

Worker Participation in Occupational Health and Safety as Employee Voice: Rhetoric or Reality?ⁱ

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In the past employee voice was largely restricted to trade union involvement in the workplace. The difference between union voice and employee voice was emphasised with the adoption of Robens-style health and safety legislation in the 1980s by requiring direct worker participation in OHS matters through consultation, health and safety representatives and committees. By examining arguments in submissions to the National Review of health and safety regulation in Australia, this paper assesses the extent to which worker participation in safety matters is in reality an employee voice mechanism. While there is evidence that it could be, the majority employer submissions reveal worker participation is of rhetorical status only due to the precedence given to the defence of managerial prerogatives.

Introduction

In April 2008 the federal Minister for Employment and Workplace Relations announced the commencement of a National Review into Model Occupational Health and Safety (OHS) Laws in Australia. The objective of the Review is to harmonise OHS legislation across Australia's State, Territory and Commonwealth jurisdictions with the creation of a 'Model Act' (MA), supported by model regulations and model codes of practice, that can be readily adopted in each jurisdiction to deliver an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions (Gillard 2008). The National OHS Review Panel examined and made recommendations on the optimal content of a proposed MA after the publication of an Issues Paper (Stewart-Crompton, Mayman and Sherriff 2008a), inviting submissions from business, governments, unions and other interested parties, a 'First Report' to the Workplace Relations Ministers' Council (Stewart-Crompton et al, 2008b), and a 'Second Report' to the WRMC (Stewart-Crompton et al. 2009). The Review was tasked to consider the scope and coverage, including definitions, of the MA and workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives (HSRs) and/or committees (HSCs), among other things. This paper focuses these key topics connected with worker participation of the Review process by examining the submissions from employer associations, governments and trade unions. Examination of submissions to the Review is ideal opportunity to assess the extent that workplace parties – and employers in particular – view worker participation in the identification and management of OHS risks as a mechanism to supply some form of 'employee voice'. Employee voice can be defined narrowly or widely. With the former definition it can simply mean 'two-way communication between management and employees'. With the latter definition it can mean 'a whole variety of processes and structures which enable, and at times empower employees, directly and indirectly, to contribute to decision making in the firm' (Dundon and Gollan 2007: 1184).

The emphasis on scope and coverage and the role of HSRs and HSCs in the proposed MA are important because it impacts on the dynamics and outcomes of worker participation and 'voice'. Investigating employee voice in OHS is needed to understand the effectiveness of legal mandates governing employee consultation and organisational compliance with these mechanisms. In addition to being encouraged by legislation, employee voice in the form of consultation and

representation is argued to be a crucial factor in reducing workplace-related deaths, injuries and diseases. However, national approaches to OHS, such as the harmonisation of OHS laws, can have limitations. While the desire for national consistency in regulation is a meritorious goal, the process should not lose sight of this objective achieving a performance-based improvement in reducing work-related injuries, illness and fatalities. In other words, the prospect of a ‘lowest common denominator’ with reduced standards is a possibility (Purse, 2008).

Employee Voice in Occupational Health and Safety

The ‘Robens Report’ is widely recognised as the basis for regulatory strategies concerning health and safety at work and is the key factor underpinning current OHS management systems. To enable self-regulation to succeed the Robens Report advocated the need for greater consultation between workers and employers, arguing that good health and safety practice should encourage workers to participate in making and monitoring arrangements for their health and safety (Walters 2001: 2-4). The encouragement of worker involvement in OHS is accepted at international level (see International Labour Organisation *Convention concerning Occupational Safety and Health and the Working Environment*, No 155 of 1981), and has strong principled and practical foundations as workers bear the burden of failure to manage risks at work (Johnstone, Quinlan, and Walters 2004).

Consultation with workers is a key element of OHS risk management. Although there are variations in the type of and extent of consultative arrangements and the level of participation that employers are expected to make, one of the most common underlying assumption is workers need to participate in the planning, implementation and review of OHS management (Bluff and Gunningham 2003: 20). Walters argues that worker participation lends OHS policy a transparent and preventative character (Walters 2001: 5). Frick (n.d: 1-2) views consultation from a more operational perspective and maintains that when workers have been involved in identifying problems and developing solutions then they are more likely to implement and adhere to safety standards. Since workplace inspection and enforcement of regulation is weak, the importance of having management commitment to OHS becomes crucial, however when social and economic policy favours productivity, profits and production, management will be motivated to meeting the business needs of the firm rather than OHS matters (Peterson, 1999; Walters and Frick 2000). While ‘tripartism’ in the OHS context is generally understood to refer to the ‘interests’ of regulators, employers and employees, this does not mean there are ‘two sides’ – management and labour – to workplace health and safety (Bergman and Rigby 2007: 80; Maxwell 2004: 60, 193; Lopatika 2009; Walters, 2003: 12).

Scope, Coverage and Definitions

The scope and coverage of the MA would be chiefly shaped by the various definitions of the legislation because new forms of work and employment arrangements pose considerable challenges for OHS regulation (Fooks et al. 2007: 340; Johnston et al. 2004: 8). The Issues Paper noted participation of workers in health and safety is challenged by the shifts in the labour market, growth in precarious and contingent employment and the decline in union membership and workplace influence (Stewart-Crompton et al. 2008a: 22). The submissions to the Review demonstrated a wide range of opinions regarding the nature and type of workers who could or should come within the ambit of the MA.

Employer submissions were generally more restrictive in the scope and coverage of the MA than other submissions. While the Business Council of Australia made no comment on defining an 'employee' or 'worker', it remarked the current provision have operated 'reasonably effectively in most sectors of the economy' (BCA 2008: 3). The Australian Higher Education Industrial Association argues for national consistency of definitions of employee or worker, without providing examples (AHEIA 2008: 2). Likewise for the New South Wales Business Chamber (NSW Business Chamber 2008: 5). The Victorian Employers' Chamber of Commerce and Industry argues the MA should define the terms 'employer' and 'employee', and suggested existing OHS regulation(s) 'has proven capable of dealing with the evolution of [new] working arrangements' (VECCI 2008: 9-11). The Australian Industry Group was emphatic that the scope and coverage of the MA needs to be broad by arguing there is not a strong case for excluding 'non direct' workers from employer's obligations in their workplace (AiG 2008: 24). The Australian Chamber of Commerce and Industry, in contrast, argues the definition of 'employee' should be the 'common' definition in the existing legislation, but 'progressively removed' from regulation to avoid 'confusion' and achieve 'consistency' (ACCI 2008: 17-18).

Government submissions also vary. The Queensland Government suggests new and evolving (non-traditional) work relationships should be covered by the MA, thus the 'business' or 'undertaking' should be the basis of any obligations owed, not the nature of the work relationship. Hence the definition of a 'worker' should cover all persons engaged for the benefit of the business etc, be that paid or unpaid. Terms such as 'employer' and 'workplace' are too restrictive to accommodate contemporary work-related entities and locations, as the term 'business or undertaking' is more relevant (Queensland Government 2008: 10-14). The South Australia Government considers the MA should cover all work performed and not be limited to 'classes' of workers, and not just 'workplaces' because often work is conducted outside of a traditional workplace. Using, and defining, terms such as 'activities at work' and 'undertaking' are appropriate to accommodate new forms of work relationships (South Australia Government 2008: 9, 11-12). The Victorian Government argues the MA should apply to work that accommodates new forms of work and use of new technologies. The terms 'work environment' and 'conduct of the undertaking' are more appropriate than workplace; 'workplace' should have a wide definition, so that it covers where the work is actually performed. Similarly, the term 'worker' rather than employee should used in the MA (Victorian Government 2008: 12, 18-19). However, Victoria suggests to avoid confusion it might be useful to specify the different types of workers and their relationships due to the varying element of control by an employer while not diminishing the duties owed to them or the protections of the MA (Victorian Government 2008: 27).

The most consistent group of submissions in regards to scope, coverage and definition were from individual trade unions and their peak bodies. For example, the Australian Workers Union proposes the MA should be concerned with risks 'arising from the conduct of work', the terms 'worker' should be used and defined and not employee, and 'business or undertaking' should be used and defined and not employer (AWU 2008: 5, 8; also see SDA 2008: 3). The Police Federation of Australia calls for a wide definition of worker to capture police officers given their special legal status and generally do not perform work in a workplace, so the MA should have a wide definition of work in relation to a business or undertaking. That is, they should be treated no differently from Crown employees, even if this impacts on how 'policing operations' are performed (PFA 2008: 4-6). Peak union bodies, such as Unions New South Wales, also argue for

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wide definition in the MA: the workplace should be defined as ‘places of work’ and a worker should be anyone engaged under a contract of work (Unions NSW 2008: 17, 22; also see QCU 2008: 4; ACTU 2008: 21-2).

In sum, employers tended to submit the MA should have a relatively narrow scope and coverage, restricted in the main to common law employees only. Unions, on the other hand, submit the scope and coverage of the MA should be wide enough to encompass all existing work relationships for any business or undertaking, including unpaid work relationships (volunteers) and the general public. Governments largely submit the scope and coverage needs to be wider than only employees, but note some practical difficulties in how the MA might actually do this. In reflecting this ‘consensus’ the Review’s First Report recommends the Model Act should include a definition for ‘worker’ that allows broad coverage of the primary duty of care. The definition of worker should extend beyond the employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking (Recommendations 10, 16 and 17).

Consultation, Participation and Representation

Views regarding worker involvement in the management of OHS risks have a similar hue to those of scope and coverage. Employers tended to argue the MA should limit consultation, participation and representation to arrangements determined at the respective workplaces: representation and consultation should be nationally consistent, but also allow for ‘flexibility’ and not prescription (AHEIA 2008: 2); be restricted to ‘discussion and information sharing’ (VECCI 2008: 18-19); the method of consultation should not be mandated by legislation (NSW Business Chamber 2008: 10); consultation should not be prescriptive as this should be the domain of contractual terms; and the MA should not ‘mandate the formation’ of HSRs, as they are often ineffective and bureaucratic (ACCI 2008: 36-7). Again, the AiG view is more worker friendly than other employer submissions: consultation is the ‘corner stone’ of effective OHS management; consequently ‘consultation’ should be defined in the MA because it can cover a range of actions including providing information, allowing workers to have ‘input’, allowing workers’ views be considered in any decisions made, and supplying feedback about both the outcomes and the consultation process itself (AiG 2008: 39-40).

Government submissions are employee friendly: representation is not limited to HSR and HSC, a trade union workplace presence and union OHS representatives are also important as studies show union involvement on OHS generally delivers better outcomes and adds to compliance with regulatory obligations; consultation should encourage cooperation and partnerships in dealing with OHS matters, and should not be limited to just employees (Queensland Government 2008: 4, 23-4); consultation is more than simple information sharing, it includes workers’ views being given ‘proper attention’ and contributing to the decision-making process both in fact and appearance – hence the duty to consult should be a feature of the MA (DEEWR 2008: 4); the MA should prescribe a duty to consult but the manner and form should be left to codes of practice, and an requirement to consult should be attached to an obligation to cooperate with HSRs in the resolution of OHS matters (WA DCEP 2008: 17-18); a definition of consultation is required to overcome ‘misconceptions’ that it is limited to information sharing and excludes worker participation in decision making (South Australia Government 2008: 30); and the method of worker representation and participation should not be prescriptive, nor have different standards

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for different types of workplaces – it should be based on agreement between management and those affected by OHS risks (Victorian Government 2008: 48).

Union submission, not unexpectedly, argue for detailed prescription about consultation, participation and representation, with a special emphasis on the role of trade unions in these processes (AWU 2008: 12; Unions NSW 2008: 36-7; SDA 2008: 4; PFA 2008: 16; QCU 2008: 11; NUW 2008; ACTU 2008: 34-41).

Overall, the submissions regarding the functions, role and powers of workers generally and HSRs and HSCs in particular followed the pattern of the previous topics. Employers express some what conflicting views about the function, role and powers of workers: any ‘right’ to cease or refuse work due to an OHS risk should not be a statutory right and instead be regulated by common law alone (BCA 2008: 7; NSW Business Chamber 2008: 11); and there should be no capacity for HSRs (or OHS committees) to issue provisional/preventative improvement notices (PINs) because they tend to be used for ‘minor issues’ which only distracts management (BCA 2008: 8; ACCI 2008: 37; NSW Business Chamber 2008: 10). Some employers do support the practice of important powers and authority given to workers, HSRs and HSCs by the Model Act. The VECCI argues HSRs should have powers to issue PINs (after ‘consultation’ with the employer), call for (but not instigate?) cessation of work if a serious OHS risk is identified, and seek expert OHS advice. They should also have access to training. The VECCI has no concerns with the right to stop work because of OHS risks being contained in legislation, as this merely restates common law (VECCI 2008: 19-20). The AiG submits the power to issue PINs or order a work stoppage are appropriate only if the matter could not be resolved by consultation, and then a state agency inspector should be able to review such decisions. If these powers are abused the employer should be able to have the HSR removed (AiG 2008: 46).

Governments support the proposal workers and/or their HSR or HSC should have a legislative right to cease work if there is a serious OHS risk (Queensland Government 2008: 26; WA DCEP 2008: 26-7; Victorian Government 2008: 56; South Australia Government 2008: 34).

Governments also support the proposal HSR or HSC should a legislative right to issue PINs: to ensure workers’ interests are not outweighed by management interests (Queensland Government 2008: 24); it allows for active worker participation in resolving OHS matters that would otherwise be determined by the regulatory agency (DEEWR 2008: 5); the issuing of PINs should be limited to specific circumstances (WA DCEP 2008: 22-3); they should be a last resort if consultation has failed (South Australia Government 2008: 40); and HSRs must have strong legislative support and ‘robust powers’ for them to perform their functions and achieve their objectives of improving OHS outcomes (Victorian Government 2008: 49-50).

Union submissions, as might be anticipated, support the MA empowering HSR to issue PINS, and to give trade unions the standing to prosecute employers for breaching their duties under the Model Act. If a trade union can instigate proceedings on behalf of members for breaches of industrial relations and employment law obligations, then they too should be able to prosecute employers for breaching their OHS obligations (PFA 2008: 20).

Once again, reflecting this ‘consensus’ – or the majority of views expressed – the Review’s Second Report recommends the Model Act contain an obligation for persons conducting a business or undertaking to consult with workers on matters affecting, or likely to affect, their

health and safety, and explain what consultation means and outline when it should be undertaken. In addition, the Model Act contain a provision for workers collectively to elect health and safety representatives at a business or undertaking, and the powers and functions of HSRs include inspecting the workplace, representing the work group in relation to OHS, investigating OHS complaints, issuing PINs (with specified procedures) and directing that work cease where there is an immediate threat to health and safety (Recommendations 100, 101, 106, 107, 108, 109, 121, and 122).

Discussion and Conclusion

In analysing the employer association, government and union submissions to the Review of OHS laws a range of conclusions can be made, some straightforward and some more complex. Overall, the employer submissions argue for a limited scope and coverage of the proposed Model OHS Act (to be called the 'Safe Work Act' requiring each jurisdiction to enact, or otherwise give effect to, their own laws that mirror the model laws) by suggesting narrow definitions of 'employee' and 'workplace', and generally restricting 'consultation' to information sharing with few or no rights or powers to be given to workers, health and safety representatives or health and safety committees. This is understandable, for it is an attempt to retain managerial prerogatives which obligation-imposing regulation would reduce (McIntyre 2005). The trade union submissions, conversely, argue for expanded scope and coverage with very wide definitions, mandating consultation processes with worker participation in decision making, vigorous powers for workers and OHS representatives, and a strong enforcement role for unions. Again, this is understandable, for OHS issues can provide a significant avenue for trade union renewal (Walters and Nichols 2007). Moreover, as both types of organisations represent various employer and employee constituencies it is largely inevitable that this diversity of interests is reflected in their submissions. A simple conclusion is, therefore, is to paraphrase Christine Keeler: they would say that, wouldn't they? Likewise with the governments' submissions, which tended to suggest the MA should incorporate the main features of their respective jurisdiction's current OHS legislative provisions. Nevertheless, it should be appreciated that the submissions from each of the three key groups of stakeholders are not uniform as there is notable variations within each of the group's suggestions. Further, a disappointing aspect of many submissions, and not just those from employers and their associations, is the arguments are not supported by research evidence.

Yet a more complex analysis suggests some employer associations are not necessarily serving the interests of their constituent members by expressing a strong management-focused argument. Workplace injury and ill-health reduces Australia's GDP by about four per cent or \$31 billion a year (DEEWR 2008: 1). This estimate is based on the direct cost of workers' compensation premiums paid by employers annually (about \$8 billion) and the indirect cost of a workplace injury or disease. The indirect cost may arise from the lost production due to injuries and illness, damage to plant and the cost of overtime or training of new workers to replace those injured (ASCC 2009: 2). Indeed, one of the objectives of the ACCI's 'blueprint' for improving OHS is reducing economic costs from workplace fatalities and injuries, and this is achieved by a significant reduction in workplace fatalities and injuries through the implementation of relevant safety management systems in the workplace. (ACCI 2005: 15, 17). Consequently, it is in employers' interests to reduce both their direct and opportunity costs related to OHS risks. There is considerable evidence that worker participation backed by statutory rights and protection that allows them to have an influence on OHS matters delivers such outcomes (Mylett and Markey

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2007; Fooks et al. 2007: 77). This is more effective when workers are permitted to take an 'activist' stance in their dealings with management (Popma 2009).

In this context the position of the ACCI is conspicuous for its staunchly pro-management focus. According to its submission the ACCI 'takes a leading role on OHS ... representing the views of Australian business to government' (ACCI 2008: iii), yet does not list reducing the incidents of unsafe work practices or unsafe workplaces as part of this role as it seems to be limited to mere advocacy of employers' one-dimensional business interests and the defence of managerial prerogatives. This much is evident from not only what is contained in the submission, but also what is not mentioned; HSCs are not discussed at all in the ACCI submission! Perhaps this is to be expected, for its 'blueprint' largely confines discussion of consultation to employer and industry participation with government in developing OHS regulation (ACCI 2005) and it was a very prominent public advocate for the discredited pro-management 'WorkChoices' industrial relations laws of the Howard government (Lyons 2007). However this is not to suggest employer associations are unable make an important contribution to improving OHS outcomes by their constituent members, rather than just protecting members' self-interests by advocating lower OHS standards and obligations (Gunningham and Rees, 2008). Of all the employer submissions examined the Australian Industry Group's was the most balanced, if not worker friendly. To be sure, at a 2008 workplace health and safety event an AiG representative remarked: 'It is often suggested that OHS should be the top priority. While this is a worthy ideal every organisation should strive for, the reality is that making a profit will always be the highest priority of a business' (NSWNA 2009). In stark contrast to the ACCI, the AiG submission reconciled the purely business interests of its members with suggestions to give priority to OHS matters by making improving OHS outcomes the dominate objective of the submission, and giving advocacy of employer concerns of OHS regulation a subsidiary goal (AiG 2008: 2). Its submission did discuss HSCs, but noted representation is not necessarily the same as participation (AiG 2008: 40-7). This attitude is the essence of the Robens-style, self-regulation, system, where managerial prerogatives are replaced with managerial responsibility of OHS risks and outcomes, where management should appreciate the moral and not necessarily legal requirement to consult with workers in a meaningful and effective way. While the final responsibility for the design and execution of the work process (and work environment) rests with employers, the purpose of safety representatives and safety committees is to assist and contribute to the OHS decision-making process. In short, the concept and practice of consultation are fundamental to the scheme of OHS self-regulation and should facilitate transparent and effective participation by workers on OHS matters.

The employer submissions are noteworthy for other reasons. Their generalised argument that the scope and coverage of the MA should be restricted to the traditional employer-employee relationship and as a result exclude indirect workers (mostly based on the contention employers lack sufficient control over these workers to have obligations imposed on them) is, debatably, incongruous. In the last few decades it has been employers who have forcefully advocated and pursued the use of non-traditional work relationships (e.g. casual, part-time and temporary employees, labour hire agency workers, outsourcing and franchising arrangements, migrant and home workers, and own account dependent contractors). As a result, the proportion of employed persons who worked part time increased from 19 per cent in 1986-87 to 28 per cent in 2006-07, and was 29.7 per cent in August 2009. In other words, about 3.3 million Australian workers (about a third of all employed persons) are engaged in non-traditional working arrangements; i.e.

casual employees, labour hire employees and own account contractors (see generally ABS 2008). The potential exclusion of such a large segment of the Australian labour force from the protections of the MA is difficult to defend. Moreover, these employer arguments are proposing either explicitly or implicitly only a minority of workers should have the opportunity to participate in any OHS management consultation, representation and the like (if they are present), given that 57 per cent of all part time employees are casually employed and casual workers do not – for a number of reasons – take an active role in participation mechanisms. In sum, the practical effect of this limited scope and coverage would be many employers seeking to avoid their OHS obligations to workers by using alternative forms of labour.

Similar to cooperative and consultative arrangements that supply some measure of employee voice adopted for mainstream industrial relations purposes (Flanders 1975, as cited in Bélanger and Edwards 2007: 715; Holland et al. 2009), Robens-style systems demand the workplace parties make compromises and overcome their different perspectives and interests to achieve a common purpose (Lopatika 2009). As a result, employers often concede the benefits of regulations and/or arrangements that they initially opposed owing to purported constraints on their economic performance (Bélanger and Edwards 2007: 728). This concept of ‘beneficial constraints’ is, we suggest, particularly relevant to OHS in Australia if participative self-regulation is to be more than mere window dressing or a cliché. With respect to the role of unions in OHS, employers should not oppose union involvement because it might improve OHS outcomes, or because there is little evidence that OHS is in reality a means of union renewal. The negative perceptions of unions by management can become something of a self-fulfilling prediction. If they believe unions will control OHS in a firm it is likely to become the reality due to management inertia or apathy. Or as one submission put it: employers do not like trade union OHS inspections because ‘they are effective’ (AMWU 2008: 28). If employers want to exclude unions from having an intrusive role in OHS matters this is best done by properly addressing safety concerns in their firm, and thus substituting a union voice with an effective employee voice. Put simply, the trade union ‘threat effect’ can be met by not supplying unions with reasons to focus on OHS.

In conclusion, there is a need to reconsider the Robens-style approach of OHS statutes adopted in the late twentieth century owing to the decline of trade union membership and coverage, the growth in non-traditional work relationships, and the ascendancy of a pro-business ideology with the re-emergence of managerial prerogatives (McCallum 2008). Examination of submissions to the National OHS Review illustrates prominent employer associations, and by implication their member firms, do not generally concede active worker participation in OHS matters is appropriate. By limiting consultation to information sharing, allowing workers, safety representatives and safety committees no decision-making authority, and excluding trade unions from involvement in OHS matters, these submissions give us an understanding of many employer attitudes towards both the theory and practice of worker participation in general – be that direct or indirect – and in OHS matters in particular.

At best, these attitudes conform to a narrow definition of employee voice. However, some employer associations concede workers should have considerable input in OHS matters and in certain circumstances be empowered to make meaningful and effective contributions to decisions on OHS. These attitudes largely conform to a broader definition of employee voice. In the OHS context active worker participation in the identification, management and elimination of work-

related safety risks is justified as it is likely to improve OHS outcomes, it gives workers 'ownership' of decisions and therefore are more willing to accept and implement them, and thus help reduce the costs of employers' workers' compensation premiums. It is also justified on moral grounds given workers bear the burden of failure to manage risks from work. While the submissions reveal some encouraging signs that worker participation in OHS can be an effective employee voice mechanism, this is a minority employer view. The majority of views indicate employee voice – as envisioned by Robens-style systems – is more rhetoric than reality, for employers' business interests has priority over work-related health and safety.

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ⁱ This paper has been peer reviewed by two anonymous referees.