



Electrical Trades Union

ETU Submission to Senate Standing Committee on Education and Employment

The Framework Surrounding the Prevention, Investigation and Prosecution of Industrial Deaths in Australia

27 June 2018

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1 INTRODUCTION

The Electrical Trades Union of Australia (ETU) is the Electrical, energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents approximately 65,000 electrical and electronic workers around the country and the CEPU as a whole represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

The ETU welcomes the opportunity to make a submission to Senate Standing Committee on Education and Employment into the Framework Surrounding the Prevention, Investigation and Prosecution of Industrial Deaths in Australia.

We acknowledge the submissions made by the ACTU and its other affiliates and support the arguments reasoned in those submissions.

There is a growing need for legislative reform to ensure appropriate regulation of prevention, investigation and prosecution activities relating to workplace fatalities in Australia.

The lack of enforcement by jurisdictional Regulators, the exclusion of worker representation in investigative processes and the intractable systems of prosecution means the current regulatory environment is failing Australian workers.

2 THE ELECTRICAL TRADES UNION EXPERIENCE

Broadly, the ETU experience is that the effectiveness of Australia's Safety Regulators is limited.

Australia's Safety Regulators are under resourced, the inspectorates often lack industry experience and training, they have limited presence in regional workplaces and the focus appears to be almost solely on educating employers rather than pursuing appropriate enforcement and/or prosecution activities.

The meaning of self-regulation has been bastardised for the convenience of employers at the expense of workers. The move from prescriptive regulatory approaches to process focussed regulatory oversight from the 1970's onwards was never intended to create an environment where employers literally "self" regulate. The focus was always about ensuring hazards, the risks that arose from them and the control measures used to mitigate them were appropriate to the particular circumstances surrounding the activity rather than the prescriptive regulatory approach taken which was suitable for large fixed workplaces with fairly static hazards. Workers were supposed to play a greater role in assessing and determining hazards in the workplace and the appropriate control measures to mitigate the risks arising from the hazards.

Over time this approach has been re-interpreted to somehow mean employers get to decide if and how they identify and control hazards in workplaces, workers are mostly excluded from this process, at best being brought in at the back end once all the decisions are already made and then employers use safety breaches as a mechanism to discipline and terminate employees despite them having little involvement in the process.

All the while Regulators take a hands-off approach either delivering a small level of education programs to some of the larger industry participants or coming in after a serious accident to investigate.

Cross jurisdictional activities of employers are rarely resolved prior to the commencement of work and almost never communicated to the workforce particularly when the cross over is between a State Regulator and ComCare. Complaints to the Regulator about suspected contraventions are usually responded to by the inspector stating they have contacted the employer (not visited the site) and the employer has provided verbal reassurances to the inspectorate.

By way of example, the CEPU Tasmanian Branch raised the issue of non-conformance with AS3012 on the Hobart Hospital Project with ComCare. The General Manager of the Regulatory Operations Group at ComCare wrote to the CEPU following these concerns being raised and stated the following¹;

"I also note your concerns re lighting at the site. Subsequent to the Comcare/Union Engagement Session, the Comcare Regional Director Victoria/Tasmania and Assistant Director have raised your concerns with the joint venture directly and have been provided with assurances

¹ ComCare letter to CEPU of 29 June 2018

by the joint venture that this issue is a priority for their safety team. I am also informed that the work timings have been adjusted to assist in lighting issues, and am advised that the joint venture are conducting regular lighting testing. The joint venture have also provided assurances that where outages occur, the joint venture will respond to these issues as quickly as possible. Furthermore, Comcare Inspectors will continue to address this as a high priority for the site.”

The transferability of Union’s right of entry of safety is limited. Even when agreements are reached between jurisdictional regulators, Union Officials are routinely challenged and prevented from entering site under a mutually recognised right of entry.

In February 2016 the State Secretary of CEPU Tasmania wrote to ComCare seeking clarification that ComCare would recognise a WHS Entry Permit issued by the Tasmanian Regulator. The response from ComCare stated²;

“Thank you for your email regarding Work Health and Safety Entry Permits.

Section 4 of the Commonwealth Work Health and Safety Act 2011 (WHS Act) provides the definition of WHS entry permit and notes that a ‘WHS entry permit means a WHS entry permit issued under Part 7 or the equivalent Part of a corresponding WHS law.’ Additionally r.6A of the Commonwealth Work Health and Safety Regulations 2011 (WHS Regulations) provides a list of what are considered corresponding WHS laws. This means that a state or territory issued WHS entry permit is recognised for the purposes of entry to a Commonwealth workplace and exercise of relevant rights at a Commonwealth workplace, and a separate Commonwealth issued WHS entry permit is not required.

For further assistance you may wish to view the [entry permits](#) information located on the Fair Work Commission’s website.

I hope this information has been of assistance.”

Despite this, the very next time an Official of CEPU Tasmania attempted to enter the project which had the jurisdictional overlap, his entry was refused. Even when the inspector was called to assist to resolve the entry dispute and the above email was furnished to the relevant inspector, entry was denied.

Often when an ETU Official attends site no one appears to know if it is under the coverage of the State Regulator or the Commonwealth Regulator. In fact, it is often the case that the employers seem to pick and choose out of convenience and are then supported by the inspector who attends site, particularly when that inspector is from the jurisdiction that the employer says does not have coverage.

² Email response 16/02/2016 12:00pm from ComCare Help Desk

Often the actual safety issue being raised becomes secondary to cross-jurisdictional dispute about who has authority and responsibility.

The issue of insecure work is a massive problem which is well articulated in submissions by the ACTU and other affiliated Unions. Labour hire and temporary labour are fearful of losing their jobs, often resulting in a workforce that can be much more readily exploited and is often bullied into unsafe work practices. Additionally, workers are regularly faced with not being provided appropriate equipment, training and supervision while at work with the principle contractor claiming it is not their responsibility but the responsibility of the sub-contractor or Labour Hire firm.

Further, the precarious nature of their employment and the structure of labour hire and temporary labour means that employers regularly avoid providing any form of ongoing skills maintenance or training. Over time this is leading to a de-skilling of the industry particularly when it comes to contemporary safety knowledge.

Prosecutions for workplace fatalities are rare. Frustratingly the time it takes for a prosecution to occur is extraordinarily long, taking years to be finalised and often the penalty is below community expectation or subject to secret settlements that avoids any public scrutiny.

Some examples include;

December 9, 2013. 2 Workers killed in Queenstown Tasmania at the Mt Lyell Copper Mine. Nearly three years later in 2016 the mine operator pleads guilty and is fined \$225,000. Just \$112,500 per worker and no one from management was prosecuted.

September 29, 2011. A worker is killed in Brisbane on the Airport Link Tunnel project run by John Holland. Four and a half years later John Holland is fined \$170,000. Again, no one from management is prosecuted.

December 5, 2009. A worker is killed in North Queensland on a job site controlled by John Holland. A year later ComCare advised no charges would be laid, however 8 years later a coronial inquest found employer responsible for the fatality.

December 2011. A worker is killed on the Perth Citilink project controlled by John Holland. Nearly three years later and John Holland is fined \$360,000. No one from management is prosecuted.

Union officials who are entry permit holders (EPH) need more readily available access to sites. The current system gives too much power to employers who regularly hinder, obstruct and otherwise delay access to workplaces. The current system also prevents a Union EPH from acting on unsafe situations if they weren't listed on the original notice of entry.

Under the current system, a Union EPH must provide details as to the date, location and reason for entering a site. These are reasonable in the circumstances, however, once the EPH is on site, entry powers are curtailed to those matters contained in the first notice of entry meaning that if the EPH becomes aware of additional suspected contraventions whilst

on site, including if they directly observe a contravention, the EPH must leave site, fill out the requisite paperwork and then seek to re-enter the site. Fundamentally, where a reasonable suspicion exists that employers aren't doing the right thing, unions should have unfettered access to enter site to educate workers about safety, the responsibilities of an employer, to direct unsafe work to stop and to inspect any part of the workplace and be involved in supporting workers to determine the most appropriate control measures to address the hazards.

An additional limitation for Unions is that they are unable to pursue civil penalties for breaches of the act, unlike the FWA. In contrast, Union Officials activities on any particular worksite are open to challenge by many more parties than just the employer on that site.

A further impediment to the prevention of workplace fatalities is the Australian Building and Construction Commission (ABCC). Other submissions have already gone to the statistics associated with workplace injuries and fatalities since this body was established. The ETU would add to those concerns the issue of ABCC inspectors being used by employers and safety regulators to interfere in the legitimate exercise of right of entry on construction sites.

ETU officials regularly attempt to enter construction sites as lawful EPH's with a reasonable suspicion of suspected contraventions. Many of these suspected contraventions relate to high risk work and hazards which leave workers exposed to an imminent risk to their workplace health and safety. It is common for employers to delay entry whilst secretly contacting the ABCC inspectors and requesting them to attend site to block the Union Officials entry. When the ABCC inspector arrives, they attempt to accuse the EPH of taking unlawful actions diverting the attempts to address the safety concerns on site.

3 CASE STUDY

1. John Holland and the Hobart Hospital Job

Attached to this submission is a CONFIDENTIAL report on activities occurring on a project in Tasmania. This example is a representative example of the kinds of frustrations workers and their Union face when dealing with asbestos on construction sites with dual jurisdictional coverage. The request to keep these confidential is due to the material being acquire via application of right of entry by an entry permit holder and subsequent requests for documentation associated with those requests and subject to restrictions on disclosure as per s148 of the Work Health and Safety Act 2012.

2. ABCC Inspector Ignores Safety

On or around April 2015 there was a shopping centre refurbishment project being completed at the Cat and Fiddle Centre in Hobart city. The site had been riddled with safety contraventions throughout the project the CEPU officials had made numerous visits to site in an attempt to improve the safety of the job.

During one visit the CEPU attended there were significant contraventions occurring which the CEPU was attempting to resolved with the builder including no site amenities, non-engineered edge protection and multiple unprotected edges with falls of up to 4 metres, no first aid

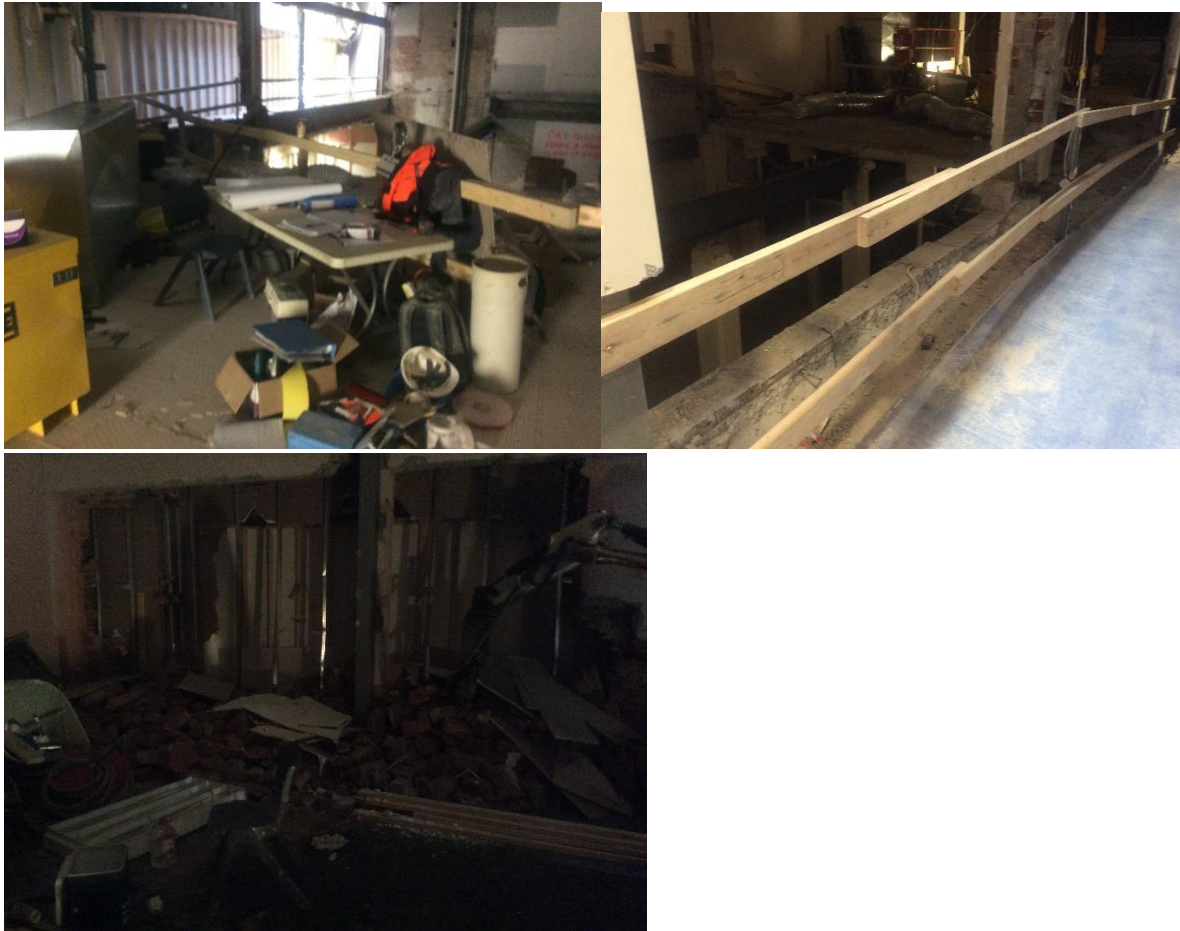
facilities, no safe access/egress path and emergency procedures and no emergency light fittings.

Shortly after CEPU officials entered the site the builder disappears and is unable to be contacted. The officials attempt to work with those left on site to start identifying and correcting the various contraventions.

A short time later the builder returns to site with the ABCC inspector.

The ABCC inspector entered the site on the mezzanine level and immediately trips and nearly falls 4 metres to the ground. After getting up and brushing himself off the ABCC inspector is asked if he is here to assist in enforcing the safety laws on site and to get the site safety in order.

The ABCC response was words to the effect “I’m not here for safety, I’m here for the Union”.



3. Rio Tinto Admits Contravention – Regulator Refuses Entry

Rio Tinto’s Gove Operations in the Northern Territory are no stranger to workplace fatalities with the most recent occurring in 2014. Union EPH’s have regularly faced opposition to exercising lawful right of entry by Rio Tinto, often supported by the safety regulator.

In 2009 Union officials from the ETU and AMWU attempted to enter site in regard to a suspected contravention of the Workplace Health and Safety Act. After being delayed for

nearly 2 hours by Rio Tinto HR staff the Regulator was asked to assist in resolving the right of entry dispute. Over the next hour exchanges occurred jointly and separately between the Union Officials, Rio Tinto HR representatives and the NT Regulator until finally Rio Tinto admitted to the suspected contravention.

At this point the Officials prepared to enter the site to assess the extent of the now admitted contravention but were again blocked by Rio Tinto. The Regulator made contact and advised that as Rio Tinto had admitted the contravention the EPH's no longer had any reason to enter the site and any further attempt to enter would be deemed by the Regulator as a contravention by the entry permit holder.

4 RECOMMENDATIONS

The ETU makes the following recommendations:

Recommendation 1

The federal government establish a model framework for prevention, investigation and prosecution of workplace fatalities which must include a provision for an offence of industrial manslaughter.

Recommendation 2

The federal government immediately repeal the ABCC and the building code due to their negative impact on worker health and safety.

Recommendation 3

Employers must not be allowed to obtain insurance against OHS penalties.

Recommendation 4

Union Entry Permit Holders with Safety Right of Entry must have their entry permits recognised across jurisdictions and penalties for hindering and obstructing must be increased significantly.

Recommendation 5

The threshold for Category 1 offences should be moved from "Reckless" to "Negligence".

Recommendation 6

Unions should have the capacity to commence prosecutions against Office Holders of PCBU's.

Recommendation 7

The rules relating to casual, labour hire and temporary work need to be changed to remove the precarious nature of these employment methods and to ensure workers employed in this manner have equal access to training, consultation and dispute resolution.

5 CONCLUSION

The current system of protracted legal proceedings, secret settlements and limited prosecution needs to change. At the heart of this change must be a system which recognises the rights of workers and their representative Unions to campaign for and secure safer workplaces.

Australia needs a national framework which effectively deals with the prevention, investigation and prosecution of industrial deaths in Australia. A framework which recognises the role of Unions is ensuring safer workplaces, which holds negligent employers to account and which applies appropriate penalties for identified breaches.

One workplace fatality is one too many.