

# Modernising Work Health and Safety Laws in Western Australia

## Submission by the Housing Industry Association

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HOUSING INDUSTRY ASSOCIATION



# Housing Australians



Submission to the  
Department of Mines, Industry Regulation and Safety

## Modernising work health and safety laws in Western Australia

31 August 2018



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## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

# 1. INTRODUCTION

The Housing Industry Association (HIA) takes this opportunity to respond to the Consultation Paper released on 20 June 2018 which outlines proposals that would see the adoption of the Model Work, Health and Safety laws (Model WHS Laws) into Western Australia subject to the range of amendments.

Any changes to the current Western Australian safety regime must be about positive reform and health and safety improvement.

However to date, much of the Workplace, Health and Safety (WHS) harmonisation process has not been about positive reform or improvement.

To the contrary and as conceded by SafeWork Australia's then President Tom Phillips in 2012:

*“The objective of the harmonisation process is not to reduce the size of Work Health and Safety regulation but to ensure uniform safety standards are in place in each jurisdiction throughout Australia. This is consistent with the requirements of the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. This exercise is about harmonisation and putting everyone on the same page, it is not rationalisation or reform”.*

The vast majority of Western Australian businesses and employees work and operate solely within Western Australia. Harmonisation per se offers no direct benefits to the mostly small and medium sized businesses that operate in only one jurisdiction, but who consider WHS regulation burdensome and the regulatory area most in need of reform. Further the range of jurisdiction specific amendments proposed lend against the adoption of the Model WHS Laws.

While HIA recognises the benefits that a nationally coordinated approach to regulation can create, HIA does not support harmonisation where it aims to achieve a nationally consistent outcome at the expense of genuine, positive regulatory reform for the residential building industry. Harmonisation should not be an exercise of simply mandating an approach which would unjustifiably increase or decrease regulatory stringency to match other state arrangements.

Certainly, the majority of residential construction businesses that operate in Western Australia are small businesses, who do not operate across intra state boundaries.

For such small businesses, it is unlikely that they will experience any great advantage from harmonised laws. Rather they will experience costs and impacts related to changing their WHS systems and processes (including training) in order to comply with the new requirements imposed in their relevant jurisdiction.

Costs relating to training, supervision, systems development and process changes will not only impose significant financial impact on small business owners but will see these costs passed onto the consumers. In residential construction this will have a large effect on housing affordability.

HIA notes that the Victorian Government released an extensive analysis that indicated the national work health and safety scheme imposes costs on businesses that are in excess of the benefits of harmonisation. The Victorian Government's Regulatory Impact Statement showed the total cost of implementing the laws would be \$3.44 billion (over five years) with small businesses hit with 78 per cent of the transition costs and 74 per cent of ongoing costs.<sup>1</sup>

HIA suggests that a similar analysis should be conducted for Western Australia.

A cost benefit analysis (CBA) carried out by KPMG for SafeWork Australia found a huge gap between the estimated net economic impact of harmonisation that was presented in the Worksafe WA 2012 Decision Regulatory Impact Statement for the model WHS regulations and codes of practice (Decision RIS)<sup>2</sup>. While the

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<sup>1</sup> See PWC (April 2012) *Impact of the proposed model workplace health and safety laws in Victoria - Summary Report of Supplementary Impact Assessment.*

<sup>2</sup> Worksafe WA (December 2012) Regulatory Impact Statement: Work Health and Safety Regulations and Codes of Practice



Decision RIS estimated that harmonisation would deliver a net benefit of around \$250 million per annum, the CBA found that harmonisation has in fact delivered a net economic cost of approximately \$1.9 billion since it began and estimated net ongoing costs to be \$1.4 billion in 2013-14<sup>3</sup>. The CBA authors state that in proportional terms the net ongoing costs will remain fixed into the future but in absolute terms they are expected to increase in line with growth in the economy.

The CBA also found that in general, harmonisation has generated limited benefits for multi-jurisdictional businesses in terms of improved efficiencies.

On this basis, HIA would encourage the WA Government to take a cautious approach when seeking to adopt the Model WHS Laws.

Further the current review of the Model WHS Laws being carried out by Marie Boland weighs against changes at this time.

Ms Boland's review is the first *"holistic review of the model WHS laws since their development"* and will *"consider all aspects including the model WHS Act, the model WHS Regulations and the model Codes"*<sup>4</sup>. HIA's submissions to the review can be found [here](#).

The consultation summary published on the 17 August has already identified a number of key themes emerging from the review including concerns with jurisdiction specific variations, the length and complexity of the Regulations and Codes and the constant tensions between the current principle based legal framework that asks Persons Conducting a Business or Undertaking (PCBU) and workers to consider and respond to risks based on what is 'reasonably practicable' and the need for certainty of compliance.

It would be sensible to await the outcomes of that review prior to legislation being drafted.

## 1.1 RESIDENTIAL BUILDING INDUSTRY

The unique nature of the residential building industry is an important consideration when adopting and implementing the Model WHS Laws.

The sector is not homogenous, the industry is divided amongst those businesses operating in detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sector.

Notably the construction process adopted on a single dwelling residential construction site is different from the approach adopted on, for example, a multi storey commercial development.

To that end, a 'one-size-fits-all' approach is inappropriate for the residential building industry and HIA strongly supports the development of industry specific guidance, including the development of a code of practice specifically for the housing sector.

In addition to the above HIA's position and response to the Consultation Paper can be encapsulated in 4 key principles:

- Compliance should take a pragmatic approach.
- Industry participants should have certainty of compliance and be directed towards practical safety solutions for achieving that compliance.
- Enforcement of the laws should be fair.
- Liability should be based on "actual" control. The notion and application of the 'PCBU' under the Model WHS Laws diverges from this approach.

HIA's submission provides some general comments in relation to provisions of the Model WHS Laws and responds to a number of the proposed amendments.

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<sup>3</sup> The economic Impact of WHS harmonisation. SafeWork Australia. November 2014, pgs 5-7

<sup>4</sup> 2018 Review of the model WHS laws Discussion Paper. February 2018, pg. 10



## 2. GENERAL COMMENTS

### 2.1 DUTY OF CARE

#### *Removing the 'Control Test'*

The adoption of the Model WHS Laws would see a shift in the primary duty of care to rest with the person conducting business or undertaking (PCBU) rather than an 'employer'. The concept of a PCBU is broader.

Duties would also apply to 'workers' as opposed to 'employees'. The Model WHS Laws would also see the removal of the 'control test' which limits a work, health and safety duty to matters within a person's control.

The modern principles of occupational health and safety were first created in the UK in 1972 under the 'Robens Review'. The principles hold that responsibility for safety is allocated according to what is reasonable and practicable to control.

The current *Occupational Safety and Health Act 1984* (OSH Act) and supporting cases reflect these principles.

As the law presently stands in Western Australia, employers and self-employed persons, employees, occupiers, designers and owners of buildings, manufacturers, owners of plant and all other persons have occupational/workplace health and safety responsibilities.

The control test applies under section 23D of the OSH Act which deems independent contractors to be employees for the purposes of the primary duty of care, but only in relation to matters over which the principal can exercise control. So, if the principal contractor does not have control of the matter in the statutory sense, they do not have a duty of care which extends to subcontractors.

In the case of certain occupations, such as scaffolding or crane operations, the principal contractor has little if any control over the operations of those workers, although they may have control over the circumstances surrounding the work. The current law delineates one party's responsibilities from the other.

The OSH Act is supported by an established body of case law.

For example, in the Western Australian Court of Appeal decision of *Laing O'Rourke (BMC) Pty Ltd v Kirwin*<sup>5</sup>, the Court confirmed that for the purposes of the OSH Act where a principal engages an appropriately experienced and qualified specialist subcontractor, the principal can, in relation to those technical matters in which the subcontractor is expert, be entitled to rely on the expertise of that subcontractor in considering whether the principal contractor is exercising control.

In contrast, under the Model WHS Laws, the primary duty is to be held by any 'person conducting a business or undertaking' (PCBU). This primary duty is to ensure the safety of 'workers'.

The phrase 'person conducting a business or undertaking' and term 'worker' are defined broadly.

A 'worker' includes employees, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company, an outworker, an apprentice or trainee, a student gaining work experience and volunteers.

Subcontractors, including the self-employed, would be considered to be conducting a business or undertaking. Hence a subcontractor would be both a worker and a PCBU for the purposes of the Model WHS Laws.

The PCBU's duty includes the provision and maintenance of a safe work environment, the provision and maintenance of safe plant, structures and systems of work; provision of adequate facilities and the provision of any information, training, instruction or supervision that is necessary to protect persons from risks to their health and safety arising from work carried out as part of the business or undertaking (s.19(3)).

The duty is prescribed to all PCBUs regardless of whether they have actual control thereby resulting in the elimination of the 'control test' which applies to principal/contractor relationships under the OSH Act.

<sup>5</sup> [2011] WASCA 117



The issue of whether they had control and therefore whether it is reasonably practicable to be able to discharge that duty comes into play at the second level of enquiry; it will no longer govern whether the duty is owed in the first place.

This leaves all PCBUs vulnerable to prosecution if the Regulator forms the view that they could exercise some level of influence and control over a WHS matter.

This change significantly elevates the risk of liability for principal contractors and builders in the residential building industry and for other PCBUs who engage contractors.

In a residential construction context it is neither fair nor practical that a principal contractor/builder (as a PCBU) will not be able to rely on the knowledge and skill of specialist contractors engaged to undertake specific tasks and for whom the PCBU exercises little to no control over. To the contrary it will result in those with no specific expertise attempting to control, supervise and direct persons at work in situations where their employer, who will also be a PCBU, may have implemented conflicting controls, supervision and direction.

The Model WHS Laws make it impossible for either party to know what their duty is, let alone how to discharge it and would place an extremely onerous obligation on PCBUs such as builders who engage specialist contractors over matters for which they have little expertise or real ability to control the actions of the contractors but who could be considered by the regulator to have some limited capacity to influence and control the matter. HIA considers that a PCBU shouldn't be criminally liable for matters that they cannot directly influence and control.

Instead referring to control as a second line of enquiry forces PCBUs to spend considerable money defending themselves in order to demonstrate that it was not reasonably practicable for them to discharge the duty.

In HIA's view, the retention of the control test is vital. The only way to achieve control as first principle is to replicate the current provisions and that there is no duty if a person does not have actual and direct control of a particular risk to health and safety.

Similarly a person is only required to eliminate or minimise the risk to the extent to which the person:

- has the capacity to influence the matter; and
- has the authority to act, and
- it is reasonable in the circumstances for them to have exercised that authority.

### ***Duties of Workers***

HIA supports a duty being imposed on workers for WHS.

However the Model WHS Laws excludes important provisions of the current OSH Act which give workers a specific duty to report hazards to their employers.

This should be retained.

### ***Upstream Duties – design/manufacture/supply/construct***

The Model WHS Laws impose a number of duties on persons who design, manufacture and supply structures, including 'buildability' and 'lifecycle' duties.

HIA is concerned with the scope and interpretation of these duties.

### ***Designer Duties***

Under the Model WHS Laws a designer, who is designing a structure that is to be used as a workplace, must ensure the health and safety of those building the structure, those who will use the structure and those in the vicinity of the workplace.

In relation to the proper construction of the structure, the scope of the duties is broader than current Western Australian provisions and go on to refer to the demolition or disposal of the structure.



A designer does not, and should not be expected to, have the requisite knowledge to be able to provide for safety in the construction process or post construction process (i.e. demolition or disposal of the structure). A designer is generally only engaged to provide a 'drawing' or 'design' or 'plan' and may not be privy to, or have understanding of, the actual demolition or disposal methods, the products or equipment being used or the inherent site conditions that would be needed to make the appropriate safety assessments.

As a result, designers will need to become familiar not only with the building process, but with demolition and disposal methods and their associated systems of work, in order to be able to provide the relevant safe design factors. It is of particular concern to HIA that any failure by the designer in regard to the safe design may then expose the builder to liability via the manufacture and supply duties as outlined below. The Model WHS Laws include additional duties for designers in relation to the range of information that designers must provide to others. This includes information to each person who is provided with the design for the purpose of giving effect to it concerning:

- each purpose for which the plant, substance or structure was designed; and
- the results of calculations, analysis, testing or examination; and
- any conditions necessary to ensure that the plant, substance or structure is without risks to health and safety when used for a purpose for which it was designed or when carrying out any defined activities.

Such additional requirements are onerous.

### ***Manufacture and Supplier (and Construction) Duties***

The Model WHS Laws contain separate upstream duties in respect of the 'manufacture', 'supply' and 'construction' of structures, plant and materials.

Whilst all three are notionally distinct activities, the way the duties have been framed in and the expansive definition of 'structure' to include any *'fixed or moveable, temporary or permanent'* building creates the potential for overlap.

For instance, insofar as manufacture of the structure is concerned the obligation is to ensure that the structure (that is to be used as a workplace) is safe to use, maintain and demolish and to provide any necessary information on the safe use, etc. of the structure.

The main concern is that the scopes of the duties refer to those persons who construct the structure at the workplace, carry out activities in relation to the structure (including demolition or decommissioning) and who are in the vicinity of the workplace and whose health and safety may be affected by the activities in relation to the structure. Such a duty is unnecessary as sections 19, 24 and 26 of the Model WHS Laws already captures builders and imposes a duty upon them for the safe construction of structures.

Whilst a manufacturer's duty might extend to a builder making offsite pre-fabricated components, such as window frames, the inclusion of manufacturer or supplier duties on builders of fixed structures is unreasonable, unjustifiable and impractical.

In all instances, these duties have potential to commit a builder to ensure safety well beyond the act of building and beyond the workplace in that they will be responsible for those persons in the vicinity of the structure whose health and safety might be affected by the activities being undertaken in relation to that structure.

HIA recommends that:

- Designers should not have safety duties in relation to the demolition or disposal of a structure and more particularly a residential home.
- Manufacturers and suppliers should not have a duty in relation to the end users of structures as they do not have control over how that building may be used in the future.
- The design, manufacture and supply duties are not imposed on designers or builders of a fixed structure.
- Insert an express definitions of 'manufacturing', 'supply' or 'construction'.
- Provide that the nature of the structure, i.e. fixed or moveable, temporary or permanent, should be an express factor in determining what is reasonably practicable for the purposes of section 26(2)(c) of the Model WHS Laws.

## **Health Monitoring**

The requirement that a PCBU ensures the monitoring of the health of workers is unrealistic and impractical for residential projects where there are multiple PCBUs, and where many workers may be working on multiple projects at one time. The requirement will also create confusion as to what is required to be monitored and who does what where more than one PCBU is responsible for a particular worker. Also of concern is that health monitoring may be construed to extend to personal lifestyle-related health issues such as fitness, obesity or mental wellbeing matters that would be difficult or impossible for a PCBU to control and inappropriate for a PCBU to monitor.

HIA recommends that:

- This duty be limited to the relationship between the PCBU and their employees.
- The section 19 (5) proviso of the Model WHS Laws that a self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work, should be extended to include monitoring their own health.

## **2.2 LIABILITY FOR OFFICERS**

The Model WHS Laws will introduce liability for officers of companies and require that they must exercise 'due diligence' to ensure that the PCBU complies with its duties or obligations under the laws.

The Model WHS Laws place new and burdensome duties on company officers.

Under the Model WHS Laws, an officer of a PCBU 'must exercise 'due diligence' to ensure that the [PCBU] complies with its duties or obligations under the Act. 'Officer' is defined broadly to mean 'officers' as defined in section 9 of the Corporations Act 2001 (Cth), as well as persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the business.

Under the Model WHS Laws officers of corporations will be personally liable to prosecution if they fail to exercise 'due diligence' and are required to proactively ensure compliance with WHS laws, regardless of whether or not their corporation has been convicted or found guilty of an offence under the laws.

This differs to current provisions under the OSH Act which provides that officers of corporations are only personally liable if their corporation is found guilty of an offence under the OSH Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to the neglect of the officer.

The new due diligence provisions create very onerous layers of duties on officers that will be easier to prosecute and difficult to defend.

Company directors and officers should be treated the same as workers and other persons at the workplace and in this regard be required to exercise 'reasonable care'. For liability to exist there must be a personal neglect or involvement on the part of the person whose act or omissions caused the breach.

In the construction industry, in particular site supervisors and on-site managers are in the best position to understand and manage the hazards and risks of a building site. Directors of building companies may have little to no day to day involvement with the onsite activities of the companies, as companies are able to obtain a building license by employing an individual who holds the requisite building license.

Unless it can be demonstrated that the company has endemic and systemic WHS failures and inadequacies and/or the offence occurred with the consent or connivance of, or was attributable to neglect of the officer, then directors and other company officers should not be personally liable for all site-based hazards and risks, when others in the organisation have direct or operational responsibilities for the duty.

HIA recommends that the due diligence duties not be adopted or a defence is included for those officers who can prove that others in the organisation have direct or operational responsibilities for the duty.

## 2.3 NEW CONSULTATION REQUIREMENTS

The Model WHS Laws broaden the current consultation requirements, including the introduction of an additional requirement to consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same WHS matter. This will widen the required level of communication and engagement for PCBUs.

Currently the OSH Act includes a general requirement to consult with workers on WHS matters that affect them.

In relation to health and safety representatives (HSRs), as there is a requirement to first establish a work group prior to the election of HSRs, principal contractors could potentially end up paying for training of HSRs of subcontractors.

Despite the introduction of reasonable practicability, the proposed additional requirements to consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same WHS matter are very broad and present difficulties in achieving certainty of compliance.

They also have little practical application in a subcontracting environment on a residential building site.

HIA recommends that the consultation requirements be restricted to the employer and employee relationship, with a small business (15 or less employees) exemption.

## 2.4 DISCRIMINATION AGAINST WORKERS OR PROSPECTIVE WORKERS

The Model WHS Laws contain a series of provisions designed to protect people who engage in health and safety activities.

For instance, section 104 provides that a person must not engage in discriminatory conduct for a prohibited reason.

Discriminatory conduct is defined broadly in section 105 to include dismissing, terminating or altering the position of the person, refusing or failing to engage the person, and refusing or failing to enter into a commercial arrangement with another person.

Further, *'prohibited reason'* is defined broadly and generally involves taking discriminatory action because the person has undertaken a role under the Model WHS Laws, cooperated or assisted a person undertaking such a role, or has raised or proposes to raise a workplace health and safety issue.

HIA recommends that these provisions not be adopted as there is no reasonable case for expanding current provisions for discrimination and particularly for including provisions for civil damages in WHS laws.

## 2.5 POWERS ON ENTRY

### ***Abrogation of privilege against self-incrimination (section 172)***

The Model WHS Laws provide that a person is not excused from answering a question or providing a document or information on the ground that the answer to the questions or the information or document, may incriminate the person or expose them to penalty.

HIA recommends that given the quasi-criminal nature of WHS prosecutions, individuals must be afforded usual criminal law protections, including a right to silence.

### ***Inspector's power to seize dangerous workplaces and things***

The power granted to inspectors by clause 176(1)(a) of the Model WHS Laws is much broader than the status quo. If this clause is allowed, it will enable inspectors to seize 'real' property.

HIA does not oppose inspectors having the power to seize a 'thing' or a particular piece of 'plant' or a 'structure' but it has difficulty accepting that inspectors have the power to seize real property.

Giving such a power is also unnecessary as inspectors already have the power to stop work where there is a safety risk.

HIA recommends that section 176(1)(a) not be adopted.

### 3. RESPONSE TO RECOMMENDATIONS

#### 3.1 OBJECTS OF THE WHS ACT (WA)

***Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.***

***Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.***

***Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.***

HIA does not oppose the proposed changes to the objects of the proposed WA WHS Act.

HIA is concerned that the proposed change to section 3(1)(c) does not require the regulators to consult with affected stakeholders

HIA recommend that an explicit object to consult broadly and inclusively with affected stakeholders including an objective that requires consultation prior to making decisions to change WHS laws, codes of practice and guidance be included.

#### 3.2 DEFINITIONS

***Amend the definition of import to include importation from another state or territory into Western Australia.***

HIA is not aware of any problems with the operation of this definition in other jurisdictions, so the need for this amendment is unclear and may have unintended consequences. For example, when plant is brought into WA from another jurisdiction, the person who sends the plant, the person who receives the plant, the transport company and the delivery driver could be importers and be required to provide the specified importer information to others.

It is preferred that the definition in the Model WHS Laws be retained.

***Amend the meaning of supply to include the loan of an item.***

It is HIA's view that this is unnecessary. A loan is implicit in the meaning of supply and has not been identified as a problem in other jurisdictions, so the need for the amendment is unclear.

It is preferred that the definition in the Model WHS Laws be retained.

#### 3.3 NEW DUTY OF CARE

***Include a new duty of care on the providers of workplace health and safety advice, services or products.***

HIA agrees with the view adopted by the Workplace Relations Ministers Council that a duty of care on the providers of workplace health and safety advice, services or products is already implicit in the primary duty of care of PCBUs and the duty of other persons at the workplace.

However a PCBU should be able to rely on the expertise of a WHS expert to establish and implement appropriate safety solutions. This could be recognised in the legislative framework.

The use of experts, who are accredited or licensed is widely used within the residential building industry. For example a builder must engage a licensed scaffolder, a licensed electrician or a licensed plumber to carry out specialists work. The builder can then rely on the expertise of the licensed trade to ensure the work is appropriately carried out.

### 3.4 SERIOUS INJURY OR ILLNESS

***Include incapacity to work for 10 or more days as a category of serious injury or illness.***

It is HIA's view that the proposed amendment is unnecessary. Injuries of this nature would fall under the existing definition of serious injury or illness.

### 3.5 WORK GROUPS, HSRs & HSCs

If the Model WHS Laws are adopted in WA HSRs will be given the power to direct that unsafe work cease and to issue Provisional Improvement Notices (PINs).

These powers should rest with the regulator.

The Model WHS Laws also facilitates employers being required to consult with non-employees, or across multiple workplaces or businesses. For instance, any 'worker' can request the appointment of a HSR, which means that a subcontractor could request a HSR be appointed and that HSR does not have to be employed by the principal contractor.

These provisions are going to be very difficult to manage on a construction site where there are many different businesses operating.

Additionally under the Model WHS Laws a HSR is given the right to allow access (to the workplace) to any person to provide assistance in WHS disputes. Although there are some restrictions under section 70(g), effectively these provisions provide a back door right of entry to union representatives and have been used by union representatives in some jurisdictions to inappropriately gain entry to construction sites.

In HIA's submission, any entry by industrial officers must be subject to the notice provisions of the *Fair Work Act 2009* (Cth) or, if applicable, the *Industrial Relations Act* (WA).

HIA recommends that:

- Small business (15 or less employees) be exempt from the requirement to have workgroups, HSRs or HSCs and the requirement be restricted to the employer/employee relationship.
- Any access to the workplace to a person to provide assistance to HSRs should be subject to agreement with the relevant PCBUs and any such access must be explicitly subject to entry permit and notice conditions of the *Fair Work Act 2009* (Cth) or, if applicable, the *Industrial Relations Act* (WA).

***Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.***

It is HIA's view that this amendment is unnecessary. The exceptions provided for in section 69(2) of the Model WHS Laws and the definition of 'another work group' in section 69(3) are sufficient to allow HSRs to assist other work groups at the workplace in the specified circumstances.

HIA is concerned that the proposed amendment may lead to an unduly wide application of the provisions leading to significant practical difficulties on a construction site.

***Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.***

HIA disagrees that the use of the word 'entitlement' may infer a level of discretion that is not intended. Under section 72(1) of the Model WHS Laws it is clear that a PCBU 'must', if requested, allow the HSR to attend a course of training. Further, the ordinary meaning of 'entitle' is to 'give (a person or thing) a title, right or claim to something.'<sup>6</sup> There is no ambiguity as to the right of a HSR in regard to the provision of training.

There is no doubt as to the obligations on a PCBU in relation to the requirement to provide training to a HSR, as such the amendment is unnecessary.

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<sup>6</sup> Macquarie Essential Dictionary, 4th edition, pg. 263

**Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.**

The proposed amendment would impose an additional burden on PCBUs. Further, such a requirement may detract from the composition of HSC by requiring the omission of persons the PCBU considers most appropriate.

The justification for this proposal to 'expedite recommendations' of the HSC is unsatisfactory. The timelines for getting answers or achieving the desired outcomes can be decided by the HSC. In addition, most of the recommendations of a HSC requiring a decision by the PCBU will likely require further consideration by PCBUs. If agreement cannot be reached in a reasonable time, the provisions of sections 76(5) to 76(7) can be invoked.

HIA does not support the adoption of this amendment.

**Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.**

HIA opposes the proposed amendment.

The ability to direct that work cease is a powerful tool that inherently relies on a subjective judgment of the circumstances. If the power is exercised incorrectly it imposes a considerable impost on the PCBU and may even put other persons in danger.

The proposed change is unnecessary given that, as stated in the Consultation Paper "the common law right extends to ceasing unsafe work if it puts another person at risk". This is codified by section 28(b) of the Model WHS Laws and, in practical terms achieves the same outcome as that proposed to be included.

The relevant PCBU or the regulator should be the only ones able to direct work to stop.

Of note the MAP did not come to a formal concluded view on this matter. In such circumstances the current Model WHS Laws should be maintained.

**Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.**

The Consultation Paper provides no justification for this requirement.

Section 101(2) of the Model WHS Laws require that an inspector inquire into the circumstances that are the subject of the Provisional Improvement Notice (PIN), this would necessarily include the HSR.

Further, creating an express right that required a HSR be notified of a request to review a PIN may cause industrial problems on a construction site.

### **3.6 RIGHT OF ENTRY**

**Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.**

HIA does not support the right of entry provisions under the Model WHS Laws. There is no evidence to suggest that such a right has led to better safety outcomes. It is HIA's view that the current provisions in WA relating to union right of entry be retained.

The Decision RIS examining the adoption of the Model Work Health Regulations and Codes of Practice in WA considered the adoption of the right of entry provisions and concluded that the model laws would not deliver direct improvements in safety outcomes in workplaces and that '...right of entry for the purposes of occupational health and safety is already provided for under the Industrial Relations Act 1979. The proposed change is considered to create duplication risking confusion and inconsistencies.'<sup>7</sup>

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<sup>7</sup> Pg.4

Adequate right of entry provisions are already provided for within the *Fair Work Act 2009* and the regulatory overlap between the WHS and workplace relations laws have led to construction unions exploiting entry on WHS grounds when the more stringent industrial law provisions do not suit their purposes.

If the WA government is minded to adopt the right of entry provisions under the Model WHS Laws HIA recommends that the provisions be amended in the following ways:

- Codify and clarify the interaction between the two regulatory frameworks in light of a recent High Court decision held that under Australian law, union officials are required to hold a valid federal right of entry permit even when invited onto site to assist a health and safety representative (HSR) under a State or Territory OHS law.<sup>8</sup>
- Training requirements for WHS permit holders should be provided only by the regulator. This will ensure that regulators can make their expectations regarding compliance with the right of entry requirements clear.
- Photo ID must be added as a minimum requirement for an entry permit.
- The notice of entry should always include the reason why they are on the site and a requirement to state this clearly with reference to the legislation. This would create more credibility and better define the visitor's role. It would also provide limits to the visitor to only talk to those people affected by the suspected contravention, at times that are reasonable.
- As a minimum, the following amendments made to the model WHS laws on 21 March 2016 need to be implemented:
  - A minimum notice period of 24 hours and a maximum of 14 days for union officials and those assisting HSRs when entering a workplace (sections 68 and 117 of the model WHS Act).
  - An increase to penalties associated with contravening the conditions of WHS entry permits from \$10,000 to \$20,000 (section 123 of the model WHS Act).
  - Minor technical amendments relating to WHS entry permit holders.

***Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.***

HIA does not oppose the adoption of the additional obligations on the Regulator and EPH in relation to workplace entry. However, HIA would recommend that such provisions be adopted unamended.

### 3.7 POWERS OF INSPECTORS

***Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.***

In HIA's view the current powers under the Model WHS Laws are adequate.

The requirement that an inspector physically enter a workplace to permit the inspection of documents or interview people is not simply a 'legal technicality'. For work health and safety matters, HIA is of the view that an inspector should be required to attend a construction site to carry out an inspection and then determine if further documentation/investigation is required.

The ability to inspect documents and carry out interviews without attendance at the workplace may lead to an abuse of these powers and less informed investigations at odds with improving safety on construction sites.

***Clarify that the power of inspectors to conduct interviews includes the power to record the interview.***

HIA does not oppose the adoption of recommendation 26.

***Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.***

HIA opposes recommendation 27.

What compliance looks like is often not clear cut. In complying with this proposed requirement a PCBU could inadvertently incriminate themselves by reporting compliance in the belief that compliance has been achieved. However, on notification an inspector may form the view that compliance was not in fact achieved. Under these

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<sup>8</sup> *Powell v Australian Building and Construction Commissioner & Anor; Victorian WorkCover Authority v Australian Building and Construction Commissioner & Anor* [2017] HCATrans 239 (17 November 2017)

circumstances a PCBU could potentially be considered to have provided false or misleading information which is a serious offence under the Model WHS Laws.

The best way to unequivocally verify compliance is by the inspector following the matter up with the PCBU.

The recommendation also unduly shifts a responsibility that should squarely sit with the regulator on to a PCBU, adding unjustifiable regulatory burden on business.

***Include the power for the Regulator to request an independent evaluation consistent with current practice.***

It is unclear from the Consultation Paper whether recommendation 28 is proposed to be confined to the mining and petroleum sectors or is to apply more broadly.

Without more the proposed new clauses to be added to Division 2, Part 8 should be confined to those sectors to which they currently apply under existing WA legislation.

### 3.8 PENALTIES

The penalties available under the Model WHS Laws are significantly greater than the current penalties under the OSH Act.

Currently the maximum penalties under the OSH Act are:

- Corporations - \$500,000 for 1st offence, \$625,000 for subsequent offence.
- Individuals - \$250,000 and 2 years imprisonment for 1st offence, \$312,500 plus 2 years imprisonment for a subsequent offence.

HIA notes that the following are the proposed penalty levels for duty of care offences:

Category	Description	Maximum Penalty
Category 1	Most serious cases – Breach of the primary (general) duty involving recklessness and serious harm (fatality or serious injury) to a person or a risk of such harm.	Corporation = \$3 million Individual = \$600,000 Imprisonment - up to five years Workers and other persons = \$300,000 Imprisonment - up to five years
Category 2	Breach of the primary (general) duty where serious harm or the risk of it without the element of recklessness.	Corporation = \$1.5 million Individual officers = \$300,000 Workers and other persons = \$150,000
Category 3	Breach of the duty that does not involve high risk of serious harm.	Corporation = \$500,000 Individual officer = \$100,000 Workers and other persons = \$50,000

These penalties are significantly higher than those that currently apply in WA.

Of note the Decision RIS considered that the penalty levels specified in the Model WHS Laws not be adopted because they “*would not deliver direct improvement in safety outcomes in workplaces*”. The Model WHS Law penalty levels were considered “*unreasonably punitive, particularly for small business operators*”<sup>9</sup>

The increases are unnecessary. The penalty provisions should reflect those currently in the OSH Act.

***Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.***

HIA opposes recommendation 30.

The amendment is unnecessary as the regulator is not compelled to accept an enforceable undertaking and can always refuse to do so.

In any case, an enforceable undertaking can be designed to provide ‘restorative justice’ and to achieve a responsive and timely sanction that is considered to be as effective a deterrent as prosecution.

<sup>9</sup> Pg.4





Current experience has been that in some cases the value of the enforceable undertaking has been higher than the highest available fine. Enforceable undertakings also provide an opportunity to encourage PCBUs to achieve systematic solutions that address the underlying causes that led to the incident and would be appropriate for Category 2 offences.

### 3.9 PROCEEDINGS

***Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.***

HIA opposes recommendation 31.

The reviewable decision provisions of the Model WHS Laws are designed to provide an opportunity to those whose interests are affected by a decision to appeal it.

A union is not a person 'affected by the decision' and should not be permitted to seek such a review. A worker affected by a decision seeking to appeal can always get assistance from their union.

The proposed amendment is inappropriate and unnecessary.

***Permit the Regulator to appoint any person to initiate a prosecution.***

HIA opposes recommendation 32.

Prosecutions for WHS offences should only be commenced by the regulator and not any other third party.

***Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.***

HIA opposes recommendation 33.

The extension of this right to unions is inappropriate and unnecessary.

Prosecutions for WHS offences should only be commenced by the regulator and not any other third party including unions.

### 3.10 CODES OF PRACTICE

***Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.***

HIA agrees with this proposal provided any new codes of practice or changes to current codes undergo a consultation process that involves specific industry sectors, such as for example HIA.

Any changes must also be subject to a regulatory impact assessment

### 3.11 WORK HEALTH AND SAFETY COMMISSION

***Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.***

HIA does not oppose this recommendation.

## 4. REGULATIONS

Appendix C to the Consultation Paper provides the only indication of the intended content of the regulations. HIA presumes that the model regulations will be adopted with the proposals outlined in that Appendix.

Whilst the core duties in the Act underpin any regulations, the details of the construction regulations in particular, are important as they contain the day to day matters that impact on managing safety on a building site.

HIA have several key issues with the Model Work Health and Safety Regulations (Model Regulations) that have been introduced into the other jurisdictions.

The Model Regulations reflect many of the inherent flaws in the Model Act imposing overlapping duties on PCBUs, both absolute and qualified by so far as is reasonably practicable.

The Decision RIS identified 13 areas where adoption of the Model WHS Laws may result in changes to work practices and associated benefits or costs. The Decision RIS concluded that *“between the two extremes of complete rejection or complete acceptance [of the model WHS laws] a finer consideration is required.”*

Key issues in the regulations and codes of practices for HIA remain such as:

- The broadness of the definition of ‘construction work’.
- The inadequacy of the \$250,000 monetary threshold for when a principal contractor is required to be appointed and comply with certain obligations;
- Construction Safety Plans and Safe Work Method Statements;
- Duties of designers of structures;
- Working at heights and the lack of a clear threshold for physical fall protection;
- Noise regulations; and
- Plant regulations.

### **Meaning of Worker**

HIA is concerned with the indication that the meaning of ‘worker’ will specify a prescribed class to include workers under the ‘gig’ economy. HIA would oppose any such moves.

In HIA’s view the current definition of PCBU and ‘worker’ are appropriate to respond to changes in the nature of work and work relationships.

New and evolving styles of workplace organisation have been a feature of the Australian economy for decades with celebrated court cases establishing the status of encyclopaedia salespeople, bicycle riding couriers and labour hire workers. In fact, as noted in the Review of the Model WHS laws Discussion Paper the shift in terminology was aimed at being broad enough and flexible enough to incorporate changes in the way we work and the way work is carried out.<sup>10</sup>

### **Dangerous incident**

While it is not clear what is proposed, HIA does not support any expansion of current OSH Act provisions to include illnesses of “long latency”.

Currently OSH regulation 2.4(1)(e) prescribes the reporting of an injury which, *‘in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred.’*

This is clearly for injuries that prevent an employee working within 10 days of the day on which the injury occurred. This would capture acute injuries or illnesses that disable immediately or within 10 days. It does not capture illnesses of long latency.

Due to its nature, illnesses of long latency take time to develop and there may be no immediate effect. Further, the day on which the injury first occurred is usually not known as it occurs or develops over a long period. It therefore follows that the current provision is not and could not have been designed to capture “long latency” illnesses and should not be expected to do so.

### **HSR Training**

HIA would agree that the training course for HSR’s should not exceed 5 days. This is currently set out under the Model Regulations.

### **Resolution of health and safety issues**

HIA opposes any prescription in relation to the *‘relevant agreed procedure’*.

We note that section 81 of the model WHS Act requires issues to be resolved in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed in the model WHS

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<sup>10</sup> 2018 Review of the model WHS laws Discussion Paper. February 2018, pg. 18



regulations. Part 2.2 of the model WHS regulations prescribe minimum requirements for an agreed procedure, and requires that an agreed procedure must include the same steps as the default procedure of the regulations.

The matters to be covered in the agreed procedure are clearly articulated in the model WHS regulations and are straightforward. There is no need for a definition.

