

Work Health and Safety and other Legislation Amendment Bill 2023

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The 2023 Review of the *Work Health and Safety Act 2011* (Qld)

**Submissions of the
Australian Rail, Tram and Bus Union,
Queensland Branch
(RTBU)**

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1. How Well Does the *WHS Act* Work for Rail, Tram and Bus Workers?

Broadly, the *Work Health and Safety Act 2011* (Qld) (“the Act”) has worked well to provide workers with the means to improve and protect their health and safety in the workplace. However, there are a number of concerns, oversights, and issues with how the Act does fail transport workers and the public.

These submissions will deal with matters pertaining to both areas being examined by the Independent Reviewers.

2. Who Are We?

The Rail Tram and Bus Union (RTBU) is an all-grades industrial union comprising over 30,000 members in the rail, tram and bus industries Australia-wide. The RTBU was formed in 1993 following the amalgamation of three previous rail unions together with the tram and bus employees’ union.

The RTBU is organised on national, state and divisional lines and is well unionised with over 85% of employees being a member of a trade union.

The RTBU thanks the Reviewers for the opportunity to make this submission. For further information about any matter contained in this submission, please do not hesitate to contact the RTBU Queensland State Office.

3. The Queensland Council of Union’s Submissions

As a member, we wholeheartedly support the Queensland Council of Union’s submissions that have been submitted as a part of this review. However, the submissions in this document should be considered complimentary changes that the RTBU wishes to see with any reform of the Act so as to better protect Transportation Workers.

4. The *Work Health and Safety Act* – The Good

The current *Work Health and Safety Act* generally achieves what it sets out to do in its Objectives.

The opening of a pathway for Unions and employees to dispute matters pertaining to the enforcement of WHS minimums has provided workers and their Unions a means to safely, non-disruptively, and quickly resolve WHS issues in their workplaces.

For Rail workers in Queensland this pathway has achieved a number of positive improvements to their safety:

- The installation of new and safer toilets into locomotives used by Coal and Intermodal operators; and
- The carrying out of significant reviews by Rail Employers into their

- bullying and harassment policies; and
- Investment by Rail Employers into updating their ageing workspaces to come up to standard in respect to ergonomics and comfort; and
- Generally, after a number of disputes, proactive consultation occurs with the workforces and their Unions.

For Bus and Tram Workers in Queensland the opportunity to dispute WHS matters has allowed these workers to achieve:

- Better protections with respect to minimizing the spread of Covid-19 amongst the workforce; and
- More transparent and democratic Health and Safety Representative elections; and
- The introduction of protective screens for Drivers; and
- and more proactive consultation from the employers.

Generally, the Act in other matters is generally competent to carry out the task to protect workers and provide their Unions a means to address WHS issues on behalf of their members.

However, the Act still has room to greatly improve its capacity to protect working people.

5. The *Work Health and Safety Act* – The Poor

The Transport Industry has some particularly unique working and industrial arrangements, dangers, and risks. Being the industry with the highest mortality rate, workers in the Transport Industry are being left behind in the general downwards trend of workplace deaths in Australia.

Currently, the *Act* fails to adequately protect Transport Workers to the same extent as other workers in other industries in several ways including:

- The Transport Industry and its essential work processes are filled with high-risk tasks that must be carried out. Presently, the Act does not capture the need for employers to decrease the rate of exposure of workers being exposed to these risks;¹ and
- The Right of Entry provisions for Union Officials are not up to task due to the mobile nature of the “workplaces” that require investigation. Further, the “pre-smartphone” nature of the notification and evidence collection provisions create needless bureaucratic hurdles to ensuring the protection of Transport Workers; and

¹ Australian Rail, Tram and Bus Industry Union of Employees v Aurizon Operations Limited [2021] QIRC 341 at para [43] – [44]

- The Act fails to capture the right of workers to stop work on WHS grounds where the workers' actions would not endanger the safety of themselves but members of the public or other workgroups; and
- Health and Safety Representatives are fearful of using their powers due to the highly interconnected and relatively small nature of the industry. This is an industry where employers do talk to each other and the exercise of HSR's power can limit a HSR's career progression and alternative employment opportunities; and
- The lack of a statutory test in respect to what is considered "frivolous", "vexatious", "misconceived" or "lacking in substance" creates a needless jurisdictional hurdle for workers or other applicant's seeking to proactively protect workers in complex evidentiary matters that require the full ventilation of the facts in arbitration.
- The consultation provisions within the *Act* do not create certainty around the responsibility of the PCBU to consult with workers and their Unions and what the contents of a consultation document/process should include.

If these matters are addressed, Transport Workers in Queensland will be better protected in their workplaces. Further, these reforms will better equip workers with the legislative tools they require to protect themselves, their colleagues, and the public from the potential dire consequences of their work.

6. Improving The Principles of Surrounding the Primary Duty of Care

In its current iteration, ss 17, 18, and 19 of the *Act* fail to capture the need to protect workers and the community from being exposed to PCBU's increasing the rate of which these persons can be exposed to a risk or hazard. The current verbiage of "minimising" does not make it clear to PCBUs (and others) that there is a positive duty to not increase the rate of exposure for a risk or hazard that is and will continue to be "minimised" under new business policy, procedure, or process.

This lack of clarity has the unintended consequences of permitting PCBUs to lower the standards of their existing safety standards and procedures without falling afoul of their duty under ss 17, 18 and 19 of the *Act*.

In the Transport Industry where high-risk working must occur in the ordinary course of work, PCBUs have been permitted to introduce new policies, procedures and directions to their workforce that increases the rate in which workers and the community are being/could be exposed to a high-risk incident.

Proposal to Remedy

This issue can be readily resolved by amending s 17 of the *Act* to include the following:

17 Management of risks

A duty imposed on a person to ensure health and safety requires the

person—

- a) to eliminate risks to health and safety, so far as is reasonably practicable; and
- b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable; and
- c) **to minimize, so far as reasonably practicable, the rate at which persons can be exposed to risks to health and safety.**

Real World Example

A Rail Operator (the PCBU) intended to introduce new work policies that would decrease the number of “control boards” that managed the safe flow of rail traffic and maintenance work on the Operator’s rail network. These control boards were and are controlled by Network Controllers whose responsibility is to safely coordinate the traffic flow over the network.

The PCBU decided as a part of these new policies to combine several control boards with other control boards. This would amalgamate 25% of the control boards into existing boards and increase the workload and fatigue on controllers required to work the newly amalgamated boards.

This increase in fatigue would predictably lead to a greater opportunity for a Controller to make a fatigue induced mistake and expose themselves and persons working on the network to possible safety risks.

The matter was disputed by the RTBU with the Union arguing that increasing the rate of which the controllers and persons operating on the rail network would be exposed to fatigue induced safety incidences would place the PCBU in breach of their duties under ss 17, 18 and 19 of the *Act*.

It was determined that as employer was not introducing a “new risk” risk into the workplace that the PCBU was not in breach of their duties under the *Act*.

7. Updating Right of Entry Rights For the 21st Century

Notwithstanding the recommendations of the Queensland Council of Unions, the current Right of Entry rights need to be updated to reflect the interconnectedness nature of 21st century communication networks.

Amongst these updates the RTBU suggests that s 118 of the *Act* be expanded to include the right of a WHS Right of Entry Holder to:

- a) Request digital copies of any document relevant to suspected contravention; and
- b) That this request is not prevented by the document being held by the PCBU at a workplace that is not the place where the right of entry is being exercised.

Real World Example

Employees of a Railway Operator (the PCBU) and Members of the RTBU raised concerns about the maintenance of their work vehicles with the RTBU. The Union Members the RTBU to request copies of these records to determine whether a contravention of the *WHS Act* was or had been occurring.

There was no Health and Safety Representative representing this workgroup of workers. The maintenance records were located at an isolated depot in Central Queensland.

This depot had a stable internet connection and access to typical office facilities. Whilst the head office of the PCBU is in the Brisbane CBD, as is the office of the RTBU.

An Official of the RTBU, who is also a WHS Right of Entry Holder, attempted to exercise their right of entry right to procure copies of these documents from the PCBU. The right of entry notice was given electronically (email) to the PCBU and was issued against the PCBU's Head Office.

The PCBU refused to permit entry to access these documents and would not release these documents unless the WHS Right of Entry Holder exercised their right of entry, in person, at the remote Depot where these documents were stored.

8. Improving the Right to Cease Unsafe Work

Notwithstanding any proposed changes to improve these rights by the QCU, the RTBU believes that the current right to cease unsafe work does not adequately protect Transportation Workers from lawful dismissal or other disciplinary action when refusing to carry out unsafe work.

The current conditions which provide a statutory right to cease unsafe work do not capture the most frequent instance where a Transport Worker would seek to exercise this right; a situation where the worker is being directed by their employer to carry out work where there exists a reasonable concern that the worker's work would expose a member of the public to a serious risk to their health and safety.

Therefore, the RTBU are seeking amendments to ss 83 – 89 that ensure that workers are able to exercise their right to cease unsafe work to protect the community and other workgroups.

Real World Example

Bus Operators (“Drivers”) raised concerns about the safety of an intersection where they and cyclists experienced more frequent near misses than normal. These concerns were raised by the Driver’s HSRs with the PCBU at two WHS Committee meetings in 2020. The HSRs requested that the PCBU, also a Local Government Authority, either make improvements to the intersection or make amendments to the routes driven by the Bus Operators that removed the need to enter this intersection.

The PCBU wrote the HSRs to say that there was no greater risk of drivers exposing themselves to a collision with cyclists at that intersection than others they traversed. Consequently, no action was taken by the PCBU (the Local Government Authority)

In May 2021 a cyclist collided with one of the PCBU’s buses that was driving through the intersection. This cyclist was killed in the collision.

The HSRs representing the Drivers required to drive this route notified the workgroup and PCBU that they were directing the unsafe work of driving through this intersection to cease as per s 85 of the *WHS Act*.

The PCBU requested the assistance of the Regulator in this dispute.

The Regulator determined, amongst other things, that as the direction to cease work was to protect members of the community, and not the drivers, from being exposed to a serious risk to their health and safety that the exercise of this s 85 right was improper in this case.

9. Improving Consultation

The consultation provisions provide good protections however it can be improved by providing more clarity to the relevant provisions and placing a greater emphasis on the sharing of typical and required health and safety documentation with both workers and their unions.

At present, there is a lack of clarity about the minimum documentation required to be supplied to stakeholders about a PCBU’s consultation and whether a workers’ Union should be also consulted about the matter.

The RTBU recommends the following changes:

S 48 Nature of Consultation

(1) Consultation under this division requires—

(a) that relevant information about the matter is shared with workers –

(i) this information may include but is not limited to documentation that constitutes a:

(ia) risk assessment; and

(ib) safe work method statement; and

(ic) safety management plan; or

(id) any data used by a PCBU in respect to a matter relating to the work health and safety of the workers and their work processes.

(b) that workers be given a reasonable opportunity—

(i) to express their views and to raise work health or safety issues in relation to the matter; and

(ii) to contribute to the decision-making process relating to the matter; and

(c) that the views of workers are taken into account by the person conducting the business or undertaking; and

(d) that the workers consulted are advised of the outcome of the consultation in a timely way.

(2) If the workers are represented by a health and safety representative, the consultation must involve that representative.

(3) If the workers are represented by a relevant Union, the consultation must include that relevant Union.

10. Improving The Dispute Process' Ability to Protect Workers

Since the adoption of Division 7A into the *Act*, the RTBU has been one of the most proactive unions using this new jurisdiction.

Many matters have been positively resolved amicably with employers at the conciliation stage of the dispute procedure. This has led to greatly better safety outcomes for workers in our industry and the greater community. Whilst also leading to greater proactive compliance by PCBU's with the *Act* and relevant Codes of Practice.

However, when the RTBU sought to arbitrate two of these disputes, the Union was met with s102E motions from the employers.

As a result of these experiences, the RTBU holds issue with the lack of a proper statutory test in respect of s 102E (1)(b) and to a greater extent the need for the provision to be in *Act* whatsoever.

The RTBU notes that the *Industrial Relations Act 2016* (Qld) does not possess a similar right of employers to raise a jurisdictional objection to stymie the speedy resolution of an industrial dispute.

Nor has the QIRC been inundated with frivolous industrial disputes due to the lack of a s 102E provision in the *Industrial Relations Act*.

The RTBU does not believe that the drafters of Division 7A intended for PCBUs to

have the option to delay proper arbitration of a WHS Dispute. However, this is what has occurred.

Once a s 102E(1)(b) motion is raised, the Applicant is placed under undue pressure to provide the Commission with their entire case, including their entire body of evidence. Lest the Applicant opens themselves up to an adverse finding and have their matter dismissed at the first step.

In matters that are especially time sensitive or very complicated, this results in Applicants either litigating their entire case twice (should they be successful in defeating the 102E(1)(b) motion) or being undone due to time constraints and the inability to procure their entire body of evidence at the time of the raising of the s 102E(1)(b) motion.

It is therefore in the opinion of the RTBU that it is a worthwhile endeavor to remove s 102E(1)(b) to ensure that Applicants are provided the opportunity to litigate their WHS disputes in whole rather than being possible victims of a motion that does not exist in the complimentary and more frequently accessed *Industrial Relations Act 2016* (Qld).

With the very litigation that occurs in this jurisdiction, it very unlikely that the removal of s 102E(1)(b) would open the flood gates to matters that are “misconceived”, “lacking in substance” or “frivolous”.

11. Improving The Ability of Unions to Protect Workers

The improvements to the capability of Health and Safety in their workplaces have been a massive boon in ensuring PCBUs comply with their WHS duties. Nonetheless, in the fight to keep workplaces safe many workplaces find themselves either a) unrepresented or b) represented by members of the workgroup installed by the PCBU into the position.

In both cases these groups of workers are at grave danger of being exploited by their employers. Then there are the additional issues that become apparent when a HSR does seek to actively represent their workgroup.

Although the Rail Industry remains a highly unionized industry, HSRs do not feel adequately protected under the current laws and therefore request on a frequent enough basis the direct intervention of their Union Officials in matters where their safety is in grave danger.

Sadly, our current iteration of the *Act* does not confer any ability on Union Officials to directly intervene to stop a serious threat to the safety of a workgroup or to issue a provisional improvement notice.

Real World Example - A

A RTBU Official entered a PCBU's remote manufacturing site (a major infrastructure project) under s 117 of the Act to investigate several possible contraventions raised by the workgroup.

During the investigation it was discovered that the PCBU was storing oxidising and flammable chemicals in shipping containers exposed to an industrial grinding machine. The grinding machine's sparks ejected from the grinder in such a way as to pose a possible direct source of ignition to the flammable and oxidising agents stored in the shipping containers.

The Official also observed workers carrying out other grinding activities without correct PPE. Consequently, these workers were being exposed to harmful grinding dust.

The workgroup's HSR was also one of the site supervisors.

The Union Official was barred from taking photographs by the PCBU.

The Union Official contacted WHSQ and was informed that an inspector would be organised to investigate the issue in the following week. The Union Official, unable to give a lawful direction to cease unsafe work was required to commence a WHS dispute against the PCBU seeking to remedy the issue.

The PCBU continued the dangerous storage arrangement and workings for several days after the Union Official's investigation but before the arrival of the WHSQ inspectors.

Real World Example - B:

A newly trained Health and Safety Representative working in a rail maintenance workgroup contacted the RTBU to request assistance of their Union in intervening with their employer directing them to carry out unsafe workings (working in 35C+ and 75%+ humidity).

The HSR was instructed that the Union could not directly inform the workgroup that the Union was not able to lawfully ban the unsafe working. The HSR was informed that they could issue a cease work direction power, however, the worker did not feel confident confronting his supervisor about the need to cease work as the supervisor had a history of picking on employees.

The HSR decided to not issue a cease work and the workgroup carried out the remainder of their shift in dangerous conditions.

The Union issued a dispute in interim ensuring that the PCBU would not proactively engage in that dangerous form of work again.

Further, in the RTBU's experience, especially with large workgroups (in the hundreds of workers across numerous localities), the ability of the Union to provide direct intervention safely and lawfully into the workplace is burdensome and slow process.

Real World Example – C

A Transport Operator had recently upgraded their fleet of vehicles. These newly upgraded vehicles possessed a driver's chair which did not conform with Australian Standards with respect to modern ergonomics.

These new chairs led directly to the temporary impairment of 40 drivers and the permanent impairment of 3 workers with back injuries sustained from the poor ergonomics and design.

The RTBU alongside the Union's HSRs (not all the HSRs) in the workgroup commenced a WHS Dispute against the employer seeking an improvement for the seats. Following months of consultation and more injuries, the PCBU was not able to commence the installation of new and safer chairs.

The HSRs issued a lawful direction to cease unsafe work. However, the HSRs did not represent the entire 1000 strong cohort of workers required to use the dangerous chairs. The HSRs were required to write in their correspondence that they were directing **their workgroups** to cease the unsafe work but **only informing the workers in the other workgroups** that they simply had a personal individual right to cease work and would be **required to individually confront their local managers if they were seeking to cease the unsafe work.**

The dispute has since been resolved with the full rollout of new safer seating. However, the difficulty remains in workers working in the same grade being able to exercise their right to cease unsafe working in a collective and lawful manner.

Therefore, the RTBU recommends that WHS Entry Permit Holders be provided with the following rights in addition to their existing rights under the Act:

- A right to direct workers to cease unsafe work; and
- A right to issue a provisional improvement notice ("PIN"); and
- A right to stop work to hold a meeting to discuss a safety issue with workers affected by an unsafe work process or procedure.

These changes will ensure that a majority of Queensland workers will not be left on their own when they experience an employer directing them to work in a unsafe manner. Further, it will lighten the load on Health and Safety Representatives who are required to continue working in the workplace and who may experience negative, but lawful, action from their employer after exercising a HSR right.

12. Incident Notifications for HSRs

The Act permits Health and Safety Representatives to, amongst other things, investigate matters that concern the health and safety of their workgroup. However, when safety incidents (whether notifiable or not) occur in most workplaces HSRs are not given the opportunity to investigate a concern as they are simply not informed or notified by the PCBU of the incident.

This creates a vexing situation where the HSR and workgroup are deprived of the opportunity of their HSR to make inquiries and investigate the circumstances of an incident.

This deprives HSRs of the ability to direct the PCBU and workgroup to take immediate actions to prevent another occurrence or a contingent event.

In the long term this creates a sense of information asymmetry where the HSR and workgroup are completely reliant on the good will of the company to even inform them of these issues.

Consequently, the RTBU recommends the adoption of an amendment to the Act that would facilitate a duty on a PCBU to notify a HSR immediately should a notifiable incident occur in the workplace.

The RTBU would suggest that the following provisions of the Act could be altered to ensure that this occurs:

- S 38;
- Ss 68 – 70.

13. Conclusions and Contact Details

The RTBU wholly supports Queensland taking the next steps in improving our WHS laws so that they provide working people with greater access to justice and freedom from working in unsafe workplaces.

At their core, these submissions have been provided to extend this access to justice to all workers of Queensland, not just transportation workers.

Therefore, we are calling upon the independent review panel to take onboard the RTBU's submissions and work with working people and their representatives to achieve better safety outcomes for all Queenslanders via the adoption of our Union's recommendations.

Kind Regards.

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