

QON 1 CFMEU INCIDENTS

Mr DAVID SHOEBRIDGE: The submission of the Construction, Forestry, Mining and Energy Union (CFMEU) to this Committee states:

In June 2017, CFMEU organisers attended a large site following a telephone call reporting a serious safety issue. When the organiser attended the site he noticed a steel frame weighing in excess of 20kg had fallen some distance endangering the safety of everyone in the vicinity. Further investigation showed that a worker had fallen 2-3 metres and was taken to hospital for assessment.

Despite being a dangerous incident, SafeWork NSW did not send an inspector to the site. SafeWork later notified the principal contractor that it would not be investigating the incident ...

That is not consistent with you chasing up serious incidents.

Mr DUNPHY: We do. I do not know the particulars of that case or the site. I would be happy to take that on notice to provide better information because if there is a serious incident we do follow it up.

Mr DAVID SHOEBRIDGE: I thought you said that you had read the submissions before you came here?

Mr DUNPHY: Yes, but that does not identify the site.

Mr DAVID SHOEBRIDGE: Surely when you read this submissions you would have said, "What the hell is going on here?" You would have chased it up. I quote another example from that submission:

In June 2017, CFMEU organisers attended a large worksite after receiving complaints from workers on the site. The organisers immediately noticed a number of safety issues including:

- i. workers using ladders to access higher levels while carrying a number of objects*
- ii. workers using ladders while carrying large pieces of timber*
- iii. no stretcher access for emergency services to enter or exit the site safely in the event of an accident.*

An inspector attended the site at the request of the union and declined to issue an improvement notice for the safety hazards despite acknowledging the legitimacy of the complaints raised by the union.

The organisers attended the same site over a number of days identifying the same or similar hazardous behaviour.

Did you take any steps to find out whether or not that was true?

Mr DUNPHY: Unless we know the particular site—

The Hon. DAVID CLARKE: Would you be prepared to follow up that particular case? Would you be prepared to contact the union and say, "Can you identify to me the incident that refers to?" You could then look at that and come back to the Committee on that specific example?

Mr DUNPHY: My question is—

Mr DAVID SHOEBRIDGE: On pages 19 to 20 of the CFMEU submission there are three incidents. The third one concerns an employer on the North Coast who threatened to terminate employees if they reported safety issues to the union. Can you provide the Committee with a response to those on notice?

Mr DUNPHY: Yes, I am happy to do that.

QON 1 ANSWER

A review of SafeWork NSW records has identified the incidents raised by the CFMEU in its submission. A response to each case is provided below.

CFMEU submission – case No. 1

Union organisers in Northern NSW have expressed concern about the willingness of inspectors to intervene in safety matters. Recently, organisers were dealing with a large employer on the North Coast who had threatened to terminate employees if they reported safety issues to the union. The organisation was attempting to prevent union organisers from exercising their lawful rights under the legislation. In conversation with the inspector, the organisers were told that they were aware of safety issues, the CEO did not believe in safety and there were ongoing issues with the safety at the premises. To the best of the union's knowledge no action has been taken against the company despite the regulator being aware of the poor safety culture and the ongoing safety issues.

SafeWork NSW response

SafeWork NSW's records show that on 11 July 2017, SafeWork NSW received a request for service (RFS), from a local CFMEU organiser. The issues raised were about a sugar milling facility on the North Coast in relation to a welder receiving an electric shock and not obtaining appropriate first-aid/medical treatment and the facility not notifying SafeWork NSW of a notifiable incident.

A SafeWork NSW inspector contacted the facility on the 12 July 2017 to obtain further information and inquire about the safety concerns and risk controls. The inspector established that the incident involved an extra low voltage electric shock and that as standard procedure for all electric shock incidents, the employer had called an Ambulance who attended and assessed the worker at the site. The assessment determined that the worker had a health condition unrelated to the incident and it was recommended that the worker attend a general practitioner at a future time. The inspector followed-up with a site visit on 20 July 2017. The employer has reviewed procedures regarding electric shock first aid and communicated these procedures at a tool box talk. An extra low voltage electric shock in this circumstance was determined by the inspector not to meet the notification requirement under the *Work Health and Safety Act 2011* as it did not expose a worker to a serious risk to health and safety.

A request for service was raised on 28 July 2017 by the employer regarding an allegation of unlawful and unannounced entry into the facility by a CFMEU Entry Permit Holder, in relation to an alleged bullying matter. The inspector contacted both parties by telephone, and the CFMEU Entry Permit Holder was granted entry to the site. No further requests for assistance about this matter were raised with SafeWork NSW.

A further request for service was raised on 11 August 2017 by the employer regarding the CFMEU right of entry in relation to on-site asbestos and lead issues. Advice was provided by an inspector about right of entry for Entry Permit Holders and asbestos management. No further requests for assistance about this matter were raised with SafeWork NSW.

SafeWork NSW has a proactive site management approach with the facility and is working with the safety management team at this site to secure good safety outcomes.

There have been no recent issues raised with SafeWork NSW by the CFMEU or by any worker at the site. SafeWork NSW has no evidence of any threat to terminate workers for reporting safety issues.

CFMEU submission – case No. 2

In June 2017, CFMEU organisers attended a large worksite after receiving complaints from workers on the site. The organisers immediately noticed a number of safety issues including:

- i. workers using ladders to access higher levels while carrying a number of objects*
- ii. workers using ladders while carrying large pieces of timber*
- iii. no stretcher access for emergency services to enter or exit the site safely in the event of an accident.*

An inspector attended the site at the request of the union and declined to issue an improvement notice for the safety hazards despite acknowledging the legitimacy of the complaints raised by the union.

The organisers attended the same site over a number of days identifying the same or similar hazardous behaviour.

SafeWork NSW response

On 31 May 2017, SafeWork NSW received a Request for Service (RFS) from the CFMEU regarding 'access/egress' at the site. A SafeWork NSW inspector conducted an inspection of the site on the same day.

Safety issues raised by CFMEU

- i. workers using ladders to access higher levels while carrying a number of objects*
- ii. workers using ladders while carrying large pieces of timber*

The inspector observed a ladder being used by a large number of workers to access the formwork deck. This is common practice in industry, provided it is used in conjunction with appropriate fall protection controls at the formwork deck, which were in place at the site.

The inspector observed one person carrying a piece of equipment up the access ladder, and immediately told the supervisor this was not acceptable. A crane was also on site to deliver materials to the formwork deck. After discussion with the person conducting a business or undertaking (PCBU), it was proposed that the scaffold stairs be adjusted to provide another form of access to the formwork deck.

On the day of the inspection, the inspector issued an improvement notice to the PCBU regarding access/egress issues at the site. The improvement notice was complied with on 9 June 2017, as it satisfied all requirements of work health and safety legislation regarding workers using ladders to access higher levels while carrying objects.

- iii. no stretcher access for emergency services to enter or exit the site safely in the event of an accident.*

This is not a prescriptive requirement under work health and safety legislation. There is a requirement under clause 43 of the *Work Health and Safety Regulation 2017* for a PCBU at a workplace to prepare, maintain and implement an emergency plan.

A documented emergency plan is in place at this site.

CFMEU submission – case No. 3

In June 2017, CFMEU organisers attended a large site following a telephone call reporting a serious safety issue. When the organiser attended the site he noticed a steel frame weighing in excess of 20kg has fallen some distance endangering the safety of everyone in the vicinity. Further investigation showed that a worker had fallen 2-3 metres and was taken to hospital for assessment.

Despite being a dangerous incident, SafeWork NSW did not send an inspector to the site. SafeWork later notified the principal contractor that it would not be investigating the incident and allowed the site to be disturbed.

SafeWork NSW response

SafeWork NSW was notified of this event by a representative for the site principal contractor on 26 June 2017. It was actioned the same day by SafeWork NSW's after-hours Duty Manager, who initiated an administrative response, based on the information provided. This information included the nature of the injuries, and confirmation that the installation of the infill formwork had ceased until the Safe Work Method Statement (SWMS) and risk control measures could be reviewed.

A duty holder is required to review and revise a control measure to identify appropriate risk control measures to reduce the risk of reoccurrence, so far as is reasonably practicable.

SafeWork NSW attended the site on 1 July 2017, in response to a request for service on 29 June 2017 from a worker about a near fall. A SafeWork NSW inspector issued an improvement notice and a section 171 notice requiring production of documents. A further inspector visit was conducted on 15 July 2017 to check compliance with the improvement notice.

SafeWork NSW is currently undertaking a proactive Harm Prevention Program in the construction industry which focuses on formwork, scaffolding and electrical safety in the mid/high rise sector. This program involves intensive engagement with stakeholders in the industry through verification activities, drop-in visits and targeted engagements conducted by inspectors at construction sites throughout NSW. The initial consultation process for the Formwork Project included consultation with the CFMEU so SafeWork NSW could ensure the program was developed to provide assistance and meet the needs of the stakeholders in the formwork industry.

In line with the program, SafeWork NSW has recently modified its triage procedures, so that an incident such as the one that occurred at the site will, in the future, receive an automatic inspector response.

The Formwork Project is only one aspect of SafeWork NSW's current extensive approach to securing compliance within the construction industry, which also includes:

- the introduction on 1 November 2017 of new penalty notices of up to \$3,600 to protect workers against falls from heights and unlicensed work
- an increase in compliance and inspection programs over the last 16 months targeting residential construction, civil infrastructure and mid-rise commercial construction
- commencement of a safety blitz on construction sites across NSW targeting falls
- recruitment of 12 additional construction safety inspectors as part of a \$2.5 million boost to safety on major infrastructure projects announced in the NSW Budget.

Further, under the *Work Health and Safety Roadmap for NSW 2022*, SafeWork NSW is currently undertaking consultation with the Construction Sector to develop a State-wide Construction Sector Plan.

QON 2 NUMBER OF PROSECUTIONS LAUNCHED / DATA

The Hon. LYNDIA VOLTZ: In the past six months how many prosecutions have you launched?

Mr DUNPHY: In filing prosecution matters in the courts, I can certainly provide that on notice.

Mr DAVID SHOEBRIDGE: The concerns are the change from 2003-04, that data would be useful. If you could give the Committee the successful prosecutions commenced, the notices and the like from 2003-04 we could get a sense of the data.

The CHAIR: And when those inspector notices came into play? Was that 2012?

The Hon. LYNDIA VOLTZ: There have always been infringement notices, have there not?

Mr DUNPHY: We have had infringement notices—

The Hon. LYNDIA VOLTZ: In fact, they went from about 600 in 2010-11 to about 30 or 40 in 2012-14.

Mr DUNPHY: A feature of the new national legislation is inspection reports. Part of the agreed approach is when inspectors go to a site and they issue a report it will also document agreed arrangements as to actions that might be taken on that site. That could be in lieu of a notice as well and that is another avenue that is now available.

Mr DAVID SHOEBRIDGE: Why have you not provided the Committee with the data on inspector reports?

Mr DUNPHY: We can.

Mr DAVID SHOEBRIDGE: Do you say that they are useful?

Mr DUNPHY: Yes. I can certainly provide the Committee with the data on the number of inspection reports that we issue.

QON 2 ANSWER

QON 2(a) Number of prosecutions in the last six months

Consistent with the *National Compliance and Enforcement Policy*, SafeWork NSW has adopted a proportionate and balanced approach to its regulatory services to secure industry compliance, to detect and correct the risk of harm before it occurs in workplaces and to investigate and prosecute serious offences, where they arise.

SafeWork NSW actively responds to work-related fatalities, serious injuries and reports of serious offences under work health and safety laws.

Prior to the introduction of the national model work health and safety legislation in 2012, NSW legislation placed a 'reverse onus of proof' on the defendant to prove they had a reasonable excuse not to comply with the provision of the Act or the Regulations. This was a feature of the former *Occupational Health and Safety Act 2000* (OHS Act) which was repealed on 31 December 2011. Up until June 2011, the OHS Act allowed for officers of corporations to be convicted on the basis of a successful conviction brought against the corporation. Since 1 January 2012, the onus is on SafeWork NSW to prove, beyond reasonable doubt, that the PCBU did not do what was 'reasonably practicable' to ensure the health and safety of a person. Similarly, the onus is on SafeWork NSW to prove, beyond reasonable doubt, that officers did not exercise due diligence in ensuring the PCBU complies with its work health and safety obligations.

The *Work Health and Safety Act 2011* (2011 Act) introduced a new feature of Enforceable Undertakings *in-lieu* of a work health and safety prosecution. An Enforceable Undertaking (Work Health and Safety Undertaking) requires a person, who has contravened or is alleged to have contravened the 2011 Act, to undertake significant work health and safety reform in the workplace, industry sector and community. Since 2012, SafeWork NSW has accepted 31 Work Health and Safety Enforceable Undertakings, worth an estimated \$10 million.

In the last six months (1 May 2017 – 31 October 2017) SafeWork NSW has commenced proceedings in relation to 17 matters, laying 33 charges against 25 defendants. During that same period, SafeWork NSW has successfully prosecuted 14 work health and safety matters, involving 18 charges against 18 defendants. SafeWork NSW has also accepted five Work Health and Safety Enforceable Undertakings in this period.

QON 2(b) Number of prosecutions – 2004 to 2018

NSW WORK HEALTH AND SAFETY PROSECUTIONS / ENFORCEABLE UNDERTAKINGS 2004 to 2018 (FYE)				
Financial Year Ending	Matters	Charges	Defendants	Enforceable Undertakings
2004 – Commenced	200	336	333	N/A
Successful	253	399	337	N/A
2005 – Commenced	234	559	377	N/A
Successful	218	384	278	N/A
2006 – Commenced	230	535	440	N/A
Successful	245	482	340	N/A
2007 – Commenced	98	290	213	N/A
Successful	175	360	300	N/A
2008 – Commenced	55	145	113	N/A
Successful	110	231	182	N/A
2009 – Commenced	60	209	156	N/A
Successful	59	108	96	N/A
2010 – Commenced	32	102	75	N/A
Successful	44	103	76	N/A
2011 – Commenced	52	144	124	N/A
Successful	47	109	89	N/A
2012 – Commenced	51	151	117	0
Successful	49	98	84	
2013 – Commenced	56	130	111	0
Successful	54	98	83	
2014 – Commenced	44	96	82	1
Successful	30	52	41	
2015 – Commenced	33	80	64	5
Successful	67	97	88	
2016 – Commenced	50	82	72	12
Successful	33	55	45	
2017 – Commenced	36	62	55	10
Successful	29	33	32	
2018 (1 July 2017 to 31 October 2017) – Commenced	15	31	23	3
Successful	11	14	14	

NOTE: Due to the time taken for matters to proceed through the court processes, the number of matters commenced in one year will be different to the number of matters finalised.

QON 2(c) Number of improvement, prohibition and penalty notices issued – 2003/04 to 2016/17

QON 2(d) Number of inspection reports issued – 2011/12 to 2016/17

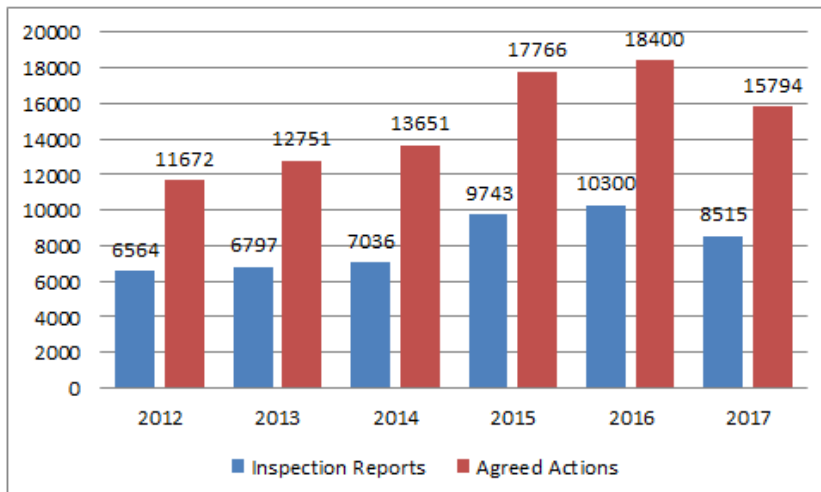
Financial year	Improvement	Prohibition	Penalty	Inspection Reports
2003/04	17,927	1,139	915	N/A
2004/05	18,213	1,421	1,652	N/A
2005/06	14,831	1,212	1,195	N/A
2006/07	13,243	1,127	726	N/A
2007/08	13,109	994	619	N/A
2008/09	10,863	769	690	N/A
2009/10	12,161	856	68	N/A
2010/11	11,318	832	587	N/A
2011/12	8,858	601	357	3,233*
2012/13	6,111	550	124	6,686
2013/14	5,091	496	69	6,679
2014/15	6,545	673	92	8,909
2015/16	7,266	718	88	9,555
2016/17	7,513	1,041	160	10,201

* Inspection reports were first issued from 1 January 2012 (half way through the financial year).

Changes in the number of notices reflect the significant changes following the introduction of the national *model Work Health and Safety Act 2011* on 1 January 2012 including:

- the issue of penalty notices was restricted to specific regulatory provisions rather than for general duty provisions
- the introduction of inspection reports and agreed actions as an alternative to an inspector’s notice.

Inspection Reports and Agreed Actions issued for 2012-2017:



QON 3 NUMBER OF DEATHS WHERE THERE HAS BEEN A BREACH

Mr DAVID SHOEBRIDGE: Could you give us the data then, going back over the past decade, of the number of deaths where there has been a breach identified of the occupational health and safety, or work health safety laws? And then can you advise in how many of those you commenced a prosecution?

Mr DUNPHY: We can certainly attempt to have a look at that, yes.

Mr DAVID SHOEBRIDGE: You say you can attempt to have a look at that. Are you saying it would not be possible to work out whether you commenced prosecutions in relation to deaths?

Mr DUNPHY: No, I think we certainly could but I am just wondering whether that is within the scope of the terms of reference.

Mr DAVID SHOEBRIDGE: Well one of the concerns is, in splitting the three organisations up your organisation is now within Finance, whatever the new Finance grouping is called, and the relationship in Finance is one of cooperating with business rather than prosecuting business. The concern expressed by a number of stakeholders is that that has led to a softening of prosecutions and a reduction in prosecutions. So I suppose the data for that is important.

Mr DUNPHY: Yes.

Mr DAVID SHOEBRIDGE: You are not resisting giving us the data, are you Mr Dunphy?

Mr DUNPHY: No, not at all. I am just trying to understand on what basis—

Mr DAVID SHOEBRIDGE: Does that explain it for you?

Mr DUNPHY: Yes.

The CHAIR: I will allow that because the evidence you have is that the change has resulted in fewer prosecutions and it would be interesting data for us to look at.

Mr DUNPHY: Yes, I would be happy to.

QON 3 ANSWER

Consistent with the *National Compliance and Enforcement Policy*, SafeWork NSW conducts a full compliance investigation for all work-related fatalities, in order to determine causation and whether there has been a breach of work health and safety laws.

A full compliance investigation may not be conducted in situations such as those where the person died of natural causes, the deceased is the only 'duty holder' responsible or where another regulator administers a similar regulatory scheme, such as with respect to road, rail and air transport matters.

As outlined in the *SafeWork NSW Compliance policy and prosecution guidelines*, where a full compliance investigation identifies a breach of work health and safety laws, it is the policy of SafeWork NSW to commence proceedings with respect to serious offences, particularly those where a work-related death has occurred.

The level of prosecution activity as it relates to work-related fatalities is dependent upon the number of fatalities notified, the number of compliance investigations conducted and the establishment of an offence, beyond reasonable doubt.

SafeWork NSW dedicates significant resources to the investigation and prosecution of serious offences in relation to work-related fatalities.

In 2008, SafeWork NSW established a centralised investigations area to manage and conduct fatality and serious incidents investigations. In a small number of work-related fatality matters where alleged breaches of work health and safety laws have been identified, SafeWork NSW determined not to commence legal proceedings. Those determinations were made in accordance with the *Compliance policy and prosecution guidelines*, on the grounds that it was not in the public interest to proceed to prosecution, specifically with respect to discretionary factors applied to each particular case.

Between 1 July 2008 and 31 October 2017, SafeWork NSW commenced legal proceedings in 142 matters and successfully completed 146 matters that involved a work-related fatality (see Table below).

There were an additional nine matters where alleged breaches of work health and safety laws were identified, but did not proceed to prosecution. In four cases, prosecution did not proceed as the deceased person was the responsible duty holder or a director of the relevant corporation. In two cases, the prosecution did not proceed because of serious health conditions of the alleged offenders. In the remaining three cases, prosecution did not proceed because of a family relationship, double jeopardy in that the offence was the subject of enforcement action by NSW Police Force and the relevant corporate entities ceased to trade.

The nine matters relate to the following financial years:

- 2010/11 – 2 matters
- 2013/14 – 3 matters
- 2015/16 – 3 matters
- 2016/17 – 1 matter

NSW WORK HEALTH AND SAFETY PROSECUTIONS INVOLVING A WORK-RELATED DEATH – 2008 to 2018 (FYE)			
Financial Year Ending	Matters	Charges	Defendants
2008 – Commenced	15	41	36
Successful	19	38	33
2009 – Commenced	18	45	37
Successful	14	24	23
2010 – Commenced	15	42	37
Successful	13	28	21
2011 – Commenced	24	58	50
Successful	21	40	36
2012 – Commenced	14	29	25
Successful	19	30	28
2013 – Commenced	14	29	24
Successful	17	28	26
2014 – Commenced	16	36	34
Successful	8	11	9
2015 – Commenced	8	14	14
Successful	20	28	25
2016 – Commenced	5	5	5
Successful	7	8	8
2017 – Commenced	9	14	13
Successful	7	8	8
2018 (1 Jul to 30 Oct 17) – Commenced	4	11	7
Successful	1	1	1

QON 4 NUMBER OF REVIEWS OF NOTICES

Mr DAVID SHOEBRIDGE: Could you let us know how many reviews have been issued of a failure to issue a notice and how many reviews have been done of decisions to issue a notice?

Mr DUNPHY: I would be happy to provide that.

The CHAIR: Going back for two years?

Mr DAVID SHOEBRIDGE: Or for as long as this system has been in place which I think is 2½ years or so?

Mr DUNPHY: It is a feature of the legislation, yes.

QON 4 ANSWER

For the financial year 2010/11 to date, SafeWork NSW has accepted a total of 373 applications to review a decision (improvement, penalty and prohibition notice), under the NSW *Work Health and Safety Act 2011*. Of these, two directly relate to a review on the basis that an inspector had refused to make a decision to issue a notice.

Notice	Financial Year								
	2017/18	2016/17	2015/16	2014/15	2013/14	2012/13	2011/12	2010/11	Total
Improvement	14	60	29	48	10	16	29	35	241
Penalty	3	12	15	8	8	18	22	28	114
Prohibition	3	7	0	1	1	2	1	3	18
Total	20	79	44	57	19	36	52	66	373

QON 5 BREAKDOWN OF INSPECTOR INTERACTIONS

Mr DAVID SHOEBRIDGE: The figure of 32,056 inspector interactions, it is hard to get meaning from that unless we know what those interactions are. On notice, could you give us a breakdown of that?

Mr DUNPHY: Yes, we can break that down.

The CHAIR: It was suggested they could just be phone calls, so if you can give us some more information around that.

Mr DUNPHY: Yes.

QON 5 ANSWER

Breakdown of SafeWork NSW inspector interactions for 2016/17:

2016/17	Number
Proactive – field based	11,460
Reactive – field based	9,917
Proactive – non-field based	10,679
Total	32,056

Field based activities include:

- Visits – workplace visits, including proactive and reactive engagements.
- Verifications in the field – completion of a health or safety checklist on site (for example, forklift safety).
- External meetings – scheduled meetings with external stakeholders.
- Provision of advice in the field – provision of advice or technical advice to an external stakeholder in the field or face-to-face.

Non-field based:

- Non-field response – non-field interactions with external stakeholder to resolve an issue (for example, resolving a dispute over the telephone).
- Provision of advice not in the field – provision of advice via a range of mechanisms to external stakeholders, in the office or not face-to-face.
- Verification in the inspector's office – completion of a desk top audit/verification activity away from the employer's work site.
- Provision of advice internal – provision of advice via a range of mechanisms to an internal stakeholder.