



National Review into Model Occupational Health and Safety Laws

CPSU (PSU Group) Submission

July 2008

INTRODUCTION

The PSU Group of the Community and Public Sector Union (“CPSU”) represents workers in the Australian Public Service, the ACT Public Service, the Northern Territory Public Service, the telecommunications sector, call centres, employment services and broadcasting.

As the principal union covering Commonwealth public servants, Telstra and Australia Post employees, the CPSU has considerable knowledge of and experience with the

- *Occupational Health and Safety Act 1991* (OHS Act) – current Act; and
- *Occupational Health and Safety (Commonwealth Employees) Act 1991* (OHS(CE) Act)- preceding Act .

The CPSU believe the amendments leading to the current Act have seen a significant diminution of workers rights and safety standards in the Commonwealth. We believe that we are uniquely placed to provide a valuable insight into the operation of the Commonwealth framework and learn from its failings in the development of model OHS Law.

The CPSU endorses the ACTU submission to the National OHS Review being the peak union body in Australia representing the interests of 1.9 million workers and their families and offers this submission in its support. This submission is not intended to cover the same ground as the ACTU’s but seeks to provide emphasis and case examples on the following terms of reference

1. Consultation and participation
2. Health and Safety committees
3. Risk Management
4. Union right of Entry
5. Regulator Functions
6. Health and Safety Representatives
7. Union right to prosecute

In preparing this submission, the CPSU has been informed by direct involvement in matters relating to health and safety, in workplaces and agencies and the experience and opinions of our members.

Two key principles that form the ACTU Charter of Workplace Rights are fundamental to the successful introduction of model OHS laws throughout Australia. They are:

1. That changes to Occupational Health and Safety law must not result in a diminution of the rights and entitlements of any worker, and
2. All occupational health and safety laws must be developed in a tripartite manner. [Tripartite meaning involvement of unions as workers representatives, employers and government.]

1. CONSULTATION AND PARTICIPATION

OHS Model law must contain

- a) **A requirement for the employer to reach agreement with employees and their representatives on arrangements in the workplace that relate to health and safety.**

- b) **A dispute resolution mechanism so that there is a way for the parties to reach agreement. The dispute resolution must include the power to arbitrate to resolve disputes as OHS is too critical an issue to remain unresolved.**

- c) **Protections for worker consultation, participation and representation rights. That means employers cannot:**
 - **Choose whom they will consult,**
 - **Run HSR elections or elect HSRs,**
 - **Determine the makeup of designated work groups (if applicable),**
 - **Determine the worker representatives on OHS Committees.**
 - **These issues are to be determined by the HSRs and workers with their union.**

Consultation and participation is of critical importance to employees in matters that relate to their health and safety in the workplace. Where employees are able to genuinely use their skills and experience, grounded in the workplace, to influence safe work processes – the result is safer workplaces.

Evidence continues to grow on the importance of genuine consultation to superior OHS performance

- A study by the National Occupational Health and Safety Commission found a positive correlation between consultation and OHS performance¹
- A SafeWork SA review of consultative arrangements found that effective workplace consultative and participative arrangements lead to improved OHSW as determined by the cost of workers' compensation.²
- Under the OHS (CE) Act 1991 which mandated OHS Policy and agreement making with the involved union(s), Comcare had the lowest incidence rate of serious injury and disease claims by jurisdiction and the lowest frequency rates of serious injury and disease claims from 2001/2002 to 2005/2006³.

¹ Gallagher C, Underhill E & Rimmer M (2001) Occupational Health and Safety Management systems: A Review of their effectiveness in securing health and safe workplaces, National Occupational Health and Safety Commission, April .

² SafeWork SA, Working Together - A review of the effectiveness of the health and safety representative and workplace health and safety committee system in South Australia, December 2001

³ SRCC Annual Report 2006/07 Indicators 5 and 6 in the Comparative Performance Monitoring Report , 9th Edition

The CPSU believe that Model OHS laws that mandate an obligation on the employer to genuinely consult and facilitate participation by employees and their representatives will lead to superior OHS outcomes.

Consultation is not a one-way flow of information or merely an exchange of information. There must be a mandated duty on the employer to consult and to take into account those consultations when making decisions about health and safety. Consultation must be deemed to have failed where employer decisions disregard or fail to satisfy the issues or feedback from employees.

Under the Occupational Health and Safety (Commonwealth Employment) Act 1991 (OHS (CE)Act 1991) employers were required to develop, in consultation with unions in the workplace, an occupational health and safety policy that enabled effective co-operation between employer and employees in promoting and developing measures to ensure the health and safety of employees at work. The policy had to provide for the making of an agreement between the employer and unions that provided appropriate mechanisms for continuing consultation between the employer, unions and employees on health and safety matters and any other matters agreed between them. This mandated requirement resulted in most Commonwealth Government Departments and Agencies having OHS Agreements with CPSU and other unions in the APS.

Commonly these agreements featured

- Joint management/union HSCs where the union determined its representatives on the committee. These could be union officials.

This is a key feature as under the new amendments to the OHS Act it is now management that decide how and who will represent employees

- Agreed DWGs structures between the parties.

The OHS (CE) Act did provide that where agreement could not be reached the parties can take the matter before the reviewing authority (AIRC) to facilitate consultation and/or arbitrate. Very few disputes were referred to the AIRC as the parties were able to reach agreement about the appropriate size and grouping of employees into DWGs. So agreement between employers and employees and their representatives can be, and has been, done in consultation and without disputation.

Workers must have the right to be represented by their union in consultations in the workplace. This is not a matter that should be self regulated. Employers must have a clear and mandatory framework to inform them of their obligations to genuinely consult with worker representatives, where they exist.

Under the OHS Act 1991 employers are not consulting with unions, even though they know that their staff are members of a union. This is because the OHS(CE) Act was amended to remove all rights of unions to directly represent workers and replaced by the limitation of “where requested by an employee”.

Since the introduction of the current Act in March 2006 employers in the Commonwealth jurisdiction such as CSIRO have demanded that the request be in writing, thus forcing the disclosure of union membership. The CPSU believe that the act of joining a union means that the worker has requested that the union represent them in consultations with their employer.

Without the mandated obligation to consult and reach agreement, employers in the Commonwealth jurisdiction can, and now do, unilaterally determine DWGs, structure of HSCs etc. Disputation has dramatically increased since the removal of the requirement to reach agreements in the Commonwealth jurisdiction. For the first time ever employees in the Commonwealth are in dispute with employers such as Centrelink, Child Support Agency, CSIRO, Telstra, over issues such as DWGs; structure and operation of Health and Safety Committee’s; access to training and facilities; HSR election processes and use of Deputy HSRs.

Centrelink

The CPSU, as the chosen representative of employees in Centrelink, has been in consultation with management on the development of Health and Safety Management Arrangements (HSMAs) since April 2007.

Centrelink has made a number of decisions that do not reflect the issues and matters raised by the CPSU. This is evidenced by the fact that Centrelink made the following decisions after mere information exchange

- *Dissolved the National OHS Committee and all Area OHS Committees*
- *Established a new National Health and Safety Committee (HSC)*
- *Determined new Terms of Reference and new staff representatives*

The OHS Act 1991 requires the development of a written dispute resolution procedure to deal with matters that arise during consultations under the OHS Act [s 16(2)(d)(v)] Centrelink has refused to finalise the consultation process in order to have this in place. As a consequence Centrelink workers, represented by their union, have had no ability to resolve disputes over consultation.

The Regulator has not been able to assist as it sees that it has no role in dispute resolution over proper consultation. This impasse is resulting in a denial of rights and entitlements of Centrelink workers to be represented during consultations over matters that affect risks to their health and safety.

The removal of the requirement to reach agreement on health and safety matters has seen Centrelink management completely dismantle the arrangements that were in place and improved since 1991. This has resulted in strong concerns and anxiety in a workforce that is confronted by complex risks to their health and safety such as

- Customer aggression; and*
- Stress and psychosocial injury*

Child Support Agency (CSA)

CSA reached Agreement with the CPSU in February 2007 on a new range of Health and Safety arrangements that covered matters such as DWG,s; HSR Elections; training; facilities to support HSRs and Health and Safety Committees.

With the amendments to the OHS Act CSA announced the ceasing of the operation of the National HSC and announced, with no consultation and the Terms of Reference and structure of a new National OHSC.

The removal of Agreement making has once again resulted in unilateral decision making by the employer and disputation. It has also resulted in the development of arrangements which weaken employee consultation and participation and will lead to increased risks to health and safety in the workplace.

2. HEALTH AND SAFETY COMMITTEES (HSCS)

OHS Model law must contain

- a) OHS Committee structures that mirror the decision making structures within the employers.**
- b) Employee representatives on committees must be determined and controlled by workers and their union.**

Workplace Health and Safety Committees (HSCs) play an important role in addressing issues such as developing policies and procedures, planning OHS improvements, monitoring trends in OHS, injuries and workers compensation, engaging consultants etc. At least half the HSCs must be elected/nominated worker representatives.

Most OHS Agreements under the OHS (CE) Act 1991 provided for union officials or nominated CPSU representatives to be members of the HSCs and, as a result, there was ongoing consultation about health and safety matters in the workplace with unions through the HSCs. Unions were involved in identifying hazards, assessment of the risks associated with the hazard and eliminating or minimising the risks.

For large, geographically dispersed employers eg Centrelink, banks, state schools in State Education Departments, there must be provision for more than one HSC with unions represented on all HSCs.

3. RISK MANAGEMENT

OHS Model law must contain

- a) **An enforceable requirement that employers use systematic and documented risk assessment procedures aimed at eliminating hazards at their source.**

A Risk Management clause must be included in OHS law. It must make it clear that the object is to eliminate the risk and if that is not possible control it and require the duty holder to be proactive utilising a systematic, pro-active process as distinct from an ad hoc reactive response. Consultation must be part of the process at every stage, including the contemplation stage, and HSRs and unions must have access to all risk management records.

The Risk Management process must be legally enforceable to ensure it is activated.

Centrelink – Glenelg CSC

Stress is a recognised hazard that can lead to serious health effects. During the introduction of the Federal Governments Welfare to Work reforms in 2006 the presence of increasing stress levels was identified by the HSR at the Glenelg Centrelink office.

Centrelink management identified the increased risk of stress when it undertook risk management in line with the Australian Standard (AS 4360) when planning the introduction of the reforms but only conducted risk assessment and risk control on risks to the “business” not employees health and safety.

Due to the failure of management to take any systematic action to introduce stress prevention programs or controls risk factors for stress were identified by the HSR at Glenelg CSC. Consultation between management and the HSR did not address the issues of concern and the HSR issued a Provisional Improvement Notice (PIN).

The resulting investigation by Comcare found no breach of the OHS Act even though it was identified Centrelink had

- No systematic approach to monitoring or managing risks associated with stress in the workplace*
- Had no documented mechanisms to identify hazards in the workplace*
- There was no evidence that any actions resulted from risk management processes.*

Centrelink's philosophy is like many employers in that it will only do what is required to be compliant with statutory requirements and routinely tests the boundaries of this due to the self-regulatory nature of OHS in Australia.

Australian Taxation Office

After the amendments to the OHS Act 1991 the Australian Taxation Office (ATO) continued the long established form of agreement making in order to determine its new HSMA.

This has resulted in an agreed structure for Health and Safety Committees and DWGs. This structure has delivered policies and procedures that have integrated a genuine and advanced risk management approach to health and safety throughout the ATO's decision making structures.

4. UNION RIGHT OF ENTRY

OHS Model law must contain

- a) A union right of entry to support members and HSRs where safety concerns are raised or incidents have occurred**
- b) A union right of entry to conduct investigations and gather evidence of a suspected breach.**

The ACTU supports union right of entry for all work sites, irrespective of union membership and right of entry for all matters of OHS not just suspected breaches.

Unions must have the powers of HSR at the place of work but particularly be able to issue notices, inspect workplaces and systems, copy documents, make audio/visual recordings and for education and information gathering purposes.

Union right of entry on OHS grounds must not be subject to industrial relations laws.

Centrelink

There have been five serious incidents – Modbury CSC, Inala CSC, South Brisbane CSC, Pt. Adelaide CSC and Marion CSC – where due to the lack of a right of entry under the OHS Act 1991 Centrelink management have refused entry to CPSU officials to support and assist HSRs and members after serious incidents.

At Inala and Modbury customers entered the workplace with flammable liquid and after pouring it over work stations and the public contact area have tried to start a fire. At Inala CSC the customer was successful.

At South Brisbane a worker had been stabbed in the neck with a blunt instrument and was seriously injured. The Pt. Adelaide incident involved staff and police being involved in a serious assault with a customer in the manager's office and the Marion incident involved an angry customer walking through the reception area, into the manager's office, locking the door holding the manager captive.

Centrelink would only provide entry to officials in accordance with the Workplace Relations Act 1996 which required 24 hours notice and workers can only meet in scheduled break times.

In all cases the CPSU was prevented from investigating the situation or providing immediate assistance to HSRs and members. The CPSU was excluded from all consultation's and investigation processes that occurred after these incidents.

Centrelink workers involved in these incidents – witnesses, victims and HSRs – reported coming under immense pressure from management not to involve “the union”. Many while seeking direct assistance and support from their union would do so under the strict condition that they remain anonymous because they feared for their jobs.

The CPSU believes that the significance of these seminal events has failed to result in a major review of Centrelink's customer aggression policies and the control measures used in offices to protect workers from physical assault.

Centrelink has failed to release to any of its employees the results of the internal or external investigations of these incidents – what the CPSU remains confident of is that there has been no systematic review of the control measures used in these workplaces to ensure incidents such as these can not happen again.

A union right of entry combined with powers to represent and assist the HSR in the investigation of any complaint or threat to health and safety would have greatly assisted the workers and HSRs in these incidents.

5. REGULATOR FUNCTIONS

OHS Model law must provide

- a) Sufficient powers and resources to the regulator to enable both proactive and reactive enforcement of safety laws.**

The ACTU supports inspectors having a full range of powers from issuing notices through to investigating and prosecuting breaches of the Act.

The focus of an inspector's duties must be enforcement of the Act and Regulations.

The inspector must inform the HSR that they are entering the place of work and be subject to and respect the consultative structures. The HSR has the right to accompany an inspector during an inspection/investigation.

In 2005/2006 Comcare had the lowest number of field active inspectors per 10,000 employees (page 17 of 9th edition of the CPMR). The work they performed is investigation of incidents and preparation of a report to senior management for approval prior to enforcement decisions being made rather than any pro-active enforcement of the legislation "on the ground" as happens in other jurisdictions. This has proved to be a very long, slow process and does not quickly address the OHS issues in the workplace. Legislation must ensure that inspectors have the power to respond swiftly during their inspection eg. by providing advice on how to comply.

The number has increased over the last couple of years as new employers have joined the scheme as self-insurers. But they are only sufficient to do reactive investigations as the number of employers covered by the Commonwealth scheme has increased.

Centrelink

The Comcare investigation into stress at the Glenelg CSC took nearly 9 months to produce a report. During this time the staff, who the investigators admitted were obviously stressed, were left to cope by themselves. Under the OHS Act all PINs are suspended during the investigation process.

The Investigation report cleared Centrelink of any breach of its s16 general duty of care and when on to say it could make no finding that staff were in fact stressed. Only upon gaining access to the report did the HSR learn of some of the evidence provided by Centrelink and accepted, on face value, by Comcare.

In discussions and correspondence between the CPSU and Comcare it was revealed that the regulator saw no role for their investigators to test the veracity of information supplied by employers by consulting with HSRs nor was it their role to take action that might inform HSRs of the progress of the investigation.

This attitude rendered a number of the HSRs powers as meaningless as

- The HSR cannot use their powers to access information under the employers control if they are not made aware of the information provided to the regulator*
- The HSR cannot exercise their power to accompany the investigator if they*

are not aware the investigator was present at the workplace

- *The HSR cannot exercise their power to be present during interviews if they are not made aware of interviews occurring.*

Given the closely mirrored powers of HSRs and Investigators it is essential that HSRs have a mandated role to assist Investigators during the investigation process.

As a result of the CPSU assisting the HSR to appeal the investigation report of the investigator to the AIRC, the CPSU and Comcare have since come to terms on a number of measures to greatly improve the process used by investigators and their involvement of HSRs in the investigation.

6. HEALTH AND SAFETY REPRESENTATIVES

OHS Model law must provide

- a) For the election of HSRs and Deputy HSRs**
- b) That elections be conducted by union at the request of an employee**
- c) That HSRs and Deputy HSRs receive accredited training from the provider of their choice within 3 months of be elected.**

Model OHS laws should provide for unions to run elections/selections of HSRs, where requested by an employee, as it will result in better outcomes in terms of percentage of positions filled and confidence that HSRs are there to represent staff in DWGs as they have not been appointed by the employer.

The OHS(CE) Act 1991 provided for a person appointed by the Safety Rehabilitation and Compensation Commission (SRCC) to conduct elections where there was no union involved at the workplace.

Under the OHS(CE) Act unions were responsible for conducting elections of HSRs. This operated and ran smoothly with high participation of staff in the election processes and the majority of positions being filled. All at no cost to the employer. As the OHS(CE) Act did not contain a right of entry this process was undermined with the introduction of the Workplace Relations Act 1996, which imposed strict right of entry provisions.

The OHS Act now requires employers to conduct HSR elections. In the APS, having employers run the elections/selections of HSRs has resulted in appointments being delayed. There has also been an increased cost to employer to run HSR elections. Unions cannot take any action to fill the HSR vacancy until the position is vacant for

6 months. This is too long to have the position vacant and not in the interest of employees.

Most importantly model OHS laws must provide for HSRs and Deputy HSRs and for them to be trained within 3 months of their election/selection.

The OHS Act provides that employers choose whether or not Deputy HSRs are required and provides no clear guidance on timeliness for the delivery of training. As a result workers have less access to trained safety representatives in the workplace.

7. UNION RIGHT TO PROSECUTE

OHS Model law must contain

- a) Powers for unions to mount prosecutions where they believe a breach of safety laws has occurred**
- b) An absolute duty of care on the employer to provide for worker health, safety and welfare.**

CPSU supports a union right to prosecute. This right must be coupled with the absolute duty of care on employers. Current and past Commonwealth legislation has not provided these. As a result, when there have been suspected breaches and no prosecution action has been taken by the regulator, there is no avenue for members to see that enforcement of the law is a reality for the Commonwealth.

In situations such as the APS, where the regulator is part of the APS, providing the CPSU with an independent right to prosecute would allow the prosecution of offences that the regulator was reluctant to prosecute for reason other than the prospects of achieving a conviction.

Especially where regulators use other enforcement mechanisms such as enforceable undertakings, which are not transparent or widely promulgated, provisions for independent prosecutions is in the interests of workers health and safety.

Enforcement outcomes must be transparent, require a change of behaviour of the employer, be communicated to all employees and result in an appropriate penalty eg. Where public service agencies are specifically funded to deliver services or outcomes the use of broader penalties, not just to levy portion of a public sector agency's revenue or budget, is more to effect change.

Centrelink

Centrelink's entire approach to customer aggression is failing to protect workers from assault and psychosocial injury. According to information provided by Centrelink to Senate Estimates the number of customer aggression reports involving physical assault since 2004, until 31 July 2006, was 758, the number of reports of verbal abuse over the same period was 13, 322. ⁴

This submission has provided several Centrelink case examples of physical assault that eventually resulted in Comcare Investigations.

None of the investigations resulted in enforcement notices or prosecutions – as a result Centrelink has made no modifications or changes to work processes or procedures which clearly did not provide adequate protections for employees from physical and psychosocial harm.

This is a clear failing of the regulator as it must be said that at the very least there was evidence in all cases of

- Inadequate hazard identification procedures*
- Inadequate risk assessment procedures*
- Inadequate or inappropriate use of controls aimed at the elimination of the hazard at its source*
- Inadequate monitoring of the effectiveness of controls*

Regulation and enforcement would be enhanced by providing powers to union to enter workplace, conduct investigations and where a suspicion of a breach is supported by the evidence mount prosecutions.

In support of this the CPSU offers the following

- In all cases the CPSU was the first on the scene*
- The CPSU already understands the context in which Centrelink workers operate*
- The CPSU has an understanding of the organisational structure and key stakeholders*

Due to these the CPSU is ideally placed to identify possible sources of evidence to assist in the investigation.

⁴ House of Representatives Official Hansard, No. 16, 2006, Tuesday, 31 October 2006, pg194

Telstra

During 2003 there were a series of acoustic shock incidents at the Telstra Chermside Call Centre.

The HSR issued a PIN after management failed to resolve any of the concerns of staff. Telstra Management responded with lawyers which resulted in Comcare cancelling the PIN.

After a series of acoustic shock incidents a final major incident happened which resulted in more than 100 workers being affected. The staff canteen was turned into a triage unit to treat the sick and injured. 3 staff were so severely injured they were hospitalised.

The resultant Comcare investigation issued two Improvement Notices which required among other things

- Hazard Study/Risk Assessment: Effect of Power Outage on Polaris Soundshield in Call Centres*
- Desktop Risk Assessment of Telstra Call Centres*

Telstra appealed these notices. Telstra and Comcare agreed to consent to the Australian Industrial Relations Commission (AIRC) revoking the two improvement notices.

If there were any enforceable undertaking entered into neither Comcare or Telstra has made these public.

The final outcome is that after a series of incidents resulting in a large scale event that caused multiple injuries found no breach of health and safety laws.

This is a case that not only highlights the benefits of union/third party prosecutions but where an absolute duty of care would have resulted in a different outcome.

The lack of an absolute duty of care and prosecution by the regulator has meant that ultimately the workers involved have ultimately borne the cost of failing to provide a health and safe work environment.