ACTU
australian council of trade unions

Review of Model WHS Laws 2018

ACTU Submission

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Introduction

The ACTU is the only peak body representing working Australians through some 43 affiliated Australian unions and trades and labour councils.

The Model Work Health and Safety Act (**the Act**), the Model Work Health and Safety Regulations (**the Regulations**) and Codes of Practice (**the Codes**) - collectively referred to in this submission as '**the Model Laws**' - were developed in 2009-10 following an independent review process by the National Occupational Health and Safety Panel (**the Panel**). To date, the Model Laws have been implemented by the Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia and Tasmania.

At the request of the Workplace Health and Safety Ministers, SafeWork Australia has appointed an independent reviewer to examine and report on the operation and content of the Model Laws to ensure they are operating as intended. The reviewer will draft a report which may make recommendations to improve the Model Laws or identify areas requiring further consideration.

Workplace health and safety is a fundamental human right. Every worker should be able to go to work and return home safely. The ACTU supported and fully participated in the processes that lead to the development of the Model Laws. The ACTU strongly maintains its position that the harmonisation process should not result in a compromise or reduction of protections or standards for workers in any Australian jurisdiction.

The ACTU's position in this submission is informed by:

1. The ACTU Work Health and Safety, Rehabilitation and Compensation Policy;
2. The ACTU Charter of Workplace Rights for OHS and Workers' Compensation;
3. International Labor Organisation (ILO) *Occupational Safety and Health Convention, 1981 No.155* (**ILO Convention 155**), and in particular the principle of tripartism which recognises the essential role of workers and their trade unions in the creation and maintenance of healthy and safe workplaces.

In 2013-14, at least 531,800 Australians experienced a work-related injury or illness.[1] In 2015-16, there were 104,770 serious workers' compensation claims made. Between 2000–01 and 2014–15, the median time lost for a serious claim rose by 33 per cent from 4.2 working weeks

[1] Australian Bureau of Statistics, Cat. 6324.0 - Work-Related Injuries, Australia, Jul 2013 - Jun 2014 (Latest Issue)

to 5.6 working weeks. Over the same period, the median compensation paid for a serious claim rose by 112 per cent from $5,200 to $11,000.[2] The ongoing human, financial and social cost of injury and death at work are stark reminders of the vital importance of ensuring that Australia has appropriate WHS laws which are strongly and effectively enforced. Prevention, through effective management of health and safety risks and hazards, is far better than cure. Continuous review and improvement of the Model Laws is essential to ensure that the framework is meeting the challenges of a changing working environment.

The ACTU welcomes this independent review and the opportunity to comment. In preparing this submission, the ACTU has carefully considered the Discussion Paper and consulted with our affiliated unions. In light of the scope of the review, there may be a need for further information in relation to some of the recommendations made. We would be happy to provide further information on request, and we look forward to ongoing constructive engagement with this important review process. A number of the ACTU's affiliated unions have made separate submissions to this review process. The ACTU endorses and supports the content of those submissions.

[2] Safe Work Australia, Australian Workers' Compensation Statistics 2015-16, accessed 17 April 2018. Safe Work Australia defines a 'serious' claim to be an accepted workers' compensation claim for an incapacity that results in a total absence from work of one working week or more.

Executive Summary

The terms of reference of the Panel included a requirement to consider the 'changing nature of work and employment arrangements'. The ACTU agrees that an accurate assessment of the realities of the modern world of work is central to ensuring that the Model Laws are operating effectively and as intended. The growth in complex labour force management structures - including the use of corporate subsidiaries, franchising, labour hire, outsourcing, sham contracting and other 'precarious' labour engagement practices designed to avoid the traditional employment relationship - present an enormous challenge to the maintenance of minimum standards at work, including workplace health and safety (**WHS**) standards.[3] The dilemma has been summarised in this way *[footnotes omitted]*:

> *The very same competitive pressures that induce firms to engage contingent or precarious work arrangements also encourage underbidding on contracts, cheaper or inadequately maintained equipment, reductions in staff levels, faster production, longer work hours and other forms of corner-cutting on OHS. These work arrangements, especially when they introduce third parties and/or create multi-employer worksites lead to fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck-passing', and inadequate specific job knowledge (including knowledge about OHS) among workers moving from job to job. As organisations outsource tasks, they diminish in size and increasingly become small or medium sized firms – with the attendant difficulties in complying with OHS requirements.*[4]

While the ACTU considers that, overall, the drafting of the Model Laws goes some way towards grappling with these matters effectively, there are a number of ways in which the Model Laws need to be strengthened to better deal with the changing world of work. These improvements are discussed below. There is no shortage of research or evidence supporting the improvements suggested by the ACTU. As noted in the Discussion Paper, there have been multiple reviews of

[3] There is a substantial body of literature on the changing world of work and the challenge it presents to labour regulation, see for example: Australian Government, *National Review Into Model Occupational Health and Safety Laws*, First Report, Chapter 2, October 2008 (**National Review, First Report**); Shaw, Andrea and Blewett Verna, *What's happening in the Big BAD World? A Review of Health and Safety Issues in Other Industries and Countries,* NSW Mining Industry Council OHS Conference, 2001; Quinlan, M (2012) "The 'Pre-Invention' of Precarious Employment: The Changing World of Work in Context" in The Economics and Labour Relations Review, vol 23, no 4, pp 3-24; Louie, M. Ostry, A. Quinlan, M. Keegel, T. Shoveller, J. LaMontagne, A. (2006) "Empirical Study of Employment Arrangements and Precariousness in Australia", in Industrial Relations, vol 61, no 3, pp 465-489; CFMEU (2011) *Race to the Bottom: Sham Contracting in Australia's Construction Industry*; Johnstone, R, *Regulating Health and Safety in 'Vertically Distintegrated' Work Arrangements: The Example of Supply Chains*, in Howe, J, Chapman A, Landau, I, The Evolving Project of Labour Law, The Federation Press, 2017

[4] Johnstone, R and Tooma, M, *Submissions in relation to draft Model Work Health and Safety Regulations and Codes of Practice*, 18 March 2011

varying aspects of Australia's WHS regime by governments, as well as by academics and others. Many of the suggestions made by the ACTU in this submission are supported by these other reviews. Where this is the case, we have endeavored to cross-reference the other reviews.

This submission outlines the key priority areas for WHS reform common across the Australian union movement, which are as follows:

- A comprehensive review of the National Compliance and Enforcement Policy (NCEP), in consultation with key stakeholders

  The strong and consistent feedback from our affiliates is that the core problem with the operation of the Model Laws is the failure of the regulators to develop effective and nationally consistent strategies to ensure compliance with the Model Laws, particularly for workers in 'non-standard' working arrangements. The ACTU recommends an immediate and thorough review (in consultation with stakeholders) of the approach to enforcement taken by the WHS regulators, including a reconsideration of resourcing and strategy, to ensure that effective action is taken to enforce compliance with the Model Laws and ensure the health and safety of *all* Australian workers.

- A new offence of Industrial Manslaughter

  In the absence of an offence of industrial manslaughter, criminal prosecutions of corporate entities remain elusive; and therefore do not act as an effective deterrent. The introduction of a new offence of industrial manslaughter will provide a strong incentive to businesses with poor practices to improve. The Model Act should be amended to include the specific offence of causing the death of a worker or other person through a negligent act or omission. The offence should apply to duty-holders and officers who take part in the corporation's management, and should be subject to the harshest penalties, including substantial periods of imprisonment.

- The capacity for unions to commence legal proceedings for both civil and criminal breaches of the Model Laws

  Under the Model Laws, unions cannot bring prosecutions and the Minister cannot authorise a prosecution by an individual. It is an essential aspect of effective enforcement of the Model Laws that trade unions having a legitimate interest in the circumstances of an offence be permitted to prosecute. The ACTU strongly submits that unions should have standing to bring proceedings for civil and criminal offences under the Model Act, in circumstances where they have a member concerned in the breach in question. There should be no requirement for the regulator or the DPP to review the decision to commence a

prosecution (as there currently is in NSW), as long as an Australian legal practitioner lodges the application on behalf of the union. A court should *not* be prohibited from allowing the moiety portion of any penalty to be directed to the industrial organisation, where it can be shown that the fine will used in accordance with the rules to further the interests of members.

- A partial reverse onus of proof

  Under the Model Laws, the regulator is required to prove all elements of a breach, including that the duty-holder has not taken reasonably practicable measures, or exercised due diligence, to prevent the breach. This is unreasonably onerous and has, predictably, made it more difficult for prosecutions to succeed. The information required to prove whether or not a duty-holder has taken reasonably practicable measures is entirely within the duty-holder's knowledge. The duty-holder is in the best position to provide evidence of the conduct engaged in and the reasons for it. The onus of demonstrating that it was not reasonably practicable to reduce or eliminate a risk occasioning a WHS duty of care offence must be borne by the defendant.

- Higher penalties for criminal and civil breaches of the Model Act and Regulations

  The level at which penalties are currently set does not act as an effective deterrent, particularly for large and profitable companies. Penalties under the Model Laws do not meet community expectations and must be reviewed and increased to ensure that they are appropriate given the grave consequences of WHS breaches, and commensurate with penalties applicable in other jurisdictions such as environmental and consumer law. Consideration should be given to increased penalties for larger sized businesses and/or repeat offenders.

- Removal of the capacity to insure against penalties issued under the Model Act and Regulations

  The deterrent effect of penalties is almost entirely undermined if insurance companies, rather than duty-holders themselves, are able to pay fines. The ACTU strongly recommends that the Model Act be amended to expressly prohibit contracts providing liability insurance against WHS penalties and fines, and that contravention of the prohibition be made an offence.

- Stronger Health and Safety Rrepresentative (HSR) and Entry Permit Holder (EPH) rights

Worker and union participation at all levels plays a pivotal role in the effective implementation of WHS legislation in Australia. The National Review acknowledged that effective participation and representation of workers are crucial elements in improving WHS performance. The ACTU recommends a number of improvements to the powers of HSRs and EPHs to strengthen their capacity to represent workers in a changing work environment. In particular, reforms are needed to ensure that HSRs are able to operate without interference, including accessing appropriate training of their choice, and to improve the functioning of Health and Safety Committees (**HSCs**).

- **Updates to the Act, Codes and Regulations to effectively address the growth in complex labour force management structures**

  Over 40% of the Australian workforce is employed in some form of precarious or insecure employment. These workers are more likely to be injured at work for a range of reasons, including inadequate training and induction, fear of reprisals for speaking out about safety concerns, lack of access to participation and consultation processes, lack of regulatory oversight, poor supervision, inadequate access to effective safety systems and exposure to frequent restructures and down-sizing. Precarious workers experience a range of sub-standard working conditions in Australia, from lack of rights to participation and consultation and job insecurity at best, to slavery-like conditions in certain sectors and industries at worst.

  WHS failures in precarious employment situations are primarily a result of a failure of enforcement, not the adequacy of existing laws. However, improvements can and must be made to the Model Act, Regulations and Codes to better assist duty-holders operating in complex work environments to understand and comply with their duties. The Model Laws must make it clear that powerful actors at the top of industry structures (such as retailers and head contractors) are required to identify who is performing work right down to the bottom of these structures and to consult, cooperate and coordinate with workers and other duty-holders to identify and eliminate or minimise the health and safety risks facing all these workers. A number of suggested amendments are outlined in this submission to address this issue.

List of Recommendations

Compliance and enforcement

1. Safe Work Australia should immediately commence a comprehensive review of the National Compliance and Enforcement Policy, in consultation with stakeholders, which considers at least the following matters:

    a. The development of a detailed, overarching national regulatory strategy and methodology (including a strategic national approach to prosecutions) to assist regulators to determine their priorities and achieve a more appropriate and effective balance between positive motivators and deterrence;

    b. Publication of an annual plan that sets out strategic compliance and enforcement priorities, activities and performance targets for that year;

    c. The provision of adequate guidance on when and how available compliance and enforcement tools should be used by regulators in practice;

    d. A process and mechanism for regular and meaningful consultation and information sharing between the regulators;

    e. Adopting successful approaches taken by other regulators (both domestic and international) where appropriate;

    f. Enhancing engagement with stakeholders, including obtaining their input into development of strategies and programs to address identified risks and priorities;

    g. Publication of a research agenda which clearly identifies SafeWork's research priorities and how they are practically linked to the achievement of strategic compliance and enforcement priorities;

    h. The need for disputes and offences under the Model Laws to be dealt with in specialist courts and tribunals by judges and arbitrators with expertise and experience in industrial and WHS matters;

i. Guidelines on the appropriate use of enforceable undertakings, including the need to consult with unions and workers before finalising them;

j. Strategies for more effectively enforcing breaches of EPHs' rights of entry, protections against discrimination, coercion and victimisation of HSRs and the consultation and participation provisions;

k. Strategies to increase the number and effectiveness of inspections, including improving the skills, training and qualifications of inspectors.

l. Strategies and statutory initiatives to deal with phoenixing and other such behaviour, including greater cooperation with other regulators, bans on being a director if liability for a serious breach is established by a court, personal liability for directors and shareholders where a company becomes insolvent because of a failure to maintain a safe work place, and amendments to the penalty regime to enable greater adherence to penalties administered for safety breaches through a full range of government options, including following the operations of the company and its directors, and licensing consequences.

2. The Model Laws should be amended to prohibit enforceable undertakings in the following circumstances, except where exceptional circumstances exist:

   a. the contravention is connected to a fatality,
   b. the contravention involves reckless conduct,
   c. the applicant has a recent prior conviction connected to a work-related fatality, or
   d. the applicant has more than two prior convictions arising from separate investigations.

3. The powers of Entry Permit Holders (EPHs) and Inspectors in Parts 7, 9 and 10 should have extra-territorial application, to the extent that a jurisdiction's legislative powers allows.

4. An EPH who has lawfully entered a workplace to investigate a suspected contravention under the Model Laws should be permitted to remain on the premises to investigate other safety issues which they become aware of after the initial entry. Similarly, an EPH who has lawfully entered a workplace under another law for a different purpose (e.g. to hold discussions with potential members under s 484 of the Fair Work Act 2009) should

be able to lawfully remain on the premises to investigate a suspected contravention (or contraventions) of the Model Laws where they become aware of safety issues after the initial entry.

5. EPH's should be authorised to:

    a. take photographs, video and/or voice recordings and measurements, conduct tests, and make sketches or other recordings; and
    b. request the production of documents post-inspection; and
    c. issue PINs (or similar) and direct work to cease.

6. The regulator should be authorised to make orders to deal with misconduct by the PCBU (as well as by the EPH) in relation to right of entry.

7. Section 112 should be amended to empower a tribunal to make a declaratory order.

Penalties and Offences

8. The Model Act should be amended to include the specific offence of Industrial Manslaughter. The offence should apply to duty-holders, and officers who take part in the corporation's management, and should be subject to the harshest penalties, including substantial periods of imprisonment where appropriate.

9. The Model Act should be amended to expressly prohibit contracts providing liability insurance against WHS penalties and fines, and make contravention of the prohibition an offence.

10. Breaches of the provisions protecting HSRs from discriminatory, coercive and misleading conduct should be upgraded to criminal offences.

11. Financial penalties under the Model Laws do not meet community expectations and must be reviewed and increased to ensure that they are appropriate given the grave consequences of WHS breaches, and are commensurate with penalties applicable in other jurisdictions such as environmental and consumer law.

Duties of Care

12. The term 'reasonable practicality' should appear in a separate provision setting out a defence to an alleged breach, rather than qualifying the primary duties of care in the Model Act. It should be removed from the Regulations and Codes.

13. The onus of demonstrating that it was not reasonably practicable to reduce or eliminate a risk occasioning a WHS duty of care offence must be borne by the defendant on the balance of probabilities. For officer offences, the 'due diligence' formulation should be retained, but as a defence to an alleged breach, with the onus on the accused on the balance of probabilities.

14. Section 19 should be amended to clarify that actors at the top of industry structures (such as retailers and head contractors) are required to identify who is performing work right down to the bottom of these structures and to identify, eliminate or minimise health and safety risks facing all these workers.

15. A general risk management clause should be included in the Model Act and Regulations.

16. New Regulations and Codes should be developed in consultation with stakeholders for the following new, emerging or neglected areas of risk:

    d. Hazards caused by non-standard and precarious working arrangements;
    e. Psychological hazards;
    f. Biological hazards;
    g. Occupational violence;
    h. Safe systems of work, and adequate staffing levels in particular;
    i. Heat-related illness and exhaustion;
    j. Reproductive health.

17. The definitions of 'notifiable incident', 'serious injury or illness' and 'dangerous incident' need to be reconsidered and redrafted to capture new, emerging or neglected areas of risk (see above), including at least the following:

    k. Psychosocial hazards, including stress, workplace bullying and fatigue (for example, by reinserting the requirement to report a 7 day or more absence);
    l. Occupational violence, including when it causes psychological harm as well as physical harm.

18. Compliance with a relevant Code of Practice should be mandated.

19. The Model Act should be amended to ensure that it expressly covers psychological health.

20. The definition of 'Officer' should no longer be tied to the Corporations Act definition. Instead, either the earlier NSW formulation should be adopted, or alternatively, a new definition focused on the capacity of the person to significantly affect health and safety outcomes should be developed in consultation with stakeholders.

21. The definition of 'due diligence' in the Model Act [s 27(5)] should be an inclusive list, not an exhaustive list, to allow for consideration of other matters that may be relevant in a particular case.

22. The Regulations and Codes regarding Officers' duties should be updated in consultation with stakeholders to ensure that they address the different roles and responsibilities of different categories of officer, as well as standards for reporting on an organisation's WHS compliance and performance.

23. The standard for a Category 1 offence should be gross negligence instead of recklessness. Alternatively/additionally, it should be clarified that regulators can prosecute Category 1 and Category 2 offences in the alternative in any one prosecution.

Consultation and Participation

24. Schedule 2 should be amended to *mandate* the establishment of permanent tripartite consultation arrangements within each jurisdiction, including tripartite sub-committees to address industry specific issues.

25. Compliance with ILO Convention 155 should be included in the objects of the Model Act.

26. Section 47(2) of the Model Act should be amended to ensure that workers who will be covered by agreed procedures for consultation have a right to be represented while such procedures are being negotiated.

27. The *Worker Representation and Participation Guide* should be amended to illustrate how workers in a large firm can authorise representatives to represent them in negotiations

with a PCBU or group of PCBUs in the process of negotiating for the formation of work groups pursuant to ss 50-53.

28. Section 52(2) should be amended to place a maximum time-limit on negotiating a work group, for example, 3 months.

29. Section 48(c) requires that the views of workers are 'taken into account' by the person conducting the business or undertaking. However, it is not clear what this means in practice. The Model Laws should be amended to include a requirement to document workers' views as well as the ways in which they have been considered.

30. HSRs should be able to attend any course of WHS training that is approved or conducted by the regulator, on the provision of reasonable notice.

31. A PCBU should be expressly prohibited from conducting or interfering in election of a HSR, with penalties for a breach.

32. HSRs should be permitted to take a minimum number of days per year off work for training purposes, to ensure that re-elected HSRs do not go for extended periods without training.

33. The constitution of a HSC must be agreed between the PCBU and the workers at the workplace.

34. A PCBU should be required, if asked by a worker, to negotiate with the worker's representative regarding the constitution of HSC.

35. Non-HSR committee members must be elected (under s 61 of the Model Act) by the workers they seek to represent.

36. The constitution of a HSC must address the functions of the HSC, including meeting processes such as timing, nomination of a Chair, minutes and attendance by the PCBU.

37. All HSC members, including officers, should undertake WHS training.

38. Cancellation of HSC meetings should be actively discouraged by the Model Laws.

39. PCBUs must actively facilitate (not just allow) the attendance of HSC members, particularly for remote, dispersed and shift workers.

40. A HSR should be authorised to direct that unsafe work cease and/or issue a PIN immediately upon election, even if they have not yet completed the required training.

41. A worker should be able to cease or refuse work if it would expose the worker *or others* to a serious risk to health or safety. This would bring workers' rights into line with their obligations under ss 28 (a) and (b), which require workers to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons, as well as themselves.

42. The review should consider introducing 'roving' or regional HSRs to fill the representation gap in workplaces which do not have a HSR for whatever reason.

43. Even if a worker is in a work group, the worker or workers or their representative should be defined as parties to a dispute.

44. Unions should be defined as 'eligible persons' entitled to seek review of every type of reviewable decision listed at s 223 (except for Items 5 and 6, which relate to the forfeiture and return of seized things).

Responses to Discussion Paper Questions

The ACTU addresses many of the questions posed by the reviewer in detail below. Not all questions have been commented on at this stage of the review. The ACTU is happy to provide additional information on request.

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

1) The ACTU supports the three-tiered approach to WHS regulation. When supported by an effective enforcement regime, general obligations supplemented by detailed Regulations and Codes can be an effective way of ensuring that duty-holders understand and comply with their obligations. This model is based on the Robens Report (1972), which underpins WHS laws in Australia and the UK. The ACTU considers that while improvement should be continuous, overall the structure of the Model Laws is generally adequate and appropriate.

2) However, the ACTU recommends an immediate and comprehensive reconsideration of the National Compliance and Enforcement Strategy and a number of amendments to the content of the Model Laws to strengthen their ability to respond to the challenges of changing work arrangements. These matters are outlined in this submission.

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

3) The purpose of the Model Regulations and Codes is to identify critical components of the general duties set out in the Model Act, to ensure that those matters are addressed by duty-holders as a minimum requirement of compliance. The use of the concept 'so far as

reasonably practicable' in the Regulations and Codes needs to be reconsidered. The Regulations are intended to set mandated minimum standards for the management of certain specific hazards. The concept is appropriate as a defence to breaches of the general duties in the Model Act, but should not be repeated in the Regulations or Codes. [See also our response to Questions 11 and 13].

4) New Codes and Regulations need to be developed, in consultation with stakeholders, to cover aspects of WHS that are emerging, worsening or that have been neglected. One of the primary regulatory gaps in the Model Laws is that the Codes and Regulations as drafted do not adequately explain the scope and nature of the primary duty of care as it applies to 'non-standard' employment arrangements, such as labour hire and sub-contracting. The legislative intention of having a broad and inclusive definition of 'worker' in the Model Act is undermined if the nature, content and scope of the duty owed to such people is not spelled out clearly in the Regulations and Codes. New Codes and Regulations are also needed to cover inadequate staffing levels, occupational violence, psychological hazards including workplace bullying, stress and fatigue, biological hazards, and reproductive health. Such amendments would also need to be accompanied by improved incident notification provisions covering these issues. [See Question 30].

Regulations

5) Risk assessment is a critical aspect of effective WHS management, but it is an area that is often neglected or misunderstood by duty-holders. It is unsurprising that poor risk assessment has been a factor in a number of serious WHS incidents.[5] The Model Regulations only require risk management in relation to the specific hazards listed in the Model Regulations, such as noise, construction, asbestos etc. The Model Regulations are too narrow in their focus on particular hazards, and do not encompass the broad range of risks inherent in different industries. It is important that duty-holders and officers have in place a risk register or similar plan to control **all** risks in the workplace, not just the hazards set out in the Model Regulations. This should form part of the Model Regulations, with guidance provided in the form of a template or model risk management plan which can be adapted to the needs of different businesses. The ACTU recommends that a general risk management

[5] See for example media reporting of preliminary hearings of the coronial inquest into Anzac Day rock fall at the Beaconsfield mine. The Australian, 2, 3 and 9 July 2008.

clause be included in the Model Laws (see for example s 27A of the now repealed *Workplace Health and Safety Act 1995* Qld).

Codes of Practice

6) Codes of practice play an important role in the WHS regime in explaining the requirements of the general duties in the Model Act and setting out practical and detailed ways to meet required standards. Codes should contain clear, comprehensive and authoritative advice for duty-holders. Before harmonisation, the legal status of codes of practice varied between jurisdictions. For example, there were approved codes of practice with a rebuttable presumption of non-compliance, approved codes that were 'deemed to comply' and approved codes that were evidentiary but had no 'rebuttable presumption' or 'deemed to comply' status.

7) Under s 275 of the Model Act, it is not a requirement to comply with a Code. However, they are admissible as evidence of what a duty-holder should have known about specific hazards, risks and risk controls, and therefore what would have been reasonably practicable in a given situation. The pre-harmonised Queensland legislation made it explicitly clear that a code of practice had to be followed as a minimum, and improvement notices could be issued by inspectors for breaches of Codes. Compliance with a relevant Code should be mandatory at a minimum. However, duty-holders should not be able to rely on compliance with a Code to meet all their obligations if the Code does not cover all potential risks and hazards. Duty-holders should still be required to consider and address *all* risks, not just those set out in the Regulations and Codes.

8) The ACTU recommends:

   a) **An amendment to the Model Act mandating compliance with a relevant Code of Practice at a minimum, unless a higher standard has been complied with, and authorising inspectors to issue an improvement notices for non-compliance with a Code.**

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

9) The current Model Laws fail to establish a minimum standard for the management of psychological health and safety at work. This is completely unacceptable. In 2004, the

Maxwell Report into WHS laws in Victoria recommended clarification of coverage of emerging 'psycho-social' occupational health risks, such as stress and bullying. Almost 15 years later, these matters are still not effectively addressed by WHS laws in Australia. Psychological health affects every type of Australian industry and workplace, and yet is not adequately addressed by the current WHS framework. These matters are currently addressed in non-binding guidelines, rather than a Code or the Regulations. This is an inadequate response to a pervasive and complex WHS problem. Specific guidance in the Regulations and Code is needed to cover psychological hazards.

10) This regulatory gap is resulting in a huge and unacceptable cost to workers, employers and the wider community. SafeWork Australia statistics show that the number of serious claims involving mental disorders has remained unchanged over the past 15 years – suggesting there has been no improvement whatsoever in the management of these issues in Australian workplaces. In addition, among claims involving disease, mental disorders recorded the largest increase in time lost, rising from 11.2 working weeks in 2000–01 to 16 weeks in 2014–15. Further, the largest increase in time lost from work was for mental stress, which increased from 11.4 working weeks in 2000–01 to 16.4 working weeks in 2014–15. Mental stress claims consistently had the longest median time lost from work, almost 3 times the 2014–15 median. Mental stress claims also have the highest median payment ($28,900 in 2014–15), more than double the median for all serious claims of $11,000. It has been reported to UnionsNSW that the Gross Incurred Cost of psychological injuries under the Treasury Managed Fund is nearing $60,000 per psychological injury claim. The ACTU also notes the appallingly high rates of suicide amongst construction workers and FIFO workers[6], and WHS risks caused by new digital technology creating a '24-hour work day' for many professionals. It is clear that the current WHS regime is failing to manage psychological risks adequately to prevent injury, or to ensure that injuries are managed appropriately after they occur.

11) The shift away from heavy industry to service industries is likely to continue to exacerbate these risks and costs. This issue needs urgent attention by policy-makers. Prevention is key to minimising the extent of psychological injury, which means duty-holders must be required

[6] See for example: https://www.perthnow.com.au/news/wa/fifo-suicides-mcgowan-government-under-fire-from-unions-families-over-mining-industry-reforms-ng-b88769851z; https://www.worksafe.qld.gov.au/construction/articles/annual-cost-of-construction-suicides

by the Model Laws to adopt proactive strategies to ensure psychological health and safety at work. The ACTU recommends the following urgent improvements to support the management of risks to psychological health in the workplace:

a) **Section 19 of the Model Act (and other sections as appropriate – see for example ss 84 and 195(1)) in relation to the right of a worker to cease unsafe work and pre-requisites for the issuing of PINs) should be reviewed and amended to expressly cover psychological health;**

b) **A new Regulation and Code on psychological health should be developed (in consultation with experts and stakeholders) covering risks such as stress, fatigue and workplace bullying and harassment.[7] Consideration should be given to the example of the Canadian *Standard for Psychological Health and Safety in the Workplace*, which sets out systematic guidelines to help employers to develop and continuously improve psychologically safe and healthy work environments. The standard was adopted after consultation with experts, industry, workers and the government.**

12) Such amendments would also need to be accompanied by improved incident notification provisions covering these issues (see below).

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

13) The ACTU supports the continued existence of specific health and safety laws in industries where there are high, complex or unique risks and hazards, so long as those laws are at least as beneficial as the Model Laws and continue to be effective in reducing deaths and injuries in the industries concerned. For example, electrical work is prevalent, highly specialised and dangerous both for workers and the public, which is why many jurisdictions have dedicated electrical safety regulators. We consider this to be best practice and recommend it be adopted by all jurisdictions.

[7] Gunningham, N, Dennerley, J and Ivec, M, National Research Centre for Occupational Health and Safety Regulation, *Project 4: The Efficacy of Codes of Practice and Guidance Material*, Report to Safe Work Australia, September 2015, Recommendations 1 and 13

14) The ACTU is concerned that there remain unjustifiable inconsistencies between the Model Laws and WHS laws in the offshore petroleum and gas industry. It is unacceptable and unjustifiable that workers in the offshore petroleum industry are denied some of the basic WHS rights and protections enjoyed by other Australian workers. These matters are addressed in detail in the **ACTU's submission** to the Senate inquiry into work health and safety of workers in the offshore petroleum industry, and we refer the reviewer to that submission for further details.

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

15) The Model Laws should make it clear that primary duty-holders are required to ensure the health and safety of workers while they are at work, regardless of where their workplace is situated. All PCBUs should be required to implement appropriate risk assessment and management processes to ensure the health and safety of workers performing work overseas.

16) This is a complex area of law, and the extraterritorial operation of the Model Laws has not yet been considered by a court. As such, the extent to which the Model Laws would apply outside of a jurisdiction is not entirely clear. The Explanatory Memorandum clarifies that the Model Act is intended to apply 'as broadly as possible' and so 'some provisions' will have 'some extra-territorial application'. The example of all PCBUs who operate state or territory-registered ships (subject to Commonwealth maritime work health and safety laws) is provided.[8] The Commonwealth and the States and Territories which have enacted the Model Laws have discretion to determine the extent to which the laws will operate outside the jurisdiction's geographical boundaries.[9]

17) The Model Act and Regulations have inherent extraterritorial application in relation to the criminal offences they contain.[10] The extraterritoriality provisions of the Criminal Codes in each jurisdiction are different and their application is complex; but liability for offences under the Model Laws may be extended where elements of the offence are 'partly' or 'wholly' committed or occur outside Australia. For example, there may be jurisdiction to prosecute under a Commonwealth law if the conduct in question occurs:

[8] Explanatory Memorandum, Model Work Health and Safety Bill, at [55]-[58]
[9] The jurisdictional note for s 11 of the Model Act provides for each jurisdiction to insert a local provision regarding extraterritorial application of the Act, including the reach of offences.
[10] *Work Health and Safety Act 2011 (Cth)* s 12F(3); *Criminal Code Act 1995 (Cth)*, s 15.1

a) Wholly or partly in Australia or on an Australian aircraft/ship; or
b) Wholly outside Australia and the result of the conduct occurs wholly or partly in Australia or an Australian aircraft/ship;
c) Wholly outside Australia but the offender is an Australian citizen or a body incorporated by or under an Australian law.

18) 'Crimes at sea' laws, federal maritime laws and Acts Interpretation Acts may also contain relevant extraterritorial rules in relation to the Model Laws. Provisions of the Model Laws which are not criminal offences do not automatically have extraterritorial application. The Model Laws contain an (appropriately) broad definition of 'workplace', which means any place where a worker goes, or is likely to be, while at work, including a vehicle, vessel, aircraft or other mobile structure, any waters and any installation on land, on the bed of any waters or floating on any waters. In the ACTU's submission, if the duty of care extends to any work activity or work consequences arising from the conduct of the PCBU, then EPHs and Inspectors must have their usual powers to inquire into potential breaches, regardless of location. There is a need to strengthen the WHS regime's capacity to effectively monitor and enforce compliance when cross-border issues arise. In light of technological advances and the increasing complexity and interconnectedness of work arrangements, such issues are increasingly likely to occur.[11]

19) The ACTU recommends:

a) **Amendments to the Model Act to confirm that the powers of Entry Permit Holders and Inspectors in Parts 7, 9 and 10 have extra-territorial application, to the extent that a jurisdiction's legislative powers allows.**

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

20) Members of the public visit and interact with workplaces on regular basis. In some cases, public health and safety is inextricably linked with WHS. The collapse of a wall on a Grocon

[11] The review of the Work Health and Safety Act 2011 (NSW) also recommended this (see Recommendation 1)

site killing three pedestrians in Carlton, Victoria in 2014 provides just one tragic example. The changing nature of work also means that some locations are workplaces at some points and residences at other times (e.g. in the case of home-based work). Systems of work can also adversely impact on public health and safety, for example unsafe systems of work in road transport place other road users at risk, and inadequate staffing levels in hospitals can lead to poorer health outcomes for the public.

21) While a connection to work and workers is clearly central to the purpose of the Model Laws, the ACTU considers that it is appropriate that the Model Laws continue to place a broad obligation on duty-holders to ensure that *no person* is put at risk by work carried out as part of the conduct of the business or undertaking, including after the work has been carried out or completed. For example, in 2016, an engineering company and its director were charged (appropriately) with recklessly causing the death of an 8 year old girl on a ride at the Royal Adelaide Show in 2014 under s 31 of the WHS Act in South Australia.[12] The respondents argued that their responsibilities in guaranteeing the ride's safety ended once they had physically handed over the safety certificate.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

22) There are a number of remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation, including the following:

a) Hazards caused by non-standard working arrangements;
b) Psychological hazards (see answer to Question 5);
c) Biological hazards;
d) Occupational violence;
e) Safe systems of work, and adequate staffing levels in particular;
f) Heat-related illness and exhaustion;
g) Reproductive health.

[12] *Boland v Safe is Safe Pty Ltd & Munro* [2017] SAIRC 17

Non-standard working arrangements

23) WHS failures in precarious employment situations are primarily a result of a failure of monitoring and enforcement, not the adequacy of existing laws. However, improvements can and must be made to the Model Regulations and Codes to better assist duty-holders in complex work arrangements to understand and comply with their duties. The current Model Laws already provide for situations where multiple businesses have overlapping duties (see s 16 of the Model Act), and the ACTU has recommended an amendment to s 19 to ensure that labour-hire and supply chain arrangements are effectively covered by the primary duty of care. In addition, the Model Codes and Regulations must be updated to better explain the scope and nature of the primary duty of care as it applies in practice to 'non-standard' employment arrangements, such as labour hire arrangements, contractor arrangements, supply chains, joint ventures, alliances and franchise arrangements. There will be many situations in which more than one duty-holder will have an obligation to identify hazards and control risks. It is essential that roles and responsibilities between different duty-holders are clearly understood and coordinated. These arrangements are complex and uncertainty regarding which obligations lie with which duty-holder is likely.[13] Duty-holders should be assisted to identify the major WHS problems associated with each type of working relationship and to develop a systematic approach to managing those issues. In light of the increasing prevalence and complexity of these arrangements in the new economy, the Model Regulations and Codes must provide clear and detailed guidance explaining which categories of workers and others are owed a duty in various non-standard working arrangements, and what steps must be taken by duty-holders to ensure their health and safety.[14] Detailed guidance on the obligation in s 46 of the Model Act on duty-holders to consult with *each other*, as well as workers and their representatives, must also be included. [See also our response to Question 18].

24) Over 40% of the Australian workforce is employed in some form of precarious or insecure employment.[15] Evidence shows that these workers are more likely to be injured at work for a range of reasons, including inadequate training and induction, fear of reprisals for speaking out about safety concerns, lack of access to participation and consultation processes, lack of

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[13] See for example the extremely complex contracting arrangement at Baiada Poultry uncovered during a FWO investigation

[14] WorkSafe Victoria has developed a significant amount of detailed guidance material addressing the respective and overlapping WHS obligations of labour-hire companies and hosts.

[15] Report of the Independent Inquiry into Insecure Work in Australia, *Lives on Hold: Unlocking the Potential of the Australian Workforce*, 16 May 2012

regulatory oversight, poor supervision, inadequate access to effective safety systems and exposure to frequent restructures and down-sizing.[16] There are particular WHS challenges for homecare workers[17] and foreign workers under temporary visa arrangements.[18] Precarious workers experience a range of sub-standard working conditions in Australia, from lack of rights to participation and consultation at best, to slavery-like conditions in certain sectors and industries at worst. For example, the recent Victorian Government inquiry into the Labour Hire Industry and Insecure Work heard evidence of abuse, violence, sexual harassment, excessive working hours, work in extreme heat with limited drinks breaks, untreated medical conditions, sub-standard accommodation, no access to workers compensation and other gross WHS breaches in relation to labour-hire workers in the horticulture, meat and cleaning industries in Victoria, including workers participating in the Government's Seasonal Worker Program. The Victorian Inquiry heard evidence that workers in labour-hire, franchise, contracting and other precarious forms of employment are routinely denied basic employment rights, including WHS protections.[19]

25) Amendments to the Model Laws need to be complemented by other regulatory approaches, such as a national safety licensing scheme for labour hire arrangements, requiring hosts and labour hire companies to take a more proactive approach to managing safety and other workplace rights, and basic safety induction cards for workers in industries with high levels of precarious employment, such as construction.

26) The ACTU recommends:

a) **The development of a new Model Regulation and Code of Practice covering precarious and non-standard working arrangements, including detail on the extent, scope and nature of the primary duty of care and the obligation in s 46 on duty-holders to consult with each other.**

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[16] See for example Richard Johnstone and Michael Quinlan, *'The OHS regulatory challenges posed by agency workers: evidence from Australia'* (2006) 28:3 *Employee Relations* 273.
[17] Michael Quinlan, Phillip Bohle and Olivia Rawlings-Way, 'Health and safety of homecare workers engaged by temporary employment agencies' (2015) 57:1 *Journal of Industrial Relations* 94, 95.
[18] The Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016
[19] See for example, Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report, August 2016 at Chapter 4 and pp 124-146; M Quinlan and P Bohle (2008), Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work, International Journal of Health Services, 38*3), 489-525.

Biological hazards

27) Biological hazards are prevalent in a range of law enforcement, health, agricultural, community services, sport and recreation, hospitality, and other customer service roles. Despite regular exposure at work, there is no systematic method of managing the risks posed by workplace exposure to biological hazards.

28) SafeWork Australia statistics show that serious claims related to exposure to Materials and substances and Animal, human and biological agencies have increased by 8-10 per cent over the past 15 years.

29) The ACTU recommends:

a) **The development of a new Regulation and Code of Practice covering Biological Hazards.**

Workload, rosters and staffing

30) Issues such as workload, rosters and staffing are often dismissed by inspectors and duty-holder as 'industrial issues', when the reality is they can and do all adversely affect WHS. Affiliates report that HSRs and EPHs who try to address these issues are not adequately understood or sufficiently supported by the regulator.

31) We refer the reviewer to the separate submissions of our affiliates for details on how this issue is playing out in particular sectors (for example, the submissions of the HSU and SDA to this review).

32) The ACTU recommends:

a) **The development of a new Regulation and Code of Practice covering safe systems of work, particularly as it relates to staffing, workload and rostering issues.**

Reproductive Health

33) The ACTU supports the inclusion of a specific reference to reproductive health, pregnancy, breastfeeding mothers and mothers returning to the workplace after giving birth in the Model Regulations, as well as the development of a Code of Practice which details the specific workplace health and safety hazards and risks which can arise in relation to reproductive health, pregnancy, breastfeeding mothers and mothers returning to the workplace after

giving birth. It is the responsibility of a duty-holder to undertake risk assessments and to control any risks that may arise in the course of employment as a result of a pregnancy. All such risk assessments must be done in consultation with the affected worker.

34) The ACTU recommends:

a) **The development of a new Regulation and Code of Practice covering Reproductive Health.**

Occupational Violence

35) SafeWork Australia statistics show that the number of claims due to being assaulted by a person or persons has *more than doubled* since 2000–01. We refer you to the separate submissions of our affiliates to this review, which disclose the scope and nature of this problem across numerous sectors and industries. For example, a survey conducted by the SDA reveals that more than 40% of retail and fast food workers have experienced customer violence or abuse in the last 12 months. Figures from WorkSafe Victoria show that up to 95% of Victorian healthcare workers have experienced verbal or physical assault. Workers in non-standard forms of employment face particular dangers. The problem is so serious and widespread that the International Labour Organisation has commenced a process to develop a new international standard to address violence and harassment in the World of Work.

36) The ACTU recommends:

a) **The development of a new Regulation and Code of Practice covering Occupational Violence.**

Heat-related illness and exhaustion

37) In 2016, the Queensland Coroner recommended the adoption of an industry code of practice addressing this issue. Currently, we have only non-binding guidance material to assist workers. This is an inadequate regulatory response for a problem of this nature, which is likely to continue to worsen due to Australia's climate, the impact of global warming and Australia's aging workforce. Safe Work Australia statistics show that 13 workers died due to heat exposure (5 of them in Queensland) from 2005 –2014. Duty-holders and workers in numerous sectors are struggling to manage this issue and need greater support from the regulator. The Regulation to prevent musculoskeletal disorders provides a precedent which could be adapted.

38) The ACTU recommends:

a) **The development of a new Regulation and Code of Practice for Heat-Related Illness and Exhaustion.**

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

39) The extension of the duty of care beyond the traditional employment relationship through the PCBU concept was a key reform of the Model Laws. Section 5(1) of the Model Act provides that a person conducts a business or undertaking whether alone or with others and whether for profit or not. The definition of PCBU is appropriate, aside from the exclusion for 'volunteer associations', which has the potential to cause confusion.

40) This issue was considered in the context of the FW Act bullying provisions by the Fair Work Commission in *Re McDonald*. It was held by the Commission in that case that the mere fact that volunteers receive an honorarium, 'in kind' benefits or ex-gratia payments does not necessarily change the voluntary nature of the relationship. It is a case by case assessment and depends on the nature of the payment or benefit in question. In *Re McDonald [2016] FWC 3000*, the FWC held that a volunteer who received certain non-financial benefits (namely a discount on a payment that she would otherwise have had to make in full) was not sufficient to convert what was in essence a volunteer arrangement into an employment contract. The current definition has the potential to cause confusion for non-for-profit organisations, and there is some evidence that this is happening in practice. For example, UnionsNSW reports that volunteer officers and workers in training sessions have expressed confusion about whether or not they owe duties.

41) The ACTU recommends that:

a) **The scope and nature of the exemption for volunteer associations be reconsidered.**

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

42) The way in which the concept of 'reasonable practicality' qualifies the duties of care should revisited.[20] The ACTU considers that the concept 'so far as reasonably practicable' should appear in a separate provision of the Model Act setting out a defence to an alleged breach, rather than qualifying the primary duty of care. The concept will still operate as an effective qualifier to the primary duty of care, but the change will increase focus on the primary duty rather than the qualifier. Feedback from our affiliates is that the inclusion of the qualifier of reasonable practicality in the primary duty of care itself has in practice focused attention on what the standard of reasonable practicality means, rather than on the overarching primary duty to ensure the health and safety of workers and others. This is undesirable and inconsistent with the purpose of the legislation. One of the primary reasons given by the National Review for including the standard in the duty itself, rather than as a defence, related to the need for clarity for the duty-holder. The ACTU submits that removal of the 'reasonably practicable' qualifier from the primary duty of care is highly unlikely to undermine the ability of duty-holders to understand what is required to comply with their duty of care. In fact, an unqualified primary duty of care sends a clearer message to duty-holders in relation to their obligations. There would be no reason under such a framework that the regulator could not continue to educate and inform duty-holders of the scope of the duty care and the meaning and effect of the defence of 'reasonable practicality', simply because it appeared in a separate section of the Model Act. Coupled with the availability of union prosecutions and a partial reverse onus of proof, such a scheme would be likely to encourage duty-holders to pay greater attention to the standard of care required in order to comply with their obligations and avoid sanction. [See also our response to Question 34.]

43) The Model Act clearly intends to recast the primary duty so that it covers new and emerging work arrangements. However, it is not entirely clear whether or not the general duty in s 19 of the Model Act in fact has the effect of placing an obligation on a PCBU in relation to workers engaged further down a supply chain, for example. This is because it is not clear whether such workers would meet the definition in s 19(1) of being 'at work *in* the business or undertaking' of the PCBU; or in s 19(2) that their work is 'carried out *as part of*' the principal PCBU's business or undertaking.

44) The performance of work throughout contemporary market economies increasingly occurs in the context of extensive contract networks, such as supply chains. These supply chains are

[20] National Review, First Report at [5.27] – [5.43].

regulated by means of private contractual 'governance structures'. There is a growing recognition of the need to regulate supply chains both at the national and international level, especially where elaborate subcontracting networks have compromised safety standards. As outlined earlier, vulnerable workers are often engaged in precarious and unsafe employment within these supply chains, with client pressure or completion bonuses leading to hazardous systems of work. With the growth of contract-based employment, identifying the duty-holder and attributing responsibility for safety in the workplace has become significantly more complex. In Australia, particular jurisdictions have introduced regulatory protection (including supply chain regulation), for example for clothing outworkers and long-haul truck drivers. In part, these regulations articulate how duties are to apply in a supply chain. There is an urgent need to ensure that these forms of protection are extended to all vulnerable workers. Duties must be imposed upon the effective business controllers (and other powerful participants) in complex workplace structure such as supply chains to harness private contractual 'governance structures' for the purpose of improving WHS for vulnerable workers. Only by imposing duties at the top of these complex structures can the root causes that give rise to WHS problems be addressed.[21] Section 46 of the Model Act already requires consultation with other duty-holders, s 19 should be amended to make the general duty of care consistent with this obligation.

45) The recent decision of Judge Curtis in *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92 suggests that a PCBU can discharge its obligations under the Model Laws simply by relying on the expertise of independent contractors. The ACTU submits that this interpretation is not consistent with the intention of the Model Laws. A PCBU must adopt a systematic approach to WHS management to ensure contractors are working safely.

46) The ACTU recommends that:

[21] There has been extensive research on this topic, see for example: EMCONET 2007 Employment Conditions and Health Inequalities: Final Report to the WHO Commission for the Social Determinants of Health, Employment Conditions Knowledge Network; James, P., Johnstone, R., Quinlan, M. and Walters, D. (2007) Regulating supply chains for safety and health, Industrial Law Journal, 36(2): 163-187; and Nossar, I. (2007) 'The scope for appropriate cross-jurisdictional regulation of international contract networks (such as supply chains) presentation to ILO/international meeting of labour inspectors, Toronto; Nossar, I., Johnstone, R. and Quinlan, M. Regulating supply-chains to address the occupational health and safety problems associated with precarious employment: The case of home-based clothing workers in Australia Australian Journal of Labour Law, 2004, 17(2): 1-24; James, P.,Johnstone, R., Quinlan, M. and Walters, D. (2007) Regulating supply chains for safety and health, Industrial Law Journal, 36(2): 163-187; and Rawling, M. (2006), 'A generic model of regulating supply chain outsourcing' in Arup, C. Gahan, P. Howe, J. Johstone, R. Mitchell, R. and O'Donnell, A. eds. Labour Law and Labour Market Regulation, Federation Press, Sydney, 420-441.

a) **The reviewer consider how s 19 can be amended to clarify that actors at the top of industry structures (such as retailers and head contractors) are required to identify who is performing work right down to the bottom of these structures and to consult, cooperate and coordinate with workers and other duty-holders to identify, eliminate or minimise health and safety risks facing all these workers.**

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

47) The phrase 'reasonably practicable' is used in Article 16 of ILO Convention 155 and is well understood by industrial parties. The ACTU supports the continued use of the standard of 'reasonably practicable', but as a defence to the general duties to be proved by the defendant on the balance of probabilities, **not** as a qualifier to the primary duty of care. [See our response to Question 11 above and related discussion regarding a partial reverse onus of proof at Question 34 below].

48) Reasonable practicality is defined in s 18 of the Model Act, which sets out a non-exhaustive list of five matters that a duty-holder must take into account and weigh up when deciding what is reasonably practicable in a given situation. Safe Work Australia's *Interpretative Guideline on The Meaning of 'reasonably practicable'* sets out two steps to meeting the obligations; firstly, a consideration of what can be done (what is possible) and secondly, a consideration of whether it is reasonable to do all that is possible. This means what can be done should be done; unless it is reasonable for the PCBU to do something less. The guidelines clarify that obligations and duties imposed by other legislation may influence what is possible and reasonable in any given circumstance, and that a duty-holder's ability to control or influence another person is also relevant, although a duty-holder's duty of care cannot be contracted out of.

49) Courts have held that duty-holders must take a proactive approach to safety issues[22] and have regard not only for the ideal worker but for one who is careless, inattentive or inadvertent.[23] The standard must be applied in a manner that acknowledges and prioritises the primary goal of the Model Laws, namely to ensure the health and safety of workers and others. A duty-holder should demonstrate a proactive, imaginative and flexible approach to

[22] *WorkCover Authority of New South Wales v Kellogg (Aust) Pty Ltd* [1999] NSWIRComm 453
[23] *Dunlop Rubber Australia Ltd v Buckley* (1952) 87 CLR 313 at [320]

identifying potential risks to health and safety and the adoption of any measures to address such risks as are reasonably practicable.[24]

50) The ACTU recommends that:

a) **The qualifier 'so far as reasonably practicable' be retained but removed from s 19 (the primary duty of care) and relocated in the Model Act as a defence to alleged breaches.**

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

51) As accepted by the National Review Panel,[25] the values and culture of a company are important to encourage appropriate attitudes and behaviours for health and safety; and are determined and influenced by those who make the relevant decisions. Therefore, personal criminal liability of company officers with involvement in such relevant decisions plays a key role in encouraging company compliance with WHS obligations. Senior leaders and managers must be legally required to take responsibility for the health and safety of workers and others impacted by the activities of their companies. Prior to harmonisation, almost all Australian jurisdictions provided for some form of personal liability for breaches of WHS duties of care.[26] Four of those regimes (NSW, Queensland, South Australia and Tasmania) placed the onus on the accused to prove a defence of 'due diligence' or similar. The definitions of 'officer' varied between jurisdictions. During the harmonisation process, the ACTU supported a model similar to the pre-harmonisation NSW provisions, which deemed a 'director' and those concerned in the management of the corporation to be liable for the offence of the corporation, unless they could make out the defences of due diligence or not being in a position to influence the contravention. The onus of proving a failure to meet the standard of due diligence was on the prosecution.

52) Although provisions for personal liability are included in the Model Laws, the Model Laws did not adopt the ACTU's preferred model. Instead, s 27(1) of the Model Act places a positive duty on an officer of a corporation to ensure that the PCBU complies with its duties under the

[24] Bluff and Johnstone, *The Relationship between "Reasonably Practicable" and Risk Management Regulation*, Working Paper 27, National Research Centre for OHS Regulation, September 2004 at p8-22
[25] National Review, First Report at [8.3]
[26] National Research Centre of OHS Regulation, *Personal Corporate Officer Liability under the Model Work Health and Safety Bill*, Working Paper 73, March 2010, pp 6-7

legislation. That duty is qualified by a requirement to exercise due diligence, and the officer is liable for their own conduct or omission, not that of the corporation. Section 27(5) of the Model Act sets out the elements of the duty of due diligence in the WHS context, which essentially codifies the content of the due diligence obligation as interpreted by the courts. The National Review Panel justified this model on the basis that it was more likely 'to ensure appropriate, proactive, steps are taken by an officer for compliance by the company with the duties of care placed on the company'. The ACTU submits that the NSW formulation was appropriate and adequate; but does not oppose the 'positive duty' formula in the Model Laws.

53) To the ACTU's knowledge, there have been no successful prosecutions of officers under the Model Laws to date. In light of the structure of the provisions, this is not surprising. In the ACTU's submission, there are four aspects of the personal liability regime that require reconsideration. Firstly, the definition of 'officer' should be amended so that it captures all senior managers who significantly impact on WHS outcomes. Secondly, the list of matters in the definition of due diligence should be *inclusive*, not exclusive. Thirdly, due diligence should be a defence to the duty of care offences, not a qualifier to the primary duty, and the onus of proof should be on the defendant to make it out. Fourthly, the Model Regulations and Codes should be updated to include detailed information for directors and senior managers on how they can meet their obligations and what 'due diligence' means. These matters are discussed in further detail below.

The Definition of Officer

54) The Model Act defines 'officer' by reference to the definition in s 9 of the *Corporations Act 2001* (Cth). The key criterion is whether the person makes decisions affecting *the whole, or a substantial part of*, the business or undertaking. The Corporations Act definition is more extensive and detailed than the definition in the pre-harmonised NSW legislation, but in the ACTU's submission, it is not necessarily more appropriate. This is because elements of the Corporations Act definition focus on management as it relates to the 'financial affairs' of a company. While this is clearly appropriate in the context of a legislative regime which imposes a number of financial management obligations on companies, it fails to effectively target senior decision-makers involved in health and safety governance in an organisation.

55) It is of course completely inappropriate for managers who do not significantly influence WHS outcomes to be held personally liable for breaches of the Model Laws, and provisions need to be carefully drafted to ensure that such people are excluded and have a strong and clear defence available in the event that allegations are made.

56) The inadequacy of the current definition is demonstrated by the case of *Mckie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq) [2015] ACTIC 1*. In that case, a worker died when his truck connected with powerlines. The court considered whether the project manager was an 'officer' within the meaning of the Model Act. The court held that it is the person's influence over the PCBU as a whole, not just over the particular project, undertaking, function or event relevant to the alleged breach of duty that must be assessed. Indicators such as the following were considered relevant to the question of whether or not the project manager was an 'officer' or not:

i) Responsibility for hiring and firing employees;
ii) Capacity to allocate corporate funds;
iii) Capacity to direct the type of contracts to be pursued by the business;
iv) Responsibility for signing off on tenders;
v) Responsibility for determining corporate structures and setting company policy;
vi) Attendance at Board meetings;
vii) Responsibility for compliance with legal obligations.

57) The project manager was a well-qualified engineer and a senior manager in the company with substantial ability to influence the safety and health of workers and others on the project he managed. He had been personally served with a prohibition notice regarding work near power lines in August 2008 on another project. The court found that the project manager was fully aware of the risks associated with the live overhead power lines above the site he managed but failed to exercise due diligence in respect to safety compliance. Despite this, the court held that there was no evidence of any involvement in the matters listed at paragraph 56 (i)-(vii) above, and therefore it was held that he had an operational role only and was not an 'officer' within the meaning of the Model Act. This decision indicates that the current definition is excluding the very senior decision-makers whose behavior the Model Laws are seeking to change. The purpose of these provisions is to improve WHS outcomes using the incentive of personal criminal liability. However, the exclusion of key decision-makers from the definition of officer seriously undermines this goal. The definition of officer must capture people with a significant level of influence over WHS outcomes; otherwise the purpose of the provision is defeated.

58) The ACTU recommends that:

a) **The use of the Corporations Act to define an 'officer' for the purposes of the Model Act be reconsidered. Use of the earlier NSW formulation,[27] or alternatively, a new definition focused on *the capacity of the person to significantly affect health and safety outcomes* should be developed in consultation with stakeholders, should be considered.**

Due Diligence and a Partial Reverse Onus of Proof

59) The National Review Panel explained that the standard of due diligence:[28]

> *…should be a high one, requiring ongoing enquiry and vigilance, to ensure that the resources and systems of the entity are adequate to comply with the duty of care of the entity—and are operating effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.*

60) The ACTU supports this statement. The due diligence formulation should be retained, but as a defence to an alleged breach, with the onus on the accused to prove it on the balance or probabilities. Also, the definition of due diligence in the Model Act should be an inclusive list, not an exhaustive list, to allow for consideration of other matters that may need to be considered in a particular case. For example, in addition to the matters listed in s 27(5) of the Model Act, courts have also referred to the need for an officer to demonstrate that they had laid down a proper system for dealing with the issues and provided adequate supervision to ensure the system was carried out, and other cases have suggested that officers are required to personally respond to incidents that are drawn to their attention.[29] Courts should not be prevented by the drafting of s 27(5) from considering such additional matters where relevant in the circumstances of a case.

61) The ACTU recommends that:

a) **For officer offences, the 'due diligence formulation be retained, but as a defence to an alleged breach, with the onus on the accused to prove it on the balance or probabilities.**

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[27] *OHS Act* 2000 (NSW), s 26(1) -"each director of the corporation, and each person concerned in the management of the corporation."
[28] National Review – Second Report at [23.174]
[29] See *Universal Telecasters (Qld) Ltd v Guthrie (1978) 32 FLR 360; R v Bata Industries Ltd (No 2)* (1992) 70 CCC(3d) 394

b) **The definition of due diligence in the Model Act [s 27(5)] should be an inclusive list, not an exhaustive list, to allow for consideration of other matters that may be relevant in a particular case.**

Regulations and Codes

62) There is no guidance provided in the Regulations or Codes on what proactive performance indicators would assist officers to meet their obligations under the Model Act. Officers fall into different categories and have different responsibilities within an organisation, for example, human resources, legal, finances, strategic leadership etc. Officers responsible for ensuring adequate staffing, for example, must consider different matters to officers responsible for financial management.

63) The ACTU recommends that:

a) **The Regulations and Codes be updated in consultation with stakeholders to ensure that they address the different roles and responsibilities of different categories of officer, as well as standards for reporting on an organisation's health and safety compliance and performance.** [30]

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

64) Section 7(1) of the Model Act defines a 'worker' as a person who carries out work in any capacity for a person conducting a business or undertaking, including work as an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, or of a labour hire company who has been assigned to work in the person's business or undertaking, an outworker, an apprentice or trainee, or a student gaining work experience or a volunteer (defined as a person acting on a voluntary basis, irrespective of whether or they receive out-of-pocket expenses).

[30] See also Johnstone and Tooma, *Submissions in relation to draft Model Work Health and Safety Regulations and Codes of Practice*, 18 March 2011 at [5]-[21]

65) The scope is intended to be broad enough to cover 'all persons who may be put at risk from the conduct of the business or undertaking'. This is consistent with the findings of the National Review, which recommended a move away from the emphasis on the traditional employment relationship and towards protecting all persons involved in or affected by 'work activity'.[31] The definition of worker does not require reconsideration at this stage.

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

66) No comments at this stage.

Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?

67) No comments at this stage.

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

68) Sections 13-17 (Part 2, Subdivision 1) of the Model Act sets out the principles that apply to duty-holder's duties of care. The principles explain the nature of a PCBU's duty of care and are a very significant aspect of the regulatory regime, particularly as it relates to changing work arrangements. In summary, the principles explain that a duty-holder is required to *eliminate* risks to health and safety so far as is reasonably practicable; or *minimise* them so far as is reasonably practicable where it is not reasonably practicable to eliminate them. Duties are not transferable, one person can hold more than one duty, and more than one person can hold the same duty at the same time. These principles are appropriate and to date have been operating effectively.[32]

[31] National Review, First Report, p 59 at [625].
[32] For example, in *Boland v Big Mars Pty Ltd* [2016] SAIRC 11 the Magistrate held that '[the Model Act] clearly places an obligation on the labour hire employer to take all reasonably practicable steps to ensure that [the labour hire employee] was safe from injury while working for the host business. This duty cannot be ignored or delegated to the host business'.

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

69) The obligation in s 46 on duty holders to consult with *each other*, as well as workers and their representatives, is crucial in the context of non-traditional work arrangements such as labour hire, contractor chains and franchises. This 'horizontal' consultation obligation is intended to ensure that the identification and management of WHS risks remains coordinated and comprehensive, even where there are numerous overlapping duty-holders. The Model Laws (appropriately) set out detailed legislative guidance on the duty to consult with workers and their representatives; but fail to do so in relation to the horizontal duty. The Regulations do not address the issue at all, and the Codes of Practice on *How to Manage Work Health and Safety Risks* and *How to Consult on Work Health and Safety* address the issue but in insufficient detail.

70) The ACTU recommends that:

a) **A new Code and Regulation on Non-standard and precarious working arrangements should include detailed explanation of the content of the s 46 duty to consult horizontally, including matters such as the triggers for consultation, the information to be provided, documentation and reporting, issue resolution and how horizontal consultation interacts with consultation with workers. [See related discussion at Question 9.]**

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

71) Effective mechanisms for consultation and participation form a critical and non-negotiable feature of WHS legislation. These mechanisms not only form a vital component of the Robens Model which underpins Australian WHS law, it is proven that worker consultation and participation improve WHS outcomes.[33] For this reason, it forms a core principle of ILO Convention 155.

[33] For example, see Walters, D. and Nichols, T, *Worker representation and workplace health and safety*, Palgrave Mcmillan, Basingstoke, 2007

72) Unions have long played a critical role in ensuring that workers have a say in WHS at their workplace, are protected from victimisation and can participate meaningfully in upholding WHS standards at work. Changes to industrial laws and work arrangements over the past decades have inhibited the capacity of unions to represent the interests of workers and present a significant challenge to the effectiveness of traditional WHS consultation and participation mechanisms and structures. The Model Laws must address these challenges and provide workers with effective mechanisms for raising issues and articulating grievances. This review presents an opportunity to reconsider whether the current legal framework is working effectively to support the implementation of meaningful and representative forms of participation in WHS regulation in Australia. The ACTU is concerned that the Model Laws are not operating to adequately promote the involvement of workers in non-standard and precarious forms of employment in consultation and participation processes. Feedback from affiliates is that PCBUs frequently breach their consultation requirements and yet inspectors seldom give adequate consideration to participation and consultation procedures during workplace visits. It is crucial that compliance with consultation and participation provisions is properly monitored by inspectors and enforced when breaches are identified. This should be considered as part of the proposed review of the NCEP.

73) In addition to improved enforcement and monitoring strategies, some legislative amendment is required. In particular, Schedule 2 of the Model Act allows (but does not require) a jurisdiction to establish a regulator and provide for local consultation arrangements. In the ACTU's strong submission, this mechanism is not sufficient to ensure adequate consultative structures remain in place. This is demonstrated by the NSW government's abolition in 2012 of the tripartite WorkCover Board and Occupational Health and Safety and Workers Compensation Advisory Council, which had been established by the *Workplace Injury Management and Workers Compensation Act 1998 (NSW)*. With this decision, tripartite consultation was abolished for both workers compensation and WHS matters in NSW. Research[34] shows that when tripartite consultation mechanisms are removed, there is a reduction in the influence and role that workers are able to play in the safety of their own workplaces. Australia is a signatory to ILO Convention 155 which provides for tripartite consultation. In particular, Articles 4 and 15 of ILO Convention 155 requires that governments, workers representatives, and employer representatives should "formulate,

[34] See for example, Saksvik, Per Øystein and Quinlan, Michael G., *Regulating Systematic Occupational Health and Safety Management: Comparing the Norwegian and Australian Experience* (March 15, 2003). Relations Industrielles/Industrial Relations, Vol. 58, No. 1, 2003

implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment."

74) The ACTU recommends that:

a) Schedule 2 be amended to *mandate* the establishment of permanent tripartite consultation arrangements within each jurisdiction, including tripartite sub-committees to address industry specific issues;

b) Compliance with ILO Convention 155 be included in the objects of the Model Act;

c) Section 47(2) of the Model Act be amended to ensure that workers who will be covered by agreed procedures for consultation have a right to be represented while such procedures are being negotiated;

d) The *Worker Representation and Participation Guide* be amended to illustrate how workers in a large firm can authorise representatives to represent them in negotiations with a PCBU or group of PCBUs in the process of negotiating for the formation of work groups pursuant to ss 50-53;

e) Section 52(2) be amended to place a maximum time-limit on negotiating a work group, for example, 3 months;

f) Section 48(c) requires that the views of workers are *taken into account* by the person conducting the business or undertaking. However, it is not clear what this means in practice. The Model Laws should be amended to include a requirement to document workers' views and the ways in which they have been considered.

Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

75) Workers and their representatives must have substantial input in protecting their health, safety and wellbeing at work. However, there is no shortage of research outlining why and

how traditional WHS consultation mechanisms and enforcement approaches often do not work in non-standard and precarious working environments.[35] HSRs continue to play a vital role in consulting with and advising workers and notifying unions and regulators of dangerous incidents or injuries occurring at the workplace.[36] As part of the ACTU's consultation process for its submission into the COAG review of WHS laws in 2014, workers from across Australia were surveyed to gain insight into their experiences with the Model Laws. In total, the survey received more than 450 responses. The results revealed that HSRs remain an important fixture at many workplaces across Australia, with 70% of survey respondents reporting the presence of an elected HSR at their workplace. This evidence suggests that the HSR system continues to be crucial to the effective operation of the Model Laws. However, there are a number of improvements that could be made to strengthen the role of HSRs and these are outlined below at Question 21.

76) Most problematically, due largely to changing work arrangements, many workplaces do not have a HSR at all. In the ACTU's submission, the correct regulatory response to this is to empower union Entry Permit Holders (**EPHs**) to take on the role of HSRs in such workplaces, to ensure that workers are not left without any form of representation. There is a broad body of evidence to suggest that worker representatives are one of the most effective means for making workplaces safer.[37] Worker and union participation at all levels plays a pivotal role in WHS legislation in Australia. Studies suggest that there is a positive relationship between indicators of strong WHS performance and workplaces with joint arrangements or union involvement in worker representation, or both.[38] The National Review acknowledged that effective participation and representation of workers were a crucial element in improving workplace health and safety performance.[39]

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[35] For example, Johnstone R, Regulating Health and Safety in 'Vertically Disintegrated' Work Arrangements: The Example of Supply Chains, Chapter in *The Evolving Project of Labour Law*, The Federation Press, May 2017

[36] For an overview of the extensive international evidence on the value of worker involvement in OHS and also the critical importance of collective/representative methods of participation see Walters, D. and Nichols, T. (2007) *Worker representation and workplace health and safety*, Palgrave Mcmillan, Basingstoke.

[37] Ayers, Gerry, F., 2011*, Consultation and Organisational Maturity in the Victorian Construction Industry*, PhD Thesis, University of Ballarat; Gill, C. 2009, Union impact on the effective adoption of high performance work practices, *Human Resource Management Review*, vol. 19, pp.39-50; Walters, D, & Frick, K, 2000, Worker participation and the management of occupational health and safety: reinforcing or conflicting strategies? in Frick, K., Jensen, P. L., Quinlan, M. & Wilthagen, T. (eds), *Systematic occupational health and safety management; perspectives on an international development,* Pergamon, Amsterdam;

[38] R Johnstone, M Quinlan and D Walters, Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market, The Journal of Industrial Relations, March 2005, Vol. 47(1), pp. 93–116.

[39] National Review, Second Report, Chapters 25 and 45

77) The ACTU recommends that:

a) **EPHs be given greater powers and responsibilities - including to consult, take recordings (including photographs, films, audio, video, digital or other recordings), issue PINs (or similar) and direct work to cease. The extension of these powers is essential to ensure that workers in non-standard and precarious work environments (likely without an elected HSR) can be effectively represented. Any new powers given to an EPH should be subject to review in the usual way.**

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

78) There are several simple improvements that should be made to strengthen the important role of HSRs in ensuring compliance with the Model Laws. Reforms are needed to ensure that HSRs are able to operate effectively and without interference, to ensure that HSCs function more effectively and more democratically, and to better meet the challenge of ensuring representation and participation in workplaces without elected HSRs.

79) The ACTU is particularly concerned that the current Model Laws place unnecessary restrictions on the training course that an HSR is entitled to attend. Clause 21 of the Model Regulations requires both the approval of the regulator and unnecessarily limits training to 5 days initially and 1 day per year each year after that. HSRs should be entitled to attend any training approved by the regulator on the provision of reasonable notice. HSRs should be entitled to choose their preferred training provider, as long as the course is approved by the regulator. PCBUs are required by the Model Act to allow HSRs to attend a course of training in work health and safety chosen by the HSR 'in consultation with the person conducting the business or undertaking.' The Model Laws should clarify that the requirement for consultation does not authorise a PCBU to veto a HSR's choice of provider, as long as the cost and location are reasonable and the regulator has approved the course.[40] If a PCBU objects to the course for any reason, they can ask the regulator to assist in finding a resolution. Otherwise, representatives may face unnecessary delays in attending their training if a PCBU refuses to allow the representative to attend a particular course. This is of particular concern given that currently representatives are unable to effectively exercise their rights until they have completed their training (NB the ACTU recommends the removal of this

[40] *Sydney Trains v SafeWorkNSW* [2017] NSWIRComm 1009

limitation – see below). In practical terms, if a HSR's training is delayed, they are powerless to stop dangerous workplace practices until training can be agreed on. This is obviously problematic and may act as a disincentive for a duty-holder to enroll a HSR into training as soon as possible. As HSRs are directly elected by their peers, the system would be more democratic if representatives were legally entitled to carry out their duties immediately upon election.

80) Training for all members of a HSC is recommended to ensure that HSRs and management can speak a common language and that both groups have a shared understanding of the legislation and other requirements. Under s 19(3)(f) of the Model Act, an employer must provide training 'necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking'. Despite this, research by the ABS has found that around one in three workers have received no training whatsoever in WHS risks.[41] Specialised, officer-targeted training would ensure that officers are properly educated on their responsibilities in relation to workplace safety.

81) The Maxwell Report recommended introducing 'roving' or regional HSRs. This system exists in other jurisdictions, including Sweden, where it assists in providing representation for workers in smaller businesses. In Australia, regional or roving representatives could fill the representation gap in workplaces which do not have a HSR for whatever reason. Roving representatives could be focused on particular industries, sectors or geographic areas. They could inspect workplaces, provide education and promote worker participation in WHS issues. Section 55 of the Model Act currently allows for the establishment of workgroups where two or more persons are conducting a business at more than one workplace. This structure could be adjusted to provide for a roving representative model.

82) The ACTU recommends that:

a) **The Model Laws are amended to allow HSRs to attend any course of WHS training that is approved or conducted by the regulator, on the provision of reasonable notice.[42]**

[41] Australian Bureau of Statistics, June 2011. *4102.0 – Australian Social Trends.* Accessed at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20Jun+2011

[42] See for example Victorian WHS Act, s 69(d)(ii)

b) A PCBU is expressly prohibited from conducting or interfering in election of HSR, with penalties for a breach.[43]

c) HSRs are permitted to take a minimum number of days per year off work per year to ensure that re-elected HSRs do not go for extended periods without training.[44]

d) The constitution of a HSC *must* be agreed between the person conducting the business or undertaking and the workers at the workplace.

e) A PCBU must, if asked by a worker, negotiate with the worker's representative in negotiations regarding the constitution of HSC.

f) Non-HSR committee members must be elected (under s 61 of the Act) by the workers they seek to represent.

g) The constitution of a HSC must address the functions of the HSC, including meeting processes such as timing, nomination of a Chair, minutes and attendance by the PCBU.

h) All HSC members, including officers, should undertake health and safety training.

i) Cancellation of HSC meetings must be actively discouraged by the Model Laws.

j) PCBUs must actively facilitate (not just allow) the attendance of HSC members particularly for remote, dispersed and shift workers.

k) A HSR should be authorised to direct that unsafe work cease and/or issue a PIN once they are elected, even if they have not yet completed the required training.

l) A worker should be able to cease or refuse work if it would expose the worker *or others* to a serious risk to health or safety. This would bring workers' rights into line with their obligations under ss 28 (a) and (b), which require a worker to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons, as well as themselves.

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[43] See *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company* (Services) Pty Ltd (No 4) [2012] FCA 894 for an example of an employer who refused to accept an employee's application to be a HSR.
[44] See for example South Australian WHS Act, s 72(1)

m) **The review should consider introducing 'roving' or regional HSRs to fill the representation gap in workplaces which do not have a HSR for whatever reason.**

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

83) Section 80 defines the parties to a dispute for the purpose of resolving WHS issues. There is some ambiguity created by this section regarding the role of unions. Section 80(1)(c) provides that if the worker or workers affected by the issue are in a work group, the HSR for that work group or their representative is the party to the dispute. Feedback from affiliates is that employers have been asserting that workers in a work group can *only* be represented by a HSR.

84) The ACTU recommends:

a) **The Model Laws be amended to clarify that even if a worker is in a work group, the worker or workers or their representative are parties to the dispute.**

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?

85) As outlined, the role of HSRs continues to be absolutely crucial to the effective implementation of the Model Laws. Discrimination, victimisation and bullying of HSRs completely undermines their role and the effectiveness of the entire WHS regime.

86) Feedback from affiliates is that HSRs are still regularly being subjected to discriminatory, coercive and misleading conduct. Workers in non-standard and precarious employment are particularly vulnerable.[45] Despite this, to our knowledge no regulator has taken action on any matter under Part 6 of the Model Laws to date, despite repeated breaches being brought to

[45] See for example, evidence provided to the Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report, August 2016 at p129

their attention. This problem is exacerbated by the lack of a union right of prosecution. [See response to Question 34].

87) The ACTU recommends that:

a) **Breaches of these provisions be upgraded to criminal offences, and strategies for more effectively enforcing these important provisions should be considered as part of the review of the NCEP.**

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

88) The importance of union involvement in the maintenance of WHS standards has already been outlined. A number of cases have considered the operation of the right of entry provisions. There are some amendments needed to improve the effectiveness of the right of entry regime.

89) **Firstly, action should be taken to ensure that WHS entry permit holders are recognised nationally, across jurisdictional borders.** EPHs should not be required to hold multiple different permits in order to perform their functions effectively. It is inefficient and inconsistent with the policy intention of national harmonisation of WHS laws. This amendment is required to strengthen the WHS regime's capacity to effectively monitor and enforce compliance when cross-border issues arise.

90) **Secondly, s 117 of the Model Act should be amended to clarify that an EPH who has lawfully entered a workplace under another law for a different purpose (e.g. to hold discussions with potential members under s 484 of the *Fair Work Act 2009*) may lawfully remain on the premises to investigate a suspected contravention of the Model Laws where they become aware of safety issues *after* the initial entry.**[46] It would be absurd and inconsistent with the objects of the Model Laws if an EPH with a reasonable suspicion of a breach had to exit a worksite and re-enter it simply in order to meet the technical requirements of the Model Act.[47]

[46] *CFMEU v Bechtel Construction* (Australia) Pty Ltd [2013] FCA 667 at [34]
[47] See Johnstone, Project 1, p 61

91) Thirdly, amendments should be made to ensure that:

a) **EPH's can also take video and voice recordings, photographs and measurements, conduct tests, and make sketches or other recordings;**
b) **EPHs can request the production of documents *post-inspection*;**
c) **EPH's can issue PINs (or similar) and direct work to cease.**

92) Lastly, strategies for more effectively enforcing breaches of EPH's rights of entry should be considered as part of the review of the NCEP.

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

93) As outlined, the primary problem is the failure of the enforcement strategy adopted by the regulators. A comprehensive review of the NCEP should be carried out in consultation with stakeholders. In addition, a number of amendments should be made to the Model Act to strengthen the powers of the regulator as outlined in this submission.

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

94) Workplace inspections are a crucial means of identifying workplaces where there are hazards and risks and seeking to eliminate those hazards and risks. Inspectors have significant powers under work health and safety laws including:

a) requiring answers to questions;
b) requiring production of documents;
c) seizing items for use as evidence of an offence;
d) issuing of improvement and prohibition notices.

95) The ACTU recommends that:

a) **Strategies to increase the number and effectiveness of inspections, including improving the training and qualifications of inspectors, should be considered as part of the review of the NCEP. This is especially important in workplaces without elected HSRs.**

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?

96) Part 12 provides for internal or external review of certain decisions made under the Model Laws. Section 223 sets out which decisions are reviewable and which people have standing to apply for review in each case ('eligible persons'). Feedback from affiliates in Victoria is that duty-holders have been using the process of internal review to get extensions of time to avoid taking compliance measures. The regulator's approval of the majority of these applications has meant that WHS breaches continue, endangering workers without consequence for the duty-holder. Regulators should support the inspectorate and HSRs by upholding the timelines they impose on duty-holders to remedy risks in their workplaces.

97) Additional feedback is that, due the complexity of the process involved in applying for review, in practice unions are required to assist members in almost every instance. **As such, unions should be defined as 'eligible persons' entitled to seek review of every type of reviewable decision listed at s 223 except for Items 5 and 6, which relate to the forfeiture and return of seized things.**

98) Tribunals assisting in the resolution of WHS matters should be made up of persons knowledgeable in health and safety matters in each jurisdiction. **The tribunals should be authorised to conciliate and arbitrate such disputes.**[48]

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

99) No comment at this time.

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

[48] See for example Queensland WHS Act, Schedule 2A

100) Section 152(g) of the Act empowers the regulator to engage in, promote and co-ordinate the sharing of information, including the sharing of information with a corresponding regulator.

'Phoenixing' and the corporate veil

101) In many industries, it is far too easy for companies to hide behind the 'corporate veil', including 'phoenixing' to avoid their liabilities for a WHS offence (see for example the recent example of AB Recycling).[49] Companies which routinely breach their WHS obligations often breach other laws and regulations. Current strategies, levels of coordination between relevant regulators and policy and legal responses are not sufficient to stop companies avoiding legal obligations. Strategies, mechanisms and forums to improve cooperation between WHS regulators and other relevant regulatory bodies, including ASIC, should be considered as part of the review of the NCEP. The review must examine a range of statutory initiatives to strengthen the ability of regulators to enforce the Model Laws against companies likely to go into liquidation or otherwise seek to avoid liability, including bans on being a director if liability for a serious breach is established by a court, personal liability for directors and shareholders where a company becomes insolvent because of a failure to maintain a safe work place, and amendments to the penalty regime to enable greater adherence to penalties administered for safety breaches through a full range of government options, including following the operations of the company and its directors, and licensing consequences.

Question 30: Have you any comments on the incident notification provisions?

102) Incident reporting is vital to the effective operation of WHS legislation. For example, reports of dangerous incidents (even when no injuries result) provide the regulator with valuable information about high-risk workplaces and sectors and can assist in developing strategic priorities. The reporting process also reinforces the importance of duty-holders' recording and taking account of 'near misses' as well as injuries. A notifiable incident is defined in the Model Laws as an incident involving the death of a person, serious injury or illness of a person, or a dangerous incident. Feedback from affiliates is that a range of serious incidents are not reported, including many in new, emerging or neglected areas of risk, such as occupational violence.

[49] Johnstone, R, National Research Centre for Occupational Health and Safety Regulation, Report to Safe Work Australia, *Sentencing of Work Health and Safety Offenders*

103) The ACTU recommends that:

a) **The definitions of 'notifiable incident', 'serious injury or illness' and 'dangerous incident' need to be reconsidered and redrafted to cover new, emerging or neglected areas of risk, including at least:**

i) **Psychosocial hazards, including stress, workplace bullying and fatigue (for example, by reinserting the requirement to report a 7 day or more absence);**
ii) **Occupational violence, including when it causes psychological harm as well as physical harm.**

Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

104) Enforcement is a crucial element of effective WHS regulation. It is an element which is currently failing to meet the challenges of the changing economy. Safe Work Australia's role is to develop policy dealing with compliance and enforcement of the Model Laws and to ensure that a nationally consistent approach is taken by WHS regulators in each jurisdiction. The strong feedback from our affiliates is that WHS regulators in Australian jurisdictions are currently not operating consistently or effectively to enforce compliance with the Model Laws, particularly in non-standard and precarious work environments and for certain types of breaches. This is exacerbated because, as outlined elsewhere in this submission, workers and unions do not currently have effective enough tools to 'police' duty-holders, including sufficient rights and powers for HSRs and EPHs and a union right to prosecute breaches. We of course appreciate that both Safe Work Australia and the regulators are constrained in what they can achieve by resource limitations, and we strongly encourage governments to ensure adequate funding and staffing to enable Safe Work Australia and WHS regulators to perform their important roles effectively.

105) The NCEP sets out the approach regulators are supposed to take to WHS compliance and enforcement, including the criteria used to guide enforcement decisions. In principle, the ACTU supports a national policy setting out a consistent set of principles and operating protocols to guide compliance and enforcement. However, the ACTU has serious concerns about the adequacy and effectiveness of the NCEP as currently drafted. Firstly, the NCEP lacks detail and specificity. It does not provide adequate guidance on when and how the

available compliance and enforcement tools should be used in practice. Secondly, the NCEP does not set out a comprehensive, effective enforcement strategy or methodology.

106) The NCEP states that *'regulators seek to use an effective mix of positive motivators, compliance monitoring and deterrents to encourage and secure the highest possible levels of compliance with work health and safety laws'*. The adoption of the constructive compliance model is reflective of a trend in policy development in regulatory bodies in many other like-minded countries. The ACTU does not oppose in principle the graduated compliance enforcement model. However, the balance between positive motivators and deterrence must be appropriate. Despite the legal requirement on regulators to secure 'compliance with the model WHS Act through effective and appropriate compliance and enforcement measures' [s 3(1)(e) of the Model Act], the overwhelming and consistent feedback from our affiliates is that regulators in all jurisdictions are disproportionately focusing on 'positive motivators' at the expense of deterring non-compliance through monitoring and enforcement activities. Voluntary compliance is being allowed over too long a period - the effectiveness of voluntary compliance activities should be more carefully monitored and outcomes documented. Importantly, a stronger response is needed when duty-holders repeatedly breach WHS laws. In particular, there are not enough prosecutions being undertaken. To be an effective deterrent, there must be a 'credible risk' of prosecution and this is not currently the case. For example, in Victoria less than 1% of accepted WorkCover claims result in a prosecution of an employer for failing to maintain a safe and healthy workplace.[50] Enforcement activity needs to be undertaken more often and earlier, in accordance with a clear strategic plan setting out priority areas for focus and performance indicators and targets.[51] While education and encouragement are undoubtedly important, they can never be a substitute for strong and consistent enforcement of the rules by the regulator.

107) The data kept by regulators on prosecutions is currently inadequate. Regulators should keep a common, publicly available database of completed prosecutions, including 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

[50] There are more than 20,000 injures per year, but less than 200 prosecutions per year.
[51] See also Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) WorkSafe Queensland pp 93-94

defendant, and the sentence imposed by the court. The database should also include links to all written court decisions.[52]

108) The NCEP should clearly articulate a national regulatory strategy to be adopted by regulators to determine their priorities for compliance and enforcement activities. Currently, the NCEP places the obligation to develop such a strategy on individual regulators. This approach does not do anything to encourage a consistent national approach or effective targeting of high-hazard, high-risk industries, occupations and sectors and common injury types. The NCEP must also include mechanisms and measurable indicators to ensure that regulators better understand how to achieve an appropriate balance between education and encouragement on the one hand, and enforcement activity on the other. The NCEP should set out more clearly the processes, expectations and consequences for non-compliance. The NCEP should also establish a process and mechanism for regular and meaningful consultation and information sharing between the regulators, rather than simply placing this obligation on individual regulators.

109) Crucially, effective enforcement strategies should address the underlying factors that lead to non-compliance and seek to change the behaviour of those actors at the top of the chain which affect the way in which markets operate. An effective enforcement strategy must ensure that companies at the top of complex industry structures (such as franchising, labour hire, supply chains and other such arrangements) are held accountable for the health and safety of workers all the way through these structures, and are not able to shift health and safety risks to smaller businesses and individual workers who are less able to bear the risks. The focus of the regulators should be on sectors and industries where there are large numbers of vulnerable employees (e.g. low paid and with limited capacity to complain), and deterrence should be prioritised. Prosecutions should target serious and repeated breaches, and/or breaches by high-profile or influential duty-holders and market-leaders. Regulators should pursue more enforcement action, including prosecutions, in relation to failures to consult with workers and their representatives, breaches of the right of entry provisions and the discrimination/victimisation protections. Consultation and participation is crucial to the effectiveness of the Model Laws, but the feedback from our affiliates is that these obligations

[52] Johnstone, R, National Research Centre for Occupational Health and Safety Regulation, *Project 2: Sentencing of Work Health and Safety Offenders*, Report to Safe Work Australia, Recommendation 1

are not adequately supported by the regulator and are therefore not taken seriously by employers.[53]

110) Another important way in which non-compliance is deterred by regulators is the publishing of information regarding the nature and outcome of compliance and enforcement activities. Although not as effective as the risk of sanctions such as prosecutions, the need to maintain a good corporate image can be an effective motivator for some duty-holders, and the ACTU submits that Australian WHS regulators could utilise this tool much more effectively.[54] Safe Work Australia should develop a communications strategy to assist regulators to use this tool more effectively. The use of publication as a strategy by the FWO and the Health Safety Executive in the UK should be considered.

111) Some of the recommendations from the Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria are worth consideration during a review of the NCEP, including:

a) Publication of an annual WHS compliance and enforcement plan that sets out strategic compliance and enforcement priorities, activities and performance targets for that year;
b) Enhancement of engagement with stakeholders, including obtaining their input into development of strategies and programs to address identified risks and priorities;
c) Publication of a research agenda which clearly identifies Safe Work Australia's research priorities and how they are practically linked to the achievement of strategic compliance and enforcement priorities.

112) The ACTU recommends:

a) The immediate commencement of a review of the NCEP - in consultation with stakeholders - to ensure that the NCEP sets out a comprehensive, effective enforcement strategy.

[53] See also Victorian Government, Report of the Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria, November 2016, Recommendation 14
[54] K Purse, D Dawson, J Dorrian, *The Deterrent Effects of OHS Enforcement - A Review of the Literature*, University of South Australia, March 2010 at pp 37-39

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

113) See our answer to Question 31 above. As the population and workforce grows in size and working arrangements continue to increase in complexity, the number of workplaces without HSRs or union representation is also likely to increase. Regulators should plan to increase the capacity of their inspectorates (including improving the quality and training of inspectors), and the number of workplace inspections, to manage this. Inspections should be based on a proactive strategic plan and focused on sectors and workplaces identified as problematic or high-risk. A consistent approach should be taken in similar fact situations and circumstances to achieve consistent outcomes. Inspections under the Model Act can be initiated by the regulator or required by the Act, for example in response to a disputed PIN, a cease work, a request for attendance under Section 75 or a notifiable incident etc. The manner in which inspectors conduct themselves, consult with HSRs and employers, reach decisions and follow up are crucial in resolving these WHS matters satisfactorily. Our affiliates have provided feedback that HSRs do not feel that inspectors consult with them effectively enough or at all during inspections. This matter should be considered as part of the review of the NCEP.

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

114) Monetary penalties are likely to continue to be the principal sanction for offences under the Model Laws, so it is essential that they are set at appropriate levels. Currently, financial penalties for breaches of the Model Law are inadequate to act as a deterrent. Breaches of corporate governance laws, consumer laws and environmental protection laws (for example) may attract higher penalties than breaches of the Model Laws. This is unacceptable and sends a message to companies that breaches of WHS duties are somehow considered less serious. Offences affecting consumers and the environment are properly regarded as very serious. However, offences under the Model Laws must be considered at least as serious given the very real potential for them to cause death and harm to human beings. Penalties under the Model Laws currently do not meet community expectations and must be reviewed and increased to ensure that they are appropriate given the grave consequences of breaches, and are commensurate with penalties applicable in other jurisdictions.

115) Large businesses in particular must bear penalties which are appropriate to their size, in order to achieve specific and general deterrence. Courts should be able to impose larger

penalties depending on the size of the business which has committed the offence, based for example on a percentage of annual turnover. This would be consistent with the approach taken by other corporate regulators. For example, the Australian Competition and Consumer Commission (ACCC) has recently announced an intention to seek bigger fines for big business in an attempt to change corporate culture.[55]

116) The inadequate deterrent effect of low maximum penalties available under the Model Laws is exacerbated by the fact the level of fines imposed by courts is consistently low, even for the most serious of breaches. For example, in NSW from 2014-16, penalties for breaches resulting in fatality have averaged just 12% of the maximum fine.[56] This is further compounded by the lack of capacity for unions to pursue legal action for breaches of the Model Laws, the failure of the current enforcement strategy, the absence of an offence of industrial manslaughter and the ability for companies to insure against any fines that may be imposed.

Industrial Manslaughter

117) From 2003 to 2016, at least 3,414 workers lost their lives in work-related incidents in Australia. In 2017, 184 workers were killed at work, compared with 182 workers in 2016. As at 20 April, 40 workers have been killed at work already this year.[57] As outlined earlier in this submission, competitive pressures and work intensification have led to the proliferation of non-standard and precarious forms of employment, particularly in the transport and construction industries. These pressures often result in 'corner-cutting' on WHS in order to meet deadlines, which can have fatal consequences for workers and others.[58] Changing work relationships have also made establishing responsibility in the workplace much more difficult. In this environment, the current legislative framework is insufficient to deter or adequately punish occupational fatalities. While all jurisdictions have criminal provisions under which an officer responsible for a workplace death could in theory be prosecuted, they require proof of fault by a high-level manager or director, which is difficult to establish in large corporations with complex corporate structures. It is very challenging to establish that a corporate entity

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[55] See the *Treasury Laws Amendment (2018 Measures No.3) Bill 2018*, which will increase the penalty for breaches of the Australian Consumer Laws by a company from $1.1 million to $10 million, or 10 per cent of turnover. Fines for individuals will increase from $220,000 to $500,000.
[56] UnionsNSW, Submission to the First Statutory Review of the Work Health and Safety Act 2011, 31 December 2016 at [8]
[57] Safe Work Australia, Fatality Statistics, accessed 20 April 2018
[58] Underhill, E (2013) *"The Challenge to Workplace Health and Safety and the Changing Nature of Work and the Working Environment"* in Teicher, J, P Holland and R Gough *Australian Workplace Relations* Cambridge University Press Sydney 2013

has a 'guilty mind'.[59] In the absence of an offence of industrial manslaughter, criminal prosecutions of corporate entities remain elusive and therefore do not act as an effective deterrent. In addition, traditional criminal law only provides for imprisonment for serious offences, whereas an offence under the Model Laws could also allow for the imposition of fines. The purpose of creating an offence of industrial manslaughter would be to hold officers of a corporate entity responsible where such a person causes, or substantially contributes to, the death of another through a negligent act or omission. In the ACTU's submission, the introduction of a new offence of industrial manslaughter will provide a strong incentive to businesses with poor practices to improve.

118) The ACTU submits that is reasonable, necessary and appropriate to include a new offence of industrial manslaughter in the Model Laws in order to change workplace cultures and prevent workplace deaths. This reform is long overdue and must be given serious consideration by this review. Two Australian jurisdictions already have industrial manslaughter provisions. In 2004, the ACT became the first jurisdiction in Australia to introduce an offence of industrial manslaughter via the *Crimes (Industrial Manslaughter) Act 2003*, which added a new Part 2.5 to their Criminal Code. 'Industrial manslaughter' is defined as causing the death of a worker while either being reckless about causing serious harm to that worker or any other worker; or being negligent about causing the death of that or any other worker. On 12 October 2017, the Queensland Parliament introduced new industrial manslaughter provisions into their WHS legislation. Under these laws, a PCBU found guilty of industrial manslaughter may be liable for a fine of up to $10 million, while an individual may be liable to a term of up to 20 years' imprisonment.

119) There are two new criminal offences of industrial manslaughter: for a 'PCBU' and/or a 'senior officer', if:

a) a worker dies (or is injured and later dies) in the course of carrying out work;
b) the person conducting a business or undertaking (PCBU) or senior officer's conduct (either by act or omission) causes the death of the worker; or
c) the PCBU or senior officer was negligent about causing the death of the worker by the conduct.

[59] Clough, J (2007) "A Glaring Omission? Corporate Liability for Negligent Manslaughter" 20 *Australian Journal of Labour Law* 29; Hall, A and R Johnstone (2005) 'Exploring the Re-Criminalisation of OHS Breaches in the Context of Industrial Death' *Flinders Journal of Law Reform* 57.

120) A senior officer is defined as:

a) an executive officer of a corporation (i.e. a person who is concerned with, or takes part in, the corporation's management); or
b) for a non-corporation, the holder of an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of a PCBU's functions.

121) Prior to introducing the provisions, Parliamentary Committees in both jurisdictions[60] considered in detail the arguments for and against introducing a new offence of industrial manslaughter and found that the reform was warranted in both cases. The main arguments *against* the reform put by employer groups and others are summarised and addressed below.

122) Opponents of the reform argue in essence that:

a) *The reform is unnecessary. Deaths in the workplace have been declining steadily over the last decade;*
b) *The existing law is adequate. Prosecutions are not easy but they are not impossible under the criminal law. Creating a new offence will be duplicative and create confusion.*

123) Neither argument withstands scrutiny. Any death at work is unacceptable. While it is correct that there is currently no evidence to suggest that the problem of fatalities at work is *worsening*, there is also no evidence to suggest that it is a problem that is disappearing, or that is likely to be solved without additional regulatory measures. While recognising that the number of cases which may arise out of a new offence of this nature is likely to be small, this is not a valid reason not to implement the reform. A new offence would complement and strengthen the existing personal liability provisions in the Model Act by acting as a strong deterrent against the worst kind of WHS failures. The creation of the offence would convey the important message that WHS failures can and do have the most serious of consequences and, if this occurs, those responsible will be held accountable. We strongly submit that a new offence of industrial manslaughter would be highly effective in promoting awareness and understanding of duties to provide a safe workplace and ensure that these duties are taken seriously.

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[60] ACT Standing Committee on Legal Affairs, *Crimes (Industrial Manslaughter) Amendment Bill 2002*, Report No. 6, September 2003; Queensland Parliament Finance and Administration Committee, *Work Health and Safety and Other Legislation Amendment Bill 2017*, Report No. 46, 55th Parliament, October 2017

124) In its report, the ACT Standing Committee on Legal Affairs concisely summarised the problem with the existing criminal law as follows:

> *Establishing the criminal liability of a corporation requires establishing the intent of the corporation (which cannot have a 'mind of its own') by attributing to it the actions, omissions or motives of a director or senior officer, being the guiding mind of the corporation. This has proven difficult in the past.*
>
> *Prosecutions of corporations under the current law, even if successful, have been considered unsatisfactory because appropriate penalties are not available. Imprisonment is the only penalty for manslaughter. This is of no use where the offender is a corporation – a legal entity not a natural person.*[61]

125) The difficulty of achieving a successful prosecution under the general criminal law means that they cannot possibly act as an effective deterrent. Company officers and their legal representatives know full well that the likelihood of personal liability for an occupational death is so remote as to be non-existent. Those responsible for high-level decisions around unsafe work practices must feel that they will be held accountable for negligent breaches of the Model Laws which cause death, otherwise their conduct is unlikely to change. It is well accepted that the real threat of personal prosecution provides significant motivation for officers of companies to take steps to comply with their legal obligations.[62]

126) In the ACTU's strong submission, a new offence of industrial manslaughter - if effectively publicised and prosecuted - will deter the negligent conduct that is leading to workplace fatalities. This approach is proven to work in other comparable circumstances. For example, a concerted and successful effort has been made by regulators to 'de-conventionalise' (i.e. bring about the necessary change in attitudes, culture and behaviour to reduce the occurrence of) road deaths - particularly those associated with drink driving - through the rigid application of penal sanctions. A similar approach can and should be taken in relation to deaths at work caused by negligence.[63]

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[61] Report at 1.4 and 1.5
[62] See for example, Wheelwright, K (2016) "The Prosecution of Officers under the Model Work Health and Safety Legislation" *Journal of Health, Safety and Environment*, 32 (1)
[63] See for example 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) and Hall, A

127) As noted by the Queensland Parliament Finance and Administration Committee, while the introduction of a new offence in WHS law will overlap to some degree with the existing criminal law, it is to be expected that in practice, conduct causing the death of a worker will be pursued under the WHS law unless the Police wish to progress manslaughter charges instead.

128) There is a question about how a new offence would interact with existing Category 1 offences. Under the current framework, a Category 1 offence is committed where a person recklessly (i.e. through a rash or careless act or omission) exposes an individual to death or serious injury, regardless of the actual outcome. A new offence of industrial manslaughter offence would apply only in circumstances where the *outcome* of the conduct is that a worker dies, or is injured and later dies as a result of that injury. If the person's negligent conduct causes the death of the worker, the person may be prosecuted for industrial manslaughter. The standard of criminal negligence would apply, meaning that the prosecution must prove beyond reasonable doubt that the person's conduct departs so far from the standard of care expected to avoid danger to life, health and safety, and the conduct substantially contributed to the death.

129) The ACTU recommends the adoption of provisions based on the existing Queensland provisions, with the amendment that the offence should include *any person* killed by the negligence of the PCBU. This would be consistent with a PCBU's duty under s 19(2) and would cover situations like the fatal wall collapse at the Grocon site in Carlton, Victoria in 2014, which killed three pedestrians. It also addresses the challenges present in the building and construction industry, which is characterised by numerous principal contractors and subcontractors working alongside each other at a worksite. In such circumstances, it is reasonably foreseeable that a PCBU may negligently cause the death of a worker who carries out work for *another* PCBU. The amendment to s 19 proposed earlier in this submission would also address this situation. The ACTU's recommendation regarding amendments to the definition of officer is equally applicable to this new offence.

130) The ACTU recommends that:

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and R Johnstone (2005) 'Exploring the Re-Criminalisation of OHS Breaches in the Context of Industrial Death' *Flinders Journal of Law Reform* 57.

a) **The Model Act be amended to include a specific offence of causing the death of a worker or another person in the workplace through a negligent act or omission. The offence should apply to duty-holders and officers [see discussion about the definition of 'Officer' at Question 13 above] and should be subject to the harshest penalties, including substantial periods of imprisonment.**

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

131) The ACTU is deeply concerned about the steep decline in prosecutions under WHS legislation over recent years.[64] For example, sections 144 and 145 of the Model Act prohibit interference with or obstruction of a permit holder. Despite many contraventions being brought to the attention of the NSW Regulator there has not been a single prosecution in 5 years. As noted already, changing work arrangements, including the growth of small and transient workplaces, present serious challenges to achieving compliance with WHS legislation. The logistical load on inspectorates is now much greater due to difficulties in locating workplaces and duty-holders. Safe Work Australia must develop a strategic national approach to prosecutions to guide WHS regulators. As part of the review of the NCEP, the criteria used to determine whether or not a regulator prosecutes a case should be reviewed and tripartite consultation embedded at all stages of the process.

132) However, while stronger, more effective regulators are crucial, they cannot alone address the vast enforcement challenges posed by a changing economy. A stronger role for unions is a crucial aspect of effective deterrence of breaches. The importance of a genuine tripartite approach to WHS compliance and enforcement cannot be overstated. Tripartism has a long history in Australia and is widely recognised as being advantageous to improving WHS standards. It is beyond doubt that a strong and robust WHS framework must be built on a tripartite approach.[65] It is an essential aspect of effective system for the prosecution of offences under the Model Laws that trade unions having a legitimate interest in the circumstances of an offence be permitted to prosecute. It is critical the entitlement to

[64] Over the last 10 years there has been a steady decline in the number of legal proceedings and fines issued. See Discussion Paper, Figure 6, pp 37-38

[65] Johnstone, R, Occupational Health and Safety Law and Policy, Text and Materials, 2nd Ed., Thomson Legal, 2004 P. 131 & South Australia, Report of the Occupational Safety, Health and Welfare Steering Committee, Volume 1, The Protection of Workers' Health and Safety (1984); Lord Robens, Report of the Committee on Safety and Health at Work 1970-1972; ILO Occupational Safety and Health Convention, 1981 No.155, Article 4 & Article 15

prosecute extend beyond regulatory authorities, in part because of inconsistencies and differences in prosecution practices between jurisdictions.[66]

Union Enforcement

133) Under the Model Laws, unions cannot bring prosecutions and the Minister cannot authorise a prosecution by an individual. 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.

134) The ACTU strongly submits that unions must have standing to bring proceedings for offences under the Model Act in circumstances where they have a member concerned in the breach in question. There should be no requirement for the regulator or the DPP to review a decision to commence a prosecution (as there currently is in NSW), as long as an Australian legal practitioner lodges the application on behalf of the union. Additionally, a court should not be prohibited from allowing the moiety portion of any penalty to be directed to the industrial organisation, where it can be shown that the fine will used in accordance with the rules to better the interests of members. The Model Laws should include a limitation period of 3 years for the commencement of proceedings for offences. This will ensure that proceedings are commenced in a timely manner, but provide sufficient time to investigate and prepare complex proceedings. A variation to the standard time limit should be able to be sought in special circumstances.

135) A right for trade unions to commence prosecutions operates as an important supplement to address circumstances in which regulators are unwilling or unable to prosecute contraventions. As the ACTU has outlined previously,[67] the independent right of trade unions to prosecute WHS offences serves important functions, including:

a) It maximises the efficient use of resources by permitting trade unions with extensive experience in a particular industry or workplace to deploy resources in a manner calculated to bring about organisational and cultural change to improve health and safety;
b) It further encourages trade unions to be actively involved in WHS management and has the potential to encourage employers to actively involve trade unions in the management of WHS concerns.

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[66] Johnstone, R, National Research Centre for Occupational Health and Safety Regulation, Report to Safe Work Australia, *Sentencing of Work Health and Safety Offenders*
[67] ACTU Submission to the National Review Into Model Occupational Health and Safety Law, 11 July 2008 at p 56

136) A qualified right of private prosecution (i.e. by a person other than a public official) for criminal matters exists at common law.[68] While it is not a common part of contemporary Australian criminal law practice, it also exists in statutory regimes such as environmental law. In the ACTU's strong submission, it is reasonable, justified and necessary to confer a right of prosecution on workers affected by a breach of the Model Laws and their unions. WHS Law is not traditional criminal law, and unions are equipped with a deep knowledge of the WHS issues confronting particular workplaces, industries and sectors. Additionally, the inspectorate may have limited visibility of WHS breaches, particularly in 'non-standard' workplaces, and limited resources to pursue all breaches worthy of prosecution. The option of union prosecutions also addresses the potential conflict of interest presented by a state regulator having to enforce compliance by government PCBUs. There is strong evidence that union prosecutions are effective in bringing about cultural and organisational change and do not present a risk of misuse. For these reasons, a state monopoly on prosecutions for breaches of WHS laws cannot be justified.

137) Union secretaries had standing to bring a prosecution under NSW laws from 1983 until 2011, when the right was curtailed. There is absolutely no evidence of abuse of the right during that period of time.[69] In fact, all prosecutions commenced by unions under the NSW legislation were successful. Union-initiated prosecutions are subject to the same legal checks and balances as any other prosecution. Prosecutions are invariably conducted by experienced legal practitioners who have professional obligations as officers of the Court that require adherence to the obligations applying to prosecutors in all criminal proceedings. The conduct of prosecutions is also subject to the supervision of the Court. If a prosecution is instituted or maintained or conducted in an improper manner, the Court can take appropriate action to dismiss the proceedings and order the union to pay costs. In the usual way, cases which are frivolous or vexatious are not permitted to proceed, and courts determine the merits of all matters which do proceed in accordance with established and transparent principles. The cost, complexity, delays and risk associated with legal proceedings operate in the usual way to deter unmeritorious actions.

[68] *National Review Into Model Occupational Health and Safety Laws*, Second Report, January 2009 at p 418
[69] Stein Inquiry, pp 127-128.

138) In both NSW and NZ,[70] the right of prosecution has been used by union secretaries sparingly and successfully and has resulted in systemic and industry-wide improvements in safety standards, conferring a significant and lasting benefit on workers, duty-holders and the public more broadly. In particular, trade unions have been able to assist in bringing cases that addressing emerging areas of concern such as psychological injuries, repetitive strain injuries and the commission of criminal acts in the workplace, and in relation to high-risk sectors.

139) The ACTU submits that the pre-harmonised NSW legislation struck an appropriate balance between the promotion of workplace safety, the encouragement of participation in WHS management and the appropriate protection of defendants. Unions are already empowered to commence proceedings seeking the imposition of penalties for contraventions of industrial laws affecting the interests of their members. For example, trade unions have the capacity to bring proceedings for contraventions of the *Fair Work Act 2009*. While these proceedings involve the imposition of civil rather than criminal sanctions, contraventions can give rise to very substantial monetary penalties. This has not undermined the capacity of employers and unions to work together to ensure compliance with industrial laws.

Partial Reverse Onus of Proof

140) Generally, a person should not be criminalised for committing an act until the prosecution can prove a 'guilty mind'. However, a number of laws, including the Model Act [s 12F(2)], impose 'absolute' or 'strict' liability for offences, meaning that proof of a guilty mind or fault is not required. The creation of offences of absolute or strict liability is common under corporate, environmental and WHS legislation for example, which seek to deter certain behaviour for a compelling social purpose, such as protecting the health and safety of people at work. Under the Model Laws, strict liability applies to non-compliance with a duty of care, qualified by a standard of reasonable practicality. The question which must be revisited by this review is how the primary duty of care is framed [see our response to Question 11] and which party should bear the burden of proving that the standard of reasonable practicality has been met. Under the Model Laws, the regulator is required to prove all elements of a breach, including that the duty-holder has *not* taken reasonably practicable measures, or

[70] Unions have had the right to prosecute in New Zealand for approximately 15 years. During that time, only a handful of prosecutions have proceeded to final determination, including two successful prosecutions in the forestry industry after 13 forestry workers died in one year: http://www.scoop.co.nz/stories/AK1508/S00251/ctu-wins-second-forestry-private-prosecution.htm; https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11522865.

The ACTU's submission to the National Review details case studies of union prosecutions in NSW.

exercised due diligence in the case of an officer, to prevent the breach. This is unreasonably onerous and has, predictably, made it more difficult for prosecutions to succeed.[71]

141) The National Review Panel justified the removal of the reverse onus (and the right to union prosecutions) that had previously existed for NSW and Queensland workers by referring to 'substantial' increases in the size and range of penalties in the Model Laws. Notwithstanding the ACTU's view that penalties remain inadequate to deter breaches, particularly for large corporations, the deterrent effect of any penalty is almost entirely undermined if the legal framework makes it too hard to successful prosecute breaches.

142) In *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92, the judge considered the meaning of reasonably practicable in the context of a prosecution of PCBU for a breach of their duty to ensure the safety of workers. The judge held that the prosecution needed to prove the following elements beyond a reasonable doubt:[72]

a) That a risk arose from work carried out as part of the business or undertaking; and
b) That the measure particularised in the summons would cause that risk to be eliminated or minimised; and
c) In all the circumstances (including but not limited to those listed in the legislation) it was reasonably practicable for the PCBU to adopt the measure.

143) In the ACTU's submission, it is unreasonably onerous for the prosecution to bear the burden of proving these *all* these matters beyond a reasonable doubt. The onus of demonstrating that it was not reasonably practicable to reduce or eliminate the risk occasioning the offence must be borne by the defendant. The matters required to prove whether or not a duty-holder has taken reasonably practicable measures are matters entirely within the duty-holder's knowledge. The duty-holder is in the best position to provide evidence of the conduct engaged in and the reasons for it. While no Australian jurisdiction currently has a partial reverse onus of proof for duty of care offences, Queensland and NSW previously had such provisions. Under the model in those jurisdictions, the prosecutor was still required to prove non-compliance with the elements of the offence beyond a reasonable doubt, but the onus was on the defendant to make out a defence on the balance of probabilities.[73] The

[71] Stats on reduced prosecutions
[72] This has been confirmed by the High Court. See for example *Slivak v Lurgi Pty Ltd* [2001] 205 CLR 304.
[73] Breen Creighton, Reasonable Practicability and the Reverse Onus: Executive Summary of Discussion Paper prepared for the Victorian WorkCover Authority

NSW legislation did not include the qualifier of reasonable practicability in the duty of care, but included it as a defence to duty of care offences. The onus was on a duty-holder to prove (on the balance of probabilities) that it was not reasonably practicable to comply with the law or that the offence resulted from causes outside the defendant's control. In Queensland, a duty-holder could seek to prove (on the balance of probabilities) that it had applied a relevant Code or Regulation or taken other reasonable precautions and exercised proper diligence to prevent the contravention. In the UK, the *Health and Safety at Work etc Act 1974* places a similar onus on an employer to make out a defence on the balance of probabilities.

144) The ACTU recognises that this is a contentious matter. The right to be considered innocent until proven guilty is a fundamental aspect of the right to a fair trial. However, like most human rights, it can be limited if the limitation is reasonable, necessary, justified and proportionate in the circumstances. The ACTU submits that the partial reverse onus is clearly necessary and justified in this case because of the public interest in ensuring the health and safety of people at work.[74] The measure is proportionate and reasonable in light of the practical difficulty of achieving successful prosecutions when the PCBU has, by definition, all or most of the relevant evidence regarding its own conduct in its possession or control. It is not unfair or unreasonable to require a PCBU to demonstrate to a court how and why it had a reasonable excuse for non-compliance.

145) Courts have considered the reasonableness of a partial reverse onus when it is associated with legislation aimed at achieving a compelling social purpose. For example, the English Court of Appeal has considered whether the reverse onus in UK WHS Act was incompatible with the presumption of innocence enshrined in the European Charter of Human Rights. In *Davies v Health and Safety Executive* [2002] EWCA Crim 2949, the Court found the imposition of the legal burden of proof on employers was justified, necessary and proportionate having regard to the social and economic purposes of the legislation, that duty holders are persons who have chosen to engage in work or commercial activity and that the facts relied upon in support of the defence will be within the knowledge of the defendant. The Court said (at [25]): *The reversal of the burden of proof takes into account the fact that duty holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it. They are not therefore unengaged or disinterested members of*

[74] The ACTU also draws the reviewer's attention to the detailed submission of Professor Ronald McCallum, Dean of Law at the University of Sydney to the Stein Review into NSW OHS law. In hat submission, Professor McCallum reviews the case law on the application of the reverse onus of proof in the United Kingdom and Australia and concludes that the approach is not a breach of human rights, nor has it placed an onerous burden on employers.

the public and in choosing to operate in a regulated sphere of activity they must be taken to have accepted the regulatory controls that go with it. This regulatory regime imposes a continuing duty to ensure a state of affairs, a safety standard. Where the enforcing authority can show that this has not been achieved it is not "unjustifiable" or unfair "to ask" the duty holder who "has" either created or is in control of the risk to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it.

146) In *R v Wholesale Travel Group* (1991) 3 SCR 154, the Canadian Supreme Court explained why a reverse onus of proof was justified, fair and reasonable in the context of regulatory legislation creating criminal offences:

> *If the false advertiser, the corporate polluter and manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on a balance probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society.*

147) In addition, the earlier NSW model has been repeatedly endorsed by a series of inquiries into WHS legislation in that State, including the 1995 Federal Industry Commission Report, the 1997 McCallum Report, the Report of the 1998 NSW Parliamentary Inquiry and the Stein Report.

148) The ACTU recommends:

a) **Amendment of the Model Act 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.**

Declaratory Orders

149) A court does not have the power to make a declaratory order unless parliament has expressly authorised them to do so. There is no good reason why the full range of remedies should not be available to a successful claimant in civil proceedings under the Act. Declaratory orders can be a flexible, inexpensive and effective way in which to resolve a WHS dispute. **Section 112 should be amended to empower a tribunal to make a declaratory order.**

Category 1 Offences

150) It has proven too difficult to prove the recklessness required for a Category 1 offence. **The standard should instead be gross negligence. Alternatively, it should be clarified that the prosecution can prosecute category 1 and category 2 offences in the alternative in any one prosecution.**[75]

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

Specialist Courts and Tribunals

151) There are significant differences between the jurisdictions in which the model WHS Act has been implemented in relation to the type of court in which the prosecution is conducted.[76] **Prosecutions for offences under the Model Laws should be heard in specialist courts by judges with expertise and experience in industrial and WHS matters.** This approach would enable the effective identification and consideration of systemic failings that may be occurring in a workplace, industry or sector, which is vital to the effective enforcement of WHS matters. General criminal courts are traditionally concerned with a particular act or omission of an individual, making them less suited to the determination of offences involving systemic failings and the liability of corporate employers.[77] Proceedings brought in specialist industrial courts are likely to be more efficient and cost-effective and improve the quality and consistency of the interpretation of the Model Laws and sentencing outcomes. The use of specialist industrial courts benefits all persons involved in proceedings under occupational health and safety legislation, including prosecutors, victims and their families and defendants.

Sentencing Guidelines

152) The main objects of the sentencing process are specific and general deterrence. Although the prosecution process is similar across jurisdictions, there are substantial differences between jurisdictions in terms of the courts that hear WHS matters, the maximum penalties available and the options available under general sentencing legislation (if any). For example, in New South Wales, the Commonwealth and the ACT, a court may decide to make an order

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[75] Johnstone, R, National Research Centre for Occupational Health and Safety Regulation, *Project 2: Sentencing of Work Health and Safety Offenders*, Report to Safe Work Australia, pp 8, 24 and 25
[76] Regnet Project 2
[77] See for example *Haynes v C I & D Manufacturing Pty Ltd* (1995) 60 IR 149 at 157 and *Drake Personnel Ltd (t/as Drake Industrial) v WorkCover Authority (NSW)* (1999) 90 IR 432 at 452-454; and McCallum, Hall, Hatcher and Searle, *Report to WorkCover Authority of NSW* (2004) at [125]-[127].

without a conviction, and can dismiss the charge, or discharge the person on condition that the person enter into a good behaviour bond for a term not exceeding two years or enter into an agreement to participate in an intervention program. On the other hand, in Queensland where a court finds the charges to be proved, there is a conviction. The court has, however, a discretion not to record the conviction, and can also impose penalties, including fines and the kinds of non-pecuniary sanctions set out in sections 236 to 241 of the Model Act. Notwithstanding the fact that the court does not record a conviction, the fact that the defendant was 'convicted' may be taken into account by subsequent sentencing courts, and by the prosecuting authorities in later proceedings. **The ACTU considers that national sentencing guidelines (developed in consultation with stakeholders) to guide the consistent administration of justice under the WHS regime would be valuable and should be recommended by this review.**

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

153) Enforceable undertakings are written, legally binding agreements in accordance with which a person agrees to take certain actions to rectify an alleged breach of the law or improve their performance through the implementation of initiatives intended to benefit workers, industry and the community. Enforceable undertakings are an alternative to court-imposed sanctions and, when properly utilised, can achieve long-term, sustainable improvements to WHS culture and practice in workplaces and across sectors. In particular, enforceable undertakings enable a regulator to apply a graduated approach to compliance and enforcement, by allowing customised workplace or industry improvement plans while reserving the right to pursue enforcement action if the PCBU fails to comply with the plan. Enforceable undertakings can be accepted for contraventions or alleged contraventions of the Model Laws, except in relation to a Category 1 offence for reckless conduct. The Model Laws are silent on the applicability of enforceability undertakings when a Category 2 offence results in a fatality or serious injury. The ACTU is supportive of enforceable undertakings being available to the regulator, but only if they are subject to appropriately strict guidelines and their usage is consistently monitored. They should only be considered when the defendant admits guilt and unions and workers have been consulted with.

154) Enforceable undertakings can be effective in driving genuine improvement in WHS systems and outcomes. For example, in consultation with the AEU, the Victorian Department of Education and Training has entered into enforceable undertakings as an alternative to prosecution, under which it has committed to - and delivered - the implementation of state-

wide systems for WHS auditing, management and training. Ongoing co-operation and consultation with the AEU was a significant aspect of the success of this particular enforceable undertaking. However, when overused or misused, enforceable undertakings have the potential to undermine compliance. An enforceable undertaking applied in relation to a breach by North Sydney Local Health District provides an example. In that case, the District had failed to disclose asbestos records or supervise a number of sub-contractors, resulting in a potential asbestos exposure. The relevant unions had been raising concerns about the failure to adequately manage asbestos risks for a number of years leading up to the incident, with management as well as the department and the Minister. Despite this, the enforceable undertaking was negotiated without the involvement of the union. As a result, the enforceable undertaking did not result in the implementation of systems to effectively and meaningfully address the District's asbestos management issues.

155) The ACTU recommends that:

a) **The Model Laws be amended to <u>prohibit</u> enforceable undertakings in the following circumstances, except where exceptional circumstances exist:**
   i) **the contravention is connected to a fatality,**
   ii) **the contravention involves reckless conduct,**
   iii) **the applicant has a recent prior conviction connected to a work-related fatality, or**
   iv) **the applicant has more than two prior convictions arising from separate investigations.**[78]

156) As part of the review of the NCEP, national guidelines on the appropriate use of enforceable undertakings should be developed in consultation with stakeholders.

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

157) The deterrent effect of penalties is almost entirely undermined if insurance companies, rather than duty-holders themselves, are able to pay fines imposed. Under the Model Laws, there is no provision expressly prohibiting contracts providing liability insurance against WHS penalties. Section 272 provides that a term of any agreement or contract that purports to

[78] See Victoria's *Policy on Enforceable Undertakings* pursuant to section 16 of the *Occupational Health and Safety Act 2004*

exclude, limit, modify or transfer any duty owed under the Act is void. However, it is not clear whether a contract for directors' and officers' liability insurance indemnifying for penalties under the Model Laws would be a contravention of s 272, and this matter is yet to be considered by the courts. As a matter of practice, corporations are readily able to, and frequently do, insure against WHS penalties. As a consequence, it is predominantly insurance companies rather than duty-holders paying fines following successful prosecutions.

158) While no Australian jurisdiction currently prohibits contracts providing liability insurance against WHS penalties, s 29 of New Zealand's *Health and Safety at Work Act 2015* provides a precedent. In New Zealand, an insurance policy or a contract of insurance which indemnifies or purports to indemnify a person for the person's liability to pay a WHS fine or infringement fee is of no effect, and persons seeking to enter into such a contract commit an offence.

159) The ACTU recommends that:[79]

a) **the Model Act be amended to expressly prohibit contracts providing liability insurance against WHS penalties and fines;**
b) **contravention of the prohibition be made an offence**

[79] See also *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, July 2017 at page 14, para [47].

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