



HOUSING INDUSTRY ASSOCIATION



# Housing Australians



Submission to the  
Department of Mines, Industry Regulation and Safety

## Work Health and Safety Regulations for Western Australia

26 November 2019



# contents

<b>ABOUT THE HOUSING INDUSTRY ASSOCIATION .....</b>	<b>3</b>
<b>1. INTRODUCTION .....</b>	<b>4</b>
1.1 THE REVIEW OF THE MODEL WHS LAWS .....	5
1.2 THE NEED FOR A GENUINE REGULATORY IMPACT STATEMENT .....	5
<b>2. KEY ISSUES IN THE MODEL REGULATIONS .....</b>	<b>7</b>
2.1 OVERLAPPING DUTIES .....	7
2.2 DEFINITION OF CONSTRUCTION WORK .....	8
2.3 THRESHOLD FOR PRINCIPAL CONTRACTORS AND ASSOCIATED OBLIGATIONS .....	8
2.4 FALLS FROM HEIGHTS .....	9
2.5 RIGHT OF ENTRY .....	10
2.6 PLANT .....	11
2.7 WHS MANAGEMENT PLANS .....	11
2.8 SAFE WORK METHOD STATEMENTS (SWMS) .....	12
<b>3. SPECIFIC MATTERS RAISED IN THE CONSULTATION PACKAGE .....</b>	<b>12</b>
3.1 TREE LOPPING .....	12
3.2 TOWER AND GANTRY CRANES .....	12
3.3 HEALTH MONITORING REPORT .....	13
3.4 PHOTOGRAPHIC IDENTIFICATION ON THE CONSTRUCTION INDUSTRY TRAINING CARD .....	13
3.5 ASBESTOS .....	13
<b>APPENDIX A - ISSUES WITH THE MODEL WHS REGULATIONS .....</b>	<b>14</b>

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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 residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

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.

Contributing over \$100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

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."*

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 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.



## 1. INTRODUCTION

HIA takes this opportunity to make a submission in response to the 'Consultation Package' released by the Department of Mines, Industry Regulation and Safety to develop regulations in support of the anticipated adoption of the model Work, Health and Safety Act in Western Australia.

Safety is of paramount importance in the residential building industry and in HIA's view any regulatory approach to work, health and safety should be based on four 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 work, health and safety laws diverges from this approach.

HIA submits that a number of provisions in the model Work Health Safety Regulations (model WHS Regulations) do not support these principles, are impractical, problematic and bring to light many of the inherent flaws in the model Work Health and Safety Act (model WHS Act) which HIA outlined in submission dated 31 August 2018 (2018 Submission).

In those submissions, HIA also highlighted that any reforms or changes to the laws must be about positive reform and health and safety improvement. HIA remains gravely concerned that there appears to be little to no benefit to the residential building industry arising out of Western Australia adopting its own version of the harmonised WHS legislative and regulatory framework – particularly because of the unique profile of residential construction methods used in Western Australia, which are distinct from those used elsewhere in the country. The new framework will simply impose unnecessary additional cost, red tape and regulation, the burden of which will fall most heavily on small businesses.

Despite the views of the supporters of WHS harmonisation, at no stage has any supporter of "national consistency" or WHS harmonisation been able to demonstrate precisely how business, particularly small businesses, will benefit from a change to the laws. Further, documentation released as part of the Consultation Package outlines a number of ways in which the approach to be taken in Western Australia will depart from the model WHS Regulations.

In reality, the harmonisation of WHS laws, can only affect and benefit that proportion of Australian businesses (and workers employed in those businesses) that operate across borders.

However, the vast majority businesses in Western Australia, including those in the residential building industry, are small to medium sized enterprises that work and operate solely within Western Australia.

The costs imposed forcing harmonisation on these businesses, would largely be deadweight, with business forced to spend money and time to become conversant with, and transition to, new laws and regulations that would not lead to any significant safety improvements but are more onerous and impractical than the current laws in place.

An area of significant concern is the cost implications associated with the adoption of the model WHS falls provisions. If adopted the changes could impose a requirement to provide fall protections on all types of height risks which will substantially increase the cost of housing, particularly for single storey homes. Due to the predominance of double brick construction in Western Australia, more cost-effective single-storey scaffolding approaches such as "bracket scaffolding", which is used in other states where framed construction methods are primarily utilised, is not a viable option in Western Australia. As such, these regulations could potentially see all single storey homes constructed using scaffolding at a cost that would exceed \$6,000 per house and could be up to \$12,000. Such outcomes must be avoided.





While HIA acknowledges that the proposed WA work, health and safety laws will differ in some respects from the model WHS Regulations underpinning the nationally harmonised package in other states, they still largely carry over impractical provisions that have already proven to be ineffective, these include:

- The overlapping duties between principal contractors and other persons who may be conducting a business or undertaking on site work;
- Working at heights and the lack of a clear threshold for physical fall protection;
- The broadness of the definition of ‘construction work’;
- The inadequacy of the monetary threshold for when a principal contractor is required to be appointed and comply with certain obligations; and
- Construction Safety Plans and Safe Work Method Statements.

HIA expands on these matters below.

Also attached to these submissions is Appendix A which provides a summary of a number of concerns with the model WHS Regulations.

## 1.1 THE REVIEW OF THE MODEL WHS LAWS

In February, the final report on the review of the Model WHS Laws (Boland Report) was released. The Boland Report contained 34 recommendations and substantial commentary.

In its 2018 Submission HIA called on the WA Government to await the outcomes of this national review prior to moving forward with the development of regulatory reforms. HIA again urges the Government to consider the Boland Report and some of the key themes that have emerged including:

- concerns with jurisdiction specific variations;
- the length and complexity of the Regulations and Codes; and
- the constant tension 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.

Responding to these concerns would seem sensible and appropriate.

## 1.2 THE NEED FOR A GENUINE REGULATORY IMPACT STATEMENT

A West Australian-specific RIS process on the model WHS Regulations was undertaken by independent consulting firm Marsden Jacob Associates. This study, whilst detailed, erroneously did not consider the impact of the substantive changes under the model WHS legislation, in particular the changes to the treatment of duties by eliminating the “control test”.

HIA notes that the Victorian Government released 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 5 years) with small businesses hit with 78 percent of the transition costs and 74 percent of ongoing costs.<sup>1</sup>

Further, a recent cost benefit analysis carried out by KPMG for Safe Work Australia found a huge gap between the estimated net economic impact of harmonisation that was presented in the 2012 Decision RIS for the model WHS regulations and codes of practice. While the Decision RIS estimated that harmonisation would deliver a net benefit of around \$250 million per annum, the cost benefit analysis 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>2</sup> The authors of the cost benefit analysis stated 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.

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<sup>1</sup> Impact of the proposed national Model Work Health and Safety Laws Victorian Government in Victoria, PWC.

<sup>2</sup> The economic Impact of WHS harmonisation. SafeWork Australia. November 2014, pp 5-7



The cost benefit analysis also found that in general, harmonisation has generated limited benefits for multi-jurisdictional businesses in terms of improved efficiencies.<sup>3</sup>

Accordingly and before proceeding with the Regulations the WA Government must undertake a similar RIS.

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<sup>3</sup> The economic Impact of WHS harmonisation. Safe Work Australia November 2014, p4



## 2. KEY ISSUES IN THE MODEL REGULATIONS

### 2.1 OVERLAPPING DUTIES

The model WHS Act establishes that a Person Conducting a Business or Undertaking (PCBU) must ensure that workers and others are not exposed to risk to their health or safety.

HIA's 2018 Submission highlighted concerns in relation to the overly broad and imprecise framing of duties for the PCBU. Of concern is the failure to articulate "actual control" as an essential element of the test. On a construction site, the PCBU will include the builders/principal contractor, any subcontractors, including subcontractors engaged by the subcontractors (including self employed contractors), along with the client engaging the principal contractor/builder. By virtue of this, there will almost always be more than one PCBU with the same duty on site at the same time meaning that PCBU's will have 'overlapping duties'.

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 extent and degree of any obligations and responsibilities is determined by considering the 'control test'.

The 'control test' applicable pursuant to section 23D of the *Occupational Safety and Health Act 1984* (OSH Act) 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. As such, 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.

It has always been HIA's view that the party in the best position to control the work environment should bear the responsibility for the safety aspects of that environment. Although a "builder" or "principal contractor" will be a concurrent duty holder, inevitably the person held responsible by the Regulators will be the builder who on most occasions does not have "actual control" over the work being undertaken by the PCBU they have engaged. With the array of obligations imposed on a PCBU under the model WHS Regulations there has been no contemplation of the scope and extent of these obligations in circumstances where more than one PCBU is responsible.

HIA recommends that the definition of 'PCBU', 'workplace' and 'worker' be revisited in order to resolve the issues with overlapping duties which arise in relation to a range of WHS obligations including, for example, to provide first aid equipment, facilities, and emergency procedures. Additionally, where a duty relates to more than one duty holder then the scope of that duty should be explained for each party.

HIA supports a duty structure that provides for individual responsibility to the extent that the person is in "control" of a certain activity, and that the subsequent liability is apportioned based on the level of control.

The problematic nature of this approach, particularly as it operates in the construction industry, was highlighted in the Boland Report which made the following observation:

*"An example of this situation is construction projects, where there are likely to be a range of businesses, labour hire firms, contractors and subcontractors involved in completing a project. Each PCBU will have a particular role and a specific ability to influence or direct particular matters relevant to health and safety for that project. To avoid duplication of effort, or an absence of effort due to presumptions that other PCBUs are managing risks, s 46 of the model WHS Act places a duty on multiple duty holders to properly consult, co-operate and co-ordinate their activities to ensure the health and safety of workers and other persons affected by the work on the project.*

*I found that those PCBU's who are at the 'top' of the supply chain, project or network were still asking questions like 'Where does my liability end?', 'When can I rely on an expert contractor to take over responsibility for WHS matters?' and 'If I can't control a WHS matter, why should I be liable?'. Those PCBUs who are lower down the chain, network or project consistently provided feedback that the*

*shared duty principle had become for them an issue of providing paperwork to the PCBU's higher up the chain.*<sup>4</sup>

As a result, the Boland Report recommended that section 5(4) of the model WHS Act be amended to make clear that a person can be both a worker and a PCBU, depending on the circumstances.

In response to the Boland Reports recommendation the NSW Government is proposing legislative amendments to the *Work Health and Safety Act 2011* that would add notes to section 5 (which sets out the meaning of a 'PCBU') and section 7 (which sets out the meaning of a 'worker')<sup>5</sup> to make it clear that a person can be both a workers and a PCBU at the same time.<sup>6</sup>

While HIA remains unconvinced that this approach resolves the issues identified, there clearly remains (after some 6 years in operation) uncertainty regarding the operation of the work, health and safety duties under the model laws.

HIA strongly suggest that WA adopt the approach taken in SA which clarifies the importance of the control test. Section 17 of the *Work, Health and Safety Act 2012* was amended to included subsection 2 outlined below:

- (1) *A duty imposed on a person to ensure health and safety requires the person—*
  - (a) *to eliminate risks to health and safety, so far as is reasonably practicable; and*
  - (b) *if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.*
- (2) *A person must comply with subsection (1) to the extent to which the person has the capacity to influence and control the matter or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity.*

HIA sees that the only way to resolve the confusion and complexity associated with the operation of overlapping duties is through the adoption of a 'control test'.

## **2.2 DEFINITION OF CONSTRUCTION WORK**

The current definition of construction work includes a number of workplaces that are not traditionally considered construction sites such as:

- Routine maintenance, testing and repair work, eg, repainting a home, replacing worn carpet, routine servicing of an air conditioning system;
- Minor work, for example installation of an antenna, adding a sky light to a home, adding extra power points, lights, or computer data cables in a home.

The capture of this type of work has a particular impact when determining who requires a general safety induction card, Safe Work Method Statement (SWMS) and what administrative provisions apply for that workplace. HIA recommends a review of the definition of 'construction work' for the purposes of the Regulations.

## **2.3 THRESHOLD FOR PRINCIPAL CONTRACTORS AND ASSOCIATED OBLIGATIONS**

The model WHS Regulations specify that a PCBU who commissions a construction project at a cost of \$250,000 or more is considered to be the principal contractor for that project. As a principal contractor on such a project, certain obligations apply such as the administrative obligations of a WHS Management Plan and collecting SWMS as well as obligations in relation to first aid, site security, falls from height, personal protective equipment, training and consultation.

While a monetary threshold offers more practicality and certainty for builders and for the regulator, the current value of \$250,000 in the definition of a construction project is unreasonably low, capturing projects that simply do not warrant certain administrative obligations and processes. It should be noted that in other jurisdictions, higher thresholds have been implemented. For example, in the Northern Territory, a \$500,000 threshold has

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<sup>4</sup> Page.58

<sup>5</sup> Also sections 5 and 7 of the Model WHS Act

<sup>6</sup> *Work Health and Safety Amendment (Review) Bill 2019*





been adopted, in South Australia a \$450,000 threshold has been implemented and in Victoria a threshold of \$350,000 applies.

Most residential construction projects have clear established control measures and do not benefit from (or require) a sophisticated and complex coordination process of paperwork and administration. HIA's view is that rather than looking to a monetary trigger for the threshold, that residential construction work should be completely excluded from the meaning of a construction project. One method of effectively achieving this would be by virtue of a definitional threshold utilising the Building Code of Australia definition of Class 1, 2 and 10 buildings or alternatively increasing the monetary threshold to at least \$1 million to exclude the majority of residential construction projects.

While it is unclear at the stage the intention regarding the adoption of model Codes of Practice it is worth highlighting that the *2013 Code of Practice – Construction Work* defines housing construction as construction work relating to the following:

- detached houses;
- attached dwellings, separated from each other by a fire resisting wall, such as terrace, row or town houses;
- villa-homes, strata or company title home units or residential flats;
- boarding and guest houses, hostels or similar with a floor area <300m<sup>2</sup>; and
- ancillary buildings to the above, such as private garages, gazebos and carports.

Work on multi-storey buildings, i.e. above three habitable storeys is not considered housing construction work and accordingly would be covered. HIA considers that this approach could be adopted within the regulatory framework more broadly.

## 2.4 FALLS FROM HEIGHTS

The scope of the falls provisions and the subsequent hierarchies of control contained in the model WHS Regulations could lead to the use of physical fall prevention measures at any height, which is impractical and cause a significant amount of uncertainty over what type of control measures should be used for low risk height issues.

Falls from height risks in a manufacturing, hospitality, farming, and even retail environment are inherently different to those in the residential building industry. Unlike other industries, working at heights is an inherent part of building a house and any regulations or guidance must specifically provide provisions that relate to the process of building.

The falls provisions contained in the model WHS Regulations applies to all types of falls in all types industries with no specific construction provisions.

Part 4.4 of the model WHS Regulations specify a hierarchy of control that a PCBU must use when addressing all falls from height risks. The hierarchy requires that where the work cannot be undertaken from the ground or a solid construction then certain other physical fall prevention measures be used where "reasonably practicable".

This is unsatisfactory in that it is contrary to the current treatment of falls in Western Australia and provides little to no certainty for the residential building industry.

Currently OSH regulation 3.55 provides that for work from a scaffold, fixed stair, landing, suspended slab, formwork and falsework from which there is a risk of falling greater than 2 metres, edge protection (defined as guard railing) is required.

For all other edges from which there is a risk of falling greater than 3 metres edge protection or a "fall injury prevention system" is required.

In residential roof construction work, WorkSafe WA has also developed guidance in conjunction with the residential building industry to support these regulations.



The WorkSafe bulletin “*Domestic construction - Controlling falling risks while working on roof structures*” has for many years provided a range of safety solutions that have been used and accepted as safe and practical for roofing work.

On the other hand, the uncertain requirements under the model WHS Regulations will lead to a significant amount of uncertainty over what type of control measures should be used for low risk height issues, and will undermine the practical controls outlined in the bulletin.

For example, the simple act of fitting cornice plaster, which has traditionally been carried out using a ladder, under the model WHS Regulations could now require a “fall prevention device”, such as mobile scaffold or a step platform with guardrails. In this regard, it could be argued that such devices are “reasonably practicable” because they are readily available and could be considered to provide a “higher level of protection”, even if doing so would introduce much burdensome difficulty and other risks (e.g. increased manual handling) as well as substantial costs to the home owner.

Also confusing is that under the Model WHS Regulation, regulation 78(1) specifies that if it is not reasonably practicable to eliminate fall risks they must be minimised in accordance with Part 3.1 by:

- Substitution/ isolation/engineering controls.
- Administrative controls.
- PPE.

However, regulation 79 introduces additional specific requirements to minimise risk as a hierarchy of controls by:

- A fall prevention device.
- A work positioning system.
- A fall arrest system.

This combination of hierarchies of control is very confusing and makes it difficult for PCBUs to be certain of what is required for compliance.

Regulation 79 should be removed to avoid confusion and reliance placed on the provisions of Part 3.1 and guidance.

The adoption of the model WHS Regulations in WA could see all single storey homes constructed using scaffolding both internally and externally. HIA is concerned that the safety risks associated with the erection, maintenance and dismantling of scaffolding are significantly greater than the risks it is intended to overcome.

Further, imposing a requirement to provide fall protections on all types of height risks will substantially increase the cost of housing. Given the predominance of double brick construction methods in Western Australia, alternative and more cost-effective scaffolding approaches such as “bracket scaffolding” utilised in other states where framed construction methods are primarily utilised is not a viable option in Western Australia. **It is estimated that the cost of providing full perimeter scaffolds on a single storey home would exceed \$6,000 per house and could be up to \$12,000.** With the potential for physical fall protection to be needed internally as well for the types of examples provided above it is likely that this cost will be significantly more.

HIA's view is that single storey residential construction should be excluded from the falls provisions of the Model WHS Regulations. Alternatively, the threshold for providing physical fall prevention measures should be no less than 3 metres, as currently framed in the existing OSH regulations.

## 2.5 RIGHT OF ENTRY

HIA understands that while Part 7 of the model WHS Bill 2011 is to be adopted, Chapter 2 Representation and participation, Part 2.4 – Workplace entry by WHS entry permit holders of the model WHS Regulations is not.

There is no explanation as to why the WA WHS regulations will not include Part 2.4 of the model WHS Regulations. HIA opposes this approach.



Part 2.4 of the model WHS Regulations sets out a number of important matters regarding:

- The content of the prescribed training that a WHS entry permit holder must undertake in accordance with section 131 and 133 of the model WHS Act;
- The form of a WHS entry permit. Regulation 26 requires that certain important details, such as the permit holders name, the name of the union the permit holder represents, dates of issue and expiry, and conditions that apply etc, be included on the permit.
- The details that must be included in a notice of entry to a workplace
- Additional details that must be included in a notice of entry issued under section 117, 120 and 121 of the model WHS Act.
- Details regarding the information to be published on the publically available register of permit holders prescribed by section 151 of the model WHS Act.

The specification of these details and requirements go some way to ensuring transparency, accountability and certainty regarding the role of an entry permit holder and the operation of the entry permit system. If the WA Government seeks to allow unions the right to enter a workplace on work, health and safety grounds the matters set out in Part 2.4 of the model WHS Regulations must also be adopted.

## 2.6 PLANT

HIA has a number of concerns with the approach taken in the model WHS Regulation to the regulation of Plant including:

- the application of the section to plant that is designed to be primarily supported by hand and to vehicles;
- the provision of guarding interlocks as a control measure;
- overly prescriptive scaffold inspection requirements;
- overly prescriptive and impractical record-keeping for plant inspections, maintenance, commissioning, dismantling, alterations, registrations; and
- the inclusion of a provisions for 'structures' with similar obligations to that of plant – the definition of structures is the same as that from the model WHS Act and would include houses and other types of buildings therefore potentially imposing record keeping, design and maintenance requirements on residential construction.

HIA is opposed to the inclusion of the above, and is of the view that the overly prescriptive nature of the model Plant regulations is not in line with the original Safe Work Australia policy to develop performance-based regulations. HIA also recommend that plant that is designed to be primarily supported by hand be excluded from the scope of this part of the model WHS Regulations and that the section relating to structures be removed completely.

## 2.7 WHS MANAGEMENT PLANS

HIA's main concern with WHS Management Plans is that over the last decade these documents have increased in complexity and have become a significant burden on the residential building industry without any evidence that they improve safety on site. WHS Management Plans and their content are frequently the subject of uncertainty.

Of particular concern are the added requirements to include the arrangements for consultation, co-operation and the co-ordination of activities in relation to compliance with the duties under the Act and the Regulations and the arrangements for the collection, assessment, monitoring and reviewing of SWMS.

WHS management plans also pose administrative problems for principal contractors, particularly in relation to making sure all workers are aware of the contents of the plan and that it is kept up to date in a constantly changing environment, which is difficult to achieve in practice.

The model WHS Regulations regarding WHS Management Plans pose an unnecessary administrative burden and should exclude residential construction. This approach could be implemented by virtue of the change to the construction project threshold detailed above.



As an alternative proposal, limiting or simplifying the information required in a WHS Management Plan would work better in practice. On this basis, the WHS management plan duty should be removed and replaced by further practical guidance material.

For example, a practical proposal would be for guidance material to recommend placement of signage onsite with the following limited information:

- contact details of the PC and site supervisor,
- arrangements for managing incidents, and
- site safety rules.

## 2.8 SAFE WORK METHOD STATEMENTS (SWMS)

A range of issues have been identified by HIA members and others in relation to the efficacy of the SWMS obligations. Of particular note is the research carried out by the ANU on behalf of SWA.<sup>7</sup> The ANU research uncovered an extensive list of mostly negative issues and observations about the use of SWMS, and the report acknowledges that *“there are grave concerns about the efficacy of SWMS in the construction industry”*.

The Boland Review also identified SMWS as *“an area of the model WHS Regulations which is not operating as intended.”*<sup>8</sup>

SWMS have been in place in most jurisdictions for some time with no demonstrated benefit. Evidence suggests that many PCBUs, including subcontractors ignore the SWMS duties and only produce SWMS when demanded by a principal contractor or other customer requiring the paperwork for compliance purposes. Additionally, when SWMS are produced by PCBUs, the SWMS are usually not of a high quality and non-compliant. SWMS are often copied or plagiarised from others with little or no regard to the actual hazards or risks onsite or whether control measures are appropriate for the work. Once produced the SWMS tend to be placed in a folder and ignored resulting in onsite safety practices not necessarily being carried out in accordance with the SWMS.

In those jurisdictions that have harmonised, there are reports that SWMS have proven to be administratively burdensome for builders who spend a disproportionate amount of time and effort to ensure the paperwork is produced but reap little or no safety benefit from it. There is also considerable confusion and many different interpretations about what hazards and risks are required in a SWMS, as evidenced by the many problems identified by stakeholders in the research by the ANU commissioned by SWA.<sup>9</sup>

It is also unsatisfactory that the model WHS Regulations require a principal contractor to ensure compliance with and collection of SWMS rather than the person required to complete the SWMS. The obligation to provide and comply with a SWMS should be wholly placed on the person undertaking the work and not jointly on to the principal contractor.

SWMS simply add administrative burden without providing any demonstrable improvement in safety outcomes; their adoption should be reconsidered.

## 3. SPECIFIC MATTERS RAISED IN THE CONSULTATION PACKAGE

### 3.1 TREE LOPPING

HIA supports the exemption under Regulation 221 of the model WHS Regulations.

### 3.2 TOWER AND GANTRY CRANES

HIA supports the exemption of tower and gantry cranes from design registration if moved to a new location.

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<sup>7</sup> National Research Centre for OHS Regulation, Australian National University, The Efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia. February 2017 (unpublished report).

<sup>8</sup> Pg. 156.

<sup>9</sup> See note 7.



### **3.3 HEALTH MONITORING REPORT**

HIA does not support Regulation 376 of the model WHS Regulations and proposes that instead, a PCBU provide the report to a worker.

### **3.4 PHOTOGRAPHIC IDENTIFICATION ON THE CONSTRUCTION INDUSTRY TRAINING CARD**

While HIA acknowledges that it may be preferable for photographic identification to enable workers to be readily identified, this is conditional on there being no cost imposed for existing card holders by enabling free conversion to a photographic card.

### **3.5 ASBESTOS**

HIA supports that the proposed WHS Regulations prescribe that an asbestos register be created by a competent person and supports the WHS requirement for a competent person to identify asbestos, carry out air monitoring, clearance inspections and issue clearance certificates.





## APPENDIX A - ISSUES WITH THE MODEL WHS REGULATIONS

<p><b>WHS Regulations Record keeping regulatory burden</b></p>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>Various parts of the Model WHS Regulations mandate the keeping of records for two years where there has been a notifiable incident, e.g., regulations 77, 58, 162, 182, 303, 304 313, 465</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>There is no valid justification for mandating the keeping of these records. This is an unnecessary regulatory burden that should be removed.</li> <li>Record keeping requirements should not be designed to facilitate the investigation by regulators. While some PCBUs may want to keep such records that should be a business decision for the PCBU.</li> </ul>
<p><b>WHS Regulation 25 Training requirements for WHS entry permits</b></p>	<p>This training should be carried out by the WHS regulator. This will ensure that the training is appropriate, provides the necessary skills and avoids the conflict of interest that currently exists</p>
<p><b>WHS Regulation 28(a) Additional requirements—entry under section 117</b></p>	<p>The term ‘so far as is practicable’ should be removed, as it is always practicable to provide written particulars of the suspected contravention in the notice of entry.</p>
<p><b>WHS Regulations 37-38 Maintenance of control measures Review of control measures</b></p>	<p>These regulations are unnecessary as requirements to maintain and review control measures are implicit and are already adequately dealt with in the <i>How to Manage Work Health and Safety Risks Code of Practice</i>.</p>
<p><b>WHS Regulation 39 Provision of information, training and instruction</b></p>	<p>This regulation duplicates section 19(3)(f) of the WHS Act and should be removed. If not removed it should at least be subject to reasonably practicable as it is in the WHS Act.</p>
<p><b>WHS Regulations 40-41 Duty in relation to general workplace facilities Duty to provide and maintain adequate and accessible facilities</b></p>	<p>These regulations are unnecessary. The provisions can be dealt with quite adequately via guidance. It should be noted that some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non WHS jurisdictions such as Victoria successfully continue to do so.</p>
<p><b>WHS Regulation 42 Duty to provide first aid</b></p>	<p>These provisions should be simplified to a general duty to ensure that first aid is provided. However, the provisions are unnecessary and should be removed. Provisions for first aid can be dealt adequately via guidance. It should be noted some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non-WHS jurisdictions such as Victoria successfully continues to do so.</p>
<p><b>WHS Regulation 43 Duty to prepare, maintain and implement emergency plan</b></p>	<p>These provisions should be simplified to a general duty to ensure emergency arrangements are provided. However, the provisions are unnecessary and should be removed. Provisions for emergency plans can be dealt adequately with via guidance. It should be noted that some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non-WHS jurisdictions such as Victoria successfully continues to do so.</p>
<p><b>WHS Regulations 44-45 Personal protective equipment</b></p>	<p>These regulations are unnecessary and should be removed. The prescribed hierarchy of control makes this duty implicit and alternatively can be dealt with via guidance.</p>
<p><b>WHS Regulations 54, 55(1), 55(2) Managing risks of falling objects</b></p>	<p>These regulations reiterate the provisions of Part 3.1 and are unnecessary. The regulations should be removed.</p>
<p><b>WHS Regulation 55(3) Minimising risk associated with falling objects</b></p>	<p>This regulation is unnecessary because risks arising from falling objects must be managed in accordance with the general hierarchy of control prescribed by regulation 36.</p>



	<p>Although r 55(3) at face value appears like it is a 'deemed to comply' provision, the means of controlling falling objects can be interpreted as possibly restricted to the matters and examples in this regulation. It is also unclear whether reliance on the general hierarchy of control would be acceptable. Accordingly, it is very confusing for PCBUs to figure out what is/isn't acceptable.</p> <p>The existing <i>Fact Sheet - Falling Objects</i> could stand alone and be sufficient without the need for Division 10. On this basis Division 10 should be removed.</p>
<b>WHS Regulation 58 Audiometric testing</b>	<p>Audiometric testing requirements are not supported. The tests do not guarantee any WHS improvement. Furthermore, it is difficult to understand who has the duty where more than one PCBU is involved and what 'frequently' required to use PPE means.</p>
<b>WHS Regulation 85(4) Evidence of licence – duty of PCBU</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>This regulation prescribes that PCBUs must keep evidentiary records of licences of workers engaged for 1 year.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>This is unnecessary red tape that should be removed.</li> </ul>
<b>WHS Regulations Schedule 3 High risk work licence – description of high risk work</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>Schedule 3 describes some of the HRW as 'use of' rather than 'operation of', e.g. use of a forklift; use of a crane and the regulations refers to the carrying out of a class of HRW as the trigger for the licencing requirement.</li> <li>The language used may be taken to catch anyone making use of the plant, not just the person operating the plant, for example, a builder making use of a hoist to carry out work. Are both the 'builder as a 'user' and the operator required to have a licence?</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>Schedule 3 should be modified to make it clear that the operator or erector of the plant – not the user – is the person who must be licenced.</li> </ul>
<b>WHS Regulation 142 Notice of demolition work</b>	<p>The requirement to provide 5 day notice prior to demolition work is an unnecessary regulatory burden.</p> <p>The compulsory demolition notification requirements are a duplication of existing requirements to notify building agencies in some jurisdictions and represent an additional unnecessary burden that will require contractors to deal with several separate agencies. The requirement to notify demolition work should be removed.</p>
<b>WHS Regulation 156 De-energised equipment must not be inadvertently reenergised</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>This regulation is unrealistic. It will not always be possible for PCBUs to prevent inadvertent re-energisation in an absolute sense.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>It should be subject to 'so far as it is reasonably practicable'.</li> </ul>
<b>WHS Regulation 163 Electrical equipment and installations and construction work – additional duties</b>  <b>Duty of PCBU</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>The requirement to comply with AS/NZS 3012 Electrical Installations – construction and demolition sites represents an inappropriate level of prescription for the construction industry.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>Specific recommendations for construction should be in guidance material and not mandated in an Australian Standard which is outside the control of SWA</li> <li>Referencing of standards in regulations is not supported.</li> </ul>
<b>WHS Regulation 166(2)(b)(ii) Overhead and Underground Electric Lines – Duty of PCBU</b>	<p>The requirement to ensure that control measures implemented are consistent with any requirements of an electricity supply authority is unnecessary and may lead to electricity supply authorities prescribing unwarranted conditions based on a perception that this regulation allows them to impose 'requirements'. This could also lead to inconsistencies between such authorities. For example one authority may require that power lines be de-energised in low risk instances but another authority may not require this.</p>



	<ul style="list-style-type: none"> <li>If an electricity supply authority has any power conferred upon it in relation to risk control when PCBU's seek to operate near power lines, then there is no need for this regulation. It is unwarranted and potentially problematic</li> <li>The regulation should be removed.</li> </ul>
<b>WHS Regulation 223(6) Lasers</b>	<p>This regulation is inconsistent with AS 2397:1993 – Safe use of lasers in the building and construction industry and with the provisions of the current SWA information sheet Laser classifications and potential hazards, both of which allow Class 3B (Restricted) lasers to be used in the construction industry.</p> <ul style="list-style-type: none"> <li>The regulation should be modified to allow for the use of Class 3B (Restricted) lasers in building and construction industry.</li> </ul>
<b>WHS Regulation 225(5) Scaffolds</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>The requirement to prevent access to an incomplete scaffold is unrealistically onerous as it will not always be possible for a PCBU to prevent access to an incomplete scaffold in absolute sense, e.g., if workers disregard the measures implemented by a PCBU to prevent such access.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>This regulation should be subject to the qualifier 'so far as it is reasonably practicable'.</li> </ul>
<b>WHS Regulation 237 Records of plant</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>The requirement to keep records of commissioning/decommissioning, dismantling and alterations imposes an extensive but unwarranted administrative burden for PCBU's in relation to plant such as prefabricated scaffolds that are constantly commissioned/ decommissioned, dismantled and altered.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>The requirement to keep records of commissioning/decommissioning, dismantling and alterations should be removed.</li> </ul>
<b>WHS Regulation 289 Meaning of high risk construction work</b>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>The tasks defined as high risk construction work (HRCW) are defined without regard to whether or not there are risks and inappropriately label all such work as 'high risk'. It is possible for some of these defined tasks to not pose a risk to health &amp; safety. E.g. painting a wall behind live power cables would be classed as HRCW by virtue of being work carried out near energised electrical installations or services, even if a risk assessment has been carried out and concluded that there is no possibility of contacting the live cables by carrying out the work. SA and Qld have made changes to the definition of high risk construction work as including the risk of falling more than 3m rather than 2m.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>If the SWMS provisions are retained this regulation should be modified so that the work is only HRCW if there is a risk to health and safety from the carrying out of that work, or alternatively, that the requirement for a SWMS and associated duties are only triggered if there is a risk to health and safety from the carrying out of the work.</li> <li>If the SWMS duty is retained, the fall risk threshold in the definition of HRCW should be changed more than 3m.</li> </ul>
<b>WHS Regulation 298 Security of the workplace</b>	<p>This regulation should be removed. It is unnecessarily prescriptive and adequate guidance is provided in the <i>Code of Practice – Construction Work</i></p>
<b>WHS Regulations 299, 300 Safe Work Method Statements (SWMS)</b>	<p>See comments at section 3.8.</p>



<p><b>WHS Regulation 302</b> <b>Review of SWMS</b></p>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>The requirements review control measures and SWMS can be adequately dealt with in the <i>Construction Work Code of Practice</i></li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>This regulation is unnecessary and should be removed.</li> </ul>
<p><b>WHS Regulations 314 - 315</b> <b>Further health and safety duties</b></p>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>The requirement for the Principal Contractor (PC) to put in place arrangements for ensuring compliance with duties is unnecessarily prescriptive, confusing and counterproductive. It is not clear what arrangement would be acceptable, and what would it matter, as long as compliance is achieved?</li> <li>The requirement for PCs to manage the risks stated in regulation 315 is unnecessary given the general requirements of part 3.1 to manage all risks and can be adequately addressed by guidance.</li> <li>Of more concern is that this regulation can potentially give subcontractors the wrong message that the PC is the sole party responsible for ensuring compliance. This can be counterproductive and could significantly lead to poor safety by subcontractors on a construction site.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>It is recommended that these regulations be removed.</li> </ul>
<p><b>WHS Regulation 317</b> <b>Duty to ensure worker has been trained (CIT training)</b></p>	<p><b>ISSUE</b></p> <ul style="list-style-type: none"> <li>This requirement is unrealistically onerous. It will not always be possible for a domestic house builder to make absolutely sure that untrained workers do not carry out construction work.</li> </ul> <p><b>RECOMMENDATION</b></p> <ul style="list-style-type: none"> <li>It should be subject to the qualifier 'so far as it is reasonably practicable'.</li> </ul>

