



Development of Work Health & Safety Regulations for Western Australia

Chamber of Commerce and Industry WA

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We believe in good business

Index Title

Introduction.....	2
CCIWA position on State WHS Bill	3
Limitations in the consultation process.....	4
Reducing the regulatory burden for small business.....	5
Balanced approach to maintaining state differences.....	6
Consequential amendments.....	7
Boland Review Recommendations.....	8
Transitional arrangements.....	8
Schedule A - 2018 Review of the Model Work Health and Safety Laws.	11

Introduction

1. The Chamber of Commerce and Industry of Western Australia (**CCIWA**) is the leading business association in Western Australia (**WA**) and has been the voice of business for more than 125 years. CCIWA represents employer members from across all regions and industries in Western Australia.
2. CCIWA welcomes the opportunity to make a submission on development of Work Health and Safety (**WHS**) Regulations for Western Australia as part of the Government's proposed *Work Health and Safety Bill for WA* (**State WHS Bill**).
3. We note that three sets of regulations are proposed to support the State WHS Act, being:
 - 3.1. regulations applying generally to all Western Australian workplaces (**General WHS Regulations**);
 - 3.2. regulations applying to the mining sector; and
 - 3.3. regulations applying to petroleum and geothermal energy operations.
4. This submission focuses on the proposed General WHS regulations.
5. CCIWA has extensive experience in providing WHS advice and services to WA employers, with core services including:
 - 5.1. developing and reviewing WHS Management Systems;
 - 5.2. providing WHS advisory and management roles;
 - 5.3. workplace inspections and audits;
 - 5.4. WHS training; and
 - 5.5. rectification of safety concerns.
6. CCIWA is also an active member of the Commission for Occupational Safety and Health, and its associated advisory groups, in which we advocate the views of WA businesses in creating safe workplaces.
7. CCIWA supports the establishment of General WHS Regulation based on the Model WHS Regulations subject to:
 - 7.1. removing unnecessary regulatory burden and duplication to address the needs of small businesses; and
 - 7.2. adopting a balanced approach to the maintenance of state-based differences.

8. However, the ability to provide meaningful feedback as part of this consultation process is significantly limited by the absence of a draft State WHS Bill or General WHS Regulations. We therefore submit that public consultation on these documents should occur once they have been developed.
9. CCIWA endorses the submissions made by the Chamber of Minerals and Energy with respect to proposed regulations to apply to the resource sector.

CCIWA position on State WHS Bill

10. In August 2018, CCIWA made a submission on the proposed State WHS Bill. In that submission we generally supported the harmonisation of State WHS laws in line with the model *Work Health and Safety Act (Cth)* (**Model WHS Act**) to provide consistency and alignment with the Commonwealth and other jurisdictions.
11. Our submission advocates that:
 - 11.1. the modernising of State WHS laws must ensure that the proposed legislation is contemporary and, to that end, the basis for the legislative framework must be the current 2016 version of the Model WHS laws developed by Safe Work Australia;
 - 11.2. we do not support any amendments to the current Model WHS laws that do not achieve the objectives of national harmonisation or consistency of work health and safety laws;
 - 11.3. any change to the legislative framework in WA must demonstrate that the benefits outweigh the costs of change and not impose unnecessary prescription or compliance burden;
 - 11.4. safety is the joint responsibility of employers and employees in every workplace and as such safe workplaces can only be achieved with cooperation and consultation directly between employers and employees working together to achieve improved safety outcomes;
 - 11.5. we support the role of the WHS Regulator and its inspectorate as the responsible independent body for compliance and enforcement of WHS laws and oppose any proposal that provides a role for any third party in this process; and
 - 11.6. WHS laws should work towards providing the best safety outcomes for workers and workplaces within WA.

12. CCIWA notes that the Government is still drafting the State WHS Bill and has indicated that it will include matters that were not canvassed in the public consultation document titled *“Modernising Work Health and safety Laws in Western Australia – Proposals for amendments to the Model Work Health and Safety Bill for Adoption in Western Australia”*.
13. There is therefore a lack of certainty regarding the proposed State WHS Bill.

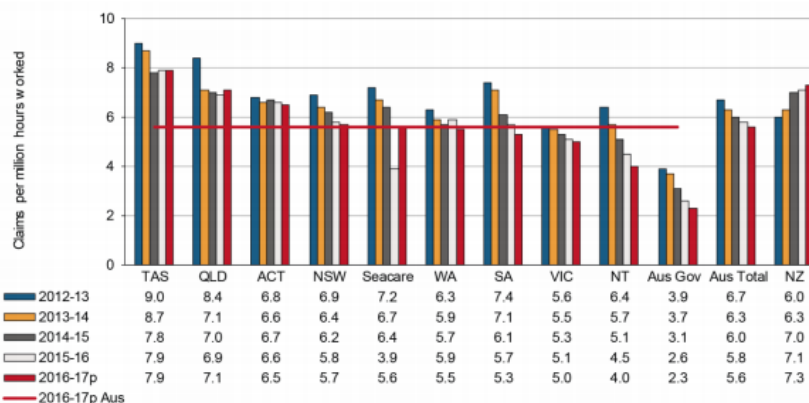
Limitations in the consultation process.

14. The value of consultation on the proposed WHS regulations is significantly diminished given the absence of a State WHS Bill. In simple terms, to ask for feedback on supporting regulation before the substantive legislation is released is a case of “putting the cart before the horse.”
15. The level of uncertainty is further compounded given that the Government:
 - 15.1. has not formally identified its position in response to public consultation on State WHS Bill; and
 - 15.2. has identified that the State WHS Bill will incorporate other matters that did not form part of the public consultation process, including industrial manslaughter, but has provided limited details on these matters.
16. The lack of clarity regarding the State WHS Bill is reflected in the consultation process for the WHS Regulations. The review process documentation identifies that the General WHS Regulations will be based on the Model WHS Regulations (effective as of 15 January 2019) but will include some unique provisions from the existing *Occupational Safety and Health Regulations 1996 (WA)*. The review material does not indicate what those provisions will be.
17. This is in contrast to the consultations that occurred in 2016 in relation to the then proposed *Work Health and Safety Regulations (Prototype Regulations)* in which a detailed discussion paper clearly identified where the Government intended to depart from the Model WHS Regulations.
18. The lack of clarity associated with these consultations limits their effectiveness. CCIWA therefore believes that it will be incumbent on the Government to engage in further consultation once the State WHS Bill and Regulations have been developed.
19. In order for consultation to be genuine it is incumbent on the Government to do so in a transparent manner, in which it fully articulates its proposed amendments and provides stakeholders with an opportunity to make comment on them. This is yet to occur with respect to this matter.

Reducing the regulatory burden for small business

20. The harmonisation of the relevant State WHS systems creates a significant opportunity to reduce the regulatory burden on businesses operating across multiple jurisdictions. This will make it easier for WA businesses looking to grow their business by establishing a presence and performing work in other states and territories.
21. However, a criticism of the Model WHS system is that it unnecessarily increases the regulatory burden with no corresponding improvement in safety outcomes. This is of particular concern to small businesses which represents 97% of all businesses and employs approximately 500,000 workers in WA. This equates to 41% of the private sector workforce.¹
22. For small businesses who are unlikely to have employees working in multiple jurisdictions, there is significant concern that the Model WHS Regulations will increase the administrative burden on them without any improvement in safety outcomes.
23. It is relevant to note that the frequency rate of serious injury claims in WA (as shown in the graph below)² is consistent with the national average. This supports the view that the existing regulation has been effective in delivering good safety outcomes when compared to the rest of the nation.

Indicator 2 – Frequency rates of serious injury claims by jurisdiction



24. CCIWA therefore believes that in developing the General WHS Regulations, consideration should be given to modifying the Model WHS Regulations to minimise the level of prescription and unnecessary duplication.

¹ Small Business Development Corporation (November 2019) *Small Business in Western Australia – at a glance*.

² Safe Work Australia (2018) *Comparative Performance Monitoring Report (20th Edition), Part 1- Work Health and Safety Performance*, p9.

25. In particular, we believe that there is significant merit in drafting General WHS Regulations to:
- 25.1. reduce the record keeping obligations;
 - 25.2. reduce reliance on Australian Standards;
 - 25.3. remove unnecessary duplication;
 - 25.4. remove the requirement to register individual items of plant;
 - 25.5. remove the requirements for mandatory audiometric testing;
 - 25.6. maintain recognition of existing licences; and
 - 25.7. retain generic definitions of 'competent person' in most circumstances, rather than adopting the more prescriptive definitions in the Model WHS Regulations.
26. However, we note that not all duplication is inappropriate and in some cases should be retained where it will aid in businesses understanding their obligations. For example, the previous WA Government's review of Model WHS Regulations³ recommended removing the provisions relating to the storage of amusement devices on the basis that these were addressed in the general storage of plant provisions. However, operators of amusement devices are likely to focus on those regulations clearly relevant to their operations to the exclusion of provisions relating to general plant. Businesses and employees are more likely to understand their obligations where relevant provisions relating to specific industry sectors are either located in the relevant part of the regulations or alternatively referenced by way of regulatory note.⁴

Balanced approach to maintaining state differences

27. CCIWA recognises that Western Australia has many unique factors by way of isolation, geography and historical practices that means there is merit in retaining some aspects of the existing *Occupational Safety and Health Regulations 1996 (WA) (OSH Regulations)*.
28. However, we believe that where a decision is made to maintain existing OSH Regulations, they should be developed in a manner that is harmonised with the Model WHS Regulations. This will help ensure that a business that is compliant with the Model WHS Regulations is also compliant with the General WHS Regulations for WA.

³ *Work Health and Safety Regulations (Prototype Regulations)*

⁴ Using the example of Control measures for Amusement Devices and Passenger Ropeways, a regulatory note could identify that "For storage of amusement devices and passenger ropeways refer to Regulation 207 – Plant not in use".

29. We believe that this can occur by ensuring that:
- 29.1. where the retained OSH Regulation relates to practices of work, that the provisions are drafted in a manner that ensures that where a business adopts a practice which is compliant with the Model WHS Regulations, such practice is also compliant with General WHS Regulations;
 - 29.2. no existing OSH Regulation is retained which is more restrictive than that prescribed by the Model WHS Regulation;
 - 29.3. where the retention of existing OSH Regulations is in relation to licencing types or categorisation of plant, that this occurs on a basis in which there is a path to transitioning to the Model WHS Regulation or means for translating WA requirements to the national model.
30. In drafting the General WHS Regulations we recommend that the numbering of the relevant provisions corresponds with the Model WHS Regulations.

Consequential amendments

31. In drafting the State WHS Bill, consideration should be given to making necessary consequential amendments that streamline and/or update existing regulations.
32. One example of this is the proposed recommendation to include existing OSH Regulations for protection from tobacco smoke on the basis that these are not adequately covered by the Model WHS regulations. In WA, the *Tobacco Products Control Act 2006 (WA)* (**Tobacco Act**) currently regulates smoking in public places whilst the OSH Regulations provide similar provisions with respect to workplaces.
33. This creates multiple sources of regulation regarding smoking, creating both unnecessary duplicate legislation but also some inconsistencies. For example, a private function room within a hotel may not be considered a public place for the purpose of the Tobacco Act yet constitutes a workplace for the purpose of the OSH Regulations.
34. We therefore believe that it is more effective for consequential amendments to be made to the Tobacco Act to establish a single set of regulations relating to smoking. This should occur in a manner which preserves the role of the WHS Regulator in enforcing relevant provisions of the Tobacco Act as they apply to workplace. This approach will also ensure that the regulation of tobacco products remains contemporary, noting that the Tobacco Act has been subject to ongoing amendments, whilst the last amendment to the OSH Regulations in relation to tobacco smoke occurred in 2008.

Boland Review Recommendations

35. The consultation process has invited parties to comment on the recommendations made by Ms Marie Boland in the *2018 Review of the Model Work Health and Safety Laws (the Boland Review)*.
36. We note that Safe Work Australia is in the process of developing the Regulatory Impact Statement (**RIS**) concerning the recommendations contained in the Boland Review.
37. CCIWA believes that consistent with the principles of a harmonised WHS system, the process of considering the Boland Review recommendations through Safe Work Australia should first be completed before consideration is given to implementing them into the State WHS legislation and regulations.
38. It is therefore premature for consideration to be given to these recommendations.
39. To the extent that the Government intends to consider these recommendations before proper consideration has been given through Safe Work Australia, CCIWA refers to the submissions made by CCIWA and the Australian Chamber of Commerce and Industry (**Australian Chamber**). Schedule A provides an overview of the CCIWA and Australian Chamber's views regarding the Boland Review recommendations which are being considered as part of the RIS.

Transitional arrangements

40. Businesses have indicated that the significant increase in volume of the model legislation and regulations is daunting and will require significant time to peruse, understand and remain up to date with applicable provisions.
41. Employers in other jurisdictions have reported that WHS harmonisation has been a complex process requiring comprehensive change-over of documentation, understanding of new obligations, education of the workforce and other parties such as contractors and clients.
42. This is particularly problematic for the State's small businesses.
43. CCIWA therefore believes that in implementing the proposed WHS Bill that appropriate resources are needed to assist small businesses. This should include the re-invigoration of the *ThinkSafe Small Business Assistance Program* to provide independent information and advice directly to smaller businesses.⁵

⁵ This program provided small businesses with less than 20 employees with free and confidential WHS advice delivered by independent consultants. The program was aimed at increasing compliance within high risk industries, but in the situation of WHS Harmonisation this should be extended across all industries. Critical to the success of the program was the use of independent consultants who were preferred by small businesses for compliance advice over the regulator.

44. Employers in other jurisdictions have reported that the WHS harmonisation process involved a complex and comprehensive change-over of documentation, understanding of new obligations, education of the workforce and other parties such as contractors and clients. Not surprisingly, many businesses agree with the findings of the impact assessments undertaken by Safe Work Australia that transitional costs to business will be very significant.
45. Individual employers have estimated that in order to prepare their workplace for the new legislation and to implement changes it will require a broad investment of time and resources.
46. Whilst it is not possible to quantify this investment as different businesses will have different existing structures and different expertise in-house, the following table provides indicative timeframes for transitioning to a harmonised system.

Employer Investment in implementing Work Health and Safety Harmonisation			
Transitional Action	Time/human resource	Financial outlay	Realistic timeframe
Obtain the legislation including codes of practice and guidance material as may be relevant to the business or undertaking	✓	✓	1 month
Distribute relevant parts of the legislation for discussion, distribution, analysis and reference	✓	✓	1 month
Review, assess and interpret the legislation to determine which aspects relate and apply to the business or undertaking	✓	✓	12 months
Change documentation to reflect new legislation responsibilities, titles and terms	✓	✓	12 months
Update and amend documents to reflect changed requirements	✓	✓	12 months
Create new documents to reflect new requirements	✓	✓	12 months
Review and update practical processes and implement new processes to reflect changed and new requirements	✓	✓	12-24 months
Communicate changes to the workforce, contractors, clients and others	✓	✓	12-24 months
Train staff and other people in relation to changes (and what hasn't changed)	✓	✓	12-24 months
Establish reporting pathways and communication networks to reflect new consultation, communication, coordination and due diligence requirements	✓	✓	12-24 months

Monitor developments and adjust systems, documents and processes as cases are tested and further clarity to requirements is produced	✓	✓	5 years
Review of physical workplace items, equipment and environment to ensure compliance with new requirements	✓	✓	12-24 months
Alteration of existing physical items at the workplace, including premises, plant, equipment etc to reflect new requirements and purchase of new compliant items	✓	✓	5 years

47. In determining appropriate transitional arrangements, CCIWA submits that the above information should be considered in establishing transitional arrangements. In particular that businesses will need between 12 and 24 months to implement new WHS systems and processes.
48. We also recommend that grandfathering provisions be in the proposed WHS regulation that recognises capital equipment that is compliant with the existing OSH Regulations.

Schedule A - 2018 Review of the Model Work Health and Safety Laws.

The following table provides an overview of CCIWA's and the Australian Chamber's views of the recommendations arising from the *2018 Review of the Model Work Health and Safety Laws*.

Recommendation	Number	Overview	Position
Psychological Risk.	2	To amend the model WHS Regulations to introduce express requirements for identification and control of psychosocial risks that a PCBU must meet in order to satisfy the existing health and safety duties.	Not supported.
Clarify that a person can be both a worker and PCBU.	4	Make clear that a person can be both a worker and a PCBU, depending on the circumstances.	Not supported
Develop a new model Code on the principles that apply to duties.	5	Develop a model Code to provide guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 of the Model WHS Act	Not Supported
Provide practical examples of how to consult with workers.	6	Update the model Code of Practice on WHS consultation to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.	Supported
Work Groups and Health and Safety Representative (HSR) in Small Businesses.	7(a)	Provide that where HSR is requested for a small business the Person Conducting a Business or Undertaking (PCBU) will only be required to form one work group.	Not supported. Support is provided for an alternative option of providing practical examples of work group and HSR arrangements for small businesses.
Work group negotiated with proposed workers.	7(b)	Provide that a work group is negotiated with workers who are proposed to form part of the work group.	Supported
Workplace entry by HSR Assistants.	8	Allow union officials to access a workplace as a HSR assistant without a right of entry permit.	Not supported
Cancelling a Provisions Improvement Notice (PIN).	9	Provide that where an inspector cancels a PIN for technical reasons, the underlying safety issue must be resolved by that inspector.	Not supported
Choice of HSR Training Provider.	10	HSR entitled to choose course of training provider.	Not supported. Support provided for PCBU to determine training provider after consultation.
Provide examples of Health and Safety Committee (HSC) constitutions, agendas & minutes.	11	Assist those establishing and servicing HSCs by adding practical information to existing model Codes.	Supported

Update guidance on issue resolution.	12	Update the worker representation and participation guide to include practical examples of how the issue resolution process works.	Supported
Referral of Disputes.	13	Introduce referral of outstanding disputes to a court or tribunal after 48 hours	In principle support provided for disputes to be referred to an independent third party but concerns raised regarding the proposed timeframe.
Prior Notice of Entry.	15	Remove requirement for entry permit holders to provide 24 hours notice.	Not supported
Inspector Powers.	17	Provide ability for inspector to require production of documents or answer question for 30 days after they, or another inspector, entered a workplace.	Not supported
Enable cross-border information sharing between regulators.	19	Include a specific power enabling regulators to share information between jurisdictions.	Supported
Review incident notification provisions.	20	Review incident notification provisions to provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.	Not supported
Review the National Compliance and Enforcement Policy (NCEP).	21	Review the NCEP to include supporting decision-making frameworks that promote a nationally consistent approach to compliance and enforcement.	In principal support
Category One Offences and Industrial Manslaughter.	23(a) and (b)	To include gross negligence and a fault element in Category One offences and introduce a new offence of Industrial Manslaughter.	Not supported
Improve WHS regulator accountability for investigation progress.	24	Remove the 12-month deadline for a request that the Regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request.	Not supported
Consistent approach to sentencing.	25	Develop sentencing guidelines.	Supported
Prohibit Insurance for WHS fines.	26	Make it an offence to provide insurance for liability of a monetary penalty, enter into a contract for such insurance, or take the benefit of such insurance.	Not supported
Risk Management Process.	27	Include a hierarchy of control that applies broadly to all risks.	Not supported
Safe Work Method Statements (SWMS).	29(a) and (b)	Introduce a prescribed SWMS template and/or develop a tool to assist in their completion.	Support the development of an intuitive and interactive tool. Prescribed SWMS template not supported.

Photographic ID on White Cards.	30	Require photographic ID on White Cards consistent with high-risk work licences.	Supported
Consider removing references to Standards in model WHS Regulations.	31(a)	Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.	In principle support for reducing reliance on Australian Standards.
Compliance with Standards not mandatory unless specified.	31(b)	Clarify that compliance with Australian Standards is not mandatory under the model WHS laws unless specifically stated.	In principle support
Review Major Hazard Facilities (MHF) regulations.	32	Review the model WHS Regulations dealing with MHFs, with a focus on administrative or technical amendments.	Support
Improving the quality of asbestos registers.	34(a)	Amend the model WHS Regulations to update model Codes to provide more information on the development of asbestos registers.	In principle support
Competent persons in relation to Asbestos.	34(b)	Review whether specific competencies, skills and experience should be prescribed for asbestos related tasks.	In principle support