# STANDING COMMITTEE ON PUBLIC ADMINISTRATION

## INQUIRY INTO WORKSAFE

**TRANSCRIPT OF EVIDENCE**
**TAKEN AT PERTH**
**WEDNESDAY, 29 NOVEMBER 2017**

**Members**

**Hon Adele Farina (Chair)**
**Hon Jacqui Boydell (Deputy Chair)**
**Hon Ken Baston**
**Hon Kyle McGinn**
**Hon Darren West**

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**Hearing commenced at 10.17 am**

**Mr MICHAEL CROSS**
**National Safety and Training Officer, Maritime Union of Australia, sworn and examined:**

**Ms MARGOT HOYTE**
**Work Health and Safety Consultant, sworn and examined:**

**The CHAIR**: On behalf of the committee, I would like to welcome you to the meeting, and before we begin, I must ask you to take either the oath or the affirmation.

[Witnesses took the affirmation.]

**The CHAIR**: You will have signed a document entitled "Information for Witnesses". Have you read and understood the document?

**The WITNESSES**: Yes.

**The CHAIR**: These proceedings are being recorded by Hansard and broadcast on the internet. A transcript of your evidence will be provided to you in due course. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones. Try to talk into them and do not cover them with papers. I remind you that your transcript will become a matter for the public record. If, for some reason, you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing and we will go off air. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

I have a long list of questions to ask, but I would like to invite you to make an opening statement if you would like to.

**Mr CROSS**: Thank you. I am the national safety and training officer for the maritime union, a seafarer. I have had 10 years in the seafaring industry across all aspects of seafaring. At the back end of that was in Western Australia in the offshore oil and gas industry. In my role, plus as a seafarer, I do work with quite a few regulators across the industry, be it NOPSEMA, AMSA, state regulators, so I am in a good position to talk about that cross-reference in jurisdiction with the regulators.

**The CHAIR**: Margot, did you want to make any statement?

**Ms HOYTE**: Not at this point, no, thank you.

**The CHAIR**: I would like to begin by referring to the case study that has been provided in the union's submission in relation to the death of 22-year-old Jarrod Hampton. At page 2 the submission states that Mr Hampton completed a pearl diving induction course; however, the course did not include practical exercises in an uncontrolled environment. Do you know whether this course was accredited and which body accredited the course?

**Ms HOYTE**: I believe the course was accredited by the Pearl Producers Association, so it is their course, and, as stated, that it was delivered in Darwin on those dates.

**The CHAIR**: It was delivered in Darwin?

**Ms HOYTE**: Yes.

**The CHAIR**: So WorkSafe would have had no involvement in accrediting that course?

**Ms HOYTE**: No.

**The CHAIR**: Page 3 of the submission states that the PPA produced a pearl diving industry code of practice. Do you know whether the code of practice was approved by WorkSafe WA?

**Ms HOYTE**: Yes. There is a reasonably extensive process for—WorkSafe WA encourages industries to write their own codes. There is a process whereby industry bodies write those codes and then have them approved as codes for compliance under the act. It is a Pearl Producers Association code that is recognised by WorkSafe.

**The CHAIR**: Page 3 of the submission includes a quote from Mr and Mrs Hampton's statement. It reads as follows —

> *The pearling industry operates under the "General Diving" classification … They are a commercial operation and should be subject to the regulations of the Commercial Diving classification.*

Do you know who determines the classification under which Paspaley operates? Would it have made a difference if they were actually operating under the commercial classification as suggested by Mr and Mrs Hampton?

**Ms HOYTE**: Who makes the determination? It is based on the activity that is undertaken and the pearling industry is, I believe, outside of the classification scope as currently exists under the WA legislation.

**The CHAIR**: Could you explain that a little more for me?

**Ms HOYTE**: It would be a different outcome if it was under the nationally harmonised health and safety legislation. The WA legislation, as I understand it, provides for some activities to be prescribed, as Jarrod's parents set out, but that pearling is deemed to be outside of that definition, so it does not come under the commercial diving classification.

**The CHAIR**: Do you know the reasons why it was deemed to be outside those provisions?

**Ms HOYTE**: No.

**The CHAIR**: Do you think it would have made a difference if it had been operating under the commercial classification?

**Ms HOYTE**: Potentially, yes, but also Jarrod's story is a story both of poor law and poor compliance with the existing law, so there is certainly a case that could be made irrespective of what law the activity was under, and one of the focuses of this inquiry is that the law as it exists is poorly administered and enforced anyway.

**The CHAIR**: At the bottom of page 3, the submission states —

> *Once it is approved, the industry code of practice may be sold by its developers to recover the publication and distribution costs. WorkSafe will include a copy of the approved code of practice on its web site for download.*
>
> We submit this practice by WorkSafe should be reviewed.

Would you like to expand on that submission made by the union and what sort of review is required and how this practice should be changed?

**Ms HOYTE**: First of all, stepping back slightly, the role of the regulator is to enforce compliance, to assist in achieving the outcomes of the objectives of the health and safety law. It does that in a couple of ways. It provides education and information; it provides compliance and enforcement activities. When a regulator such as the WA regulator effectively outsources part of that responsibility that is its own, it disables its capacity in a whole lot of ways. The practice of having industry draw up their own codes of practice and then comply with certain tick criteria, or whatever, on the surface looks really good because, as a lot of industry people will say, "We know our industry best." A lot of them will also say, "Hazards and issues are unique and special to our industry." But I have worked in health and safety for over 25 years and there are so many parties across so many industries that have said, "What you've got to understand is that we are so unique and we're so special that we need this." But almost universally and consistently there are hazards, there are risks, and there are steps and processes that apply across all industries. Certainly, in diving there are some obvious unique characteristics: water is not respirable. That is not an issue in a lot of other areas.

Anyway, coming back, with allowing industry groups to draw up their own codes of practice, WorkSafe WA has stepped away from its essential education, compliance and enforcement role. It has also stepped away from some of the objects of the act—that is, to enable participation of workplace parties. What has been established, and well established, since the early 1970s with the Robens-style legislation that we have everywhere in Australia, based on the UK model, is that Robens said that we have to set out some duties and we have to set out a process, and it is a process of tripartite participation, and that is where you achieve the best outcomes. Robens recognised that not all three parties—government, workers represented by unions and employers—are always going to agree. He said that that was okay and that mechanisms would be set up whereby you can achieve a good outcome anyway. But when you have these industry codes of practice, by definition you step away from that tripartite process. So by definition you are undermining the law under which it is set up.

**The CHAIR**: For the purposes of Hansard, Ruben, is that —

**Ms HOYTE**: Robens.

**The CHAIR**: How is it spelt?

**Ms HOYTE**: R-O-B-E-N-S, Lord Robens. He oversaw an inquiry into health and safety in, I think, 1974, by the UK government. His recommendations and its legislation formed the basis of all of Australia's health and safety laws.

**The CHAIR**: In preparing a code of practice, industry heads get together and develop it; there is little to no consultation with the employees in that process?

**Ms HOYTE**: There may be consultation involvement, but it would not be a uniform process, whereas in other jurisdictions where there are codes of practice developed under the regulator, they are developed in a tripartite process.

**The CHAIR**: What role does WorkSafe play in the development of that code of practice under Western Australian law? Does it actually lead, moderate and monitor that, or does it simply leave it to industry to prepare something and then they have a look at it once industry has submitted a code of practice?

**Ms HOYTE**: WorkSafe WA provides guidelines for development of codes and then provides an approval mechanism once a code is developed and the developers can demonstrate that the draft code is in compliance with the guidelines.

**The CHAIR**: But it is not necessarily the case that WorkSafe would have any technical experts in that particular field to give advice to them separate from industry that has prepared the code?

**Ms HOYTE**: It may or may not. I am not particularly aware, but I am happy to take that on notice if you want to make it a question on notice.

**The CHAIR**: We will take that as question on notice 1.

**Hon KYLE McGINN**: I just want to delve a little bit deeper in respect of employee consultation under the WA model. Is it part of the guidelines to prove consultation with employees and engagement, or has that pulled off completely without the regulator being involved?

[10.30 am]

**Ms HOYTE**: In the development of a code of practice?

**Hon KYLE McGINN**: Yes.

**Ms HOYTE**: I am not currently aware of that, but again I can provide that advice to you, if you like.

**The CHAIR**: That will be question on notice 2.

**Mr CROSS**: Just further to that point, any changes with regard to the OH&S act, anything that affects your health and safety, any changes to health and safety, employees must be consulted on. That is in section 9 of the act. It is spelt out in very plain English. That is always a point of conjecture: what is consultation? I am sure everybody on this board is well aware of that. That is where we do seem to find a lot of problems. There is consultation in the agreement—now it does; now it does not—but if it is not agreed to, then there is a process that a safety issue is in dispute and that process needs to be followed through to get a resolution.

**The CHAIR**: Consultation with a draft document on a website that people are supposed to automatically know about is not exactly consultation either.

**Mr CROSS**: No.

**Hon KYLE McGINN**: And I would assume that one code of practice would cover hundreds of workplaces, potentially, so there would be plenty of employees who have not been consulted in the making of the code of practice, so enforcing section 19 would be —

**Mr CROSS**: You are exactly right. I suppose from a worker's perspective, the unions are there to represent a tripartite approach to consultation; your union is there to represent that workplace and those workers. But you are right in what you are saying: there could be many, many workers who, whether it be a non-unionised workplace or whether it be isolated—numerous reasons that they would not have any input into that document at all.

**Ms HOYTE**: Just to add to that for a moment, too, in relation to pearl diving: you have a fairly transient industry. You have the boat Jarrod Hampton was on. He was from Victoria and had colleagues from New Zealand, so you have people here for a period of time and then perhaps going home to their place of residence which could be in another country. In some industries you have a highly transient workforce, so it makes consultation more difficult—not only to achieve, but also to demonstrate that it has occurred, but it means then that there have to be greater steps taken, not a, "Shucks, we can't do it" in this case.

**The CHAIR**: At page 4, the submission states that the pearl industry code of practice 1990 has disappeared from the department of commerce website. Have you asked WorkSafe about the removal of the code of practice from the website, and what did WorkSafe tell you?

**Ms HOYTE**: No.

**The CHAIR**: At page 4, the submission states that the practice of allowing industry to draw up codes of practice amounts to an abrogation of WorkSafe's regulatory and enforcement role. Who should draw up the industry codes of practice? I think we have touched on this a little bit, but just for the record could you say whether there is a model that you think works best.

**Ms HOYTE**: We believe a tripartite model overseen by an effective and functioning regulator that facilitates participation from bodies representing workers, that is the union and from industry representatives, that it is a WorkSafe function to oversee that.

**Hon KYLE McGINN**: Are you aware of that happening anywhere in Australia at the moment?

**Mr CROSS**: Yes, the stevedoring code of practice is a good example of such. That was a full tripartite approach through the employers, unions and WorkSafe. That has been adopted in three states now, I am pretty certain; I will stand corrected. Three states now have adopted that code of practice. WA has not and is looking to. That was a full tripartite approach to a code in this country, and there are many others.

**Ms HOYTE**: Every other jurisdiction is the tripartite process. That is not to say that there is not a role for industry information. The meaning of "practicable" includes the state of knowledge, and the unions very usefully contribute to the state of knowledge about hazards, risks and solutions, and process matters as well, as do quite a number of industry associations as well. But that does not allow, and it should not be seen to allow, a regulator to step away from its fundamental role.

**The CHAIR**: In a case where an industry code of practice has been developed solely by industry and it gets submitted to WorkSafe WA under the requirements of the legislation, does WorkSafe WA then contact the unions to give them an opportunity to comment on the draft code of practice?

**Ms HOYTE**: It is approved under the commission, I believe, and the commission has tripartite representatives, so there is that mechanism there, but it is not intrinsic and fundamental to its development.

**The CHAIR**: Are there occasions when WorkSafe WA tightens provisions in industrial codes of practice once it has been submitted before they actually approve it, and do you know the process they engage in to do that with industry?

**Ms HOYTE**: I could take that as a question on notice.

**The CHAIR**: We will take that as question on notice 3.

On page 4, the submission states that the higher AS/NZS 2299.1:2007 should apply to high-risk diving work. Is the union aware that Standards Australia is a privately owned business that engages people to prepare the standards and that they may very well be industry people? When I read the submission, there seemed to be a view being put by the union that they had great store in the Australian standards. I have a different view, personally, about the Australian standards because of the way they are actually put together and the fact that sometimes they are actually put together by volunteers who just have an interest in that particular area and there is no oversight by Parliament, industry or any tripartite body as to what is in those Australian standards. I am just trying to understand: is it the union's view that you have greater faith in the Australian standards?

**Ms HOYTE**: The union supports the general principle that good law should set out to not reference an external document, and it is good law to not require a party to go somewhere else in order to comply with that initial law. But, in one of my previous roles, when I was at the ACTU, I had some involvement in developing the harmonised model health and safety act and model regulations, and so that matter, that principle, was at the forefront of the minds in that tripartite process, and so it was considered in each regulation cluster whether or not there should be any mention of an

Australian standard. The approach taken in that tripartite process, auspiced by Safe Work Australia, was that the general principle is no, unless there is an overriding reason as to why that would be yes. So we ended up with harmonised regulations that call up Australian standards, I think, four, maybe five times over about 300-odd pages of regulations. It was agreed by parties that that was a good balance, and there was merit in the diving regulations in calling up those Australian standards. Another area where an Australian standard was called up—there is no contention or dispute about it that I am aware of anyway, and has been called up for over 25 years I think—is in hearing testing, and that calls up a specific Australian standard. That allows for accuracy, clarity and non-ambiguity in the nature of the testing and the determination of the outcomes, et cetera. They have clear merit when they are used judiciously, and when they are good technical standards they have also some use in a range of codes of practice as well. So, for example, under the Queensland health and safety act, the Queensland code of practice in relation to concreting mentions about four or five Australian standards, sprinkled throughout the code. It is used effectively there. It flags that there is further detail there, or that that part of the code draws on an element of the Australian standards. I guess, in summary, there is merit when merit is established.

[10.40 am]

**The CHAIR**: But why not simply incorporate that standard into the law by incorporating all the words within the standard, rather than making reference to it? Then, people are required to purchase the Australian standards, which can be quite expensive.

**Ms HOYTE**: It can be significant, yes. There is some case to be made for that in relation to regulation 171, so Australian standard 4005, which in fact has now been withdrawn, and there is a very sensible case to just list all the requirements there, and that can be done, and would be done most effectively by referencing something in a code of practice. The code of practice to go with the diving regulations is yet to be confirmed or fully developed, but there is, in relation to the high-risk diving work, a bit more detail in that Australian standard, and the parties that are engaged in that training anyway, that it is not onerous for them, because there is already a significant commitment there. It is not a bridge too far or a jump too high.

**The CHAIR**: Whereas an Australian standard changes, when it has been incorporated into legislation, that would then require an amendment to the legislation to make reference to the more updated Australian standard?

**Ms HOYTE**: It may, but it depends on the nature and scope of the change in the Australian standard. I should also advise the committee that I am a member of the Standards Australia standing committee 17 for diving work, and with that hat on, with deliberations that we have made in relation to the standards, the committee has actively sought out and engaged with Safe Work Australia—asked questions, sought advice about whether or not matters would be consistent or inconsistent with diving work regulations, et cetera, so it is not done in isolation and in ignorance of the national body, Safe Work Australia.

**The CHAIR**: Page 4 of the submission states that if pearling were to be defined as high-risk diving, then a dive supervisor would be required, under the regulations. Who determines whether pearling is high-risk diving?

**Ms HOYTE**: There is a definition of high-risk diving in the regulations, and at the moment high-risk diving includes construction diving work, and a couple of other sorts of diving work, but it excludes some as well. It would be a matter for the definition of high-risk diving, to include or otherwise not include.

**The CHAIR**: So who is the body that makes that determination?

**Ms HOYTE**: The harmonised law, or the model legislation, is overseen by Safe Work Australia, and every jurisdiction—WA, New South Wales, et cetera—is a member of Safe Work Australia, and then each state and territory jurisdiction has its own work health and safety act. Matters are considered by Safe Work Australia. They then make recommendations, and it is up to the jurisdictions to then implement them or not, as has been the case in WA up till now.

**The CHAIR**: Has Safe Work Australia considered the question of whether pearling should be included in the definition of high-risk diving, and what has been their conclusion? You can take that as a question on notice if you like.

**Mr CROSS**: Yes, we would have to take that on notice.

**The CHAIR**: That will be question on notice 4. At page 5 the submission states that emergency procedures and equipment should be revised for pearling and drift diving. I am just wondering whether the union has made representations to WorkSafe to this effect, and what has been the response?

**Ms HOYTE**: We have spoken to WorkSafe.

**Mr CROSS**: I could not comment on that, sorry. We would have to take that on notice.

**The CHAIR**: We will take that as question on notice 5. The same question—has the union raised this concern with COSH, and what has been the response from COSH? Also, has the union raised this issue with the minister, and what has been the response from the minister? We will take that as the three parts to question on notice 5.

**Mr CROSS**: Yes.

**The CHAIR**: At page 5 the submission makes reference to a full investigation being undertaken by WA water police, including a number of recommendations in relation to this incident. Does the union have the WA water police investigation report and recommendations, and are you able to provide the report to the committee?

**Mr CROSS**: No.

**The CHAIR**: No—you do not have it?

**Mr CROSS**: No.

**The CHAIR**: In terms of this incident, the union has indicated that it took three years for WorkSafe to complete its investigation, and that this is an extraordinary length of time. I am just wanting to find out whether there was any action in the intervening period taken by WorkSafe immediately following the fatality to ensure safe work practices and avoid a repeat of the fatality, or were we simply just continuing to do the same thing for the three years that it took to undertake the investigation?

**Ms HOYTE**: It is not clear what action WorkSafe WA took in the aftermath of Jarrod's death. I understand that that has been a point of frustration for Jarrod's parents, and we understand that there were some clear and specific recommendations made by WA Police, but it is not clear whether or not WorkSafe WA followed those recommendations.

**The CHAIR**: Are you aware whether WorkSafe issued any safety alerts immediately following the fatality?

**Ms HOYTE**: No, I am not aware.

**The CHAIR**: At page 6, the submission states that Paspaley were fined $60 000 on a plea of guilty. Does the union know whether the fine was agreed between the parties or was a decision of the magistrate in that matter?

**Ms HOYTE**: We understand that it was a decision of the magistrate. We also understand that there were no steps taken by WorkSafe WA to appeal that decision of the magistrate.

**The CHAIR**: Does the union view the fine of $60 000 as adequate?

**Mr CROSS**: Not at all.

**Ms HOYTE**: No.

**The CHAIR**: Does the union view the maximum penalty under the act of $200 000 as adequate?

**Ms HOYTE**: No.

**The CHAIR**: Can you explain why not, and what would be an adequate penalty in the circumstances?

**Ms HOYTE**: In relation, first of all, to the adequacy of a 30 per cent fine of the maximum, the union understands that matters such as a guilty plea be taken into account. The union does not agree with the points that the magistrate made in relation to good corporate citizenry et cetera. Given the nature of the incident, given the preventability of the death, given the capacity of the company et cetera to have had fairly fundamental and basic things in place, 30 per cent of the maximum fine is not proportionate to the level of culpability of the company, Paspaley—so, certainly a much higher percentage. In terms of what maximum fines are, jurisdictions around Australia, for many, many, many years have been increasing their maximum fines. The union understands that part of the purpose of that is to flag to the courts the community's expectations that penalties merit the level of severity and the level of culpability of the parties that have committed a crime in killing, in this case, Jarrod Hampton. We would like to refer the committee to the recent Work Health and Safety and Other Legislation Amendment Bill in Queensland —

[10.50 am]

**The CHAIR**: I will just indicate that those documents are tabled before the committee.

**Ms HOYTE**: Thank you. That bill, plus the explanatory memorandum, includes some useful penalties. In terms of monetary penalties, we now have provision in Queensland, which is on page 2 of the explanatory notes, that the industrial manslaughter amendments include that there are two penalties. There is a monetary penalty; a maximum penalty for a body corporate will be $10 million. Similar amendments were made in Queensland's Electrical Safety Act and the Safety in Recreational Water Activities Act. In addition to that, the industrial manslaughter amendment also includes the penalty for an individual for a maximum of 20 years' imprisonment—a custodial sentence—where the crime of industrial manslaughter is proven. Coming back to the question of whether the $200 000 is adequate, it is not, and it has not been for decades—decades. Currently, the mark in Queensland of $10 million—certainly, the MUA would recommend a finding be that a contemporary set of health and safety laws would have contemporary level fines and a contemporary suite of penalties that include the provision in relation to industrial manslaughter where a custodial sentence for negligence is also a potential penalty.

**The CHAIR**: The submission states that the union supports an offence of industrial manslaughter being created in Western Australia. You have now just made reference to the Queensland legislation. Can you just run through, for the committee, the elements of the industrial manslaughter offence and whether there are any defences under the Queensland law?

**Mr CROSS**: If I could, the way things sit now in the environment in a workplace is in the regime for your health and safety committees who meet once a month or thereabouts. So those minutes, we are told as a union, as workers, are sent to the highest workers in the company and I do not dispute that for one second. I do not dispute that high up in the company that manager would want to know what is going on with health and safety in that workplace. Does that filter back down and mean that

things get fixed that are hazards in the workplace? No, it does not. For whatever reason that might be, it does not. So, when we move into the space of industrial manslaughter charges, there will not be an excuse that high-level management did not know because they cannot say on one hand that these go to the highest levels and our management want to know about it and, at the same time, things do not get fixed. I understand that they do not get fixed—it is not that upper management is responsible for fixing them, it is at the workplace level—but at the same time, if these minutes and the issue that are tabled in these minutes then, as the definition of manslaughter is not intent, but rather recklessness or negligence, then there will be no excuse. That is why we believe that the industrial manslaughter provisions should make up part of the WA legislation.

**The CHAIR**: Does the Queensland legislation provide any defence at all against that offence?

**Ms HOYTE**: In terms of the level of steps that have been taken?

**The CHAIR**: Obviously, there are a number of defences under criminal law that you can use as a defence to a prosecution. Some of them apply in some instances and others in other instances. I am wondering whether, in the creation of the industrial manslaughter offence, do those standard criminal law defences apply, or whether, in creating that offence, the defences available at criminal law were limited in any way? If you cannot answer that question, it is okay, just say so, and we will ask others about that. I do not want to put you on the spot, I am just taking advantage of the fact that you have some knowledge of it, so I thought I would ask the question! If you do not feel you can answer it, just say so.

**Ms HOYTE**: I would defer to my legal advice notes but my understanding is that the defence is similar to that that is already established under criminal law in relation to negligence and that there are a number of elements in the offence that have to be proven: that the person was a worker, that they died in the course of carrying out work, that the person's conduct caused the death of the worker, and that the person is negligent about causing the death of the worker by that conduct. So they are the elements of it. The defences turn around, I believe, negligence, which is a different set of tests to what previously existed, which was only in relation to recklessness and reckless endangerment, which is a provision under the harmonised act that applies everywhere else. It attracts a maximum of a five year jail term. Recklessness is a mismatch for what often happens in workplaces, which is to neglect to have things like the emergency retrieval of divers, which is to neglect to have training of people, which is to neglect to have resuscitation equipment on board a multimillion-dollar pearling vessel. They are matters of negligence. They are not matters of recklessness—thinking about something but failing to do it anyway. It is a number of steps of failing to do things that increase the likelihood of, in the case that we highlight, people like a 22-year-old dying.

**The CHAIR**: At page 6, the Hamptons are again quoted as expressing the view that a coronial inquest is the only way to find out exactly what happened in this particular instance and what needs to be done to avoid a repeat of this tragedy in the future. Does the union agree with this view?

**Mr CROSS**: Yes.

**Ms HOYTE**: In the current context, yes.

**The CHAIR**: Is the union of the view that fatality investigations should be left to the coroner and not be completed by WorkSafe? You can take this question on notice, if you want to, and give that consideration, because it is a big question.

**Ms HOYTE**: Well, our submission was written prior to this recent Queensland legislation. There are some very good other provisions in the Queensland legislation that the union would recommend to the inquiry. That includes, in Queensland now, there is a separate office being established. If you

look at page 2 of the explanatory memorandum—this goes to term of reference (d) I believe of the inquiry—and independent statutory office for prosecutions —

> The Bill establishes an independent statutory office for WHS prosecutions. The statutory office will be headed by a WHS Prosecutor appointed by the Governor-in-Council for a five year renewable term.

Just as an aside, that five-year renewability means that that office also has that trigger for accountability as well. The bill transfers the current functions of the regulator to conduct and defend proceedings under the act before a court or tribunal to the health and safety prosecutor. So, an independent separate entity established by statute law then enables the regulator to be more accountable for what it does and does not do. It puts the regulator, in one sense, in a position whereby it can free up its resources to put more into the investigating and enforcement activities, so that is a recommendation that we would add to our submission, as I said, originally written prior to this review.

[11.00 am]

**Hon KYLE McGINN**: That is pretty good information. I know we have heard a lot of evidence around prosecution in this hearing so far.

**The CHAIR**: Mick, did you want to add anything to that?

**Mr CROSS**: No; fine, thank you.

**The CHAIR**: At page 6, this submission states —

> ***The outcome of the Worksafe investigation and prosecution should be of concern to every single employee in Western Australia and should be reviewed.***

What do you say were the shortfalls in this particular case and what needs to be done to improve WorkSafe's investigations and prosecutions? We understand it took three years to complete the process, and although the coroner held the hearings, we are still awaiting the coroner's report and recommendations.

**Ms HOYTE**: The shortfalls in the investigation and prosecution: I would make just a short comment here on the footnote from Robyn and Tony Hampton on the last page of our submission. This is just to ensure that we do touch on this. The nominated liaison person said to Jarrod's parents, "This is not a court case like you see on television." His parents found that unnecessary and condescending. Not knowing the person who made it, I cannot do anything other than to draw the inquiry's attention to that. That indicates, apart from anything else, that the organisation needs to have some expertise in this area. Other jurisdictions, Victoria for example—I am reasonably familiar with that jurisdiction—many years ago appointed liaison people. It is their job to liaise with family members of a worker who has died or been severely injured and the organisation or the entity—how do you deal with this agency? Properly trained, resourced, professionally appropriate personnel—we believe that that comment would be outside what would be appropriate to an appropriate person to do that job, okay. I did not want to lose that in the comment.

Look, the timeliness of the response, I do not know whether it has been said before at the inquiry, but it is an old saying of, what is it? Justice delayed is justice denied. For whatever reasons, whether it is one of, or whether it is a combination of, the organisation's culture, resourcing whatever—I suspect it is a combination and one kind of reinforces the other—but three years is not adequate. The harmonised legislation states that a prosecution will occur within two years unless there is particular extending, but a case has to be made about why there is no prosecution within a two-year period. Two years is way long enough. The length of time that it took for the prosecution to

occur, the investigation process in which people had at the very least the perception but also had the experience of being pushed away and not being informed about what was happening and why things were happening or why things were not happening, and the kind of stop-start of whether the prosecution was on or off was all just in one sense abusive of the family of the worker who had been killed. It should be within the capacity of any modern, contemporary entity that has a role and responsibility in the area of workplace health and safety—it is not just food, it is not just labelling or something like that; it is people's lives.

**The CHAIR**: Margot, just reading the union's submission, I got from that that there was a delay during the period of time that the WA water police impounded the boat, so during that time WorkSafe were not able to access the boat to continue its investigation and, obviously, that would have created some delays in the process. Is that the union's view that we should make legislative changes to provide for investigations by these different government agencies to occur concurrently and to have joint investigations? It seems to me that although WA Police will always argue, "Well, you need to protect the evidence", I do not understand why you cannot protect the evidence and also include another government agency as part of that investigation and make sure you are getting whatever information each agency needs through that investigation process.

**Ms HOYTE**: Yes, and one is not mutually exclusive to the other. If there are matters of either fact or perception—perhaps it is just perception—then surely the process of establishing a memorandum of understanding would clarify that. This jurisdiction could look to just about any other jurisdiction in Australia today to have a look at that path; it is very well travelled about how multiple agencies work together in matters where there are multiple jurisdictions. It is not hard.

**The CHAIR**: Mick, did you want to add anything to that?

**Mr CROSS**: No.

**Hon KYLE McGINN**: Referring to the second last page and comments of the water police —

> The Water Police have no power to do other than issue recommendations. On the other hand WorkSafe WA did have the power to require that specific measures be addressed though the issue of Improvement Notices or Prohibition Notices under sections 48 and 49 of the Occupational Health and Safety Act.

**Ms HOYTE**: This is on page?

**Hon KYLE McGINN**: It is the second last page.

**The CHAIR**: No—can I just have a look? He is reading from the statement from the Hamptons.

**Hon KYLE McGINN**: It starts with —

> *Jarrod's death was investigated by the WA Water Police, —*

And continues —

> *they impounded the boat operated by Paspaley—from which Jarrod was working at the time—and conducted a detailed examination.*

It seems from this statement here that they then passed on their recommendations to WorkSafe. It states here that the water police did not have the power to issue notices to see the hazards fixed. Somewhere else in the submission might be the recommendations given to WorkSafe, but I am assuming that these were identified to WorkSafe through the recommendations from WA water police but was not enacted prior to the vessel leaving the harbour.

**Ms HOYTE**: That is our understanding too.

**Hon KYLE McGINN**: Are you of the understanding that anyone from WorkSafe attended the vessel?

**Ms HOYTE**: I cannot say.

**Hon KYLE McGINN**: But let us just put that to one side. Even if they did not attend the vessel, we are of the understanding that the water police gave WorkSafe recommendations, but WorkSafe did not act on those recommendations.

**The CHAIR**: I think the evidence is that we do not know what WorkSafe did.

**Hon KYLE McGINN**: We do not know what WorkSafe did with their recommendations. It seems from reading this that the vessel left —

**The CHAIR**: Sorry, can we just have an answer to that question before we go on.

**Ms HOYTE**: The last sentence in that paragraph there says —

*The company stated that the "recommendations have been taken 'under advice.'*

**Hon KYLE McGINN**: But if there was an improvement notice or a prohibition notice, the company cannot just say, "The recommendations have been taken under advice", can they?

**Mr CROSS**: That is right. The company has the obligation to prove to the regulator that those improvements have been made and then the regulator, once they were happy with that, they would withdraw the PIN. The improvements that have been issued through the notice have been rectified and then the regulator would remove that notice, and then the company would be free to continue on. In this case it has not happened.

**Hon KYLE McGINN**: It does say there "without the recommendations having been addressed".

**The CHAIR**: We can ask WorkSafe those questions, I think.

**Ms HOYTE**: What steps they have taken to —

**Mr CROSS**: Just to the point that you said Kyle: in any situation, no company takes PIN notice. The issues and what is deemed to be in the PIN are rectifications that need to be done. No company takes that through advice. The company rectifies it and then they have to inform WorkSafe what they have done to meet their obligations with regard to being issued a PIN, which is clearer now.

[11.10 am]

**Hon KYLE McGINN**: Before WorkSafe removes the improvement notice.

**Mr CROSS**: Exactly.

**The CHAIR**: It should actually be a prohibition notice really, should not it, in relation to the vessel in these circumstances? It should not be allowed back on the water until they were rectified.

**Hon KYLE McGINN**: That is what it seems, the recommendations from the WA water police.

**The CHAIR**: At the bottom of page 6, the submission raises the issue of a correlation between the rise in casualisation of the workforce and the penalisation of employees who raise safety issues. I would like to provide you with an opportunity to expand on this and also to advance whatever evidence you have in support of this statement.

**Mr CROSS**: As casualisation has increased in this country, throughout various workplaces in the maritime industry and other industries—I can only speak on behalf of the maritime industry—I will draw attention to where things are in the seafaring industry, which might just give the committee a bit of an understanding of where things are at. There was a massive downturn in seafaring in this country, especially in the offshore oil and gas industry. A lot of big projects finished up all within that 12 or 18 months of each other. There were guys and women who were out of work for long periods of time. For them to come back to work and raise safety concerns and be confident that that will not jeopardise their work in the industry is a real issue that they face every day. It is the

same on the waterfront and it is also the same in other areas in the maritime industry. The way the HSR system works and the way that participation and workers' involvement in safety builds a better workplace is undeniable. It is absolutely undeniable that workers' participation is crucial to workplace health and safety. Workers who are casual and who have been out of work long term regrettably do have concerns in raising health and safety issues in the workplace as a casual worker. It is real. We have seen a lot in the maritime industry. We are currently working with the Seacare Authority on trying to improve HSRs and the role of HSRs within the industry. Seacare has recognised that we need to make improvements in that space. That is where we were with our submission; that is the point we were trying to make there. There is a real reluctance for casual employees to raise safety concerns across the maritime industry.

**The CHAIR**: At the top of page 7, the submission refers to the Pettifer case. Do you know whether this decision has been appealed?

**Mr CROSS**: Sorry, Chair; could you just—

**The CHAIR**: Take the time to have a read of that paragraph; it is quite long. As I understand it, it refers to an undescribed incident occurring on a site on 30 October 2015 under a contract between MODEC, the labour hire company, and BHP Billiton. BHP Billiton had the right to request that MODEC remove any of their employees from the site and BHP requested MODEC remove Mr Pettifer after an undescribed incident.

**Mr CROSS**: No, that was not appealed. That decision has not been appealed.

**The CHAIR**: I am curious as to why it has not been appealed.

**Mr CROSS**: I would have to take that on notice and get legal advice as to why.

**The CHAIR**: We will take that as question on notice 6.

**Ms HOYTE**: Can I just advise that the harmonised model Work Health and Safety Act sets out some provisions in relation to discrimination and includes a provision that it is illegal to induce, request or require anyone to discriminate against another person. That was included particularly having in mind arrangements where someone was employed by another party, and then for someone to phone and say, "Don't send that person back tomorrow." Under the model Work Health and Safety Act, that is illegal. There is no such provision in the 1984 act of WA.

**The CHAIR**: At page 7, the submission recommends —

> That the Act be amended so as to prohibit a labour hire company from entering into any contractual arrangements with a third party employer that would cause the labour hire company to offend any relevant legislation including but not limited to unfair dismissal provisions in *Fair Work Act 2009* (Cth).

Has the union raised this with the minister in this state and what has the minister's response been?

**Mr CROSS**: I would have to take that on notice as well.

**The CHAIR**: We will take that on notice as question on notice 7.

Again this is a three-part question: Have you raised it with the minister and what was his response? Have you raised it with WorkSafe and what was WorkSafe's response? Have you raised it with COSH and what has been COSH's response to that? That will be question on notice 7, in three parts.

**Hon KYLE McGINN**: I just want to go back to the vicarious employment, more just to put to you: do you think that also not having a tough copper on the beat as far as the regulator is concerned in the eyes of employees affects also precarious workers' raising safety issues rather than that just fear of termination?

**Mr CROSS**: Yes, absolutely. As someone who has been an HSR in the maritime industry, you absolutely rely on the regulator having your back, for want of a better term, I suppose, and that you have the confidence in the regulator that if you need to speak to them or you need to raise an issue or even guidance, even being able to contact the regulator and say, "I believe I have a genuine safety concern. I'd like to talk to someone about it or I'd like some information" before you rush straight into a PIN, whether it was issued wrongly or incorrectly. That is exactly what an HSR would rely on in the industry, especially someone who is new. You get elected from your fellow workers to become the HSR for that work group. You do a five-day course and then away you go. As with everything, it comes with experience, but as an HSR, a regulator who is a strong regulator, who supports their HSRs, who supports safety reps in any industry, is crucial; absolutely crucial.

**Hon KYLE McGINN**: To pick up on the comment about the five-day training, in WA they have up to 12 months before they have to put them through the training. Do you have a view on that?

**Ms HOYTE**: Again, I refer the committee to the Queensland bill, which amends the original model legislation whereby training is mandatory and must occur within six months of the rep being elected. The model bill sets out that it is mandatory when a rep requests it, and upon that request, it must occur within three months. But it has been the experience for a number of reps and unions over the last five years or so that that three-month period, whilst well intentioned, consistently causes a problem with the rep then being able to choose the course that they want to go on and that there may not be one in that window of time. So the six-month provision contained in the Queensland bill is a good one. Making the training mandatory, that a rep must be trained, takes away a point of conflict which has been a point of conflict ever since reps have had a right to be trained under health and safety laws since the mid-1980s.

**The CHAIR**: Are there employers who have not actually wanted health and safety reps to be trained?

[11.20 am]

**Ms HOYTE**: Yes. I remember a course I ran a few years ago in Victoria and for some reason along the back row of this training course were five fellows from one company—it was a large national company. Part the way through that they were chippering away and having a good old time, and I said, "Why are you all here at the same time?" They said, "What happened was that an inspector came out to the site and said, 'Have you got health and safety reps? All right, you're coming along with me. What are we looking at here and there?'" Whilst the inspector from the regulator was doing the inspection, he said to the health and safety rep, "Do you know what I'm doing?" "No, not really." "Do you know who I am?" "No, not really. Someone important." "Have you done any training?" "No." "How long have you been a health and safety rep?" "Eighteen months." "Have you asked to go on a course?" "Yeah, I have, but we've been told that for operational reasons we haven't been able to be released." "Really, for 18 months?" for this large company, which in fact is an international company. The inspector said, "All right, I'm going to write an improvement notice and I am going to require that you all be trained within,"—I think it was six weeks or two months or something like that. Hence, I had five very happy health and safety reps sitting along the back row of the course. They went away and all of a sudden the fog was lifted. They knew what was black and white, there were no more shades of grey, and they were looking forward to having a really productive role there. Can I just say, that is a good news story, but it is also about a regulator and an inspector being proactive, finding that reps had been effectively prevented from accessing their rights, which the mandatory training would get rid of, who had said, "All right, we're going to step in and support you health and safety reps" by issuing that improvement notice.

Can I come back to that in another way as well. This regulator also made a number of other important prosecutions, or brought a couple of other prosecutions that were important in

supporting health and safety reps. It is important that inspectors seek out health and safety reps. I have read a number of transcripts, and a recurring theme in this jurisdiction is that there is no sense, no experience, of the inspectors seeking out health and safety reps, even asking if they are there. But there have been a couple of prosecutions that have been important in supporting health and safety reps. There was a rep who I also trained who issued a provisional improvement notice to a state government employer—her employer—and when the employer received it, their advice was to ignore it. Really!—which was really bad advice because it is illegal. So the employer ignored it and ignored it and ignored it and then the regulator said, "We're going to prosecute you. We're going to take you to court. It says that if a PIN is issued, it has to be complied with or appealed, and you have done neither so you have broken the law." The regulator, to its credit, said that is the way of supporting the law which the Parliament has said, "This is the law. It's your job to support it," but it is also a good way of supporting health and safety reps. The fine was $10 000, which is not big money, but it is enough, and it sent a message. It was something that the regulator could take around and publicise, promote, and support itself in its activities. And it was a great support for health and safety reps. When we are talking about supporting health and safety reps, prosecutions are an important part. Too often in the past regulators have cherrypicked bits of the law that they enforce, and they may say, "Oh, that's not a machine, that's not going to crush you or kill you, so we'll ignore it." But it is not up to a regulator to determine which bits of the law it supports. Another couple of prosecutions regulators have taken have been in relation to discrimination, when workers have stood up and raised a health and safety matter. I would add that that is part of the mix of a good regulator.

**Hon KYLE McGINN**: I suppose that we have, obviously, the non-harmonised act here in WA. It states in our act that they have up to 12 months before they have to put them through the training. You stated that in the Queensland and the harmonised act, the HSR who is elected can provide dates for a course and that they must be given the training within three months. Outside that, the HSR failing to actually advise that, do they have to do it within six months regardless?

**Ms HOYTE**: No. In the model act that applies in Victoria, New South Wales, NT et cetera that is three months. In the Queensland act, I think as of last month, it has a six-month notice—or it could be commencing from July next year.

**Hon KYLE McGINN**: Is it mandatory?

**Ms HOYTE**: Yes.

**The CHAIR**: So is there no harmonisation on that particular point because it is recognised that three months, while it was well-intended, is actually a bit difficult to implement?

**Mr CROSS**: If I may, Chair, one of the things that underpins the status of an HSR is the ability to issue a PIN notice. That is one of the fundamental rights of a HSR, but only a trained HSR can issue a PIN notice.

**Hon KYLE McGINN**: I am not too sure about that being the case in WA.

**Mr CROSS**: Yes; as I understand it, only a trained HSR can issue a PIN notice, on the information I have.

**The CHAIR**: We will check that, but, regardless, if you have not had the training, there is a risk that you will not fill it out correctly and it will be overturned.

**Mr CROSS**: Exactly, and also the fact that the employers who do not wish to meet their obligation in regard to the act, if they know that the HSR is not able to issue the PIN notice, why train them up? Why would they bother?

**Ms HOYTE**: Again, I have trained a couple of health and safety reps in Victoria over the years who had to issue a PIN in order to get to the training course.

**The CHAIR**: Seriously?

**Ms HOYTE**: And Victoria does not have a restraint on a rep issuing a PIN or ordering a cease-work.

**Hon KYLE McGINN**: What would you suggest or recommend to the committee WA should do in respect of HSR training?

**Mr CROSS**: Obviously, the three months is in the model act at the moment. As Margot has said, Queensland has gone for six months. Who knows? To me, I think three months. If the employer cannot get things in place to train someone within three months, I think there are probably some issues there. Margot has raised some good points—that three months can go pretty quick and there are always operational restrictions on training people up, especially if you look at the maritime industry where you have people who could be away for four weeks, five weeks, then home to their families and away. That three months can go really quick, so they can only have that one month at home to be able to be trained up. They could have booked a holiday for three of those weeks, so they would in no way be able to be trained up within three months. I think there would be some scope for somewhere between that three or six-month time frame.

But I also draw the committee's attention to the provider and who provides the training. Within the harmonised legislation, in consultation with the company the workers have the right to request the training provider they wish to go to as long as that provider is endorsed by the regulator in the state. I think that is very important. I think it is very important that the HSR goes to a course that they feel comfortable to go to in consultation with the company. That is another part of the act that underpins the role of an HSR—to have the right to be provided the training that they feel comfortable with.

**Ms HOYTE**: Perhaps, Kyle, to answer your question specifically but also more broadly: the MUA believes that WA should start with the model health and safety act. We understand there is now another reviewing process et cetera and that it would be a fundamentally flawed process to start with your old act and tinker with it yet again. It is a difficult piece of words to read through, it has been tinkered with so many times. Start with the model act and then say, "All right, at this point now, have there been any improvements made? You've got before you the Queensland improvements. Okay, let's put them in and then look at that. Now is there anything that we need to add and then prove the case?" There are elements in the model act that are specifically taken from the old WA act and there are some good provisions in there, but your starting point should fundamentally be the model act because everyone deserves to have the same rights and protections. That is the best, the most sensible and the most logical way to proceed, and that any listing of things that people want et cetera, you look at it under that framework.

In terms of the health and safety training, six months is sensible. In terms of what else may be looked at, South Australia has some really good, continuous training and development programs where reps have an entitlement. I cannot remember the exact details of it, but there are some really good provisions. The South Australian approach has been that reps are a really valuable resource; let us grow and develop them and enhance and enable their capacity to contribute to workplace safety in their representative role.

[11.30 am]

**The CHAIR**: Margot, can we take that as question on notice 8, that you provide us with the South Australian model in relation to that?

**Ms HOYTE**: Yes. In relation to training providers, there are a number of jurisdictions that require that the training providers be a registered training organisation, as does WA and Queensland. I am personally not convinced of the necessity of that.

**The CHAIR**: Could you explain why?

**Ms HOYTE**: Why do you need to be a registered training organisation?

**The CHAIR**: Do you not want to be able to audit at the standard of the training that is being provided and make sure that it is of a level that actually ensures that the HSR is adequately trained to do their job?

**Ms HOYTE**: So jurisdictions that do not require—what requiring a training organisation to be an RTO does is it outsources that auditing to ASQA, whereas other jurisdictions, such as in Victoria, say, "We accredit the training organisations."

**The CHAIR**: Who is "we"?

**Ms HOYTE**: We as in WorkSafe Victoria. "We then audit against what we've approved."

**Hon KYLE McGINN**: So that is technically?

**Ms HOYTE**: Yes; someone else audits the RTOs.

**Hon KYLE McGINN**: Technically, WorkSafe Victoria is the RTO in that respect?

**Ms HOYTE**: It is the approving entity.

**The CHAIR**: No, it is not; it is the auditor.

**Mr CROSS**: It is the auditor.

**Ms HOYTE**: Yes.

**The CHAIR**: But there is nothing to stop WorkSafe WA being the auditor and still requiring registered RTOs.

**Ms HOYTE**: Yes. But I do not —

**The CHAIR**: Certainly, in the case of Western Australia with high-risk work licences, WorkSafe WA is the auditor of the assessors.

**Ms HOYTE**: Yes, so the high-risk work licence RTOs, absolutely. Training of health and safety representatives, representative training et cetera. I am not convinced.

**The CHAIR**: In the other jurisdictions, the introductory course that is provided for HSRs, are they required to pass it or are they just required to attend? We learnt yesterday that in Western Australia they are just required to attend.

**Ms HOYTE**: Everyone is required to attend. Attendance is only similar to any other representative role—that you are elected to represent your co-workers. People are elected to Parliament, the Senate et cetera and there are not competencies attached to that. It is the constituency that determines whether or not someone represents them, not the passing or otherwise of competency-based assessments.

**Mr CROSS**: If I may, that also moves into the one-day refresher training that HSRs do every three years. We do not work in a perfect world, but that should be refresher training with like-minded industries together doing that refresher training, so those HSRs can talk about what has gone on, talk about their knowledge, share their knowledge, whereas now, for a lot of the refresher training that goes on, you will see stevedores with plumbers, electricians and factory workers to do this refresher course. But we believe that refresher course should be an industry-based refresher

course. Like I said, logistically it might be hard to do but I think that is something I would suggest the committee look into because that would be a wonderful way of sharing the knowledge of HSRs.

**Hon KYLE McGINN**: I think we have more questions coming up about HSRs, so I might wait on that.

**The CHAIR**: Yes, we do.

At the bottom of page 7 of the submission, it highlights the high-risk nature of stevedoring work, in particular that once an elevated work platform reaches a vessel's ramp, any unlicensed or unqualified operator deemed competent by the employer can drive it up into the vessel's cargo hold. How is it permitted for this to occur; that anyone who is unlicensed and unqualified can actually be deemed competent by an employer? Does WorkSafe WA have jurisdiction?

**Mr CROSS**: Probably to go a little bit against what Margot said before, there has been a real struggle to get a memorandum between AMSA, which has jurisdiction over stevedoring work in this country, as well as the state regulator. There was a fallacy that if it was on board the ship, it was AMSA; if it was on the wharf, it was WorkSafe.

**The CHAIR**: So that is not correct?

**Mr CROSS**: Not correct entirely, no, it is not. In a situation of an EWP, it is competency based. It goes back to seafaring with regard to marine orders. Just so the committee knows, with the stevedoring code of practice, what was mandatory in marine order 32 was removed from marine order 32, and into the code of practice now which is guidance. If you look at that space, that means now that consultation is the key to resolving safety issues; so therefore consultation. The regulator has a major role to play now because that has been taken out of the marine model which is a mandatory document, which is legislation. When you are talking about regulators working together and having strong regulation, for the stevedore on the wharf at two o'clock in the morning who is trying to resolve a safety issue, now it has gone into guidance and it is not mandatory anymore; therefore it has to be resolved through consultation with the company. That is where a regulator really has a role to play with regards to health and safety in that industry—when you have something removed.

**The CHAIR**: Can I just understand, because this is not an area that I understand very well. You have got elevated work platforms, and we are told that while it is operating and to the point that it reaches the vessel's ramp, it is required to be a licensed, qualified operator; but from the point that it reaches the vessel's ramp, it is no longer required to be a licensed, qualified operator. Why is that, and where has the law failed?

**Mr CROSS**: I would have to take that on notice simply because of the difference in the jurisdiction and the regulators involved in that, plus because it is cross-jurisdictional with regard to the wharf onto the vessel. So I would have to take that on notice as a question because I do not want to be taken out of context.

**The CHAIR**: That will be question on notice 9.

**Mr CROSS**: Thank you.

**The CHAIR**: Because I really need to try to understand why there would be a distinction between whether it is on the vessel or off the vessel as to whether a qualified and licensed operator is required.

**Ms HOYTE**: Could I make a quick comment about the memorandum of understanding, because perhaps it has been misunderstood. My point was that there is a capacity to make memorandums, and that one of the precursors to that is a willingness to do it, and once parties are willing to do it, the problem is often one of perception rather than reality.

**The CHAIR**: Understood. At point 5.3 of the submission, which appears at the bottom of page 7, it refers to NSCOP. Can you just explain?

**Mr CROSS**: National stevedoring code of practice. Actually, "Managing risks in stevedoring" is the official name of the code on the Safe Work website.

**The CHAIR**: Does the code of practice for managing risks in stevedoring approved by Safe Work Australia apply in Western Australia?

**Mr CROSS**: Not as yet, no.

**The CHAIR**: Why not?

**Mr CROSS**: That would have to be a question for the relevant government officials. It has not been adopted in Western Australia as yet.

**The CHAIR**: So it actually needs to be incorporated in the WA legislation?

**Mr CROSS**: That is right. Safe Work has signed off on that code of practice. As I said, South Australia, Tasmania and another state—I cannot think of who it is now; I am sorry—have signed up to that. It is up to the state Parliament to sign off on that code of practice.

**The CHAIR**: You are not aware of any discussions between the union and WorkSafe or the minister in terms of progressing that?

[11.40 am]

**Mr CROSS**: We have contacted the relevant department, and they said it was not on their agenda at this time. But that was leading into the state election as well. That was the only info that was forthcoming.

**The CHAIR**: At page 8 of the union submission, it recommends that all port authorities should insert into their standard terms and conditions of port access and into their health, safety and environmental site rules a definition of "stevedoring" as per the Stevedoring Industry Award 1999. Again, this is my three-part question. Has this been discussed with the Minister for Transport, the Minister for Commerce and COSH, and what was their response? I am happy to take that as a question on notice, which will be question on notice 10.

**Mr CROSS**: Thank you.

**The CHAIR**: At page 8, the submission recommends that the Port Authorities Act 1999 (WA) be amended at section 114 to call up the code of practice for managing risks in stevedoring and other relevant codes of practice for marine work. Has this been discussed with the Minister for Transport, the Minister for Commerce and COSH, and what was the response? I will take that as a question on notice 11.

**Mr CROSS**: Yes.

**The CHAIR**: At the bottom of page 8, the submission highlights the lack of WorkSafe inspectors located in the north west of the state and the inadequate number of WorkSafe inspectors across the state. Would you like to expand on this part of the submission, and what are the current problems regarding inspectors on regional sites?

**Mr CROSS**: I suppose it goes back to the point that I made before. To have such a vast area as the north west and such a labour-intensive and crucial part of the state's economy, and have minimal presence from WorkSafe WA up there, it beggars belief, it really does. You have got highly dangerous work going on up there. You have got all types of cargo. So from a maritime and stevedoring perspective, you have got all types of cargo and crane-lift operations that are not the norm. There is no container terminal up in Dampier or other ports or in Broome. You are talking about all the

types of cargo that is being discharged and loaded on vessels up there, notwithstanding LNG. The HSRs, whether it be on board vessels or with the stevedoring companies, need a strong regulator to support them up there. A lot of modules and also a lot of different types of machinery are used up there in the oil and gas industry. With regard to lifting, there are dual lifts. There is numerous work that goes on that is not commonplace, I must say, up on the wharves up there. So you need strong regulation up in that area, one, given the isolation, and, two, given the vast amount of work that goes on in that area. I think, too, you also have people from all over the country working there. I am not going to go into the pros and cons of fly in, fly out work, but that is another reason why those HSRs are there and why they are at work, because once they leave work, they will need to be back in any other part of this country. So while they are at work, they need to have access to strong legal action, or strong legal aid, I should say.

**The CHAIR**: Do you have any evidence that HSRs or other employees are contacting WorkSafe with complaints and safety concerns and they are being told, "We can't investigate this matter", or "We've decided not to investigate this matter", and the reason is simply because they do not have an investigator locally located who can get out there and investigate?

**Mr CROSS**: I have not got a specific example, Madam Chair.

**Ms HOYTE**: Just in terms of the number of inspectors on the ground et cetera, I know that other submissions have made reference to the comparative performance monitor that is issued by Safe Work Australia and that on paper the ratio of inspectors to the operation and size of the workforce does not look that bad—okay, but room for improvement. But that is on paper. I think again, in relation to South Australia, that the inquiry could look at South Australia's ratio in terms of the population size. Western Australia has just under 2.6 million people. South Australia has just over 1.7 million people, and it has more inspectors. Points of comparison, South Australia has a population concentrated in the southern part of the state and then it is sparsely populated throughout. Western Australia is obviously a state of very much greater proportion but similar characteristics of a dense population and spread very sparsely. So simply comparing the number of inspectors to the size of the population and size of the workforce is a bit two-dimensional and does not take into account matters of the vast distance. A principle in relation to the law that applies not just in health and safety but across all areas of law—as I remember any time I am sticking to the speed limit of 40 kilometres an hour driving my son to school in the morning and see the police speed camera—is that you not only have to have good law but you have to have law that is enforced and you have to know that it is predictable that that law will be enforced. Where you have matters of poor culture or poor resourcing or simply people not there, even if WA had the best law in the world, it would not matter for those workers at those very great distances, because it is not going to apply in reality—it will make no real difference to their lives.

**Mr CROSS**: If I may, we have seen this very recently with an incident that has come to light only over the past few days with regard to diving and sat diving, which is saturation diving where divers are down below the surface sometimes for weeks on end. There was a clear disregard for what the standard was for that diving, and it was around time constraints. We can provide all this information to the committee; as I said, it has only come to light very recently—I mean in the last few days. We have seen since then that there are divers who are now suffering from medical—they have been diagnosed by what we believe is one of the top doctors in the country with regards to diving injuries. They were subjected to—it was less than half the time required to saturate the body and the pressures that they were going to be exposed to diving, and those divers performed that work, have since left, and there are numerous issues right now with these divers. The point I am trying to make in raising this, Chair, is that if there was strong regulation, this company would not even have considered taking this approach. We will provide you with all the information in regard to this, but

it is a perfect example of where, when you have strong regulation, as Margot suggested and pointed out, along with strong laws, then that improves, and that is there to protect workers' health and safety. As I said, we can provide the committee with all this information, but this does —

**The CHAIR**: Okay. That would be appreciated.

**Mr CROSS**: Yes, that is right. But this is a very serious incident and we are going to hear more about it, but I just thought I would raise that now and the information will be forthcoming.

**The CHAIR**: Okay. We will just classify that as question on notice 12 just for the purposes of identification. At page 9 the submission raises jurisdictional issues faced by the maritime industry and recommends that WorkSafe establish MOUs with other regulators to establish clear demarcation of areas of responsibility. What I would really like to get some understanding of is: what are the current issues involving other regulators such as AMSA, DMIRS and NOPSEMA, how does this jurisdictional issue get sorted currently, and how regularly is it a problem, because it just seems to me that this is stuff that could easily be sorted if there was a willingness to sort it?

**Mr CROSS**: Yes, you are right; you have probably just answered your own question in a sense there, Chair. But what we find is that there is a reluctance for the regulators to take ownership in the jurisdiction that they have regulation for when there is a cross-jurisdictional issue. The reasons, look, could be numerous. Whether it is because there is a lack of resources to deal with—say, there was an issue on the wharf up in Dampier, it might be an issue where WorkSafe have not got the resources to get up there to inspect or regulate in that space, and AMSA are up there, but AMSA says, "We believe this is for WorkSafe WA. This is for the state regulator to look after." As an example, there have been two deaths of seafarers off the WA coast in the past give or take eight years. Still to this day neither NOPSEMA nor AMSA have taken responsibility for jurisdiction when that worker was killed—eight years later.

[11.50 am]

**The CHAIR**: Why? I mean, they are established to look after the safety of workers.

**Mr CROSS**: The MUA has made numerous submissions to the ATSB—the transport safety investigation bureau—and still we are awaiting replies for those. But to this day we have two families that are without fathers, brothers, sons who still have no answers as to who was responsible for their work health and safety right at that instant they were killed in the maritime industry. I cannot put it plainer than that, Chair. That highlights that there is a real deficiency in the cross-jurisdictional way that the regulators work in this country.

**The CHAIR**: Would you be able to provide us with the names of those workers?

**Mr CROSS**: Absolutely.

**The CHAIR**: So we will take that as question on notice 13.

**Hon KYLE McGINN**: I think I know which one of them he is referring to.

**The CHAIR**: Did you want to ask any questions?

**Hon KYLE McGINN**: No; I know the ones he is talking about.

**The CHAIR**: Was there a coronial inquiry into those deaths?

**Mr CROSS**: The ATSB have done reports into both of those, yes, that are available through the ATSB. A coronial inquiry, no; but both incidents have been investigated fully by the transport safety bureau.

**The CHAIR**: Can I just get clear that the transport and safety bureau does not have any offences within their legislation? Are they able to prosecute?

**Mr CROSS**: I would have to take that on notice. No, I do not think —

**The CHAIR**: No, I do not think they do. Okay. Another thing that appears through the union submission that surprises me is that the AMSA regs are often substantially inferior to WorkSafe regs. That is the statement that has been made. Why is that? I mean, with the harmonisation of the occupational health and safety laws, one would have thought that we would have started to address some of these issues and made sure that the regulations that apply to all these bodies actually have regulations that are on par?

**Ms HOYTE**: AMSA is not harmonised. AMSA was not part of the harmonisation process. It was the states and territories and Comcare.

**The CHAIR**: So why was AMSA left out?

**Ms HOYTE**: You would have to ask parties other than myself.

**The CHAIR**: Okay.

**Ms HOYTE**: There are a couple of anomalies.

**The CHAIR**: I thought that when you were aiming for harmonisation of laws, you would actually include all the relevant parties.

**Ms HOYTE**: Yes.

**The CHAIR**: Okay. At page 10 the submission recommends that the word "imminent" in section 26 of the OSH act and section 19 of the Fair Work Act should be removed and replaced with the word "likely". Again, I have my three-part question here. Has this been discussed with the minister, with WorkSafe, with COSH, and what has been the response? I take it that you want to take that one as a question on notice.

**Ms HOYTE**: Yes.

**The CHAIR**: That will be question on notice 14. Has this issue been dealt with by those states that have agreed to the national harmonisation laws, and is this dealt with within those laws?

**Ms HOYTE**: There is slightly different wording in relation to the right to cease work under harmonised legislation.

**The CHAIR**: Right. Could you explain it?

**Ms HOYTE**: Harmonise does not include the wording "likely".

**The CHAIR**: But does it use the word "imminent"?

**Ms HOYTE**: Yes, "immediate and imminent".

**The CHAIR**: But the recommendation in the submission is to delete the word "imminent" and replace it with the word "likely". Was this considered through the process of drawing up the harmonisation laws; and, if so, why was it not incorporated as part of that new law?

**Ms HOYTE**: I cannot recall whether "likely" was specifically discussed, but the discussion at the time was more about whether or not to include cease-work provisions in the model law, given the right to withdraw yourself from harm was already present in common law and that workers already had that common law right. So that was more about the discussion at the time of harmonisation, but I cannot recollect anything further.

**The CHAIR**: At page 11 the union says that there should be harmonisation of safety regulations between the states. Our understanding is that most states and territories have already agreed to harmonisation under the work health and safety legislation. Is Western Australia the only state that is lagging behind in adopting this legislation?

**Ms HOYTE**: No.

**The CHAIR**: What other states?

**Ms HOYTE**: It is Western Australia and Victoria. Neither Victoria nor Western Australia have harmonised but they are not on an equal footing as a result of that failure to harmonise. The Victorian health and safety law was the basis for large portions of the model health and safety act. There is a case that is not difficult to prosecute that workers are neither better nor worse off for not having the harmonised health and safety act in Victoria because the vast tract of its good provisions find themselves in the model act. You cannot prosecute the same case for workers in Western Australia.

**The CHAIR**: Are you saying that the Western Australian legislation is inferior to the harmonised laws?

**Ms HOYTE**: Yes. And inferior to every other jurisdiction.

**The CHAIR**: At page 11 the union says that the WA OSH act should be amended in line with section 84 of the Occupational Health and Safety Act 2004 Victoria so as to allow registered employee organisations to access a workplace in the event of a reasonably suspected contravention of the act. I have a three-part question. Would this include union representatives?

**Mr CROSS**: Yes.

**The CHAIR**: Do employers deny the union access to worksites currently?

**Mr CROSS**: Yes.

**The CHAIR**: Does this create safety problems for workers?

**Mr CROSS**: It is fundamental for a worker to have representation from the union around safety issues. It is a fundamental right of a worker, given that there are provisions there under industrial law for union right of entry given 24 hours' notice under the Fair Work Act. For a worker to have the ability to contact their representative to come and inspect a workplace where there is believed to be a contravention of the act is a fundamental right for a worker. A worker should have it anyway, I believe.

**The CHAIR**: I now have another three-part question that relates to the amendment of the act in line with section 84 of the Victorian act. Has this been discussed with the minister for commerce? Has this been discussed with COSH, and what was the response? I will take that as question on notice 15.

**Ms HOYTE**: The recent Queensland amendments considered matters of right of entry. The Queensland Parliament back in 2011, when it passed the harmonised legislation, as with every other state and territory, considered the matter of whether or not union officials should have the right to enter and uniformly agreed that yes, they do and that unions have a valuable role in relation to health and safety. That is well-established elsewhere. The Queensland amendments, though, recognised that over the last five or six years or so there have, however, been some problems in relation to upholding and ensuring that the intent of those right-of-entry provisions has been maintained. In relation to the conduct of inspectors, there has been some legal interpretation that inspectors could not on the spot enforce their right of entry. The recent amendments—Queensland's last month—now enable an inspector to make a determination. This is found on page 3 of the explanatory memorandum. It enables inspectors to —

> … make a determination on the matters where WHS right of entry issues cannot be resolved (after reasonable efforts have been made) and remain in dispute by workplace parties. This includes whether there is a valid right to enter and the WHS issues that have given rise to the parties for entry. Allowing inspectors to make a determination on these matters supports

> resolution of right of entry for workplace health and safety matters as quickly as possible at the workplace and possibly without the need for escalation to a tribunal.

What that, in a nutshell, provides is that an inspector can come along and say they have a valid right of entry permit and there is reasonable reason to expect that there has been a breach of the act and then order that the union official be given the right to enter the workplace. The MUA would recommend that the inquiry look at that amendment in the recent Queensland bill, which was made after the inquiry started and after our submission was made. In line with that, the meaningfulness of that amendment is probably now best read against the provisions in the model health and safety act that are not inconsistent with the Victorian act.

[12 noon]

**The CHAIR**: I have a number of other questions but I note that time is running on. I think that the other questions I have can be dealt with through correspondence. I can put them in writing to obtain answers. They are pretty straightforward ones. I think I will do that because I would like to provide you with an opportunity to add anything further to this inquiry that you would like to at this point in time. Are there issues that you want to raise that we have not covered during this morning's hearing or issues that have developed since the written submission was provided that you would like to take this opportunity to raise with the committee?

**Ms HOYTE**: Can I just make a few specific—tie a few bows on things or whatever. Is there anything that you want to specifically say?

**Mr CROSS**: You go ahead and I will just make sure.

**The CHAIR**: You have up to 10 minutes if you need it.

**Ms HOYTE**: Thank you. I would just like to highlight a specific thing in our submission in relation to specific dives safety steps that could be taken. The MUA would like very much if the inquiry could make specific recommendations about particular actions that should be taken to ensure dive safety, to ensure appropriate supervision. We find that particularly at 3.12 of our report and also 3.15. Those provisions, if they were in place may well have saved Jarrod's life. I make that specific comment to highlight that from our submission. We might, in further reply to some of the questions on notice, draw it out anyway but each of the Queensland amendments have merit. We think the industrial manslaughter offence is a good offence. An offence of negligence is the most appropriate offence for workplace health and safety inactions that take place. However, there is perhaps some more—some legal advice I have received—felicitous wording that might achieve better the policy objectives of legislation. I am happy to provide that to the inquiry as well.

**The CHAIR**: That would be much appreciated; thank you.

**Mr CROSS**: I would just like to further speak to the roles of HSRs and strong regulators within the industry. Given that there would not be a lot of cross-jurisdictional issues between NOPSEMA and WorkSafe WA—NOPSEMA obviously has coverage for the whole offshore and gas industry in this country, be it Darwin, Victoria and wherever else there may be offshore work going on—but it is in WA and NOPSEMA's head office is over here in WA, so there is a WA connection there. I just would like to highlight to the committee that strong regulators—again, HSRs need to have strong regulators to support them. They need to know that if they have issues they want to raise and the inspector comes out to do an inspection, whether it be on the wharf or offshore with regards to NOPSEMA, that their concerns will be listened to. I would just like to make the point that in NOPSEMA's recent yearly report, there was zero mention of HSRs in their annual report. We try to have a tripartite approach with NOPSEMA and the industries, but that is not going to happen at this stage. Employer groups do not want to have a tripartite approach to health and safety in the

offshore industry. Given that, if that flows on through to WorkSafe and WA and the reluctance of employers to have a tripartite approach, that is absolutely detrimental to workers' health and safety in this state—absolutely detrimental. I suppose I would just like to emphasise the point that HSRs really are at the coalface, for want of a better term, for safety. They are elected by their workers. They are there to play a major role in health and safety in any workplace through participation, and there is a lot of evidence that participation of workers in health and safety, as I have mentioned earlier, leads to better workplaces. There is actually a code of practice around participation and consultation that Safe Work have written up in a workplace. Let us not skate around the issue with regards to the role that HSRs play in health and safety, and that absolutely has to be underpinned by the strength of the regulator. I would just like to make that point again.

**Hon KYLE McGINN**: I just want to delve in on that one as well, because we have heard quite a fair bit of evidence about the lack of HSRs in workplaces. Do you believe that the majority of workplaces have HSRs or do you believe that —

**The CHAIR**: At which—MUA?

**Hon KYLE McGINN**: I will be specific to the MUA, I suppose, in the maritime industry under WorkSafe jurisdiction. Do you believe the majority of the workplaces have HSRs?

**Mr CROSS**: Yes, I believe they do. I could not break it down without numbers. I could provide numbers. We maintain a HSR database so we know which workplaces have HSRs in them through our branches. We maintain that database so we know those numbers. I am happy to provide those to the committee.

**The CHAIR**: We will take that as question on notice 16.

**Hon KYLE McGINN**: Are you aware of any register with WorkSafe where the HSRs register through WorkSafe or make WorkSafe aware that they are a HSR on-site?

**Mr CROSS**: It is different in every state, but the obligation is on the employer to provide the details of the HSR to WorkSafe.

**Hon KYLE McGINN**: Under the harmonise act?

**Mr CROSS**: Yes. The obligation is on the employer to provide the information of the elected HSR to the regulator.

**The CHAIR**: And you are not aware of what the situation is under the WA legislation.

**Mr CROSS**: In WA, no, not at this time.

**Ms HOYTE**: QON.

**Mr CROSS**: I could probably take that on notice.

**The CHAIR**: We have that information; I will supply it to the member later.

**Mr CROSS**: Yes; it is just a matter of referencing the act. It is the obligation of the employer to inform the regulator who the HSRs are.

**The CHAIR**: I do appreciate your attendance before the committee. I assure you that your attendance before the committee and the information that you have shared with us this morning will be invaluable to the committee in its consideration of this important matter and in writing its report. I do sincerely appreciate the evidence that you have given before the committee this morning.

I would just like to remind you that a transcript of the hearing will be forwarded to you for correction. If you believe that any correction should be made because of typographical or

transcription errors, please indicate those corrections on the transcript and return it to the staff and we will attend to those. The committee requests that you provide any answers to questions taken on notice when you return your corrected transcript of evidence. If you require a longer period of time, just indicate. I mean, if you require two weeks to provide answers to questions on notice, that is fine. If you want to provide additional information or elaborate on particular points, you can provide supplementary evidence to the committee for our consideration when you return the answers to the questions on notice. With that, I will conclude today's hearing and, again, thank you very much.

**Hearing concluded at 12.10 pm**

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