



Wednesday 6 June 2018

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

RE INQUIRY INTO INDUSTRIAL DEATHS IN AUSTRALIA

Victorian Trades Hall Council (VTHC) welcomes the opportunity to make a submission to the inquiry into industrial deaths in Australia.

VTHC was founded in 1856 and is the peak body for unions in Victoria. VTHC represents over 40 unions and more than 400,000 workers in Victoria. These workers are members of unions that reach into every industry in the state, both in the public and private sectors.

Since gaining the Eight Hour Day in April 1856, VTHC has had a long history of fighting for and defending the rights of workers in Victoria. The importance of winning the eight hour day is significant not just in Australia but worldwide. Few advances in the quality of life for working people would have been achieved without the involvement of the Victorian union movement.

Over the last 160 years, VTHC and its affiliated unions have campaigned for and successfully won a range of important rights and entitlements for Victorian (and Australian) workers, including:

- Minimum wage
- Penalty rates
- Collective bargaining rights
- Occupational Health and Safety (OHS) protections
- Annual as well as sick (and carer's) Leave
- Maternity and parental leave
- Domestic violence leave
- Superannuation, and
- Protections from unfair dismissal and redundancy entitlements

VTHC will continue to campaign tirelessly for the rights, entitlements and protections of workers in Victoria, no matter their employment status, employer or workplace.

Today VTHC places a particular emphasis on our work regarding OHS. Too many Australian workers are killed or injured at work every year. The latest statistics from Safe Work Australia show that in 2016, 182 Australians lost their lives in work-related traumatic injury fatalities. It is important to note that fatality data does not include

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those who have died as a result of work related cancers.¹ A further 113,965 workers made serious claims as a result of injury or disease.² In many jurisdictions, the figures do not include fatalities of workers on the road.

In this submission VTHC will focus primarily on items (e); the role of employers and unions in creating a safe-work culture, and (f); the effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death. This submission will also briefly comment on a number of other issues raised by the terms of reference for the inquiry.

a) Harmonisation of workplace safety legislation between the states, territories and Commonwealth.

Harmonisation of workplace safety legislation has occurred through the majority of Australia, however, Victoria is one of the states that chose not to harmonise workplace safety laws. VTHC supported this decision because federal workplace safety legislation was not based on best practice and to harmonise would have taken Victoria backwards.

VTHC supported this decision and continues to do so. Many of the concerns of VTHC are regarding protections for and training of Health and Safety Representatives (HSRs). Specific concerns include the expansion of HSR disqualification procedures, a reduction of access to independent training for HSRs and the requirement that HSRs must undertake and complete training before exercising their rights. A further concern is the 24 hour right of entry notice period for authorised representatives of registered employee organisations.

Should federal workplace safety legislation be amended to reflect best practice and improve safety outcomes for all workers then VTHC would consider supporting further harmonisation. Until this occurs, VTHC does not support harmonisation as it would simply result in weaker protections for Victorian workers.

Recommendation 1 - Improve the training and other rights under the Model Work Health and Safety (WHS) Laws to be in line with those in the Victorian OHS Act 2004.

Recommendation 2 - Remove from the Model WHS Act the 24hr notice period before an ARREO can investigate a suspected contravention.

b) Safety implications relating to the increased use of temporary and labour hire workers

The increasing use of temporary and labour hire workers poses a significant risk to Australia's OHS system. The Victorian Government Inquiry into Labour Hire and Insecure Work found that working holiday maker and student visa holders, all of whom are temporary workers, are subjected to exploitation in the labour market.³ The inquiry found that many of these workers are in the agriculture sector creating a flow on effect to health and safety.

Temporary workers, such as those on working holiday or student visas, are often amongst the most vulnerable in our society. These workers are more often than not

without a voice. They are scared to report safety incidents or hazards for fear of losing their job and potentially their visa.

Businesses are increasingly utilising this type of work not just to evade their responsibilities under the Fair Work Act but to also cut corners when it comes to worker safety. Safe Work Australia reports that the agricultural sector accounts for more than 20 per cent of workplace deaths,⁴ despite making up between just 2 and 3 per cent of total employment.⁵ In 2016, it reported there were 14 worker deaths for every 100,000 workers in the agriculture industry, making this industry nearly twice as dangerous as any other.⁶

In the process of compiling our submission to the Victorian Government's Inquiry into Labour Hire and Insecure Work, VTHC, in collaboration with the National Union of Workers Victorian Branch (NUW), developed an online submission portal, which collected over 600 submissions, where workers could share their stories. Through this process 43 per cent of workers reported they were not told about WorkCover or what to do if they were injured. 55 per cent reported they did not feel they could speak up about conditions at their work, including health and safety, without risking their jobs. VTHC is happy to make this submission available to the committee upon request.

The evidence leaves no doubt that temporary and labour hire workers are at increased risks to their health and safety – and consequently at increased risk of serious injury and death. The increased use of such forms of employment in certain industries has led to these industries having unacceptably poor standards of OHS/WHS/Workers Compensation compliance and outcomes.

c) The role of employers and unions in creating a safe-work culture

Since the beginnings of Australian unionism, the trade union movement has played a critical role in fighting for the health and safety of workers. This has often been a fight against employers who have historically viewed the costs associated with creating a safe working environment as an unnecessary impost on profit making.

Today many employers continue to flout OHS laws. During the 2016-17 financial year WorkSafe Victoria commenced more than 138 prosecutions as a result of workplace safety incidents.⁷ While this figure is better than any other state, it remains a drop in the ocean compared to the 25,819 claims lodged with WorkSafe in 2016-17, the vast majority of which were as a direct result of a duty holder's breach of the OHS Act.⁸

It is a widely accepted principle that the most effective method in addressing workplace health and safety problems is using the "hierarchy of controls". The hierarchy of control is embedded in the OHS and WHS Acts around Australia. The hierarchy sets out the order of preference for hazard control measures, beginning with eliminating the hazard at the source to using engineering controls all the way through to the use of personal protective equipment.

Using this method and the presence of HSRs make worksites safer. Our legislation was developed on the fact that WorkSafe Inspectors, or their interstate equivalents cannot be in every workplace but union HSRs can.

Contrast this to the approach of too many employers: shifting the focus from the hazards in the workplace to the behaviour of individual workers as the cause of most work-related injuries and illnesses – known as ‘Behaviour Based Safety’. This approach is based on discredited research conducted in the United States of America in the 1930’s which reviewed supervisors’ accident reports which, not unlike today, blamed workers for accidents. Behaviour based safety relies on administrative controls which are lower down the hierarchy of controls than elimination, substitution and engineering controls. Administrative controls cost less than higher order controls.⁹

A study of 31 industrialised countries published in September 2013 found that union density was the most important external factor in workplace safety climate and health. The report concluded that “eroding unionism may not be good for worker health or the economy either”.¹⁰ Further, a 2007 study of manual workers in the United Kingdom found that unionised workplaces were less likely to have a fatal injury.¹¹ Unfortunately the federal government under Malcolm Turnbull has introduced a number of measures that make it harder for unions to play this vital role in OHS. One of these is the reintroduction of the Australian Building and Construction Commission (ABCC) which makes it harder for construction employees to seek the help of their union on safety issues.

In its previous iteration under the Howard Government the ABCC workplace fatalities in construction peaked at 48 deaths in 2006 and 51 deaths in 2007. In direct contrast just 30 deaths were reported in 2012 following the abolition of the ABCC.¹²

The OHS/WHS Acts acknowledge the crucial role of unions, workers and their elected representatives in the Objects and Principles. The laws provide elected HSRs with a range of rights and powers, and employers with duties, such as the duty to consult with elected HSRs and workers. The laws also provide unions with the ability to investigate suspected OHS breaches. The ABCC cuts across these rights and has had the effect of hampering efforts to ensure safe and healthy workplaces.

Recommendation 3 – VTHC recommends that the federal government immediately repeals the ABCC due to its impact on worker health and safety.

d) The effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death.

Australia has a long and shameful history of industrial deaths. The major incidents in Victoria alone include:

- Creswick Mine disaster in 1882, where 22 miners drowned.
- Spotswood sewer disaster in 1895, six killed.
- Dalyson Colliery explosion in Wonthaggi in 1937, 13 killed.
- West Gate Bridge collapse in 1970, 35 killed.
- In the 1990’s the Kew Cottages fire and the Esso Longford explosion, combined 11 killed.
- In this century the Kerang train/truck crash and the Grocon wall collapse, 14 killed.

This list of major disasters does not take into account the quiet toll of asbestos or the occupational cancer toll. It also does not count the vast majority of industrial killings where only one person loses their life.

For many years the number of serious injuries and workplace fatalities was dropping. This is no longer the case. In 2017 WorkSafe reported that 27 Victorians were killed at work. This number is up from 19 in 2015.¹³ This is because our workplace laws continue to have a gap and they fail to provide justice when a person is killed. The message sent by our laws is not serious enough when a person is killed by corporate negligence.

These are two clear examples of the failure of our OHS system to protect workers.

Melbourne Water Corporation

Tim Bakerov died when he fell through a missing grate on a walkway and drowned in the Return Activated Sludge channel at Melbourne Water Corporation's Eastern Treatment Plant. Melbourne Water Corporation had prior knowledge of grates being dislodged or missing on at least two previous occasions. Melbourne Water Corporation also knew that the grates ought to be bolted down in what was an inexpensive procedure. The court held:

“There are two aspects of the failures of Melbourne Water relating to the death of Mr Bakerov that are of particular significance. The first is that there were a number of incidents going back three years where there were clear reports of missing or displaced grates on the walkways...Despite the evidence of reports of these prior occasions no steps were taken to investigate the risk of slatted grates becoming dislodged and no consequent steps taken to secure them. In my view this was a clear and substantial failure, in particular in a workplace where there were considerable hazards and occupational health and safety matters were said to be important.

The second significant issue in my view is that the potential consequence of the failure to take adequate steps to properly secure the grates was dire. A missing or displaced grate in this plant with hazards such as water courses and channels would likely result, to anyone who gave the matter a moment's thought, in the death of a worker by drowning, if he stood upon an uncovered hole or attempted to lift the heavy grate back into place. Tragically in this case that indeed occurred.”¹⁴

Melbourne Water Corporation was convicted and fined only \$400,000 for the death of Tim Bakerov.

Amcor Packaging Pty Ltd

Darren Moon was killed when he was caught and drawn against unguarded large rollers – part of a paper manufacturing machine which occupied the entire floor of the building. The machine had been unguarded since 1966. HSRs, through several near misses and risk assessments in the years preceding the fatality, had drawn attention to the risk of being dragged into the machine. The company refused to put guarding in

place, although it was prepared to spend a reportedly large amount of money introducing a behaviour based safety scheme some time before 2000¹⁵. After Mr Moon was killed, Amcor very quickly had guarding installed on all its machines. The court of appeal held:

“Despite the assertions advanced on behalf of the respondent about its concern for the safety of its workforce, and despite the claimed difficulties in fitting a guard, the fact is that a guard was able to be fitted within a very short time of the occurrence of a serious accident. Furthermore, while the cost of installation was plainly substantial, the factor which seems to have been of greatest importance to the respondent was that installation of the guard and the adoption of safe working practices significantly increased the costs of operating the machine and otherwise conducting the respondent’s operations.

In our opinion, the inference is irresistible that the respondent approached the situation from the viewpoint that as little untoward had happened over a long period of operation, it could be assumed that nothing ever would and therefore that the substantial expenditure and increased operating costs involved in the removal of the danger were not regarded as justified. A degree of complacency based upon the acceptance of that assumption can be seen to have contributed to the death of one of its employees.”¹⁶

Amcor was convicted and fined only \$340,000. The new guarding cost Amcor \$700,000 according to evidence tendered.

In each of these cases serious managerial and corporate negligence resulted in the death of a person. In each case the outcomes, even when appealed to the Supreme Court, were manifestly inadequate. There are many more cases we could refer to.

In all other areas of life if you negligently kill someone you go to jail. That sends the right message to the community about the dangers and harm that your actions can cause. But if employers fail in their most basic duty of care to their workers and the public exposed to their work, they merely get a fine.

Shockingly some insurance companies are now offering policies to protect employers from even having to pay the fines issued for OHS contraventions, in effect allowing employers to insure themselves against negligence.

VTHC and the Victorian union movement are advocating for legislation which will:

- Insert a crime of corporate and industrial manslaughter into the Occupational Health and Safety system;
- Adequately punish corporate negligence where the negligence results in the death of a person;
- Adequately punish negligent decisions by senior managers in control of a substantial part of the business where that negligence results in the death of a person;
- Bind the Crown in its role as an employer;
- Provides two exceptions for:
 - Emergency services employees operating in good faith; and
 - Family run small business where the deceased is a family member of the business owner/operator.

VTHC congratulates the Daniel Andrews Labor Government on their recent commitment to legislate for corporate and industrial manslaughter.

This is not a new idea. Industrial manslaughter legislation exists in the ACT, Queensland, Canada and the United Kingdom. The federal government should follow in the footsteps of these jurisdictions and take a stand against employers who put profit ahead of safety, employers who cut corners, employers who fail to protect their employees from preventable risks and hazards in the workplace.

Corporate and industrial manslaughter laws send a strong message to corporations that their negligence, malfeasance and lack of care for Australians will no longer be tolerated.

Recommendation 4 – VTHC recommends that the federal government inserts corporate and industrial manslaughter provisions into the Model WHS Act.

Conclusion

Even one person being injured or killed at work is unacceptable. Until we ensure that everyone who goes to work comes home safely at the end of the day we have more work to do.

This submission has highlighted flaws in our current workplace safety system. There are a number of actions the federal government can take in order to improve safety at work in Australia. These include, harmonising our workplace safety legislation to the highest standard, appropriately limiting and regulating the use of labour hire, recognising the important role of unions in safety and abolishing the ABCC and finally by inserting corporate and industrial manslaughter provisions into the Model WHS Act.

Undertaking these actions will ensure that safety outcomes at work around Australia will continue to improve for all workers.

If you have any questions or would like further information, please do not hesitate to contact Danae Bosler

Thank you for your consideration.

Yours sincerely,

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Secretary

LH:TS Ref: 27.131

Endnotes

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³ Victorian Parliament, 2016, *Inquiry into the Labour Hire Industry and Insecure Work*, https://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-.pdf

⁴ *Ibid* (1)

⁵ ABS, *Labour force, detailed, quarterly, Nov 2017*, cat. no. 6291.0.55.003

⁶ *Ibid* (1)

⁷ WorkSafe, 2017, *Annual Report*, https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0019/214831/ISBN-WorkSafe-annual-report-2017.pdf

⁸ WorkSafe, 2017, *ISBN WorkSafe Victoria Statistical Summary 2017*, https://www.worksafe.vic.gov.au/__data/assets/excel_doc/0016/215152/ISBN-WorkSafe-Victoria-2016-17-statistical-summary-2017-10.xlsx

⁹ We Are Union OHS Reps, 2015, *Behaviour Based Safety*, <http://www.ohsrep.org.au/news-and-views/vthc-ohs-campaigns/behaviour-based-safety#who>

¹⁰ Dollard and Neser, *Social Science and Medicine*, Volume 92, September 2013, Pages 114–123

¹¹ S Grazier, *Compensating Wage Differentials for Risk of Death in Great Britain: An Examination of the Trade Union and Health and Safety Committee Impact* (2007) Working Paper 2007/02, Welsh Economy Labour Market Evaluation and Research Centre, Swansea University.

¹² ACTU, 2016, *Federal Government must focus on the real issues and abandon the ABCC stunt*, <https://www.actu.org.au/actu-media/media-releases/2016/federal-government-must-focus-on-the-real-issues-and-abandon-the-abcc-stunt>

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¹⁴ DPP v Melbourne Water Corporation [2014] VCC 184 [22]-[23]

¹⁵ See 8th Annual SIA Conference (2000) paper <http://www.academia.edu/download/8544485/10.1.1.195.8951.pdf#page=137>

¹⁶ DPP v Amcor Packaging Pty Ltd [2005] VSCA 219 [30], [33]