

Modernising Work Health and Safety Laws in Western Australia

Submission by IPC Maintenance

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WHS Act (WA) Harmonisation Public Submission

ABOUT IPC MAINTENANCE

Established in 1993, IPC Maintenance has long term and highly productive relationships with many businesses within the Kwinana Industrial Strip. Our service offerings include: Mechanical Maintenance, Scaffolding, Welding & Fabrication and Building Maintenance.

IPC Maintenance's number one focus is managing the safety of our workers. IPC Maintenance's H&S Policy objective is to causes zero harm to those we engage with. Testament to our safety commitment is our impressive HSEQ performance record.

With more than 200 employees IPC Maintenance instils a culture throughout the organisation that takes responsibility for arriving at work safely and returning home the same way. Our HSEQ Management System (MS) is certified to AS/NZS 4801:2001 and the MS will transition to ISO 45001:2018 accreditation in 2019.

FOCUS OF SUBMISSION

IPC Maintenance appreciates the opportunity to make a submission regarding the harmonisation of Work Health and Safety (WHS) legislation. We offer an opinion on the recommendations made by the MAP, from the perspective of a service provider to the chemical manufacturing industry.

The harmonisation of WHS legislation across Australia is considered a positive reform by IPC Maintenance. Working towards common practices across Australia is beneficial for:

- Developing business relationships nationally;
- Providing confidence that projects are managed compliantly when working interstate; and
- Most importantly, ensuring our workers are protected from harm when at work – where ever they work.

FORMAT OF SUBMISSION

The submission on the following pages has been presented in the *submission template – table of recommendations* supplied by the Department of Mines, Industry Regulation and Safety.

Submission template (including all recommendations)

Enter your comments on specific recommendations in the table below. You may add new rows at the end of the table if you wish to include comments on other aspects of the WHS Act other than those covered by the recommendations of the MAP.

#	Recommendation	Clauses	Comments
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).	Recommendation supported
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	Recommendation supported
3	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.	3(1).	Recommendation supported
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	Recommendation supported
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	Recommendation supported
6	Amend the meaning of supply to include the loan of an item.	6(1).	Recommendation supported

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7	<p>Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.</p>	5(4).	<p>With the introduction of Artificial Intelligence (AI) into Western Australian workplaces, the clarification of the extend to which AI holds a <i>duty of care</i> in WHS legislation could be beneficial. If a driverless train causes a human fatality which <i>person/s</i> owe/s a duty of care to mitigate the risk of said incident?</p> <p>The consideration of list of exclusions to PCBUs to be extended to include AI could be undertaken by the MAP.</p> <p>Is AI or the manufacturers of AI a: <i>person conducting business or undertaking</i>. A decision to adding AI to the list of exclusions to PCBUs or not, will make it clear whether AI is able or not (by definition) to conduct business or undertaking.</p> <p>Clause 7 defines the <i>Meaning of worker</i>. Could AI be defined as a <i>worker</i> within this clause? This may be an important consideration for the MAP to undertake when making recommendations to the Minister.</p> <p>The document linked below, suggests that it will be up to the courts to decide on liability when accident involving AI come before the law. Having clear intent for Western Australian courts (or WHST) may aid decision makers. https://www.justice.org/sites/default/files/Driven%20to%20Safety%202017%20Online.pdf</p>
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8	<p>Include a new duty of care on the providers of workplace health and safety advice, services or products.</p>	<p>New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.</p>	<p>The recommendation is supported in the spirit for which it is intended.</p> <p>WHS Advice (service and product) is often complex; the extent to which the advice is implemented can have unintended consequences from which the advice (service or product) was supplied.</p> <p>PCBUs may need support to easily identify those <i>service providers</i> that are a class of person that can uphold a duty of care for providing WHS advice (services or products).</p> <p>The regulator may consider commissioning a register that WHS advisors (service providers and products) can apply to become a member of. Membership could be subject to proving competency as a WHS advisor (service or product advisor). Proof could be based on experience, education, training, endorsements etc.</p> <p>The register would have the aim of removing discrepancy regarding the ownership of duty of care. If a PCBU enlists the services of a “registered” WHS advisor and the subsequent implemented advice is the cause of a duty of care breach – the penalty for the breach is assigned to the WHS advisor and not the PCBU.</p> <p>If an “unregistered” WHS advisor’s advice is implemented the duty of care may be with the PCBU for not appropriately assessing the competency of the advice. This could cause unintended consequences from which this recommendation has been made.</p>
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9	<p>Amend the meaning of <i>serious injury or illness</i> to include immediate treatment as an in-patient without reference to a hospital.</p>	36(a).	<p>Illness should exclude predisposed health concerns. The indication of the predisposed health issue could be disclosed during pre-employment medicals, during their employment or at the time the illness causes the individual to seek treatment as an in-patient.</p> <p>For example, if an employee whom is a smoker and has had a previous heart condition then suffers a heart attack and subsequently dies at work, this fatality should not be reportable. The fatality may not be contributed to by the work conducted at the time.</p> <p>Recommend the clause to consider those serious injuries or illnesses <i>that result from a workplace incident</i>. This removes the need to report to Worksafe an employee death from an illness or disease that is not caused from being engaged by the PCBU.</p> <p>The clarification that the injury or illness must be related to employment, could remove an impediment for employing older candidates that have a perceived high risk of suffering a fatality from pre-existing medical conditions.</p>
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10	Include incapacity to work for 10 or more days as a category of <i>serious injury or illness</i> .	36.	<p>Calling on the example used above, it is possible that an employee can suffer an illness that may keep them from work for 10 or more days that is not contributed to by their engagement with a PCBU, even though the incident occurred at a workplace.</p> <p>Is the definition of illness clear enough to distinguish between work contributed illness and pre-disposed illness?</p> <p>The recommendation is supported if the incapacity is due to the workers engagement with the PCBU and not from pre-disposed illness.</p>
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	Recommendation supported
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	Recommendation supported
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the <i>regulator</i> to the Work Health and Safety Commission.	72(1)(a).	Recommendation supported
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).	Recommendation supported

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15	<p>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.</p>	<p>New clause to be added to section 76.</p>	<p>There will be many instances where corporations cannot automatically approve safe systems of work, even when top management attend Health and Safety Committee meetings.</p> <p>Often risk assessments and evaluations are required to ensure the system does not put at risk safe systems of work that have already been implemented. This is defined as best practice in AS4801:2001 and its replacement standard ISO 45001:2018 which mandates reviewing effectiveness of corrective and improvement actions.</p> <p>The intent of having top management attend committee meetings may delay meetings due to restricted availability. This recommendation may have the unintended consequence of delaying or interrupting meeting schedules.</p> <p>Even when top management attend, it is not a guarantee that safe systems of work can be immediately approved.</p> <p>The reverse may be true – suggestions may be immediately discredited without sufficient review of effectiveness. Often consideration is required for how ideas are presented to top management. The aim of presenting ideas well is to gain constructive criticism of the idea and subsequently gain approval.</p> <p>It is recommended that top management attend health and safety committee meetings, but their attendance does not need to be compulsory to guarantee the progress of ideas for safe systems of work.</p>
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16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	Recommendation supported
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.	Recommendation supported
18	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.	New clause to be added to section 100.	Recommendation supported in the instance when a HSR issued the PIN. It should be made clear that only the HSR who issued the PIN can be notified.
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	Recommendation supported
20	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.	New clauses inserted in section 117.	Recommendation supported
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	Recommendation supported

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22	Insert the <i>WHS Tribunal</i> as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	Recommendation supported
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)	Recommendation supported
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	Recommendation supported
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).	Recommendation supported

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26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	Video recording of interviewees may make them anxious or nervous, which could impede the information gathering exercise. An audio recording may be less intimidating than a video recording for example. The recommendation is supported if the means of recording the interview is at the discretion of the interviewee.
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	Recommendation supported
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.	Recommendation supported
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.	Recommendation supported
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	Recommendation supported
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	Recommendation supported
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	Recommendation supported



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33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	Recommendation supported
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34	<p>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.</p>	274(2)(b).	<p>Many Western Australian PCBUs operate nationally. Liaising with interstate businesses requires an understanding of legislation in each state. Having national Codes of Practice (COP) is beneficial to strengthen interstate business relationships by improving the understanding of legislation obligations of each of the parties.</p> <p>The Ministers ability to act without national consultation may inadvertently impair Western Australian businesses to participate efficiently nationally.</p> <p>Harmonisation of WHS legislation across the nation reduces red tape for industry, the extent of which is inclusive of COPs. COPs are requested to be listed in Safe Work Method Statements; having to understand the nuances of varying state applicable COP decreases the strength of interstate business relationships.</p> <p>Pointing to the national Chain of Responsibility legislation as an example of where Western Australia has not harmonised with the rest of the county. Western Australian Main Roads Dept has published a Factsheet comparing Western Australian and National Chain of Responsibility legislation (Sept 2017). These nuances between Western Australian and national law impede business efficiency by placing onerous responsibility of Western Australian businesses that operate nationally to be across two sets of legislation. We must train vehicle drivers in various laws when they are required to cross the Western Australian boarder.</p> <p>If a Western Australian Minster would like to amend a nationally applicable COP, then the nation should be consulted and the COP amended based on the recommendation of the national consultation.</p>
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35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.	Recommendation supported
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.	Recommendation supported
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2.	Recommendation supported
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	Recommendation supported
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	Recommendation supported
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.	Recommendation supported

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41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.	Recommendation supported
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act.	Recommendation supported
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.	Recommendation supported
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	Recommendation supported

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