



**Community and Public Sector Union  
State Public Services Federation Group**

**Submission**

**To the**

**National Review into Model Occupational Health and Safety  
Laws**

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**Submission by State Public Services Federation Group,  
Community & Public Sector Union to the National Review  
into Model Occupational and Safety (OHS) Laws**

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## **WHO WE REPRESENT**

1. The State Public Services Federation Group (SPSF Group) of CPSU, the Community and Public Sector Union (CPSU - a Federally-registered union), consists of six State Branches representing employees of the Crown in Right of the States and other State public sector entities.
2. Outside Victoria, the State Branches are essentially mirror entities of State based public sector unions known as the Public Service Association of New South Wales (PSA NSW), Queensland Public Sector Union (QPSU), Public Service Association of South Australia Inc. (PSA SA), Civil Service Association of Western Australia (CSA WA), and State Public Service Federation of Tasmania. The Victorian Branch exists solely as a Branch of the Federal Union.
3. The SPSF Group represents members in the State industrial systems of Queensland, New South Wales, South Australia, Western Australia and Tasmania. It also represents members in Victoria, who are in the Federal IR system as a result the referral of its industrial relations powers by the State of Victoria. The SPSF Group also has members in all States outside Victoria within the Federal system, in particular general staff employees of universities.
4. The SPSF Group seeks to contribute to the Inquiry as a representative of State public servants and other State sector employees. The SPSF Group unions have extensive experience in all State OHS systems.

5. Employees of the State OHS regulators are eligible to be members of the State unions associated with the SPSF Group. We have active membership in these authorities. We have consulted with members; especially those members employed in the inspectorates. We asked the questions arising from the Issues Paper that go to the issue of how effectively these people can perform their jobs. A section of our submission is devoted to these responses. The responses are not discordant with our institutional position.

### **OUR INVOLVEMENT WITH OHS**

6. There is no industrial matter more important to our organization, to our members, or for employees generally, than that they have the highest expectation that they will return safely home at the end of a work period; that they continue to do so for a working life, and then into retirement without chronic, disabling work related illness or disease.
7. Work related incapacity destroys the foundations of workers' lives and working families when a "breadwinner" is seriously incapacitated or killed. Many court judgments, after employers are prosecuted, particularly in deaths and serious injury, show expression of grief, sorrow and remorse on the part of the employer. For the workers' families there is nothing but devastation. Our branches' staff supports workers' and/or their families in these circumstances – in making workers' compensation claims, in accessing superannuation breakdown benefits or provident funds where the injury is

fatal.

8. The SPSF Group has a national OHS Committee that includes an employee from the Federal Office acting to co-ordinate and support the work of the national committee. The committee convenes regularly several times a year by teleconference. It also meets once yearly in a two-day face-to-face meeting to develop a work plan for the next year and discuss policy issues in depth.
9. Members of the committee represent each State union – some committee members are industrial relations generalists while others are dedicated OHS specialists with academic backgrounds. All members participate at the State level in OHS development at the trades and labour council level (TLC). All committee members contribute directly to policy development at the ACTU level.
10. For several years we have concentrated on two main activities. Firstly, policy, research and campaigning initiatives at the peak council level. Secondly, following the identification of critical OHS issues for the membership, we have produced and used campaign kits designed to assist organisers and educate members in workplaces to deal effectively with particular OHS issues.
11. The three priority issues are work overload, bullying and occupational violence. This focus is consistent with the National OHS Strategy 2002 - 2012 which is aimed at more effective prevention of diseases related to work stress:

cardiovascular disease; musculoskeletal and psychological disorders; and cancer, where the link between occupational exposure and the disease is not always easily demonstrated.

12. Each member on our national committee has oversight of OHS activities and issues in his or her own State union; contributes to policy development at the State and Federal level and works to exchange OHS information and knowledge across the six State public services.
13. The committee met face to face to consider a response to the Issues Paper and drew on their own experience and expertise, as well as that of members, especially in the regulatory authorities to develop this response.
14. Our efforts are directed first, to making constructive input to the ACTU submission so that it is reflective of our own experience and concerns, diverse as it is, with the six different jurisdictions. Secondly, we have focused in this submission on issues that we feel we are in a sound position to make comment on – prosecutions of Government agencies in NSW and feedback from discussions with OHS inspectors.
15. Our broader observations focus on the dilemmas posed by the knowledge that best practice OHS is based on democratic, representative mechanisms in the workplace and that “such principles and mechanisms may not fit comfortably with the current emphasis on singular relationships or individual workplace arrangements”<sup>1</sup>.
16. We have not responded to each question, or even every topic

raised by the Issues Paper, on the basis that it would merely duplicate responses we adopt in the ACTU submission. We especially welcome the focus by the Review Panel on the need for submissions to be based on the “evidence” because we have been concerned and disheartened by a employer campaign against core elements of OHS systems, particularly the most robust features of the OHS law NSW where we have been engaged and proactive for many years.

### **ADOPTION AND ENDORSEMENT OF ACTU SUBMISSION**

17. We adopt and endorse the ACTU submission.
18. We welcome the opportunity to make a contribution and hope that this additional contribution builds upon the ACTU submission and adds to the understanding of the Review Panel from the perspective of an active campaigning public sector union.

### **GENERAL OBSERVATIONS**

#### **IR and OHS – long term core union function**

19. It was long thought that the Australian Constitution only provided the Federal Government with specific but limited powers in relation to the conciliation and arbitration of industrial disputes that extend to more than one State.
20. Industrial relations laws have delegated to industrial tribunals the task of conciliation and arbitration of industrial disputes.

This has led to the making of awards specifying rates of pay and the conditions under which work is performed.

21. State Governments, although not restricted from making laws directly dealing with industrial relations, have utilised the conciliation and arbitration model, until recently constitutionally required of the Commonwealth Government.
22. As State registered unions, SPSF Branches in their State manifestation (known as “associated bodies”) have operated primarily, but not exclusively, in the State industrial jurisdictions. These jurisdictions are not limited in the way in which the Federal IR tribunal has been by constitutional limitations.
23. Over many years a system of regulation was developed through the making of awards by means of agreement; by conciliation or by arbitration. The vast majority of these awards covered matters that, properly considered, may be understood as provisions for the protection of employees from certain risks to occupational health and welfare.
24. Limitations on hours worked, limitations on length of shifts without breaks, minimum requirements on breaks between work periods, penalty pay provisions to limit excessive hours and provide for adequate rest, holiday and leave provisions to allow employees to recuperate from extended periods of work are properly seen to be measures to protect employees from harm – from overwork, from fatigue and from disruptions to human diurnal patterns.

25. Awards also contained provisions that were seen by employers to be restrictive work practices as they specified who could perform specific functions, or required special qualifications and supported carefully defined job functions. In some instances awards were made that specified minimum staffing levels or ratios of trainees to qualified staff. The issue of the extent to which managerial discretion was limited by the application of award provisions was very much a matter of discretion of the arbitrator making a decision based on the evidence and the need. It is clear that many award based “limitations” were measures that gave employees a degree of “control” over aspects of their life at work.
26. In recent years the drive by employers, supported by Governments, to increase “productivity” and obtain greater flexibility has eroded many of these beneficial provisions, as awards have been pared back, and agreements entered into that have effectively traded off so called “restrictive provisions” for pay rises.
27. The laws providing for conciliation and arbitration actively encouraged the formation of representative organisations of employers and employees. These representative organisations were registered, and regulated, to represent members in defined industries or vocations, or both. Industrial legislation actively encouraged employees to join appropriate registered unions and participate in the governance of the organisation. We know from the evidence that OHS works best where there are active health and safety representatives

(HSRs) and a “factor in the success of the representative provisions is union support”<sup>2</sup>

28. Implicit in State support and encouragement of representative organisations was the recognition that there was a significant disparity in power between most individual employees and employers. The formation of employees unions went some way to correct this imbalance. Effectively, a social consensus as to the form and structure of “industrial relations” held in up in Australia until the early 1980s.
29. A vigorous campaign against unions’ representative role in industrial relations (IR) appeared first in Australia in the mid 1980s. It’s legislative triumph, was the passage of WorkChoices. Its core objective is to remove representative structures giving employees a collective voice – in IR as in OHS – if it is ever possible to separate the two.
30. The radical and aggressive employer thinking shifted from the “consensus” as to the representative structure of industrial relations, to an extreme position that posited a near equality of bargaining power as between employees and employers (notwithstanding the evidence to the contrary) and secondly, portrayed unions as alien “third parties” whose presence was unwelcome in the workplace.
31. At the same time, employers embraced and championed employment policies that favoured increased casual employment, individual contractual arrangements, labour hire etc. – forms of work that increased uncertainty for workers,

undermined their bargaining power and intensified their work.

32. The core philosophy of neo liberalism (aka “economic rationalism”) rejects recognition that there is an imbalance in bargaining power, and the relationship itself, between employees and employers – or that the imbalance can partly be corrected, by employees banding together in unions to pursue their common interests collectively. It also rejects or limits a mediating role played by agencies of the State; especially compulsory arbitral tribunals.
33. For these market purists, regulation of labour relationships through the encouragement of unions is an unwarranted interference with the operation of the free market. The pragmatists in the employer camp focus their energies on legislative provisions that encumber unions, impede their organisation and strictly limit the application of ILO convention rights to organise and take industrial action in defence of members interests.
34. The conundrum that emerges for OHS is that the “Robens model” is predicated on the principle that best OHS results emerge from proper dialogue between employers and employees (and their representatives) by means of consultation – access to all relevant information and free exchange of ideas between all workplace parties – and that employees should be empowered and encouraged to act in a representative capacity without fear of employer disfavour or victimisation.

35. There have been some widely acknowledged changes to the structure of the “labour market” since OHS laws based on the Robens model were enacted, both in Australia and overseas. It is recognised that approximately 58% of the workforce are employed in jobs in which they are entitled to paid leave.<sup>3</sup> There is evidence that these changes - subcontracting, outsourcing, franchising, home based work, casual, part time and contingent forms of work - have adverse affects on the health and safety of workers.<sup>4</sup> They altered, and eroded, the power relationship between employers and employees.
36. Many public and private sector employers actively sought to exclude unions from the workplace and denied their legitimacy as representative organisations. In an unguarded moment, a Telstra Chief Operations Officer is quoted as saying “We’re not running a democracy. We don’t manage by consensus. We’re criticised for it but the fact of the matter is we run an absolute dictatorship.”<sup>5</sup>
37. Positive legislative support for representative organisation of employees was abandoned with a spate of “workplace” legislation – first in Western Australia by the Court Government; then in Victoria by the Kennett Government and latterly, by Howard with WorkChoices. Basic and essential, matters such as union access to many workplaces became problematic.
38. In many industries the level of unionisation declined in numerical and/or percentage terms and the implications for OHS are disturbing because “the extent of collective

negotiation, the degree to which regulatory authorities facilitate the involvement of unions within the work process and the strength of participatory mechanisms both across regulatory jurisdictions and within specific firms is highly relevant to the effectiveness of health and safety management systems'<sup>6</sup> This decline is not so apparent in the State public sectors where for several reasons union density has fared better despite outsourcing and privatisations; but we have specific OHS issues with the "Government as employer".

39. SPSF Branches continue to operate with a high level of activity around OHS issues. We enjoy membership support to sponsor active interventions in the workplace on critical OHS issues. We devote considerable resources to OHS training for delegates and actively encourage and support members' involvement in OHS committees and as HSRs.

#### Better data needed for effective policy

40. Approximately 85% of employees in the private sector are engaged by corporations rather than by natural persons. These corporations operate on the basis of limited liability, so that when they fail, or incur losses greater than their value, shareholders are not personally liable for debts or losses.
41. For corporate Australia, when OHS failure results in death or serious injury, there is some financial cost (actual fines and monetary penalties are at derisory levels) and disruption to operation; but for the employee and his or her family, the loss is personal, intimate, family focused, frightening and

intergenerational.

42. Conservative estimates put the number of workers killed at work in Australia each year at around 2000. But it is widely acknowledged that this figure is an understatement, as it does not include many thousands more who die as a result of work related diseases of gradual onset. Approximately 700,000 people are injured at work; many thousands very seriously each year.<sup>7</sup>
43. Statistics on work related deaths and injuries in Australia are based on several sources. First, workers' compensation statistics are compiled from compulsory workers' compensation claims; but statutory workers' compensation is a form of compulsory insurance and covers employees. It does not include the growing army of "independent contractors" that have developed as a result of the shift from large employers to large companies that contract out their operations.
44. A significant number of employees do not file workers' compensation claims when they are injured at work. Reasons differ, but can include employer failure to inform employees of their rights; employees' fear of retribution or some act by an employer against the individual that is to their detriment; or by agreement with an employer who covers the injured employees time off work, with medical expenses usually picked up by the public health system.
45. Casual employees, approximately one third of the workforce,

are engaged for the duration of a shift. For many, a workers' compensation claim means the end of ongoing work.

46. Also, "comprehensive" workers' compensation schemes have been systematically slashed by State and Federal Governments over the past 20 years to limit the costs of workers' compensation premiums to employers. The circumstances in which an employee can make a claim have been limited.
47. For instance, where work has aggravated or exacerbated a pre existing condition, and this has led to incapacity for work, qualifying and narrowing terms have been introduced that require work to be the "significant," "dominant" or "substantial" cause of incapacity. The terms of the qualifier differs, but the purpose is to knock out previously legitimate claims.
48. These types of 'reforms" make it much more difficult for an employee to establish a claim for incapacity arising from cardiovascular diseases, musculoskeletal or psychological disorders and diseases of gradual onset.
49. Another cost cutting mechanism is to limit the scope of coverage of workers' compensation. The States of South Australia, Western Australia, Tasmania and Victoria; and most recently, the former Federal Government in relation to the Comcare scheme, removed cover of employees on their regular journeys to and from work and recess breaks. This exclusion removes up to 25,000 potential workers who are injured in these circumstances on the roads or during breaks<sup>8</sup>.

50. Getting to and from work is an activity closely connected with employment and it is not correct to configure it as an activity entirely beyond or outside of the employment relationship. But the exclusion of injuries on journeys to and from work is not compensable and reduces insurance premiums – and deaths and injuries on journeys do not count in work related statistics. There is a worrisome correlation between motor vehicle accidents and shift worker travel to and from work and home.
51. Secondly, statistics in relation to deaths are compiled from coroner's reports in some jurisdictions. In Victoria, the Work Related Liaison Service reports that since July 2005 119 deaths have been identified as industrial fatalities according to its definitions<sup>9</sup> WorkSafe Victoria reports less than half this number of work related deaths.
52. Thirdly, the ABS has conducted two multi purpose household surveys (MPHS) and included questions about work related injuries for 2006 and 2000<sup>10</sup>. The notes to the 2006 survey State that, the "MPHS was designed primarily to provide estimates at the Australia level. Broad estimates are also available for States and territories, although users should exercise caution when using estimates at this level, because of the level of high sampling levels." (This survey does not include work related deaths, either narrowly defined by catastrophic death or by disease of gradual onset).
53. There is doubt about the accuracy of data based on workers' compensation statistics; worrying coronial data suggesting the

real occupational mortality rate is much higher than the OHS regulators reports, and a single ABS survey from 2006 (excluding the 2000 survey due to the alterations in the series showing an increase in injury), based on a small sample, that raises more questions than it answers.

54. The problem with inaccurate data is not restricted to Australia. In the context of discussion on “under-reporting,” just one of the contributors to the problem, the UK Health and Safety Executive commented that “it is unclear why regulatory authorities have not moved to different methods (relying more on epidemiological approaches or employee surveys) of assessing risk”<sup>11</sup>
55. It is simply not possible to operate an effective and focused “evidence based” OHS regime without accurate and complete information. The protestations of employers about a requirement to provide accurate data – “excessive red tape, form filling, written reporting, data collection”<sup>12</sup> must be set aside.
56. Most recent OHS data shows NSW is the only jurisdiction to be on target to meet the reduction in injury necessary to meet the National OHS Strategy 2002 - 2012.<sup>13</sup>
57. Employers often cite the 2006 ABS survey to support a contention that the Victorian OHS regime, post Maxwell, is the preferred “OHS package” for adoption because they assert it produces “safer outcomes.” This is simply an assertion.
58. The interesting aspect of this survey, is the disparity between

the estimated extent of work related injury and illness as between NSW and Victoria for men, not women. The publication reports that 67.6 workers for every 1000 suffered work related injury or illness in NSW in the survey year, and 53.6 in Victoria. When the figures are looked at for women the incidence of injury and illness is much closer – 46.5 for NSW and 44.7 for Victoria – figures easily in the realm of sampling error. But for men the figures are disturbing with an estimate of 85.1 men in every 1000 reported as suffering work related injury or illness in NSW as opposed to 61 in Victoria. It is this disparity between estimates for men in NSW and Victoria that accounts for the significant gap between the two States performance in the given year.

59. We have found no basis to account for the disparity. Various suggestions have been made, and some tested. We can rule out the suggestion that NSW has more persons employed in dangerous industries (agriculture, forestry, fishing, manufacturing, construction and mining) as the two States have comparable percentages of workers in these industries. SPSF Victoria asserts that the availability and use of PINs is critical in achieving better safety results at work but we do not have supporting research analysis. Secondly, there is a view that despite a weaker legislative and regulatory regime, Victorian unions have campaigned more actively around OHS in the workplace and this has had the desired results and reduced injuries. Another possible difference may be that in NSW the Dust Diseases Board processes claims that in Victoria are litigated in the tribunals and not recognized as

work related.

60. It could be that NSW has many more men employed in dangerous industries than Victoria – but it is improbable that there is such a significant difference to account for the disparity.
61. We may rule out the suggestion that Victoria has more robust and effective inspectorial, enforcement and general education activities that have borne results. A 2007 review report, recommends a closer alignment of the Victorian regulators “balance” to that of NSW or Queensland in regards to prosecutions<sup>14</sup>.
62. Whatever else may be said, it cannot be confidently asserted using the 2006 ABS survey based estimates, that the Victorian OHS regime, its formulation of law and nature of regulator activity, is “better” or “safer” than NSW. There is no evidence to make this conclusion; nor that NSW is deficient. If it were, and this is the key point, the relative “safeness” for men and women in NSW would be closely aligned, which they are not.
63. Corporations and businesses are required to keep proper records about their activities for taxation and other purposes. OHS regulators should require and enforce the same high standards of accuracy and completeness of OHS related data.
64. A further consideration, relates to the nature of the corporate employer in Australia and the legitimate expectations the community has of their performance, in terms of general

conduct as “model corporate citizens,” and specifically in relation to OHS and record keeping. Due to corporate status, a majority of employers enjoy the protection of limited legal liability. Many economic historians postulate that the creation, by law, of limited liability corporate entities was the single most important initiative that unleashed entrepreneurial activities that underpinned the development of market capitalism. Without this special protection afforded with artificial legal identity, it is thought that the personal investor would be reluctant to invest in economic activity that runs the risk of failure, and loss of personal assets, beyond the specific capital invested.

65. All too often, corporate employers appear to forget that the special status of limited liability incorporation does not abrogate from a moral responsibility to do all that is necessary (subject to defenses) to ensure the health and safety of employees. A worker who suffers a devastating work related incapacity suffers much more than the limited economic loss suffered by a corporation.
66. Additionally, many of the “price signals” that might provide feedback into a corporations management and/or shareholders have been blunted. Many jurisdictions trumpet the ongoing reductions in the cost of workers’ compensation premiums - set following cuts in benefits and/or access to benefits. HSE comments that “regulatory trends and initiatives in many jurisdictions – such as procedural barriers to the introduction of new regulations, lower (long term)

compensation costs, the growth of behavior safety modification programmes and lower rates of inspection and enforcement – aim to contain regulatory costs associated with non-compliance” [and these] “work against the idea that OHS compliance makes good business sense”<sup>15</sup>.

67. Only two jurisdictions, Queensland and the ACT preserve full common law options whereby a worker who has suffered a loss as a consequence of his or her employers’ negligence can sue for negligence and damages. Common law action for negligence provides the most accurate estimation of the real costs of occupational injury or illness at the individual level - simply because awards for losses are calculated on the basis of restoring the worker to the position he or she was in before the injury, as best monetary compensation is able. A whole raft of factors is included in these calculations that simply do not even arise in the no-fault statutory schemes.

#### Employer attitudes and implications for OHS

68. The rise of neo liberal economics in the western world has had a significant impact of the nature of employment and the capacity of unions to effectively protect their members. The philosophy inherent in “Workchoices” is a classic example of the success of market “uber alles” theory. It falsely hypothesized that the relative bargaining power of an employer was equal to the bargaining power of an employee, and that the best bargains as to wages and working conditions would be achieved by removing to the so called “third party,”

from the bargaining process. The hypothesis is wrong and it was seen to be wrong by the electorate in November 2007. “WorkChoices” and its backers were rejected.

69. The electorate wants principles of balance and equity incorporated into industrial relations law and practice. It wants the State to intervene to balance the rights and responsibilities between the economic participants. It wants the State to recognize that workers are not “resources” to be treated as a disposable purchase – and that bottom line profit and shareholder return is not to be maximized at the expense of the health and safety of the workforce.
70. The “ACCI OHS Blueprint” reflects confusion and dismay at being encumbered by OHS law and being held to account; especially by unions. The Blueprint castigates the OHS regime in NSW – both the formulation of an employers duty of care, the independent body charged with conciliation and arbitration of OHS disputes, the Industrial Commission in Court Session where prosecutions are heard by judges, and the capacity of unions to prosecute employers for serious breaches of OHS duties.
71. It appears as if ACCI believes that employees and employers should equally share the duty of care; ignoring the central issues of who has control, or is in a position to control what goes on in the workplace, suggesting that “compliance activities and penalties for OHS breaches should be capable of equal application to all stakeholders – employer, employee” That the NSW OHS system is “radically onerous”; that the

effect of prosecutions for breaches are “marginal and symbolic at best”; that the duty of care imposes “extreme, absolute and in some cases impossible duties”<sup>16</sup>.

72. The problem with the use by employers using imprecise and emotive terms such as “red tape” and “unnecessary restraints on enterprise” is that they are slogans. They are not evidence of anything except to reinforce (essentially to the neo liberal politicians of the Howard era) and underpin a campaign to escape obligations that are perceived to be difficult and distracting from the main game of operating a business in a sharply competitive economy. Their expressions are classic ‘straw men’ – set it up, to knock it down. No one likes ‘red tape’ if it is correctly identified and applied to unnecessary, redundant and purposeless rules and regulations. But if the issue was framed differently - as regulation to avoid or minimize death and injury to mums and dads and their children at work – instead of as “red tape’ - public opinion would not support weakened regulation through the reduction of “red tape”.

73. A good example of the technique to mislead is detailed below – at page 21 of the “Blueprint” ACCI States that the “fact that a workplace injury has occurred should not automatically mean that a breach of law has occurred. These duties must not impose *absolute or unreal* obligations, whether by legislation or court interpretation”. There is no jurisdiction in Australia where employers do not have a sound basis for defense of OHS breaches and no jurisdiction in which “unreal” or

“impossible” obligations are placed on employers.

74. The misstatements by ACCI are subtly transposed into a broader discourse. A good example of this process is to be seen in the NSW Report on the Review of the Occupational Health and Safety Act 2000 – a review process commissioned by the relevant minister in June 2005<sup>17</sup>. At page 50 of the report in a section dealing with “The Role of the Regulator” it is said of public comments by “stakeholders”, obviously employers, that there is “a view that WorkCover and the courts *may sometimes set unrealistic expectations* about the control of workplace risks. This led to a *perception by some that all risk was required to be eliminated from the workplace regardless of the duty holder’s level of control over the risk or how far fetched the potential for the risk to cause harm*” (our emphasis). This is not the law in NSW and never has been. A false assertion by ACCI is transmuted into a “perception” without supporting evidence or analysis.

75. The misstatements arising in the context of the employer initiated offensive to cast aside a century of IR regulation then finds its way into a Federal report by the Howard Government’s Regulatory Taskforce on Reducing the Regulatory Burden on Business<sup>18</sup>.

76. At a certain point, the report on OHS issues becomes confused and plainly incorrect:

*“The strong view of business is that in some jurisdictions the duty of care has been interpreted as an absolute duty on employers. The Australian Chamber of Commerce and Industry (ACCI 2005b, p. 40), in its blueprint*

*for improving OH&S, notes that this requires employers to have full control over the conduct of all staff, contractors and third parties on or within their businesses. ACCI (2005b, p.55) recommends that OH&S legislation be based on a general duty of care limited by what is reasonable, foreseeable, controllable and realistic.*

*OH&S laws have gone overboard in compliance regulations — it is bad enough if we or an employee has an accident, but then the OH&S can come in and fine us amounts that are unreal in relation to our income level ... no matter how careful we had been. National Association of Retail Grocers of Australia, sub. 40, p. 3*

*[OH&S] is of substantial concern to Australia's farmers with the extraordinary complexity of compliance ... the problems associated with OH&S red tape are such that workplace risk is simply being shifted as the sole responsibility of the farmer rather than being shared with employees ... National Farmers' Federation, sub. 22, p. 2*

*The concepts of 'reasonably practicable', 'foreseeable' and 'control' have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practical or achievable. Master Builders Australia, sub. 100, attachment B, p. 17*

*The Taskforce notes the strong concerns of business on this issue but is unable to consider ACCI's recommendation that OH&S legislation be based on a general duty. This would entail a significant change to current no fault policy and as such lies outside the terms of reference for this study. The Taskforce does, however, strongly endorse the principle of national consistency. On the issue of the inconsistent interpretation of duty of care in some jurisdictions, the Taskforce regards the recent reforms in Victoria as a good model.*

*The Victorian Government, in responding to the Maxwell Review (2004), implemented changes to its OH&S legislation explicitly recognising that duties under the Act include not only employers and employees, but also*

*a range of third parties such as 'designers of buildings or structures' and 'manufacturers and suppliers of plant and substances'. The changes also recognise that those duties are not absolute, but are qualified by requiring what is 'reasonably practicable' in the circumstances (VECCI 2004)."*

77. Following this report, the Council of Australian Governments (COAG) during the term of the former Howard Government adopted the "harmonization " agenda for OHS and linked it with the object of removing burdensome "red tape" – with a proviso added by the State representatives, to include a clause, a little ambiguous, protecting existing standards.
78. The Review Panel should not be swayed by the essentially wrongheaded employer campaign against unions' representative role and best practice OHS standards. There are some matters raised by employers, and others, deserving close consideration.
79. Employers operating in more than one State have a legitimate concern as to compliance up to eight different, albeit broadly similar OHS schemes. We do not have figures quantifying additional costs but recognize there must be some complications and some costs for multi State employers.
80. It is the case that more needs to be done to engage "contractors", casuals, and non-unionized workers - as well as migrants, temporary visa workers and others with English language difficulties in the process of OHS consultation with their employers and principals.
81. The key question is what provisions and protections does the

workforce need to participate fully in OHS - so that workers are informed and empowered to raise all and any legitimate OHS issue without fear of retribution or detriment.

82. Employer arguments against effective and functional NSW OHS provisions – the employers’ “absolute” duty of care; the onus on the employer to prove the defence of “reasonable practicality” or lack of control, to the civil standard; union initiated prosecutions and OHS inspections of relevant workplaces by union authorised officers – are not sound or supported by evidence and have no merit.
83. Employer expressions of support for a “tripartite” approach to OHS are hollow if this support is restricted to input at the peak level. The critical place for engagement at a tripartite level is across industries and into workplaces. Supportive structures are required to promote an engagement between employers, employees and any relevant union/s at these levels.

#### Opportunity knocks?

84. Corporate profit share has never before represented such a large proportion of gross domestic profit. ABS statistics show that profit share as a percentage of total factor income is at historically high levels<sup>19</sup>.
85. Much of the increase in profitability has come as a result of changes to the labour market (outlined above); increased hours (often unpaid); greater “flexibility” (that has often resulted in “work intensification”) and the introduction of new

technologies.

86. Simultaneously, access to workers' compensation benefits, particularly for stress related mental disorders, as well as conditions of gradual onset and that may be aggravated by work have been tightened.
87. Employers complain about the cost of workers' compensation premiums and "red tape" associated with compliance with OHS standards. The reality is that by far the greater burden of injuries and diseases related to work is borne by the employees and their families.
88. It is reported in a NOHSC report, *The Cost of Work-related Injury and Illness for Australian Employees, Workers and the Community* (2004)<sup>20</sup> that workers bear 44% of the total cost of work related injury and disease with society picking up anything between 35% to 53% (depending on whether workers' compensation premiums are included in the employer – in which case the employer burden is as low as 3%). The key point is that, however calculated, employers carry the lowest proportion of cost – but are in a position to do more than either individual workers or regulators to minimise the rate of injury and disease.
89. The Final Report (2002) into the Western Australian OHS regime by R. Laing<sup>21</sup> suggests the "lack of employer commitment [to consultation] is not illogical nor should it be surprising". "An employer who is trying to manage a business and to prioritise a busy work schedule will have even more

issues to respond to and problems needing resolution. Even the decision to genuinely consult will result in issues needing resolution”.

90. The critical question is why employers can afford not to do more to comply with OHS legislation and improve OHS outcomes to best practice standards.
91. 1601 people were killed in 2006 on Australian roads<sup>22</sup> – several hundred less than were killed at work (on the most conservative calculations). The NSW Bureau of Crime Statistics publishes annual reports on crime and punishment in NSW<sup>23</sup>. In 2006 there were 379 people charged in the lower courts with occupational health and safety offences, but by contrast – 83 people were charged with driving causing death, 7092 charged with dangerous or negligent operation of a motor vehicle (of which 161 were gaoled). By way of contrast, gaol for OHS offences in Australia is almost unknown.
92. Obviously there are differences between the cause and nature of injury at work and on the roads, (many work related incidents arise from a systemic or chain of failures; as can some on the roads) but the essential point is that there is a broad based regulatory and community failure to act as robustly on OHS as is necessary to dramatically reduce the loss and waste of human life arising from work.
93. Multi State employers correctly submit that a single scheme, and standardised regulations, codes and guidance materials

will reduce costs. Equally, from an employee's point of view, and their representative organisations, it is just as reasonable to expect a new national scheme will deliver OHS laws with the highest standards, and that cost savings arising from the reform process are invested fully in OHS improvements that benefit workers.

94. We have a historic opportunity to develop an OHS system across a nation that will put Australia into position as the leader in the prevention and reduction of occupational injury and disease. But to do this requires adoption of the highest standards from the various jurisdictions – 'to round up, not down' – and this then entails a commitment to empowering workers, and their representatives, to carry out their legitimate functions in the workplace.
95. Priority must be given to factoring the real cost of work related injury, disease and death into our competitive market economy. The role of State regulation is critical in offering encouragement - and enforcing the law to bring about necessary improvements.
96. The threat to 'life or limb' in a workplace must be treated as seriously as the threat to life or limb in any other field of social activity – neglect and 'trivialisation' of work related loss must end. In the following sections we focus on several critical elements that we submit to the Review Panel must be incorporated in model law for any prospect of success.

## **PROTECTION OF OHS REPRESENTATIVES**

97. All State and territory OHS reviews conducted in recent years support the need to empower workers to actively engage in OHS consultative processes in the workplace. Additionally, there is concern that HSRs may be discouraged from representing employees. The Tasmanian Discussion Paper “suggested that changes to workplace relations have increased worker insecurity – a major factor in preventing workers from speaking up about health and safety matters”<sup>24</sup>.
98. Similar concerns are expressed by Laing in Western Australia when he observes of Robens that he did not take sufficient account of the unequal power relationship in the workplace. Employees are reluctant to exercise their statutory rights for fear for their jobs – but that consultation must be encouraged and protected by law. Employers will respond to employees who exercise their entitlement to be consulted and to consult under the legislation. It can be expected that employees who are properly protected by the legislation from discriminatory practices will also be more disposed to participate openly and without fear.
99. There is an old aphorism that “justice delayed, is justice denied”. Never can this be truer than in circumstances where an employee finds themselves out of a job for asserting a right. It would be there rare exception that any worker has enough set aside to live without income from work for more than a few weeks - and even in the most user friendly IR jurisdictions, an aggrieved employee would be looking at

months, not weeks, for independent review and the prospect of redress.

100. The decline in union spread and density is of significant concern because there is incontrovertible evidence that unionised workplaces are safer workplaces. This is because the “union” provides a measure of protection from misuse of employer power directed against an individual; and also a forum in which work related issues could be discussed and resolutions worked out from the employee’s point of view. Typically in a “representative” IR system, these collective views would be discussed with the employer/management and agreement reached.

101. OHS is mainstream union business – it has always been reflected in awards – and often been the subject of contention in the workplace, in the arbitral tribunals and courts and in the struggle for OHS legislation.

102. But it still comes down to the individual workplace. We submit that model OHS law needs to strengthen support for the representative functions of HSRs, and wherever practical, close and co-operative relationships between HSRs and OHS committees.

103. Additionally, better and clearer specific provision needs to be made to ensure HSRs and members of OHS committees have the skills to competently represent the workers. Much of this educative function is currently the work of unions where they have coverage and presence.

104. All SPSF Branches provide training for delegates to equip them to work effectively in a representative capacity and to impart the necessary skills and knowledge that is needed. Significant training in OHS matters is provided. In our experience the training equips employees with the skills and confidence to engage with employers in meaningful OHS consultation. But representatives are backed up by the resources of the union.

105. Government agencies are not always exemplars of behaviour, and OHS representatives may, from time to time, require strong support to encourage active engagement on OHS matters. SPSF Branches report suspicions that active delegates are “discouraged” from representative roles in some agencies. This concern is supported by conversations we have had with OHS inspectors who operate across a wide range of industries.

106. It is unusual to uncover discrimination that is so blatant and discriminatory that it can be held up as an example of “worst practice”. We outline one such instance. In short, a union delegate at a juvenile justice centre was sacked (as an ongoing casual) because she raised OHS concerns about bullying, on behalf of members. It was held that her unfair dismissal was the manifestation of victimisation. There was evidence of a “cover up” by the management to hide the reasons for her dismissal. Her reinstatement was ordered along with orders for continuity and payment for lost remuneration. This decision, righting the wrongs done by the

employer was made almost ten months after the delegate ceased work<sup>25</sup>.

107. The decision is interesting as an example of the ease with which an employer can victimise an employee who in every aspect of their work performs well – but has the courage and ability to raise legitimate OHS concerns. It must be asked, where it can be done in the public sector with well developed policy and specialised human resource management, how much more prevalent is this type of problem in other sectors? What is the consequence in workplaces where there is no institutional support and resources to be deployed in defence an employee victimised for raising legitimate OHS issues?

108. Several SPSF members who work as OHS inspectors, suggested it may assist in these type of situations if the inspectorate was empowered to issues a notice reversing management decisions that damaged the interests of workers who raise OHS issues. Clearly also, there is a great need to provide speedy access to a conciliation and arbitration tribunal with the power to issue an order that restores a worker to a position prior to the employer imposed “detriment” pending a full hearing of the matter. Workers generally need advice and support in these circumstances and it seems appropriate that it be provided institutionally if there is to be fair treatment and no union presence.

## **UNION RIGHT OF ACCESS TO WORKPLACES for OHS PURPOSES**

109. Unions have worked to protect their members' occupational health, safety and welfare since their formation in the nineteenth century. Laing discusses some of the employer fears around OHS "that encouraging employees to develop good health and safety representation and processes in the workplace will reduce their authority and/or encourage union membership and potential conflict with the union"<sup>26</sup>.
110. The evidence shows that employee consultation is necessary to produce acceptable OHS outcomes, and, because of the institutional support and professional advice, unionised workplaces are safer. It is all a matter of balance – and the current laws on union rights of access are illogical and at odds with the goal of reducing work related injury and disease.
111. In the State jurisdictions SPSF Branches do not have legal right of access to workplaces in Western Australia, South Australia or Tasmania. We do in the States of New South Wales, Queensland and Victoria on OHS grounds (although the provisions differ in terms). Notwithstanding the legal situation, the six SPSF Branches report that access to workplaces across the State public services has produced no practical problems and that OHS matters are pursued by union officials with vigour and commitment that has produced better and safer work arrangements. We do not claim that that the types of issues raised are easy, or without contention – but we do assert that our consistent activity over decades

has done much to improve OHS standards and practices.

112. We have been particularly proactive in campaigning around issues to do with repetitive strains, work overload, bullying and occupational violence that we identified as particularly common hazards. International and national evidence supports our assessment of these priority issues that give rise to psychological harm and stress related disease of gradual onset. Not only are these afflictions harmful to individuals but also expensive to compensate.

113. Our key point is that workplaces cannot be a dictatorship and workers have rights – and that effective union representation on OHS matters, broadly understood, is predicated on unions having access to workers in their places of work. In OHS terms, access is not merely about inspecting a workplace for “suspected” breaches but having access to members and industries in which the unions act as representatives to promote and educate employees about their rights under the OHS laws – to impart the skills, knowledge and confidence OHS HSRs need to carry out their roles. All SPSF branches conduct “Lunch ‘n Learn” sessions to inform employers about OHS issues without disruption. The model OHS laws should provide access for union officials on OHS grounds that include educating employees.

114. If comprehensive supportive arrangements for workers on OHS matters are not to be applied in model law – *“It seems that employees are not to be trusted to take a reasoned and intelligent approach and instead those in higher positions must*

*make decisions on their behalf. The concern seems to stem from a belief that employees might unduly interrupt or interfere with production. If this is correct, it implies that the prevention of occupational injury and ill health is only to be regarded as a cost of production. If that is so, it follows that those who assume the responsibility must face the full consequences if their failure ends in the injury and death of employees who have little control over the safety of their work. It also means that a community that accepts injury and health failures, and is not prepared to empower its workers, must ensure the employees do not bear the cost of injury and ill health<sup>27</sup>.*

115. Finally, there is a need for greatly increased awareness and training in OHS matters – 43% of the workers who reported injury or illness in the ABS survey had not received any occupational health or safety training in the job where the injury occurred<sup>28</sup>.

### **UNION RIGHT TO PROSECUTE**

116. NSW is the only jurisdiction in which the SPSF ‘associated body’ (Public Service Association of NSW), can initiate and run prosecutions for breaches of OHS duties.

117. The ability to do so has been available for many years and there is no evidence of misuse. It has proved to be a constructive and productive tool to improve OHS outcomes. The evidence suggests it will be beneficial to incorporate into

model national OHS law.

118. It is worthwhile examining the principal reasons given against the right of unions to prosecute. They fall into two categories. The first line of argument comes from employers groups. Essentially what has been said on the public record to date is that they do not like to be prosecuted – if they are prosecuted for OHS breaches they desire it to be conducted by the regulator or other State agency – and moieties should not be awarded. They cite no evidence at all of abuse.

119. Several reasons were outlined by Maxwell in his Report on the Victorian OHS system - although it appears he did not analyse the operation of union prosecutions in NSW. In the Victorian context he postulates that:

- 1.1. advocacy of a union right to prosecute implies that the regulator is “under-prosecuting” and that an increased number of prosecutions leads to improved OHS outcomes;
- 1.2. If the argument for union prosecutions is a lack of resources available to the regulator to prosecute the answer is to increase resources; and
- 1.3. the regulators prosecutorial discretion is not being exercised appropriately.

120. Additionally, he suggests that:

- 1.4. the role of prosecutor is a specialist one;
- 1.5. it is important to the integrity and consistency of the

enforcement role to have the regulator in exclusive control of prosecutions; and

- 1.6. union prosecutions will damage the development of trust between unions and employers that is essential if workplace health and safety is to be improved.

121. The experience in NSW of five successful prosecutions by the PSA (one underway) disposes of these arguments. In each PSA prosecution the union requested the regulator to prosecute before prosecuting. This request was declined. It is not known why, whether a matter of resources or inappropriate exercise of discretion, but the facts show that the cases were run, competently conducted, were all successful and resulted in significant OHS improvements. None had any adverse impact on the relationship with the employers.

122. In two of the PSA prosecutions the employer has challenged the award of a moiety. It is a matter within the discretion of the court. The suggestion that there is something improper or untoward about the award of a moiety is unfounded. There is an exceptional drain on staff resources that are never fully recovered. The investigatory process is seldom welcomed or supported by management and this adds to the effort required to obtain the evidence to found a prosecution.

123. It needs to also be understood that the prospects of a successful prosecution is essentially, a matter of the evidence. The process of investigation, collection of evidence, documentation, expert opinion and legal advice is painstaking

and costly. One matter currently under investigation has required legal counsel attending a coronial investigation to ensure that if and when a prosecution is launched, the case that is presented to the court by the union prosecutor is the highest standard. Many investigations by the PSA have been conducted into safety breaches but have not resulted in initiation of prosecutions. Union investigations are carried out with limited inspection powers as compared to the regulator. The framing of the evidence and the charges related to suspected breaches involves careful and responsible consideration by the prosecutor. We believe the PSA has carried out important prosecutions with the utmost responsibility and this is reflected in the awarding of costs – however it needs to be understood that only a portion of costs are awarded, especially where some but not all of the alleged breaches are proven. The PSA undertakes the prosecutorial role to advance its members' interests and spends a very great deal more on OHS on behalf of its members than ever awarded in costs or moieties.

124. It was suggested by Maxwell that union prosecutions will damage the development of trust between unions and employers that is essential if workplace health and safety is to be improved. Our experience has been the opposite. One reason the union prosecutes is because the employer has not been helpful, even after an incident, to improve and rectify safety matters. In all of the prosecutions we believe changes to systems of work would not have been made had it not been for the prosecution action. It should not come as a surprise

that the some of the best OHS improvements are made in consultation with the PSA after prosecution. It is a matter of sitting down in the “wash up” and working out what the industrial parties can do to bring about real and significant changes to systems of work and work culture.

125. We cite a recent example where the PSA prosecuted the Department of Community Services with the decision being issued on the 27 June 2008<sup>29</sup>. The PSA was invited to assist the Department with its refurbishment of interview rooms and front counter areas (the inadequacies of which had been a significant factor in the facts of this prosecution).

126.

127.

128. The PSA (as with all other SPSF branches) has never taken its OHS responsibility lightly. The organisation has approximately 50,000 members in the NSW public sector covering a range of blue and white-collar workers, general,

trades, technical and professional occupations. Coverage also includes industrial in Safety Inspectors with the NSW WorkCover Authority and Mines inspectors at Department of Primary Industries.

129. Prosecution is only one tool, rarely used, the PSA deploys to drive OHS improvements. The union puts enormous resources into assisting members and employers in improving safety. Relevant activities include, but are not limited to active involvement in two WorkCover Industry Reference Groups, involvement in the WorkCover CEO Forum, involvement with the NSW Workplace Health and Safety Strategy Review Committee. The union provides advice to members and industrial staff through two dedicated OHS specialists, and also conducts general OHS training program for members across the State. It also runs training on specific OHS hazards and actively participates in OHS policy-making initiatives by peak union councils and Government. The specialist staff also conducts safety investigations – a very few of which end up as prosecutions.

130. As a matter of principle we accept the regulator is appropriately the first prosecutor and should carry the load in prosecuting duty holders, whether they be in public or the private sector, where to do so advances the objectives of OHS law as a social instrument to protect workers. The reality however is that regulators do not always make the correct decisions to prosecute in appropriate circumstances and this observation is supported by the series of union prosecutions

in NSW. We do not speculate on the reasons regulators fail from time to time, other than to say that research shows that prosecution, or the prospect thereof, is one of the most effective measures that can be taken to drive home to duty holders that OHS is not a second order, or trivial concern.

131. OHS officers in unions observe closely the emergence of adverse developments in the workplace and may be better attuned to mobilising resources to counter the hazards. A slip, trip, or fall is very clear cut, but for workers suffering incapacity from stress related illness, however caused, the connections are to work can be less demonstrable and more complicated.

132. Nor is OHS responsibility in a social democracy the sole preserve of the Government of the day, that through direction can “adjust” prosecutorial focus having regard to the opinion of “stakeholders” and thereby avoid the clear and independent scrutiny of a court. Every year public sector workers are killed or injured in the course of their public service. Indeed, some areas of work are more hazardous than others. In NSW some public sector employees are considered “special” by legislation and are provided an extra value in the criminal law when it comes to sentencing for criminal offences against these public sector workers (Section 21A of the Crimes (Sentencing Procedure) Act 1999 NSW). Despite this “value” recognised by law, there is little evidence that regulators generally are as much focused on prosecuting other agencies of the State with unfettered discretion.

133. Unions generally, know their “industry” and have the unique

position of being the only institution solely and singly focused on the welfare of their members at work. Our analysis of union prosecutions suggest they aim at broader health or safety issues with an employer or the industry in quite proactive ways. This again, should not come as a surprise as unions are constituted by law, with objects and rules that require democratic governance for the benefit of members. If, as we assert, the NSW unions have prosecuted responsibly to promote the best interests of members, there is no basis to assume that this effort will be different in cause or effect if in model national law.

134. Indeed, members of the SPSF OHS Committee from all other States report that they are aware of circumstances and OHS issues within their coverage that are similar to those prosecuted in NSW by the PSA – and that these instances have not been taken up and prosecuted by the regulators.

## **ROLE OF REGULATORS**

168. There is a real opportunity in the harmonisation process that through cooperation and coordination the existing resources of all regulators can be effectively deployed to significantly

increase assistance to employers and workers. The opportunity is to improve research efforts, education, training, assistance to small businesses, plug gaps in inspection, increase prosecutions and lift the effort to meet the National OHS Strategy which is currently in danger of falling short of its targets.

169. The resources that are likely to be freed up from the adoption of national OHS law, regulation, guidelines and so on should not be returned general revenue. By cooperation, we have an opportunity to make real improvements to slash work related injury and disease. It is a pressing opportunity because *“Where competitive pressures within a dynamic economy are great, it could be argued that Government, through the regulators, need to assign more, rather than fewer, resources to support and enforce the regulatory framework.”*<sup>30</sup> In terms of research necessary to support evidence-based policy development there is a pressing need to monitor and research the ‘changing world of work’ and its impact on health and safety.

170. It is apparent that prosecutions have dropped off significantly in NSW and Victoria (and elsewhere) despite the knowledge that “deterrence is essential to effective compliance and the likelihood of prosecution for breach of the Act or regulations is a powerful incentive to comply with the law”<sup>31</sup>.

171. The rate of inspections and investigations needs to be greatly increased. There is evidence that “enforcement deregulation” is occurring in all jurisdictions looked at by the UK Health and

Safety Executive. For example it is uncertain the extent to which employers comply with the basic requirements for the role and function of HSRs - there is a “real risk that lower rate of investigations will feed into lower rates of prosecution and emasculate the powers of the courts to frame how health and safety is conceived in the public imagination”<sup>32</sup>.

## **INSPECTORATE**

172. The SPSF Group organized a national discussion (by teleconference) between inspectors who at some level were involved in their State union.

173. We did this with two objectives:

173.1. to give members an opportunity to make input to the SPSF submission, that dealt in part at least, with the work that they performed; and,

173.2. to better inform the SPSF Group about the issues raised by the Issues Paper that concerned enforcement

174. Before dealing with the specific responses to questions arising from the Paper we deal with a matter of broad significance concerning HSRs. The following question was asked: Are you aware of any instances where OHS employee representatives were bullied or victimized by an employer –and if so – were the remedies adequate and timely?

175. The majority of responses (not all had observed this problem)

is that there is a real problem with HSRs being “bullied”, “stood over” or “intimidated” by employers. None of the respondees had taken formal action by way of prosecution.

176.A further question was asked about whether it would be appropriate and constructive to better protect HSRs from dominating employers by specifically giving inspectors the authority to better support HSRs – and if so – how?

177.The common response was that it may be useful to have a provision for an inspector to intervene in circumstances where “in the opinion” of the Inspector the HSR was subject to influence by an employer that limited the ability of the HSR to act independently and freely in discharging his or her duties.

178.Additional responses to questions raised by the Discussion Paper, or arising from it, included:

178.1. regulators should publish enforcement and prosecution policies;

178.2. the model Act should contain provisions that allow the making of interpretative documents;

178.3. Inspectors should not be empowered to enter into enforceable undertakings with an employer nor have the final say on what breach is prosecuted and what is not;

178.4. the number of prosecutions is limited in some States because of lack of resources – especially of inspectors, legal and associated professionals and OHS

specialists;

- 178.5. there is a reluctance to prosecute Government authorities (but they are much more prepared to negotiate improvements and take guidance from inspectors than private firms);
- 178.6. there is a powerful case for more resources if the regulator is to be effective;
- 178.7. responses were mixed on whether it is appropriate to have the recommending inspector named as prosecutor at all jointly with the regulator;
- 178.8. in some jurisdictions prosecutions have halved during a period when much more emphasis is placed on advisory and education of employers but there is no proper assessment of what communication techniques actually work, or what works most effectively;
- 178.9. in one jurisdiction the problem is that the effectiveness of inspectors is being measured by statistics on prosecutions and infringement notices not on all the work done advising employers – there is a disincentive to advise;
- 178.10. inspectors should have all tools to be optimally effective at their disposal and this is not possible if the advisory and enforcement role is separated;
- 178.11. there may be a strong case that it should be compulsory for all-new businesses to obtain OHS

- advise from regulator before operating;
- 178.12. greater use should be made of web based OHS material to assist employers (starting up now in NSW);
- 178.13. there may be a case also for a tiered approach with some obligations being stronger on some employers than others;
- 178.14. formal qualifications e.g. Dip. Of Government for Inspectors may be desirable at point of engagement or in service – industry experience is important;
- 178.15. it would help inspectors if all interviews could be taped;
- 178.16. it would also help if an inspector could compel an employer to attend for an interview in the regulators office where proper facilities are available for interviewing;
- 178.17. there should be no limitation on an inspector forming an opinion and issuing an improvement notice;
- 178.18. query requirement in at least one State that the regulator talk to Government. agency prior to prosecuting;
- 178.19. internal review of inspector decisions is supported;
- 178.20. an inspector should be able to alter a notice where the wrong entity was named, or where there is something wrong in law, or an order made which is not practically possible - Inspector's notices in one jurisdiction can

only be cancelled by Commissioner – query if undue pressure might be brought to bear on an inspector after issuing an order if the Commissioner did not decide the matter;

178.21. transparent internal reviews are supported and decisions should be reviewable by competent tribunal;

178.22. on the spot fines should be available as a tool for inspectors (used sparingly; and should always be accompanied by an improvement notice);

178.23. as a matter of effective deterrence, fines are not appropriate when there is a serious injury as it precludes prosecution;

178.24. a problem exists some with corporations avoiding big fines by going bankrupt – directors should be personally liable – and laws applying when winding up a company such that it is required that liabilities be declared ( gives the regulator an opportunity to chase recovery of fines);

178.25. there is a significant disparity between OHS fines compared to fines for offences under tax, trade practices or environment law;

178.26. fines should be larger to be more effective;

178.27. jurisdictions need to provide more legal backup to Inspectors, preferably with experienced in house

lawyers not contractors;

178.28. regulators need more solicitors (and more experienced senior solicitors - work is sometimes undesirably contracted out) and public solicitors need better pay;

178.29. as a matter of policy in interviews with employers supported by private lawyers there should be two persons from the regulator;

178.30. a power to seek an injunction would be useful, especially when a prohibition notice is ignored, as the only option is to prosecute;

178.31. it would also be useful to protect HSRs from being bullied, harassed etc;

178.32. admission of wrongdoing should be a precondition for entering into an enforceable undertaking to moralize offences and employees affected as well as the relevant union should be consulted;

178.33. an on the spot fine of a significant sum should be available to deal with failure to comply with improvement notices; as a matter of policy partial compliance should be dealt with by the issuing several notices covering each step an employer needs to take to comply fully;

178.34. all employers should be required to adopt a risk management system;

- 178.35. union officials should have rights to exercise the same powers as HSRs only if properly trained;
- 178.36. HSR should be informed an inspector is on site;
- 178.37. joint inspections may be useful at the request of an authorized union official provided there is no misuse and the inspection is solely in control of inspector (and terminated, if in inspectors opinion the official is impeding the inspection);
- 178.38. more specialist inspectors in specialist positions are necessary eg. hygienists, doctors, ergonomists etc. and need to be deployed in the field; and
- 178.39. specialist units to advise employers are required. Presently inspector's issue notices requiring employers to engage private consultant specialist to advise which adds to costs and effectiveness of regulator.

## **ROLE OF PUBLIC SECTOR AS AN EXEMPLAR**

179. Several reports on State OHS systems suggest that there is a role the public sector agencies to act as an "exemplar" to employers generally. It is a proposition that for a major public sector union it is difficult to disagree.
180. In Victoria for example, Stensholt reports that the Government "expected the public sector to be an exemplar in respect of

occupational health and safety [but] there is insufficient evidence of clear progress”<sup>33</sup>. He quotes Maxwell observing the ‘corrosive’ effect it would have on the private sector to perceive that Government as an employer cannot achieve reasonable OHS standards. The SPSF Victoria believes that the Government spares no expense trying to avoid a conviction. In another State an inspector reports “It has been quoted many a time that the Government can not prosecute the Government”.

181. We have previously documented in this submission the prosecutions conducted in NSW by the PSA and a case of victimisation. We conclude that Governments are far from exemplars and need to do much more.

182. The following case summaries included below are actual experiences from our branches from States that extend to HSRs the power to issue PINs. It is important to note that the HSRs acted in a representative capacity in conjunction with unionised workplaces. The cases are evidence to support the extension of PINs to the model law – but also demonstrate the distance needed to be travelled by sections of the public sector if it is to be an exemplar to others.

## CASE 1

### A Government registration office

183. Several years ago, plans were under way to redesign a large office counter, which had caused many RSI (repetition strain injury), neck and back injuries.

184. The employees were pleased about the proposed changes, as they would lead to fewer injuries for them. However, some of the managers decided that they would use the opportunity to introduce another change. They wanted to remove a physical, see-through barrier that they claimed was causing poor customer goodwill and contributed to client anger.
185. As negotiations with management progressed, it was clear that they would not give way on the security barrier and that if the workers wanted improvements in workstation ergonomics, they would have abandon any hope of retaining the security barrier.
186. On two of the many occasions that a union official met with members, a client shouted obscenities and gesticulated in a threatening manner.
187. However, the staff was able to feel secure knowing that they were safe due to the presence of the barrier. In both cases, a manager would appear and lead the client out of the office.
188. Members also reported to the union instances when angry clients would hurl objects against the barrier, hence their resolve not to give approval for its removal.
189. Finally, the members, after consultation with the union, agreed that if there were any attempt to remove the barrier, the elected Health & Safety Representative would serve a Default (PIN) Notice (not available to health and safety representatives in all States).

190. A meeting was arranged with a more senior manager to discuss the issue.

191. When told that a Default Notice would be served if the barrier were removed, he acceded to the workers' demand. The barrier stayed. The campaign to improve the ergonomics and to keep the security barrier lasted for 4 years

192. Several years later, it has been decided that there may have to be other changes to the workstations for ergonomic reasons. There is no suggestion by management that the security barrier will be removed.

## CASE 2

### Correctional services

193. Several years ago, there was a riot in a State prison that left two prison officers with such serious injuries that they were forced to take early retirement.

194. Obviously there was much concern about security and OHS amongst prison staff. Despite this event, management decided to remove an officer from one of the prison's watchtowers of the prison and replace that person with a surveillance camera that was being monitored from the central control tower.

195. A Health and Safety Representative (HSR) immediately served a Default Notice (PIN) on the management. This led to a meeting between the general manager of the prison, the HSR and the union's OHS Industrial Officer. During this meeting the general manager became excessively abusive

and shouted obscenities at the HSR.

196. The union contacted the local OH&S inspectorate who refused to act, as they did not consider potential violence to be an OHS issue!

197. Following this, there was a management decision to put all fine defaulters into the main prison system. This is not an acceptable practice in other prison services as it has led to short term offenders being exposed to extremely violent prisoners with some tragic consequences.

198. Initial negotiations between the union and management led to an agreement that fine defaulters would be:

198.1. given separate accommodation to main stream prisoners;

198.2. provided with different uniforms to normal prisoners;  
and

198.3. exercised at different times to the rest of the prisoner population.

199. One sticking point in the negotiations was that prison authorities originally wanted to have incoming fine defaulters being showered on arrival in the same facilities as other prisoners. Separate facilities were necessary to ensure the security of the fine defaulters and the hygiene of prison officers. Eventually, management ceded this point too and promised they would not make the transfer of fine defaulters

until their showers were installed.

200. Suddenly, without any notice, a group of fine defaulters were sent to the prison in a police paddy wagon even though the surveillance cameras were not functioning. They got no further than the area between the two \*sally point gates. The HSR had told his fellow workers that he would serve a cessation of work directive if there were attempts to transfer the fine defaulters before the security and hygiene issues were not resolved. The officers were right behind him and refused to allow the paddy wagon to proceed from the sally point into the prison grounds.

201. The relevant department despatched a senior inspector to adjudicate on the situation. This inspector harangued both the H&SR and the union OH&S industrial officer for the situation and would not listen to the arguments of the H&SR, which were:

201.1. the security camera was not working;

201.2. management had removed the officer from the watchtower;

201.3. therefore there was no check to ensure that police; and

201.4. personnel had removed their firearms before entering the prison.

[The procedure was that police personnel should remove their firearms and place them in a safe in the sally point before driving through the inner gate. This is a necessary

precaution to prevent the police from being jumped by a prison working party. Prison officers were not armed].

202. Because of the inspector's abusive approach, the union made an official complaint to his chief executive.

203. This action had a number of outcomes:

203.1. the inspector was counselled about his approach to people;

203.2. and the importance of prevention in planning to reduce;

203.3. potential violence;

203.4. a prison officer was reassigned to the watch tower;

203.5. the union OHS industrial officer was invited to the prison; and

203.6. to make suggestions about improving OHS&W conditions in the section of the prison that accommodated the fine defaulters.

[A sally point is a double gate system at the entrance of prisons]

### CASE 3

#### Government office

204. Most of the ticket sellers in this particular Government office are women.

205. For many years they had to endure some clients putting their hands across the counter to grab them - sometimes to

threaten them, sometimes to steal spare tickets and sometimes in a sexually suggestive manner.

206. They sought help from one of the first female OHS inspectors in the State. She insisted that the employer install security barriers around the counters to protect the workers and the tickets and cash for which they were responsible. If tickets or money did not tally at the end of the working day, they were expected to make up the difference out of their own wages. So the installation of the barrier was heartily supported.

207. Many years later, a manager insisted that the barrier was an impediment to good customer relations and demanded that it would have to go or be drastically modified.

208. Union members consulted with the union office about what action they should take to retain the barrier.

209. The first thing they did was to list why the barrier was so important.

210. The items they listed were:

210.1. it provided security for staff members;

210.2. it deterred customers from getting access to money or tickets; and

210.3. it provided a hygiene barrier to those clients who sneezed.

211. Discussions about this issue went on for some time and the union and its members maintained their opposition to the

barrier's removal or any drastic alterations to it that would compromise security.

212. Staff also discussed the option of having HSRs serve Default Notices if management went ahead with their threat to remove or change the barrier.

213. They maintained their resolve while management proposed several options.

214. All were rejected and when management looked at their final option, they discovered that it was far too expensive to make any change at all. The barrier was unchanged.

#### CASE 4

##### Private Prisons

215. A number of attacks on prison officers at a privately run prison have escalated over a period of time. Health and Safety Representatives (HSR's) found a common feature of the attacks related to poor staffing levels in particular units at the time the violent behaviour occurred. Poor staffing in other units meant were slow to respond to alarms.

216. Meetings were held with union delegates and the Occupational Health and Safety committee to discuss the issue. Delegates explained to management that should staffing levels drop in particular areas, they would have to take immediate action, as staff would be in danger.

217. Staff would use the "immediate risk" rights under OHS legislation to keep the prisoners locked down until sufficient

staff was provided. This was the only way they could ensure staff was protected from risk of further occupational violence.

218. This strategy was agreed to by the management along with strategies for ensuring adequate staff in particular units and especially at times of high risk.

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