

Response from: Finance Sector Union of Australia

Contact name: Veronica Black

Section 3 – The model WHS Act

3.1 What areas in the model WHS Act, other than those identified by COAG and addressed below, have positively or negatively impacted on your organisation and how could they be improved?

Overall the FSU is supportive of the concept of a national harmonised WHS system, provided that this system provides the best laws for all Australians, rather than becoming a race to the bottom on safety.

The major concern for the FSU with the introduction of the model WHS Act has been around the significant curtailing of the right for unions to initiate prosecutions for breaches of the Act in NSW & removal of the right to prosecute in the ACT. This is a clear reduction in the protection available for workers in our industry.

Research demonstrates that prosecutions provide effective deterrence for breaches of work health and safety laws.

In McCallum's *Reflections on General Deterrence and OHS Prosecutions*, he found that: *prosecutions must be used routinely under the Act in order to deter non-compliance by non-prosecuted companies, because of the important constitutive and symbolic effects associated with such prosecutions.*¹

In our experience it is rare for regulators to initiate prosecutions within the finance industry, or indeed, in the federal system, to initiate any prosecutions at all – with the most recent Comcare annual general report showing that no prosecutions had been undertaken within the 2012-2013 financial year.

Given that prosecutions are important in ensuring compliance, if the regulators are unwilling or unable to initiate prosecutions, there is a clear role for unions to be able to undertake this activity in the interests of the safety of their members.

A major health and safety issue for bank workers is exposure to violence and armed hold ups. 4545 bank workers were directly threatened and assaulted in the 10 years to 2007. This includes workers being bashed and kicked unconscious and one who received a sledgehammer to the face resulting in a broken jaw. Many workers involved in these incidents have permanent physical and psychological injuries as a result.

In 2002 there were 106 bank robberies in NSW. All of these were notified to the regulator, but no action was taken. The FSU instigated 4 prosecutions between 2002-2005, and as a result of this intervention, the industry invested over \$100 million in upgrading security in bank branches. Hold ups in NSW decreased to 20 by 2008, and nationally we saw a reduction of armed hold ups by 70%.

The FSU had been requesting that employers in the industry upgrade their security for many years, and had been urging the regulator to intervene, but it was only the capacity for the

¹ McCallum, Ron, 2010, *WP 75 - Reflections on general deterrence and OHS prosecutions*, National Research Centre for OHS Regulation, Canberra

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union to initiate prosecutions that saw the safety of finance workers improved.

The FSU strongly asserts that introducing the capacity for unions to prosecute under the model WHS Act, would lead to significant improvements in workers health and safety.

Comments on the review

The FSU has grave misgivings about this review of the model WHS Act, these relate to the following matters:

1. The timing of the review;
2. The timeframes available for consultation
3. The areas under review.

The timing of the review

In May 2014, COAG agreed to investigate ways that the model WHS laws could be improved. Given that the laws were only introduced from Jan 2012; that a review of the law is scheduled for 2016; and that the legislation has not been in place for long enough to have sufficient data available to properly assess its effectiveness, this review seems premature.

The timeframes available for consultation

Unions were advised of the review in mid July, with due dates for submissions from 25th July. This leaves very little time to prepare a submission, and certainly excludes the possibility of properly consulting with HSRs and other union members.

The areas under review

The FSU notes with concern that in this review on “Improving the model Health and Safety laws”, that it appears that no consideration has been given to improving workplace safety and reducing injuries and deaths from workplace accidents. All of the matters being examined relate to reducing the responsibilities of employers and reducing the rights of employees and their representatives, e.g. there are no questions examining the experience of HSRs, and the difficulties they face in exercising their powers to improve workplace safety, or about barriers to exercising right of entry for their representatives.

Director’s liability under the model WHS laws

3.2 What impact (positive or negative) has the duty on officers had on your organisation?

The FSU supports the introduction of the positive duty on officers to exercise due diligence to ensure their PCBU complies with its WHS obligations. The intent of the duty is to ensure that people in leadership roles take health and safety seriously.

Many of the employers in the finance industry are very large and profitable organisations. They make calculated assessments around risk across the organisation, and the organisation can afford to carry the financial risk of failure to comply with work health and safety obligations. The best way to ensure that safety is made a priority within the organisation is to impose a personal responsibility on senior managers.

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This is backed up by research that suggests - *the nature of the company is that such financial burdens generally fall only upon company funds. Even given the strong incentives for directors to be seen to be conducting business profitably, in the end the worst that can happen in most cases is insolvency for the company. It has been accepted for a number of years that directors and managers, who are making decisions that affect safety, must be made to feel the impact of those decisions more personally.*²

Hopkins makes the point in his review of the causes of a mine disaster at Moura in Queensland: *The financial costs of disasters such as at Moura do not appear to be sufficient to provide the necessary incentives. The threat of personal legal consequences is probably the best way of concentrating the minds of senior managers on questions of health and safety*³

In his more recent study of the causes of the disastrous Texas City refinery explosion, Hopkins makes a similar point in the context of noting the incentives for senior managers to take short-cuts in spending money on safety: *Chief executive officers of companies like BP have a strong personal interest in cost cutting. Their remuneration consists (in part) of share options... So, all things being equal, a CEO can raise share prices by cutting costs. There is thus a powerful incentive for CEOs to drive cost cuts throughout an organisation. What is needed is some equally powerful incentive to ensure that these cost cuts are not at the expense of safety. Perhaps the law should be holding CEOs personally accountable in this respect*⁴

To the same effect is research by Gunningham. In a study commissioned by the National Occupational Health and Safety Commission, Gunningham comments: *In the literature review, regulation was identified by a large majority of studies as the single most important driver of corporations, and the **threat of personal criminal liability** (in particular of prosecutions brought against them as individuals) as the most powerful motivator of their CEOs to improve OHS... Prosecution of individuals within the corporate structure has both specific and general deterrent effects, particularly if the prosecution is widely publicised*⁵.

Gunningham and Johnstone make a number of similar suggestions: *A primary reason for imposing criminal liability for OHS contraventions on individual corporate officers is that the imposition of civil or criminal penalties on corporations for these offences can simply be seen by corporations as a cost of doing business, and passed on to consumers, shareholders, or employees. One solution is to impose criminal liability on corporate officers... OHS prosecutions should be targeted at individual corporate decision makers, not just the organization itself, because individuals who are vulnerable to personal sanctions have both a much greater incentive and a greater capacity to avoid these penalties than do fiduciaries*⁶

² Foster, Neil, 2010, *WP 73 - Personal corporate officer liability under the Model Work Health and Safety Bill*, National Research Centre for OHS Regulation, Canberra, p4

³ A Hopkins "Repeat Disasters: The Lessons of the Moura Coal Mine" in C Mayhew & CL Peterson, *Occupational Health and Safety in Australia* (St Leonards: Allen & Unwin, 1999) 140-157, at 157.

⁴ Hopkins, *Failure to Learn* (2008), above n 3 at 82.

⁵ N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice* (Report prepared for the NOHSC, October 1999), at 39-40.

⁶ N Gunningham & R Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford: OUP, 1999), 217-218, footnotes omitted. See generally the discussion at 217-223.

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3.2 Which aspects of the duty (if any) should be changed?

The FSU believes that the responsibilities placed on officers of PCBUs are not too onerous. They are no more onerous than responsibilities placed on them by corporate, financial and tax laws.

NSW OHS laws have had responsibilities for directors for a number of years prior to the harmonised legislation without causing detriment to business. In the case of NSW, there is now greater clarity with the clearer definition of 'officer'.

The FSU does not believe that it is appropriate to change any aspect of the duty of officers. Given that this was an area of extensive consultation in the drafting of the model WHS Act, and the available research into the importance of personal responsibility in ensuring that WHS does not become a simple budget line item, to be cut in the interests of further profits, FSU believes that retaining the duty of officers is an intrinsic aspect of the model WHS Act that should not be altered.

Powers of Union Officials under the model WHS laws

3.3 What impact (positive or negative) have the powers provided to WHS entry permit holders to enter a workplace had on your organisation? Please provide relevant examples and evidence.

Trade unions have an important role to play in ensuring the safety of workers, particularly under legislation styled on the Roben's committee approach. Any reduction in the powers provided to WHS entry permit holders under the model WHS Act, will result in a reduction in health and safety for workers.

The model WHS Act confers powers to entry permit holders to enter workplaces to:

- Inquire into suspected WHS contraventions;
- Inspect employee records;
- To consult and advise workers

Inquire into suspected WHS contraventions

The powers provided to WHS entry permit holders to enter a workplace to inquire into suspected WHS contraventions have had a positive impact on the FSU's capacity to support members with health and safety issues at work.

First contact with members around health and safety concerns would generally be to:

1. Identify the nature of the WHS issue;
2. Ascertain whether the member has raised the matter with the employer and the outcome of this;
3. Provide any information that may be of assistance to the member in raising the issue, (either directly or via their HSR)

Should there be a need for the union to enter a workplace in order to inquire into suspected WHS contraventions, this would generally occur at a time that is agreed with the relevant

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employer. The times that this may not be the case, would include: where the risk is serious and imminent; and/or where advising the employer in advance would defeat the purpose of the entry to the workplace; and/or where the employer would not come to a reasonable arrangement.

It is important that the current right of entry provisions in the model WHS Act are retained and are not replaced with the requirements for notice that are contained within the Fair Work Act. Contraventions of WHS laws can have immediate and serious consequences for the health and safety of workers, which is why entry to inquire into WHS contraventions is different from entry under the Fair Work Act, and should not be subject to the same requirement for notice.

Within the finance industry, a key safety issue for members is the potential for serious injury/death as the result of armed hold ups. FSU contends that situations where we receive contact from members reporting malfunctioning of security equipment, or severe staff shortages resulting in one person working alone with cash, require immediate attention.

Member feedback on this issue is that members value the right to have a union official attend their workplace when there are health and safety concerns and that they strongly feel that this should continue without further limitations.

Inspect employee records

The issues paper suggests that there may be some confusion around the interaction between entry to inquire into suspected WHS contraventions and entry to inspect employee records and documents held at other locations. The FSU has not experienced any problems in relation to this matter and as such, sees no need for changes to this area. If changes were to be made to align the notice periods, then it would be most appropriate to remove the requirement for notice to inspect records, given the importance of entry without notice for suspected contraventions in ensuring worker health and safety.

Entry to consult and advise

Trade unions have an important role to play in raising awareness among union members about health and safety in the workplace – this is necessary if workers are to effectively participate in WHS process with their employers.

Lunt et al. assert that: *In cases where trade unions were present, more meaningful worker consultation and representation on health and safety has been found*⁷

Ayes reports that: *Empirical evidence from the UK tends to support such claims, showing that where trade union safety representatives work together with employers, accident rates are up to 50% lower than where managers alone make decisions over OHS*⁸

FSU provides information to members about matters such as:

⁷ Lunt, J., Bates, S., Bennett, V. & Hopkinson, J. 2008, *Behaviour change and worker engagement practices within the construction sector*, Research Report RR660, Health and Safety Executive, available on the Health and Safety Executive home page: <http://www.hse.gov.uk/research/rrhtm/rr660.htm>.

⁸ Ayers, G., F., 2011, *Consultation and Organisational Maturity in the Victorian Construction Industry*, PhD Thesis, University of Ballarat.

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- Information on specific health and safety issues in the industry;
- Employees rights and responsibilities;
- Consultation;
- Identifying hazards and risk assessment;
- How to resolve work health and safety issues;

It is important to note that freedom of association principles were the cornerstone of the Roben's committee's approach, recognising, as it did, the unique role of the representatives of employees (unions), and, whereas individual employees may not have had personal experience of health and safety adversity, collective organisations acquired what may now be called "corporate knowledge" of OHS issues, particularly those specific to an industry.⁹

The FSU has not experienced any difficulties in relation to this provision and as such, sees no need for changes.

Overall

The FSU strongly opposes any move to place further limitations on the power of entry permit holders. The capacity to respond as a matter of urgency to serious work health and safety matters is critical to reducing workplace injuries. Given that there are already safeguards against the misuse of the WHS entry provisions built into the model WHS law, we do not support the idea that a potential small benefit to businesses and regulators can possibly be given priority over the health and safety of our members.

In NSW, unions have had right of entry for WHS purposes since 1983, i.e. more than 30 years, without issue. It encourages a collaborative approach to the resolution of WHS issues without the involvement of WHS agencies and enforcement action. Solutions reached are more specific and appropriate to the industry and workplace due to the more specialised knowledge of union officers.

3.4 What limitations (if any) do you think should be placed on the powers? Please provide reasons for your suggestions.

There are already strict limitations in place in relation to permit holders. This includes a requirement for a union official to attend training and to reapply for permits every three years, as well as a process for cancellation of permits for misuse.

When permit holders enter a workplace they are limited in what they are able to do, particularly in regards to the resolution of WHS matters that are identified. Unlike a HSR (representing employees) a union official (also representing employees) cannot issue a PIN or direct workers to cease unsafe work.

No FSU permit holder has ever had their permit cancelled for misuse, and given the very limited powers available, we do not see any need to further limit powers of WHS entry permit holders. Indeed, feedback from members suggests that they would like to see greater enforcement powers for unions on safety, including the capacity to issue PINS and to initiate

⁹ Parliament of Australia, Parliamentary library, Bills digest, 30th August 2005

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prosecutions for breaches of the Act.

Powers of Health and Safety Representatives

3.5 What impact (positive or negative) have health and safety representatives' powers and functions had on your organisation? Please provide relevant examples and evidence.

At this stage FSU has seen minimal impact of powers of HSRs in the finance industry. As a general rule, the designated work groups that have been established prevent any genuine opportunity for HSRs to truly represent the interests of those they represent. For example, in one major bank there are currently 20 HSRs in a company with almost 30,000 employees. One of these HSRs has a workgroup consisting of all bank branches across WA, SA and the NT. Another major bank has a very similar structure with one designated workgroup consisting of 4 HSRs for 397 separate workplaces. Even if these HSRs worked on nothing other than their HSR role, it would be unrealistic to expect that they could conduct this work in a meaningful way while representing so many different workplaces. The reality of staffing levels in the finance industry is that HSRs can spend very little of their time on their HSR duties.

Comments from HSRs & workers in the finance industry in a recent union survey included:

I think HSRs should be given more power and duties. In my workplace the role is a bit "decorative" or tokenistic

Requirement for one in EVERY branch

Lets have a HSR to begin with. Give them a right to identify and follow through on any issues and make management accountable if issues are raised

Staffing levels need to change, so the HSR always has the necessary time to conduct the inspections

In these circumstances it is incredibly difficult for the HSR to effectively represent their workgroup. In addition, when they are dealing with some of the largest and most powerful employers in the country, with teams of OHS specialists, it can be quite intimidating for HSRs to raise issues without significant support from their union.

The issues paper discusses two key concerns:

1. Power of HSRs to request assistance; and
2. Power of HSRs to direct unsafe work to cease

Power of HSRs to request assistance

The model WHS Act gives HSRs the right to request the assistance of any person whenever necessary. This could include many types of people, e.g. an electrician or ergonomist who has specialist knowledge of the particular health and safety concern. For HSRs who are union members, this person may be their union official, who has specialist knowledge of health and safety in their particular industry.

When union officials attend a workplace to support the HSR in exercising their functions

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under the Act, this is not the same thing as a union right of entry to investigate a suspected breach of the Act, or to inspect documents or hold discussions.

where worker representatives are supported by trade unions directly or indirectly, they are more likely to be able to engage meaningfully and autonomously in the dialogue with employers that is essential to self-regulation.¹⁰

For this reason it is important that there are not restrictions placed on the power of an HSR to request assistance, either by attempting to exclude union officials from the people from whom assistance can be sought or by requiring HSR assistants to provide notice of entry.

Power of HSR to direct unsafe work to cease

The 2008 OHS review recommended that both workers and HSRs be afforded the power to cease work as HSRs were considered better placed than individual workers to progress discussions with PCBUs and participate in the issue resolution process. Individual workers are often highly reluctant to take the decision to cease unsafe work on their own, feeling more confident when they are acting on the recommendation of someone who has received training in WHS.

FSU is not aware of any information that would suggest that there is widespread abuse of the HSR power to direct unsafe work to cease, and given that there are currently processes in place in the model WHS act to deal with situations where HSR powers are abused, we would be reluctant to see the removal of this power.

3.6 Which aspects of health and safety representatives' powers and functions (if any) should be changed?

The FSU supports the status quo in relation to powers of HSRs, with increased training and support in how to exercise these powers effectively to resolve health and safety issues in the workplace, and better protections for those who do exercise these powers.

¹⁰ Walters, David, 2003, *WP 10 - Workplace arrangements for OHS in the 21st Century*, National Research Centre for OHS Regulation, Canberra, p12

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Section 4 – The model WHS Regulations
<i>4.1 Which areas of the model WHS Regulations are concerns for you and how could they be improved?</i>
The FSU does not have concerns about the current model WHS Regulations.
Regulatory burden
<i>4.2 Which areas of the model WHS regulations (if any) are more burdensome than beneficial?</i>
The FSU does not believe that the model WHS Regulations are burdensome. There was extensive consultation during the development of the model WHS Regulations which allowed for concerns to be aired and these matters to be resolved during the drafting process. FSU believes it is most appropriate to review the model regulation at the time of the broader review process set for 2015-2016.
<i>4.3 How could these requirements be changed and what impact would this have?</i>
The FSU believes it would be inappropriate to change the current requirements outlined in the model WHS Regulations. These matters were subject to extensive stakeholder consultation at the time of development, and had input from many experts in the field. It would be inappropriate to amend them based on a hasty two week long consultation process. Removing areas from the regulations would lead to lower safety standards for workers.
Level of prescription
<i>4.4 Which areas of the model WHS Regulations (if any) are unnecessarily prescriptive and therefore limiting compliance options?</i>
The FSU does not find the model WHS Regulations to be unnecessarily prescriptive. We are extremely concerned that the issues paper identified important areas such as access to first aid, issues resolution and emergency plans to be areas that may be considered “unnecessarily prescriptive”. These are essential areas where workers require legal certainty, and must remain in the model Regulations.
<i>4.5 How could these requirements be changed and what impact would this have?</i>
It would have a negative impact on the health and safety of workers if minimum requirements around essential areas such as first aid, issue resolution and emergency plans were to be removed from the model Regulations.
Practical compliance difficulties
<i>4.6 Which areas of the model WHS Regulations are difficult to comply with or unworkable in practice?</i>
The FSU has not found that the model WHS Regulations are difficult to comply with or unworkable.
<i>4.7 How could these requirements be changed and what impact would this have?</i>
No change necessary.

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Section 5 – The model WHS Codes of Practice

Complexity

5.1 What role should approved Codes of Practice have in the legislative framework?

The National Review into Model Occupational Health and Safety Laws recognised that codes of practice play an important role in assisting duty holders to meet the required standard of health and safety practices at work and that it is important that they be provided with a legal status that maximises that role.

The FSU believes that a Code of Practice should maintain its current role within the legislative framework as a practical guide on how to comply with the legal duties under the Work Health and Safety (WHS) Act and Regulations.

5.2 Which model Codes of Practice do you use and how do you use them?

The FSU most frequently uses the following model codes:

- WHS consultation, cooperation and coordination
- How to manage work health and safety risks
- Managing the work environment and facilities
- First aid in the workplace
- Hazardous manual tasks
- How to manage and control asbestos in the workplace
- How to safely remove asbestos

These are generally used to provide information to FSU members and workplace HSRs who request advice and assistance in resolving a health and safety issue at work, or in raising concerns directly with employers about suspected breaches of the WHS Act or Regulations.

codes are commonly used by inspectors to provide practical guidance to duty holders, as part of a co-operative approach to advise and persuade duty holders to comply.¹¹

5.3 What improvements could be made to the model Codes of Practice to make them more useful?

The current model Codes of Practice are clear and easy to understand, and are not in need of improvement. There are a number of other Codes that would be useful to develop as a matter of urgency, including Codes around Bullying, Customer Aggression & Violence and Pregnancy, (as recommended by the Human Rights Commission.¹²)

¹¹ National Research Centre for OHS Regulation, WHS briefing 6, 16th July 2012, p4

¹² Australian Human Rights Commission, Supporting Working Parents: Pregnancy and Return to Work National Review – Report 2014

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5.4 Does it make any difference to you if guidance is presented in a Code of Practice or in other formats such as guides or fact sheets?

The FSU is deeply concerned by any attempt to downgrade the status of any Code of Practice to a guide or fact sheet.

Codes of Practice provide both organisations and workers with certainty around the standards that are expected in order to meet legal obligations under the Act and Regulations. For organisations this means some legal certainty that they are doing what is required to comply and for workers, it provides information that they can use when raising health and safety concerns with their employers.

Codes of Practice have a special status because an approved code is automatically admissible as evidence in court proceedings under the WHS Act and Regulations. Courts may have regard to a code as evidence of what is known about a hazard, risk or control and may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

*“the lack of legal status of guidance materials can be a distinct disadvantage. Indeed it is precisely because codes have legal implications that they are taken seriously by duty holders, and play such an important role in a ‘Robens based’ regulatory framework”.*¹³

Research internationally suggests that codes should be maintained,

*“Significantly, there is no suggestion in the international literature that codes should be substantially replaced with guidance material. Indeed both the Health and Safety Executive in the UK, and the Australian work health and safety regulators continue to rely heavily on approved codes of practice and a recent review of the UK statutory framework strongly endorsed their continuing use”.*¹⁴

5.5 Is the level of detail in the model Codes of Practice appropriate? Please provide any examples of where material in a model Code is overly complex.

The level of detail in the model Codes of Practice is appropriate in helping duty holders to comply with the law. FSU does not have examples of material in a model code being overly complex.

Jurisdictional flexibility

¹³ National Research Centre for OHS Regulation, WHS briefing 6, 16th July 2012, p5

¹⁴ Löfstedt R, *Reclaiming Health and Safety for All*, HMSO, UK, 2011, p 55.

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5.6 What impact would allowing regulators to develop codes specific to their jurisdiction without national tripartite consultation have?

The FSU supports the best health and safety laws for all of our members around Australia. We don't have a firm position on whether this is best achieved through allowing the development of codes specific to a particular jurisdiction or National codes.

Whether codes are developed locally or nationally, tripartite consultation is core and is the most appropriate way to ensure we continue to comply with our obligations under ILO convention 155 - Article 4 which states that:

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.

5.7 What alternatives can you suggest to improve timeliness and flexibility in delivering codes? Would these alternatives involve any financial costs or benefits?

While Codes of Practice can take time to develop, the process of tripartite consultation gives us the best chance of developing content that is practical and meets the key objective of reducing workplace injuries. It is worth taking the time to do this work properly, timeliness and flexibility cannot override substance.

Method of consultation (who was consulted and how):

This submission was developed by the FSU on behalf of FSU members. Due to the very limited period allowed for the development of submissions, consultation was not as widespread as we would like, however HSRs and Union reps were consulted via an online survey and a review was undertaken of case notes in relation to health and safety calls from members.