

Modernising Work Health and Safety Laws in Western Australia

Submission by the Industrial Foundation for Accident Prevention

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1. 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).	No comment.
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	No comment.
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).	No comment.
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	No comment.

#	Recommendation	Clauses	Comments
5	Amend the definition of import to include importation from another State or Territory into Western Australia.	4.	<p>According to the MAP comments, amendment of the term import is necessary to overcome a lack of compliance with safety obligations by ‘importers’ from other States and Territories with regards subsequent supply of plant and materials to WA.</p> <p>Of note, is the definition of ‘import’ used in all other States and Territories means ‘to bring into (the State / Territory) from outside Australia’. The amendment is therefore inconsistent with existing safety laws and common definition of the term.</p> <p>Although other jurisdictions are likely to have experienced the same issues with importers who fail in their duties (as identified within the MAP comments), they have not deemed it necessary to amend the definition of import and it remains as ‘to bring into the State from outside Australia’. This is likely due to the fact that the obligations of importers, are similar if not the same as those imposed on suppliers of plant or substances.</p> <p>If the term import is expanded, PCBU’s from outside of WA will be both an importer, and a supplier of plant or substances. The obligations are the same regardless of which definition is met.</p> <p>Given the above, it’s unclear why there is any need to artificially broaden the definition of import, when the existing safety obligations of PCBU’s who supply plant and materials achieves the same standards with respect to safety obligations.</p> <p>Not supported.</p>
6	Amend the meaning of supply to include the loan of an item.	6(1).	No comment.

#	Recommendation	Clauses	Comments
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	No comment.
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>As identified, the proposed expansion of obligation holders to include PCBU's who provide 'services', was a recommendation of the National Review and was not endorsed by the Workplace Relations Minister on the basis that these safety obligations already exist and are captured within the primary duty of care provisions.</p> <p>There are unintended consequences of such, including professional advisers such as lawyers or training providers such as IFAP (Industrial Foundation for Accident Prevention) who may inadvertently, and unfairly, get caught in the broad expansion of the duty.</p> <p>It is therefore unclear why further amendment to the Act is necessary when the existing provisions more than adequately provide for safety obligations.</p> <p>There are no comments provided within the MAP recommendations paper clarifying or justifying the need to create further obligations on service providers. Further to this position, such as WHS consultants are not clearly categorised as a profession and MAP has not defined the minimum qualification requirements.</p> <p>Apart from the legislative safety obligations between the entities, the commercial relationship between the service providers, provides for civil remedies should the quality of that advice or service not be of an acceptable standard, or if the person providing the advice is negligent.</p> <p>The combination of civil remedies and the existing statutory obligations are more than adequate with respect to ensuring the quality of safety service is appropriately managed.</p> <p>Including further obligation holder provisions above and beyond those already imposed by the draft Act is unnecessary and is not supported.</p> <p>Not supported.</p>

#	Recommendation	Clauses	Comments
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a).	No comment.
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36.	No comment.
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	No comment.

#	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>As an elected Health and Safety Representative (HSR) from a workgroup of their employer, the HSR has been elected by their peers to represent their safety interests. As is appropriate, in limited circumstances other workgroups from within the same PCBU, may seek assistance.</p> <p>Apart from the trigger of being ‘asked’ to assist another workgroup, there are no limitations of the HSR’s powers mentioned in the recommended amendments. Should the suggested amendment be approved, HSR’s will be entitled to exercise all their existing powers with respect to others, despite not being an elected representative of that work group or an employee of that PCBU. In the event of a disagreement between employees of a workgroup who have “asked” a HSR to assist and who then change their mind – what mechanism will be in place to ensure that the HSR ceases and the PCBU recognises that the particular HSR is no longer acting for the workgroup?</p> <p>Powers of HSR’s are extremely broad ranging and include the ability to issue Notices against their employer for an alleged contravention of the Act. Of concern is the practical and financial impact of the effect of this expansion of responsibility by HSR’s.</p> <p>Not supported.</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).	No comment.

#	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>Given the significant powers and responsibilities of HSRs, it is without question that they must be trained and competent to perform their role. Training should be mandatory, as it will only improve the level of skills held by HSR's, and benefit both workers and employers alike.</p> <p>It is recommended that HSRs also undergo refresher training every three (3) years. At present this is not a requirement, however, we submit that it should also be introduced as a requirement so as to ensure HSRs keep abreast of changes / updates to Regulations etc and to maintain a minimum level of competency at all times.</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.	Agreed.
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	<p>Consistent with existing OH&S Legislation in WA workers currently have the right to stop work should they feel that there is an imminent risk to their own health and safety. We submit that the current provision should be retained in the new legislation as the responsibility for safety is with the individual and employer at all times. Such an amendment could expose a worker who fails to identify a hazard and cause a colleague to stop work and arguably this could put the employee in breach of his / her personal duty of care under the legislation.</p> <p>On that basis there is no reason to implement an amendment.</p>

#	Recommendation	Clauses	Comments
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.	No comment.
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.	No comment.
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>The current arrangements for a Union exercising a right of entry contained in the industrial legislation (Industrial Relations Act 1979(WA)) should continue. They have been tested and the current case law is well understood by the industrial players in this State.</p> <p>Not supported.</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>Although we do not agree with the proposal, we comment that should this provision become the law, that the EPH should be required to inform the Regulator prior to entering worksites. If there is reason to suspect WHS breaches or an immediate threat to the health and well being of employees and / or the general public, the Regulator must be provided the opportunity to respond by leading the right of entry or attending with the EPH.</p> <p>Further, a report must be provided to the Regulator by the EPH post inspection to ensure that identified improvements are either closed out or noted with closeout timelines. The process must also be about confidence and commitment by all parties if WA is to realise any significant step change in workplace WHS.</p> <p>Not supported.</p>

#	Recommendation	Clauses	Comments
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.	No comment.
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.	No comment.
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)	No comment.
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).	No comment.

#	Recommendation	Clauses	Comments
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).	Not supported.
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	The legislation should enshrine an individual's right to have a lawyer present during any interview by inspectors. This is particularly important as the right to silence has been removed by the legislation. Not supported.
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	No comment.
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.	No comment.
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.	No comment.

#	Recommendation	Clauses	Comments
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	<p>There is no doubt that fines and penalties are a useful deterrent for breaches of safety laws. The degree of reckless indifference to safety obligations identified within Category 1 offences should preclude the opportunity to avoid the imposition of significant financial penalties. However, while fines have some effect, it remains the case that money received from fines and penalties simply goes to Consolidated Revenue and is not directly used to improve health and safety outcomes at work.</p> <p>Prosecution Policies by Regulatory bodies are based on three key considerations.</p> <p>First, there must be a case to answer. Secondly, there must be a likelihood that the prosecution will succeed, and finally, the prosecution is consistent with public interest. This consideration of public interest is an inherent cornerstone of the evaluation by the established Regulatory Review Board to accept an Enforceable Undertaking. In that regard, since the provision was first established in Queensland, there has never been an Enforceable Undertaking associated with a workplace fatality.</p> <p>Enforceable Undertakings have been proven in the eastern states to deliver substantial benefits to safety at the workplace and throughout industry. All Regulatory bodies are quick to point out that Enforceable Undertakings are not a means to avoid prosecution. As a rule of thumb, PCBU's seeking an Enforceable Undertaking should be required to expend three times the amount likely to be imposed by a court (fine / penalty) on measures to improve safety.</p> <p>There is no limitation as to the type of safety improvements that can be nominated by the PCBU within an Enforceable Undertaking. The stringent review by the nominated Regulatory Review Board will ensure that each applicant is considered and evaluated on its merits and in accordance with the 'Public Interest' test.</p> <p>Category 2 offences occur without the need for negligence or reckless conduct by the PCBU. While not diminishing the seriousness of this charge, it remains the case that prosecutions are often initiated due to an omission as opposed to a deliberate act by the PCBU.</p> <p>Supported.</p> <p>Further reducing the availability of Enforceable Undertakings, overlooks the real evidence and positive experience from other States. While fines remain a valid deterrent, they are not the best solution in all circumstances.</p>

#	Recommendation	Clauses	Comments
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	<p>The suggested amendment identifies the need to eliminate the administrative burden faced by employers and employees where more than one worker is affected by the decision. As with a number of these recommendations, no specific examples or data has been provided which demonstrate or support the proposition that employers and employees are faced with administrative difficulties due to the existing class of eligible persons.</p> <p>It is difficult to support further amendments to existing provisions of the 'harmonised laws' without clear and empirical data to support the change. There is no doubt Unions should be able to support members throughout any review. However, affording Unions the right of subrogation when they are not affected by the original decision is contrary to established safety laws and is not supported.</p> <p>Given the breadth of the suggested amendments and nature of decisions that may be reviewed, it is likely that employers will be burdened by far more applications for review than what they may be faced under the current provision. For these reasons, the suggested amendment is not supported.</p> <p>Not supported.</p>
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	<p>Prosecution should only be initiated by legal officers employed by the department of Regulator.</p> <p>Not supported.</p>
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>The authority to prosecute should remain with the Regulator and / or the Government. Providing the right to the Union to take civil proceedings is unnecessary and has the potential of conflict resulting in extended legal action and unnecessary cost.</p> <p>However, should the Government be inclined to include such a provision, we submit that "any interested person" should also have the right to initiate a prosecution. This is consistent with the fundamental human right of Freedom of Association and the fact that not everyone is a member of a Union and there wishes also ought to be taken into account.</p> <p>Not supported.</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).	No comment.
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.	No comment.
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.	No comment.
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.	No comment.

#	Recommendation	Clauses	Comments
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	No comment.
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	No comment.
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.	No comment.
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.	No comment.
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.	No comment. However, this should not impact upon our submission that a Union's right of entry should remain under the auspices of the Industrial Relations Act and the processes that surround same.

#	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.	No comment.
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	No comment.
	<i>Add your comments by creating new rows</i>		