



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY



ACCI Comments WA WHS Bill 2014

JANUARY 2015

EXECUTIVE SUMMARY

ACCI supports the process of consolidation of legislation involved in developing the model legislative framework in work health and safety (WHS). The model legislation is a positive step towards strengthening health and safety outcomes in Australian businesses and will be further improved by the adoption of the model legislation in Western Australia.

Consistent application of the legislation including compliance and enforcement across jurisdictions is much needed. Industry commends the effort to eliminate inconsistencies and duplication in WHS legislation.

ACCI supports a legislative package that includes simple regulation supported by short and sharp industry specific guides.

**The Australian Chamber of Commerce and Industry
is the leading voice of business in Australia.**

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

2. INTRODUCTION

- 2.1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a written submission on the Western Australian Work Health and Safety Bill 2014.
- 2.2. These comments are provided by ACCI as a result of consultations with members and our wider industry network and are without prejudice to any consideration of these matters by any of our individual members.
- 2.3. ACCI members may make submissions. This submission is made without prejudice to ACCI or its members' views.

3. COMMENTS

ACCI supports the process of consolidation of legislation involved in developing the model legislative framework in work health and safety (WHS). The model legislation is a positive step towards strengthening health and safety outcomes in Australian businesses and will be further improved by the adoption of the model in Western Australia.

That Victoria and Western Australia did not adopt the model legislation at the same time as other jurisdictions has caused some difficulties. For example multi - state employers or those travelling across borders there remains a need to continually check requirements in each jurisdiction.

Consistent application of the legislation including compliance and enforcement across jurisdictions is much needed. Industry commends the effort to eliminate inconsistencies and duplication in WHS legislation.

In addition ACCI supports a nationally consistent approach to work health and safety in mining. Any legislative outcomes should support and mirror the provisions in model Work Health & Safety legislation.

3.1 Control

ACCI members remain concerned about the application of control, especially where there are multiple duty holders.

Even though a PCBU's duty extends only, so far as is 'reasonably practicable', further clarity is needed on the term 'control' to assist define where the line is drawn on what is *within capacity to influence or direct* by the person. Clarification on the issue of Control should be strengthened in the legislation.

As an example, emergency evacuation is site specific and it is not always clear who would have control particularly where there are multiple duty holders. In addition for small businesses or shopping centres for example a simple agreement could take into account any obligations or could involve co-located emergency services.

3.2 Australian Standards

ACCI confirms the Ministerial direction and Safe Work Australia (SWA) commitment to the removal of references to Australian Standards in legislation. Australian Standards are costly and numerous. Business cannot be expected to purchase the range of Australian Standards (AS), especially given the high volume of cross-referencing between standards. ACCI does not support the inclusion of cross referenced standards.

This approach could also be reflected in Interpretive Guidelines or Explanatory Memorandum.

If information is vital and complex and technical then the relevant text could be included in guidance supporting the legislation. In this way relevant standards can be referenced for further information in supportive documents but should not be used as mandatory requirements.

Whilst ACCI supports the development of technical standards, ACCI does not support Australian Standards on policy or management areas.

When a reference to Australian Standards is made, government should ensure that these standards are free, accessible and that they are in plain simple language.

3.3 WHS Record keeping requirements

Recording and providing information to ensure WHS and to facilitate discharge of any duties is encouraged where there is a demonstrated need. ACCI recommends a minimal approach to record keeping requirements where there is an established proven need.

ACCI Members in other jurisdictions report significant time and resources devoted to auditing and health management systems with no discernible safety benefits. For example the current requirement for record keeping for audiometric testing.

3.4 Application of “Reasonably Practicable”

‘Reasonably practicable’ is used to qualify duties to ensure health and safety and certain other duties in the WHS Act and Regulation. It means that which is, or was at a particular time, reasonably able to be done to ensure health and safety involves taking into account relevant matters including:

1. the likelihood of the hazard or the risk occurring
2. the degree of harm that might result from the hazard or the risk
3. knowledge about the hazard or risk
4. ways of eliminating or minimising the risk, and
5. the availability and suitability of ways to eliminate or minimise the risk.

A duty holder must consider what can be done and what would be reasonable in the circumstances.

ACCI maintains that this qualifier should be used whenever there is an alternative or a complex response possible. As an example the duty to provide changing and washing facilities should be qualified by what is reasonably practicable. There are a range of responses possible and these should be commensurate with the size and nature of the operations. As an illustration, plumbers that have dynamic work should not be required to provide the same facilities as would be the case for a static workplace.

3.5 Right of Entry

Under the model WHS legislation there are two applications for authorised permit holders. They can:

- inquire into suspected contraventions of work health and safety laws and
- consult and advise such workers about work health and safety matters.

ACCI notes that there is an ongoing issue of how the WHS Entry Permits relate to FWC permits. These should be consistent. Some members have reported health and safety issues misused for industrial purposes. It must be clear that the person that seeks to rely on a reasonable concern about an imminent risk to his or her health and safety, has the burden of proving that the imminent risk exists. This must also be recorded clearly.

ACCI supports notification 24 hours prior to entry or access to a workplace. This should be the minimum allowable standard to provide both consistency with other provisions in the WHS Act and Fair Work legislation, and give notice to a PCBU to ensure they can appropriately respond.

Failure by a WHS entry permit holder to provide a report should be grounds for a suspension or revocation of the WHS entry permit holder's permit. Where multiple WHS entry permit holders attend a workplace on the same occasion, each WHS entry permit holder should be required to submit an individual report.

ACCI strongly encourages consistent application and enforcement across WHS jurisdictions of entry permit requirements. For example

- A PCBU who has management or control of the workplace must be able to request an authorised inspector from the relevant regulatory body to accompany any right of entry by union officials.

- A PCBU should be able to report suspected abuses of WHS right of entry. The regulator would then be required to investigate the complaint and report back to the complainant within a reasonable period of time.
- It should be grounds for the suspension or revocation of the WHS permit holder's permit if the WHS permit holder has been found to have intentionally breached WHS right of entry laws or has breached WHS right of entry laws on multiple occasions.
- WHS right of entry permit holders should be required to have completed site specific induction before being able to enter a site.

As an example of the need for site specific induction in *Darlaston v Parker*, the Federal Court of Australia found that three CFMEU officials had breached the then Workplace Relations Act 1996 (Cth) while on a building site under a right of entry permit on 3-4 December 2008. The three union officials failed to follow a reasonable safety instruction, namely to undergo a brief safety induction before entering the site. The Court also found that CFMEU official, Thomas Mitchell, was also in breach of the Act by not following a reasonable request to come down from scaffolding, CFMEU official, Brian Parker, was in breach for hindering and obstructing workers, and Thomas Mitchell was found to be acting in an improper manner when he intentionally drove his car into a cyclone fence, endangering a bystander.

- Regulators must be transparent and apply consistent rules to satisfy that permit holders are fit and proper persons
- ACCI Members note that there are difficulties distinguishing those that are genuinely entering to assist a health and safety representative. Assistance needs to be clearly defined and applied consistently. ACCI has been advised of instances where a union official is requested as an assistant by a health and safety representative, despite not possessing appropriate qualifications or expertise that would enable them to assist.
- Members also note that there are difficulties distinguishing those that are genuinely entering to consult. This needs to be clearly defined and applied consistently. Local site management (in addition to PCBU) need to be aware that an entry is to take place and the WHS basis for the consultation.

3.5 Application of control hierarchy to psychosocial matters

ACCI maintains that the hierarchy of controls does not apply to psychosocial hazards, exclude psychosocial hazards completely from strict application of control hierarchy. It is the early reporting and early interventions that are appropriate responses for minimising the risks to work psychosocial health and safety. Psychological health is uncertain, debatable and often relies on perceptions.

This has been supported by the authors of a recent publication of the book, *The Australian Workplace Barometer: Psychosocial safety climate and working conditions in Australia*, Professor Maureen Dollard and psychologist Tessa Bailey (University of South Australia's Asia Pacific Centre for Work Health and Safety).

The authors confirm that, *it is difficult to apply the OHS hierarchy of controls (elimination, substitution, engineering, administrative, behaviour and PPE) when attempting to address psychosocial hazards identified through risk assessment.*

The PCBU cannot reasonably be held responsible for the diverse range of social environmental, biological and psychological factors that can impact in an individual's mental health.

The PCBU is not responsible for the way people feel, think, behave or interact, but they can voluntarily assist and support - so far as is reasonably practicable.

The [National Health Priority Areas Report on Mental Health](#) defined mental health as *'the capacity of individuals and groups to interact with one another and the environment, in ways that promote subjective wellbeing, optimal development and the use of cognitive, affective and relational abilities'. A diverse range of social, environmental, biological and psychological factors can impact on an individual's mental health. In turn, people can develop symptoms and behaviours that are distressing to themselves or others, and interfere with their social functioning and capacity to negotiate daily life. These symptoms and behaviours may require treatment or rehabilitation, even hospitalization'*

This definition shows the indeterminate nature of mental health and difficulty with the obligations under the WHS legislation.

The same "Stressors" do not always lead to negative outcomes in each individual. Further 'work related' stressors cannot be isolated from other factors affecting a person's psychology.

ACCI network maintains that psychological health involves complex behaviours and perceptions and cannot be treated in the same way as a risk from a physical hazard in the workplace

That is the prevention and management cannot be the same as is applied to a physical hazard such as noise. What is important are early reporting mechanisms and then early interventions. The focus of any workplace actions should therefore be on encouraging early reporting that affects WHS and appropriate interventions. Any actions must also be proportionate to the risk and recognise the size and nature of the business. The most effective are non-legislative approaches, such as policies, mechanisms for early reporting, and for early intervention.

Similarly ACCI does not support monitoring of psychological health and therefore does not support S19 (g) that refers to physical and psychological 'health monitoring' for the purposes of prevention of injury or illness. There is specific monitoring for changes to health status with exposure to specified substances listed in a schedule of Model legislation.

3.6 Multiple duty holders

Clarification is needed on the extent to which a PCBU holds a particular duty to determine their respective duties where there are multiple duty holders at a particular workplace. The current test of whether a matter “is within the person’s capacity to influence and control” is difficult to apply and means that each concurrent duty holder has similar responsibilities for the same risk.

As an example, where there is high risk construction work under the model WHS regulations, a principle contractor is appointed. ACCI Members report that there are a wide range of interpretations of the term principal contractor. In some cases more than one principal contractor is appointed to more than one construction project especially where there is as a large programme of work. Application of multiple duty holders in the workplace is problematic.

3.7 Enforceable Undertakings

ACCI does support the option of using enforceable undertakings. When used correctly these can provide benefit to the organisation and the wider community.

3.8 Option to Cease Unsafe Work

The right to cease unsafe work should remain with the individual worker. In the model legislation individual workers have the statutory right to cease work on safety grounds. This acknowledges that individual workers can be best placed to make this decision. Clear grounds for this belief must be provided. And an issues resolution procedure established. Health and safety representatives would still be able to provide advice to workers but should not have extra rights to cease work.

3.9 Other

Lessons from Model Codes of Practice

Existing Model Codes of practice have too wide an audience and thereby lose their application – one size does not fit all. This has made the current model Codes of Practice too complex and lengthy and ACCI supports the Ministers direction to simplify any new guidance material.

To achieve the aim for improvements in WHS in workplaces, there is a significant need for targeted specific guides that people can pick up and use in their businesses. The number, length and complexity of the model Codes of Practice remain a particular concern. Long and complex Codes of Practice do little to assist small business to meet their work health and safety duties. ACCI supports the development of Guides and Information Sheets. They provide the ability to target the specific audiences, specific applications and issues.

Guides and Information Sheets must be consistent with the legislation and must not include concepts which change the meaning and intent of the legislation itself.

Education and Awareness

Industry experience for smaller businesses suggest that the best way to improve safety outcomes is to provide clear and practical solutions to common safety issues with strong education and awareness programmes. These can best achieve their aims when partnered with the industry or employer association. Research has shown that these organisations are the credible trusted sources for businesses.

4. ACCI MEMBERS

ACCI CHAMBER MEMBERS: ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY BUSINESS SA CHAMBER OF COMMERCE NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF COMMERCE & INDUSTRY VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY **ACCI MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC AND SPECIALTY PRODUCTS INDUSTRY AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION AUSTRALIAN BEVERAGES COUNCIL AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES AUSTRALIAN FOOD & GROCERY COUNCIL ASSOCIATION AUSTRALIAN HOTELS ASSOCIATION AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP AUSTRALIAN MADE CAMPAIGN LIMITED AUSTRALIAN MINES & METALS ASSOCIATION AUSTRALIAN PAINT MANUFACTURERS' FEDERATION AUSTRALIAN RETAILERS' ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY BUS INDUSTRY CONFEDERATION CONSULT AUSTRALIA HOUSING INDUSTRY ASSOCIATION LIVE PERFORMANCE AUSTRALIA MASTER BUILDERS AUSTRALIA MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA (THE) NATIONAL BAKING INDUSTRY ASSOCIATION NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION NATIONAL FIRE INDUSTRY ASSOCIATION NATIONAL RETAIL ASSOCIATION OIL INDUSTRY INDUSTRIAL ASSOCIATION PHARMACY GUILD OF AUSTRALIA PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA RESTAURANT & CATERING AUSTRALIA VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE