



## **STATEMENT**

# **DRAFT WORK HEALTH AND SAFETY BILL 2014 (GREEN BILL)**

**BY IFAP**

30th January, 2015

**INTRODUCTION**

The Industrial Foundation for Accident Prevention (IFAP) is a not-for-profit, member-based organisation, governed by a Board of Directors. It is based in WA and is the largest organisation of its type in Australia, with over 800 corporate and approximately 1,500 individual members. IFAP delivers specialised training to more than 20,000 participants each year.

IFAP has been at the leading edge of health and safety since 1962, providing independent counsel and support to our stakeholders, including local and State government, on policies and practices to reduce the incidence of workplace injury and death.

The comments which follow are IFAP's response to the draft Work Health and Safety Bill 2014 (Green Bill), tabled in the WA Parliament by the Minister for Commerce, Hon Michael Mischin, on 23 October 2014.

IFAP's comments reflect the combined wisdom of its Members, Directors and staff.

IFAP appreciates the collaboration of the Safety Institute of Australia, in the preparation of the responses to the Green Bill by our two organisations.

**GENERAL COMMENT**

IFAP supports the concept of National Harmonised Laws to regulate and improve the performance of work health and safety in Western Australia and nationally.

The Board believes that harmonisation across State laws, based on national Model Legislation, will go a long way to address the inconsistencies across jurisdictions in Australia and will remove some of the more egregious aspects of the existing laws in some States and Territories.

After considering the Green Bill, IFAP supports it being introduced in WA, subject to the following considerations.

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**SPECIFIC COMMENTS****1. Extension of 'Employer' and 'Employees'**

IFAP supports the extension of the general duty of care as proposed by Lord Robens in 1972 from 'Employer' to 'Persons Conducting a Business or Undertaking' (PCBU). This reflects the dynamic approach to employment relationships in contemporary workplaces and IFAP sees it as a progressive move.

Similarly, IFAP supports extending the definition of 'Employees' to 'Workers' to reflect the changing nature of contemporary workplace arrangements.

**2. Volunteers**

Section 7(4)(a) of the Green Bill excludes Volunteers from the definition of "Worker". The Bill places Volunteers into the category of "Others" who may be at a workplace.

IFAP believes that Volunteers should not be a secondary class of person in the workplace, as in many instances they do similar work to an employed person. IFAP believes that the approach taken in the Model Legislation for the protection of Volunteers should be incorporated into the WA Legislation.

**3. Role of Health and Safety Representatives (HSR)**

IFAP supports the extension of the role of Health and Safety Representatives to include a greater emphasis on consultation and the capacity to address minor issues with notices, or to cancel notices. These extensions are in line with research conducted by IFAP on how to strengthen and support the role of Health and Safety Representatives.

**4. Right of a Health and Safety Representative to Stop Work**

IFAP agrees with the government's modification of the Model WHS Bill to not provide a power for Health and Safety Representatives to direct a worker to stop work.

**5. Appointment of Health and Safety Representatives**

IFAP does not support the extension of the term of office of Health and Safety Representatives from two years to three years (s64(1)). It is IFAP's experience that a two-year term is already significant demand on HSRs and that to increase the term by 50 per cent will make the role significantly less attractive to workers. Moreover, it will increase the rate of resignations by HSRs before they have completed their appointments. Research conducted in various fields of work health and safety also suggests that erosion of skills and knowledge is likely to become a factor affecting the effectiveness of HSRs during such an extended period. IFAP is also concerned that the effectiveness and enthusiasm of HSRs will decline if the appointment period is extended.

Should the government proceed with this provision, IFAP encourages it to consider making mid-term refresher training mandatory. Such training should be for the purpose of re-invigorating HSRs' interest in their role and bringing them up to speed with work health and safety issues.

## **6. Union Right of Entry**

IFAP does not support the right of union entry into workplaces for the purpose of workplace health and safety. It is contrary to the fundamental principle of the Western Australian Occupational Safety and Health Act, which is to separate health and safety from industrial relations. Right of entry is provided for in the WA Industrial Legislation.

It also creates potential conflict with the role of elected Health and Safety Representatives.

## **7. Obligations on Officers**

IFAP supports changes to extend obligations (enshrined in the Corporations Act 2001(Cth)) of the due diligence requirements for health and safety onto Officers of a corporate PCBU. It is a positive move that will provide greater certainty and protections for Directors, in a way which does not compromise standards for legitimate safety concerns.

## **8. Penalties**

IFAP supports an increase in penalties for non-compliance with the Legislation and behaviour which endangers workers, and supports the levels proposed in the Green Bill. These levels of penalties will act as additional deterrents both generally and specifically (to offenders) without being overly punitive in effect.

IFAP proposes that fines paid under the new Legislation should be hypothecated into a fund administered by WorkSafe WA to promote work health and safety in Western Australia. The use of fines in this way has a precedent in road safety where speed camera fines are used exclusively to fund road safety promotion.

## **9. Onus of Proof**

IFAP supports the requirement that the prosecution bears the onus of proof in alleged safety breaches, removing the reverse onus of proof contained in some states' Health and Safety Legislation.

## **10. Capacity of Unions to Bring Prosecutions**

IFAP supports the retention of the status quo in which unions are not empowered to bring prosecutions.

## **11. Mining Industry**

IFAP supports the implementation of a separate, but complementary suite of Legislation for the mining industry that reflects the Green Bill for non-mining workplaces, because it will simplify compliance requirements for businesses that operate across legislative jurisdictions and industry sectors.

## **12. Enforceable Undertakings**

IFAP opposes the omission of the provision in the Model Health and Safety Bill of the option for PCBUs to make Enforceable Undertakings. Fines that are imposed by courts are intended to have both punitive and remedial effect. Enforceable undertakings are an alternative for achieving the remedial benefits. They are particularly appropriate in the case of small companies which may be disproportionately penalised by monetary sanctions.

**13. Where Prosecutions are Brought**

IFAP proposes that the Green Bill should be modified to provide for work health and safety prosecutions to be brought in the District Court or in a special court, and not in the Magistrates Court (Criminal) as part of its general list, as at present. This would have the benefit that written reasons for decision would be delivered and it would also mean that safety and health matters are afforded the necessary time and gravitas. It would also mean that a body of knowledge about this very specialised area of the law could be developed by the decision-makers.

**14. Risk**

IFAP is pleased to note that the concept of “risk management” is proposed to be introduced in Health and Safety Legislation for the first time (s17), and that the obligations to manage risk are defined.

**15. Obligation to Report a Dangerous Incident**

IFAP supports the introduction of an obligation to report a dangerous incident in the Green Bill (s37). This appears to bring the general WHS jurisdiction into line with the existing mining safety jurisdiction.

**16. Welfare**

IFAP queries the return of the term “welfare” in the Green Bill, for example in s3(2) Objects of the Act. The references to welfare were removed from the Occupational Safety and Health Act some years ago, for good reason. In addition, the term “welfare” is not defined in the Green Bill rendering any purported obligations for the welfare of workers meaningless.

**17. Search Warrants**

IFAP notes the inclusion of new powers to conduct searches in the Green Bill (subdivision 3). Such powers are not part of the existing Occupational Safety and Health Act. IFAP queries the need for such significant new powers.

**18. Compensation**

IFAP notes that the Green Bill explicitly does not adopt the provision for the court to order compensation which is contained in the Model Work Health and Safety Bill (s184).

While the intention of the government appears to be that compensation should not be available, some level of compensation / rectification is available to courts under the Sentencing Act.