



# ELECTRICAL TRADES UNION OF AUSTRALIA

## NEW SOUTH WALES & ACT BRANCH

SECRETARY [REDACTED]

Communications • Electrical • Electronic • Energy • Allied Services

### **Independent Review of SafeWork New South Wales: Electrical Trades Union of Australia Submission**

1. On 25 October 2022, the NSW Government announced the appointment of the Hon. Robert McDougall KC to carry out an Independent Review of SafeWork NSW (Review).
2. The scope of the Review is to inquire into, report on and where thought desirable make recommendations as to:
  - a. The performance and effectiveness of SafeWork NSW's compliance and enforcement functions. This part of the Review will consider complaints, inspections, investigations, and prosecutions, and will include consideration of SafeWork's Triaging and Investigation Decision Making Panel processes.
  - b. The performance and effectiveness of SafeWork NSW's educational functions.
  - c. The governance and culture of SafeWork NSW, including complaints as to alleged unlawful or undesirable conduct in the workplace.
  - d. Appropriate measures to ensure that workers and their representatives (including Health & Safety Representatives), and the families of injured and deceased workers, have a genuine voice in the complaints, investigation, and enforcement processes.
3. The Review's focus is to identify deficiencies and recommendations at the organisational level.
4. The Electrical Trades Union, New South Wales and ACT Branch (ETU) represents over 15,000 electricians and electrical trade workers in multiple industries including construction, power, communications, transport and manufacturing. Our Officials are from an industry background with experience and knowledge of those industries and direct experience with work health and safety. Officials hold New South Wales work health and safety permits and regularly enter work sites, particularly construction sites, to exercise their WHS right of entry to investigate suspected safety contraventions.

### **Work Health and Safety Act (NSW) 2011**

5. Section 3 of the *Work Health and Safety Act (NSW) 2011* (WHS Act) states that the main object of the WHS Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:
  - (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant, and
  - (b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety, and
  - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment, and

- (d) promoting the provision of advice, information, education and training in relation to work health and safety, and
  - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures, and
  - (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act, and
  - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety, and
  - (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
6. In furthering the object in subsection (a) above, regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.
7. The ETU submission will focus on our concerns with SafeWork's ineffectiveness in enforcing work health and safety at workplaces, safety inspections arising from right of entry, and dealing with complaints. These concerns show that SafeWork's function as the NSW health and safety regulator is not to the standard required to protect workers and other persons against harm to their health, safety and welfare.

### **Case Examples**

8. We provide examples below that are illustrative of the many issues ETU Officials encounter at work sites involving SafeWork. It should be noted that the examples are a small snapshot of issues, and the examples are far from exhaustive.

#### **██████████ Project Site**

9. On Saturday 16 July 2022 a high rail train car became detached from its prime mover and travelled uncontrolled down the track approximately 2 kilometres until gravity eventually derailed it. The incident had the potential to kill or seriously injure workers.
10. On Monday 18 July 2022, an ETU Official exercised WHS permit entry rights to inspect the site and incident. The Official was informed by ██████████ the PCBU, that the site had been cleared and the PCBU commenced its own investigation. During the inspection it became apparent to the Official that the PCBU had not reported the incident to SafeWork. The PCBU claimed that they were not required to notify SafeWork.
11. The Official reported the incident to SafeWork (Ref no.: ██████████). In the days after the incident was reported to SafeWork, the Official made several attempts through the SafeWork hotline to ascertain whether there was a SafeWork inspector assigned to the incident and was told by a representative from SafeWork it could take several weeks to get a SafeWork inspector assigned as the incident was rectified.
12. This incident is extremely concerning as it appears SafeWork failed to investigate a serious incident in a workplace and to satisfy itself that any failures in the PCBU's safety systems had been rectified. There was no consultation with the Official who made the complaint prior to SafeWork concluding the incident was rectified. For all we know, the failures in the PCBU's safety systems may still exist.

#### **██████████ Project at "██████████"**

11. On 25 October 2022, two ETU Officials exercised their WHS right of entry at the “ [REDACTED] [REDACTED] ” construction site. The perimeter fence was only installed in sections allowing access to the site at numerous entry points. Upon entry the Officials commenced a safety inspection with the PCBU and [REDACTED] the electrical contractor. The Officials identified multiple safety issues with the construction of the electrical boards, the emergency lighting systems, and no risk assessments. There was a dispute between the Officials and PCBU on what steps were required to address the safety issues and at about 8.30am an Official requested a SafeWork inspector to attend the site (Ref no.: [REDACTED]).
12. At about 11am the job was closed due to heavy rain.
13. Between about 11am and 2pm the Official made several attempts to contact SafeWork to determine if a SafeWork Inspector was attending the site.
14. At about 7am on Tuesday 25 October 2022, the two Officials again exercised their WHS right of entry and entered the site. The Officials requested to inspect the site as the safety issues identified on 24 October 2022 had not been rectified. The PCBU denied the two Officials right of entry and an Official contacted the SafeWork emergency contact number to make a complaint that the Officials were being hindered and obstructed while exercising their right of entry (Ref. no: [REDACTED]).
15. At about 7.48am a Project Manager of the PCBU stated that a SafeWork Inspector had attended the site and openly ignored attempts by an Official to contact him.
16. At about 9.10am the PCBU continued to hinder and obstruct the Officials from entering the site. The Officials made a further complaint to SafeWork (Ref no.: [REDACTED] relating to being denied entry to the site. At about 10.21 a call was made by the Officials to the SafeWork hotline.
17. Ultimately, the PCBU acknowledged that the safety issues identified by the Officials required rectification and directed the electrical contractor to take remedial action.
18. This incident highlights a deliberate practice of PCBU’s and electrical contractors hindering and/or delaying ETU Officials in exercising their WHS right of entry in circumstances where there were safety issues conceded by the PCBU. Safety issues that were a serious risk to worker’s health and safety. There is a myriad of instances where ETU officials’ entry to sites have been delayed or hindered. In this instance the delay risked an electrical shock causing death or serious injury to workers on the site. The ETU regularly encounters these scenarios where for no valid reason a PCBU denies or delays ETU Officials WHS entry to sites to investigate safety contraventions.
19. It is the ETU’s direct experience that there is often a reluctance or avoidance by SafeWork inspectors to attend sites and resolve WHS right of entry disputes or by the time SafeWork inspector attends the site the Official has been unduly delayed for an extended period. Stemming from this issue is a distinct lack of WHS prosecutions by SafeWork against PCBU’s and employers who engaged in right of entry contraventions. The lack of prosecutions by SafeWork encourages employers to obstruct or prevent union officials entering sites for suspected WHS contraventions. Our observations are that the lack of compliance enforcement of right of entry contraventions emboldens poor safety practices.
20. From the ETU’s perspective SafeWork’s practice appears to be “leave it up to the unions” to prosecute right of entry contraventions. The decision of [REDACTED] in [REDACTED] v [REDACTED] [2022] FCA 1142 emphasises this issue. In the

proceedings His Honour found that [REDACTED] contravened right of entry provisions under the *Fair Work Act 2009* (FW Act) on 12 August and 13 August 2021 for hindering/obstructing and deny the entry of two ETU Officials who were exercising their WHS right of entry. In particular, on 13 August 2023, the two ETU Officials exercised their WHS right of entry to inspect suspected safety contraventions observed in a safety inspection on 12 August 2021. The Officials account of the incident was that a SafeWork inspector attended the site and advised [REDACTED] [REDACTED] it was acceptable for only one official enter the site. Based on that advice on 13 August 2021, [REDACTED] proceeded to deny the entry of one ETU Official.

21. It is disturbing that a SafeWork inspector provided advice to an employer that it was permitted to deny a permit holder entry to the site in circumstances where the Court determined denying the permit holder entry was in contravention of the FW Act. It appears that the SafeWork inspector was wrong to the provide advice to [REDACTED] [REDACTED] that only one Official could enter the site or worse SafeWork and the inspector were complicit in the contraventions.
22. The proceedings were conducted at significant cost to the ETU, as they are for any union that commences these types of proceedings. As the safety regulator in New South Wales, SafeWork is empowered under s 152(h) of the WHS Act to conduct and defend proceedings under the WHS Act before a court or tribunal. The safety regulator should take right of entry breaches seriously and prosecute such breaches rather than derogating the task to unions.

#### [REDACTED] Project

23. On 14 and 15 December 2022, there were multiple incidents of workers performing work at the [REDACTED] Project who suffered electric shocks. The incidents were reported to SafeWork by an ETU Official. Pursuant to s 37(e) of the WHS Act a dangerous incident that exposes a worker to a serious risk to a person's health or safety includes electric shock. The response from SafeWork was that the incident was low voltage and not a reportable incident. A guidance note was provided to the ETU Official along with the response stating that electric shocks arising from electrical equipment less than or equal to 50V AC and less than or equal to 120V DC is not a reportable incident. The guidance plainly conflicts with s 37(e) of the WHS Act.
  24. On 4 February 2023, there was a partial collapse of a structure at the [REDACTED] Project. The structure collapse was a notifiable incident pursuant to s. 37(e) of the WHS Act. The PCBU reported the incident to SafeWork. There was no direction by SafeWork to preserve the site for an WHS investigation, and more seriously SafeWork did not attend the site at all to investigate the incident.
- [REDACTED]
25. Over about the past six months there has been multiple potential electric shock incidents at [REDACTED] sites. Officers of [REDACTED] stated to ETU Officials during review meetings of the incident that SafeWork have provided guidance stating that the incidents were not reportable as no workers have received electric shocks. The guidance is plainly incorrect.
  26. The definition of notifiable incident at s. 35 of the Act includes a dangerous incident. A dangerous incident pursuant to s. 37(3) of the Act means an incident in relation to a

workplace that exposes a worker or any other person to a serious risk to a person's health or safety emanating from an immediate or imminent exposure to electrical shock.

27. A failure to notify a notifiable incident is a civil penalty provision (s. 38 of the Act). The following issues concern arise:
- a the guidance conflicts with ss 35-38 of the WHS Act.
  - b. It is concerning that SafeWork is providing guidance to employers and PCBU's to not report dangerous incidents in contravention of the ss 35 – 38 of the WHS Act.
  - c. Of equal concern is that SafeWork considers that "low voltage" electric shocks are not dangerous and not reportable.

### **Additional Observations**

28. In consultation with legal representatives conducting prosecutions on behalf of SafeWork it was suggested that SafeWork should provide additional resources to inspectors in the form of additional training to improve their investigation and interview skills for compliance and prosecutions. A further observation is that SafeWork decision making concerning safety incidents is inconsistent. Commonly there is a divergence of decisions in matters that have substantially the same background facts applied to the same work health and health legislation. A more consistent approach would improve safety prosecutions.
29. A broader observation by the ETU is that SafeWork currently lacks the resources to be effective as a regulator and to affect the objects of the WHS Act. It is suggested that increased funding be provided for additional inspectors, and additional training for inspectors.

### **Conclusion**

30. As stated above the examples set out in this submission should not be taken as exhaustive. The examples are a snapshot the ETU's direct experience at work sites, and issues that require the attention of the Review. The ETU is available to provide further information to the Review and participate further in the Review.

**Electrical Trades Union of Australia**

**New South Wales and ACT Branch**

**28 February 2023**