



**Submission by the Queensland Council of Unions to the National
Review into Model Occupational Health and Safety Laws**

24 July 2008

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INTRODUCTION

The Queensland Council of Unions is the peak union body in Queensland. Unions affiliated to the QCU represent in excess of 300,000 workers. The QCU was involved in and supports the submission put to this review by the Australian Council of Trade Unions. The QCU submission is complementary to that of the ACTU.

In its submission the QCU has not attempted to address all of the questions posed in the Issues Paper. Our submission is focused on issues of particular concern to affiliates such as the maintenance of industry specific OHS legislation, the role and function of OHS representatives and OHS Committees and the obligations to be contained in the model Act in particular the maintenance of the absolute obligation of duty holders. We also address those provisions that are either unique to Queensland, such as workplace health and safety officers and risk management provisions or provisions such as enforceable undertakings which have operated in Queensland for substantially longer periods of time than in other jurisdictions.

The success of any model legislation can only be judged on its success in improving health and safety in Australian workplaces. For this to occur two key principles must be adhered to not only in the development of the model Act but also in the regulations and codes of practice that will follow. Firstly, changes to OHS law must not result in a diminution of the OHS rights and entitlements of Australian workers and secondly the laws, regulations and accompanying guidance material must be developed in a tripartite process.

Not only was the tripartite approach to the improvement of OHS one of the principal recommendations of the Robens Report, it is also a central feature of the International Labour Organisation (ILO) Occupational Safety and Health Convention, 1981 No. 155 which Australia has ratified.

1. SCOPE AND APPLICATION

1.1 Workplace

The ACTU submission states that:

It is a matter of principle and a common sense response to the changing nature of work that all workers (and others including the general public) be protected by the health and safety law regardless of the type of work they perform or where they perform it

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This approach is supported by the Queensland Government submission which states that:

In principle, the touchstone should be the prevention of exposure to risk arising from the conduct of the undertaking- regardless of whether the person placed at risk by the duty holder is at the workplace or away from it, and regardless of whether the person exposed to the risk is working or not working.

The QCU advocates that the emphasis be on the conduct of the work, wherever it may be performed rather than the traditional approach of assuming work is only performed in workplaces which have generally been premises of the employer. The definition of “workplace” in s. 9 of the Queensland Act meets these requirements. The definition is as follows:

9 What is a workplace

A workplace is any place where work is, or is to be, performed by--

(a) a worker; or

(b) a person conducting a business or undertaking

Examples--

1 a vessel used for teaching members of the public to scuba dive

2 a vehicle supplied by an employer for use by a worker in the performance of work

1.2 Crown Immunity

OHS legislation in Queensland specifically exempts the crown from prosecution. While there has been agreement to apply the enforceable undertakings provisions of the Act to government departments without legislative sanctions, there is little incentive for governmental instrumentalities to improve their OHS performance. The QCU notes that the Queensland Government is not advocating that this provision be included in the model legislation.

A provision such as that contained in s.118 of the NSW Act or S 6 of the Victorian Act would be appropriate to include in model legislation.

1.3 Industry Specific Legislation

The QCU supports the maintenance of industry specific OHS laws. The Queensland Government is recommending that the central features of OHS legislation (i.e. duties and defences) should apply consistently to all industries and undertakings. As long as the duties and defences are the same for both the general and industry specific OHS legislation, they are supporting the maintenance of industry specific legislation. They recognise that “consistent with the findings of Maxwell (2004: 71-88) in Victoria”, specific industries have special regulatory requirements. The QCU sees merit in the position adopted by the Queensland Government.

The *Electrical Safety Act* in Queensland arose from recommendations to the Government by a Joint Ministerial Taskforce set up to advise and make recommendations on the manner in which electrical incidents could be prevented, investigated and dealt with.

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It recommended stand-alone electrical safety legislation based on the *Workplace Health and Safety Act 1995* and complimentary to other safety legislation. In line with that recommendation the duties and defences in the *Electrical Safety Act 2002* were taken from the *Workplace Health and Safety Act 1995*.

The Explanatory Notes to the *Electrical Safety Bill 2002* stated that the bill provided for, amongst other things; the introduction of mandatory safety management systems for prescribed electrical authorities; consumer protection for failures of persons who perform electrical work to properly perform or complete the work; and for the appointment of a Commissioner for Electrical Safety and an Electrical Safety Board separate and distinct from the Workplace Health and Safety Board. These were all recommendations of the Taskforce and recognised the specific and unique regulatory requirements of the electrical industry.

The *Transport Operations (Marine Safety Act) 1994* is essentially an instrument that regulates vessel safety in Queensland in the same way that the *Navigation Act 1912* regulates vessel safety at the national level.

By contrast the *Workplace Health and Safety Act 1995* is a worker/personnel safety instrument. Similarly the Commonwealth *Occupational Health and Safety (Maritime Industry) Act 1993* is a worker/personnel safety instrument.

Vessel safety legislation is separate and distinct from worker/personnel safety legislation. However vessel safety legislation should not be inconsistent with worker/personnel safety legislation.

The QCU supports the retention of the maritime industry specific worker/personnel safety legislation – *Occupational Health and Safety (Maritime Industry) Act*.

The QCU supports a single national maritime jurisdiction which is on the agenda of the Australian Transport Council meeting on Friday 25 July and is scheduled to go back to COAG later this year. This process will ultimately determine the future of State and Territory commercial vessel safety legislation like *Transport Operations (Maritime Safety) Act*.

1.4 Definitions

The definitions in the Model Act should include a definition of “worker”. There are many different forms of labour market arrangements and the definition in any model Act should be broad enough to encompass all of these different arrangements. The person in control of a workplace (defined as any place where work is or is to be performed) has a general duty which should cover all workers regardless of the relationship they have with the business or undertaking. It is the view of the QCU that the Northern Territory *Occupational Health and Safety Act 2007* contains the definition that best meets these requirements.

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The definition is as follows:

Section 4 (Definitions)

“worker” means:

- (a) *any person who works in the employer's business:*
 - (i) *as an employee; or*
 - (ii) *as an apprentice or person undergoing on-the-job training; or*
 - (iii) *as a contractor or sub-contractor; or*
 - (iv) *as an employee of a contractor or sub-contractor; or*
employee of a labour hire company who has been assigned to work for the employer; or
 - (vi) *as a volunteer; or*
 - (vii) *in any other capacity;*

- (b) *if the employer is a natural person who works in the employer's business – the employer him/herself*

2. DUTIES OF CARE

2.1 General Duty

The deregulation of the Australian economy in the 1980s and the constant push for increased productivity has seen substantial growth in flexible forms of employment variously described as “contingent work”, “precarious employment” and “non-standard work”. Quinlan describes the growth in flexible employment as “the most significant change affecting work globally over the past 20 years” (Quinlan, 2004; 121). There is now compelling evidence that the shift of employment towards small scale, contract/sub-contract/leased labour, casual/temporary, franchised and other forms of precarious employment has serious OHS consequences. (Quinlan, 2000).

A general duties provision in the model Act need to be flexible enough to accommodate all of these new working arrangements. The duties should apply whether or not the person placed at risk is at the workplace or whether the person placed at risk is a worker (as defined in NT Act s.4) or a member of the public with no relationship to the person conducting the business or undertaking. The lack of a contract of employment with a particular person does not preclude the person in control owing a duty to the person.

The duty is defined by reference to a certain kind of activity, namely the conduct by the employer of his undertaking. It is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it (R v Associated Octel Co Ltd [1996] 4 All ER 846)

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Section 28 of the Queensland WHSA and s23 and 24 of the Victorian Act are both broad enough (Johnstone, 2008) the main difference being that the Queensland Act refers to “persons conducting a business or undertaking” and “workers” while the Victorian Act refers to “employers and self employed persons” and “employees”.

In addition to the general duties the model Act should include specific duties. These should include but not be limited to:

- ensuring the health, safety and welfare of all workers and others at the workplace;
- providing and maintaining a healthy work environment;
- providing and maintaining safe plant;
- ensuring the safe use, handling and storage of substances;
- ensuring safe and healthy systems of work;
- providing adequate training and supervision to ensure health and safety;
- providing adequate workplace amenities;
- monitoring health and safety;
- reporting injuries, illnesses and dangerous events;
- systematically identifying and controlling hazards and risks.

The model act should also specify that a duty of care is also owed by everyone in the supply chain who has capacity to affect health and safety.

2.2 Control

The QCU does not support a definition of control being included in the Act. If the Act attempts to define control there will be situations where obligation holders may be able to avoid their obligations simply by arguing that a particular situation falls outside of the definition. Establishing a satisfactory definition of control would be difficult and it could see people who would ordinarily be duty holders seeking to avoid liability by restructuring their operations so that they do not fall within the definition. What constitutes control should be left to the courts to determine, taking all the facts of a particular incident into consideration.

If reasonably practicable is a defence rather than a limitation on a duty as advocated by the ACTU, the QCU and the Queensland Government, the recommendation by Maxwell in Victoria (mentioned in the Issues Paper) that control be defined and included in a list of factors that determines reasonably practicable is not relevant. In these circumstances control determines when a duty exists and “reasonably practicable” determines what a duty holder has to do in order to be compliant.

2.3 Duty to others

All OHS laws involve duties to third parties who may not be workers. The NSW Act restricts the duty to persons at the workplace while the ACT Act is limited to at or near the workplace.

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A duty to protect the health and safety of all people currently exists in the Queensland Act and Victorian legislation. The QCU supports such a provision being included in the model Act. Members of the public maybe at risk from activities carried out at the business even though they are not at the workplace and in these instances it is impossible to separate OHS from public safety. Persons passing a construction site would be an example of this.

2.4 Duty of workers

Section 36 of the Queensland Act places the following obligations on workers and others at a workplace:

- (a) to comply with the instructions given for workplace health and safety at the workplace by the employer at the workplace and any principal contractor for construction work at the workplace;*
- (b) for a worker--to use personal protective equipment if the equipment is provided by the worker's employer and the worker is properly instructed in its use;*
- (c) not to wilfully or recklessly interfere with or misuse anything provided for workplace health and safety at the workplace;*
- (d) not to wilfully place at risk the workplace health and safety of any person at the workplace;*
- (e) not to wilfully injure himself or herself*

There is no specific provision in the Queensland Act which recognizes a worker's right to cease or refuse to do dangerous work. Section 36 (e) above implies it but does not spell it out. Sections (a) – (d) are proscriptive and could be simplified to simply requiring workers to take reasonable care and not knowingly injuring themselves or others. Taking reasonable care would quite clearly require employees to comply with reasonable instructions given to them by their employer including the wearing of PPE. The clause should make it a right of a worker to cease or refuse to do work which they know to be dangerous.

2.5 Appointment of OHS officers (WHSO's)

One of the unique features of the Queensland legislation is the requirement for the compulsory appointment of a Workplace Health and Safety Officer (WHSO) in a business or undertaking where there are 30 or more employees. This has been a requirement since the WHSA was passed in 1995. Vanderkruk (1999) looked at the effectiveness of this provision and concluded that WHSO appointments have resulted in significant OHS management improvements, particularly in risk management. More recent research (Crittall, 2001:14) indicates that WHSO's have proven to be an effective means of improving knowledge and understanding of OHS issues at the workplace. The appointment of WHSO in Queensland has by and large been a positive one and the QCU supports their appointment being included in any model legislation. The Queensland Government states in its submission that "the experience in Queensland has been that employers had not viewed WHSO as an opportunity to displace their OHS obligations".

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While this maybe so the ongoing nature of employer obligations regardless of the appointment of a WHSO, needs to be spelt out in the model act.

This potential problem was recognised in the Robens Report (Robens 1972 par 54). Robens recognised that “there was an important role for specialist safety advisers or safety officers” but also anticipated that “an obligatory appointment can sometimes lead others to act as though their own responsibilities for health and safety are thereby decreased”. The Queensland Act (s.98) has a provision which makes the position quite clear, and any model act which provides for the appointment of OHS Officers should contain such a provision. Section 98 states as follows:

98 Appointment of workplace health and safety officer not to diminish employer's obligations

An employer's or principal contractor's workplace health and safety obligations are not diminished by--

(a) the appointment of a workplace health and safety officer; or

(b) any act or omission of a person acting in the capacity of workplace health and safety officer

If there is to be a legislative requirement to appoint WHSOs this needs to be augmented by a provision which requires employers to assist them in the carrying out of their functions. The value of a WHSO is limited if they are not given this assistance and a provision such as s.97 in the Queensland WHSA should also be in the legislation.

97 Employer and principal contractor to help workplace health and safety officer etc.

(1) An employer or principal contractor must do each of the following--

(a) provide information in the employer's or principal contractor's possession about risks to the workplace health and safety of workers and other persons from workplaces, relevant workplace areas, workplace activities, or plant or substances for use at a workplace to the workplace health and safety officer;

(b) include the workplace health and safety officer at any interview about workplace health and safety between the employer and a worker, if the worker agrees;

(c) consult the workplace health and safety officer on any proposed change to the workplace that affects, or may affect, workplace health and safety at the workplace;

(d) help the workplace health and safety officer to seek appropriate advice on issues that affect, or may affect, workplace health and safety at the workplace;

(e) allow the workplace health and safety officer to conduct workplace inspections and assessments during normal working hours;

(f) provide resources to the workplace health and safety officer to allow the officer to properly exercise the officer's functions under this Act;

(g) take appropriate action to rectify any identified unsafe workplace health and safety conditions and practices;

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(h) take all reasonable steps to ensure the workplace health and safety officer performs the person's function under section 96A;

(i) keep anything given to the employer or principal contractor by the workplace health and safety officer under section 96(c) or 96A(4) for 5 years after it is given.

Maximum penalty--10 penalty units.

(2) An employer or principal contractor may instruct the workplace health and safety officer on action to be taken to ensure workplace health and safety at the workplace

3. "REASONABLY PRACTICABLE" AND RISK MANAGEMENT

In all jurisdictions, with the exceptions of NSW and Queensland, duty holders are required to take reasonably practical measures to ensure health and safety. In NSW and Queensland the duties are absolute and are not limited to measures which are reasonably practicable. The duty holder in NSW and Queensland has the onus of proving that the offence was not committed but the benchmark for determining compliance in NSW is "reasonably practicable" and in Queensland it is "reasonable precautions" and "proper diligence". While these terms may seem to be different they have been interpreted by the courts as effectively meaning the same thing. (Bluff & Johnstone, 2005)

As "reasonably practicable" exists in some form in all legislation, the question to be answered is whether it should qualify as a general duty or be a defence for a breach of a general duty. One of the objects of all health and safety legislation, however framed, is the prevention of death, injury or illness and the elimination or minimisation of exposure to the risk of death, injury or illness. This does not sit well with a general duties provision that has the "where practicable" limitation.

The position of the QCU is for the retention of "reasonably practicable" as a defence in a prosecution for breach of a general duty. As pointed out in the Issues Paper, Article e 4 of the ILO Convention No.155 refers to "reasonably practicable" and having this as a defence balances the interests of employees and employers without compromising the objectives of the legislation.

Bluff & Johnstone (2005) looked at how the courts have interpreted the general duties and the extent to which they have required the proactive management of risk and stated that

the courts' interpretation of the general duties qualified by (reasonably) practicable does incorporate a risk management approach, or at least the proactive and systematic assessment of risks.

Rather than arising implicitly as a result of interpretation by the courts, OHS legislation should explicitly require systematic and proactive identification and control of workplace hazards and risks.

Despite the fact that the courts have interpreted the general duties as requiring some form of risk management the Queensland WHSA is the only act which mandates its use. A risk

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management provision was first included in the legislation in 2003 as a strategy that could be applied to the management of risks but it stopped short of making risk management compulsory. A new section 27A was included in the Act in 2005 which mandated its use. Section 27A states as follows:

27A Managing exposure to risks

(1) To properly manage exposure to risks, a person must--

- (a) identify hazards; and*
- (b) assess risks that may result because of the hazards; and*
- (c) decide on appropriate control measures to prevent, or minimise the level of, the risks; and*
- (d) implement control measures; and*
- (e) monitor and review the effectiveness of the measures.*

(2) To properly manage exposure to risks, a person should consider the appropriateness of control measures in the following order--

- (a) eliminating the hazard or preventing the risk;*
- (b) if eliminating the hazard or preventing the risk is not possible, minimising the risk by measures that must be considered in the following order--*
 - (i) substituting the hazard giving rise to the risk with a hazard giving rise to a lesser risk;*
 - (ii) isolating the hazard giving rise to the risk from anyone who may be at risk;*
 - (iii) minimising the risk by engineering means;*
 - (iv) applying administrative measures;*
 - (v) using personal protective equipment.*

Examples of subparagraph (iii)--

redesigning work, plant, equipment, components or premises

Examples of subparagraph (iv)--

training, reasonable hours of work

(3) However, this Act also specifies particular ways in which workplace health and safety must be ensured in particular circumstances.

(4) Compliance with subsection (1) does not excuse a person from an obligation to ensure workplace health and safety or a particular obligation imposed on the person under this Act.

The QCU supports the inclusion of a risk management clause which details the risk management process and mandates its use in managing exposure to all hazards and risks in the workplace. However, to maximize the effectiveness of the risk management process the risk management clause in the model Act must also include the hierarchy of control and mandate

its use. If this is not done it will allow duty holders to adopt control measures which may be convenient but may not be the most effective available to them. Section 27A (2) does not mandate the use of the hierarchy of control.

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Any clause in the model Act should make it clear the object must be to eliminate the hazard and if that is not possible to control the risk. The clause must specify that elimination of the hazard must always be the first consideration. Without it duty holders need not first consider whether the hazard giving rise to the risk can be eliminated and allows them to move straight to a second best option. Section 27A (2) of the Queensland WHSA meets these requirements.

Consultation is an important part of every step of the risk management process. Workers know the hazard and risks associated with a job and their experience must be utilized if the process is to be effective.

Risk management records should be in writing and available to Authorised Representatives. If risk management is to be mandated, interested parties, including authorised union representatives, need to be able to ascertain that provisions have been applied. Some AREOs in Queensland have sought access to such records and have been told that they were not in writing. A requirement for the records to be in writing and available would assist in ensuring compliance.

A provision such as clause 27A of the Queensland WHSA should be included in the model act. The clause must also stipulate that the use of the hierarchy of control outlined in Sub clause (2) must be compulsory. The clause must also provide for the keeping of records in writing detailing the full risk management process applied to all identified hazards and risks. The records must be available to workers and to authorised union representatives. The clause must also provide for compulsory consultation with workers at every step of the process.

4. CONSULTATION, PARTICIPATION REPRESENTATION

4.1 Workplace Health and Safety Representatives

The QCU is in agreement with the Queensland Government (as expressed in Executive Summary of its submission) that worker participation and union involvement are crucial factors in the achievement of good OHS outcomes. In its submission the government states:

Worker participation is crucial to good OHS outcomes

A number of studies have identified a relationship between objective indicators of OHS performance (such as injury rates or hazard exposures) in workplaces where structures of worker representation are in place (union presence, joint safety committees or worker/union safety representatives). Despite their diversity in terms of methods and other details, taken collectively these studies support the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes. Generally, these studies found participatory workplace arrangements led to improved OHS management practices and compliance with regulatory standards (see Walters, 2006). This research suggests that the model OHS statutes must provide a framework for worker participation in OHS, and must enable strong trade union involvement in, and support for, the various worker participation processes.

4.2 Entitlements of Representatives

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The QCU supports the entitlements of representatives as detailed in the ACTU submission. There must be mirror provisions which detail the employer responsibilities. There must be penalties attached for not complying with these provisions (Qld ss76-80). Penalty provisions for not assisting representatives would signify the central role played by representatives in achieving the objects of the legislation.

4.3 Union involvement

Union involvement in health and safety can occur in a number of ways. Firstly, through the involvement of authorised union representatives in investigation of potential breaches and the provision of information to members and potential members. Secondly as part of the general responsibility of unions to represent their members. The Queensland Act provides other specific roles for unions in the election of representatives (s.74) and also in negotiations with employers about health and safety representatives (s.70). These two sections are as follows:

70 Negotiation between workers and employer about workplace health and safety representatives

(1) Workers at a workplace may negotiate with their employer about workplace health and safety representatives for the workplace, including, for example--

(a) the number of workplace health and safety representatives for the workplace; and

(b) the extent to which the employer will facilitate the election of 1 or more workplace health and safety representatives for the workplace; and

(c) if there is to be more than 1 workplace health and safety representative--each representative's area of representation; and

(d) the intervals at which a workplace health and safety representative is entitled to conduct inspections; and

(e) access by the representative to training designed to help the representative in the exercise of the representative's entitlements.

(2) Workers may be represented during negotiations by the union of which they are members if they have told the employer that they want to be represented by their union.

(3) To remove any doubt, it is declared that if the workers are members of more than 1 union, each of the unions asked may be involved in the negotiations.

(4) The Queensland Industrial Relations Commission may hear and decide, as an industrial matter, an application by a person aggrieved by the failure of a negotiation under subsection (1).

(5) Subsection (4) must be read with the [Industrial Relations Act 1999](#)

74 Workers may ask union to conduct election of workplace health and safety representative

(1) The workers may ask any union with members at the workplace to conduct the election of 1 or more workplace health and safety representatives for the workplace.

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(2) However, if a union agrees to conduct the election, it must conduct it for all workers at the workplace

4.4 Number of Representatives

The number of representatives at a workplace should be determined by the employees at a workplace. The model act should not limit the number.

4.5 Protection from liability

The model act must specify that workplace health and safety representatives are not liable for the exercise or failure to exercise an entitlement under the act.

4.6 Right of Entry

The QCU supports the current situation under the Queensland legislation where an Authorised Representatives of an Employee Organisation (AREO) can enter a workplace to investigate breaches of the act and also to discuss health and safety with the additional right to issue notices. The QCU contends that the Queensland experience shows that the provisions have not been abused and this contention is supported by the Queensland Government. They state that:-

the union right of entry provisions have not been abused and have ensured that workers have had an additional source of advice on OHS issues

Maxwell (2004) considered the possible introduction of authorised representatives into Victoria and looked at the experience in NSW. He concluded that the right of entry had not been misused and the report stated that:-

unofficial employer comments have acknowledged the benefits which properly-qualified union officials can bring to a workplace where OHS issues are poorly understood or ignored.

Employer predictions of widespread abuse of right of entry provisions in NSW, Victoria and Queensland have proven to be baseless. Specifically in relation to Queensland, there have been in excess of 250 authorities issued since the legislation was introduced in 2006 and complaints have been minimal.

The importance of union involvement in health and safety is well and succinctly expressed in Part 5 of the Executive Summary of the submission of the Queensland Government

The entry power of an AREO under the NSW and Victorian legislation is restricted to situations in which they “suspect” (s.77 in NSW) or “reasonably suspect” (s.87 in Victoria) that a breach of the relevant legislation has taken place. A similar provision (s 90I) is in the Queensland Act but in addition s 90J allows for entry to discuss matters relating to health and safety. The QCU supports the Queensland provisions as they allow an AREO to provide general health and safety information and advice to workers as well as investigating and providing specific advice on suspected breaches.

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4.7 Workplace health and safety committees

The QCU recognises the important role played by OHS committees. The principles set out in the ACTU submission are appropriate for the setting up and functioning of OHS committees. The Queensland Act also provides that workers can be represented by their unions in negotiations to form committees and the QCU supports the inclusion of this provision. The Queensland Government supports the model legislation containing a provision which encourages the formation of committees and makes them compulsory in workplaces of more than 30 employees. The QCU supports this proposal.

4.8 The right to stop work

The QCU supports the right of the WHSR to stop a job if it is unsafe. We also support a worker's individual common law right to cease or refuse unsafe being spelt out in legislation. The Queensland Government supports a WHSR being able to stop a job if it is unsafe. However, it also advocates that, where there is a WHSR this right should supersede the common law right of an individual to refuse to do dangerous work leading up to the WHS direction to cease work.

There will be situations where there is no WHSR in a workplace or there is a WHSR but they are sick, on holidays or working on a different shift. There can be no guarantee that there will be a WHSR on every job let alone on every shift. Realistically, there will also be situations where there is a WHSR on the job but the WHSR is not strong enough to make the decision to cease work. This would be a particular problem on some jobs where there is low or no level of unionisation. The common law right of an individual to refuse dangerous work should be codified and should exist side by side with the statutory right of a WHSR to collectively direct that work cease in specified situations.

4.9 Protection from discrimination and victimization

For WHSRs to be effective the model act must contain provisions protecting them from discrimination and victimisation. The provisions must be easily enforceable and protect them against the threat of or actual discrimination, bullying, harassment, intimidation and any detriment to their employment. Sections 76-78 of the Victorian Act are the preferred provisions. The QCU would also refer the panel to the ACTU Submission (section 5.3) and also the *ACTU Charter of Workplace Rights*.

5. REGULATOR FUNCTION, POWERS & ACCOUNTABILITY

The QCU supports regulator functions remaining with each jurisdiction.

The primary focus of inspectors must be enforcement of the Act and Regulations. However, The QCU does not believe that this is inconsistent with inspectors performing an advisory role where they would assist duty holders in complying with their obligations under the act.

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The Victorian Act (s.18) gives a specific power to Worksafe to give advice on compliance but also makes it clear that such advice does not create a defence which would not otherwise be available.

6. COMPLIANCE AND ENFORCEMENT

6.1 Enforceable Undertakings

Enforceable Undertakings were introduced in Queensland for offences under the *Electrical Safety Act 2002* and the *Workplace Health and Safety Act* in 2003. The Queensland Minister for Industrial Relations in his second reading speech described them as follows:-

An enforceable undertaking is an additional tool to prosecution. It allows the Chief Executive of the Department to enter into a written undertaking with someone who has breached the Act that sets out what actions a person or company will take, over and above their rectification of their breach.

Figures provided by Workplace Health and Safety Queensland show that in the five years from 2003-2008 there have been 105 applications for enforceable undertakings with 54 being accepted, 32 rejected and 22 withdrawn. WHSQ issues a booklet entitled *Information for Applicants* in which they outline the principles that apply to enforceable undertakings. These principles are as follows:-

1. undertakings will deliver tangible benefits to workers' industry and/or the community;
2. undertakings will deliver benefits beyond compliance;
3. undertakings will not normally be accepted in cases involving workplace or electrical fatalities;
4. enforceable undertakings may be published;
5. obligation holders compliance will be monitored;
6. costs will be borne by the applicant.

It is the view of the QCU that these principles are inadequate and enforceable undertakings, if they are to form part of the model legislation should be based on a tighter and more rigorous framework.

In his address to the recent ACTU Occupational Health and Safety Conference Professor Richard Johnstone detailed the principles that, in his view, should apply to enforceable undertakings.

If there are to be enforceable undertakings provisions in the model act the QCU supports these principles as being the basis for their introduction. The principles are as follows:

- they should be consistently used;
- they should not be over-utilised;
- they should be open to public scrutiny;
- they should be voluntary;

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- they should require comprehensive systematic approaches to occupational health and safety management;
- regulators must have specialist in-house staff to oversee implementation;
- regulators must develop auditing criteria;
- regulators must oversee the appointment of and ensure the independence and quality of work of auditors;
- regulators must strongly enforce contraventions of undertakings.

The QCU strongly supports the principle that if there are to be Enforceable Undertakings they must deliver benefits beyond compliance. However what constitutes compliance needs to be spelt out and rigorously applied. Section 27A of the Queensland WHSA mandates the use of risk management and obliges the duty holder to be proactive in identifying and controlling hazards in the workplace and the risks associated with them introducing appropriate control measures and monitoring the effectiveness of the controls. For an employer to commit to applying this process subsequent to an incident is simply complying with the act and cannot be deemed to be beyond compliance regardless of the level of the expenditure involved the benefits must be genuinely beyond compliance.

Enforceable undertakings should NEVER be available where there is a death involved.

There MUST be a requirement to publish the full details of all Enforceable Undertakings. These details should include full details of the charge including the name of the company, the breach, the undertakings and the agreed timeframe. The regulatory authority's website would be an appropriate place for the undertakings to be published. A regulator should never accept an Enforceable Undertaking which contains a confidentiality clause.

Enforceable Undertakings should not be given if the duty holder concerned denies culpability.

In considering whether an Enforceable Undertaking is suitable in the circumstances the regulator should consider matters including:

- the gravity of the alleged contravention and the potential health risks involved;
- the cooperation of the duty holder;
- demonstrated level of senior management commitment ;
- previous compliance history including workers compensation and enforcement sanctions;
- capacity of the duty holder to fulfill the undertaking.

7. PROSECUTION

7.1 Union Right to Prosecute

The QCU strongly supports the right of unions to initiate prosecutions. The NSW experience shows that unions have not capriciously undertaken prosecutions and most of the successful

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prosecutions have been in situations where the regulator has been reluctant to act. All of the prosecutions initiated in NSW in the last 10 years have been successful. Details of successful prosecutions are detailed in the ACTU submission.

Significantly, the recently conducted *Inquiry into the Review of the Occupational Health and Safety Act* by Justice Stein found no evidence that the right to prosecute had been abused by unions

The Queensland Government opposes union initiated prosecutions. Its submission states that:

the use of trade union officials to bring prosecutions could add to the adversarial nature of Australian industrial relations by undermining relations between management and unions within a workplace.

Research from the UK (Walters 2003) indicates that union involvement improves OHS outcomes. In its submission the Queensland Government states that:

Despite their diversity in terms of methods and other details, taken collectively these studies support the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes.

The argument that union initiated OHS prosecutions could undermine relations between management and unions is not a convincing one. Far from undermining relations between management and unions, a union right to prosecute has the potential to encourage employers to actively involve unions in OHS matters. The cost of conducting prosecutions would ensure that it was used by unions as a last resort when all attempts to negotiate have failed and the regulator has been reluctant, for whatever reason, to act. Union initiated prosecutions should not be seen as an attempt to usurp the legitimate role of the regulator but rather as being complementary to it.

7.2 Burden of proof

The QCU supports the proposition that the burden of proof should rest with the employer. It should be up to the employer to prove that there were not reasonably practicable measures available to prevent a contravention. This currently exists in the NSW and Queensland legislation. The Queensland Government also supports the maintenance of this position. In its submission the government points out that the reverse onus of proof exists in the *Health and Safety at Work Act (1974)* in the UK and the *Occupational Health and Safety Act (2002)* in NSW and the position was also supported by the Industry Commission in its *Inquiry into Occupational Health and Safety(1995)*. In support of its position the Industry Commission stated:-

It is more efficient for the holder of the duty of care than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time than anyone else.

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In addressing an IPA seminar in 2007 University of Newcastle law academic Neil Foster makes two points in support of the maintenance of the reverse onus of proof in the NSW legislation which are equally relevant to the Queensland situation.

Firstly, he points out that the reverse onus of proof is not unique to the NSW (or indeed the Queensland) OHS legislation. He points out that such provisions exist in the areas of motor traffic, drug trafficking and environmental law.

Secondly, the reversal of the onus of proof is not complete. In most criminal prosecutions the prosecutor has to prove all elements of the case “beyond reasonable doubt”. In an OHS prosecution in NSW and Queensland, however, while the onus of proof is on the defendant the case only has to be made out “on the balance of probabilities”.

The Stein Report in NSW is the most recent review of the NSW legislation and it supported the maintenance of the reverse onus of proof. This was not surprising as it had previously been supported by the Industry Commission in 1995, McCallum Report in 1997 and the NSW Parliamentary Inquiry into Workplace Safety in 1998.

The English Court of Appeal considered the question as to whether the onus on the employer under the *UK Health and Safety at Work Act (1974)* was incompatible with the presumption of innocence in the European Charter of Human Rights. In *Davies v Health and Safety Executive [2002] EWCA Crim 2949* the court found that putting the onus of proof on employers was justified, necessary and proportionate having regard to the social and economic purposes of the legislation and that duty holders have chosen to work in a commercial activity. The court said (at [25])

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.

7.3 Workplace death and serious injury

The QCU adopts the submission of the ACTU in relation to workplace death and injury as follows:

1. The QCU considers that it is appropriate that model occupational health and safety legislation include a specific offence of recklessly or negligently causing death in the workplace. Such an offence should apply to employers and directors and officers of corporate employers and should be subject to the harshest penalties, including substantial periods of imprisonment.
2. An offence of industrial manslaughter could, however, remain within the mainstream of occupational health and safety legislation rather than being removed to general criminal statutes. Occupational health and safety law should continue to be regarded as a

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specialist jurisdiction, separate from the mainstream criminal law, administered by specialist courts. The elements of the offence will ordinarily be:

- a worker dies in the course of employment or at a place of work or is injured or contracts an illness in the course of employment and later dies;
 - the conduct (by way of act or omission) of a person caused the death, injury or illness; and
 - the person was reckless or negligent about causing serious harm or death to the worker.
3. The offence should apply not only to deaths that occur at the workplace, but also to instances in which a worker is injured or contracts an illness in the course of employment and later dies as a result of the injuries or illness. Some of the most egregious instances of reckless or negligent conduct by employers have involved the exposure of workers to work practices causing terminal illness. The exposure of workers to asbestos over many years is a particular tragic example. Sections 49A-49D of the *Crimes Act 1900* (ACT) should be adopted in the model occupational health and safety legislation.
 4. Another model is found in the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK). That Act creates an offence in the event that the way a corporation's activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. A relevant "duty of care" includes a duty owed by a corporation to its employees or to other persons working for the organisation or performing services for it. The Act permits unlimited fines to be imposed.
 5. Whilst a specific offence of recklessly or negligently causing death in the workplace can perform an important function as part of the regulation of occupational health and safety, it must be recognised that in the circumstances of many workplace deaths it will prove difficult to successfully prosecute under provisions of this nature. As a consequence, the QCU considers that it is necessary for other mechanisms to be included in the model legislation to ensure that community outrage at incidence of workplace deaths gains appropriate expression.
 6. The usual approach to sentencing for offences under occupational health and safety legislation is that, in assessing the objective seriousness of the offences, the focus will be upon the gravity of the risk to health and safety of employees and other, rather than

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the actual consequences of the breach (such as injury or death) although the consequences may demonstrate the seriousness of the risk. The QCU supports this general approach. That approach focuses attention of systemic failings rather than a particular accident or event.

7. However, it must be recognised that workplace deaths provoke particular concern within the community that demands the potential for additional penalty. In order to express condemnation of deaths in the workplace and provide appropriate deterrence, increased penalties should be applied in the event of breaches of legislative duties imposed that cause death or serious injury. In this respect, the *Workplace Health and Safety Act 1995 (Qld)* provides an appropriate model.

SUBMISSIONS

A National OHS System for the Modern World. Submission by the Queensland Government July 2008

The Highest Standards for Harmonised OHS Law. Submission by the Australian Council of Trade Unions July 2008

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