



Submission of the Construction Forestry Mining and Energy Union (New South Wales Branch) Construction and General Division regarding the Review of the Occupational Health and Safety Act 2000.

1. INTRODUCTION

The CFMEU considers occupational, health, and welfare of workers as paramount. The CFMEU supports tough laws which hold employers and others accountable for putting workers lives at risk. In the building and construction the difference between good and bad workplace safety can determine whether a worker returns home after a day's work or not.

The CFMEU makes the following submission in relation to the current review of the Occupational Health and Safety Act 2000 and related legislation.

2. COMMENTS REGARDING WORKCOVER DISCUSSION PAPER DATED JUNE 2005.

The CFMEU makes the following comments in relation to issues raised by the WorkCover discussion paper on the Review of the Occupational Health and Safety Act 2000. For ease of reference the CFMEU will in this section of its submission refer to the headings used in the discussion paper.

Chapter 2 Legislative Framework

Codes of Practice as a Guide

The CFMEU refers to the commentary relating to Codes of Practice. The CFMEU submits that the status of industry codes as being a practical guide to employers (as provided for

under Section 40 of the Occupational Health & Safety Act 2000) is not sufficiently strong enough to ensure compliance by employers with their obligations under the principal Act.

In the building and construction industry codes of practice are important documents which set out in more prescriptive terms the steps that must be taken to ensure a safe system of work. They form the basis for risk assessment and the development of plans such as safe work method statements and the like.

Industry participants, employers, industrial organisation and workers rely heavily on codes of practice to provide them the detailed information required to ensure observance with the law as well as ensuring safe work practices. Since the shift away from prescriptive legislation to a system where the parties themselves have to assess risk and then take action to eliminate or control risk, codes of practice in the building and construction industry have become essential in informing employers and employees and other industry stakeholders as to the minimum requirements in relation the particular activity being undertaken. Codes of practice are the foundation for risk assessment to be undertaken.

We submit that given the reliance by industry on codes of practice they should be given a more mandatory character.

The CFMEU submits that section 40 OHS Act 2000 should be amended to include an obligation that the approved industry code of practice should be followed unless there is a demonstrated better alternative course of action.

The CFMEU submits there is no prejudice in including such a provision.

Prevention and Compliance

One area of difficulty with the Risk Assessment/Risk Management approach is that the same risk factor can be identified very differently by a number of people. When employees introduce costing into their Risk Management and Control procedures, the risk is normally poorly control and done to a budget. Working at heights is one the main risk areas in the Construction Industry and the OHS Legislation addresses this risk well with a hierarchy of

control, the last control being the use of Personal Protective Equipment (PPE). The common practice amongst many employers in the roofing sector for example, place their employee at great risk in a safety harness as the first control measure not the last as legislated. Many of these safety harnesses are not maintained and employees are not trained in their use. Subsequently the employee either does not wear a harness or takes a risk with an unsafe one,

The legislative changes in NSW involved consolidation of a myriad of Acts and Regulations. However, the hazardous nature of construction has been recognised with inclusion in the legislation of prescriptive provisions that apply to the industry for example, Chapter 8 of the OHS Regulation 2001 and provisions that place on principal contractor's specific responsibility regarding site safety management. The responsibilities imposed on a principal contractor or a sub-contractor by Chapter 8 of the OHS Regulation are in addition to any other responsibilities that the principal contractor or sub-contractor may have as an employer or self employer. Identifying workplace hazards, assessing their risks and implementing control measures are the responsibility of all employers.

However, whatever the legislative regime is on paper, it will be ineffectual if not rigorously enforced. This cannot and is not being achieved by Work Cover alone at the moment. The CFMEU and other building union play a crucial role in this.

The CFMEU supports an approach that encourages employers to put in place systems of work that ensure safe outcomes. The CFMEU does not object to WorkCover advising and assisting employers to ensure that their compliance obligations are met.

However, the CFMEU sees a relevant consideration in determining whether or not an employer should or should not be prosecuted, or should or should not be the subject of a prohibition or penalty notice, rather than just the recipient of advice or assistance should be the risk of injury or accident in a particular industry. The building and construction industry is an industry that is characterised by a significant level of injury and death. Whilst overall the numbers of fatalities and injuries appear statistically across all industries to have declined, the experience of the CFMEU is that too many builder and construction industry workers are injured or killed as a result of poor work practices.

Moreover, the inspectors should be free to enforce the legislation. The provision of advice and information should not be the function of the inspectors. Their role should be to enforce the provisions of the Act and in the circumstances of breaches of the Act to take the necessary and appropriate action.

At some point, it is our view that the provision of information assistance and advice is an insufficient tool to ensure that employers in the building and construction industry meet their safety obligations. The building and construction industry is also characterised by increased competitiveness as well as massive cost pressures as a result of the sub contracting nature of the industry.

The construction industry is classified as a “high risk industry” in that it has a high and unacceptable level of fatalities and injuries and disease. This is a fact recognised by the NSW Government and the WorkCover Authority of NSW.

The poor OH&S performance of the construction industry is evident from the statistics. In a WorkCover report, *Analysis of Claims in the Construction Industry* dated 1998, found that that persons employed in the construction injury had a much greater risk of employment injury than the average New South Wales worker over the period 1991/92 and 1996/97. The average incident rate for the construction industry was almost double the average for all other industries over the period. (refer page 2 of the report). The 1998 Report states at Page 5:

“Workplace injuries presented a predominant proportion of all employment injuries report in the construction industry, accounting for an average of 70 percent of employment injuries for the period 1991/92 to 1996/97. The proportion of workplace injuries to all employment injuries has fluctuated from year to year with a maximum of 79 percent in 1991/92 and minimum of 63 percent in 1993/94.

Ten-percent of all workers compensation claims for injury and disease arise in the building and construction industry with workers suffering injuries such as sprains, strains, muscle injuries, fractures, discs and dislocations and these injuries are predominately are suffered in the upper limbs and the trunk. (refer page 5 & 6 of 1998 statistical report). These injuries result in workers compensation claims for an extended period of time with the number of workers staying off work more than twenty six weeks increasing.

Fatalities

Unfortunately, the industry also experiences a high rate of fatalities. WorkCover NSW statistics show that construction workers are at a higher exposure to risk of an employment injury than most other workers. Across industry divisions for employment injuries, whilst mining had the highest incidence, construction had the second highest incidences of employment injury across all industries.

Falls from height, injury from moving plant, being crushed and exposure to electricity appear to be a common way in which fatalities occur, with a number of the victims being younger than 30. This is a tragedy and it our firm view that many of these fatalities could have been avoided if employers put in place appropriate safety measures, by implementing a safe system of work and following the hierarchy of controls procedures. This is to be done in consultation with the employees. A safety harness should not be the first control measure to prevent an employee from falls from heights. Exclusion zones and an observer should be established around moving plant. The use of mobile phones should be banned in the vicinity of moving plant. The use of live electrical work should be banned and more vigilant attention paid to safety in all areas.

An area of concern is employers appointing supervisors who are not competent. Supervisors cannot effectively supervise unless they are trained to do so, and have a system to work under.

In its *Statistical Bulletin 1999/2000* WorkCover reports that there were 32 fatalities (that gave rise to a compensation payment) in the construction industry in NSW. Labourers and related workers had the highest numbers, with 20 fatalities.

Over the nine year period 1991/92 and 1999/00 the highest number of fatalities were recorded in construction trade service and general construction, with the major hazards being “hit by moving objects”, “hit by falling objects”, “falls from height” and “contact with electricity”, all hazards prevalent in the building and construction industry. In October 2003, a 16 year old boy, Joel Exner was killed after only 3 days on the job after falling some 14 metres through a roof. He was not properly inducted, trained or supervised and was not

provided with any fall protection. Joel was put to work on the roof on his first day of work. He was not consulted about any OHS issues regarding his work, properly inducted, trained or supervised. In more recent times Mr Ronald Shores and Mr Glen Viegas also tragically lost their lives on building and construction sites.

It is the collective opinion of those involved in the production of the report *Safely Building New South Wales* that whilst the statistics showed some decline in incidence rates of injuries the number of fatalities in the New South Wales Construction industry remains at an unacceptable level. At page 71 the report states:

“Too many workers a dying as a consequence of work on construction sites.”

Why Safety is Poor in the Construction Industry?

The industry has recently taken a detailed look at its safety performance and the reasons why the industry performs badly in OHS in *Safely Building New South Wales* a report published by the WorkCover Authority of New South Wales in 2001 (“The 2000 Report”). This report was compiled by the Occupational Health & Safety Best Practice Initiative Unit of WorkCover New South Wales.

In developing the 2000 Report, representatives of the CFMEU, Labor Council of New South Wales, the WorkCover Authority and employers participated to produce the report. In the foreword Professor Dennis Else states,

“This Report details significant improvements in the way OHS is being managed in the industry and the development of a valuable set of OHS management tools in relation to hazard management, contractor management, OHS training, safe design and performance measurement. In particular, the evaluation shows that the initiatives have produced greater commonality in the expectations of sub-contractors and helped reduce the time wasted by them on documenting safe work practices in a myriad of different formats for different principal contractor.

This Report also shows, however, that some major gaps remain in the way the construction industry is managing OHS. Documented safe work practices often do not

translate to actual safe work practices at the workplace. It would appear that this is an area in which performance measures should be targeted to ensure that we have lead indicators to show that our actual safe work practices are improving on the ground.” (page 1)

Further at page 7 the report finds:

“Notwithstanding the achievements in improved OHS management and performance in the period 1996-2001, the NSW construction industry must maintain a priority focus on OHS reform. The rate of fatality, injury and disease in the industry, with its resultant human suffering and economic and social costs, still remains unacceptably high.” (page 7)

The impediments to better OHS on site are (recognised by WorkCover and the industry in the 2000 Report (refer page 7):

OHS systems have improved but documented safe work practices often do not translate to actual safe work practices at the workplace.

Poor programming practices are a contributing factor to unsafe working environments. Unrealistic scheduling and interfacing trades operate as a major barrier to improved safety practices. Financial incentives and bonuses which encourage projects to finish ahead of schedule results in compromise when it comes to safety. Pressure to finish projects also means workers are required to put in an excessive number of hours which further exacerbates the risk of accident and injury.

Poor design is identified by the overseas research as a key contributing factor in a high percentage of construction industry incidents. This issue is generally not systematically addressed by clients, the design profession or principal contractors.

Performance measurement techniques are pre-occupied with negative outcome measures such as lost time injury frequency rates. When used in isolation from lead indicators, these measures fail to provide accurate performance appraisal from which improvement strategies can be determined.

In the 2000 Report the impediments to better OHS were further summarised as including:

- Commercial pressures – that is, contractors tendering for jobs at the cheapest possible price winning the work. These contractors pay scant regard to occupational health & safety in the workplace and profit margins are improved by cutting corners in safety.
- Inconsistent contractor and subcontractor standards
- Lack of expertise amongst supervisors
- Unrealistic programming of projects by contractors
- Subcontractor reluctance to invest in training
- Low levels of trained trade workers
- Low literacy and language skills
- Size of the project

The CFMEU agrees that these matters operate collectively to compromise safety on construction sites today.

Another key issue in OHS is the amount of hours that workers are required to work. The industry operates and workers are required to work six, sometimes seven days/week. It is not uncommon for employees across the industry to work in excess of 60 to 70 hours/week. Often work occurs in contravention of local council regulations. The more fatigued a worker is the more likely that an accident will happen. Such hours also impact adversely on employee's family and community life. Many workers suffer family breakdown attributable to the number of hours they must work. Refusal to work the hours set will result in termination. The pressure on individual workers is extreme. Some employers do not address fatigue in the workplace as a risk and therefore have not developed or implemented a safe system of work in consultation with their employees to ensure safety.

Due to the lack of industry training and shortage of skilled labour, workers are recruited from outside of the Sydney metropolitan area each day. Workers from the Central Coast, Wollongong and the Blue Mountains and beyond are getting up at 4am and even earlier each day to travel to Sydney construction sites. Construction work is very demanding, dirty, hot in summer and cold in winter. Amenities are portable and quite often almost non-existent. Drinking water is not always available close to the employee.

The industry in conjunction with WorkCover and Government must do more to address the implications on OHS in relation to these issues or workers will continue to be maimed and killed.

The CFMEU in April 1999 undertook a survey of 850 of its members to provide some indication of the attitude of workers in relation to OHS on site. Whilst 63 percent respondents to that survey thought safety had improved over the last five years in their workplaces, 85 percent of respondents indicated that they thought unrealistic deadlines jeopardised workers safety. Also 86 percent of respondents thought that safety could be improved at their workplace (refer page 77 of 2000 Report).

In light of the continued number of deaths and injuries in the building and construction industry we submit that the nature and risk involved in the industry should be a relevant consideration when deciding what enforcement action should taken for breaches of the Act, including whether a prosecution should take place. The inspectorate should concentrate on its enforcement role.

Chapter 3 – Policy Objectives of the OHS Act

Following on from our comments above in relation to the nature of the industry, the CFMEU is of the view that there is a relevant and powerful player in the building and construction industry which escapes responsibility for OHS on site. This is the developers and/or clients who contract for building and construction work to take place. In this category the CFMEU does not include people doing renovations on their homes, but is a reference to developers and/or clients who operate for commercial gain.

We submit that in addition to the objectives set out under Section 3 there should be an additional objective which is to ensure that categories of persons such as developers and/or clients to building and construction companies are also responsible for ensuring the health, safety and welfare of people at work.

Chapter 4 – Duties relating to health, safety and welfare

In relation to the duties the CFMEU supports the retention of the current duties as set out. However as discussed above, the CFMEU submits that there should be an additional category of duties of developers in the building and construction industry to ensure health, safety and welfare on site.

Developers play an important role in determining OHS outcomes in the building and construction industry. Developers drive the costs associated to building and construction products and essentially affect the capacity for building and construction companies and subcontractors to meet their OHS obligations.

This pressure is no more clearly shown than in the death of Joe Exner, a young man who plunged to his death in October 2003. The Coroner in investigating that fatality accepted a submission by Counsel assisting that the failure to comply with the code of practice in relation to roofing in that case may have well been a cost saving measure. The cost saving would come in that case from not only the cost of the mesh alone, but also the cost savings associated with installing the mesh correctly.

The Coroner asked a very relevant question, the Coroner stated:

“It would be of interest to know whether roofing contractors tend to put jobs on the basis of a cost analysis based on the code or the practice that appears to exist in the industry to not overlap” (see decision of Magistrate Milovanovich NSW Deputy State Coroner 29 July 2005)

The industry has seen too many fatalities and injuries caused by cost cutting. A contributing factor to this cost cutting is the pressure that developers place on builders to keep costs down and profits up.

Reference was also made to such issues in the WorkCover paper, *Safety Building NSW* a report published by the WorkCover authority of New South Wales 2001.

It is only when the recipient of profits, being the developers and clients of building companies, have a legal responsibility to ensure compliance with OHS laws in the industry that further improvements in OHS performance in the building and construction industry can be achieved.

It is only until developers and/or clients are held accountable for breaches of the OHS Act and for injuries and deaths in the workplace that a real change will occur in behaviour by employers, principal contractors and sub contractors down the line.

The CFMEU submits that the OHS Act 2000 should be amended to include duties on developers/clients.

Labour Hire

The subcontracting nature of the building and construction industry has been further exacerbated by the increased use of labour hire companies to source labour. In the case of specialist labour requirements labour hire companies themselves can outsource the supply of labour leading to a complicated chain of contracts.

The CFMEU is concerned, and seeks to have WorkCover ensure, that the providers of labour such as labour hire companies, or other entities contracted to labour hire companies are caught by the OHS Act. More commonly on site, labour hire companies use individuals which are purported to be independent contractors we want to ensure that such arrangements are not used to avoid occupational health and safety obligations.

The CFMEU supports the concept of mutual obligations by both the providers of labour hire employees as well as the users of such labour, but the CFMEU is also concerned to ensure that arrangements are not used to reclassify employees to independent contractors.

The CFMEU does not support any change to the legislation which would reduce the legislation's capacity to ensure that all those providing their physical labour are protected under the OHS Act and that host employers and labour hire employers should be held responsible for ensuring the safety of their direct employees as well as their outsourced labour.

In terms of the recommendations six and seven of The General Purpose Standing Committee Number 1 2004 set out in the discussion paper, regarding clearly defining the obligations of the parties involved in an apprenticeship relationship between a training organisation, the host employer and the apprentice, and in relation to the parties involved

in a labour hire relationship, the labour hire company, the host organisation and the hired employee, the CFMEU would only support amendment to the Act that did not exclude or limit the responsibilities of the hirer and host of labour. Any such amendments should ensure maximum possible coverage under the OHS Act 2000.

General duties and onus of proof.

The CFMEU does not support any erosion of the defences available under the OHS Act so as to make the defences more easily available to defendants. The defences are set at an appropriate level so that those who do make out a proper defence can get the benefit of them.

The CFMEU does not support any loosening of those defences to allow employers to more easily put up a defence in the face of a prosecution for breach of the Act.

The strict liability nature of the Act is its strength not a weakness. That strength should not be diminished. The CFMEU is of the view that employers in the building and construction industry are already able to avoid liability under the OHS by such practices as winding up their companies, and setting up phoenix operations, which can be easily done to avoid prosecution and/or payment of fines.

This behaviour should not be further exacerbated by providing to the employers a greater capacity to avoid prosecution altogether.

Duty to Consult

The CFMEU is concerned that employers are not consulting with workers as they should under the Act. Practices have emerged which have allowed employers to avoid properly consulting with their workers about OHS issues. The provisions of the Act are very broadly cast and do not specifically set out what an employer should do in discharging their obligation to consult with their employees.

The CFMEU submits that for the building and construction industry more effective consultation could occur during the site induction process. The site induction process,

which takes place when someone comes on site, tends to be a standard process where the workers are taken through emergency procedures and the like.

The CFMEU submits the site induction process should also be used to consult with employees about occupational health and safety issues and risk management and to communicate with them the requirements of safe work method statements including the amendment of or development of safe work method statements. Where work processes change on site workers should be re-inducted in relation to the changes. The fact that a worker is so consulted should be recorded.

Providing for consultation in this structured way would make the consultation process a far more effective mechanism to ensure the proper discussion between employer and employee, proper dissemination of information and instruction to all employees prior to undertaking work. Thus, the induction process provides a formal framework for consultation to occur. It becomes part of doing work on building and constructions sites.

The CFMEU also submits that employers should be required to have a policy in relation to consultation, how the consultation will take place and who will be involved. A record of the consultation undertaken should be kept.

A consultation policy should contain within it, the roles of various parties, including a role for an employee representative to participate in inspections. Where a safety committee exists, the safety committee should form an integral part of the consultation process.

The CFMEU is not supportive of the concept of “other agreed arrangements”. If the concept is to be maintained, the CFMEU believes they should be genuinely negotiated between employers and employees and/or their union. Where such an arrangement is negotiated between the parties, it should be subject to endorsement of the whole workforce and should be filed with the NSW Industrial Relations Commission (in the same way as an Enterprise Agreement is filed). The arrangement should be subject to review and reindorsement every three years.

The obligations of employers has to be more clearly defined and the event that an employer fails to comply with the requirements of the consultation process they should be subject to the various penalty provisions of the Act.

Safety Committees

The CFMEU also has some concerns in relation to the operation of safety committees. Despite the provisions of the Act which protect workers from victimisation, safety committees often do not function well on building and construction sites because of the pressure the employers place on employees to:

- (a) not participate on a safety committee; and/or
- (b) for members of the committee to not participate substantively in ensuring safe system of work for fear of having their employment terminated.

Principal contractors too can pressure employers to terminate the employment of workers who are considered “troublesome”. The CFMEU has recently raised this matter with WorkCover on many occasions but there has been complete inaction on the issue.

The CFMEU submits that:

- **Section 23 of the OHS Act (victimisation provisions) should be amended to apply also to a principal contractor.**
- **It should also be mandatory that a safety committee, once elected should establish a constitution which sets out the membership, the roles and duties of the member of the safety committee, it should also set out the tasks that the safety committee will undertake including inspections, the frequency of inspections, the development of safe work method statements or other management plans required to ensure a safe system of work.**
- **It should also be mandatory for members of an Occupational Health & Safety Committee to be trained. Training in all aspects of the Occupational Health & Safety Act and Regulations and related training should take place within seven days of a person being elected to an Occupational Health & Safety Committee.**
- **There should be developed, an Occupational Health and Safety Committee representative accredited training package to be provided by accredited trainers chosen by the employee representatives to ensure that the quality of training is of a sufficient standard.**

We note that Sections 67 of the Victorian legislation makes it an obligation for an employee to attend courses either an initial course of training of Occupational Health & Safety or a refresher course. We note that in this legislation it is up to a Health & Safety representative to request such training. We submit that it should be compulsory for all Occupational Health & Safety representatives to be properly trained and for there to be mandatory refresher courses to ensure that Occupational Health & Safety Committee members are up to date with all aspects of safety regulations.

Powers of Health and Safety Representatives

In addition the CFMEU is also supportive of inclusion in to the OHS Act, similar to provisions found in the Victorian legislation namely section 60 of the OHS Act 2004, which empowers health and safety representatives to issue improvement notices. The CFMEU is supportive of authorised officers of industrial organisations also having such powers.

The CFMEU submits the OHS Act 2000 should be amended to give OHS Representatives the power to issue notices. The CFMEU understands other states have enacted provisions similar to those in Victoria and believes at the very least such provisions should be included in the New South Wales legislation.

Directors and Managers

In relation to the duties of directors and managers, the CFMEU does not object to a code of practice being developed in relation the duties and obligations of directors and managers. However, the CFMEU objects to compliance with the code of practice being used as some sort of defence against prosecution in relation to breaches of the Occupational Health and Safety Act.

The CFMEU does not support the use of the code of practice as a defence additional to those already provided for in Section 26.

The CFMEU wishes to continue its involvement in any development of such code and at any discussions about the effect of such code on the capacity of Directors and Managers to be prosecuted.

Employees' Duties

In relation to employees' duties and the duties of other persons such as members of the public, the CFMEU does not support any amendment to the Sections of the Act which deal with the duties of employees in relation to Occupational Health and Safety. The CFMEU does not believe that further clarity is required in relation to the employees' duties to take reasonable care for health and safety of people or at their employer's place of work. That is an unambiguous obligation which does not need further amendment.

The CFMEU also does not accept that members of the public do not have a reciprocal duty to observe safety and health as suggested in the paper. To the contrary, the provisions of the Civil Liability Act and the common law disentitle and/or limit the capacity of people to make claims for compensation where their own negligence contributed to injury.

Occupiers of premises, employers, principal contractors, developers and clients should be held responsible for the health, welfare and safety of members of the public. This is important in the building and construction industry where members of the public have been killed because of poor work practices. To the extent that the legislation does not apply to developers/clients the legislation should be amended to so apply as discussed above.

Protection of Employee from Victimisation – Section 23 of the OHS Act 2000

In the Coronial inquiry report into Joel Exner dated 29 July 2005, Coroner Milovanovich stated:

"I would also like to comment that in this case, one discerning issue that did surface is the disadvantaged position that some workers find themselves in. On the one hand they may well have concerns regarding safety issues and on the other those very workers will be the least able to exercise any power of objection as they may have concerns for their livelihood. I appreciate that unfair dismissal laws exist (and this issue may be particularly contentious at the moment with new Industrial Relations Laws being considered), however, the responsibility for providing a safe place of

work, under the provisions of the Occupational Health and Safety Act is clearly the responsibility of the employer”.

The CFMEU shares the coroners concern about the ability for workers to be able to raise safety concerns without being victimised or have their employment terminated.

We note that there is no provision in the OHS Act 2000 for workers to make a claim for reinstatement and/or compensation in the event that they are terminated as a result of raising a safety issue.

In addition to amending s23 to apply also to principal contractors, we submit that there should be an amendment to the Occupational Health and Safety Act along similar lines of that in Section 84, or Section 213 of the Industrial Relations Act 1996. There should be a specific capacity under the Occupational Health and Safety Act for employees to take action against and seek relief from unlawful dismissal as a result of making a complaint about workplace safety.

The New South Wales Industrial Relations Commission having experience in dealing with the termination of employment of workers would be best placed to hear and determine such complaints.

Safe Design

Question 13 seeks comment on the appropriateness and practicability of the current coverage of the general duties in relation to safe design of building and structures.¹

The Union is very concerned that currently there is no provision to ensure the safe design of buildings and structures during their construction phase. This is a long standing and serious anomaly giving that the legislation does currently set OHS duties to ensure the safe design of plant.

The Union hopes the Government remains strongly committed to the 1998 Memorandum of Understanding with the industry and unions where the Attorney General and Minister for Public Works committed the Government to examine legislative reform with the view of

¹ Priority Issues for Construction Reform “Safely Building” New South Wales p.31

establishing duties to ensure safe design to protect the lives of building and construction workers. We believe it is time to address this problem; further delays can lead to the unnecessary loss of life.

Work Cover's report into the MOU launched by Minister Della Bosca in 2001 outlined Work Cover's research on safety design conducted by the University of NSW and made special recommendations on safety design. This research highlighted that up to 60% of accidents that injure and kill building workers can be traced to poor design and planning. The seriousness of this problem is highlighted by European research that points out that about 500 construction workers fatalities could be attributed to lack of safety design.¹ We strongly support the conclusions made in the report on this important question.²

The Bilbao Declaration which arose out of the European Construction Safety Summit 22/11/2004 which we attach, called "*on the design community in Europe to design out risks wherever reasonably possible and to highlight any remaining residual risk in all projects in which it is involved.*"

The Declaration goes on to declare that "*designing out risk is easier and cheaper than dealing with them later.*"

However this issue seems to continue to receive little priority from Government and Industry other than being a subject of discussion papers and reports.

We would propose that the OHS Act establish a duty to ensure that buildings and structures are designed with safety in mind – to protect the lives of buildings workers who have to construct them.

We also believe that there should be an obligation on all those involved in the planning and design of a building – the architects, engineers, developers, clients and builders – to consult and co-operate to ensure that the building is appropriately designed with safety in mind.

² Priority Issues for Construction "Safely Building" New South Wales, Commissioned research on OHS – Best Practice p.26

For building workers, the OHS legislation as it stands at the moment only has application from the time the builder turns up on site and commences construction. But as WorkCover's own report recognises, by this stage most injuries that are going to happen on a building site have already been locked into the buildings design and are inevitable.

The OHS Act must be amended so that such accidents are not inevitable.

Section 20 of the Occupational Health and Safety Act 2004 (Vic) provides sets out the duties of designers of buildings and structures.

The CFMEU submits that similar provisions to those in Victoria should be included in the Occupational Health and Safety Act 2000.

Penalties

The CFMEU is of the view that the penalties imposed for on the spot fines by WorkCover Inspectors are insufficient. The CFMEU believes the amounts are of such a low level that employers and principal contractors can well afford to risk the imposition of on the spot fines as part of their cost structures.

The CFMEU recommends that the fines available for WorkCover Inspectors for on the spot penalties should be substantially increased.

Enforceable Undertakings

The CFMEU supports the introduction of a system whereby enforceable undertakings can be used as an additional sanction available against employers who are in breach of the Act. Enforceable undertakings may be effective in changing behaviour.

However, the CFMEU would not support a system whereby employers could avoid prosecution by making these enforceable undertakings. Failure to comply with an undertaking should result in a fine.

The CFMEU submits that enforceable undertakings should be just one other sanction available in addition to the sanctions already available and not a substitute for them.

Recovery of fines

The CFMEU has long criticised WorkCover's inability to ensure that the fines imposed by the Chief Industrial Magistrate or the Industrial Relations Commission are recovered promptly.

The case which highlighted the complete failure of WorkCover in this regard was that of the fatality of Mr Dean McGoldrick who died at age 17 as a result of injuries sustained when he fell 12.2 metres from an edge of a roof.

He was employed by Metal Gutter Fascia Services Pty Ltd. Mr John Poluvic was the Director of this company and the Chief Industrial Magistrate Court imposed a fine of \$20,000.00 but in the event of defaulting the payment by the company, Mr Poluvic the Director of the company was liable to pay. In 2003 the CFMEU became aware that two and half years later, Mr Poluvic had only paid \$1800 of the fine and the rest remained outstanding.

Until the CFMEU raised this issue with the Government we can quite confidently submit that neither WorkCover or the State Government did anything to ensure that the fine was paid. Anecdotally the Government appears to pursue with vigour unpaid speeding tickets of drivers going so far as to suspend drivers licences yet a small fine imposed for killing a worker goes uncollected. There must be clear process set out by which the recovering authorities, be it WorkCover or the Office of State Revenue take prompt action to ensure that fines are collected.

The CFMEU is also concerned to ensure that the penalties imposed fit the "crime" that whilst there are heavy fines available that the full breadth of those fines are not necessarily imposed. While the CFMEU respects the independence of the Chief Industrial Magistrate

and the Industrial Relations Commission in relation to these matters the CFMEU is concerned to ensure that in the appropriate cases the adequate level of fines should be imposed.

Finally the CFMEU seeks amendment to the OHS Act and/or other legislation so that WorkCover can advise the families of workers killed and other relevant stakeholders whether or not a fine is paid.

Chapter 5 Regulations and Industry Codes of Practice

The CFMEU repeats its earlier statement that compliance with industry codes of practice should be more clearly set out and it should be a legislative condition that a code of practice be complied with unless an employer can clearly demonstrate a better practice than that set out in a code.

The Occupational Health and Safety Regulations

In relation to Regulations, the CFMEU is supportive of tightening the licensing requirements particularly in light of the value of WorkCover to properly administer the licensing system. The CFMEU would be supportive of including additional offences in the Occupational Health and Safety Act 2000 which would provide a deterrent for persons to falsely represent, or to do anything under the Occupational Health and Safety legislation for which they are not duly authorised, and for a person who by deception obtains or attempts to obtain for themselves any financial advantage in connection with the Occupational Health and Safety legislation.

3. OTHER ISSUES

Notification of Incidents

It has come to the attention of the CFMEU that there are problems in relation to the notification of incidences (Sections 86-92 of the OHS Act 2000)

Particularly the CFMEU is concerned, that serious injuries and incidences are not being reported immediately but are either not being reported at all or are not being reported for more than seven days after an injury or incident occurred.

The CFMEU seeks a review of the provisions in relation to notification and non disturbance category of incidence and injury. The definition of what is or what isn't a non disturbance category should be more clearly defined and should not exclude injuries such as broken limbs and the like.

The CFMEU for example is aware of an 18 year old person being injured where the injury ultimately resulted in the worker being in a coma. The injury had not been reported immediately and was not the subject of a non disturbance classification. The CFMEU recommends that there be stakeholder discussion in relation to clarifying what is a non disturbance category event to ensure that all serious injuries and incidences are caught by the provisions.

Traffic Control

Another matter which the CFMEU wishes to raise in its submission is the issue of traffic control. It is the experience of the CFMEU that building and construction principal contractors and sub contractors are using as traffic controllers, back packers and non qualified personnel including people who do not even hold a drivers licence.

The CFMEU submits that there needs to be more regulation of traffic control and traffic management operations. The CFMEU supports the introduction of a system of regulation for traffic controllers similar to that which is in place in Queensland.

In Queensland it is recognised that traffic controllers play a major role in making the road safer for people in road construction, road maintenance and special events. We would go so far as to say that they play an absolutely major role in ensuring the safety of the general public when it comes to the building and construction process.

It is unsatisfactory for unaccredited, unqualified individuals to carry out this important task. The CFMEU submits that there should be a requirement that only accredited traffic controllers can be used by principal contractors and sub contractors in the building and

construction industry. To be accredited the traffic controller should complete an improved traffic controller training course or refresher training/knowledge test.

A traffic controller should also have held an Australian drivers licence for a continuous period of two years in the previous five years. The CFMEU believes it is a very important issue that the having qualified traffic controllers would go a considerable way to ensure the safety of workers and the general public.

Work On Roofs

In light of fatalities like that of Joel Exner and Dean McGoldrick from falls from roofs, the CFMEU supports the immediate adoption of the recommendations of Coroner Milovanovich, in the report into Joel Exner's death.

The CFMEU seeks that:

- **The roofing industry comply as a minimal standard to the requirements of the requirements of the Safe Work on Roofs Part 1, Commercial & Industrial Buildings”, Codes of Practice and AS/NZS 4839: 19965, Safety Mesh. Where any discrepancy exists between the NSW Code of Practise and the Australian Standard the NSW Code of Practise is to prevail;**
- **A system of inspection and certification in regard to completed safety mesh installation be applied before work is permitted above the safety mesh. The CFMEU submits that such installation certification be undertaken by an engineer. In addition before maintenance or repair work is done on roofs where mesh has been previously installed, the mesh should be re-certified to ensure that it has not degraded or damaged in any way.**

Right of Entry and Role of Authorised Officers

The CFMEU NSW does not apologise for its proactive approach to OHS at both a policy and legislative development level and more importantly, at the workplace. If the Union was not involved at these levels, the rights of the workers would be fully eroded.

The CFMEU NSW, its officials and delegates make a very significant contribution to industry safety by participation in WorkCover NSW, the Industry Reference Group, working parties and also within Standards Australia. The CFMEU and other trade unions are key stakeholders in safety in the workplace.

Whilst the statistics might indicate some improvement in the incidences of injuries in the industry, compared to other industries the level of injury and fatality in the building construction industry remains unacceptably high. The union has a very important and committed role in ensuring compliance with OHS legislation. This is achieved by our supporting of the operation of OHS site safety committees and Safety Representatives in promoting best practice in OHS management in workplaces.

The CFMEU provides on-going support both emotionally and financially, to the families of victims of accidents in the building and construction industry. This support is not provided by Work Cover or any other Agency. The family members are traumatised and their whole life is affected by these accidents. Most people do not ever experience the Legal system, and very few to the extent of these families, and it is very frightening to them. It needs to be remembered that these families are in this position due to an accident in their workplace, where the employer has an absolute duty of care to ensure safety, and obviously this was not done. All workers have the right to go home to their families' safe at the end of a work day. This is a right not a privilege. From our conversations with the families it appears that Work Cover do not keep the family adequately informed of what is going to happen next. Some families of victims have stated that they have not heard from Work Cover since the day of the death of their loved one. The CFMEU takes on this role and remains in constant touch with the families, 7 days a week if necessary. It is not an easy role, but the Union will always look after the workers and their families.

The CFMEU has undertaken extensive training in OHS of its officials, delegates and members. This training has been conducted both in house and on site, with the emphasis being placed on practical hands on training using professional and experienced trainers. The Training is on-going and updated. All Officials, delegates and members are able to make contact with an experienced trainer or other professional should they require any "on the spot" information.

The Union's presence on sites is essential in ensuring compliance with OHS, particularly as WorkCover does not have sufficient resources or OHS Construction specific inspectors to effectively police the industry. The CFMEU has a good working relationship with Work Cover and assists and supports them in ensuring compliance.

Without the CFMEU's quick response to near misses, accidents and injuries on sites, the current statistics could be much worse causing more unnecessary suffering for workers and their families. As soon as the CFMEU is made aware of the accident, they ensure Work Cover is also informed, unfortunately the reverse does not always happen. The CFMEU priority is to ensure the site is made safe so as to prevent further danger to anyone. Most accidents have a number of contributory factors and prevention of further injury and the safety of workers is always a priority to union officials. Many times, it is quite a lengthy time before Work Cover is able to dispatch an Inspector to the site of the accident in Sydney. In the NSW Country areas, the delay is lengthier due to the travelling distance. At times, both in Sydney and in regional areas the Inspector sent is one without any experience in the Construction Industry. All our Union Officials are trained in OHS specific to the Construction Industry.

It is imperative that the CFMEU Officials retain their "Right of Entry" to enter sites on their own. If they have to give prior notice or wait for a Work Cover or any other Regulator to accompany them, the delay could have serious consequences. Construction is a very high risk workplace and the site and risks change daily. Any delay in response time could contribute to more risk of accidents, more injuries and more grieving families.

There are approximately 15 serious accidents per day in the construction and building Industry, and there are only approximately 6 WorkCover Construction Inspectors available for response at any given time. Following an accident some employers appear to set out deliberately to remove evidence relevant to the accident, therefore preventing Work Cover from issuing Notices and achieving a successful prosecution. Log books and other records are altered after accidents. This practice has been witnessed by our Union Officials. The quick response of our Union Officials have either prevented this happening or stopped it. All these incidents are reported to Work Cover.

Employees are threatened that they will be sacked if they report accidents to Work Cover or the Union. Some employers transport injured workers direct to Public Hospitals for treatment and do not report the accident as a workplace accident. This is a failure to comply with both the OHS Act and the Workers Compensation Legislation. The Union is frequently informed of these practices and notified Work Cover.

Individual employees and OHS committees are powerless without the support of the Union. Employees and OHS committees often face considerable pressure and victimisation when safety issues are raised. If builders and subcontractors can save costs by cutting corners on OHS they will.

The CFMEU submits that whilst it is implicit in the provisions of s76-85, amendment should be made to section 81 of the OHS Act 2000 to include:

- **The right of Authorised Officers to meet with workers on sites in relation to their investigations; and**
- **The right of Authorised Officers to attend a workplace to distribute safety information and advice workers of their rights with respect to their occupational health, welfare and safety;**

Notification of Safety Disputes to the Industrial Relations Commission of NSW

In addition to the jurisdiction of the Commission in Court Session in relation to the enforcement of provisions of the Act by way of prosecution, the OHS Act 2000 should also be amended to give the NSW Industrial Relations Commission the jurisdiction, under the Act, to hear disputes relating to workplace safety. This would provide a clear and unambiguous power in the OHS Act 2000 and avoid the necessity to indirectly use the provisions of the Industrial Relations Act 1996 which give the Commission power to conciliate and arbitrate industrial disputes generally.

In relation to occupational health and safety common sense would dictate that the Commission should have particular jurisdiction under the main legislation being the OHS

Act 2000. This would also avoid jurisdictional arguments that are often used by employers and their lawyers to disrupt a meaningful and constructive resolution of a safety matter.

Further the Commission should have a range of powers available to it to ensure compliance with the OHS Act 2000, including making recommendations and directions and orders for payment of lost wages.

The CFMEU recommends that the OHS Act 2000 be amended to include jurisdiction in the NSW Industrial Relations Commission to deal with workplace safety disputes.

CONCLUSION

The CFMEU commends this submission and the suggestions contained herein to ensure better safety in the building and construction industry.



Andrew Ferguson

State Secretary

Attachments:

- A. Priority Issue for Construction Reform Safely Building, A Summary 2001;
- B. Bilbao Declaration, Building in Safety European Construction Safety Summit, 2004;
- C. Queensland Government Traffic Controller Accreditation Scheme Fact Sheet 2003;
- D. Report of Inquest into the Death of Joel Exner July 2005.