

**Submission
No 5**

**INQUIRY INTO WORK HEALTH AND SAFETY
AMENDMENT (REVIEW) BILL 2019**

Organisation: CFMEU
Date Received: 4 February 2020

4 February 2020

The Hon Tara Moriarty MLC.
Chair Portfolio Committee No. 1 – Premier and Finance
Legislative Council
Parliament of New South Wales

Dear Ms Moriarty

Re: CFMMEU Submission concerning the Legislative Council Inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019

A: Introduction

The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) welcomes the opportunity to make submissions to the 2019 Legislative Council Inquiry into the provisions of the *Work Health and Safety Amendment (Review) Bill 2019* (the Bill.)

The CFMMEU represents approximately 16 000 members in the building and construction industry. A large proportion of our members are workers who come from non-English speaking backgrounds with little or no education beyond the age of 15. Our members rely on the assistance of union delegates, health and safety representatives and union officials in navigating their way through day-to-day safety issues.

Workplace safety remains a key concern for construction workers in New South Wales. The construction industry has the third highest rate of fatalities, both nationally and at the state level with 58 workers having been killed at work in NSW between 2014- 18. This appalling safety record occurs in the context of an industry which is increasingly characterised by casualised workforces, fragmented labour hire structures and sham contracting. The vulnerable nature of job tenure in the construction industry means that workers find it increasingly difficult to raise work health and safety complaints without jeopardising their employment security.

While the CFMMEU supports nationally harmonised work health and safety laws and regulations, such harmonisation must not tend towards a lowest common denominator approach to regulation. Reforms are necessary to ensure that unions as workers' representatives can actively participate in the review of safety issues - particularly in circumstances where SafeWork NSW fails to act as the regulator. Urgent reforms are also necessary to respond to the emerging crisis concerning silica exposure and silica related diseases. The proposed Bill leaves these urgently required reforms unaddressed.

B: Consultation, Representation and Participation

The proposed Bill implements a few targeted Boland Review¹ recommendations including provisions which may assist in resolving deadlocks between employees and employers regarding HSR training and improve choice of access on the part of employees.

The proposed amendments do not pick up important recommendations from the Boland Review to ensure that union officials entering workplaces to assist HSRs not be required to hold an entry permit under the Fair Work Act 2009 or other industrial laws.² The proposed reforms do not address the artificial limitations through which the Model Act generally restricts HSRs to raising issues that affect their discrete work group. These restrictions encourage employers to exploit demarcation issues between workgroups, particularly where significant issues such as systems of work affect workplaces as a whole. Nor do the proposed amendments address the oppressive existing requirements regarding the production of s117 suspected contravention notices by union officials.

B: Compliance and Enforcement

The proposed legislative amendments will not overcome the ongoing inaction by SafeWork NSW as the regulator. SafeWork remains unwilling to initiate work health and safety prosecutions and increasingly relies on administrative procedures and penalties such as the issuing of on-the-spot fines for fall from height hazards.

With respect to issue resolution, the proposed bill takes no action to resolve the present unsatisfactory arrangement whereby unions cannot as of right apply for the internal and/or external review of decisions by the regulator. Currently, in order for a union to represent a worker, the worker must identify themselves as the applicant in any such review. Given the disparity in terms of the power relationship between employees and employers and the likelihood of victimisation against workers who raise safety issues, the current arrangements mean that there are no effective avenues to appeal against inaction on the part of SafeWork NSW.

The Bill includes significant amendments on the procedures for the service of notices (s155B). These include the ability to serve notices on “a person who appears to be over 16 years and who appears to reside or work” at a person’s residence or business. The CFMMEU is concerned that any notice requiring an employee to attend a mandatory interview clearly be served on the employee concerned, and not on someone who may merely appear to have some connection or relationship with the employee.

The CFMMEU supports the proposal to remove the ability for PCBUs to obtain insurance to offset work health and safety fines.

C: Prosecutions and Legal Proceedings

The CFMMEU supports introduction of an offence of industrial manslaughter. The need for uniform industrial manslaughter offences is addressed in the *CFMMEU Submission to the Senate Education and Employment Committee’s inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*.³ Several state jurisdictions have now acted on the

¹ *Review of the model Work Health and Safety laws Final report December 2018*.

² *Ibid*, Recommendation 8.

³https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Industri

need for industrial manslaughter laws. In November 2019 the Victorian Parliament passed the *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019*. Queensland has had industrial manslaughter legislation in place since the passage of the *Work Health and Safety and Other Legislation Amendment Act 2017*.

The proposed New South Wales bill does not introduce an offence of industrial manslaughter, and instead adds annotation to the effect that a workplace death may be prosecuted as manslaughter under the *Crimes Act 1900*. Relying on the *Crimes Act 1900* for the prosecution of industrial manslaughter is not practicable. It is doubtful that the inclusion of a notation in the criminal code will bring about the organisational and cultural changes necessary to bring the required focus on the prosecution of industrial deaths in New South Wales. The proposed approach is not consistent with the Boland Review recommendations, which at Recommendation 23b proposed the following:

Amend the model WHS act to provide for a new offensive industrial manslaughter. The offence should provide for gross negligence causing death and include the following:

- *The offence can be committed by a PCBU and an officer as defined under section 4 of the Model WHS Act.*
- *The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate.*
- *The body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or offices.*
- *The offence covers the death of an individual to whom a duty is owed.*

D: Urgent responses to Silica Exposure

The New South Wales government is well behind other jurisdictions in responding to the emerging silicosis crisis. There is an urgent need to amend outdated work health and safety laws and regulations concerning silica exposure. The proposed bill takes no action with respect to this issue. The Queensland Government has introduced mandatory reporting by physicians and has established a silicosis register. This has not occurred in New South Wales.

On 17 December 2019, the Victorian government took action to reduce the workplace exposure standard (WES) for respirable crystalline silica from 0.10 mcg/m³ to 0.05 mcg/m³. WorkSafe Victoria is also recommending that employers take a precautionary approach and further reduce exposure to below 0.02 mg/m³ to protect employees from developing silicosis and minimise the risk of cancer.⁴ The CFMMEU has repeatedly called on the New South Wales State government to act early in reducing the WES, including with respect to State government infrastructure development sites such as the Westconnex other state-sponsored tunneling programs.

The Victorian government has also passed The *Occupational Health and Safety Amendment (Crystalline Silica) Regulations 2019* specifically targeted at wet cutting and other unsafe work practices. While the New South Wales Legislative Council has passed a motion to “immediately consider” a ban on manufactured stone, formal regulations are yet to be passed requiring mandatory reporting, reducing the WES, banning wet cutting and limiting the sale and use of manufactured stone. Further, the state government has continued to ignore recommendations by the New South Wales Legislative Council for the funding of a silicosis case finding study.

[aldeathsinAus/Submissions](#)

⁴ <https://www.worksafe.vic.gov.au/crystalline-silica-safety-basics>

E: Safework Restructure

The CFMMEU is concerned that the Bill is being introduced at a time when the government has abolished SafeWork NSW as a stand-alone safety regulator. Important SafeWork functions such as compliance and enforcement, and policy development have been dissipated into a generalist Better Regulation Department, which is now responsible for functions as broad as liquor licensing, greyhound racing and product safety in addition to safety regulation. We have real concerns that this restructure will further stultify the government's ability to act promptly and effectively with respect to workplace safety concerns.

Yours faithfully

Rita Mallia
State President