4 592	<sup>d</sup> 285	<u>345</u>	<u>172</u>	102	218	1 703	13	<b>8 495</b>	269
	2012–13	222	u/a	<sup>e</sup> 2 865	<sup>d</sup> 334	377	257	94	168	1 776	u/a	<b>6 094</b>	219
	2013–14	644	u/a	<sup>e</sup> 2 744	<sup>d</sup> 319	279	125	51	159	2 001	u/a	<b>6 322</b>	u/a
Number of workplace visits: reactive	2009–10	15 661 16 514	1 999	<sup>c</sup> 4 646	13 871	2 741	3 996	u/a	425 30	<b>59 883</b>	5 352		
	2010–11	<u>16 370</u>	17 413	<u>2 389</u>	<sup>c</sup> 4 754	10 562	2 644	<u>3 672</u>	<u>1 613</u>	<u>210</u>	66	<b>59 693</b>	5 435
	2011–12	13 652	18 567	2 446	<sup>c</sup> 4 446	<u>9 510</u>	<u>3 230</u>	<u>2 889</u>	<u>1 574</u>	<u>244</u>	u/a	<b>56 558</b>	4 908
	2012–13	12 782	19 782	1 697	<sup>c</sup> 4 573	9 698	3 298	2 875	1 886	536	u/a	<b>57 127</b>	4 231
	2013–14	10 403	18 845	<sup>f</sup> 698	<sup>c</sup> 4 148	9 338	3 623	3 514	2 384	384	u/a	<b>53 337</b>	927
Other reactive interventions	2009–10	19 138 u/a	12 648	13 495	2 673	0	u/a	u/a	906	0	<b>48 860</b>	4 268	
	2010–11	23 263	u/a	<u>11 296</u>	13 814	11 806	0	<u>u/a</u>	<u>0</u>	<u>1 191</u>	0	<b>61 370</b>	4 013
	2011–12	26 244	u/a	11 715	17 307	<u>11 869</u>	<u>0</u>	<u>u/a</u>	<u>0</u>	<u>1 426</u>	0	<b>68 561</b>	4 814
	2012–13	28 777	u/a	8 362	19 398	8 110	0	357	0	3 098	0	<b>68 101</b>	5 197
	2013–14	17 019	u/a	6 280	20 264	9 278	0	259	0	2 372	0	<b>55 472</b>	1 243
Number of field active inspectors	2009–10	315	<sup>e</sup> 255	221	<sup>f</sup> 103	93	31	12	16	55	3	<b>1 104</b>	<sup>h</sup> 151
	2010–11	<u>315</u>	<sup>e</sup> 248	233	<sup>f</sup> 103	93	31	<u>12</u>	<u>23</u>	<u>44</u>	4	<b>1 106</b>	<sup>h</sup> 145
	2011–12	315	<sup>e</sup> 240	216	<sup>f</sup> 103	<u>93</u>	<u>31</u>	<u>12</u>	<u>23</u>	<u>44</u>	4	<b>1 081</b>	<sup>h</sup> 146
	2012–13	315	<sup>e</sup> 261	210	<sup>f</sup> 103	93	31	17	22	44	1	<b>1 097</b>	<sup>h</sup> 135
	2013–14	315	<sup>e</sup> 261	211	<sup>f</sup> 103	93	31	17	30	46	0	<b>1 107</b>	<sup>h</sup> 160
Number of field active inspectors per 10 000 employees	2009–10	1.1	1.0	1.3	1.0	1.4	1.5	1.1	1.2	1.5	6.6	<b>1.1</b>	0.9
	2010–11	<u>1.0</u>	<u>1.0</u>	<u>1.3</u>	1.0	1.3	1.5	<u>1.1</u>	<u>1.7</u>	<u>1.2</u>	8.3	<b>1.1</b>	0.8
	2011–12	1.0	0.9	1.2	1.0	<u>1.3</u>	<u>1.5</u>	<u>1.1</u>	<u>1.7</u>	<u>1.2</u>	7.4	<b>1.1</b>	0.8
	2012–13	1.0	1.0	1.1	0.9	1.3	1.5	1.5	1.5	1.1	1.9	<b>1.1</b>	0.7
	2013–14	1.0	1.0	1.0	0.9	1.3	1.5	1.4	2.0	1.2	2.1	<b>1.0</b>	0.7

**Indicator 13 – Work health and safety compliance and enforcement activity by jurisdiction *continued***

		NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aus Gov	Seacare	<sup>a</sup> Total Aus	NZ
Number of other staff undertaking non-inspectorate activities	2009–10	34	u/a	57	<sup>i</sup> 6	13	0	0	<sup>i</sup> u/a	24	2	<b>136</b>	11
	2010–11	34	u/a	64	<sup>i</sup> 6	13	0	0	3	32	2	<b>154</b>	11
	2011–12	<u>36</u>	u/a	<u>57</u>	<sup>i</sup> 5	11	0	0	4	<u>28</u>	2	<b>143</b>	12
	2012–13	35	u/a	71	<sup>i</sup> 4	<u>11</u>	0	0	4	27	2	<b>154</b>	u/a
	2013–14	0	u/a	81	<sup>i</sup> 5	12	0	0	4	36	2	<b>140</b>	u/a
Number of infringement notices issued	2009–10	688	<sup>k</sup> n/a	390	<sup>k</sup> n/a	<sup>k</sup> n/a	56	0	6	<sup>k</sup> n/a	0	<b>1 140</b>	4
	2010–11	<u>588</u>	<sup>k</sup> n/a	<u>308</u>	<sup>k</sup> n/a	<sup>k</sup> n/a	54	0	14	<sup>k</sup> n/a	0	<b>964</b>	10
	2011–12	357	<sup>k</sup> n/a	207	<sup>k</sup> n/a	<sup>k</sup> n/a	<u>44</u>	0	4	<sup>k</sup> n/a	0	<b>612</b>	23
	2012–13	124	<sup>k</sup> n/a	61	<sup>k</sup> n/a	0	18	0	29	<sup>k</sup> n/a	0	<b>232</b>	54
	2013–14	55	<sup>k</sup> n/a	58	<sup>k</sup> n/a	2	22 0	43	<sup>k</sup> n/a	0	<b>178</b>	101	
Number of improvement notices issued	2009–10	12 161	21 600	9 072	10 640	1 841	224	132	187	36	20	<b>55 913</b>	1 187
	2010–11	<u>11 326</u>	20 551	6 140	10 416	2 347	92	99	265	<u>17</u>	47	<b>51 300</b>	1 081
	2011–12	8 859	17 907	7 039	8 212	<u>2 295</u>	<u>79</u>	68	282	26	28	<b>44 795</b>	1 430
	2012–13	6 118	16 137	5 489	11 963	1 951	105	138 544	19	31	<b>42 499</b>	2 068	
	2013–14	5 098	15 834	4 424	12 568	1 347	160	108	832	20	32	<b>40 423</b>	4 957
Number of Prohibition notices issued	2009–10	856	928	2 291	705	628	167	51	103	26	3	<b>5 758</b>	356
	2010–11	<u>834</u>	754	<u>1 839</u>	603	885	139	<u>82</u>	<u>139</u>	<u>5</u>	5	<b>5 285</b>	364
	2011–12	601	645	1 759	401	<u>857</u>	<u>132</u>	72	135	13 0	<b>4 615</b>	554	
	2012–13	551476	1 363	553	832	122	109	177	18	1	<b>4 202</b>	1 205	
	2013–14	498 499	1 220	550	629	121	122	195	14	0	<b>3 848</b>	2 416	

**Indicator 13 – Work health and safety compliance and enforcement activity by jurisdiction *continued***

		NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aus Gov	Seacare	<sup>a</sup> Total Aus	NZ
Number of enforceable undertakings	2009-10	n/a	0	14	<sup>m</sup> n/a	n/a	n/a	n/a	n/a	0	n/a	14	n/a
	2010-11	<u>n/a</u>	<u>0</u>	<u>8</u>	<sup>m</sup> n/a	n/a	n/a	<u>n/a</u>	<u>n/a</u>	<u>0</u>	<u>n/a</u>	<u>8</u>	n/a
	2011-12	0	0	6	<sup>m</sup> n/a	<u>n/a</u>	<u>n/a</u>	0	0	0	n/a	6	n/a
	2012-13	0	3	17	<sup>m</sup> n/a	0	0	0	0	0	n/a	20	n/a
	<u>2013-14</u>	<u>1</u>	<u>7</u>	<u>10</u>	<sup>m</sup> n/a	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>n/a</u>	<u>18</u>	<u>n/a</u>
Number of legal proceedings finalised	2009-10	<sup>'81</sup>	149	96	49	51	15	1	3	3	0	<b>448</b>	91
	2010-11	<u><sup>'93</sup> 103</u>	<u>93</u>	36	46	19	<u>1</u>	<u>1</u>	<u>5</u>	<u>0</u>	<b>397</b>	67	
	2011-12	<sup>'84</sup>	116	98	54	<u>37</u>	<u>10</u>	4	2	2	0	<b>407</b>	84
	2012-13	<sup>'80</sup>	91	98	28	29	8	1	3	2	1	<b>341</b>	98
	<u>2013-14</u>	<u><sup>'46</sup></u>	<u>122 53</u>	<u>19</u>	<u>23</u>	<u>5</u>	<u>1</u>	<u>4</u>	<u>5</u>	<u>0</u>	<b>278</b>	97	
Number of legal proceedings resulting in a conviction, order or agreement	2009-10	<sup>'76</sup>	134	85	<sup>m</sup> 42	46	10 1	3	4	01	<b>401</b>	117	
	2010-11	<u><sup>'89</sup></u>	<u>76</u>	<u>75</u>	<sup>m</sup> 32	40	<u>12</u>	<u>1</u>	<u>1</u>	<u>2</u>	<u>0</u>	<b>328</b>	75
	2011-12	<sup>'84</sup>	100	78	<sup>m</sup> 47	<u>36</u>	<u>7</u>	<u>4</u>	1	5	0	<b>362</b>	51
	2012-13	<sup>'78</sup>	77	78	<sup>m</sup> 24	23	7	1	2	1	1	<b>292</b>	85
	<u>2013-14</u>	<u><sup>'41</sup></u>	<u>107</u>	<u>47</u>	<sup>m</sup> 16	<u>21</u>	<u>5</u>	<u>1</u>	<u>4</u>	<u>2</u>	<u>0</u>	<b>244</b>	80
Total amount of fines awarded by the courts (\$'000)	2009-10	\$5 614	\$7 674	\$3 812	\$781	\$877	\$48	\$60	\$15	\$335	\$0	<b>\$19 216</b>	\$3 022
	2010-11	<u>\$6 039</u>	<u>\$3 870</u>	<u>\$2 819</u>	<u>\$703</u>	<u>\$1 377</u>	<u>\$48</u>	<u>\$8</u>	<u>\$8</u>	<u>\$98</u>	<u>\$0</u>	<b>\$14 969</b>	\$1 934
	2011-12	\$7 922	\$5 946	\$3 161	\$1 735	<u>\$1 825</u>	<u>\$175</u>	\$336	\$15	\$890	\$0	<b>\$22 005</b>	\$1 238
	2012-13	\$5 057	\$4 182	\$2 470	\$666	\$1 386	\$60	\$120	\$48	\$120	\$180	<b>\$14 289</b>	\$2 444
	<u>2013-14</u>	<u>\$2 481</u>	<u>\$3 673</u>	<u>\$1 910</u>	<u>\$423</u>	<u>\$956</u>	<u>\$33</u>	<u>\$5</u>	<u>\$58</u>	<u>\$470</u>	<u>\$0</u>	<b>\$10 009</b>	<u>\$3 512</u>

Source: Safe Work Australia, Comparative Performance Monitoring Report 17<sup>th</sup> Edition

<sup>#</sup> Lines in the Table represent the implementation of the model work health and safety legislation in different jurisdictions, which resulted in some changes to enforcement tools used by jurisdictions. See the text to this chapter for further information. New South Wales, Queensland, the Northern Territory, the Commonwealth and the Australian Capital Territory implemented the model WHS legislation in January 2012. South Australia and Tasmania implemented the model WHS legislation in January 2013. Victoria and Western Australia have not implemented the model WHS legislation. Data below the lines shown in Indicator 13 were collected after implementing the model WHS legislation by most jurisdictions.

<sup>a</sup>Totals only include jurisdictions that supplied the relevant data. <sup>b</sup>Does not include industry forums/ presentations where an inspection also occurs. <sup>c</sup>The number of inspectors in attendance are not counted separately. <sup>d</sup>Figures may be inflated when Inspectors and Community Education Officers present or attend the same event and therefore have been counted more than once. It is not possible to identify and separate such events from these figures. <sup>e</sup>Amended to include managers of inspectorate. <sup>f</sup>Decrease in reactive activities is indicative of the general decrease in incident notifications in the same period. <sup>g</sup>WA includes vacancies and auditors who are gazetted as inspectors for all years (FTEs). <sup>h</sup>The drop is due to budget cuts. <sup>i</sup>FTE figures supplied for external Consultants, ThinkSafe Small Business Managers and Community Education Officers. <sup>j</sup>The new structure within WorkSafe ACT (re Proactive, Reactive and High Risk Teams) was established on 1 July 2010, therefore there have been no specific recordings of statistics for the dates 2006–07 to 2009–10. <sup>k</sup>There is no legislative requirement for infringement notices in Western Australia, Victoria and the Australian Government, while in South Australia it commenced in January 2013 under WHS legislation. <sup>l</sup>Data are for number of defendants in successful Work health and safety prosecutions. <sup>m</sup>Enforceable undertakings are included in Western Australia under their 2004 OSH

42. Are there differences between how the NSW regulators are providing advice and assistance compared to the other states, territories and the commonwealth? If yes, please provide a detailed response.

NSW appears to be focussing their advice on employers through reactive visits, business forums and webinars. Whilst some workers may be able to access these webinars during working hours, most will not be able to put aside their work requirements. Other states such as Victoria have HSR conferences in conjunction with Trades and Labour Council to support the development of Health and Safety Representatives. There is an absence such support for worker's representatives in NSW in the same way.

Whilst SafeWork sponsors the SIA conference, this is targeted to managers of safety and is not a forum that provides general assistance to worker representatives.

For some time there has been pressure on inspectors to provide advice rather than enforcement. Whilst this is a noble idea it often appears misplaced when the company has more advanced understanding of the hazard than the inspector and just choses to not minimise the risk. There is also a lack of restorative justice for the workers, and minimal support for the workers who have to raise issues and fight for the improvement of safety issues.

Many inspectors appear to operate in a conflicted environment when they are called to enforce the law, and yet instead find themselves providing advice when there is a clear breach. This fails to support the workers who are reliant on the alternative authority in the workplace to put things right when their employer refuses.

43. Are the provisions that relate to two WHS regulators working well?

Generally yes, there is a memorandum of understanding between the DPI and SafeWork. However, they do have different focuses and to avoid issues being missed both regulators should be involved in ongoing enforcement. The Mines Inspectorate has a focus and the general safety inspectorate has a different focus. In the US these focuses

have caused issues to be missed when one inspectorate style dominates, particularly with regard to high risk activities such as what occurred in BP Texas City<sup>28</sup>.

However, there are actually more than two regulators in NSW. There is the EPA for various environmental protection matters such as asbestos waste, there is the Fire Brigade and Local Government who have shared jurisdiction over emergency management, then there is the energy supplier jurisdiction over aspects of power supply and there is the unions who have an ability to enforce legislation in the workplace where the government agencies fail. Examples exist such as the check inspectors and union prosecutions where unions have a key role in reducing workplace injuries.

### **Recommendation**

There needs to be a proper consultative forum with all the regulators (including the unions) to ensure that appropriate enforcement regime can occur in a coordinated manner and technical issues and differences can be resolved.

44. Are any additional provisions needed to provide for easier communication and exchange of information between the regulators?

No Comment

45. Do you have any comments to make about the forums nominated to conduct reviews under the WHS Regulation in NSW?

As provided in previous comments a safety court jurisdiction should be included into the Industrial Relations Commission of NSW.

46. Do any parts or sections of schedule 4 require updating? If yes, please provide sufficient details about what the provision is, why it is out of date or not working well, and what can be done to improve it.

Schedule 2 has been amended and is unique to NSW. See comment above on Tripartite Consultation.

Schedule 4 deals with the enactment of the WHS Act. The majority of the matters dealt with apply to the Regulator.

47. Are the above-mentioned definitions working effectively? (clause 5 and 7)

Subject to amendment of the emergency service workers referred to in question 16.

Clause 7 exclusion for strata management appears to cause confusion and this is conflated by the introduction of the term employee rather than worker in subsection (2).

Similarly subsection (3) creates a problem in that many incorporated associations hire through stipends, subcontracting arrangements, or fee for service a range of workers through indirect mechanisms to avoid this responsibility. In training provided by Unions NSW staff to incorporated associations, whilst these arrangements would appear on first instance to be an organisation without employees, the traditional employment tests provide a more questionable indication that the workers are actually employees. Examples of this include Surf Life Saving Clubs hiring security, bar staff, or care takers through a range of mechanisms such as cash in hand, labour hire and or stipend arrangements. This then also creates problems with peak associations that often do employ persons and defer duties through contract to incorporated associations without employees and a lesser safety knowledge. Unions proposes that these organisations should be assisted to better understand Work Health and Safety obligations by making all the organisations duty bound.

#### **Recommendation**

That the provisions related to strata and voluntary organisations are deleted to remove ambiguity and secure compliance.

48. Do you wish to comment on provisions for the Act to apply (or may apply) to dangerous goods and high risk plant that are not at a workplace? (clause 10)

Dangerous Goods and High Risk plant require regulation regardless of whether they are associated with a workplace. Dangerous goods and high risk plant have the potential to cause damage to people on a site and in areas around a site to neighbours and the community. The risk of these hazards does not discriminate solely to those at work and the risk arises from the substance or machinery.

#### **Recommendation**

There should be no exclusion for non workplaces.

49. Do you wish to comment on the exclusions that mean the Act does not apply (or may not apply) to dangerous goods and high risk plant that are not at a workplace? (clause 10)

#### **Recommendation**

There should be no exclusion for non workplaces.

50. Is the above note about training for health and safety representatives helpful?

Yes

51. Is any additional information required to make it easier to understand that the requirements for demolition licensing continue to apply from chapter 10 of the former

legislation? If information is needed, please provide examples of situations where the information has been needed.

No, this remains a high risk activity for workers involved and those surrounding a demolition project. There should be no reduction in requirements.

52. Is the meaning of electrical equipment clear? (clause 144)

Yes

53. Do you wish to comment on the term 'authorised' that has been inserted by NSW? (clause 146)

Not about the term authorised, but problems that this change in term may cause.

Electricity components are now supplied at hardware stores to the public and state that a licensed electrician should install the device. By introducing a new term this may undermine this warning.

Additionally as there is a duty to supply equipment that is safe and without risks when used as intended, there is a gap in the legislative framework as the equipment can be installed, without the requisite check that the purchaser is an authorised electrician.

In a similarly hazardous task gasfitting, certain components will only be sold to purchasers from the trade shop if the purchaser is licensed. Due to the alignment of Fair Trading and SafeWork, this is an opportunity to close this loop for electrical components.

#### **Recommendation**

That the terms authorised and licensed are aligned for all legislation including consumer safety laws in consultation with unions and industry groups.

#### **Recommendation**

That the relevant legislative amendments are made to stop supply of electrical components that require licenses to the unauthorised public.

54. Do you wish to comment on the exclusion that applies to an electricity supply authority, or a person accredited and providing contestable services? (clause 152)

This clause causes confusion to SafeWork inspectors. At least two incidents have occurred where a large employer in construction that had its own electrical supply company, have caused a risk of electrical shock where tagged out systems have been tampered with and enlivened whilst work is being carried out. This has then been

notified by the workers to SafeWork and the employer has refused to notify. The SafeWork Inspector has been influenced by the employer's lawyers that this clause exempts the employer from notification despite the requirement to notify being in another Division of the Regulations.

To take the view of the employer that this exemption would apply to a broader part of the Regulations and Act would be to exempt them from their duties to provide a safe workplace and allow disregard for the safety of their workers.

### **Recommendation**

Unions NSW proposes that the exemption is made clearer by including the statement with words to the effect that, *"This clause does nothing to reduce the obligations of the PCBU with regard to the rest of the WHS Act and Regulations."*

55. Is the note that advises that residual current devices (RCD's) are also regulated under the Electricity (Consumer Safety) Act 2004, helpful? (clause 164)

Yes

56. Is the note that advises the Electricity (Consumer Safety) Act 2004 and the Electricity Supply (Safety and Network Management) Regulation 2008 also apply to the PCBU, helpful? (clause 166)

Yes but should be stated that it is not to the exclusion of the WHS legislation.

57. Are the professional organisations or associations provided for determining a competent person to conduct a major inspection of registered mobile cranes and tower cranes appropriate? (clause 235)

We understand that the Professionals Australia- Association of Professional Engineers also offers professional accreditation for engineers and therefore should be added<sup>29</sup>.

We refer to the CFMEU Construction and General submission on this question as there has been too many crane incidents in Sydney in the last few years and the existing process must change.

58. Do the local laws that NSW added for exemptions to clause 328 remain appropriate?

No, this should not be read to exempt the operation of this clause but instead work to complement the clause. For example the technical instructions for safe transport of dangerous goods by Air solely operate exclusively whilst in the air, but not exclusively when on land.

59. Do you wish to comment on the Pesticides Act 1999 being specified to provide for an exemption, meaning identification of physical or chemical reaction is not required when the chemical is being used for agricultural purposes? (clause 354)

This appears to be contrary to best practice, and farm workers have already one of the highest injury and fatality rates year on year. The GHS should also be implemented, with 25 years since its inception in the Rio Climate Summit, there should be no burden on industry for this notification. This industry could be better served putting less time into lobbying to get out of obligations and more effort into educating its members on safer practices.

60. Do you wish to comment on the exemption that means a license is not required for work involving transport and disposal of asbestos or asbestos waste – that is done in accordance with the Protection of the Environment Operations Act 1997? (clause 419)

These provisions with clause 458 (10 metre square rule) are creating a missing link in the legislative circuit surrounding asbestos removal and dumping.

Industry and Unions alike have complained about this gap in the legislation and by not requiring licensed asbestos removalists, or transport companies, there is not only a regulatory, but a financial incentive to dump asbestos.

### **Recommendation**

That the relevant Regulations including Clause 419 and 452 are amended to ensure that asbestos removal work is only carried out by a licensed removal worker and or transported by a licensed transport worker.

### **Recommendation**

That by capturing all asbestos transportation workers that improved prevention and monitoring work can be carried out to reduce the risk of asbestos disease when conducting asbestos transport.

61. Do you wish to comment on the requirement for the regulator to be satisfied that the applicant is able to ensure the licensed work will be done safely, competently and in compliance with the conditions of the license, working well? (clauses 497 and 500)

This is an activity that requires high trust that the licence holder will adhere to the safe operating conditions of its safety management plan for the workers and the community. This industry has been open to infiltration by poor performing operators in the past who have been interested in securing a quick profit by undercutting safety. There should be no reduction in standards in this area.

62. Do you wish to comment on the exclusion that means chapter 9 does not apply to a facility that is regulated by the National Offshore Petroleum Safety and Environmental

Management Authority under the Offshore Petroleum and Greenhouse Gas storage Act 2006 of the Commonwealth? (clause 530(1))

NOPSEMA is a poor regulator, particularly with regard to lesser injuries that do not involve the possibility of a Piper Alpha scenario, which is the true focus of the Agency. There is minimal exposure to this industry in NSW at present, however, rather than an exclusion, a MOU should be developed to ensure that everyday safety issues are still managed by SafeWork NSW.

63. Do you wish to comment on the exclusion that means chapter 9 does not apply to a port operational area under the control of a port authority? (clause 530(2)(a))

Unions NSW has organised for a meeting with the MUA and SafeWork to discuss Maritime Order 32 and the new Stevedoring Code of Practice.

It is our understanding that Maritime Order 32 scope is not as wide as to require an exemption. We refer to the Maritime Union of Australia with regard to this question.

The Major Hazard Facilities legislation came after almost a decade of negotiations following the Esso Longford disaster. Unions NSW refers to the relevant unions who deal with these facilities on a daily basis and were involved in the formulation of the national model legislation after this horrific tragedy. There should be no reduction in standards or process as the costs are catastrophic.

64. Do you wish to comment on the exclusion that means chapter 9 does not apply to a pipeline to which the Gas Supply Act 1996 or the Pipelines Act 1967 ? (clause 530(2)(b))

The Major Hazard Facilities legislation came after almost a decade of negotiations following the Esso Longford disaster. Unions NSW refers to the relevant unions who deal with these facilities on a daily basis and were involved in the formulation of the national model legislation after this horrific tragedy. There should be no reduction in standards or process as the costs are catastrophic.

65. Do you wish to comment on the exclusion that means chapter 9 does not apply to a mine or petroleum site? (clause 530(2)(e))

The Major Hazard Facilities legislation came after almost a decade of negotiations following the Esso Longford disaster. Unions NSW refers to the relevant unions who deal with these facilities on a daily basis and were involved in the formulation of the national model legislation after this horrific tragedy. There should be no reduction in standards or process as the costs are catastrophic.

66. Is the example under the heading 'arrangements for preventing unauthorised access to the major hazard facility' helpful? (clause 552)

The Major Hazard Facilities legislation came after almost a decade of negotiations following the Esso Longford disaster. Unions NSW refers to the relevant unions who deal with these facilities on a daily basis and were involved in the formulation of the national model legislation after this horrific tragedy. There should be no reduction in standards or process as the costs are catastrophic.

67. Do you wish to comment on the requirement to consult with Fire & Rescue NSW in preparing an emergency plan for a major hazard facility? (clause 57(2)(a)(i))

Should remain as Fire and Rescue are essential in the Emergency Plan and need to be consulted so that they can be prepared and resourced.

The Major Hazard Facilities legislation came after almost a decade of negotiations following the Esso Longford disaster. Unions NSW refers to the relevant unions who deal with these facilities on a daily basis and were involved in the formulation of the national model legislation after this horrific tragedy. There should be no reduction in standards or process as the costs are catastrophic.

68. Do you wish to comment on the requirement to consult with the NSW Rural Fire Service in preparing an emergency plan for a major hazard facility? (clause 557(2)(a)(ii))

As per Section 67

69. Do you wish to comment on the requirement for the operator of a major hazard facility, to provide the content for a safety case, as stated in schedule 18? (clause 561)

There have been improvements made since the safety case model. However, until agreement can be made to move to this higher level, the safety case should remain.

The Major Hazard Facilities legislation came after almost a decade of negotiations following the Esso Longford disaster. Unions NSW refers to the relevant unions who deal with these facilities on a daily basis and were involved in the formulation of the national model legislation after this horrific tragedy. There should be no reduction in standards or process as the costs are catastrophic.

70. Do you wish to comment on the Civil and Administrative Tribunal being the forum for external review following the regulator's decision to refuse to renew a MHF license? (clause 599)

As per questions above, all provisions should be moved to a new safety court jurisdiction of the Industrial Relations Commission.

71. Do you wish to comment on the period of 21 days for the internal reviewer to review the previous decision? (clause 680)

No

72. Do you wish to comment on the period of 21 days for the internal reviewer to give notice of the decision and the reasons for the decision? (clause 681)

No

73. Do you wish to comment on the Civil and Administrative Tribunal being the forum that is nominated to hear and decide applications for external review of a decision? (clause 683)

As per questions above, all provisions should be moved to a new safety court jurisdiction of the Industrial Relations Commission.

74. Is the note advising that the Public Health Act 2010 also imposes obligations relating to the notification of certain medical conditions, helpful? (clause 699)

Yes, as there are workplace and community transmission control aspects to all these notifiable diseases.

75. Do you wish to comment on the Acts that have been prescribed in the Regulation for the purposes of section 271 (3) (c) (ii) of the Act? (clause 702)

The provision lists a number of Acts from around the country that provide an exemption for the privacy and confidentiality provisions. Included are a number of current and former OHS legislations. This is because a person's right to safety was seen as a more important right than their privacy. This right to access for people undertaking genuine safety actions has always been balanced by restrictions for what and how the information is used.

The current legislation allows a reversal of the hierarchy of rights but in a perverse manner.

The right to confidentiality and privacy is used as an obstruction to worker representatives and workers obtaining important safety information about workplace hazards and incidents, and safety such as information about clients' behaviour management".

Yet despite these so called privacy protections, the rights of the worker to withhold personal information such as diagnosed mental illness, prescriptions, other injuries and illnesses are being subverted with workplace safety policies that remove these rights to

privacy. This access is regularly used to disadvantage and discriminate against workers in their employment all in the name of providing a safer workplace.

The WHS legislation conflates this problem by making it harder for worker's representatives to access information to assist improve safety, yet tacitly authorising the PCBU to hold this information that causes harm.

### **Recommendation**

That all privacy and confidentiality provisions are amended to allow the primacy of the right to have safe work, balanced with the prohibitions for the misuse of this information as currently apply.

76. Do you wish to comment on the penalty notice offences listed in schedule 18A? (clause 702A)

### **Size**

The size of the penalties is inadequate for the type of offence that is occurring. Section 243 prescribes the maximum that a penalty notice may be applied at 20% of the provision. Unfortunately most provisions do not come anywhere near this amount. In effect what is happening is that offenders are getting off without a prosecution and the deterrent effect for a minor fine. Unions NSW proposes that all fines be adjusted to 20% of the maximum penalty.

### **Breadth**

There are a number of areas that were formerly included in the penalty provisions but removed in harmonisation. These include certain licensed high risk operations such as asbestos removal license and general duty penalty notices. The lack of fine for an asbestos removal license for example encourages non licensed operators to enter the industry with relatively low entry barriers, undermining licenses operators and undermining the safety of workers and business model for those working within the rules. Restoration of general duty penalties, if set at 20% of the maximum penalty, will act as a greater deterrent than many prosecutions. Unfortunately which in the last two years fatality prosecutions have averaged 12% of the maximum penalty for fatalities (See Appendix B). Agreement has been reached with Employer bodies as to this approach at the DACC with entities such as the MBA.

### **Process**

There should be a quick process to ensure that penalty notices are not issued simply because it is easier than a prosecution.

### **Recommendation**

Penalty Notices should be set at 20% of the maximum penalty under the relative provisions.

### **Recommendation**

Penalty notices should be broadened to include penalties for operating in all licensed categories unlicensed and also reinstated for general duty offences.

77. Which of the pre-WHS codes listed above do you still use?

**All**

Please refer to our submissions when this exercise was undertaken last year.

The codes are without replacement at a national model level.

Whilst Unions NSW agrees that a number of them require modifications of legislative references, they provide a minimum standard for what is often a high risk industry or activity, and often with low barriers to entry.

78. How often do you use the pre-WHS codes you have listed? Please explain how often you use each code you named for the question above.

We will refer members to these at least every month.

Please refer to our submissions when this exercise was undertaken last year.

The codes are without replacement at a national model level.

Whilst Unions NSW agrees that a number of them require modifications of legislative references, they provide a minimum standard for what is often a high risk industry or activity, and often with low barriers to entry.

79. What parts of the pre-WHS codes have you looked up in the last 18 months? Please describe the situation and whether the part you looked up was useful, or not, and why.

All- We are a peak council and regularly must reference all the codes for workplace policy reviews, and advice to members.

80. What parts of the pre-WHS codes do you or persons you represent find useful? Please describe which parts are useful, when and how these are useful to you or persons you represent.

We are a peak council and have different affiliates that will use different codes dependent on their industry and occupation.

81. Are there any parts of the pre-WHS codes that are unclear or confusing? If yes, please state which codes, which parts and what is unclear or confusing.

As stated several of them require updating rather than deletion including for the GHS and updated legislative references.

82.Are there any documents that cover the same subject matter as any pre-WHS codes, but are inconsistent with the codes

There are some standards and guides that cover similar areas but are not free, and are optional so not effective to regulate workplace safety and setting a floor for expected performance standards. Optional compliance is not acceptable for the high risk range of activities in the pre WHS codes.

83.Is additional guidance needed for any of the subjects covered by the pre-WHS codes? If additional guidance is needed, please explain what guidance would be useful with practical examples of when you (or persons you represent) would use it.

This is dependent on each code, but the updating process we submitted last year should encompass legislative and GHS updates.

## Appendix B: Reported summaries from SafeWork prosecutions in 2015 and 2016.

Source SafeWork NSW Website

October 2016	Newcastle Stevedores	Fatality- crushed by load	\$150,000 (10%)
October 2016	Bo Liang Yu	Fall 3 metres off forklift tines	\$15000
October 2016	Tho's Services	15 y.o. work experience blinded in both eyes on first day of job	\$240,000
October 2016	MS Glass	Non notification of serious injury	\$4000
September 2016	Greg Dunn	Fatal crushed by tractor	\$160,000 (10.6%)
September 2016	Karemen	Fatally crushed by car falling off hoist	\$75,000 (5%)
September 2016	Essential Energy	Fatally electrocuted	\$300,000 (20%)
August 2016	Com Constructions	Failure to provide information	\$30,000
August 2016	Kang Hua P/L	Worker foot crushed by forklift	\$90,000
August 2016	Matthew Pense	Worker struck another worker with a forklift	\$4000
August 2016	Freedom Foods	Workers hand crushed when clearing blockage in plant	\$75000
July 2016	JSN Hanna	Worker fell 12 m from unguarded platform	\$87,500
July 2016	Pegela Rural Enterprises	Fatality when worker crushed between steerloader and how	\$90,000 (6%)
July 2016	Matthew Albens	Apprentice got arm caught in meat mincing machine	\$3400
June 2016	Pickles Auctions	One worker killed and another seriously injured when moving cabinet onto forklift	\$225,000 (15%)
June 2016	High Top Roofing and Carlos Abraham	Worker fell 3 metres	\$56250, and \$5625
May 2016	Garth Paterson	Failed to provide information re incident that caused serious brain injury after fall from height	\$2000
April 2016	Brilliant Along Developments	Underground fuel storage tank explosion	\$240,000

		when moved with excavator	
April 2016	Romanous Contractors P/L and John Allen Romanous	Worker fatally fell 5 metres through penetration	\$425,000 (28.3%) and \$85,500 (28.5%)
April 2016	Oakville Produce P/L	Worker fatally struck by forklift	\$187,500 (12.5%)
March 2016	Hills Mushrooms	Worker's arm seriously injured when pulled into unguarded point whilst undertaking maintenance	\$165,000
March 2016	See Win Construction	Failure to comply with prohibition notices	\$20,000
February 2016	E&T Bricklaying and Eyup Kose	Worker suffered electric shock when scaffold contacted power lines	\$80,000 and \$10,000
February 2016	Omega International Coatings	Fire broke out causing damage and considerable part of suburb to evacuated	\$40,000
December 2015	Austral Hydroponics and Eang Lam	Worker seriously injured when fell removing item from roof	\$15,000
December 2015	High Performance Constructions	Two workers were crushed by staircase	\$9000
November 2015	Plumbers Supplies Coop	Worker fatally killed when crushed between trucks	\$120,000 (8%)
November 2015	Anthony Spackman	Failed to supply information after worker suffered chemical burns	\$2000
November 2015	Yoorooga Holdings	Hotel worker fell through cellar trap door at hotel	\$150,000
November 2015	Grand Central Beverage P/L and Kwei-Yung (Mark) Suen	Worker crushed between wall and truck	\$37500 and \$3700
November 2015	Aardvark Steel Constructions	Worker's arm crushed between scissor lift and steel beam	\$120,000
October 2015	Neil Graham Gillespie	Use fraudulent High Risk License	\$7000
October 2015	Southern Cross Rigging and Construction P/L	Worker injured when jumped from scissor	\$51000 and \$5400

	and Khalil Merhi	lift to avoid overloaded crane collapse	
October 2015	Allmen Engineering Projects	Worker's foot was crushed when a 563 steel beam fell on it, requiring amputation of toes and multiple surgery	\$13500
September 2015	Merrywinebone P/L	Multiple crush injuries and leg amputation when 8.4 tonne counter weight fell on worker	
September 2015	Auen Grain P/L	Same incident	\$41,250
September 2015	NMK P/L	18 y.o suffered brain damage when a steel bar went through excavator cabin 100mm into brain	\$120,000
September 2015	Aluminium Shapemakers P/L	Worker became injured when trapped in extrusion press.	\$37500
September 2015	Waycon Bulk	Defendant failed to notify that a worker's hand was severed using a wood splitter	\$195,000
September 2015	Baker and Provan P/L	Worker fatally killed when worker crushed between ship mounted crane and another crane.	\$225,000 (15%)
September 2015	Visy Paper	Worker crushed and fatally injured when front end loader drove over him	\$412,5000 (27.5%)
August 2015	Damon Spackman	Worker suffered chemical burns	\$19000
August 2015	MSS Security	Worker fatally killed when struck by cement truck	\$150,000 (10%)
August 2015	Siva and Jeya P?L and Sivakumaran Mathiapartanam	Worker severely burned when suffered explosion	\$88,000
August 2015	CH Stop n Save P/L	LPG was being decanted and caught fire causing significant fire.	\$85,000
July 2015	Build 2020	Worker struck by steel	\$82500
July 2015	Hunter Valley Labour	Same incident	\$49500

	Hire P/L		
July 2015	Demolition Environmental Civil Contractors P/L	Worker injured undertaking demolition on bridge when bridge fell away into river	\$30,000
July 2015	JMW Developments P/L	Worker suffered electric shock when steel reinforcement hit power lines	\$75000
July 2015	4 Lift N P/L	Worker was crushed when unloading shipping container, failure to notify	\$75000
June 2015	Ausgrid	Worker injured when fascade and roof collapsed after adjacent trenching work	\$37500
June 2015	Resco Engineering Services	Worker fatally crushed by steel hopper that fell off forklift tynes	\$75000 (5%)
June 2015	Interlink Carpentry P/L and Allan El-Bayeh	Worker fatally crushed when demolishing internal wall	\$33,750 (2.25%)
June 2015	DARREN Henry Grant Finley Trading as Pacific Roof Restoration	Defendant intimidated and threatened an inspector, and failed to comply with a prohibition notice and obstructed the inspector.	\$16000 and 9 months suspended prison
May 2015	Structural Concrete Industries P/L	Crane load knocked a 2 tonne structure trapping worker and crushing back	\$37500
May 2015	Laurent D P/L	Worker Fatally crushed by pallet whilst using forklift	\$150,000 (10%)
April 2015	Baiada Poultry	Worker injured when trapped in spin operating spin chiller for several hours	\$37500
April 2015	DHL Express	Worker got hand caught between nip point in unguarded conveyors	\$122,500
April 2015	Brandown PO/L	Worker got hand caught between nip point in unguarded	\$90,000

		conveyors	
April 2015	Onesteel Coil Coaters P/L	Worker's arm amputated when caught between two nip points whilst machine in operation	\$45,000
March 2015	Sarjame Storage P/L	Worker fatally injured when run over by front end loader	\$250,000 (16.6%)
March 2015	Patricks Stevedores Holdings P/L	Worker killed when crushed by shipping container.	\$150,000 (10%)
March 2015	Rex Australia	Worker crushed by panels of glass	\$112,000
March 2015	Novocastrian Demolition Services.	Scaffolding collapse and Regulaytor not notified	\$18,000
March 2015	Ali Radi al- Kassan	Worker fatally injured when crushed by sheets of glass	\$8500 (2.8%)
March 2015	Plumbwizard P/L	Apprentice fell through open penetration on construction site	\$60,000
Feb 2015	J & S Engineering Maintenance P/L	Worker fatally injured when hit by metal drill rod being	\$75000 (5%)
Feb 2015	Antoun's Construction P/L	Worker Fatally injured when crush by excavator bucket	\$85000 (5.6%)
Feb 2015	Dominic James Roberts	Worker fell 11 metres when working on port	\$90,000
Jan 2015	ACN140979193 P/L	Worker fatally crushed when demolishing internal wall	\$250,000 (16.6%)

<sup>i</sup> Safe Work Australia, The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community 2012–13, (2015).

<sup>ii</sup> Clause 38, Work Health and Safety Regulations 2011

<sup>iii</sup> Clause 341 (a & b), Occupational Health and Safety Act 2000

<sup>iv</sup> TMF information from agency consultation from non issued

<sup>v</sup> NSW Rural Fire Service v SafeWork NSW [2016] NSWIRComm 4

<sup>vi</sup> Hazards Magazine, [http://www.hazards.org/safetyreps/wsa\\_hit.htm](http://www.hazards.org/safetyreps/wsa_hit.htm)

<sup>vii</sup> Recommendation 11, Royal Commission on the Pike River Coal Mine Tragedy

<sup>viii</sup> SafeWork Website, <http://www.safework.nsw.gov.au/law-and-policy/enforcement/enforceable-undertakings>

---

<sup>ix</sup> <http://www.safework.nsw.gov.au/law-and-policy/enforcement/enforceable-undertakings/northern-sydney-local-health-district>

<sup>x</sup> Employment Agents Registration Act 1993 (SA), Employment Agents Regulations 2010 (SA)

<sup>xi</sup> South Australian Parliament, Final Report Inquiry Into The Labour Hire Industry 93rd Report Of The Economic And Finance Committee

<sup>xii</sup> Inquiry into the practices of the labour hire industry in Queensland Report No. 25, 55<sup>th</sup> Parliament Finance and Administration Committee June 2016 (could not reach agreement on party lines)

<sup>xiii</sup> Victorian Parliament, Final Report, Inquiry into the Labour Hire Industry and Insecure Work, November 2016

<sup>xiv</sup> Based on consultations with government agencies and unreleased reports.

<sup>xv</sup> Safe Work Australia, The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community 2012–13, (2015), p 5

<sup>xvi</sup> National review into model occupational health and safety laws second report, p 518

<sup>xvii</sup> Case No. Y03015739 James Reid Chasser (Victorian Workcover Authority) Informant V Patrick Stevedoring Pty Ltd Geelong Magistrates Court, 2010

<sup>xviii</sup> See Fair Work Website, <https://www.fwc.gov.au/termination-of-employment/unfair-dismissal/remedies>

<sup>xix</sup> See Geoff Derrick v Westpac Banking Corporation [2006] NSWIRComm 76 (30 March 2006) for details of how the unions apportioned money from prosecutions back to the victims of the safety breach.

<sup>xx</sup> Transport Workers Union NSW Branch (A. Sheldon) v Fletcher Insulation (NSW) Pty.Ltd. 200140714/07/02

<sup>xxi</sup> Recommendation 11, Royal Commission on the Pike River Coal Mine Tragedy

<sup>xxii</sup> Dr Peggy Trompf, ‘Another Brick in the Wall’: Responses of the State to workplace fatalities in the New South Wales construction industry

<sup>xxiii</sup> ABC News, Concerns Raised about Barangaroo Workplace Accidents, 20 August 2016, <http://www.abc.net.au/news/2016-08-20/concerns-raised-about-barangaroo-workplace-accidents-in-nsw/7768998>

<sup>xxiv</sup> See Unions NSW Submission to the Law and Justice Committee of NSW Parliament, Review of Workers Compensation Legislation.

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/56542/0076%20Unions%20NSW.pdf>

<sup>xxv</sup> Source WorkCover Annual Reports 2003-2004-2014-2015

<sup>xxvi</sup> Quinlan M., Ten Pathways to Death and Disaster: Learning from Fatal Incidents in Mines and Other High Hazard Workplaces, Federation Press, 2014, see for example p. 158-160

<sup>xxvii</sup> Referring to “the number of workers’ compensation claims in the construction industry has fallen from 736 in 2012-2013 to 527 in 2013-14 – a 25 % reduction in the space of a year “Source Speech of Mick Gentleman MLA, ACTU OHS and Workers Compensation Conference, 14 October 2015

<sup>28</sup> Quinlan M., Ten Pathways to Death and Disaster: Learning from Fatal Incidents in Mines and Other High Hazard Workplaces, Federation Press, 2014, see for example p. 159

<sup>29</sup> Professionals Australia website- <http://www.professionalengineers.org.au/rpeng-cpd/>