

Construction, Forestry, Maritime, Mining and Energy Union submission  
to the Senate Education and Employment Committees' inquiry into:

# **The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia**

July 2018

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## 1. Introduction

On March 2018, the Senate referred the inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia to the Education and Employment References Committee for inquiry.

The Construction, Forestry, Maritime, Mining and Energy Union (**the Union**) is Australia's main trade union in construction, manufacturing, maritime, mining and energy production. We welcome the opportunity to submit comment to this inquiry.

Our union has been at the forefront of battles to improve health and safety for workers in our industries and sectors for over 150 years. And for good reason; our members work in some of the most dangerous industries. The history of mining, forestry, manufacturing, construction and maritime in Australia is littered with incidences of industrial death and disease. The challenges in these industries are not historical, but contemporary. A worker is seriously injured or killed every 6 minutes in these industries. Wharfies remain 14 times more likely to die on-the-job than the average Australian worker. As many as 1 in 15 coal workers in Queensland may have contracted Black Lung Disease. Deaths on construction sites are a fortnightly occurrence.

When employers cut corners on health and safety, workers - especially apprentices, casuals and older people - often feel unable to speak up. That's why the union's role is vital.

In a globalised world it is all too easy to see what will happen if our union's role is diminished; one just needs to see what happens overseas. 1200 workers have already died in construction on World Cup stadiums and related infrastructure in Qatar between 2010 and 2017. In Bangladesh, a five-story textile and clothing factory named Rana Plaza collapsed. The search for the dead ended on 13 May 2013 with a death toll of 1,134.

Our campaigning has built today's workplace health and safety system. As the evidence shows, our work saves lives. But our work is under attack by hostile Governments (particularly a hostile Commonwealth Government), anti-union regulators, inept WHS regulators and employers who care more about the bottom line than work health and safety.

At our union's inaugural National Conference held in June 2018, a number of resolutions were passed which will inform our approach to health and safety into the future. Copies of these resolutions are found in Appendix 1.

We welcome the opportunity to participate in this inquiry, and would appreciate further opportunities to outline our special expertise and knowledge in this field.

## 2. Unionised workplaces are safer workplaces

Research shows that unionised workplaces are safer workplaces. Unions play a key role in educating workers about safety hazards, ensuring employers reduce hazardous tasks or workplaces, and provide well-trained OHS reps who are able to identify and fix potential safety problems in the workplace.

Employers can face conflicts of interest in relation to health and safety in a number of respects. This may include the need to increase workloads and pressure workers to work faster or longer hours in order to increase output; a temptation to have employees ignore safety protocols that slow production; the trade-off between the bottom line and costly safety related expenditure or training; or managers overlooking safety related spending such as maintenance. For example, a 2017 study examining the relationship between workplace safety and managers attempts to meet earnings expectations found significantly higher rates of injuries in firms that are under pressure to meet earnings targets. The study also found that the relationship is not as strong in industries where there is high union membership and that this is likely due to unions' aim to ensure reasonable workloads, work speed and safety.<sup>1</sup>

Empirical evidence has demonstrated that unionised workers suffer less injuries than non-unionised workers. Workers in a unionised workplace are 70 percent more likely to be aware of OHS hazards and issues than in a non-unionised workplace.<sup>2</sup> In the United Kingdom, research has found that employers that had trade union health and safety committees had half the injury rate of employers who managed safety without unions. Workers in unionised workplaces were less likely to have a fatal injury.<sup>3</sup> Unions have also been found to improve safety outcomes in studies across Ireland, Canada, France and the United States. In Australia, unionised workplaces have been found to be three times more likely to have a Safety Committee and twice as likely to have undergone a management safety audit than non-unionised workplaces. In addition to improved injury and fatality rates, a 2013 study of 31 industrialised countries found that union density is the '*most important external determinant of workplace psychosocial safety climate, health*' and that '*eroding unionism may not be good for worker health or the economy*'.<sup>4</sup> Research also finds that unionised workers are more likely to receive safety instructions; have regular safety meetings; be made aware of dangerous work practices; and be less likely to perceive that taking safety risks is part of their job<sup>5</sup>.

In the Australian context, an interim report completed in the Deakin University, Department of Management Faculty of Business and Law on the Victorian construction industry made findings which suggest that Union OHS representatives play a valuable role in improving health and safety on Victorian construction sites and that:

- High hazard risks were less prevalent on sites with Union OHS representatives than those with management nominated OHS representatives, and those with no OHS representation at all;

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<sup>1</sup> Caskey, J., Ozel, N. (2017), 'Earnings expectations and employee safety', *Journal of Accounting and Economics*, 63, pp. 121-141.

<sup>2</sup> ACTU (na), 'What has the Union movement done for OHS?', accessible at: <https://www.actu.org.au/ohs/about-us/union-movement>

<sup>3</sup> TUC (2015), 'How unions make a difference on health and safety: The Union Effect', accessible at: [https://www.tuc.org.uk/sites/default/files/Union%20effect%202015%20%28pdf%29\\_0.pdf](https://www.tuc.org.uk/sites/default/files/Union%20effect%202015%20%28pdf%29_0.pdf)

<sup>4</sup> *ibid*

<sup>5</sup> Gillen, M., et al. (2002), 'Perceived safety climate, job demands, and coworker support among union and nonunion injured construction workers', *Journal of Safety Research*, 33(1), pp. 33-51.

- Injuries occurring on sites with Union OHS representatives were less severe than those on sites with management nominated OHS representatives, and those with no worker representation at all. They were less likely to involve hospitalisation, or require transportation to hospital by ambulance;
- Sites with Union OHS representatives were more likely to have undertaken appropriate risk assessments, contributing to a lower level of high hazard tasks. They were also less likely to have a mismatch between documented safe work method statements and work practices;
- Sites with Union OHS representatives were more likely to demonstrate a learning approach to hazards; this contrasts with a 'repeat offender' approach identified on non-union sites;
- Sites with Union OHS representatives were better informed on industry standards, demonstrated by the lesser need for OHS inspectors to provide advice on these standards;
- Improvement notices were less likely to be issued on sites without a Union OHS representative, compared to sites with no OHS representative; and
- Sites with no OHS representation appear to be under-reporting injuries to WorkSafe Victoria.<sup>6</sup>

Trade unions also play an important role in enforcing health and safety standards where individual workers do not feel they have the ability or power to stand up for themselves. This is particularly relevant where workers are in insecure work and feel they have to avoid upsetting their employers in order to receive ongoing work. The relationship between insecure work and safety is discussed later in this submission.

In addition, unionised and non-unionised workplaces often have a different way of investigating incidences. There is evidence that investigations in unionised workplaces result in greater learnings and preventative strategies which can be applied across a sector to improve WHS and prevent future incidences of industrial death (see **Case Study 1** below).

There is significant Australian and international evidence that a union presence in a workplace is positively associated with improved work health and safety.<sup>7</sup> As unionised workplaces have been

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<sup>6</sup> Dr. Elsa Underhill, Deakin University, "Evaluating the role of CFMEU OHS representatives in improving occupational health and safety outcomes in the Victorian construction industry: Interim Report" May 2016

<sup>7</sup> See, eg, Maureen F Dollard\*, Daniel Y Neser, 'Worker Health is Good for the Economy: Union Density and Psychosocial Safety Climate as Determinants of Country Differences in Worker Health and Productivity In 31 European Countries' (2013) 92 *Social Science & Medicine*; Andrew Robinson and Clive Smallman, 'Workplace Injury and Voice: A Comparison of Management and Union Perceptions' (2013) 27 *Work, Employment & Society* 4; Theo Nichols, David Walters, Ali C. Tasiran, 'Trade Unions, Institutional Mediation and Industrial Safety: Evidence from the UK' (2007) 49 *Journal of Industrial Relations* 2; 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; Department of Trade and Industry, *Workplace Representatives: A Review of Their Facilities and Facility Time*, Consultation Document, January 2007; Theo Nichols, David Walters, Ali C Tasiran, *The Relationship between Arrangements for Health and Safety and Injury Rates – The Evidence-Based Case Revisited*, (2004) Working Paper Series Paper 48, School of Social Sciences, Cardiff University; Kwan Hyung Yi, Hm Hak Cho, Jiyun Kim, 'An Empirical Analysis on Labor Unions and Occupational Safety and Health Committees' Activity, Their Relation to the Changes on Occupational Injury and Illness Rate' (2001) 2 *Safety and Health at Work* 4; Andrew Robinson and Clive Smallman, *The Healthy Workplace?* (2000) Working paper

empirically shown to increase safety and reduce the rates of injury and fatality on worksites, it would be logical for the Government to encourage and support unionised workplaces. Unfortunately, the Government's anti-union agenda is achieving the opposite, making workplaces less safe.

### Case Study 1: The difference a union makes – Responding to fatalities in the pulp and paper industry

In 2010, two fatalities occurred in the pulp and paper industry: one at a unionised workplace, the other at a non-unionised site. The difference in the responses is striking.

#### **How a unionised site deals with a fatality**

At a paper mill in NSW, a pedestrian was fatally injured after colliding with a forklift carrying pulp bales.

As this was a unionised site, the union was notified of the incident within 20 minutes of it occurring.

The company and union immediately established a joint investigation team. With the union involved, the investigation was transparent, accountable and focussed on the root cause of the tragedy.

Following a five week investigation, 12 key recommendations were presented back to company and union, all of which were accepted. The recommendations were quickly implemented and actively involved senior union delegates at the site.

A pulp & paper industry Safety Alert, issued by the Pulp & Paper Industry Health, Safety & Environment Unit, was prepared and distributed across all businesses in the pulp and paper sector, aiming to improve knowledge and safety practice.

Since this incident and the subsequent implementation of the 12 key recommendations, the workers and management at the site have worked hard, collectively, to improve their safety performance, significantly reducing their first aid & medical incidents. 2013 was a Lost Time Injury free year for the mill.

#### **How a non-unionised site deals with a fatality**

At a paper finishing and converting plant in NSW an observer was fatally injured when a 400kg reel fell on him as a truck was being unloaded.

As this was a non-unionised site, it was difficult to ascertain and confirm any facts about the incident. WorkCover NSW were reluctant to share details of the incident, citing the privacy of the company and individual.

It was impossible to be confident that appropriate preventative actions had been taken. What is known is that no pulp & paper industry Safety Alert was produced – a key way of lifting safety standards in the industry, especially following such a serious incident.

Eight weeks after the incident, the Union's Pulp & Paper Workers District Federal Secretary wrote to the Head of WorkCover NSW requesting a comprehensive review of traffic management practices in the sector following this and a number of incidents in a short space of time. No response was ever received.

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2000/05, Judge Institute of Management; Barry Reilly, Pierella Paci and Peter Holl, 'Unions, Safety Committees and Workplace Injuries' (1995) 33 *British Journal of Industrial Relations* 2.

### 3. Insecure work and exploitation of temporary overseas workers is making workplaces less safe

*"Trade unions can play an important role in enforcing health and safety standards. Individual workers may find it too costly to obtain information on health and safety risks on their own, and they usually want to avoid antagonizing their employers by insisting that standards be respected."*

– The World Bank

#### Temporary overseas workers are less likely to speak up about OHS issues

For many temporary overseas workers, their ability to stay in the country is linked to their employment contract. This makes these workers particularly vulnerable, particularly where they feel that speaking up about an OHS issue may result in them being sent home by an employer. As a result, temporary overseas workers may be less likely to speak up about OHS issues or to exercise their rights in the workplace with respect to health and safety. Vulnerable workers are also more likely to be willing to agree to longer work hours (contributing to fatigue), or be convinced to cut corners increasing the likelihood of injury.

Overseas workers are also likely less well informed of their rights and the obligations of their employers with respect to OHS issues. Many workers, particularly lower educated and lower skilled workers, are less likely to have received formal OHS training than domestic workers. There is also an issue in relation to culture and language. When workers are from countries where their native language is not English, their ability to read and understand instructions, safety signs etc. may be diminished. Cultural factors may also influence how overseas workers see and understand risks, particularly those from countries with poor OHS records and substantially lower OHS standards than Australia.

These problems mean many overseas workers are not prepared for working in dangerous work environments, such as construction and mining. For example, at the end of 2016 a German national hired on a work site in Perth fell 35 metres to her death down a ventilation shaft.

## Case Study 2: The needless death of a German backpacker on a Perth construction site in 2016

At approximately 2.50PM on Monday 10th October 2016 a 27 year old German backpacker, Marianka Heumann, fell 35 metres to her death on construction project in the Perth CBD. It was yet another black day for Western Australian construction workers.

When Union officers entered the site about 40 minutes after Ms Heumann's death, they saw that the builder – Hanssen Pty Ltd - had failed to close off the second level of the job where the worker had landed. Blood and strewn work clothing were clearly visible and accessible, and no effort had been made to ensure the scene of the fatality wasn't contaminated. The job was still going full steam ahead with a major concrete pour taking place. The police had not been contacted.

The OHS regulator, Worksafe didn't arrive at the job until over an hour after the Union.

The deceased worker wasn't wearing a fall prevention harness when she fell from the 15th floor of the service shaft. An investigation by the Union found that there were no suitable harness points. The closest harness point was a few metres from where she was working, located on the floor. At best, the harness point was unsafe, even if it had been used to secure a harness. To make matters worse, the worker was balanced on a plastic bucket with a 35 metre fall beneath her when she slipped and fell whilst placing silica on the shaft panels.

The site was under the control of builder Hanssen, who have an exclusive building arrangement with the develop Finbar. Ms Heumann's death was not the first death of a worker at a Finbar / Hanssen site. In 2011, a worker was killed when a concrete well lid crushed his skull as the load was being lifted by a crane.

The site where Ms Heumann died was also less than 1km from the site where 2 young Irish construction workers were crushed and killed by a concrete panel less than 12 months before (see Case Study 6 below).

In 2008, Hanssen was fined \$173,250 by the Federal Magistrates Court in Perth for exploiting foreign workers. In that case, the court found that the company was guilty of 21 breaches of the Workplace Relations Act in relation to Australian Workplace Agreements. At the time, then-Commonwealth Workplace Ombudsman Nicholas Wilson said: *"As highlighted in court, Mr Hanssen, the director and secretary of the company, gloated that the employees would sign anything because they were frightened of being sent back overseas. This was a deliberate case of exploitation and something that the community, quite rightfully, will not tolerate"* (*"Building Firm Hanssen fined for exploiting workers"*, Perth Now, March 11 2008). Magistrate Tony Lucev said the breaches were *"deliberate and exploited vulnerable workers"* (*Jones v Hanssen Pty Ltd* [2008] FMCA 291 (11 March 2008).

Since that decision, the Union has continued to raise repeated concerns in relation to the use of foreign and temporary workers on Hanssen constructions sites. The union remains concerned that Finbar / Hanssen sites are characterised by young, inexperienced construction workers – many of whom are unsupervised apprentices, or inexperienced and unqualified backpackers on working holiday visas.



## Insecure work leads to poorer OHS outcomes

*“You have got a high turnover of workers. You have got many casual workers on these jobs that work from one day to the next. They are not going to put up their hand and say, 'I've got a concern about the contamination or what I'm doing here.' They are just going to do it because they want to get paid for the work that they can do so that they can pay their bills. That is the reality”*

– Mick Buchan, Branch Secretary, Western Australian branch of the Construction and General Division of the Union<sup>8</sup>

Non-standard work has also been associated with poorer OHS outcomes. Casual, labour hire workers and independent contractors often face greater risks because 1) the temporary nature of their work/triangular working relationship means they are often not properly trained; 2) they may have less experience in the workplace; 3) their rights under regulation may be less clear/not so well understood; and 4) their vulnerability means they may find it much harder to speak out about OHS issues in fear of not receiving future work.

Anecdotal evidence by workers in our industries demonstrates that workers in insecure work will often be less likely to speak out about OHS issues, and therefore more likely to be injured, than those in permanent work. This anecdotal evidence is consistent with international research.

For example, a report by the International Labour Organisation found that the growth of non-standard work has been associated with adverse OHS outcomes (e.g. injury rates) as well as weakening the regulatory regimes that protect workers. It finds that global evidence points to large adverse health effects from insecurity and that research directly links low pay (as associated with temporary and part-time jobs) and poor OHS outcomes. The use of subcontracting and multilevel subcontracting is associated with fractured OHS management, poor OHS outcomes and “*corner cutting on safety*”.<sup>9</sup>

In 2006, The University of New South Wales Industrial Relations Research Centre conducted a study into the health and safety costs of casual employment. The study found that “*casual working arrangements and job insecurity are associated with adverse OHS outcomes such as increased fatalities, illnesses, occupational violence and psychological distress, decreased reporting propensity, fewer training and career opportunities, as well as inferior knowledge, compliance with OHS entitlements, standards and regulations*”. The study found that characteristics of precarious work, including greater insecurity; economic and reward pressures; low levels of social support; imbalance of demands and control; disorganised work processes or settings and lack of induction and training; and regulatory failure contribute to adverse OHS outcomes. “*Job insecurity and especially the fear that absence from work or even refusal to do overtime might increase the likelihood of redundancy, means that some workers may avoid taking time off even when ill... Casual workers receive no paid sick leave, annual leave, carers*

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<sup>8</sup> Official Committee Hansard SENATE ECONOMICS REFERENCES COMMITTEE, Non-conforming building products THURSDAY, 9 MARCH 2017 PERTH p 9.

<sup>9</sup> Quinlan (2015), ‘The effects of non-standard forms of employment on worker health and safety’, Conditions of work and employment series, No. 67, International Labour Office, accessible at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_443266.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443266.pdf)

*leave or public holidays. Thus being sick is a real problem or hazard for the majority of casual workers.*"<sup>10</sup>

A University of Sydney study in 2004 also found that if the growth of casual jobs continues, we are likely to 'witness the further erosion of safety and training standards'. Specifically, analysing worker entitlements the study found that while less than three percent of permanent workers are not covered by workers' compensation arrangements, over one in five casuals (21.7%) were found not to be covered.<sup>11</sup>

Labour hire has also found to result in poor OHS outcomes. The dissenting report of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation's inquiry into Labour Hire Arrangements and Independent Contracting (2005) found credible evidence of difficulties in identifying the responsibilities of parties under labour hire agreements: *"the triangular relationship, involving the labour hire agency, the host firm and the labour hire worker has led to a blurring of legal obligations and entitlements in a number of areas, such as occupational health and safety and return to work policies."*<sup>12</sup>

A 2002 Worksafe Victoria study examining OHS data for labour hire employees found that they were more likely to be injured than direct hire employees, and that their injuries are more severe.<sup>13</sup> Brennan et al. found that approximately 40% to 50% of labour hire agencies do not consistently provide safety inductions for their employees and 34% to 39% of labour hire agencies do not even assess the host organisation's OHS systems and workplaces prior to assigning employees. Almost 50% of hosts state that labour hire agencies never conduct OHS assessments of their workplace, a further 19% say it occurs only sometimes.<sup>14</sup> A 2011 study examined Victorian OHS data and found that temporary agency workers (labour hire) experience different and more acute risks than direct hire employees.<sup>15</sup>

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<sup>10</sup> McNamara, M. (2006), 'The hidden health and safety costs of casual employment', Industrial Relations Research Centre, Research supported by Bartier Perry, accessible at:  
<http://www.docs.fce.unsw.edu.au/orgmanagement/IRRC/CasualEmploy.pdf>

<sup>11</sup> Buchanan J (2004) Paradoxes of Significance: Australian Casualisation and Labour Productivity. Paper prepared for ACTU, RMIT and The Age Conference 'Work Interrupted: casual and insecure employment in Australia', Hotel Sofitel, Melbourne, 2 August 2004. Accessible at:  
[www.actu.org.au/media/230391/buchanan\\_productivity.doc](http://www.actu.org.au/media/230391/buchanan_productivity.doc)

<sup>12</sup> Standing Committee on Employment, Workplace Relations, and Workforce Participation (2005), Inquiry into Labour Hire Arrangements and Independent Contracting. Accessible at:  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=erwp/independentcontracting/dissent.htm](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=erwp/independentcontracting/dissent.htm)

<sup>13</sup> Underhill, E. (2002), 'Extending Knowledge on Occupational Health & Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Workers' Compensation Claims', a report prepared for WorkSafe Victoria, accessible at:  
[https://www.worksafe.vic.gov.au/\\_\\_data/assets/pdf\\_file/0010/10081/LHReport\\_October2002.pdf](https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0010/10081/LHReport_October2002.pdf)

<sup>14</sup> Brennan, L. Valos, M. and Hindle, K. (2003), 'On-hired workers in Australia: Motivations and Outcomes', School of Applied Communication, RMIT University, Occasional Research Report, Melbourne.

<sup>15</sup> Underhill, E. and Quinlan, M. (2011), 'How precarious employment affects health and safety at work: the case of temporary agency workers', Industrial Relations, vol. 66, no. 3, pp. 397-421. Accessible at:  
<https://www.erudit.org/revue/ri/2011/v66/n3/1006345ar.pdf>

### Case Study 3: Insecure work and adverse OHS outcomes

The following examples of workers in insecure work feeling unable to raise OHS issues come from the Union's 2015 Submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work.

**PATRICK**, a casual rigger/dogman hired through a labour hire firm in the construction industry in Melbourne says that his workplace is not always safe, he was not told about WorkCover and what to do if he was injured and does not feel he can discuss health and safety without risking his job.

*"I work in the construction industry as a rigger/dogman, which is very dangerous at the best of times. As a casual, you have absolutely no secure ground to stand on, and if you even question health and safety, the builder you are on-site for will call you a trouble maker, phone your employer, and demand not to send you back to that job. So your employer gets angry and blames you, and before you know it you don't get any more phone calls for work and are hung out to dry. So you are constantly putting your safety at risk due to intimidation and fear of losing your livelihood."*

**RICHARD**, a casual Crane Driver in Melbourne said his workplace was not always safe but felt he could not discuss health and safety without risking his job. *'Cranes had no load charts!!! Riggers were too inexperienced. We were expected to lift dangerous deliveries (reo in bags). Rubble and rubbish in bags instead of rated bins. No street protection for the public and dogmen. Reo bars not capped. Balconies overloaded.'* He stated that he *'carried an injury because I was afraid to report it. [he was] always stressed because safety was ignored and men with my experience are told to shut up or get sacked. NO DECENT OH AND S REPS ON MOST SITES.'*

**ALISTAIR**, hired through a labour hire agency in the mining industry stated *'I'm a Boilermaker by trade, and because of my height (195cm) they put in a position where I was forced to weld in overhead position for 7-8 hours with my neck in hypertension. After about 5 hours of welding in that ridiculous position, the cervical disc prolapsed in the blink of an eye.'*

*"It was a grindy kind of clicking sensation in my neck that lasted under a second, followed by a nervous tingle down my right arm that went for about 15-20 seconds. That was the annulus of the cervical disc failing and the jelly inside the disc squeezing out. The headshield had overloaded the cervical disc. Anyway I was stuck in the mine site like that for nearly a week, and had to wait another 2 weeks for spinal surgery in Perth. They didn't send me to hospital, they bailed me up in a hotel instead. And on the day of surgery, while on the table with a hole in my throat the size of a lemon, [the company] terminated me. Yep. Fired on the table. Now I have 25.4% of permanent overall body impairment, and 62.5% of permanent calculated injury to my cervical spine. For life. Show me an employer who will employ a Boilermaker with a prosthesis in their spine. You're joking. They won't go anywhere near me. That mining company destroyed my life and career. Personally I think that I'm better off as ash. I wasn't even compensated adequately.... I was on permanent labour hire. Meaning I could go any day. Even if I did nothing wrong or out of line. Even if injured. Working under labour hire is inappropriate for tradies when you consider what can happen to us. Labour hire is casual essentially....and in our line of work this can mean being casually injured or casually killed. Those T&Cs are inadequate and totally inappropriate".*

**SARAH**, a contractor in the construction industry in Geelong states that her workplace was not always safe and she did not feel she could discuss health and safety without losing her job. She said *'I was contracting with an ABN but to one employer only. I know this is illegal and I know myself and other workers are being paid incorrectly through ABNs but to speak up is to lose your job. If WorkCover is mentioned it's a big issue. Employers cringe at the words so to keep your job you don't mention it.'*

## 4. The Government's attacks on unions is making workplaces less safe

Workplace health and safety for workers is core business for our Union. The more that the Government attacks and undermines unions' legitimate roles and positions in society, the more that they hinder and restrict unions, then the more that they undermine our capacity to implement our core business and contribute to better WHS outcomes for workers.

Attacks on our Union and our core business - which includes preventing industrial deaths in Australia - is a feature of this Commonwealth Government.

### The reinstatement of the ABCC

The Commonwealth Government's attacks on unions has made workplaces less safe. There is no greater example of this than the reinstatement of the Australian Building and Construction Commission (**ABCC**).

The ABCC works to undermine the role of unions, which has had an adverse impact on work health and safety outcomes. This undermining happens in a range of ways, including application of the Building Code restricting the inclusion of clauses in enterprise agreements that facilitate union and worker participation in work health and safety matters.

By way of background, in the year in which the ABCC was introduced – 2005 - the number of workplace fatalities in construction was 30. It then exceeded that number (and the number in 2004 (35)), every year between then and 2012.<sup>16</sup>

Laws which cause workers to fear raising safety issues or which compromise their ability to voice safety concerns – including via their union representatives – have a negative effect on work health and safety outcomes. The fact is that when workers are faced with huge fines and a politically motivated 'watchdog' that prosecutes workers and unions, but not employers, they will think twice about taking action to fix safety problems.

The ABCC was re-established in 2016. Fines increased and compulsory interrogation powers were reinstated.

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<sup>16</sup> Whilst there was a reduction in the frequency rate of serious injuries over that period consistent with a reduction in the all-industries rate, a number of factors need to be kept in mind. Firstly, the number of serious claims actually grew by 13% in the same period and secondly, the rate of decline in the incidence rate has decreased since 2005 by comparison with the 2002-03 to 2004-5 period.

### Case Study 4: the ABCC's political priorities

The capacity of union officials to enter workplaces to assist in protecting members from unsafe work practices is critical, but the union is consistently obstructed from performing its safety role.

In 2017 a federal court judge blasted the Australian Building and Construction Commission for wasting time and taxpayers' money on taking two officials to court for "having a cup of tea with a mate" which Justice North described as a "miniscule, insignificant affair". Justice North said: "*This is all external forces that are beating up what's just a really ordinary situation that amounts to virtually nothing*"; "*for goodness sake, I don't know what this inspectorate is doing*"; and "*[when the ABCC] use[s] public resources to bring the bar down to this level, it really calls into question the exercise of the discretion to proceed*" ("Judge turns on ABCC for wasting time over 'cup to tea' CFMEU incident", *The Australian Financial Review*, 13 March 2017).

An appeal brought by the ABCC was subsequently unsuccessful.

### The Code for the Tendering and the Performance of Building Work

Of further concern is the *Code for the Tendering and Performance of Building Work* (the **Code**) which was implemented at the time of the reintroduction of the ABCC in 2016. The requirements of the Code are currently applied to 310 Head Contractors in the industry, and 1,121 subcontractors that are also code-covered entities.<sup>17</sup>

Clauses 11(1) and 11(3) of the Code have the effect of prohibiting code-covered entities from being parties to an enterprise agreement that include an array of clauses that would otherwise be permitted under the Fair Work Act. These include clauses that provide for union participation in decision making about matters that affect workers in the workplace, such as work health and safety and excessive hours of work from a fatigue management perspective. It also prohibits clauses which provide for the rights of an official of a building association to enter premises other than in strict compliance with Part 3-4 of the FW Act.

Laws which foster joint management of work health and safety matters have a positive effect on work health and safety outcomes. Including joint management in enforceable industrial agreements should therefore be encouraged. Prohibiting joint management in industrial agreements, which is the effect of the Code, is completely counter-productive to what should be a universal goal of safer workplaces.

To compensate for restrictions on these proactive measures which unions utilise to manage fatigue and prevent occupational hazards, the Code includes a requirement for Code covered entities to abide by work health and safety laws. The Commissioner of the ABCC is empowered to refer any code-covered entity that has failed to comply with the Building Code, including because of a failure to comply with work health and safety laws, to the Minister with recommendations that a sanction be imposed.

However, rather than actively monitor compliance with work health and safety laws, which unions do in the event they are provided access to a workplace, the ABCC's approach is completely re-active. Specifically, rather than actively monitoring compliance with clause 9(3) as part of the inspection and audit regime, the ABCC will only act if there has been a court decision that a code-covered entity has

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<sup>17</sup> Proof Committee Hansard SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE Estimates (Public) WEDNESDAY, 30 MAY 2018 CANBERRA, p 31

contravened a work, health and safety law. This approach contrasts to the ABCC's approach in other areas where it will actively investigate and refer matters for enforcement.

Their approach significantly diminishes the potential for the Building Code to effect real change in improving work health and safety in the industry, as was recently explained by Ms Cato in a Senate Estimates hearing:

*'...As you can imagine, it takes some time for these matters to go through the courts, so, by the time there's a court outcome, it's usually two or three years after the event, so it will take a little while for the power of the code and the sanction that can also apply to the company to be able to be put in place for those OHS breaches.'*

## The Federal Safety Commissioner is ineffective

It is entirely appropriate that a company's work health and safety record, and record of compliance with work health and safety laws, are taken into account when awarding public contracts. However, for several reasons the Federal Safety Commissioner (**FSC**) has proved a complete and utter failure in improving work, health and safety performance in the industry.

By way of background, the FSC was established in 2005 following the Cole Royal Commission recommending that the Australian Government use its influence as a client and provider of capital to foster improved work health and safety performance by developing, implementing and administering a work health and safety accreditation scheme for Australian Government building and construction work.

There are currently about 420 accredited companies to FSC requirements representing 30 to 50 percent of industry turnover.<sup>18</sup> Without FSC accreditation, companies are not allowed to be the head contractors in Government building projects.

The fact of the matter is that the presence of the FSC (and Federal Safety Officers) is invisible in the industry. Direct requests for assistance or intervention in particular safety issues of relevance to the Federal Safety Commissioner's remit have not been met. Problems would appear to include the below:

- the FSC is not valued or resourced appropriately in order to be effective. The office of the Federal Safety Commissioner has only 28 staff, along with 27 consultants engaged as Federal Safety Officers;
- An unaccredited company is only prevented from acting as a head contractor undertaking Commonwealth-funded projects, not as subcontractor (in contrast to an exclusion sanction under the Building Code); and
- the Federal Safety Commissioner will not publish the name of a company that loses accreditation (again, in contrast to an exclusion sanction under the Building Code). This protection reduces the incentive to maintain accreditation.

From 2005 up to 14 July 2017, only two companies lost accreditation for not complying with the FSC's "best practice work health and safety standards". One of these companies is apparently not John

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<sup>18</sup> Official Committee Hansard SENATE ECONOMICS REFERENCES COMMITTEE Non-conforming building products FRIDAY, 14 JULY 2017 MELBOURNE, p 10

Holland, which retains the right to tender for and perform Commonwealth funded building work. This is despite their appalling record, which includes the deaths of multiple workers over recent years. Some - but not all – of the examples of workers being killed by John Holland’s failures are set out in **Appendix 2** to this submission. And the tragedy continues – on 24 June 2018 another worker, an engineer working on Melbourne’s West Gate Tunnel project, died when he was hit on the head with piling rig cable. An investigation into this needless death is ongoing.

All of these deaths and injuries that are set out in Appendix 2 have been found by courts to be directly attributable to John Holland’s failure to discharge their duty of care to their employees. In this same period, the Union has faced fines for conduct ultimately designed to try improve safety to prevent these unnecessary deaths.

The Federal Safety Commissioner has not acted by removing John Holland’s accreditation. The FSC stated that the reason that there were not more companies losing accreditation is because it would be the end of the company (due to not being able to tender for Commonwealth Building work), and that subsequently: *“When a CEO or a board find that their accreditation through me is at risk, they will pull out all stops to avoid the loss of accreditation.”*<sup>19</sup>

Small fines, and a lack of willingness for the FSC to remove accreditation, would appear to result in a lack of any genuine deterrent effect. It results in a death or serious injury being treated simply as the cost of doing business for some unscrupulous companies.

The governments’ actions which adversely impact health and safety are not always as blatant as the reinstatement of the ABCC. Other recent actions have included:

- The abolition of the requirement that Commonwealth Department’s source textile, clothing and footwear only from Australian companies accredited to Ethical Clothing Australia (**ECA**). Accreditation to ECA requires company members to undergo a comprehensive occupational health and safety audit of their business and supply chain - to protect some of the most vulnerable workers in the country;
- Regulatory and legislative moves which have caused the decline of Australian shipping and facilitated the increasing use of Flag of Convenience (**FOC**) shipping in Australia. FOC has lax workplace and health and safety standards, with crew members being often reluctant to provide evidence to the Australian Maritime Safety Authority (**AMSA**) investigations or safety inspections;
- Refusing to act on the plague of non-conforming building products flooding the country, and widespread employer non-compliance with the National Construction Code; and
- Not implementing industrial manslaughter laws or - in the case of the Queensland Government- exempting dangerous industries from the law such as mining.

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<sup>19</sup> Ibid, p 16



## 5. Improving the legislative and regulatory framework

### There is inadequate enforcement action being taken by regulators

Workplace safety laws should be enforced when they are significantly breached, whether by criminal prosecution or civil penalty proceeding, even if no injury or death results. The Union has longstanding and grave concerns that that state and territory regulators are not effectively or efficiently enforcing work health and safety laws. This has led to widespread disregard of workplace safety obligation by some employers, leading to more injuries and deaths. There is a desperate need for more, and stronger, enforcement.

Indeed, the failure of state and territory regulators to act has also recently attracted criticism in multiple jurisdictions. For example:

- An inquest was recently heard in the Magistrates Court in Burnie into the 2014 death of Tasmanian roofing contractor Kurt Gorrie. Mr Gorrie fell 6 metres to his death from an unfinished roof of the King Island Airport extension onto a concrete slab; he was working on a part of the roof which had no safety mesh on it, and he was not wearing a safety harness. Evidence was led that Mr Gorrie's employer, De Jong & Sons Construction Ltd, had refused to source a crane to move a pack of roofing iron on the grounds of cost. Counsel assisting the Coroner, Sandra Taglieri, told Coroner Simon Cooper that no prosecution had been brought, and that the purpose of the *Work, Health and Safety Act 2012* was not fulfilled if prosecutions were not made<sup>20</sup>;
- In South Australia, the Independent Commissioner Against Corruption recently commenced an evaluation of the practices, policies and procedures of the regulatory arm of SafeWork SA. This followed from the Office of Public Integrity receiving a number of complaints and reports about SafeWork SA, including relating to the death of a construction worker, Jorge Castillo-Riffo, at the Royal Adelaide Hospital site in 2014 and the death of 8 year-old Adelene Leong who was thrown from a ride at the Royal Adelaide Show in September 2014. In both cases, SafeWork SA dropped prosecutions after announcing it had withdrawn charges. In Mr Castillo-Riffo's case, this decision was made merely days before the hearing was to commence<sup>21</sup>;
- The ACT's Chief Magistrate, Lorraine Walker, heavily criticised the Office of the Director of Public Prosecution's workplace health and safety cases as being "abysmally run" and plagued by a "lack of diligence" after prosecutors abandoned a case in May 2018. That case involved a worker being injured when he fell backwards from a service door as he mopped the cabin of a Q400 turboprop aircraft parked in the airport's QantasLink hangar on 30 January 2014. The worker's employer, Star Aviation, pleaded not guilty and was found to be at a "significant disadvantage" after it took more than two years for the matter to come to trial, and when it emerged that defence lawyers and prosecutors still had not agreed on details on the allegations and the particulars of the charges the company faced, more than four years after the incident<sup>22</sup>.

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<sup>20</sup> 'Critical of no prosecutions', Leah McBey, The Advocate, 21 June 2018

<sup>21</sup> <https://icac.sa.gov.au/sites/default/files/Public%20Statement%20Evaluation%20of%20SafeWork%20SA.pdf#overlay-context=content/public-statements>.

<sup>22</sup> "Star Aviation fall: ACT's chief magistrate Lorraine Waler criticises DPP's 'abysmal' Industrial Court case, Megan Gorrey, Canberra Times, 14 May 2018



The Australian Maritime Safety Authority (**AMSA**) and the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) are other regulators who, in the Union's view and experience, seem unwilling or unable to effectively prosecute employers who breach safety laws and endanger workers. These regulators often have cross-jurisdictional coverage and, all too often, shift the burden of responsibility from one regulator to another effectively skirting their responsibilities. They are also plagued by lack of capacity, politicisation and inadequate funding which breeds a lack of confidence in workers in dealing with safety issues on the job.

The Maritime Union of Australia Division (**MUA**) of the Union has repeatedly raised concerns with the AMSA and NOPSEMA that the approach to enforcement and penalty action by these maritime regulators is grossly inadequate. The responses of these regulators to serious injury and death in the maritime sector, namely the offshore oil and gas industry, do not function as a deterrent to prevent unsafe practices by employers, nor do they allow for adequate compensation when a life is lost at sea due to employer negligence. The absence of a fully functioning regulator in the offshore oil and gas industry is particularly concerning to the MUA as the work performed in the sector is high-risk, but not duly recognised as so under the relevant legislation, the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (**OPGGGS Act**). We discuss the need for legislative consistency in the offshore oil and gas industry further below.

Indeed, in our experience - across all jurisdictions - there is a general reluctance for inspectors to take enforcement action (such as the issuing of formal notices) in relation to incidents which amount to breaches of work health and safety law, but where a serious injury or death has not occurred. For example, in the NSW construction industry SafeWork has begun promoting the issuing of on-the-spot fines relating to fall from heights hazards as an alternative to prosecution. Anecdotally, we are concerned that this approach is informed by a reluctance on the part of regulators which relates to their oversensitivity to complaints being made by industry employers and their representatives, leading to inspectors being criticised by the Regulator's management structure where enforcement action is taken, or despite low-level enforcement action being taken. In the construction industry in particular, the remuneration levels of inspectors are inadequate which compromises the ability of the regulators to attract and retain appropriately qualified inspectors. Regulation is also being outpaced by technology, leading some Inspectors to put an inappropriate focus on fine technical details rather than broad safety principles.

The health and safety of workers cannot be ensured unless regulators take a serious approach to all risks, big and small. It is not enough for regulators to park an ambulance at the bottom of a cliff, and wait for a worker to fall.

The failure of the regulators to take enforcement action (including through prosecution) – and the increasing phenomena of prosecutions discontinued at a late stage – is also influenced by the inadequacy of the investigatory processes undertaken by the regulators. It is overwhelmingly important that any investigation address not just the immediate cause of an incident, but also the root causes where there are systemic failures or corporate attitudes which fostered the environment necessary for the incident to occur.

### Case Study 5: Inadequate investigations lead to discontinued prosecutions

In 2014, construction worker Jorge Castillo-Riffo was tragically crushed in a scissor lift during the construction of the new Royal Adelaide Hospital. A prosecution brought against Mr Castillo-Riffo's employer was dropped just three days before it was due to go to court, and an enforceable undertaking was entered into by Mr Castillo-Riffo's employer.

Due to the persistent lobbying of Jorge's partner, Pam Gurner-Hall, a coronial inquest finally commenced in 2018. The inquest is part-heard, and will resume in August 2018. At the time of this submission, however, the evidence given by one SafeWork SA Senior Work Health and Safety Inspector involved in the matter indicates:

- the Inspector's understanding was that neither they, nor the other SafeWork SA Officers in attendance on the day of the accident (several hours after Mr Castillo-Riffo's death), spoke to any eyewitnesses;
- no one from the SafeWork SA Investigation Unit attended the site of the accident on the morning it occurred, despite being a 10 minute drive from SafeWork SA's office. Neither the Inspector, nor – to her knowledge – any other SafeWork SA officials on site exercised their statutory powers to investigate at the site on the morning of the accident;
- a significant issue in the investigation was whether the control mechanism for the scissor lift which crushed Mr Castillo-Riffo's head into the underside of the concrete slab above worked properly. The inspector agreed that she did nothing to investigate whether the control mechanism had been touched, altered or moved;
- the Inspector was present when the scissor lift concerned was removed from the site of the accident. When that occurred, it was apparent that there was a problem with the controller. The inspector's evidence was that, to her knowledge, no one from SafeWork SA did anything to investigate how that problem may have related to the accident;
- the Inspector made no attempt to establish which individual was responsible for safety management of the particular area concerned, or who Mr Castillo-Riffo reported to in his employment;
- the measuring aspects of the work environment in which the accident occurred was extremely important. Notwithstanding this, the Inspector did not take any measurements of critical aspects of the work environment. Further, potentially important evidence was left on the ground at the accident site when the SafeWork SA official left, and the machine in question – once SafeWork SA took possession of it – was stored for a substantial time outside in the elements which resulted in noticeable deterioration;
- the investigation practices at the time, and those of others, were contrary to SafeWork SA's own requirements;
- the Inspector could not provide any information about the monitoring or auditing of compliance with that undertaking, other than her belief that it is monitored.

A wide-ranging approach needs to be taken to improve the practical enforcement of work health and safety laws. Such an approach should include:

- **Review of the National Compliance and Enforcement Plan (NCEP).** The NCEP sets out the approach regulators are supposed to take to WHS compliance and enforcement, including the criteria used to guide enforcement decisions. The Union shares the ACTU's serious concerns about the adequacy and effectiveness of the NCEP as currently drafted. The NCEP should be reviewed and improved, and should reflect a move towards 'hard' compliance rather than

emphasising ‘positive motivators’. Where duty-holders repeatedly breach WHS laws, or a worker is killed, prosecutions should follow;

- **Directors of Public Prosecution should be required to give clear reasons when it decides not to pursue prosecutions**, including its reasons for doing so where a workplace accident results in serious injury or death. For deaths in industries such as construction where there are multiple contractors and sub-contractors in a supply chain, and multiple PBCUs, an explanation should also be provided where a prosecution is taken against an employer but not the head contractor who has overall responsibility for the site.

### Case Study 6: Head Contractors are not being held accountable

Irish backpackers Gerry Bradley (27) and Joe McDermott (24) were killed in November 2015 on an apartment construction site in Perth. They were in an area designated for making phone calls and having meal breaks when precast concrete tile panels – each weighing more than three tonnes – fell on them from overhead. The panels had not been individually restrained.

In the months leading up to the deaths, the Union had raised repeated concerns about safety on site, including the lack of supervision and spotting, and the failure to observe exclusion zones. Indeed, the Fair Work Building Commission (the predecessor to the ABCC) had visited the site three times, however their preoccupation with preventing the union from visiting the site to inspect safety issues prevented them from taking action on the clear safety issues which plagued the site.

Despite the deaths being entirely preventable by what Deputy Chief Magistrate Elizabeth Woods described as “simple and practical steps”, the trucking company responsible – Axedale Holdings Pty Ltd trading as Shaws Cartage Contractors – was fined only \$160,000.

The Head Contractor, Jaxon Construction, was responsible for the site. It chose the subcontractors. Further, it had responsibility for ensuring a safety management system was in place that all contractors complied with; it had a responsibility to plan and coordinate works; and it had a responsibility to ensure that all parties on the site adhered to all applicable legislative requirements. Despite these obligations, WorkSafe did not see fit to prosecute Jaxon Construction effectively stating that they had done nothing wrong.

The lack of effort by the regulator to enforce builder compliance enables self-regulation at the expense of enforcement. The result was the death of Joseph McDermott and Gerard Bradley. Corporations should not be able to handball their responsibilities through the exploitation of corporate and employment structures.

- **Mandatory Coroner’s Inquiries should be held when a worker is killed at work.** It is increasingly common for coroners not to conduct open court hearings into workplace deaths. Rather, reliance is placed on the outcomes of investigations conducted by the regulator. This approach means that investigations which may not have been conducted forensically are not able to be tested by the calling of witnesses. When matters came before the coroner’s court by way of a hearing, this serves as an important process for family members and engages the public interest in an important way. It also means the matters tend to be in the news and public interest attaches to the safety and other concerns that arise. It can also focus the mind of the prosecutors on their responsibilities. Moreover, coroner’s findings can be an important tool in driving reform in relation to how accidents are investigated with a view to preventing

further industrial accidents. The following observation was made by the Coroner dealing with the death of Mr Castillo-Riffo:

*“This wouldn’t be the first time I’ve run an inquest into an industrial death and then felt impelled to criticise the lugubrious process of criminal prosecution that ensued after that particular death.... I made certain comments about the processes involved in policing industrial deaths and that was almost 10 years ago and it’s a topic that I’m not going to shy away from this time”<sup>23</sup>.*

- **A common, publicly available database of completed prosecutions should be maintained by Regulators.** We support the ACTU’s submission that such a database should be created and maintained to include information about the date of the prosecution, the nature of the entity prosecuted, the type of issue giving rise to the prosecution, the provision of the Model Act under which the prosecution was taken, the court in which the prosecution took place, the plea entered by the defendant, and the sentence imposed by the court. The database should also include links to all written court decisions;
- **Specialist Industrial Courts should be allocated, and resourced.** Prosecutions should be heard by specialist courts by judges with industrial and safety expertise and experience. Currently, there are significant differences between the jurisdictions in relation to the type of court in which the prosecution is conducted. In NSW, the Union is particularly concerned that the jurisdiction for work health and safety prosecutions has been removed from a specialist Industrial Court, to the District Court of New South Wales. The District Court does not have specialist knowledge of industrial safety matters. Criminal courts are traditionally concerned with the particular act or omission of an individual; the criminal law is not developed with corporate offenders in mind. The concepts of “*mens rea*” and “*actus reus*”, that is, guilty mind and guilty act, while making perfectly good sense when directly applied to individuals, do not easily translate to corporate offenders. In the case of industrial death, it is important that an adjudicator address offences involving systemic failings and the liability of corporate employers;
- **Independence must be secured.** As a matter of general principle, prosecuting authorities should be truly independent of, and not under the control or directions of, the relevant Minister. Enforcement should be functionally separate from ‘education’; and
- **A specialist Safety Inspectorate should be established** to consider, review and correct the failures in the performance and behaviour of the current regulators.

In addition, the consistent experience of our officials is that the Regulators are reluctant to inform and consult with unions whose members are involved in a serious incident or fatality. Often, the union is the most consistent point of institutional support available to the families. The failure of the regulators to engage in a co-operative process with the union and its surviving members is not only a major disservice to those workers and their families, but also undermines the ability of the union to educate its members.

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<sup>23</sup> See Transcript, page 1626, Lines 4 -25

## Legislative inconsistency in the offshore oil and gas industry

The OPGGS Act should be amended so that it is legislatively consistent with the model *Work Health and Safety Act 2011* (Cth) (**WHS Act**) and *Work Health and Safety Regulations 2011* (Cth) (**WHS Regulations**), with appropriate consideration given to the specifics of the industry, for example remote location. This would remedy many of the threats to worker health and safety in this high-risk industry. Achieving practicable legislative consistency in the offshore oil and gas industry would also provide an appropriate regulatory framework, and impetus, for the NOPSEMA (and AMSA) to operate as fully-functioning regulators empowered and guided by the involvement of their subject workforces.

Major issues include:

- **High-risk licensing** - The offshore oil and gas industry does not have in place a high-risk licensing system. Implementation of a high-risk licensing system, which encompasses relevant training and qualifications ‘designed to minimise the risk of adverse consequences associated with lack of competency’ in work of such a nature, has been proven to be effective<sup>24</sup>. The effectiveness of such a system has been communicated and recommended to the NOPSEMA on multiple occasions however gaps in the OPGGS have provided reason for the regulator to avoid implementation. A high-risk licensing system in the OPGGS Act would harmonise it with Part 4 of the WHS Act and Part 4.5 of the WHS Regulations.
- **Safety case, stakeholders and consultation** - The NOPSEMA purports that its application of, and strong focus on operator and worker compliance with, a safety case<sup>25</sup> approach accounts for the high-risk nature of the industry and sufficiently mitigates risks. Given the importance of worker involvement in work health and safety management, it is critical that workers and their representatives are involved in the development and review of safety cases. In the experiences of the MUA and its members, the NOPSEMA does not appear to consider its workforce or workforce representatives as genuine stakeholders and as such, does not provide any mechanisms for meaningful consultation with its workforce or their industrial representatives regarding safety cases.
- **Health and Safety Representatives** - Where work health and safety legislation were to be harmonised in the offshore oil and gas industry, offshore Health and Safety Representatives (**HSRs**) would be afforded the same rights as HSRs in onshore industries. Critically, this would enable HSRs, under the WHS Regulations<sup>26</sup>, to have the capacity to trigger a review of various safety management documents, including safety case documentation. Increased involvement of the workforce, in particular in the NOPSEMA's safety case model, would greatly improve health and safety outcomes for offshore oil and gas workers.

In general terms, legislative consistency would:

- Address issues of high-risk licensing;
- Amend deficiencies in the safety case model;
- Provide employees and their industrial representatives greater legislative recognition, thereby facilitating genuine and comprehensive consultation between the NOPSEMA and its workforce;

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<sup>24</sup> *National Review into Model Occupational Health and Safety Laws*, Second Report, January 2009, paragraph 34.8, p 291.

<sup>25</sup> An offshore facility cannot be constructed, installed, operated, modified or decommissioned without a safety case in force for that stage in the life of the facility, NOPSEMA, Commonwealth of Australia 2018.

<sup>26</sup> Regulations 38(2)(e) and (f), 401(1)(g) and (3), 430(1)(d) and (2), 559(2)(e) and (4) and 569(2)(e) and (5)

- Improve the recognition and role of HSRs in the high-risk; and
- Provide a comprehensive regulatory framework for the national regulators to enforce, thereby providing a deterrent and preventative effect.

### Workers, their families and their unions should be able to prosecute WHS breaches

To make the cultural change necessary to attack the scourge of workplace death, compliance should not be only reactive, but also proactive and preventative. In our experience, it is extremely rare for a regulator to commence a prosecution or civil penalty proceeding for breaches of work health and safety laws where there has not been an injury (e.g. cases of “near misses” or identified failures to provide a safe system of work).

This is a significant problem, because under the Model WHS law, only the regulator is able to bring proceedings. A request can be made to the regulator, and later the DPP, if a prosecution is not brought for any offences other than Category 1 offences. However injured workers, the families of deceased workers, and unions are unable to bring prosecution proceedings directly.

New South Wales is the only jurisdiction to retain access to union prosecutions. However these provisions are restricted to situations where the DPP has declined to bring proceedings. The application of the provision is problematic, not least of all because of the reluctance of the DPP to involve themselves in OHS matters (which means that the requisite referral cannot be made) and because, where penalties are ordered, they are unable to be retained by the prosecuting union (which exacerbates internal resourcing limitations within the unions who may seek to prosecute). Previously, between 1983 and 2011, union secretaries had standing to bring a prosecution under NSW laws and there is no evidence whatsoever that indicates that this ability was abused. To the contrary, all such proceedings were successful.

We strongly argue that the Model Act be amended so that unions have standing to bring proceeding for offences under WHS legislation. Indeed, the enforcement of work health and safety laws for contraventions of work health and safety laws would be considerably strengthened by allowing injured workers, the families of deceased injured workers and their unions to commence proceedings for the imposition of civil penalties where work health and safety laws are contravened. This would share the burden of regulatory enforcement in circumstances where persons more directly concerned in the events are motivated to take action, or where the regulator fails to take action.

Further, any requirement for review by regulator or the DPP should be removed. If a union runs a successful prosecution, it should also be entitled to the benefit of any pecuniary penalty.

The adoption of the regime similar to the civil remedy enforcement regime presently found in the *Fair Work Act 2009* (Cth) (**FW Act**) would greatly enhance the enforcement of workplace safety laws. Under that regime workers concerned, and their unions, are able to commence proceedings for the imposition of civil penalties where employment laws are contravened<sup>27</sup>.

To be clear, such an approach should not be at the expense of criminal prosecution proceedings which the Union considers to be an essential aspect of enforcement (we discuss this further below). However, enhanced enforcement is likely to lead to enhanced compliance.

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<sup>27</sup> The table in s539 of the FW Act sets out standing, jurisdiction and maximum penalties payable for civil remedy provisions

We further submit that the Model Act should be amended to place the onus of demonstrating that it was not reasonably practicable to reduce or eliminate a risk giving rise to a WHS duty of care offence on a defendant (a partial reverse of onus of proof).

### Where penalties are ordered, they are inadequate

*“There needs to be harsher penalties for those who are prepared to “run the risks” and play a game of “workplace probability”, in order to complete their particular sphere or scope of works; no worker in the world should ever have to play a game of probability and hope that they came home safely at the end of their work “shift”. And in many cases, those who decide upon the “risks” are never the ones who are exposed to the risks.”*

- Dr Gerard Ayers, PhD, MAppSci, GradDipOHM, OHS&E Manager, Construction and General Division, Victoria / Tasmania Branch

The penalties which are being applied in response to industrial deaths are woefully inadequate.

Because there is no current common, publicly available database of completed prosecutions maintained by Regulators, it is difficult to obtain reliable data in this regard. However, we do note that a 2012 paper examining judgements issued by the NSW WorkCover Authority under the *Occupational Health and Safety Acts 1983 and 2000*, for offences relating to workplace fatalities heard by the Industrial Court of NSW from 1988 – 2008, demonstrated that penalties were low, representing approximately only 18% of the maximum penalty allowable<sup>28</sup>.

In order to be an effective deterrent, penalties must be significant. It is wholly unacceptable, for example, that repeat offenders like John Holland – which is worth hundreds of millions of dollars in Commonwealth Government contracts – continue to accrue penalties in the order of \$170,000 - \$180,000 per fatality (see Appendix 2). These outcomes allow large companies to treat the lives of their workers as a minor cost of doing business. Moreover – and despite this – John Holland is one of the very few private sector businesses who have been granted a Comcare licence, allowing it to maintain a self-insurance scheme and manage all of its own workers’ compensation payments in cases of work-related injury or death. This is wholly unacceptable.

The inadequacy of pecuniary penalties is also exacerbated where small employers are able to evade the enforcement of penalties ordered by ceasing trading, stripping the business of assets and entering into insolvency.

### Case Study 7: Non-compliance of sub-contractors with already inadequate penalties

On 1 February 2000, Dean McGoldrick fell 12 metres to his death on a Sydney construction site. He was employed by Metal Gutter Fascia Services Pty Ltd, a small company run by sole director John Peter Poleviak. Disappointingly, WorkCover brought a prosecution in the then-Chief Industrial Magistrates Court which had a penalty cap of \$20,000. An extract of a letter written by Mr McGoldrick’s mother, Robyn McGoldrick, to the then-Premier of NSW Morris Iemma reads:

<sup>28</sup> *‘Another Brick in the Wall’: Responses of the State to Workplace fatalities in the New South Wales construction industry*, Peggy Trompf, A thesis submitted in fulfilment of the requirements of the degree of Doctor of Philosophy. School of Business, Department of Work and Organisational Studies, University of Sydney, August 2012



*“On the 5<sup>th</sup> of December 2003 I was presented with a Safety Award from Unions NSW. I greatly value the Award but it is a poor substitute for the loss of my son, 17 year old Dean, in a workplace accident. Dean had only worked for a few days on a Sydney building site at Broadway when he tragically fell to his death on 1<sup>st</sup> February 2000.*

*On the site where my son worked there was no OH&S induction provided, no scaffolding, inadequate supervision and no requirement to wear a harness. My son fell 12 metres to his death. Unfortunately WorkCover NSW initiated the prosecution of the employer in the wrong jurisdiction with the end result the employer was fined only \$20,000. It caused me and my family considerable distress when I found out years later from the CFMEU that the employer only paid \$1,800 of this fine. This is unacceptable. It was subsequently established that other employers had also not paid fines arising from fatalities.*

*When I received my Award in December 2003 I was given a commitment from the former Premier of NSW Bob Carr that I would be advised when the fine payable following the death of my son is paid. This commitment has not been honoured. I have been advised that the privacy of a rogue contractor is more important than the rights of families and friends of workers killed. I do not accept this nor does the community; I request that there be an amendment to the relevant legislation as proposed by Unions NSW and the CFMEU and that it be done as a matter of urgency. Finally I request you honour the commitment of the former Premier of NSW and advise me when the fine arising from the death of my son is paid.*

*Payment of the fines even when inadequate represents a form of closure for many families”.*

The Union is also concerned about the proliferation of enforceable undertakings. Enforceable undertakings should not be accepted in cases where workers are seriously injured or killed, and the Model legislation should be amended to expressly prohibit enforceable undertakings in these circumstances. Additionally, where the contravening employer has a history of prior convictions arising from separate investigations, they should not be entitled to the benefit of enforceable undertakings as a means of avoiding prosecution. Our experience with Comcare, in particular, is that it has a habit of accepting enforceable undertakings regarding serious work health and safety breaches and deaths which significantly undermines the effectiveness of sanctions.

Employers should also be prohibited from insuring against safety penalties and fines. The Model Act should be amended to expressly prohibit insurance contracts being entered into which cover the cost of work health and safety penalties and fines. Contravening such a prohibition should be an offence. It is unacceptable that employers should seek to reduce the life of workers to a cost that can be insured against.

### **The need for industrial manslaughter laws**

Over many years, we have been at the forefront of the campaign to make industrial manslaughter a specific criminal offence under workplace health and safety legislation. Financial penalties, on their own, are not an effective strategy or deterrent in ensuring better health and safety at work. Specifically, financial penalties:

- do not ensure that the offenders restructure their workplace to comply with OHS standards;
- only have an impact upon the financial returns of the corporation, and not on the motivation and/or behaviour of the responsible managers;



- do not ensure any disciplinary action is ever taken against those who should be held responsible and accountable (especially if the hazards and risks were previously known to them);
- do not require management to review their systems of operation so that the offence will not reoccur; and
- can be easily avoided by restructuring the corporate structure or identities or by moving the organisation's assets to other corporate entities<sup>29</sup>.

Effective deterrence needs to pierce the corporate veil. Corporate business must be held accountable and responsible, both morally and legally.

The proposition that the threat of personal prosecution is a substantial motivator to ensure compliance with work health and safety obligations is well-established<sup>30</sup>. Moreover, if law is a reflection of society's values, then criminal sanctions have both a moral and symbolic role to play. As renowned WHS academics Neil Gunningham and Richard Johnstone have stated:

*"...symbolic or moral aims of criminal sanctions seek to apportion moral blame for criminal acts, and officially demonstrate society's intolerance of harmful behavior...we use the criminal law when our sensibilities are assaulted – when, in addition to redressing the particular problem, we want both to condemn the wrongdoers' conduct, and to stigmatize them. The criminal law both reflects existing public sentiments about the heinousness of certain activities, but can also be used to shape such perceptions, particularly if used in conjunction with media campaigns showing the reprehensible aspects of the behavior, while simultaneously emphasizing society's condemnation of that behavior..."<sup>31</sup>.*

Gunningham has also identified that regulation and personal liability, reinforced by credible enforcement, is the single most important motivator for a CEO, in relation to their responsibility in ensuring high-level OHS standards are both implemented and maintained at their organisations' workplace<sup>32</sup>.

The introduction of a uniform industrial manslaughter offences would demonstrate the significance of workplace health and safety as a matter of public policy, and to help bring about cultural change in workplace health and safety practices.

Currently, the only jurisdictions which contain industrial manslaughter provisions are the ACT and Queensland, although we note the Victorian Andrews government's recent commitment to legislating an industrial manslaughter offence should it win another term of government, and commend it for

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<sup>29</sup> Ayers, Gerard 2013, *Corporate Manslaughter legislation (A Brief summary of Australia's experience*. Report prepared on behalf of the Australian Council of Trade Unions; Gunningham, N., & Johnstone, R. 1999, *Regulating Workplace Safety: systems and sanctions*. Oxford University Press, Oxford

<sup>30</sup> Bailey, T, J Woolley and S Raftery (2015) "Compliance and enforcement in Road Safety and Work Health and Safety: A Comparison of Approaches" *Journal of Health, Safety and Environment*, 2015; 31(2); Clough, J (2007) "A Glaring Omission? Corporate Liability for Negligent Manslaughter" 20 *Australian Journal of Labour Law* 29; Purse, K and J Dorrian (2011) "Deterrence and Enforcement of Occupational Health and Safety Law", *The International Journal of Comparative Labour Law and Industrial Relations* 27(1)

<sup>31</sup> Ibid, at pp.193-194

<sup>32</sup> Gunningham, N. 1999, *CEO and Supervisor Drivers: Review of literature and current practice*, Report commissioned by the National Occupational Health and Safety Commission.

doing so. We also note that the Queensland legislation excludes the mining industry. This is absurd and unjustified, and we call upon the Queensland government to remove this exclusion.

The Union strongly supports the inclusion of an industrial manslaughter offence in the Model WHS laws, and within the legislative framework for work health and safety. In particular, the offence:

- should include both acts and omissions which substantially contributes to death;
- should apply to corporate duty-holders and officers who have the capacity to significantly affect health and safety outcomes. The cause of action should go not just to the immediate cause of a death, but also to the root cause of it;
- should carry significant penalties, including substantial periods of imprisonment; and
- should encompass circumstances where *any* person is killed. This would protect members of the public (such as the three pedestrians who were killed when a wall on the edge of a Grocon site collapsed in Melbourne in 2014), as well as ensure justice in industries such as construction where there are multiple contractors and sub-contractors engaged on a site / where multiple Person Conducting a Business or Undertaking (PCBU) exist under the WHS Act.

### Other improvements to the Model WHS Framework which would improve safety

The Construction and General Division of the Union recently made a submission into Safe Work Australia's review of the model OHS laws which made a number of recommendations. That submission is available on Safe Work Australia's website<sup>33</sup>. The Union's recommendations work to improve the legislative framework in a way that will positively address the underlying causes of workplace fatalities. The recommendations included (but were not limited to):

- **Improving work health and safety "right of entry" provisions.** The capacity of union officials to enter workplaces to assist in protecting members from unsafe work practices is critical. The Model Act should be amended to remove the requirement for written notice in relation to suspected work health and safety contraventions. However if a notice requirement is retained, it should be given as soon as is reasonably practicable *after* entering a workplace, except where giving the notice would defeat the purpose of the entry to the workplace or unreasonably delay the permit holder in an urgent case. Further, notices in relation to suspected contraventions should be limited to identifying the nature of the suspected contravention, and permit holders should be specifically able to investigate suspected contraventions after entering a workplace based on matters observed whilst on site after lawful entry (irrespective of whether or not they were known at the time of the initial entry;

### Case Study 8: the Union is being consistently obstructed from performing work health and safety inspections

The capacity of union officials to enter workplaces to assist in protecting members from unsafe work practices is critical, but the union is consistently obstructed from performing its safety role by aggressive and uncooperative employers, and the obstructionist ABCC.

<sup>33</sup> <https://zengage.swa.gov.au/32134/documents/79615>

The capacity of union officials to enter workplaces to assist in protecting members from unsafe work practices is critical, but the union is consistently obstructed from performing its safety role by aggressive and uncooperative employers, and the obstructionist ABCC.

Employers consistently obstruct our officials where they are seeking to investigate suspected contraventions including by refusing to acknowledge reasonable suspicions, by calling police without any reasonable basis for doing so and by taking advantage of technical minutia in entry notices.

At the Perth Children's Hospital site – a site plagued with significant safety issues – the union was repeatedly obstructed by John Holland when trying to deal with concerns from workers over asbestos on site (just one of the serious safety issues identified at the site):

In 2012:

- Deadly asbestos was unearthed during civil works. Union officials were obstructed for hours, and denied the right to represent workers in an investigation. John Holland refused union requests for documentation relating to the discovery;
- Comcare launched an investigation into the continued obstruction of union officials who were trying to represent workers in regard to safety; a warning was issued, but a copy of the warning was not released to the union;
- Comcare held two mediation meetings between John Holland and the Union in order to make clear to John Holland that the union had a right to be a party to safety investigation, and to be on site to speak to workers. John Holland responded that this was a "grey area" in their view.

In 2016:

- Asbestos is again discovered on site. Workers contact the union and express concern about the discovery, and John Holland's handling of the discovery;
- Workers from a painting subcontractor contact the union to complain that they were being made to remove asbestos containing material but were not qualified to do so;
- The union requests legal access to the site four times, and was denied four times;
- Comcare attends site and attempts to take the unions' concerns about asbestos and untrained workers being exposed to the deadly fibres to John Holland, who respond that there were no OHS issues on site and that there was no reason for alarm;
- The union requests that Comcare meet with representatives from the site without management present. Comcare declines;
- Eventually the state government organized a meeting of all parties. As a result of the meeting, and tour of the worksite, union representatives were of the opinion that the site should be shut down while proper asbestos removal took place. This did not occur;
- Workers expressed concern that products had arrived on site from a supplier who had recently been found to be using asbestos in their products. The union was again refused entry. John Holland insisted that there was no issue but, in any event, they would investigate the issue themselves. Workers were rightly upset. The products were being cut up on site, and workers were covered in dust as a result.

- **Appropriate amendments to ensure that designated workgroups are fairly chosen and properly representative, and that Health and Safety Representatives (HSRs) are fairly elected and supported.** The designation of workgroups is an essential pre-requisite to the election of HSRs under the Model Act. It is imperative that the task of assigning workgroups is not discharged in a cursory manner, and that employees have proper access to representation without the need to make specific requests for that representation to the employer (which may expose their union membership status in an undesirable manner). In the construction industry, which is characterised by increasingly complex contracting and sub-contracting arrangements, there should be a requirement for an overall HSR to be elected by workers who is able to work across designated work groups;
- **Ensuring that HSRs and Health and Safety Committee's (HSCs) are properly trained.** Mandatory prescribed training for HSRs and HSC members should be conducted and not unduly delayed by obstructive employers, and workers must be entitled to a choice of provider approved by the regulator. Further, the restrictions around training for the exercise of HSR functions, particularly in relation to the issuing of Provisional Improvement Notices, should be removed;
- **Issue Resolution procedures are deficient and need to be strengthened.** The current Model Act fails to appropriately recognise the role of unions in the resolution of safety disputes, provides no straightforward mechanism for unions to assist workers and HSRs who are being undermined by difficult PCBUs or to otherwise resolve disputes, and unfairly excludes unions from participating in dispute resolution as initiating parties. Unions should have the right to notify safety issue/disputes on behalf of their members, including where matters affect multiple workgroups and where HSRs have been elected. Further, any worker should be able to request the assistance of their union to assist HSRs, regardless of whether or not the union officer involved is a permit-holder. The ability for HSRs to be assisted by union representatives, with respect to both on-site and representative activities, needs to be understood as an ordinary and expected practical application of the model WHS legislation;
- **Internal and External Review provisions are deficient and need to be strengthened.** Where an inspector acts inappropriately, or refuses to act at all, the issue resolution procedures come to a halt. The legislation does not include an effective mechanism through which a party, whether an HSR, a worker, or a union can satisfactorily access an appeal body. Unions are excluded from acting as initiating parties in applications for internal and external review. Despite the functions and powers provided to HSRs in the legislation, the relative power imbalance between such individuals and their employer often makes it impractical for an HSR to act as an initiating party in the commencement and resolution of a safety issue. These provisions must be reformed.

## Appendix 1: Resolutions passed at the Union's National Conference, June 2018

### Health and safety

Conference recognises the paramount importance and responsibility of the Union towards all issues around workplace safety. We must always ensure that our members are not exposed to unsafe work conditions and are educated in all spheres of safety rights and laws. We must organise non-members into our Union and fight insecure work to improve Workplace Health and Safety across our Union's industries and sectors.

The level of fatalities and injuries remains unacceptably high across our industries and each workplace fatality and serious injury is a travesty that could have been avoided. Families and workmates affected should have been spared the trauma of unsafe workplaces and the fact that too many employers' place productivity and profitability before safety is a disgrace.

Workers, Health and Safety Representatives (HSRs), organisers and officials should have an unfettered legal right to stop work to diminish the risk of injuries, fatalities and industrial disease, especially after a workplace incident or close miss and in order to show respect to fallen or injured comrades.

The achievement of these legal rights, especially for organisers and officials are vital in the context of increased insecurity of work in many sectors our Union has coverage for through casualisation and increased use of labour hire where workers legitimately worry about their future employment prospects if they speak out about safety.

Conference notes the absurd approach of the Queensland government in excluding the mining industry from the recently legislated industrial manslaughter laws.

Conference supports the Union's continued fight to; improve and enforce safety laws, organise to advance health and safety in the workplace, facilitate the election in the workplace of HSRs, support, educate, resource, coordinate and assist HSRs and delegates and ensure negligent employers are jailed and corporations are severely penalised where death or serious injury is caused, or serious wilful negligence is proven.

Conference calls on the Union to coordinate and link the safety struggles of all divisions with a view to a single national campaign with sector and industry specific elements and consider the merits of holding a cross divisional Health and Safety Conference.

Conference calls on the Union to continue to fight for significant improvements to workers' compensation schemes and other insurances.

Conference remains committed to ensuring that workers in all our industries return home in one piece every night and day. Safety before Profit.

### Safety regulators

Conference recognises that safety is a critical issue for all workers. Conference calls on the Union to pay constant campaigning attention to positively reforming the various safety regulators and their current lack of capacity to effectively deal with issues affecting workers on the job.

AMSA, NOPSEMA, and all regulators are currently unable to deliver outcomes for workers on the job or effectively deal with employers and corporate power in resolving safety issues in the interest of workers. Conference calls for the establishment of a safety inspectorate to address these failures.

These regulators often have cross-jurisdictional coverage and all too often shift the burden of responsibility from one regulator to another effectively skirting their responsibilities.

This lack of capacity, politicisation and funding of safety regulators breeds a lack of confidence in workers in dealing with safety issues on the job.

Currently regulators seem unwilling or unable to effectively prosecute employers who breach safety laws and endanger workers.

The Union will work across all divisions with shared regulatory coverage to mount campaigns that effectively reform the regulatory regimes in the interest of working people's safety.

Conference condemns those regulators who collude with employers to breach safety laws.

## Appendix 2: John Holland's abysmal safety record

### CASE 1: *Comcare v John Holland Pty Ltd (No 2)* [2009] FCA 1515

Mark McCallum was working at the Dalrymple Bay Coal Terminal in Queensland on 6 March 2008. The work involved the transportation of precast concrete decks by a platform supported by two jinkers propelled by a front end loader. Mr McCallum's leg became caught amongst wooden scaffolding planks as the wheels of the front jinker began to press down and run over the planks. Another employee working alongside him believed that he could not safely assist Mr McCallum to free himself so he ran to the right side of the jetty so that he could see a third employee to signal for the transportation unit to stop. The unit stopped a few seconds later but by this time the front wheels of the front jinker had passed over Mr McCallum's trapped body. Emergency assistance was requested and a paramedic arrived at the scene, but nothing could be done to assist Mr McCallum who had suffered fatal injuries. The company admitted that its conduct had caused Mark McCallum's tragic death.

It did not carry out a plant hazard assessment for the piece of plant that killed Mr McCallum. An assessment would likely have identified a need for a remote braking system and radio protocol that would have prevented this tragedy.

The Court said:

*"The dangers were obvious from the start, relatively simple to avoid, but unrecognised and unaddressed in a manner which raises the objective gravity of the offence ...towards the higher end of the scale"*

And:

*"The size of the plant involved, the vulnerability of workers in front of it, and the very real risk of serious injury or death in the absence of a fail-safe means of immediate emergency communication does suggest a systemic failure by the respondent rather than "a risk to which an employee was exposed because of a combination of inadvertence on the part of an employee and a momentary lapse of supervision" as contended by the respondent".*

John Holland was fined \$180,000.00.

### CASE 2: *Comcare v John Holland Pty Ltd* [2009] FCA 771

This case concerned a contravention at a worksite at Koolyanobbing railway siding in Western Australia, where the repair of rail tracks was being undertaken in November 2007. Welding activities were being undertaken, at the company's behest and direction, unsafely, near a fuel source. A fire broke out and an employee suffered second degree burns to 20% of his body.

The Court said that the company's conduct was objectively serious and that the consequences could have been far more serious but for immediate action taken by another employee. It found that the injured employee had never seen the company's documentary procedures relating to refuelling in proximity to a heat source. A fine of \$124,960 was imposed.

### *CASE 3: Comcare v John Holland Pty Ltd [2012] FCA 449*

The incident that caused Wayne Moore's death occurred on 19 March 2009 at the Mount Whaleback mine in WA. Unsecured grid mesh Mr Moore was standing on and which had not been secured in accordance with Australian standards when it was laid, gave way, causing him to fall 10 metres and sustain fatal injuries.

Two previous incidents involving grid mesh falling to the ground, labelled by the Court as 'near misses', had occurred just days before. Significantly, John Holland Pty Ltd had failed to report these incidents (of which its management had actual notice) to the SRCC. No action was taken after these earlier incidents to rectify a serious occupational health and safety issue.

The Court said there were measures open to John Holland Pty Ltd that were reasonably practicable and would have prevented Mr Moore's tragic death. Specifically, it found that there were no adequate reporting procedures in place in regards to the incidents. The Court was minded to impose the maximum penalty of \$242,000 available under the Act. The incident was the result not of inadvertence by an employee, but a fundamental systematic failure by John Holland Pty Ltd.

The Court lamented that the maximum penalty imposed was insignificant compared with the loss of human life and that large corporations like John Holland Pty Ltd might be expected by the community to pay substantially more than the prescribed maximum penalty in the circumstances.

John Holland gave an undertaking to ensure that they would "use their best endeavours to observe and implement industry best practice in relation to work health and safety".

### *CASE 4: Comcare v John Holland Pty Ltd [2014] FCA 1191*

On 30 December 2011 Anthony Phelan was working on sinking of the railway tracks to and from Perth Central railway station. He was operating a high pressure water and air mist hose cleaning debris from the rail tracks. He was wearing earplugs. At the same time, about 160 metres further up the rail tracks was a hi-rail vehicle. The hi-rail vehicle was located on a decline. During the offtracking process, the hi-rail vehicle lost its braking capability. It started descending the decline gathering momentum as it went.

The employee operating the vehicle lost control of it. He sounded the vehicle's warning horn. Mr Phelan was directly in the path of the runaway vehicle. There were warning shouts from other workers. Mr Phelan apparently did not hear the warning horn or shouts because of the earplugs he was wearing and the noise from the hose he was using. The hi-rail vehicle struck him and he was fatally injured.

The accident that killed Anthony Phelan was determined by the Court to have been foreseeable. The Court said neither John Holland Group company had taken steps identified by both of them to be necessary to discharge their obligations in relation to their employee's safety. This was made worse by the fact that the companies had been sent a safety notice by the Office of Rail Safety Western Australia following a similar incident involving a runaway vehicle before the death of Mr Phelan and had failed to take remedial action. That notice advised the companies of the need to restrain vehicles to prevent the potential for 'runaway'. The Court noted that the death of Mr Phelan was the third fatal accident in 5 years that had occurred at sites JH Pty Ltd controlled.



It concluded: The need to remind the (companies) of the importance of constant vigilance in relation to workplace safety, is particularly important because (they) operate in an industry which on a daily basis requires their employees to carry out inherently dangerous activities or to operate, and work in the vicinity of, vehicles which have the propensity to put their lives at risk. Constant vigilance was not present in the circumstances of this tragic case. The result was that a man lost his life... The two JHG companies were fined \$180,000 each.

#### *CASE 5: Comcare v John Holland Pty Ltd [2015] FCA 388*

John Holland Pty Ltd failed to take all reasonably practicable steps to protect the health and safety of its employees in relation to an incident that occurred on 1 December 2011 on the Airport Link Tunnel project in Brisbane. The incident involved a metal bridge being dislodged and falling to the ground, striking an employee of John Holland in the head. The employee, Alexander Hogg, suffered serious lacerations and other injuries. Other employees were also exposed to risk or injury from the dislodgement of the metal bridge. The Court found that the company had: - failed to conduct a formal risk assessment; - failed to provide the work crew with any information or training; - failed to take steps reasonably practicably open to it which would have enabled maintenance of a safe working environment. The event that led to Mr Hogg being injured was foreseeable. The Federal Court imposed a \$110,000 fine on John Holland Pty Ltd.

#### *CASE 6: Comcare v John Holland Pty Ltd [2015] FCA 388*

In June 2016, John Holland pleaded guilty in the Adelaide Magistrate's Court to two charges of failing in its work health and safety duty during construction of the city's South Road Superway, in an incident that endangered the lives of two Adelaide motorists. A 40 kilogram section of concrete pipe broke off and fell around 15 metres into evening peak hour traffic. The pipe snapped because it was not properly supported. The company was convicted and fined \$130,000 in what was the first criminal prosecution brought by federal regulator Comcare under the Commonwealth Work Health and Safety Act. The Court found John Holland did not carry out a risk assessment for the job or ensure the work was done safely, exposing the drivers to the risk of serious injury or death.

This was the first criminal OHS prosecution against John Holland.

#### *CASE 7: Comcare v John Holland Pty Ltd [2016] FCA 501*

On 29 September 2011, Sam Beveridge, a 40 year old diesel fitter employed by John Holland Pty Ltd on the Brisbane Airport Link project died after being struck by a falling beam whilst performing work on the formwork that was used to pour suspended concrete slabs which formed the roof of the tunnel. Mr. Beveridge suffered severe crush injuries to his head, neck and chest. He died in hospital two days later.

John Holland admitted it failed to provide Mr Beveridge with training on risk or control measures for the work, or a safe system of work for the cutting of the formwork. "In this case there was a clear failure to take all reasonably practicable steps to ensure this work was carried out safely," the CEO of Comcare said after the decision. "Detailed risk assessments are fundamental requirements in identifying hazards and ensuring the health and safety of workers, and that did not happen here." The company was fined \$170,000.