

Australian Industry Group

Work Health and Safety Bill Western Australia

Submission

JANUARY 2015



Comments on the *Work Health and Safety Bill 2014*

Ai Group

The Australian Industry Group (Ai Group) is Australia's 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 congratulates the Western Australian Government on progressing with the adoption of the Model WHS Laws, through the introduction into Parliament of the Work Health and Safety Bill 2014.

Ai Group is a strong supporter of harmonisation of work health and safety. We believe the approach provides clarity and certainty around the legal obligations and activities necessary to improve the health and safety of workers across Australia. This is especially important in an environment where workers are becoming more mobile and businesses need to explore new opportunities, including working across state/territory borders, in order to prosper.

We are pleased to note that the WA WHS Bill has made only a relatively small number of amendments to the Model WHS Laws, and that many of these amendments are consistent with the WA Government's states policy throughout the development of the Model WHS Laws that:

- Union right of entry would not be included in the laws, as it was considered that current workplace relations provisions are sufficient;
- There would be no reverse onus of proof in the discrimination provisions; and
- Health and Safety Representatives (HSRs) would not be given the right to direct a cessation of work.

Our comments below are focused predominantly on the areas where changes have been made to the Model WHS Laws.

Clause (section) of the Model WHS bill	Comment
Clause 17	<p>Management of risks</p> <p>Inclusion of additional subsection (2) which states:</p> <p style="padding-left: 40px;"><i>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 had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.</i></p> <p>We note that this provision is identical to the sub-section added to the South Australian WHS Bill. It is presumed that it is designed to overcome concerns about how far responsibilities apply to each duty holder.</p> <p>It is Ai Group’s view that this clarification is provided by the qualification of what is <i>reasonably practicable</i>, and is therefore unnecessary. In addition, there is a view that the “control” test articulated in sub-section (2) may mislead duty holders to believe that their obligations are more limited than they are in reality by implying a subjective test of control.</p>
Clause 38(7)	<p>Incident notification</p> <p>Ai Group strongly supports the removal of 38(7) which requires the person conducting a business or undertaking (pcbu) to retain records of the notification for 5 years.</p>
Clause 68(2)(g) and 70(1)(g)	<p>Assistance to HSRs</p> <p>Ai Group welcomes the additional provision which clarifies who can assist an HSR.</p> <p>However, it is Ai Group’s view that it would also be beneficial to make further amendments that would be applied when the assistance was being provided by an “authorised representative”. The introduction of a notice period that aligns with the relevant workplace relations right of entry provisions would minimise the opportunity for this provision to be utilised to circumvent other right of entry laws. Such an amendment would be consistent with changes that have recently been made to the Queensland WHS Act. The provisions, at s.69 of the Queensland Act are reproduced below for information:</p> <p style="padding-left: 40px;">(3A) Subsection (3B) applies if—</p> <p style="padding-left: 80px;">(a) a health and safety representative requests the assistance of a person (the assistant) under subsection (2)(g); and</p> <p style="padding-left: 80px;">(b) the assistant requires access to the workplace to assist the health and safety representative.</p> <p style="padding-left: 40px;">(3B) The health and safety representative must give notice of the assistant’s proposed entry to—</p> <p style="padding-left: 80px;">(a) the person conducting the business or undertaking at the workplace; and</p> <p style="padding-left: 80px;">(b) the person with management or control of the workplace.</p> <p style="padding-left: 40px;">(3C) A notice given under subsection (3B) must—</p> <p style="padding-left: 80px;">(a) comply with a regulation made for this subsection; and</p> <p style="padding-left: 80px;">(b) be given to the persons mentioned in subsection (3B)(a) and (b)—</p> <p style="padding-left: 120px;">(i) during the usual working hours at the workplace; and</p> <p style="padding-left: 120px;">(ii) at least 24 hours, but not more than 14 days, before the assistant’s entry.</p>

<p>Clause 74(2)</p>	<p><i>Advising Regulator of HSRs</i></p> <p>This provision has been modified from a requirement to provide the regulator with an up-to-date list of HSRs, to a requirement to advise the regulator of the election of an HSR.</p> <p>It is acknowledged that this does reduce the regulatory burden on the pcbu. However, it is not clear to us what benefit is achieved by the regulator being made aware of newly elected HSRs; especially when there is no requirement to advise of the discontinuation of an HSRs term of office.</p>
<p>Clause 78</p>	<p><i>Arrangement for Committees</i></p> <p>Ai Group supports the flexibility provided by removing the requirement for a committee to meet at least every 3 months.</p>
<p>Clause 100</p>	<p><i>Request for review of Provisional Improvement Notice (PIN)</i></p> <p>Ai Group supports the removal of the 7 day timeframe to request a review of a PIN issues by an HSR; it is more appropriate to utilise the compliance date as the legislated timeframe, as has been done in this amended provision.</p>
<p>Clause 224</p>	<p>Ai Group supports the removal of the 14 day timeframe to request of an internal review; it is more appropriate to utilise the compliance date as the legislated timeframe, as has been done in this amended provision.</p> <p>We do not support the changes to this section which allow the internal reviewer to make a decision as soon as practicable, rather than within a 14 day timeframe. This is particularly problematic in circumstances where the review request relates to a prohibition notice which has not been stayed.</p>
<p>Clause 184</p>	<p>This provision in the Model WHS Laws allows for compensation to be obtained from the (state) in relation to losses associated with the exercise of powers upon entry, including the power to seize things. The provision is not included in the WA WHS Bill.</p> <p>It is Ai Group's view that, if the powers are exercised unreasonably, there should be an avenue for a pcbu to seek compensation.</p> <p>We request that consideration be given to including this provision in the Bill.</p>
<p>Part 11</p>	<p><i>Enforceable undertakings</i></p> <p>We note that the entire part relating to enforceable undertakings has been removed from the Bill.</p> <p>It is Ai Group's view that the ability to accept an enforceable undertaking is an appropriate compliance activity that should be in the WHS laws. Where the provisions exist the regulator is not required to accept an enforceable undertaking and various safeguards are in place to ensure that they are not misused.</p> <p>We request that consideration be given to including this provision in the Bill</p>

<p>Clause 228</p>	<p><i>Stays on reviewable decisions</i></p> <p>This section contains two significant variations from the WHS Model Act, which are addressed below:</p> <p>The Model WHS Laws include a provision at 228(4) that the internal reviewer must make a decision on an application to stay a prohibition notice within 1 working day. The WA WHS Bill modifies this to 3 days.</p> <p>At 228(5) the Model WHS Laws state that if the reviewer has not made a decision within the required timeframe, the reviewer is taken to have made a decision to grant a stay. The WA WHS Bill reverses this, stating that if there is a failure to make a decision within the required time, the reviewer is taken to have made a decision not to grant a stay.</p> <p>Both of these provisions have the potential to have a significant financial impact on the pcbu. In some situations, a prohibition notice can cause large parts of a process (sometimes the entire process) to cease operation.</p> <p>It is unreasonable for a pcbu to wait three days for a decision to stay a prohibition notice.</p> <p>Further, a default position that a stay is not granted if the timeframe is not met, does not provide any incentive for the internal reviewer to meet the required timeframes. An unintended consequence of this approach is that an internal reviewer may find it easier to not meet the timeframes than to make a difficult decision to grant or deny a stay of the prohibition notice.</p> <p>Ai Group is opposed to these amendments to the WHS laws. However, we object most strongly to the default position being that a stay is not granted if timeframes are not met by the regulator.</p>
<p>Clause 232(1)(a)</p>	<p><i>Limitation period for prosecutions</i></p> <p>The Model WHS Laws establish two years as the limitation period. The WA Bill increases this to three years.</p> <p>It is Ai Group's strong view that two years should be sufficient time for the regulator to initiate a prosecution, and this change should not be made.</p>
<p>Clause 277</p>	<p><i>Review of the Act</i></p> <p>Ai Group supports this additional provision which requires operation of the Act to be reviewed after 5 years.</p>