

Modernising Work Health and Safety Laws in Western Australia

Submission by the Australian Industry Group

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Australian Industry Group

Modernising work health and safety laws in Western Australia:

Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia

Submission to
Western Australia
Department of Mines, Industry
Regulation and Safety

AUGUST 2018

Ai
GROUP

**MODERNISING WORK HEALTH AND SAFETY LAWS
IN WESTERN AUSTRALIA: PROPOSALS FOR AMENDMENTS
TO THE MODEL WORK HEALTH AND SAFETY BILL FOR
ADOPTION IN WESTERN AUSTRALIA**

**SUBMISSION TO WESTERN AUSTRALIA DEPARTMENT OF
MINES, INDUSTRY REGULATION AND SAFETY**

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Ai Group is a member of Safe Work Australia (SWA) and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety Laws and continues to actively monitor implementation and amendments. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have been actively engaged in supporting the effective implementation of the Model WHS laws that were introduced in most states and territories of Australia, and in recent times New Zealand.

We have ongoing contact and engagement with employers on work health and safety issues, including informing them of regulatory changes, discussing proposed regulatory change and industry practices, as well as providing consulting and training services.

We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to work health and safety.

It is in this context that we make our submission in relation to the Report of the Ministerial Advisory Panel entitled [Modernising work health and safety laws in Western Australia: Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia](#) (the Report).

HARMONISED LEGISLATION

Ai Group is pleased to see that Western Australia is pursuing the adoption of the Model WHS Laws. It is a welcome step toward achieving harmonisation. We continue to hope that Victoria will eventually adopt the Model so that we can achieve harmonisation across all states, territories and the Commonwealth.

A key benefit of the harmonised approach to WHS law within the federation has been to unify and thereby clarify the language and intent of work health and safety law in Australian workplaces.

Those who do not practice work health and safety at a workplace level can underestimate the importance of such a development.

The ability of multi-state organisations to operate under consistent safety practice, language, jargon, systems and descriptions of personal and corporate responsibility across all their operations nationally should be self-evident. Even companies who only operate in Western Australia will interact with the national economy and health and safety principles from other states.

All governments in Australia profess their absolute commitment to ensuring safe workplaces. Harmonisation has been an important signal that they care enough to reconcile historical differences for the sake of clarity and focus and avoid the trap of too many different voices clouding the message.

Ai Group and our members strongly support the harmonised model and are concerned about variations proposed or adopted by individual jurisdictions. The harmonised model provides a process, through the multi-jurisdictional forum of Safe Work Australia, to consider significant amendments to the standards of legal responsibility, or the administration of the laws.

We are not fair-weather friends of the harmonised model and have previously argued that amendments made by individual jurisdictions should not be adopted outside the harmonised process, even when they might be seen as reforms supported by employers. Such is our commitment to the utility of harmonisation.

THE RECOMMENDATIONS OF THE REPORT

As outlined above, it is Ai Group's preference that Western Australia adopt the Model WHS Laws, without amendments other than those identified within the jurisdictional notes. Within this context, we provide our views on the amendments proposed.

In general, the Report has provided good insight into the rationale for the recommendations to amend the WHS Act when it is adopted in Western Australia. However, the Report lacks clarity around the impact that the adoption of the Model WHS laws will have on PCBUs in Western Australia. This means that many people who are considering this report do not have a full understanding of what the changes will mean to them and their business. Employers are generally concerned about the overall implications for their businesses and their officers. We have identified that they will be requiring assistance to understand and implement the laws.

It has been our experience in the jurisdictions that have adopted the laws that a high-profile communication and engagement strategy has been crucial to help businesses understand the changes and to utilise the new laws to drive an increased focus on health and safety improvements.

It is essential that, once a decision is made about these recommendations, a communication strategy is developed to assist businesses to understand that they need to prepare early in order to be confident of compliance when the laws come into effect in 2020.

We recognise that this is stage one of a process which will include a review of the Model WHS Regulations. Ai Group is keen to be involved in this process at an early stage to share our experiences of the implementation of the Regulations in other jurisdictions.

#	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).	Ai Group does not see this as a necessary amendment, but we do not have any strong objection.
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	Accept.
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).	Ai Group does not see this as a necessary amendment, but we do not have any strong objection.
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	Accept.
5	Amend the definition of <i>import</i> to include importation from another state or territory into Western Australia.	4.	<p>Ai Group understands the reasons why this recommendation was made; however, it is a significant amendment to the concept of importation as it is used and understood in WHS and most other regulatory contexts. That in itself could be very confusing.</p> <p>We are concerned that there may also be some unintended consequences when this flows through to regulations. Is there potential for PCBUs to have additional, unintended duties in relation to movement across state and territory borders within Australia?</p>

#	Recommendation	Clauses	Comments
6	Amend the meaning of supply to include the loan of an item.	6(1).	Accept.
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	<p>Ai Group acknowledges that this terminology has created some confusion from a practical perspective.</p> <p>However, it is not clear to us how this amendment will help deal with any concerns.</p>
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.	<p>We note that this recommendation of the National OHS Review was not endorsed by Ministers.</p> <p>If introduced in just one jurisdiction there is likely to be significant confusion about its application, particularly for service providers who work across jurisdictions.</p> <p>It will also discourage businesses from assisting each other by sharing their experiences and knowledge, and potentially reduce the development of industry knowledge to improve work health and safety. There are many supply chain relationships where regulators, and indeed the Australian WHS Strategy, encourage those with more knowledge and experience to support others in the supply chain who have less access resources.</p> <p>If this recommendation is adopted, the duty holders could be very broad and would need to be well-defined.</p> <p>The provision would need to capture both advice</p>

#	Recommendation	Clauses	Comments
			<p>and services sought by the PCBU, and also any recommendations that arose out of engagement with regulators and with Entry Permit Holders employed by unions.</p> <p>If Western Australia wishes to pursue adoption of this provision Ai Group believes it should be addressed at a national level, possibly as part of the current 5-year review.</p>
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a).	<p>It is unclear how a person would receive immediate treatment as an in-patient, without actually being admitted to hospital.</p> <p>If this proposed amendment progresses, there will need to be examples provided to duty holders about what would be included in this definition.</p>
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36.	<p>The proposed amendment mirrors the provisions currently within the WA OSH Act. However, the current WA Act does not link incident notification requirements to site preservation obligations.</p> <p>It would be inappropriate to require a workplace to “preserve the incident site” in circumstances where the worker has attended a medical practitioner for treatment at a time not closely connected to an incident, or when there is no identifiable incident. For this reason, we strongly object to this recommendation.</p> <p>If the recommendation is adopted, it should be included as an additional duty, not connected to site</p>

#	Recommendation	Clauses	Comments
			<p>preservation, in a new section as 38A or 39A.</p> <p>We also note that the list of prescribed diseases for this purpose (OSH Reg 2.5) do not align with those in the WHS laws (Reg 699). It is Ai Group's strong preference that the definition of notifiable incident is consistent across all jurisdictions and would encourage WA to adopt the list in the Model WHS Laws.</p> <p>It is Ai Group's view that all injuries or illnesses that are notifiable should be specified in the Act. The conditions listed in WHS Reg 699 were included there only because the Act had been finalised when it was agreed to include those conditions.</p> <p>WA is encouraged to include the list of notifiable incidents in the Act. Alternatively, the Act should specifically refer to Regulation 699, rather than the general reference, in section 36 of the Model, to "any other injury or illness prescribed by the regulations".</p>
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	Ai Group does not see this as a necessary amendment, but we do not have any strong objection.

#	Recommendation	Clauses	Comments
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	<p>Ai Group strongly objects to this proposed amendment. The Act allows for the establishment of multi-PCBU workgroups for the election of HSRs (sections 55 and 56). When this occurs PCBUs would generally reach an agreement about how the role of the HSRs will be funded.</p> <p>If multi-PCBU agreements are not in place, the worker of one PCBU should not be expected to become involved in an issue that involves an unrelated PCBU.</p> <p>To do so would create difficulties for the HSR, and a potentially unacceptable cost and lost productivity for the PCBU.</p>
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a).	Accept.

#	Recommendation	Clauses	Comments
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).	<p>It is Ai Group's view that all HSRs should receive training that enables them to understand their role and to have a base knowledge in WHS.</p> <p>The proposed amendment takes a similar approach to recent amendments in QLD. We raised a concern then, and we do again now. What is the consequences, for both the PCBU and the HSR, if the HSR does not want to attend the training?</p> <p>This is a question that needs to be answered if this proposed amendment progresses. To the best of our knowledge it has not been answered in QLD.</p>
15	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.	New clause to be added to section 76.	Ai Group does not see this as a necessary amendment, but we do not have any strong objection.
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	Ai Group does not believe that this amendment is necessary. However, we do not object to it being included for clarity. We note that the common law right is to cease performing the duties that are felt to be unsafe, not (in most cases) to cease all work or leave the workplace. This is an important distinction that, left unclarified, has caused many disputes at workplaces.
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.	Ai Group does not see this as a necessary amendment, but we do not have any strong objection.

#	Recommendation	Clauses	Comments
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.	Ai Group does not see this as a necessary amendment, but we do not have any strong objection.
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	<p>It is Ai Group's view that the 2016 amendments (agreed by Ministers) should be adopted by all jurisdictions. This will ensure that the <i>right of entry to inquire into a suspected contravention</i> is not utilised to bypass the controls that are in place within IR laws.</p> <p>We will not achieve any progress with the Model WHS laws if no jurisdiction is prepared to adopt an agreed amendment because to do so would make them the first.</p> <p>We encourage WA to adopt the 2016 amendments which include a requirement to provide at least 24 hours' notice for all entries by a permit holder.</p>
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.	<p>The SA variation states that:</p> <ul style="list-style-type: none"> • A permit holder must give consideration as to whether it is reasonably practicable to advise the Regulator that they are planning to exercise their right of entry to inquire into a suspected contravention. • If they exercise their power without being accompanied by an inspector, they must furnish a report on the outcome and the regulator must give consideration to what action they should take.

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			<p>The commentary in the Report indicates that the EPH is “allowed” to give consideration. Further, the recommendation is that the EPH should be given a discretion in relation to providing the Report – i.e. it changes “must” to “may”. It is also recommended that the regulator be required to provide a response [to the EPH report] to the PCBU and EPH.</p> <p>As highlighted at the start of this submission, Ai Group supports consistent adoption of the Model. However, we do see some merit in the SA approach which is designed to minimise entries that are not truly related to a WHS breach.</p> <p>It is unclear from the Report whether the practical application of the SA provisions has been assessed. This would provide valuable input to the WA considerations.</p> <p>The full intent of the SA provisions can only be effective if the EPH is required to provide a report. Otherwise the protection will not be complete, especially if the EPH has decided that it is not reasonably practicable to advise the regulator in advance of their entry.</p>

#	Recommendation	Clauses	Comments
			In summary: <ul style="list-style-type: none"> • Adoption of the SA provisions will have no impact if they are amended to give further discretion to the EPH; and • These amendments would be mostly unnecessary if a 24-hour notice period was adopted, in line with the 2016 amendments, as there would be little advantage in utilising WHS entry laws, rather than IR laws. This approach would further advance harmonisation by taking the lead in adopting the 2016 agreed amendments.
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.	Accept.
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	Accept.
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)	Accept.

#	Recommendation	Clauses	Comments
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).	Accept.
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).	Accept.
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	Accept.
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	<p>We note that the current provision within the OSH Act, at 48(5) states:</p> <p style="padding-left: 40px;">A person issued with an improvement notice commits an offence if the Commissioner is not notified forthwith upon the requirements of the improvement notice being satisfied.</p> <p>We are pleased to note that, since at least 1 January 2005, there has not been a prosecution for breaching this provision.</p> <p>Ai Group is concerned that these provisions put a PCBU in a difficult position when the manner of compliance is not black and white.</p>

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			<p>The PCBU may genuinely believe that they have complied, make a declaration to that effect, and later find that their declaration was considered <i>false or misleading</i> as the inspector wanted a different outcome to what the PCBU understood to be the case.</p> <p>If this recommendation is to be incorporated into the WHS laws, we would like to see the following:</p> <ul style="list-style-type: none"> • The provision reworded so that there is a requirement to notify, but failing to do so <i>forthwith</i> is not an offence • That a proforma be made available that: <ul style="list-style-type: none"> • utilises words such as “to the best of my knowledge we have complied ...”; and • includes a section where the action taken is described.
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.	It is Ai Group’s understanding that this provision is designed to maintain the status quo and will apply only to mines and offshore petroleum facilities. On this basis we accept the recommendation. If it is intended that the power would be used more widely, we would have strong objections.
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.	Accept.
30	Ensure that enforceable undertakings are not available for	New sub-	There appears to be a general community view that

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	Category 2 offences involving a fatality.	clause to be added to section 216.	<p>if someone dies as a result of a workplace accident, there necessarily must have been a high level of culpability on behalf of the PCBU and that culpability must attract significant financial penalties and punishment of the PCBU.</p> <p>Those who have more direct and objective experience with workplace safety incidents know this is not always the case. It may be that the money spent as part of an EU will make a much bigger contribution to making workplaces safer than a hefty fine, accompanied by enormous legal costs for both the prosecutor and the defendant.</p> <p>There is no logical case for a blanket exclusion of fatality incidents from the application of EUs, although we recognise the public debate might take on a different perspective.</p> <p>Ai Group believes that this issue is best addressed through administrative guidelines that can take into account all the factors associated with each individual event, including the views of the family of the deceased.</p> <p>If this exclusion is included in the laws, there should be some way that special circumstances can be considered. Perhaps a <i>presumption against</i> an EU applying in such cases, with the capacity for that presumption to be reversed, may be a better way to frame this issue legislatively.</p>

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31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	<p>Ai Group strongly objects to this recommendation.</p> <p>Unions already have considerable powers within the WHS Act. It is not appropriate to add this additional ability to interfere within the workplace.</p> <p>It may be that the workers and HSR are comfortable with the decision that has been made; it is not appropriate for the union to make applications that may not be supported by the workers.</p> <p>If this amendment was to progress, there would need to be a number of safeguards in place, including some form of confirmation from one or more workers that they supported the action being taken. This confirmation could be done as part of the lodgement process and may not need to be something shared with the PCBU.</p>
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	Accept.

#	Recommendation	Clauses	Comments
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.	<p>Ai Group strongly objects to this recommendation.</p> <p>As indicated in the table on pages 66 and 67 of the Report, there are many occasions when an EPH would be in breach of the Act and there is no situation where a union would initiate proceedings against an EPH, their employee.</p> <p>These provisions would be utilised by unions to initiate proceedings against PCBUs, potentially for no better reason than to cause mischief.</p> <p>Ai Group continues to hold the view that the regulator and the DPP are the only entities that should have the power to initiate any prosecution or civil penalty action under WHS laws.</p> <p>If this recommendation was to be progressed, it would be essential for the benefit of fairness and balance that employers and employer associations would also be given the power to initiate civil penalty actions in relation to EPH breaches of the right of entry provisions.</p>

#	Recommendation	Clauses	Comments
34	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.	274(2)(b).	<p>Ai Group strongly objects to this recommendation, as we have done in other jurisdictions that have adopted this approach.</p> <p>Codes of Practice have a far more significant impact on workplace knowledge and behaviour than the Act, or even the Regulations.</p> <p>When individual jurisdictions start to make changes to agreed Codes without participating in the national consultative process, harmonisation begins to be seriously undermined in a very practical sense.</p> <p>There are other tools available to jurisdictions to respond quickly to emerging issues, such as alerts and guidance documents.</p>
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.	Ai Group supports this approach, in principle. We are keen to continue to be consulted as changes progress.
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.	Accept.

#	Recommendation	Clauses	Comments
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.	Accept.
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	Accept.
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	Accept.
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.	Accept.
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.	Accept.
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.	Support.

#	Recommendation	Clauses	Comments
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.	Our members have raised some concerns about how the WHST may be utilised (misused) by unions and Entry Permit Holders (EPHs) to interfere with workplace arrangements, outside legitimate work health and safety issues.
44	Insert the <i>WHS Tribunal</i> as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	<p>However, we also believe that this could create an appropriate forum for employers to seek assistance when they believe that right of entry provisions have been breached.</p> <p>We provide qualified support for this approach and will be keen to see how it will work in practice.</p>