Senate Education and Employment Committee

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

Queensland Council of Unions Submission

Queensland
Council of Unions

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Introduction

The Queensland Council of Unions (QCU) is Queensland's peak union council. The QCU has for many years been at the forefront of advancing workers' interests, including for better workplace health and safety outcomes. Accordingly, the QCU was involved in the most recent best practice review of Workplace Health and Safety Queensland (WHSQ) and the review of the national review of the model laws currently being undertaken by Safe Work Australia. This submission resembles the QCU submissions made to both the abovenamed reviews.

The same literature is relied upon to frame this submission within a context of inadequate prosecutions and a preference for regulators for softer compliance strategies of education and cooperation over that of a harder deterrence strategy. A number of case studies that were previously submitted to the above-named reviews are also included for the benefit of the committee. Those case studies demonstrate a culture of softer compliance strategies that was found to have existed in Queensland prior to the Best Practice Review of Workplace Health and Safety Queensland. It is also understood that the experience in Queensland does not differ markedly from the experience in other states and territories.

Following the case studies, this submission provides a discussion concerning the Best Practice Review of Workplace Health and Safety Queensland. That review resulted in significant changes to the operation of Workplace Health and Safety Queensland and associated legislative reform. Relevantly to this inquiry, the legislative change resulting from the Best Practice Review of Workplace Health and Safety Queensland included the introduction an offence of industrial manslaughter in Queensland.

Prosecution and compliance

Workplace Health and Safety (WHS) regulation in Queensland, like other Australian jurisdictions, has been based on the Robens Model that will be discussed later in this submission. This approach to regulation emphasises the management and regulation of WHS

at the workplace alongside a primary duty of care on the part of the employer and a strong regulatory approach from Government by way of enforcement (Bray et al 2014). Fundamental to this approach is the ability of employees to be represented and consulted in the workplace via workplace health and safety representatives (HSRs). It also requires an element of deterrence where employers are not meeting their legal obligations for this system to work.

While all Australian jurisdictions had legislation based on the Robens Model, the regulation differed in various ways from jurisdiction to jurisdiction. The current legislation in Queensland results from a process of harmonisation of WHS legislation agreed upon by the Council of Australian Governments (Bluff and Gunningham 2012; Bray et al 2014). The harmonised legislation, or model laws, were introduced by most Australian jurisdictions in 2012 and maintained the approach adopted with the Robens model. The currency of this model demonstrates the continued, fundamental importance of employee voice and strong regulatory compliance to allow self-regulation to work in such a way as to protect workers.

The Australian labour market has undertaken substantial changes in the past few decades. These changes have resulted in several outcomes including declining union density and an increase in non-standard and precarious forms of employment (Quinlan et al 2009; Underhill 2013). It is probable that these two changes in the labour market are related. Casual employment, the use of labour hire and independent contractors have contributed to the increasingly precarious nature of employment and, in turn, to deleterious WHS outcomes. Employees with less employment security are less likely to make complaint with respect to unsafe work practices and potential breaches to WHS legislation (Quinlan et al 2009; Underhill 2013).

Coincidental with those changes to the labour market that are detrimental to WHS outcomes, unions have had serious restrictions placed on their capacity to bargain and represent their membership (Bray et al 2005:123; Gardner 2008:36; Gittens, R cited in Sappey et al 2006:226). Many restrictions placed on unions by virtue of Workplace Relations Act 1996 remain in place under the Fair Work Act 2009 (Cooper 2009:288; Cooper and Ellem 2009:304; Jerrard and Le Queux 2013:51; McCrystal 2009:4; Pittard 2013:95). Union officials' capacity to enter

workplace places, take industrial action (other than protected industrial action) and bring matters before industrial tribunals have been severely curtailed and unions and/or workers breaching industrial legislation face massive fines. Most recently, the reintroduction of the Australian Building and Construction Commission and Building and National Construction Code places substantial restrictions on those matters over which a union can bargain and imposes even more disproportionate penalties upon those workers and unions that seek to assert their WHS rights.

There is a small but compelling body of contemporary literature about the level of prosecutions being undertaken in the field of workplace health and safety (WHS) in Australia. Much of the literature that does exist demonstrates the lack of effort to establish the effectiveness of differing approaches to obtaining compliance with respect to WHS laws (Purse and Dorrian 2010; Scofield et al 2014). The literature discusses two different but not mutually exclusive approaches to seeking the enforcement of and compliance with WHS laws, those being the approaches of deterrent and compliance. Deterrence refers to the use of punishment, in the case of WHS laws prosecution for breaches of the law, whereas compliance refers to the use of persuasion by "encouraging and supporting companies to comply with safety duties" (Schofield et al 2014:7120/11).

Except for New South Wales in a previous era, all Australian jurisdictions seem to have a preference for an approach of compliance rather than deterrence. There are a variety of potential reasons for this preference however, it is reasonable to assume that bureaucratic efficiency would be a very reasonable explanation (Schofield et al 2014). That is providing supportive mechanism to business such as education and training is going to be far less expensive; require far less effort and meet considerably less political resistance than an approach that includes routine prosecution of non-compliant employers.

The regulatory authority in New South Wales was said to have been more aggressive with respect to prosecution, thereby adopting a deterrence approach to WHS laws. In New South Wales the regulator was faced with a political campaign by employer organisations against the deterrence approach that included routine prosecutions for breaches of WHS legislation

(Schofield et al 2014). The political campaign resulted in a review of the Occupational Health and Safety Act 2000 as it then was by the retired judge Paul Stein (2007). Whilst the author of the report did not agree with employer organisations that prosecutions rates were too high, the report recommended a more strategic and targeted approach to prosecutions. Since that more strategic and targeted approach has been adopted, New South Wales has become more like regulators in other jurisdictions (Schofield et al 2014). It is also worthy of note that New South Wales is the only jurisdiction in which unions can prosecute under the WHS legislation (Bluff and Gunningham 2012).

The absence of a deterrent approach within any Australian jurisdiction is of concern to the trade union movement. It is evident that such an approach does work and does improve employer compliance with WHS legislation. Compliance with WHS legislation is in turn likely to bring about a reduction in workplace injury and death (Purse and Dorrian 2011; Safe Work Australia 2013). What is also evident is that there has been little effort to measure compliance with WHS legislation in any jurisdiction and the absence of any such measurement makes much of the statistical analysis of the efforts made by regulatory agencies, such as WHSQ to be somewhat meaningless. Large businesses will comply to avoid prosecution because of the adverse impact to their reputation that a successful prosecution brings (Purse and Dorrian 2011). Prosecutions have a deterrent effect on small businesses by increasing awareness either by personal experience, media reports or word of mouth (Jamieson et al 2010). Alternatively, it is evident that a failure to prosecute for breaches of the legislation will bring about a normalisation of the non-compliant conduct (Bailey et al 2015).

The harmonised legislation that was introduced with model laws in most Australian jurisdictions did bring with it significant increases to penalties in Queensland as a result. An important aspect of the model laws was the introduction of three categories of offences with respect to breaches, particularly for category 1 serious breaches risking serious injury or death through recklessness (Schofield et al 2004:713). Prosecutions however remain rare and prosecutions for officers of person conducting business or undertaking PCBUs remains even rarer (Bailey et al 2015; Jamieson et al 2010; Scofield et al 2014; Wheelwright 2016). At the time of writing this submission, there are reported cases for prosecutions under the head of power for category 1 breaches in any jurisdiction in Australia. It is hard to imagine that of all

the workplace deaths that have occurred in Australia since the introduction of the harmonised legislation in 2011 that none have been the result of recklessness.

One way to provide perspective for WHS enforcement strategies is to make the comparison with road safety (Bailey et al 2015). In so doing it is noted that breaches of road safety had traditionally normalised and if one takes community attitudes to drink driving as an example, substantial education has been coupled with routine prosecution. There is no defence against drink driving and offenders are routinely prosecuted. These efforts have resulted in a massive reduction in road deaths over recent decades. If this approach has been adopted with respect to road safety with such positive results, why has it not been applied to WHS?

The absence of prosecution against individuals also proves the current enforcement regime for WHS to be less than fully effective. The threat of personally being prosecuted provides substantial motivation for individual executives to ensure compliance with WHS obligations (Purse and Dorrian 2011; Wheelwright 2016). An absence of prosecutions and accountability is addressed by industrial manslaughter legislation:

> "The main rationale for the introduction of this type of offence is its potential for removing the 'corporate veil' that has traditionally shielded directors and senior executives of large and medium-sized organizations from prosecution for OHS offences, thereby strengthening the deterrent effect of the law and assisting in the de-conventionalization of OHS crime" (Purse and Dorrian 2011: 356).

To de-conventionalise is to bring about the type of change in attitude that is necessary to reduce workplace deaths. As with changing community attitudes to road safety, regular prosecution and greater accountability for workplace deaths can bring about a similar improvement to WHS.

This review of the academic literature is consistent with the experience of union officials in Queensland. An absence of deterrence is considered by many officials as a cause of non-compliance by PCBUs in Queensland. The following section of this submission provides some

recent case studies of cases in Queensland where the response from WSHQ has been inappropriate and/or inadequate to provide for deterrence of unsafe behaviour in the workplace.

Case Studies

Case Study #1 (ETU)

On the 24th and 26th of April 2017, an official of the Electrical Trades Union (ETU) raised concerns with the absence of emergency lighting on a construction site at West End. The absence of emergency lighting breaches several standards and pieces of legislation including section 40 (d) of the Workplace Health and Safety Regulation 2011, which reads as follows:

> 40 Duty in relation to general workplace facilities
>
> A person conducting a business or undertaking at a workplace must ensure, so far as is reasonably practicable, the following—
>
> (a) the layout of the workplace allows, and the workplace is maintained so as to allow, for persons to enter and exit and to move about without risk to health and safety, both under normal working conditions and in an emergency;
>
> (b) work areas have space for work to be carried out without risk to health and safety;
>
> (c) floors and other surfaces are designed, installed and maintained to allow work to be carried out without risk to health and safety;
>
> (d) lighting enables—
>
> (i) each worker to carry out work without risk to health and safety; and
>
> (ii) persons to move within the workplace without risk to health and safety; and
>
> (iii) safe evacuation in an emergency;
>
> (e) ventilation enables workers to carry out work without risk to health and safety;

> (f) workers carrying out work in extremes of heat or cold are able to carry out work without risk to health and safety;
>
> (g) work in relation to or near essential services does not give rise to a risk to the health and safety of persons at the workplace.
>
> Maximum penalty—60 penalty units. (emphasis added).

The official of the ETU raised this issue with Workplace Health and Safety (WHS) inspectors who responded that the matter of emergency lighting is an electrical issue. They added that an officer of the Electrical Safety Office (ESO) had attended the site and had not raised this issue. The inspectors refused to take any action in relation to what is an obvious breach of the regulation above.

In our submission, this example demonstrates a lack of diligence to enforcement of minimum standards and a willingness to pass responsibility to another branch of government.

Case Study #2 (ETU)

On 18 April 2017, at another site in West End, an official of the ETU ascertained that electrical workers were performing work for an electrical contractor that was operating without a Queensland licence. Section 56 of the Electrical Safety Act 2002 provides that:

> 56 Requirement for electrical contractor licence
>
> (1) A person must not conduct a business or undertaking that includes the performance of electrical work unless the person is the holder of an electrical contractor licence that is in force.
>
> Maximum penalty—400 penalty units.
>
> (2) Without limiting subsection (1), a person conducts a business or undertaking that includes the performance of electrical work if the person—

(a) advertises, notifies or states that, or advertises, notifies or makes a statement to the effect that, the person carries on the business of performing electrical work; or

(b) contracts for the performance of electrical work, other than under a contract of employment; or

(c) represents to the public that the person is willing to perform electrical work; or

(d) employs a worker to perform electrical work, other than for the person.

(3) However, a person does not conduct a business or undertaking that includes the performance of electrical work only because the person—

(a) is a licensed electrical mechanic who—

performs electrical work for the person or a relative of the person at premises owned or occupied by the person or relative; or

makes minor emergency repairs to make electrical equipment electrically safe; or

(b) contracts for the performance of work that includes the performance of electrical work if the electrical work is intended to be subcontracted to the holder of an electrical contractor licence who is authorised under the licence to perform the electrical work.

(4) This section does not authorise the performance of electrical work by a person who does not have an electrical work licence for the work.

(5) A person does not contravene subsection (1) if—

(a) the person conducts a business or undertaking that includes the performance of electrical work as a partner in a partnership; and

(b) the partnership is the holder of an electrical contractor licence that is in force. emphasis added)

The parliament obviously intended that this provision is significant as a breach has a maximum penalty of 400 penalty units. The official of the ETU raised this matter with the ESO and requested that power be turned off at this site until this matter could be resolved. This request was refused by the ESO. The ETU official asked what action, if any, was being taken against the contractor that was operating without a license and was advised that this information was unable to be provided because of the "Privacy Act". As far as is understood, there was no action taken against the contractor that was operating without a license and that a Queensland license was granted immediately to the contractor that was in breach of section 55 of the Electrical Contractors Act 2002.

Elsewhere in this submission reference is made to literature that draws an analogy between road safety and WHS. One can presume with some certainty, that driving without a licence would result in a routine prosecution of the offender. It is obvious from this example that operating without a drivers' licence is taken far more seriously than operating without an electrical contractors' licence. It is also the case that there were other significant breaches occurring on this site.

Case Study#3 (ETU)

On 6 February 2017, an official of the ETU attended the construction site of the Sunshine Coast Solar Farm along with another official of ETU, an official of the Construction, Forestry, Mining and Energy Union (CFMEU) and an official of the Australian Manufacturing Workers Union.

Whilst attending the Sunshine Coast Solar Farm site under Section 117 of the Work Health and Safety Act 2011 an issue was raised with the PCBU in relation to unhygienic air conditioners in the cribbing facilities. The state of the air conditioners was of concern at this site as it had previous been discovered that the site had, prior to it becoming a construction site, been illegally used as a dump for asbestos.

The PCBU called WHSQ and sometime later two inspectors attended the site. The Inspector spoke to the project manager of the site in relation to the air conditioning matter. After talking to the project manager, the inspector was approached by an ETU organiser who had inspected the air conditioners. The inspector agreed that the air conditioners were dirty but posed no risk to the workers. Another official of the ETU explained to the inspector that there was an asbestos incident on the site which resulted in the site being closed for five weeks. The air conditioners had not been cleaned or even checked for any airborne contaminants and that that they were unhygienic. The inspector asked this ETU official, in a condescending way, if he was an hygienist. The inspector then dismissed anything else the ETU official had to say on the matter.

The inspector then asked the PCBU management if they had any other matters to discuss because he was leaving. The ETU official asked the inspector to stay on site as there were other issues to raise. The inspector replied "No. I am not staying". The ETU official explained to the inspector that there were other issues that needed to be resolved and he had an obligation to hear them. The ETU official advised that members had raised issues of bullying and harassment that occurred on this site. The inspector laughed and said "That is great. A union official raising concerns about bullying and harassment. That is the pot calling the kettle black." The inspector went on to say "Why does it take four union officials to come and inspect an air conditioner. What is the real reason you guys are here?" These statements were made in front of PCBU management and the union officials on site had no doubt that the inspector wasn't performing his role impartially. The inspectors were on site for approximately 15 minutes.

The ETU has made a complaint about the inspector to whom the comments above were attributed. In this particular case, the issue of asbestos was not taken seriously by the inspectors called to the site. An obvious bias against the unions that were exercising their rights in terms of the Work Health and Safety Act 2011 was demonstrated by a least one of the inspectors. Moreover, for the comments to be made in front of the PCBU management was to undermine the position of the unions who were pursuing legitimate health and safety matters on behalf of their membership.

The inspector in question has acted in a totally unprofessional manner and has allowed his own prejudices to potentially endanger workers at this site. It is of concern that such an attitude can be adopted by an inspector charged with enforcing safety standards.

Case Study #4: Right of entry and Poor issue resolution (NUW)

In November 2016, NUW officials were made aware that untrained labour hire employees were driving specialist machinery and working on unsecured ladders in areas where forklifts were loading at a manufacturing and storage site in Lytton. NUW officials sought to exercise their rights under section 117 of the WHS Act to investigate the suspected contraventions. The PCBU did not facilitate entry and WHSQ inspectors were called.

Two inspectors attended the site. The inspectors spent approximately 20 minutes asking NUW permit holders "whether they had state or federal" right of entry permits. It appeared to the NUW officials that either the Inspectors did not have adequate knowledge of the different permits, or were attempting to delay entry to the workplace. The NUW officials then outlined the suspected contraventions. The inspectors did not facilitate entry, rather they went to speak to the site manager. Approximately 15 minutes later the inspectors advised that the issues had been rectified, or were not contraventions.

Employees and NUW officials were concerned by this advice and showed the inspectors some footage taken by the employees. After viewing the footage, the inspectors re-entered the site. At some point the inspectors left the site but did not come back to NUW officials to advise of their findings. Neither the NUW or the workers were advised of an outcome at any later date. The only visible outcome was the PCBU erecting cardboard over the window where the footage was taken.

Case Study # 5: HSRs and Poor issue resolution (NUW)

In approximately June 2016, workers at a large wholesaler in Northlakes appointed the NUW to assist negotiate designated work groups and elect HSRs. Workers expressed that the 17-person 'Safety Committee' had been appointed by management and did not address worker safety matters.

The parties were unable to reach a negotiated position and the NUW sought that an Inspector be appointed to make a decision under sections 54(1) and 54(3)(b) of the WHS Act on 30 August 2016. The NUW provided a letter outlining how the workers' proposal of having six HSRs took into account all the factors in section 17 of the Regulations. An inspector contacted the NUW on 8 September 2016 and was taken through the factors which included: the diversity of work in distinct areas without crossover (warehousing, security, receiving, fresh produce), the size of the workforce (over 300) and the two shifts across multiple rosters and a seven-day operation.

The NUW did not hear anything further from the Inspectorate, however the PCBU released nomination forms for three HSRs to be elected. Upon contacting the Inspectorate, the Inspector suggested that "three was better than none", provided no evidence to suggest that she had made a decision in relation to the designated work groups and was happy to let the PCBU proceed without making a decision.

These case studies along with evidence provided by a range of other stakeholders helped to form the recommendations of the Lyons Review. The following section of this submission provides a synopsis of the Lyons Review to assist the committee by highlighting the major reforms the Lyons Review advocated. The Palaszczuk Government adopted the recommendations of the Lyons Review. Some of the reforms advocated required legislative amendment that were brought into effect by the *Work Health and Safety and Other Legislation*

Amendment Act 2017. Others required administrative changes, however the following section deals largely with the contents of the amending act.

Best Practice Review

Consistent with the literature referred to above, there had been a change in emphasis and culture within Workplace Health and Safety Queensland (WHSQ). That change in emphasis tilted the balance towards a supportive and educative approach towards compliance with the legislation to the detriment of compliance outcomes. This view was reiterated by several unions and legal practitioners who made submissions to the *Best practice review of Workplace Health and Safety Queensland* (the Lyon Review). A range of potential explanations exist for the de-emphasis on deterrence and it was noted in the QCU submission to the Review, that such a cultural change was not limited to Queensland (Scofield et al 2014).

It is probable, having regard to the material that was provided to the Review, that this change in emphasis was an unintended consequence of the harmonised legislation that was introduced in most Australian jurisdictions in 2011. The cutting to funding and personnel that was undertaken during the period of the Newman Government was likely to exacerbate any imbalance that may have begun as a result of the harmonised laws.

The Lyons Review (2017:71) also mentioned factors the WHSQ had suggested contributed to the reduction in prosecution:

- several court decisions which have had led to defendants appealing and challenging particular matters; and
- the removal of the absolute duty of care in the now repealed WHS Act 1995, which was replaced with the defence of 'so far as is reasonably practicable' under the WHS Act 2011 from 1 January 2012.

In the event that inspectors are in any way discouraged from adopting a deterrence strategy, it would follow that the skills and confidence necessary to pursue such a strategy would lapse into atrophy. A lack of experience may well explain how the over-reliance on strategies that prefer a partnership approach would occur.

Industrial Manslaughter

Following the Lyons Review, the Queensland Government introduced the offence of industrial manslaughter. The rationale for the enactment of an offence of industrial manslaughter includes the difficulty applying the existing offence of manslaughter, as it applies in the criminal code, to corporations (Australian Capital Territory Legislative Assembly 2003; Clough 2007; Hall and Johnstone 2005). The existence of the offence of industrial manslaughter recognises the seriousness of negligence causing death in a workplace setting. Industrial manslaughter, by having application to corporations, has the capacity to make corporations liable for the actions or inactions that cause fatalities (Australian Capital Territory Legislative Assembly 2003). The QCU submission relies upon literature that compares workplace deaths with the road toll. That literature (Bailey et al 2015) contrasts the concerted effort to 'de-conventionalise' road deaths, particularly those associated with drink driving, through a rigid application of penal sanctions. By contrast workplace fatalities do not have the same level of priority. It is considered that the inclusion of an offence of industrial manslaughter should go some way to 'de-conventionalise' workplace fatalities.

The Lyons Review (2017:113) sets out the following finding in relation to industrial manslaughter:

> As previously identified, there are long standing entrenched views from stakeholders regarding the offence of industrial manslaughter which are unlikely to change or resolve the debate. It is however the view of the Review that, following consultation and research, a case supporting the introduction of an offence of negligence causing death can be made. In particular, it is considered that, despite the view of some stakeholders, there is a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code only apply to

> individuals as opposed to corporations which makes it challenging to find a corporation criminally responsible. Additionally, a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect. In May 2017, the Queensland Government provided in principle support for this view.

This finding is consistent with the QCU submission that supports the introduction of this offence into the model laws. We also agree with the Lyons Review that this offence is best placed in the *Work Health and Safety Act 201*1 rather than the criminal code as was done in the Australian Capital Territory.

Independent Statutory Office

One of the primary problems identified by the union movement was a shift away from deterrence to the extent that it has had adverse outcomes for workplace health and safety in Queensland. The following finding of the Review reflects this concern (Lyons 2017:73):

> While the regulator is not subject to Ministerial direction when deciding whether to commence prosecutions, there is some perception from both employee and employer groups that the regulator has been subject to external pressure in respect of the prosecution function. This is so, despite the fact that prosecution decisions are delegated to the Director (LPS) applying the DPP Guidelines and that the Enforceable Undertaking scheme includes a step for independent advice and provides for judicial review. The Review finds that there is a need to strengthen the formal governance framework to ensure public confidence in the prosecutions system. These findings and related recommendations are not criticisms of any individuals involved in the current process, but reflect an in-principle' view of about the optimal policy settings that should apply to this vital function.

In order to remedy this situation, the Report (Lyons 2017:74) suggests that:

> The creation of a new independent statutory office should be headed by a Director of Workplace Health and Safety Prosecutions (Senior Executive Service level) to be appointed by the Governor-in-Council for five year renewable terms. A five year renewable term will provide independence to the role as it will not be aligned to political cycles and will ensure consistency in decision making. The Director should be supported by existing departmental staff from Prosecution Services including Legal Officers and support staff.

The Lyons Review finds that the overall level of prosecutions has been below that which would indicate that an appropriately robust approach was being adopted. There is an ongoing need to monitor the number of prosecutions and benchmark success rates (the latter measure serving partly as a proxy "quality measure": for both the investigation and prosecutions functions).

In our submission, this a cogent, legislative response to a problem that is widely acknowledged. The creation of this independent office will go some way to restore public confidence in policing and enforcing workplace health and safety matters.

Work Health and Safety Disputes

The QCU submission supported the capacity of parties to be able to notify disputes in relation to WHS matters to the Queensland Industrial Relations Commission (QIRC). The following excerpt is taken from the QCU submission (2017a:19) to the Review:

> The QCU submits that there should be the capacity to refer disputes concerning WHS matters to the QIRC for a quick resolution. Under current arrangements workers are often faced with the prospect of taking industrial action in cases where they believe there is a potential safety risk. The establishment of a mechanism that allows an existing tribunal to quickly deal with matters in dispute, in relation to the Act and Regulation, is a step towards dispute resolution rather than prosecution. Such a mechanism would be beneficial to workers, their unions and industries.

The experience of unions is that they are left in a no-win situation when there is a bona fide health and safety dispute arising in the workplace. Within the construction industry, in particular, there is no alternative to taking what will be possibly considered industrial action in relation to unsafe work. The current regulatory regime, with the introduction of the Building Code 2016 and the Australian Building and Construction Commission means workers will be faced with massive fines if they are seen to be taking unprotected industrial action. The solution promoted by the Bill is directed towards a peaceful resolution of disputes concerning safety rather than punitive action against workers and their unions.

The Lyons Review (2017:88) makes the following findings:

It is the view of the Review that the jurisdiction for the review of reviewable decisions (under Schedule 2A of the WHS Act 2011) as currently vested in QCAT, be transferred to the QIRC given that:

- the QIRC is the specialist workplace tribunal established for Queensland;
- the QIRC currently has jurisdiction to hear some work health and safety matters (including disputes regarding the right of entry of work health and safety entry permit holders and worker's compensation appeals); and
- other states and the Commonwealth have vested external review jurisdiction in industrial commissions.

However, reviewable decisions prescribed under the WHS Regulation 2011 should appropriately remain with QCAT, as these matters are more administrative in nature and better align with QCAT's jurisdiction.

Given concerns raised by stakeholders around securing a timelier method of dispute resolution about key work health and safety matters, it is considered appropriate to expand the QIRC's jurisdiction to hear and determine the following categories of disputes:

- a dispute in relation to the provision of information by an employer to a HSR;

- a dispute in relation to any rights or functions that may be exercised by work health and safety entry permit holders;
- a dispute in relation to a request by a HSR for assistance;
- a dispute in relation to work health and safety issue resolution process; and
- a dispute in relation to cease work matters.

It is envisaged that this will be treated as a separate category of dispute under the Work Health and Safety Act 2011 with jurisdiction vested in the QIRC to deal with the dispute.

The QCU remains unconvinced of the need for a party to wait 24 hours to notify of a dispute as was legislated in Queensland. It would also appear reasonable to transfer existing functions from Queensland Civil and Administrative Tribunal (QCAT) to the QIRC, having regard to the other proposed amendments to provide the QIRC with some jurisdiction in this area. In our submission this is useful reform to promote the peaceful resolution of WHS disputes. The committee might also consider this in a broader discussion about the capacity of workers and unions to seek a peaceful resolution to disputes generally, however WHS matters have the obvious potential to lead to disputation.

Codes of Practice

The harmonisation of workplace health and safety laws in 2011 brought with it some level of compromise. In order to create nationally consistent legislation, a "middle ground" was reached and as is stated above and in various submissions to the Lyons Review, this may have had some unintended consequences for Queensland. One such unintended consequence might have been the virtual "shelving" of codes of practice. Under the current legislation, codes of practice might be seen as something that a duty holder might occasionally refer to rather than comply with on an ongoing basis. Under previous Queensland legislation codes of practice had greater status and therefore a greater likelihood to contribute to workplace health and safety outcomes. The following finding (Lyons 2017:22) sets out the comparative nature of the pre- and post- harmonisation effect of codes of practice in Queensland:

While both the 1995 and 2011 work health and safety regimes provide a framework where compliance with a code of practice can be used as evidence that a duty holder has complied with their safety obligations, the regimes are markedly different in relation to their enforceability.

The WHS Act 1995 made it explicitly clear that a code of practice had to be followed as a minimum and in doing so provided a specific provision that improvement notices could be issued against. Conversely, while the WHS Act 2011 continues to promote codes of practice as the minimum standard (this is evidenced by the application of codes of practice to court proceedings), there is no standalone provision that enables failure to reach this minimum standard to be enforceable by inspectors. While there is an ability for inspectors to refer to codes of practice in compliance notice directions (which would have the effect of making following a code of practice mandatory), this power is discretionary and requires a link back to an overarching duty of the WHS Act 2011 or Regulations, a somewhat more convoluted process than in the WHS Act 1995.

Given the strong stakeholder support for the role of codes of practice, it is appropriate to clarify their status to give certainty to employers, unions and the regulator. The aim is to ensure that codes of practice operate in a manner which assists all industry participants to manage work health and safety risks, including the inspectorate.

It is the view of the Review that a specific legislative provision, such as existed in the WHS Act 1995, is required to make it clear that codes of practice are the minimum standard and provide a clearer avenue for enforcement action by inspectors. Additionally, an approach similar to the WHS Act 1995 would eliminate the suggested need by unions for requirements in codes of practice to be brought up into the WHS Regulations 2011 - a review process that was commenced to facilitate enforcement action and provide clarity to duty holders regarding their obligations.

The QCU supports this policy position as assisting with better workplace health and safety outcomes. Compliance with codes is more likely to engender a preventative approach to workplace health and safety measures rather than apportioning blame after the event. In our submission to the review of Model WHS laws, the QCU urged the adoption of this measure at a national level.

Enforceable Undertakings and Fatality

The QCU and other union submissions are cited in the Report (Lyons 2017:78) regarding enforceable undertakings. In our submission and the submission of other unions, enforceable undertakings are often seen as a "soft" option that will be readily agreed to by an employer and may be attractive to an agency that is under resourced. The Report reflects this sentiment (Lyons 2017:79):

> There is a strong view from the majority stakeholders that submitted to the Review that enforceable undertakings should not be permissible in circumstances where a fatality is involved. The genesis of this view is that public perception dictates that there should be a prosecution or punishment for a fatality and that an enforceable undertaking does not reflect the seriousness of the incident. The Review supports this assertion and is of the view that there is a need for clear expectations around when an enforceable undertaking will be accepted and that the acceptance of enforceable undertakings should be mindful of community expectations.
>
> To this end, it is the view of the Review that the current enforceable undertakings framework should be amended to provide a clear position on the treatment of fatalities and very serious injuries. In relation to fatalities, this could potentially be done in two ways:
>
> > 1. Consistent with the approach being considered by WHSQ, the Guidelines for the acceptance of an enforceable undertaking could be amended to include a similar approach to Victoria where an application for an enforceable undertaking that relates to a fatality is generally excluded unless a case for exceptional circumstances can be made.
> >
> > 2. Alternatively, the WHS Act 2011 could be amended to exclude enforceable undertakings from being permissible for fatalities. This would be in addition to the current exclusion for Category 1 offences but would ensure Category 2 offences, where a fatality is due to a person's failure to comply with a duty, is explicitly excluded.

The QCU supports this policy position of preventing the use of enforceable undertaking in the case of fatalities, that is consistent with our submissions to other inquiries. Moreover, an over-reliance on enforceable undertakings has the potential to normalise breaches as is discussed elsewhere in this submission. In our submission the analogy with road safety (Bailey et al 2015) is pertinent to the over-use of enforceable undertakings, that have been described as a soft option for regulators.

Workplace Health and Safety Officers

The Workplace Health and Safety Officer (WHSO) was also discarded from the Queensland legislation as a result of harmonisation. It is noted that the proposed amendments will not mandate WHSOs but provide incentives for their engagement. This policy would appear to be sound having regard to the other policy positions adopted by the Report and contained in the Bill.

Health and Safety Representatives

The reduction in significance of Health and Safety Representatives seems to have recently occurred in Queensland since the introduction of harmonised legislation and deliberate policy on the part of the Newman Government. In the QCU submission to the Review the following submission were made in the QCU submission (QCU 2017a:16):

> WHSQ's current approach does not identify the fundamental importance of HSRs in securing compliance at workplaces. While the discussion paper highlights programs, tools and strategies aimed at the PCBU, there appears to be no equivalent promotion or resourcing of worker engagement.
>
> As part of improving compliance in workplaces, WHSQ should fund programs and initiatives focused on actively assisting and promoting the role of elected HSRs and HSR committees in the workplace. A lack of enforcement may also be contributing to

> a trend in workplaces to develop alternative structures as substitutions for the legislatively recognised HSRs structures. In the experience of some affiliates, PCBU's are avoiding the framework of the WHS Act by developing their own version of 'workplace safety representatives' that are neither elected, or representative of workers. In most cases, these 'representatives' have managerial functions, have not received workplace health and training and acquire none of the powers or protections of HSRs under the WHS Act. These structures have the effect of undermining workplace health and safety by diminishing employee voice.

The Report made the following finding (Lyons 2017:124):

> While there is clear evidence of the important role HSRs can play in improving and maintaining safety performance at a workplace, it is the view of the Review that there is insufficient emphasis by WHSQ on supporting HSRs to fulfil their role. Accordingly, it is the finding of the Review that further funding and support is required to actively assist and promote the HSR role. Such efforts could be tailored to the priority industries and undertaken as part of the industry action plan activities of WHSQ.

The QCU thoroughly supports the role of HSRs in providing a safer workplace. Having workers trained to identify hazards and understand how they are best managed is an essential aspect of the framework of the legislation. Moreover, the QCU supports the role of the HSR in providing workers with a voice for workplace health and safety issues.

Union Capacity to Prosecute

The QCU submission also advocated providing unions with the capacity to prosecute for breaches of the *Work Health and Safety Act 2011*. Unfortunately, in our submission, this recommendation was not adopted in the Report. Providing unions with the capacity to prosecute could only provide for better workplace health and safety outcomes. We note that the only jurisdiction that has ever enabled such a capacity is New South Wales (Bluff and

Gunningham 2012) and incidentally that jurisdiction has historically been associated with a far greater use of deterrence (Schofield et al 2014).

More over unions are able to prosecute employers for breaches of industrial legislation and have long held such an ability. It appears incongruous that a union can prosecute an employer for not paying an employee correctly but has no standing with respect to workplace health and safety. In summary, the more resources available to ensure compliance with workplace health and safety obligation the better it will be for workplace health and safety outcomes.

Conclusion

Industrial deaths are still at an unacceptably high level in Queensland and throughout Australia. In this submission we have relied upon an analogy with road safety that is provided by academic Bailey et al (2015) in the journal article *Compliance and enforcement in Road Safety and Work Health and Safety: A Comparison of Approaches*. When one considers the changing attitude of the community towards potentially deadly infringements such as drink driving, and that how this change in community attitude was led by police forces strictly enforcing road rules, it is in our submission worthy of adopting such a practice for workplace health and safety regulation.

This submission has identified the amendments to the relevant Queensland legislation introduced in 2017, including the offence of industrial manslaughter, to assist the committee in considering potential options for various governments to adopt. The committee could make recommendations to all jurisdictions to adopt these measures. As noted above, the QCU maintains that unions should be allowed to prosecute for breaches of the relevant legislation in order to bring about a greater culture of compliance with legislative requirements throughout industry. Whilst not adopted by the Lyons Review we would ask the committee to consider the capacity of unions to prosecute as being consistent with the goal of safer workplaces.

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