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2018 Review of the model WHS laws: Australian Chamber Submission

April 19th, 2018

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Chamber of Commerce
and Industry

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Summary table of review questions and our Recommendations

Recommendation 1: Regulators should adopt a "light touch" or "economic nudge" approach to regulation for SMEs and need to look at the specific impacts of WHS regulation on SMEs. **Recommendation 2:** A risk-based approach should be maintained and minimal prescriptive methods used within supplementary materials. **Recommendation 3:** Regulators should engage wherever possible with Business Associations as 'trusted intermediaries' and experts in relation to workplace practices, particularly SME practices. **Recommendation 4:** Further research into the management of WHS within SMEs in needed.
***Q1** What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?*
While the three-tiered approach of the WHS Act, Regulations, and Codes provides flexibility in responding to changing circumstances and technology, it can at times lead to confusion given the sheer volume of documents. Regulators who may also publish guidelines on issues of individual jurisdictional concern compound this problem.
***Q2** Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?*
The model Regulations are cumbersome and difficult to navigate and interpret. **Recommendation 5:** Implement recommendations 4b and 5c: • Recommendation 4b - Safe Work Australia develop a tool that will assist duty holders to ascertain which WHS regulations apply to their business or undertaking and work with WHS regulators to clarify any misinterpretation of the laws that are contributing to regulatory burden. • Recommendation 5c - national guidance material be the preferred format, unless Safe Work Australia Members identify that a model Code of Practice is needed, based on a set of rigorous criteria agreed by Ministers
Recommendation 6: Development of any guidance must involve industry at the earliest stage to ensure materials are practical and applicable. Involvement of industry should not be restricted by Safe Work Australia imposed timelines and SWA Member composition.
***Q3** Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?*
Industry reports that the majority of Codes are not useful to their members as they are not industry specific and therefore not always relevant or not perceived as relevant. The number, length and complexity of Codes of Practice are of particular concern. Long and complex Codes of Practice do little to assist small business to meet their work health and safety duties.

Recommendation 7: The Australian Chamber advocates the use of simple regulation with supportive industry-specific guidance prepared with detailed stakeholder input.

Recommendation 30: References to any ancillary or external documents should be removed from the model Codes unless they are freely available and easily accessible.

Recommendation 31: Referencing inconsistencies in Codes of Practice need to be addressed in order to clarify requirements.

Q4 *Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?*

The model Regulations and Codes are lengthy, prescriptive and complex. National guidance material should be where the weight of information is found, unless Safe Work Australia Members identify that a model Code of Practice is needed, based on a set of rigorous criteria agreed by Ministers

Q5 *Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?*

Recommendation 32: We believe the model WHS laws are effective in supporting the management of risks to psychological health in the workplace, particularly in light of the suite of supplementary guidance under development by SWA. We would encourage SWA and State and Territory Regulators to engage with industry to determine the need for and scope of further education and awareness resources and clear referral pathways.

Q6 *Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?*

Since the model WHS laws were introduced, there has been increasing duplication and complexity caused by the overlap of WHS regulation and industry specific and hazard specific safety legislation.

Recommendation 12: Conduct an analysis of existing overlap between model WHS laws and industry specific and hazard specific safety legislation.

Duplication should be removed wherever possible in an effort to decrease red tape and regulatory burden on business.

Recommendation 13: If a safety issue is already adequately regulated under another jurisdiction, there is no need for duplication under WHS. This should be identified where possible and responsibilities of jurisdictions clarified.

Q8 *Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?*

We assert that the Act is not operating as intended in distinguishing between work health and safety duties with work-connectedness and public health and safety.

Recommendation 9: Clarification in the Act is needed so as to limit an extension of the primary duties as intended. WHS laws should not duplicate other public health and safety regulation – they should only seek to fill any gaps

identified.

Recommendation 10: More education and awareness of duties (i.e. incident notification and record keeping) in these circumstances (workplaces as a public venue) and targeted industry campaigns are needed.

While employers may be cognisant of the benefits of healthy workers, we have concerns about the increasing expectation from governments and community that it is a corporate responsibility to address general health and provide health-promoting programs.

Recommendation 11: Consideration of guidelines that clarify where responsibility lies and to whom in relation to health.

Q9 *Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?*

If the current model legislation correctly applies general duties to PCBUs and other workplace parties, it should not require amendment to respond to specific or emerging health and safety issues. These issues should be inherently capable of being addressed within the existing legislative framework.

To the extent that specific information is required, it can be progressed as subordinate regulation or guidance material.

Recommendation 8: SWA and Regulators need to monitor developments and provide updated information and clarity on interpretation and application. This is particularly relevant where case law interpretations have changed e.g. worker definition and Uber.

Q10 *Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?*

The existing WHS legislation has proven capable of dealing with the evolution of working arrangements that has occurred over the last decade.

Q11 *Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?*

A practical and properly defined approach to control would minimise the imposition of overlapping duties and help clarify for PCBUs with concurrent duties what is expected of each party in each given circumstance.

Recommendation 16: Clarification of control is needed to ensure consistency of interpretation and should take into account which party genuinely:

a) Has control of a particular activity.

b) Has the knowledge and skill to identify what potential workplace hazards or risks are.

c) Is best placed to manage, remove or mitigate those risks.

Q12 *Have you any comments on the approach to the meaning of 'reasonably practicable'?*

Recommendation 14: The meaning of 'reasonably practicable' needs be further clarified. Clarification should take

into account which party genuinely:

a) Has control of a particular activity;

b) Has the knowledge and skill to identify what potential workplace hazards or risks are; and

c) Is best placed to manage, remove or mitigate those risks.

Recommendation 15: State of knowledge interpretation should not be open ended. Further clarification is needed to ensure the benefit of hindsight and subjective choice is not used case by case.

Q14 *Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?*

Industry generally supports that the current definition of 'worker' is sufficient and should be left as is. We are also confident that the current definition is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships.

Q15 *Have you any comments relating to a worker's duty of care under the model WHS Act?*

Recommendation 19: Further education activities and supporting materials should be developed clarifying workers' duties and what would be reasonably expected of them in various situations (emphasis on changing nature of work and different contexts i.e. working from home, 'gig economy' workers).

Q17 *Have you any comments relating to the principles that apply to health and safety duties?*

Recommendation 18: Safe Work Australia should develop further guidance to provide to PCBUs in the correct and safe use of expert independent contractors in various situations (particularly in high-risk industries).

Recommendation 17: That the model WHS Act adopt section 17(2) as per the WHS Act (SA).

Q18 *Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?*

Recommendation 22: A review of the model code on WHS Consultation, Co-operation and Co-ordination and information provided in relation to multiple duty holders is needed in consultation with industry. The focus should be on providing practical and clearly understood guidance relevant to various modern situations in which multiple duty holders may need to consult.

Recommendation 23: Education and awareness campaigns are needed – specifically in relation to s46 (and the linkages to s14-16).

Q19 *Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety*

Recommendation 20: SWA should review how consultation requirements within the Act may be clarified and

simplified for duty holders.

Recommendation 21: Supplementary guidance material (including the model code on consultation) should be reviewed with input from industry in order to ensure the materials are clear, practical and useful to duty holders, and are flexible enough to adapt to business size and context.

***Q22** Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?*

General consensus is that these provisions are working well, no changes needed.

***Q24** Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?*

Recommendation 24: We continue to support minimum notice periods of 24 hours and implore SWA to exercise its role in strengthening the harmonisation efforts particularly in relation to adoption of this provision and consistent adoption by jurisdictions.

***Q25** Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?*

***Q26** Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?*

Recommendation 25: Recognising the volume of awareness raising information and training initiatives already conducted or provided by the regulators, SWA should consider new ways and evaluate existing channels for getting regulatory messages and resources to workplaces through industry networks and channels.

In South Australia, SafeWorkSA (SWSA) restructured to separate out the enforcement and educational branches. Industry reports that this approach has reduced the fear and stigma employers had for SWSA, increased employers willingness to seek out advice and therefore provides safer workplaces. It has fostered a more collaborative environment between employers and the regulator.

Recommendation 26: The national compliance and enforcement policy should be reviewed and consideration given to the SafeWork SA model, setting precedent in approach for all jurisdictions.

One of the deficiencies of inspectors that members raised is that they can't or won't provide clear guidance on "how to do things right" even though this is the most effective way that regulatory delivery could be conducted to improve health and safety outcomes. SMEs in particular need assistance identifying what regulation is relevant to them and then assistance in implementing it for their specific context (i.e. what to do, or why, and how).

Recommendation 27: Supplementary materials should reflect how an inspector will conduct an inspection (i.e. what they will look for, what they expect is reasonably practicable for that business and what specific controls or risk management systems are in place) and provide relevant and real examples.

***Q31** Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?*

Recommendation 28: the National Compliance and Enforcement Policy should be reviewed to ensure it is

reflective of the Act's objectives, provides sufficient detail to ensure consistency across jurisdictions and is in line with current best regulatory delivery practices.

Q32 *Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?*

Recommendation 28: the National Compliance and Enforcement Policy should be reviewed to ensure it is reflective of the Act's objectives, provides sufficient detail to ensure consistency across jurisdictions and is in line with current best regulatory delivery practices.

Q33 *Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?*

There is strong academic evidence to support the conclusion that increasing penalties is – most of the time – ineffective. Attempts at engineering criminal law rules to achieve a heightened deterrence effect are also generally ineffective.

Overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of "severe sanctions leading to higher compliance" – neither in criminal justice, nor in enforcement of business regulations.

Research suggests that criminal prosecution may not be the most appropriate tool to ensure that non-compliance is addressed, or behaviour changed. More flexible and risk based tools are likely to result in achieving better regulatory outcomes, such as greater use of EUs.

Q36 *Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?*

Industry welcomed EUs in the model WHS legislation as a legitimate tool in compliance activities, recognising they have been used outside of WHS at the federal level for some time (i.e. ACCC, ASIC etc.).

One issue raised by industry however is the lack of consistency of EUs across jurisdictions and by regulators.

Recommendation 29: Industry is calling for SWA to conduct a review of enforceable undertakings and, in particular:

a) The consistency of application and approach to consideration of offers;

b) Whether regulators should do more to encourage duty holders to propose undertakings?

c) What regulators can do to reduce the time it takes to negotiate undertakings? and

d) What is the best way to monitor the implementation of accepted undertakings, and to enforce undertakings that have not been properly implemented within specific time limits?

Australian Chamber of Commerce and Industry

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1 Introduction

The Australian Chamber of Commerce and Industry (**Australian Chamber**) welcomes this opportunity to contribute to the *2018 Review of the model Work Health and Safety (WHS) laws*. This review is an opportunity to examine the operation and content of the model WHS laws to ensure they are operating as intended in those jurisdictions who have implemented them.

The Australian Chamber continues to support the process of harmonisation and values the opportunity for industry's views to be represented. The Australian Chamber has made its extensive network available during the Safe Work Australia review process in each State and Territory and our Members have participated in various forums and one-on-one discussions with the Reviewer.

The feedback has been positive. Harmonisation was and is widely welcomed. Industry commends the ongoing efforts to eliminate inconsistencies and duplication in WHS legislation across States and Territories but acknowledges more work is still needed.

We maintain that the model WHS Act, Regulations and Codes must be focused on safety outcomes and that any legislative tools should be thoroughly justified, practical and non-prescriptive, in line with COAG principles.

The Australian Chamber continues to advocate that an effective health and safety culture requires all those involved in the workplace to accept shared responsibilities. Making workplaces safer starts with the workplace culture and attitude, not with regulation. A commitment to preventing and managing risks develops from a foundation of realistic, practical and encouraging guidance suitable for all workplaces. To engender a healthy workplace culture and attitude, the Australian Chamber advocates the use of simple regulation with supportive industry-specific guidance prepared with detailed stakeholder input.

An effective WHS regulatory framework can only deliver productivity and safety benefits to Australians if the available tools are:

- Fair;
- Balanced;
- Clear;
- Reasonable;
- User-friendly and practical;
- Consistent with each other; and
- Enforced fairly and consistently in each jurisdiction.

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Work Health Safety and SMEs

A large percentage of Australia's workplaces are small and medium enterprises (SMEs); it is important that their capacity to implement the WHS laws (including guidance material) is given full and serious consideration.

The traditional model of health and safety regulation is founded on addressing physical hazards in high risk industries and with workers in medium to large workplaces.

This model acting as the conceptual basis for the legislation is increasingly unhelpful or even irrelevant to many modern SMEs. There have been major changes to the Australian small business sector over the last 40 years. In 1983 – 1984 there were an estimated 550,000 small firms, and by 2010 this had grown to almost two million. There is another dimension to the growth in this sector. Around 60 per cent of businesses in Australia are non-employing, and 95.6 per cent have fewer than 20 employees, predominately less than five[1]. This tends to blur the line between managers and employees, creating a more informal and often egalitarian workplace environment. It seems plausible that a system designed around medium to large business needs will have trouble adapting to meet the needs of modern small businesses.

The aims of the model WHS legislation act to provide a framework for enabling the protection of all workers at work and of other people who may be affected by the work. It has long been assumed that these aims universally apply to businesses of different sizes; the issue is in the further assumption that the mechanisms by which these aims are achieved are also universal.

The fundamental differences in structure and operations between small, medium or large organisations are not explicitly recognised or proactively addressed. What does 'compliance' really means for modern SMEs; what does it really look like? What does it look like in a principle based system, and how is it measured in practice – or perhaps more importantly, what happens when it is not?

WHS is not merely a compliance issue for SMEs, but for most, is a way of business life. SME owners and managers recognise the penalties they face for failure to maintain healthy and safe working environments. They are also aware of the potential costs of death and injury to both their workers and their organisations. Regulators need to adopt a "light touch" or "economic nudge" approach to regulation and need to look at the specific impacts of WHS regulation on SMEs.

The diverse nature of the SME, and the large proportion of organisations that are either non-employing "nano" organisations, or micro-businesses comprising small teams of fewer than five employees, requires specialised assistance with specific material, education and regulatory approaches.

There are clear indications that workplaces and key relationships are changing with the influence of technology, globalisation and changing workforce demographics. What has also emerged consistently is that there is limited research addressing the specific needs of SMEs, particularly in the changing environment.

[1] DIISR, Key Statistics: Australian Small Business, AGPS Canberra, Department of Innovation, Industry, Science and Research, (2011).

There is an absence of knowledge about the management of WHS within SMEs, particularly in relation to how best practice WHS management enhances organisation performance. This needs to change. SMEs cannot be treated like "little big businesses" in relation to WHS. They need help identifying and translating WHS regulation into their own context and then, assistance in implementing it.

Given the diversity of the business landscape, we maintain that the best approach to the model legislation is one that supports a systematic approach to risk management without mandating the risk assessment step of the process in every case.

Recommendation 1: Regulators should adopt a "light touch" or "economic nudge" approach to regulation for SMEs and need to look at the specific impacts of WHS regulation on SMEs.

Recommendation 2: A risk-based approach should be maintained and minimal prescriptive methods used within supplementary materials.

Recommendation 3: Regulators should engage wherever possible with Business Associations as 'trusted intermediaries' and experts in relation to workplace practices, particularly SME practices.

Recommendation 4: Further research into the management of WHS within SMEs in needed.

1.1 The effectiveness of the three-tiered approach and codes of practice

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

The model WHS laws framework is comprised of the model WHS Act, the model WHS Regulations and the 24 model Codes. The framework is intended to be broadly applicable to all organisations regardless of their size or industry.

The model WHS laws consist of broad, outcome (or principle) focused duties. This was designed to ensure the highest practical level of protection against harm arising from work while allowing businesses flexibility to choose solutions that best suit their circumstances. The model WHS Act relies extensively on this approach, as demonstrated by the primary duties.[2] In order to understand how to comply with these broad duties, duty holders are provided with further guidance either in regulations or in other supporting material.

The Australian Chamber has consistently supported this principles-based system approach with a minimum use of prescription or process standards.

While the three-tiered approach of the WHS Act, Regulations, and Codes provides flexibility in responding to changing circumstances and technology, it can at times lead to confusion given the

[2] model WHS Act, sections 19, 27, 28 and 29

sheer volume of documents. Regulators who may also publish guidelines on issues of individual jurisdictional concern compound this problem.

Model Regulations

The model Regulations are cumbersome (523 pages) and difficult to navigate and interpret.

The 2014 COAG review into the model legislation sought to address areas where the laws could be improved in terms of regulations being necessary, cost-effective, proportional, flexible and performance-based. The review highlighted that generally, prescriptive requirements in regulations should be limited to areas of high risk— with other or further detail provided for in model Codes or guidance material.

On 1 July 2015, Senator the Hon Eric Abetz, Minister for Employment, wrote to Michelle Baxter, CEO of Safe Work Australia, requesting that the model WHS laws be amended to reflect the recommendations of the report on *Improving the Model Work Health and Safety Laws* (the Report) as agreed by the majority of Ministers on 24 October 2014.

Almost three years later, two key recommendations are yet to be enacted. In particular, we refer to:

- *Recommendation 4b - Safe Work Australia develop a tool that will assist duty holders to ascertain which WHS regulations apply to their business or undertaking and work with WHS regulators to clarify any misinterpretation of the laws that are contributing to regulatory burden.*
    - 6 months from agreement by COAG, and
- *Recommendation 5c - national guidance material be the preferred format, unless Safe Work Australia Members identify that a model Code of Practice is needed, based on a set of rigorous criteria agreed by Ministers,*
    - 3 months from agreement by COAG.

This is the preferred model to achieve compliance especially with small to medium businesses. Imposing regulatory obligations on businesses with mandatory requirements through Regulations or Codes of practice, simply adds to the complexity and burden.

Recommendation 5: Implement recommendations 4b and 5c as above.

Recommendation 6: Development of any guidance must involve industry at the earliest stage to ensure materials are practical and applicable. Involvement of industry should not be restricted by Safe Work Australia imposed timelines and SWA Member composition.

Providing relevant and practical guides that can be easily understood and used in the workplace should enhance efforts and improve WHS outcomes.

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Codes of practice must provide duty-holders with practical ways to comply, not just repeat the Regulations. Industry reports that the majority of Codes are not useful to their members as they are not industry specific and therefore not always relevant or not perceived as relevant.

Especially (but not exclusively) for small and medium businesses, we note that:

- SMEs constitute approximately 85% of the workplaces;
- The current Codes of Practice are still far too complex for small business; and
- The Codes of Practice need to be practical, user friendly, tested, and concise.

The practicality, capability and limitations of small and medium enterprises need to be understood and taken into account.

The 2014 COAG report[3] where costings were assumed against Safe Work Australia Survey data that estimated:

- *Approximately 525 000 businesses refer to SWA codes or other guidance material;*
- *Businesses that do refer to codes will only refer to codes that are relevant to their operations; and*
- *On average two codes are relevant to businesses that refer to codes.*

The Codes often encompass too wide an audience and thereby lose their application – one size does not fit all. This has made the current Codes of Practice complex and lengthy.

To achieve the aim for improvements in WHS in workplaces, there is a significant need for targeted practical guides that people can pick up and use in their businesses. This can be achieved without a reduction in safety standards.

The number, length and complexity of Codes of Practice are of particular concern. Long and complex Codes of Practice do little to assist small business to meet their work health and safety duties.

Industry experience is that for smaller businesses, 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 association.

The Australian Chamber remains concerned about the referencing and use of other technical standards in Codes of Practice and we address this further in section nine.

Useful industry-specific guides would simplify compliance; especially where the Codes have tried to cover too many areas e.g. plant

[3] *Improving the model Work Health and Safety laws*, Decision Regulatory Impact Statement, (2014). https://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws accessed 6th April 2018.

The requirements in Codes should be practical, and should offer specific examples for how the target audience could comply with regulatory requirements.

Everything in a Code of Practice needs to be tested against the following:

- Is this enforceable?
- Is this necessary?
- Is this guidance (in which case of course, it should not be part of the Code)?
- Does this improve the safety outcome?

Recommendation 7: The Australian Chamber advocates the use of simple regulation with supportive industry-specific guidance prepared with detailed stakeholder input.

Provision of helpful and practical guidance material is essential. Industry needs specific information that individuals and organisations can relate to, that provides clear and practical guidance to compliance and that properly take into account the diverse nature of workplaces. All-encompassing Codes are neither acceptable nor useable in workplaces.

2 Changing nature of work

As digital technologies advance in capability and decrease in cost, they are likely to enter the work environment in greater numbers and a variety of situations. Enabled by these advancements, the emergence of peer-to-peer platforms has the potential to shift traditional employment patterns and structures towards a 'gig-economy'[4]. These changes are occurring in the wider Australian context of an ageing workforce, changing economies, and increased globalisation and competitiveness.

The emerging changes will undoubtedly affect WHS and our regulatory systems need to be designed in such a way as to meet these future challenges.

The *National Review into Model Occupational Health and Safety Laws 2008/2009* contemplated these issues and consequently the model WHS duties were designed to be broad enough to respond to the changing nature of work and employment arrangements.

The existing WHS legislation has proven capable of dealing with the evolution of working arrangements that has occurred over the last decade to a degree. The model legislation has served to clarify in most instances who owes a duty to whom. Emerging industries and occupations have successfully been covered where generic legislation is formulated correctly.

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

Issues with clarity of duties owed have predominantly emerged in relation to multiple duty holders and supply chains as they become increasingly complex and layered. We have concerns regarding the jurisprudence that has emerged in relation to the concept of control in some jurisdictions. Our concerns with the concept of control are discussed further in section four.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

If the current model legislation correctly applies general duties to PCBUs and other workplace parties, it should not require amendment to respond to specific or emerging health and safety issues. These issues should be inherently capable of being addressed within the existing legislative framework.

To the extent that specific information is required, it can be progressed as subordinate regulation or guidance material.

[4] Horton J, Cameron A, Devaraj D, Hanson RT, Hajkowicz S., A Workplace Safety Futures: The impact of emerging technologies and platforms on work health and safety and workers' compensation over the next 20 years (2017). CSIRO, Canberra.

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Safe Work Australia and State and Territory Regulators should keep pace with change, where appropriate, at the applied regulatory level, rather than adjusting the fundamental architecture of the system.

Recommendation 8: SWA and Regulators need to monitor developments and provide updated information and clarity on interpretation and application. This is particularly relevant where case law interpretations have changed e.g. worker definition and Uber.

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3 Overlap of Australian regulation

Increasingly, employers are being asked to manage workplace issues with regard to more than one piece of legislation.

These include, but are not limited to, the *Fair Work Act 2009 (Cth),* state based work health and safety laws and workers' compensation laws, federal and state anti-discrimination laws, superannuation laws, taxation laws and the *Migration Act 1958 (Cth).*

These intersecting obligations add layers of complexity and can make compliance more difficult.

Limitations on addressing safety imposed by other workplace regulation

Employing PCBUs are often placed in an unenviable position as they attempt to reconcile their duties under WHS laws to provide a safe workplace and the provisions of the *Fair Work Act 2009* (Cth) that deal with unfair dismissal.

The Australian Chamber made submissions to the Productivity Commission's 2015 inquiry into the workplace relations system highlighting this concern, including by referring to a case where an applicant found to have committed serious and repeated breaches of WHS protocols and procedures was nonetheless reinstated and awarded compensation because the impact of the decision was harsh on him financially.

In its inquiry report, the Productivity Commission said:

> "*The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor.1 The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain administrative procedures meant that the dismissals were unjust, unreasonable and therefore unfair*. (p.1).

This led it to recommend an amendment to the Fair Work Act so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal. The Australian Chamber recommended making a complete defence available if an employee was dismissed for the dominant purpose of complying with laws relating to discrimination, sexual harassment, bullying, WHS or any other relevant federal, state or territory law.

The Australian Chamber maintains that the unfair dismissal provisions of the *Fair Work Act 2009* (Cth) operate in a way that is not consistent with WHS law and the expectations placed on employers to comply with their duties under WHS law and that changes are required. An employer who can be held accountable for employee actions that result in risks to work health and safety must be able to discipline and if necessary end the employment of those who place the safety of their colleagues and others at risk.

Volume of information and authorities

It is not just the regulation however but also the number of distinct government departments and agencies at local, State and Federal level as sources of information that amplify this confusion.

This is summarised well in the below quote from a business owner:

> *"There is a lot of noise out there. Noise in the various people saying you should be doing it this way. Noise in that there's a lot of feedback we receive… a lot (of) information from a lot of different people and you've got to work out what information is sound, what information is meaningful and what is the agenda for each."*

> *"That's one of the biggest challenges when we're attempting to generate value for the businesses, getting around all the different regulations. So, basically every component of a business in manufacturing, you're got workplace health and safety, which covers all the business and plays a big part when you've got large people workforce undertaking manual-ish labour out there, and then you've got industry specific regulation you have to comply with. … then you have obviously HR regulation, which your work force has to comply with. And these three often interact with each other and make it quite challenging." (JP, Melbourne)*

3.1 Overlap of general public health and safety regulation

Questions 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

Since the model WHS laws were introduced, the distinction between WHS regulation and public safety regulation has become blurred.

The Explanatory Memorandum to the model WHS Act states:

> *The primary purpose of the Bill is to protect persons from work-related harm. ...At the same time, the Bill is not intended to extend such protection in circumstances that are not related to work. There are other laws, including the common law, that require such protection and provide remedies where it is not supplied.*
>
> *The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is*

> *not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.*[5]

In *Boland v Safe is Safe Pty Ltd & Munro [2017] SAIRC 17* the full South Australian Industrial Court held that s19(2) of the WHS Act is to protect members of the public from work performed, as opposed to being limited to the exact time when work was performed. The case arose from the certification of an amusement device where the certifier unsuccessfully argued that the health and safety duty imposed by s19 (2) of the WHS Act only exists whilst work is being carried out by the relevant business or undertaking and that it does not extend to the consequences or product of work, after the work has been carried out or completed.

In our 2008 submission, we asserted that the model WHS duties should only be extended to members of the public if an incident or accident has occurred in connection with persons at work or in relation to the use or operation of plant. We acknowledge that the case cited above is in relation to plant but note that the analysis in this case was whether s19 (2) merely complements s19 (1) by extending the duty imposed beyond workers to customers and visitors of workplaces, or whether it creates a wider duty that protects the public at large from the adverse health and safety consequences of work undertaken by a PCBU.

Industry is concerned that this interpretation of the application of s19 is contrary to the intent of the section and we note that Court decisions are limited to reference to the statutory text and not any assumptions about the desired or desirable reach or operation of the relevant provisions. Without clarifying further the intent of the Act, this interpretation will set precedence.

The terms of this review refer to the consideration of whether the model WHS laws are operating as intended. We assert that the Act is not operating as intended in distinguishing between work health and safety duties with work-connectedness and public health and safety.

The WRMC panel's response to recommendations of the national review into model OHS laws states in relation to the application of the primary duty of care that:

> *"Care needs to be taken during drafting to ensure that the scope of the duty is limited to matters of occupational health and safety and does not further extend into areas of public safety that are not related to the workplace activity.*[6]*"*

Recommendation 9: Clarification in the Act is needed so as to limit an extension of the primary duties as intended. WHS laws should not duplicate other public health and safety regulation – they should only seek to fill any gaps identified.

Workplaces as a public venue

A number of workplaces also function as public venues. These include:

[5] Explanatory Memorandum, Model Work Health and Safety Bill (2010), p 10
[6] WRMC Response to Recommendations of the National Review into Model OHS Laws, (2009) https://www.safeworkaustralia.gov.au/system/files/documents/1702/wrmc81outcomesmay09.pdf accessed 1 March 2018

- Performing arts venues;
- Schools;
- Hospitals and aged care facilities

Duties in these instances may overlap with other public safety or health legislation and can be confusing for PCBUs and workers.

Recommendation 10: More education and awareness of duties (i.e. incident notification and record keeping) in these circumstances and targeted industry campaigns are needed.

General public health overlap

Employers acknowledge public health issues (e.g. diabetes, cardiovascular disease, cancer) impact not only on individuals and families, but also on the workplaces that form an important part of our community, social and economic lives.

We acknowledge our WHS responsibilities in ensuring worker health and safety and note that occupational health hazards are clearly defined in the legislation and guidance on controls provided.

While employers may be cognisant of the benefits of healthy workers, we have concerns about the increasing expectation from governments and community that it is a corporate responsibility to address general health and provide health-promoting programs.

Any extension of PCBU duties to that of general worker health and 'wellbeing' would fundamentally redefine expectations about the nature of the employment contract, the scope of work, the capacity to manage a business and its workers and the drivers of productivity needed for competitive and profitable performance and interfere with personal choice.

Although some workplaces may voluntarily implement various health-promoting initiatives, it is first and foremost up to the individual to maintain an acceptable level of personal health. Employers should not be expected to enforce particular behaviours outside the scope of occupational health and safety.

Recommendation 11: Consideration of guidelines that clarify where responsibility lies and to whom in relation to health.

3.2 The model WHS laws and industry specific and hazard specific safety legislation

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

As with public safety regulation, since the model WHS laws were introduced, there has been increasing duplication and complexity caused by the overlap of WHS regulation and industry specific and hazard specific safety legislation.

Some pertinent examples of industry or hazard specific legislation that overlaps with WHS include:

- National Heavy Vehicle ("Chain of Responsibility Legislation")
- Aviation Safety
- Non-conforming building products
- Criminal
- Mining Safety
- Environmental Protection.

These intersecting obligations add layers of complexity and can make compliance more difficult. It also increases the regulatory burden for business without evidence of any improvement in safety and health outcomes.

Overlap of WHS and EPA regulation example: Quarries and community dust exposure.

An example is dust in quarries which is monitored by environmental authorities (e.g. EPA). This issue also falls under general WHS provisions for public safety. The mine authorities also monitor dust exposure for workers as a WHS issue, but under mining provisions, not WHS laws.

Recommendation 12: Conduct an analysis of existing overlap between model WHS laws and industry specific and hazard specific safety legislation.

Duplication should be removed wherever possible in an effort to decrease red tape and regulatory burden on business.

Recommendation 13: If a safety issue is already adequately regulated under another jurisdiction, there is no need for duplication under WHS. This should be identified where possible and responsibilities of jurisdictions clarified.

4 Reasonably practicable and control

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

In our 2008 submission, we emphasised the need for clear legislative guidance on what is meant by the term 'reasonably practicable' and a defined test. Although the term existed in OHS legislation across Australia prior to the model WHS laws, the concept had been significantly distorted by jurisdictions to the point where they no longer reflected what was reasonable, practical or achievable.

We noted the need for examples based on case law (where possible) and supplementary guidance, to aid consistent interpretation and assessment of compliance. Although SWA produced the "*Interpretive Guideline - model Work Health and Safety Act - the meaning of 'reasonably practicable'* we note that considerable differences in interpretation of the term by various jurisdiction courts and judges and consequent confusion from PCBUs still remain an issue.

If the courts are inconsistent in their interpretation and any changes to the interpretation of legal principles are not clearly articulated to PCBUs, how can PCBUs be expected to know what actions to take to fulfil their duties.

Anecdotally, our members report that in some instances hindsight is used by courts to hold employers accountable, not what was practicable at the time the decision was made in the workplace. Furthermore, that interactions with other duty holders and consideration of their role and liability (i.e. suppliers or importers of non-conforming products used by a PCBU or independent contractors used for specialist knowledge) are contemplated and determined case-by-case.

The *Interpretive Guideline* on the meaning of 'reasonably practicable' specifies that section 18 does not include all of the matters to be considered and that: **whether a duty-holder can control or influence a particular thing or the actions of another person, or any limits on their ability to control or influence,** may be relevant to what the duty holder can do, or what they may reasonably be expected to do.

The incorporation of 'control or influence' in the definition of 'reasonably practicable' was discussed in the 2008 *National Review into Model Occupational Health and Safety Laws First Report* but was ultimately dismissed although it received significant support for inclusion[7]. The report highlighted that both the Maxwell Review and the NSW Inquiry into the Review of the Occupational Health and Safety Act 2000 proposed that 'control' should be added as a factor to be considered in determining what is practicable stating that:

> *The consideration of the degree of control a duty holder has in particular circumstances enables the courts to assign responsibility appropriately where there are multiple duty*

[7] *National Review into Model Occupational Health and Safety Laws*, First Report to the Workplace Relations Ministers' Council, (2008).

> *holders. Arguably, the concept of 'reasonably practicable' includes considerations of control.*

Recommendation 14: the meaning of 'reasonably practicable' needs be further clarified. Clarification should take into account which party genuinely:

d) Has control of a particular activity;
e) Has the knowledge and skill to identify what potential workplace hazards or risks are; and
f) Is best placed to manage, remove or mitigate those risks.

Another interpretation issue that has arisen in relation to 'reasonably practicable' is in relation to section 18(c) 'state of knowledge'.

> *The state of knowledge applied to the definition of practicable is objective. It is that possessed by persons generally who are engaged in the relevant field of activity and not by reference to the actual knowledge of a specific defendant in particular circumstances: Laing O'Rourke (BMC) Pty Ltd v Kirwin [2011] WASCA 117 at [33].*

'What a person ought to know' has had very broad interpretation by the courts and has set an unrealistic and impractical bar for employers. This is particularly evident for small and medium businesses who do not necessarily have the time, resources, or expertise that larger or more specialised businesses do and yet they are held to the same standards of those "persons generally who are engaged in the relevant field of activity".

Example: Reference To VACC Daily Inspection Checklist

In January this year an automotive company involved in car repair and maintenance was convicted for failing to provide a safe system of work (Occupational Health and Safety Act 2004 21(1)&(2)(a); 23(1)).

In the case, the prosecution referred to "… no safe operating procedure requiring the SAR's to be fully engaged or a **VACC daily checklist** to be completed prior to work commencing under the vehicle."

The requirement for the daily operational check comes from Crane and Vehicle Hoist Standards but the prosecution referenced the VACC checklist specifically. This is an example of the broad application of the 'state of knowledge' test that is currently used.

The reference to Australian Standards in a significant number of Codes of Practice amplifies this issue. By virtue of being referenced in 'quasi-regulation' a relevant standard could be considered something the PCBU "would reasonably be expected to know" in consideration of a hazard or risk and any ways of eliminating or minimising the hazard or risk and a failure to comply with their terms may carry serious consequences. As described in more detail in section nine, the number of standards referenced is numerous and costly. In one model code alone, twenty-three standards are referenced where one alone may cost on average $312.

Recommendation 15: State of knowledge interpretation should not be open ended. Further clarification is needed to ensure the benefit of hindsight and subjective choice is not used case by case.

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5 Defining control still an issue

Question 11: Have you any comments relating to a PCBUs primary duty of care under the model WHS Act?

The Australian Chamber has previously supported the inclusion of a definition or test for 'control' for the following reasons:

a. To eliminate inconsistencies in legislative interpretation.
b. To identify and define who is in control with regards to the employment relationship.

The standard for reasonably practicable is independent to the control exercised by different duty holders. That is, it is the Australian Chamber's view that both concepts should apply. A duty holder should have an obligation to take reasonably practical steps to control risks and hazards, but only to the extent that they exercise realistic and practical control over such risks.

The concept of 'influence or control' is broad and there is no statutory definition provided in the Act. Due to this, there has been inconsistency in the interpretation and application by the courts of 'influence or control' as an element of a duty of care. Direct versus indirect influence is hard to articulate and has been applied more broadly than we believe was intended.

The 2014 COAG Decision RIS[8] noted industry concerns about the application of control, particularly when there are multiple duty holders.

In December 2010, SWA Members received a legal opinion (from the VIC Member) in relation to the application of duties on concurrent duty holders and the issue of control in the draft model Bill.

The advice stated:

> *"The duty provisions work in a straightforward manner if the relationship is that of a single employer and employee. However we consider that the Bill may cause considerable difficulties in determining the nature of the duties owed and as to what is reasonably practicable to be done by an employer where there are concurrent duty holders."*

Section 16 of the model WHS Act determines the duty and what is reasonably practicable to discharge it according to the extent that a duty holder has the capacity to control.

The explanatory memorandum for this provision states[9]:*the Bill makes it clear that…where a duty holder has a very limited involvement or very limited ability to take relevant steps in relation to managing risks, those factors will assist in determining what is 'reasonably practicable' for them in complying with their duty of care.*

[8] Decision Regulation Impact statement (DRIS) Improving the Model Work Health and Safety Laws, Council Of Australian Governments (2014), https://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws accessed 3 April 2018
[9] Explanatory Memorandum, Model Work Health and Safety Bill 2010 p 66.

Accordingly, the Bill and the explanatory memorandum contemplate that where there are concurrent duty holders; the nature of the duty owed by each duty holder may differ according to the extent of each person's capacity to influence or control the matter.

Industry has considerable concern with the distortion of the control concept in contemporary courts and tribunals. Some have interpreted control to mean 'control to any extent' and this has too often been used to impose duties on persons who, by any reasonable analysis, are in no position to exercise control or influence safety outcomes.

A practical and properly defined approach to control would minimise the imposition of overlapping duties and help clarify for PCBUs with concurrent duties what is expected of each party in each given circumstance.

Recommendation 16: clarification of control is needed to ensure consistency of interpretation and should take into account which party genuinely:

d) Has control of a particular activity.
e) Has the knowledge and skill to identify what potential workplace hazards or risks are.
f) Is best placed to manage, remove or mitigate those risks.

5.1 Management of risks, control and multiple duty holders

Another section that has received scrutiny in regards to the extent a PCBU has the capacity to influence and control is in relation to s17 management of risks.

Section 17(2) of the WHS Act (SA) further qualifies the general WHS duty of a duty holder to eliminate or minimise risks to health and safety, so far is reasonably practicable, with a 'control test' that is intended to strengthen the protection from a person being held criminally liable for something they cannot control.

Model WHS Act	**WHS Act (SA)**
Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (s17).	Also provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only **to the extent to which they have the capacity to influence and control the matter** (s17 (2)).

'Reasonably practicable' is defined at section 18 of the WHS Act (SA) without variation from the Model WHS Act. The inclusion of section 17(2) to the WHS Act (SA) effectively extends the definition of 'reasonably practicable' in relation to a duty holder's responsibility to manage risks.

The Report from the *2014 Review of the South Australian Work Health and Safety Act 2012* (2014 Review) noted that section 17(2) was added during the passage of the WHS Bill (SA) and that it has no counterpart under other versions of the model WHS laws implemented in other jurisdictions.

Industry strongly supported the retention of section 17(2) in the South Australian Review and notes that overall, there doesn't appear to be any detrimental evidence relating to the operation of section 17(2) of the WHS Act (SA). We are not aware of any relevant case law to date nor any negative empirical evidence regarding the effectiveness of section 17(2).

Recommendation 17: That the model WHS Act adopt section 17(2) as per the WHS Act (SA).

6 Definitions and duties of care

6.1 Duties are not transferrable

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

In *WorkCover Authority of NSW v Eastern Basin Pty Ltd [2015] NSWDC 92*, Judge Curtis found that it was not unreasonable for Eastern Basin to rely on the skill and expertise of Newcastle Stevedores to ensure Gauchi packs were safely loaded.

In the report "*Legal Construction of Key Sections of the Model Work Health and Safety Act*" produced by the National Research Centre for OHS Regulation on commission from Safe Work Australia, Professor Richard Johnstone[10] stated that:

> *"Further, Judge Curtis' remark that it was reasonable 'for the defendant to rely upon the skill and expertise of Newcastle Stevedores to ensure that the Gauchi Packs as they were prepared by Eastern Basin and delivered to the wharf were safely loaded' is questionable."*
>
> *"If Judge Curtis' decision is correct, it suggests that PCBUs can discharge their obligations under the enacted model WHS Acts by simply claiming that the persons carrying out the work were expert independent contractors. While it is certainly the case that PCBUs can, indeed perhaps should, engage expert independent contractors to carry out skilled work for which the PCBU has no in-house expertise, the PCBU still needs to ensure to adopt a systematic WHS management approach to ensure that the contractors work safely."*

In this instance, there are two different interpretations presented by a Judge and Professor of Law. If two respected legal authorities can have such differing views, it is not unexpected that PCBUs and managers may have difficulty in interpreting and understanding duties in relation to independent contractors.

Recommendation 18: Safe Work Australia should develop further guidance to provide to PCBUs in the correct and safe use of expert independent contractors in various situations (particularly in high-risk industries).

[10] Richard Johnstone is at the Faculty of Law, Queensland University of Technology.

6.2 Definition of worker and duty of care

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

Question 15: Have you any comments relating to a workers duty of care under the model WHS Act?

In the *2008 National Review into Model Occupational Health and Safety Laws First Report*, the reviewers noted that[11]:

> *The objective of the duty of care placed on a worker is to ensure that the conduct or omissions of the worker do not expose any person to a risk to their health or safety.*

In addition, they acknowledged that:

> *…the workers ability to put themselves or others at risk … is usually associated with a want of care or, occasionally, misconduct or failure to cooperate in relation to health and safety (e.g. a failure to follow instructions).*

Consequently, the model WHS Act accounted for this and placed greater emphasis on the individual accountability of workers to comply with reasonable instruction and cooperate with reasonable policies or procedures, beyond merely 'taking reasonable care for his or her own health and safety'.

Industry generally supports that the current definition of 'worker' is sufficient and should be left as is. We are also confident that the current definition is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships.

Industry would like to see more materials and resources dedicated to increasing workers' awareness of their duties, particularly in non-traditional/changing work environments i.e. working from home or as 'gig economy' workers.

Recommendation 19: Further education activities and supporting materials should be developed clarifying workers' duties and what would be reasonably expected of them in various situations (emphasis on changing nature of work and different contexts i.e. working from home, 'gig economy' workers).

[11] *National Review into Model Occupational Health and Safety Laws*, First Report to the Workplace Relations Ministers' Council, (2008).

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7 Consultation, representation and participation

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety.

The Australian Chamber believes that involving workers, and where appropriate their representatives, in health and safety matters encourages commitment to the achievement of good WHS outcomes and an awareness of shared responsibilities. Workers can provide some of the most practical and constructive suggestions on WHS risks and the management of those risks.

Whilst the Australian Chamber supports provisions for consultation in the model WHS Act, we maintain that the method of consultation should be determined at a workplace level. The provisions for consultation should be limited to a general duty to consult, without prescribed mechanisms for when and how this consultation should occur.

Object (1) (b) of the model WHS Act is to provide for "fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety". We would argue however, that that Act is not effective in relation to consultation requirements.

The model WHS Act promotes a formal structured approach to consultation that is unnecessarily complex, burdensome and impractical for duty holders. Furthermore, the supplementary guidance is not considered helpful by industry.

In response to the confusion PCBUs have in regards to consultation requirements, many have put in place complicated and expensive systems to 'comply' that don't necessarily contribute to safer outcomes. They do this however believing that this is what the legislation requires.

Another common assumption and perceived requirement of the Act is that workplaces must have HSRs and/or Committees to meet their consultation duties. This is also reinforced by WHS Inspectors who when enquiring about consultation in the workplace, ask first and specifically about HSRs.

The theory and intent of Part 5 of the model WHS Act is good, however issues remain in regards to practical application, interpretation and supplementary guidance.

Any guidance material should provide practical advice on how PCBUs and workers should approach consultation, what would be the range of matters over which consultation might usually occur, and how any disputes about consultation might be resolved. WHS authorities should provide support to the parties to enable them to create working, effective consultative arrangements.

Recommendation 20: SWA should review how consultation requirements within the Act may be clarified and simplified for duty holders.

Recommendation 21: Supplementary guidance material (including the model code on consultation) should be reviewed with input from industry in order to ensure the materials are clear, practical and useful to duty holders, and are flexible enough to adapt to business size and context.

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

The duty to consult with other duty holders (s 46) and the provisions that duties are concurrent and non-delegable (s 14-16) mean that where work arrangements involve relationships between multiple PCBUs, all PCBUs must fully discharge their primary duty, and each must consult, cooperate and co-ordinate their activities with the other PCBUs (in relation to the same matter). This applies regardless of whether the relationships between PCBUs are relatively simple (e.g. a typical triangular labour hire arrangement), or more complex (e.g. in vertical supply chains).

In 2011, Johnstone[12] identified that:

> *"regulators face the major challenge of developing suitable regulations, codes of practice and guidance material to provide guidance on exactly who is and is not a 'person conducting a business or undertaking', to flesh out the obligations in the primary duty, and to provide guidance for PCBUs to enable compliance with the primary duty in the many situations to which the primary duty will need to be applied. The draft model regulations and codes of practice released in December 2010 did not provide such guidance, and at the time of writing the final regulations had not been publicly released."*

The Australian Chamber consistently reiterated this need for clear supporting codes and guidance on the nature of the consultation duty between multiple duty holders. The supplementary material that resulted from this process however is still lacking and does not provide the clear guidance needed on this issue. The circumstances in which consultation is required and the extent of that consultation is still not clear from the model Code.

Model Code of Practice – WHS Consultation, Co-operation and Co-ordination

The focus of section five (multiple duty holders) of the Code should be on how duty holders can meet the obligation imposed by section 46 of the model WHS Act. That section is about situations where multiple duty holders have a work health and safety duty in relation to the same matter - in other words, where their activities coincide and will impact on the same workers or others at the workplace. Currently section five covers both this obligation and attempts to deal with consultation with workers where there are multiple PCBU workplaces.

[12] Johnstone, R., *Dismantling Worker Categories: The Primary Duty of Care and Worker Consultation, Participation and Representation in the Model Work Health and Safety Bill 2009*, (2011), National Research Centre for OHS Regulation.

These are separate matters with different obligations imposed by the model Act. Information on consulting with workers in multiple PCBU workplaces should be separated out, as this is a point of confusion.

The Australian Chamber is concerned that the Code provides no guidance on what is meant by "influence and control" in this circumstance. Where there are multiple and overlapping duty holders, each must discharge their duty to the extent to which they influence and control the matter.

Industry considers that one of the purposes of consultation is to establish the extent to which each person has influence and control – what can each duty holder do in order to control the risks arising from circumstances where their work overlaps or intersects. An additional and clear explanation of what is meant by influence and control in relation to the duty to consult with other duty holders with practical examples is needed.

This issue is of particular importance for the construction industry, particularly where principal contractors engage expert subcontractors to undertake work. Case law indicates that the principal does not necessarily have to understand each aspect of the work of the expert contractor or assess the suitability of the risk controls implemented by the expert contractor. However, they must be satisfied that the contractor has the skills, experience, systems and processes in place to manage the risk. Where guidance is needed is in relation to how far a duty holder needs to delve into the suitability of risk controls adopted by another duty holder in order to satisfy themselves that they have, in turn, met their duty of care. This is where guidance is inadequate.

We are concerned that the prescriptive nature of consultation in the model Act, combined with the lack of clear guidance on how to apply these duties in relation to multiple duty holders is compromising the quality of consultation, transforming the process into a tendency to 'tick the box' rather than focus on the quality of engagement.

Recommendation 22: A review of the model code on WHS Consultation, Co-operation and Co-ordination and information provided in relation to multiple duty holders is needed in consultation with industry. The focus should be on providing practical and clearly understood guidance relevant to various modern situations in which multiple duty holders may need to consult.

Recommendation 23: Education and awareness campaigns are needed – specifically in relation to s46 (and the linkages to s14-16).

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

The Australian Chamber notes that there is an ongoing issue of how the WHS Entry Permits relate to Fair Work Act 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.

Examples of misuse from Members:

Two permit holders arrived at the site without stating what their purpose was. Given it was unclear why they were on site, Site Manager requested they both produce the following:

- Fair Work Entry permit,
- State WHS Entry permit (both are required to be produced in the case of entry relating to suspected WHS breach, and
- Notice of entry stating what the suspected WHS Breach was (if entry was relating to suspected WHS breach).

Both refused to provide entry permits nor any notice. They were consequently advised they would be trespassing if they entered. Both walked onsite and inspected the entire site. The Site Manager 'accompanied' them and after about an hour, they left.

2)

Two permit holders arrived at site. They were both asked to provide:

- Fair Work and State WHS Entry permits (these were provided although one permit holder did not have his Fair Work permit and the second permit holder didn't have the original as required)
- Notice of Entry—(these were provided, however both were non-compliant – one was general in nature and the other was a scrap of notepaper without relevant detail required. It was also general in nature (e.g. AS 3012 breaches rather than "temporary power boards not compliant" for example).

Both walked casually around the site rather than specifically to look at a suspected WHS breach. All work was stopped on site whilst this occurred. Site was closed down for 1 ½ hours.

During the walkthrough, one permit holder turned off all the power boards, which he had no authority to do so, especially when he was unaware of what was being powered by these. He could well have created a situation with far higher risk than what was in place.

The Australian Chamber 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.

The Australian Chamber strongly encourages consistent application and enforcement across WHS jurisdictions of entry permit requirements.

Providing Assistance

Australian Chamber 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. The Australian Chamber 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.

Amendments to model WHS Act and model WHS Regulations

We note the model WHS laws were amended on 21 March 2016. As at 30 November 2016, no jurisdiction had implemented these amendments:

- Introduction of a minimum notice period of 24 hours and a maximum of 14 days for union officials and those assisting HSRs when entering a workplace (sections 68 and 117 of the model WHS Act).
- An increase to penalties associated with contravening the conditions of WHS entry permits from $10,000 to $20,000 (section 123 of the model WHS Act).
- Minor technical amendments relating to WHS entry permit holders.

Recommendation 24: We continue to support minimum notice periods of 24 hours and implore SWA to exercise its role in strengthening the harmonisation efforts particularly in relation to adoption of this provision and consistent adoption by jurisdictions.

8 Compliance, enforcement and prosecutions

8.1 Industry engagement and partnerships

The Australian Chamber commends industry engagement initiatives and partnerships by a number of regulators in recent years and encourages further engagement where possible.

Improving communication to employers

A number of research papers have demonstrated the intermediary role of industry associations, particularly for small and medium enterprises. The Australian Chamber has submitted to SWA as part of the last few annual Members Planning Days, that greater use of employer networks and partnerships would increase the effectiveness of regulator campaigns and help disseminate information to industry in greater numbers.

As discussed earlier, the key elements of successful engagement with industry are regular and importantly industry specific information provided in highly accessible formats.

Having information filtered through an industry body is seen as preferable to receiving it through a regulator. Regulator bulletins and information while useful are seen as too general and focusing on high profile changes.

> *"I like to get it from the MTA. They provide us with everything we need to know in a format that goes into a folder and is updated. The other reason is if it's relevant to our industry its better coming from them. There's no point getting something that applies to the building industry. I've got stuff from Worksafe and it's not relevant to me." (ID 3146 Automotive Business - General/Other SME)*[13]

Similarly, the domestic construction sector and hospitality sector highlighted the strong relationship with industry associations who facilitate numerous information activities such as seminars and briefings on any changes.

Hospitality Sector engagement example

Between 26 February – 26 June 2013, SafeWork SA partnered with the SA Hospitality industry associations to deliver rounds of WHS presentations.

Overall:

- 12 presentations in total
- 7 metropolitan, 5 regional
- Total of 346 persons booked with a 80% conversation rate for attendance
- Total of 181 different organisations represented

The feedback overall was excellent with businesses indicating a high degree of compliance and awareness.

[13] Mercer, R., *Evaluation of model work health and safety (WHS) laws: non-employing, small and medium business interviews*, (2014), Safe Work Australia.

Recommendation 25: Recognising the volume of awareness raising information and training initiatives already conducted or provided by the regulators, SWA should consider new ways and evaluate existing channels for getting regulatory messages and resources to workplaces through industry networks and channels.

Consultative groups and Committees

Members have advised that another key element of successful industry partnerships is engagement during the identification and development of campaigns or projects.

A number of regulators have established industry reference groups or committees such as Safe Work SAs – Construction Industry Safety Committee (CISC) or WorkSafe WAs – Construction Industry Safety Advisory Committee. These groups meet every couple of months to discuss and progress matters of safety in the building and construction industry. Officers report on interventions and accident investigations and discuss upcoming campaigns and other relevant issues.

Engaging with industry throughout the campaign development and delivery process enables greater targeting of relevant issues, industry-specific knowledge sharing, and greater buy-in which ultimately leads to greater safety and health outcomes.

Partnership example:

Focus on high risk industries and fatalities
WorkCover NSWs Focus on Industry Program is designed to improve WHS, return to work and injury management outcomes in industry sectors that are high risk in terms of workers' compensation claims, or fatal or serious injury.

Before commencing work in a particular industry, WorkCover analyses data, and consults industry associations and unions to validate and better understand trends, identify WHS concerns and contributing factors, and solutions. The agency then validates these findings by visiting workplaces to better understand and confirm the risks in the work setting, to identify risk areas not raised in the data or consultation, and to discuss WHS concerns directly with workplace parties.

The aim is to have 'industry ownership' of the program and to approach the program as a partnership. There is a program plan and elements may include awareness raising and information for PCBUs about risks and controls for them. There are briefings for inspectors about the approach to take, the risks and issues to address, questions to ask, and guidance about when agreed actions may be sufficient and when to move to notices. Participants are given the time and opportunity to make changes, poorer performers may be case managed more intensively but, if non-compliance persists, inspectors may issue notices or take further action. The program is evaluated and the lessons learned are fed into the next program.

8.2 Compliance and enforcement

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

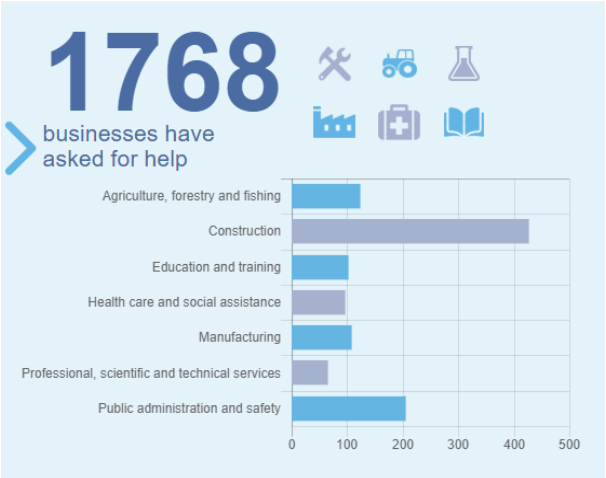
Question 32: Have you any comments in relation to your experience of the exercise of inspectors powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

Separate enforcement and educational branches

In South Australia, SafeWorkSA (SWSA) restructured to separate out the enforcement and educational branches. In doing so, the Agency established clear lines between the departments with no crossover of information i.e. educational officers cannot go into a workplace, see an issue and then call in an inspector.

Industry reports that this approach has reduced the fear and stigma employers had for SWSA. In the past, employers were fearful of a visit and did not seek out SWSA to provide education/advice, due to fear of getting in trouble if compliance issues were identified. This change has increased employers willingness to seek out advice and therefore provides safer workplaces. It has fostered a more collaborative environment between employers and the regulator and SWSA is no longer seen as the enemy.

Educator dashboard (SafeWork SA), Since 1 July 2016 and quotes from users:



"A very worthwhile service for businesses to use to help them provide a safe workplace.

"Extremely helpful and run by very knowledgeable Advisors. This is a fantastic program and it's helped me massively.

"Highly professional, excellent that it is free, especially for a small organisation.

"I believe the service is beneficial because businesses can feel free to use the service without fear of retribution or penalty."

Education needs to be the priority. At a minimum, there should be equal proactive engagement by the regulators, to that of reactive measures.

The changes in SA were enacted after concerns were raised in the RSC Review that SafeWork SA was not striking the right balance between providing information, education and advice on the one hand and enforcement under the legislation on the other. The establishment of an Educator and Regulator, effective from 1 July 2016 created a clear delineation between inspector and educator functions and roles, so that inspectors could focus on ensuring compliance with the laws while educators (who are not inspectors) could concentrate on providing support to businesses to help reduce workplace injuries. This approach was expected to result in further reductions in workplace injuries and should be implemented by all jurisdictions.

Recommendation 26: The national compliance and enforcement policy should be reviewed and consideration given to the SafeWork SA model, setting precedent in approach for all jurisdictions.

Publishing analysis about inspectorate activities would provide greater transparency and enable duty holders to assess the extent to which these activities are consistent and proportionate. Importantly it would also enable measures to be attached to inspectorate initiatives and campaigns to see what is effective and what will actually help industry, and assist in conveying the message to industry that inspectorate work can be a positive resource.

Inspection models are unsatisfactory

The move to a Robens model in the 80s/90s and then 'harmonisation' in 2011 set a legal framework to ensure that compliance and enforcement activities were more risk-based and risk-focused.

With the current responsive regulation model used by regulators, the main businesses inspected are those in high-risk industries, typically of medium to larger size. The main complaints from industry in relation to inspections are:

- The volume of inspecting agencies, inspectors, and inspection visits – frequent overlaps, duplications, lack of coordination (e.g. a quarry may have a WHS inspector, Mines Safety inspector and EPA inspector all within the same week);
- lack of consistency, coordination and coherence between individual inspectors and State regulators – lack of uniform structure, guidelines and approaches;
- the unwillingness or ability of inspectors to advise on risk management and appropriate controls (i.e. what does the PCBU need to do); and
- a focus on finding violations rather than improving compliance and outcomes.

It is well established internationally that successful compliance and enforcement systems require[14]:

- Reduction in institutional overlaps and structures, clarifying which agency should deal with which type of risk, and reducing duplications and overheads;

[14]Blanc, F., "*Reforming Inspections: Why, How and to What Effect?*", (2012), OECD, Paris.

- Clear roles and responsibilities of national and local structures, combining flexibility and responsiveness with coherence and consistency;
- Risk-focus in resource allocation, planning and implementation of inspection visits – relying on a comprehensive and up-to-date information system; and
- Transparency of requirements and clear guidance, allowing businesses to know what is expected of them, and what they can expect from inspectors.

8.3 Enforcement tools and delivery mechanisms

There has traditionally been a greater focus on regulation and its design and review (as evident by this Review and its focus) then on delivery mechanisms such as inspections and other enforcement tools. The Australian Chamber has been reminded numerous times over the years at the SWA table that regulator activity, and compliance and enforcement mechanisms are the remit of the Heads of Workplace Safety and not SWA Members. As such, tripartite involvement is not present in discussions around regulator activities, guidance development or policy.

There is ample evidence that enforcement and inspections are crucial to how the regulatory sphere affects businesses and the economy more broadly. In a report to the OECD on inspection reform, Blanc stated that[15]:

> *First, inspections and enforcement actions are generally the primary way through which businesses, in particular SMEs, "experience" regulations and regulators. Second, inadequate approaches or lack of changes in enforcement and inspections can mean that changes in regulations fail to deliver their full benefits. Third, evolutions in inspections and regulatory delivery to make them more compliance-focused, more supportive and risk-based can all lead to real and significant improvements for economic actors, even within the framework of existing regulations (which may, for different reasons, be very difficult to change "on the books" – so the ability to change the way they are enforced in practice matters). Finally, enforcement and inspections are as much about methods and culture as institutions, and as much about organizational mechanisms as legislation.*

The way in which inspections are conducted by individual inspectors (i.e. some may be flexible and look to the 'spirit' of the provision whereas others may stick to the written rules) can make identical regulation translate to very different compliance realities.

It's in the delivery

A multi-national business may have its workplaces in different locations such as South Australia, New South Wales and Queensland, each of which has its own WHS inspectors. The regulation the business has to comply with may be the same (as all are based on the model WHS Act) however the business is faced with different interpretations of the same provisions by the inspectors for its workplaces in each state. The regulation itself is not the problem, it's the implementation. Any clarity and simplicity gained by 'harmonised' legislation disappears creating confusion and likely a costly systems design in order to meet each state inspectors 'interpretation'.

[15] ibid

Most businesses are more concerned with how the legislation is implemented and enforced than with how it is written. Guidance material is critical to businesses understanding their duties and managing risk. Even more critical however is how inspectors interpret and use that guidance and apply it to the business they are present at for the inspection. The regulatory delivery needs to mirror and enhance the regulation. Any inconsistencies only serve to create further confusion and uncertainty about responsibilities under the law. The more complex the regulations are and the larger the volume of supplementary materials, the more likely you are to have inconsistencies.

One of the deficiencies of inspectors that members raised is that they can't or won't provide clear guidance on "how to do things right" even though this is the most effective way that regulatory delivery could be conducted to improve health and safety outcomes. SMEs in particular need assistance identifying what regulation is relevant to them and then assistance in implementing it for their specific context (i.e. what to do, or why, and how). At the same time, SMEs are typically cautious of inspectors and do not necessarily know what to expect, what is required of them and what the inspector is looking for leading to fear and hostility.

Specific guidance addresses both these issues. Codes or guidance material should reflect what an inspector will be looking for during an inspection and the outline the corresponding risk management approach for that particular hazard. The inspector is clear on what to look for and what controls should be used and so is the business.

Recommendation 27: Supplementary materials should reflect how an inspector will conduct an inspection (i.e. what they will look for, what they expect is reasonably practicable for that business and what specific controls or risk management systems are in place) and provide relevant and real examples.

Recommendation 28: the National Compliance and Enforcement Policy should be reviewed to ensure it is reflective of the Act's objectives, provides sufficient detail to ensure consistency across jurisdictions and is in line with current best regulatory delivery practices.

8.4 Enforceable undertakings

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

Enforceable undertakings (EUs) are negotiated between the business and the regulator as an alternative to undertaking court proceedings.

Industry welcomed EUs in the model WHS legislation as a legitimate tool in compliance activities, recognising they have been used outside of WHS at the federal level for some time (i.e. ACCC, ASIC etc.). The advantages of enforceable undertakings are that, unlike prosecutions, they can produce better results in respect of lasting compliance and do so across a wider range of workplaces and situations.

Example: NSW Resources Regulator

The NSW Resources Regulator accepted the joint enforceable undertaking (EU) from Ulan West Mine's mine holder, Ulan Coal Mines Ltd, and operator, Ulan West Operations Pty Ltd, after finding it would deliver better safety outcomes than a prosecution.

In accepting the EU, Resources Regulator chief compliance officer Anthony Keon said "the undertaking is considered significant, and will provide tangible benefits to the mining industry and the community".

Ulan Coal Mines and Ulan West Operations will spend $90,000 on developing and delivering a "skills workshop" for managers and supervisors from mining operations in the Mudgee region, and their contractors according to the EU.

They will also spend $60,000 on mental health training seminars for these organisations, and provide $100,000 to surrounding public health facilities to fund equipment for musculoskeletal disorder rehabilitation. The undertaking is estimated to cost $250,000, and the two companies will pay the regulator's costs of $252,744.

Example: SafeWork SA

SafeWork SA alleged SRG Building (Southern) Pty Ltd breached s32 of the State WHS Act. The regulator accepted SRG's enforceable undertaking because it "delivers substantial work health and safety benefits to SRG workers, the construction industry in general and the broader community".

The EU document outlines that the employer was issued a prohibition notice after the fatality, and responded by reviewing its system of work for scissor lifts, and designing and manufacturing early-warning devices to be used on EWPs. It also introduced new safety initiatives and safety standards including a "take five" initiative and requiring executive sign-off for EWP use.

The undertaking is expected to cost $461,920 in the first year, and $449,600 over the following 24 months, taking the total estimated cost to $911,520.

The EU document states that SRG committed to:

- $76,500 on supplying nominated organisations with the early-warning devices to be used throughout the industry, and grant them use of its design and other relevant intellectual property;

"The design and manufacture of such a device is an initiative in the industry that sets a new standard for safety when using a scissor lift," the document says. "It can be further adapted and allow the industry to further improve the current work system".

- $72,010 to delivering safety training to all levels of staff;
- $35,200 to implementing a health and wellbeing program targeting manual handling and body awareness;
- $56,210 to introducing an intranet documents management system;
- $36,200 on establishing an annual safety awards scheme and participating in SafeWork SAs "safe work month";
- $169,000 on employing a national quality and system manager; and
- $16,800 on strategies that deliver community benefits, including expanding its workplace and graduate programs and presenting health and safety education sessions for TAFE SA.

There have been few evaluations of the effectiveness of EUs within WHS however, a study carried out by the International Monetary Fund investigated their use in regulation of the finance industry in

Australia[16]. The report notes that EUs have been found to be effective in changing the behaviour of businesses subject to the EU in the finance industry.

In 2017, 25 EUs were accepted around Australia with the total value of actions amounting to $7,786,448. The average value of actions under EUs in 2017 was $311,458. However, increasingly there is a trend for larger companies to undertake actions averaging $800,000 to $1 million.

The most frequent type of actions relate to training, information sharing and auditing with an increasing amount also focusing on the development of new preventative or risk minimising technologies.

EUs not consistently applied across jurisdictions.

One issue raised by industry however is the lack of consistency of EUs across jurisdictions and by regulators.

HWSA produced guidelines and information publications for EUs. The nationally consistent **materials** included an overview, guidelines for proposing an enforceable undertaking, and three further publications: information at a glance, information for injured persons, and information for auditors.

A report into "Regulator Compliance Support, Inspection and Enforcement" conducted for Safe Work Australia by the National Research Centre for OHS Regulation found that:

> *"Two regulators have adopted these HWSA guidelines and information publications. One regulator has adopted the information publications, but not the guidelines. Two other regulators have guidelines and information publications with essentially the same information as the HWSA material, but with a few small substantive modifications. One regulator has not yet adopted or developed guidelines or information publications."*

Although the materials developed were designed for national consistency, the adoption and use of them have not been applied consistently by jurisdictions. Furthermore, the report concluded that there is no common approach to consider offers of EUs, although in each instance a proposed undertaking will be evaluated by a team or panel. For most of these regulators, the team or panel is made up of agency staff.

The Report recommended that:

> *The Australian WHS regulators discuss the most effective use of enforceable undertakings and, in particular:*
> *(a) how can other WHS regulators build on Queensland's experience in using enforceable undertakings?*
> *(b) should regulators do more to encourage duty holders to propose undertakings?*
> *(c) do undertakings have a place in a business engagement strategy to improve systematic work health and safety management?*

[16] Bluff, L., Johnstone, R., & Gunningham, N., *Project 3 Report – Regulator Compliance Support, Inspection and Enforcement*, (2015), conducted for Safe Work Australia by the National Research Centre for OHS Regulation

(d) what can regulators do to reduce the time it takes to negotiate undertakings?

(e) what is the best way to monitor the implementation of accepted undertakings, and to enforce undertakings that have not been properly implemented within specific time limits?

Recommendation 29: Industry is calling for SWA to conduct a review of enforceable undertakings and, in particular:

e) The consistency of application and approach to consideration of offers;

f) Whether regulators should do more to encourage duty holders to propose undertakings?

g) What regulators can do to reduce the time it takes to negotiate undertakings? and

h) What is the best way to monitor the implementation of accepted undertakings, and to enforce undertakings that have not been properly implemented within specific time limits?

8.5 Penalties in the model WHS Act

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

The current system as applied in practice is punitive rather than preventative. Penalties after the fact should not be the deterrent. Regulators need to bolster their inspectorate capabilities to 'even the playing field' and actively monitor compliance before an incident.

There is strong academic evidence to support the conclusion that increasing penalties is – most of the time –ineffective. Attempts at engineering criminal law rules to achieve a heightened deterrence effect are also generally ineffective[17].

Regulatory agencies in developed countries have traditionally had broadly two enforcement styles available; the *deterrence strategy* that

> *'emphasizes a confrontational style of enforcement and the sanctioning of rule-breaking behaviour. It assumes that those regulated are rational actors capable of responding to incentives, and that if offenders are detected with sufficient frequency and punished with sufficient severity, then they and other potential violators, will be deterred from violations in the future.'*[18]

Or the *compliance strategy* that seeks to prevent harm rather than punish it and focuses on cooperation between regulator, enforcement authority and person rather than confrontation, and conciliation rather than coercion.

[17] W. Voermans, *De aspirinewerking van sanction-eren (The Aspirin Effect of Sanctioning),* (2007), Wolff Legal Publishers.
[18] Neil Gunningham, *Enforcement and Compliance Strategies*, in: Baldwin, Cave and Lodge (eds.), *The Oxford Hand-book of Regulation*, (2010) Oxford University Press, chapter 7 (p. 120-145).

With the introduction of the model WHS laws, Australia sought to adopt an approach that combined the two styles, coined 'responsive regulation', however increasingly governments, regulatory agencies and courts are reverting to an outdated, deterrence style approach.

The question and debate of whether penalties are an effective means to ensure regulatory compliance has gone on for centuries. In recent years criminologists, legal economists and forensic psychologists, in particular, have dealt with these issues.

In 1997, Elffers, together with Hessing, examined the role of the threat of punishment related to compliance with tax legislation, concluding:

- *Statutory sanctions are ineffective for the conformist compliers, i.e. those who comply with rules only because they fear punishment. There is only an effect if – and this is generally not feasible, and perhaps not desirable either – the punishment threatened is certain, quick and severe.*
- *Statutory sanctions have an indirect effect on the identifiers, i.e. those who comply with rules because they want to belong to a social group for which compliance is the norm. Imposing sanctions on the others, those who break the rules, is necessary and useful for the identifiers, because this serves to maintain the social norm for them, the norm that keeps them on the straight and narrow.*
- *Statutory sanctions are superfluous for the internalises, those who comply with rules because they have made these rules part of their own worldview.*

Robinson and Darley[19] sought to answer the question "Does criminal law deter?, concluding it didn't after consideration of the behavioural science data. Tombs and Whyte[20] affirmed that across a heterogeneous variety of regulation scholars, there is a generalized rejection of 'deterrence-based' approaches and Beckett and Harris characterized the use of monetary sanctions as misguided[21].

Barrett, Lynch, Long and Stretesky conducted a longitudinal study examining the impact of the dollar amount of fines on compliance with environmental laws in Michigan, US. The research suggested that

> *"while noncompliance may slightly decrease immediately following a fine, there are few changes to a firm's long term compliance behaviour. Furthermore, analyses of these data suggest that total fines levied prior to the most recent fine actually have a positive relationship with noncompliance."*[22]

[19] Robinson, P & Darley, J., *Does Criminal Law Deter?; A Behavioural Science Investigation*, (2004) Oxford Journal of Legal Studies, 42, 2, p. 173-205.
[20] Tombs, S & Whyte, D., *The myths and realities of deterrence in workplace safety regulation*, (2013), British Journal of Criminology, doi:10.1093/bjc/azt024
[21] Beckett, K., & Harris, A., *On cash and conviction: Monetary sanctions as misguided policy, (*2011*)*. Criminology & Public Policy, 10(3), 509–537.
[22] Barrett, K.L., Lynch, M.J., Long, M.A. et al. Am J Crim Just (2017). https://doi.org/10.1007/s12103-017-9428-0

Lynch, Barrett, Stretesky, and Long[23] simultaneously examined thirty years of US EPA criminal cases, and concluded the probability of detection and criminal punishment for a crime is unlikely, casting doubt on the utility of current deterrence based models.

Overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of "severe sanctions leading to higher compliance" – neither in criminal justice, nor in enforcement of business regulations[24].

Research suggests that criminal prosecution may not be the most appropriate tool to ensure that non-compliance is addressed, or behaviour changed. More flexible and risk based tools are likely to result in achieving better regulatory outcomes, such as greater use of EUs.

8.6 Industrial Manslaughter

In response to the push for greater criminalization of offences in relation to a fatality, we submit:

- **There is no legal 'gap'**. The legal system already allows for manslaughter charges. The criminal law should apply generally were warranted and without qualification or diminution i.e. "industrial" manslaughter.
- **An adequate penalty regime already exists under WHS legislation to address work related fatalities arising from reckless disregard by a person who owes a duty of care to a worker.** Any deficiencies should be addressed as part of the upcoming 2018 model legislation review to ensure robust consultation and consistency of approach.
- **Industrial Manslaughter provisions are not justified as a means to improving workplace health and safety.** Nationally there has been a continued downward trend in work related fatalities with Safe Work Australia reporting a 37% decrease in recorded worker deaths from 2007 – 2015.
- **Indirect culpability**. The application of a charge of manslaughter against an individual has traditionally, under Australian law, referred to the direct criminal and culpable involvement in the death of another person. This proposal seeks to change that relationship and could result in charges against persons who may be totally removed from direct culpability.
- Industrial manslaughter **charges seek to link an offence to the outcome of an incident**. WHS charges rightly seek to link offences to the level of risk involved.
- The **focus should be on prevention of workplace injuries and deaths** rather than taking punitive action after the event. A punitive approach is counterproductive and less effective than encouraging employers and workers to work together.

[23] Lynch, M. J., Barrett, K. L., Stretesky, P. B., & Long, M. A. *The weak probability of punishment for environmental offenses and deterrence of environmental offenders: A discussion based on USEPA criminal cases, 1983–2013*, (2016). Deviant Behavior, 37(10), 1095–1109.
[24] Blanc, F., "*Reforming Inspections: Why, How and to What Effect*?", (2012), OECD, Paris.

- Industrial manslaughter laws would **engender excessive legalism and a 'blame' culture**. Employers and workers would focus on defending themselves rather than working co-operatively and recognising that safety is a shared responsibility by all involved, including business owners, managers and employees.

We are of the firm view that the creation of the new offence of Industrial Manslaughter is not necessary, and that such an extreme punitive amendment will have little to no positive impact on workplace safety.

For the reasons articulated above, and as outlined in the previous section, the Australian Chamber strongly opposes the inclusion of dedicated industrial manslaughter offences in criminal or workplace health and safety legislation.

Industrial accidents, including those leading to fatalities, should remain subject to regulation via existing workplace health and safety legislation. Manslaughter prosecutions should only come into play in relation to workplace fatalities subject to existing formulations and tests under the criminal law, without the creation of bespoke or dedicated new offences of industrial manslaughter.

9 Reference to Australian Standards in model legislation

A number of model Codes refer readers to Australian Standards for further information. This is intended to provide additional guidance on how a PCBU may discharge its duty under the model WHS Act and WHS Regulations.

This approach is taken in all model Codes, except where the model WHS Act or WHS Regulations prescribe that a PCBU must comply with an Australian Standard, in which case the model Code uses mandatory language.

The Australian Chamber has maintained that Australian Standards should not be referenced in the legislation (including Codes) unless they are made freely available.

The majority of model Codes make reference to multiple external documents. This inhibits its utility as a reference guide as:

a) These documents may not be readily available or kept updated;
b) An employer may be required to obtain copies of ancillary material to achieve compliance with the Code; and
c) Mandating compliance with other external documents imposes an unreasonable (and significant) cost and administrative burden upon business.

In 2016, a Western Australian Joint Standing Committee inquiry was held into access to Standards, chaired by Liberal MLA Peter Abetz.

The inquiry's final report noted that:

> *"Restricting free access for members of the public to the laws that apply to them is contrary to the rule of law principles that apply to all democracies such as ours,"*
>
> *"As Standards become quasi-legislation upon adoption, a failure to comply with their terms may carry serious consequences."*

Incorporation by reference may have the effect of making the standard legally binding. The result is that "*the reader is forced to look outside the usual sources of written laws in order to gain a complete understanding of it. Affected parties are required to obtain the incorporated material if they are expected to know and fully comply with the law. Not only does this increase compliance costs, it may also have an adverse impact on actual levels of compliance."*[25]

Australian Standards are costly and numerous. Business cannot be expected to purchase the range of Australian Standards, especially given the high volume of cross-referencing between standards.

[25] Joint Standing Committee on Delegated Legislation, *Report 84 Access to Australian Standards Adopted in Delegated Legislation*, (2016), Western Australia Legislative Assembly.

Example of references in Codes and average costs of standards referenced:

	No. of standards referenced	Example standard referenced and associated purchase cost
Model Regulations	19	AS/NZS 3012:2010. Electrical installations - Construction and demolition sites - $207.35
Model Code on Hazardous Chemicals	23	AS 1940:2017. The storage and handling of flammable and combustible liquids - $312.49
Model Code on Facilities	9	AS/NZS 1680.1: 2006 Interior workplace lighting - $267.66
Model code on welding	25	AS 1674.2-2007. Safety in welding and allied processes Electrical - $144.69
Model code on risks of falls	31	AS/NZS 1576 Scaffolding - $207

Example:

A spray painting company, for example, that fails to ensure its electrical equipment complies with the Wiring Rules (AS/NZS 3000) or the Standard for electrostatic spray guns can be fined up to $50,000 in Western Australia.

Additionally, how standards are referenced in Codes differs, further confusing the legal standing of the Standard – examples from model construction code:

- Further information on fixed walkways, stairways and ladders **is in AS 1657-2013: Fixed platforms, walkways, stairways and ladders – Design, construction and installation.**
- Scaffolding checklist. Prefabricated scaffolds must be of the same type and not mixed components, unless the mixing of components has been approved by the manufacturer. **AS/NZS 4576 sets out the assurances that are needed** before the components of different prefabricated scaffolding systems can be mixed in a scaffold.
- Elevating Work Platform checklist. The platforms should only be used as working platforms. They should not be used as a means of access to and egress from a work area **unless the conditions set out in AS 2550.10 are met.**
- Equipment used for fall-arrest should be **designed, manufactured, selected and used in compliance with AS/NZS 1891(Set): Industrial fall-arrest systems and devices.**

Recommendation 30: References to any ancillary or external documents should be removed from the model Codes unless they are freely available and easily accessible.

Recommendation 31: Referencing inconsistencies need to be addressed in order to clarify requirements.

10 Specific hazards

10.1 Psychological health in the workplace

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

We acknowledge mental ill-health as an important public health issue, which impacts not only on individuals and families, but also on the workplaces that form an important part of our community, social and economic lives. Employers, through initiatives such as beyondblue's HeadsUp program, have consistently supported efforts to raise community awareness and help address stigma associated with mental illness

Work-related psychosocial risk and psychological injury are complex issues and continued research is needed into best practice prevention and mitigation strategies. We believe that there is already adequate legislation in place to govern the management of psychological risk.

We also note a number of practical supplementary resources recently released or currently in development by Safe Work Australia addressing this topic including: the model code "*How to manage work health and safety risks*" with specific examples of how to use the risk-management approach to manage psychological hazards, as well as a new National Guide on psychological health and safety. Furthermore, the Mentally Healthy Workplace Alliance (of which SWA is a member) is in the process of developing an over-arching framework for mentally healthy workplaces.

Mental health in the workplace and psychosocial hazards are still developing fields of study with academics ambiguous as to how to achieve optimal outcomes. Maintaining legislation that is flexible and adaptive to new evidence and controls is critical. This is even more relevant in the context of the changing nature of, and the future of work.

Further regulation is not the answer and we would encourage Governments to explore other less prescriptive and more practical measures to assist employers in addressing this issue, particularly in the form of increased education and awareness resources and clear referral pathways.

Recommendation 32: We believe the model WHS laws are effective in supporting the management of risks to psychological health in the workplace, particularly in light of the suite of supplementary guidance under development by SWA. We would encourage SWA and State and Territory Regulators to engage with industry to determine the need for and scope of further education and awareness resources and clear referral pathways.

10.2 Globally Harmonised System of Classification and Labelling of Chemicals (GHS)

Referenced GHS edition

The WHS legislation currently references the 3rd revised edition of the GHS. The 7th revised edition was published in July 2017.

Policy agreement was obtained from Safe Work Australia Members to implement the 6th revised edition of the GHS, and this was intended to occur on 1 January 2017 on a 2 year transition. This has still not occurred to date.

Australia's trading partners are implementing different editions and building blocks, and with unpredictable timing. We need to be able to accept imported products with minimal reworking in Australia, which could mean long "transition" time to move from one edition to the next e.g. 5 years, and updating every 2 years to the newer version of GHS. In reality, this would mean that 2-3 editions of GHS may be acceptable at any one point in time. The longer the transition time, the more editions of GHS will be in force at any one time.

National consistency of GHS implementation by States/Territories.

GHS is a hazard classification and communication system for chemicals developed and maintained by the United Nations through the United Nations Sub-Committee of Experts on Globally Harmonised System of Classification and Labelling of Chemicals (UNSCEGHS).

In Australia, GHS is given effect through the Model WHS Regulations. As the Model WHS law package was not adopted consistently across Australia, the hazard classification and communication of workplace chemicals was also inconsistent. As Victoria will not adopt the Model WHS law package, hazard classification and communication of workplace chemicals will continue to be inconsistent across Australia.

Example of differences:

Scope: In Model WHS law, GHS physico-chemical and human health hazards apply to chemicals for hazard classification. In Victoria, only GHS human health hazards apply.

Nomenclature – In Model WHS law, substances and products meeting one or more GHS hazard classification criteria are named "hazardous chemicals". In Victoria, substances and products meeting GHS human health hazard criteria are named "hazardous substances".

While jurisdictions that have not adopted the Model WHS laws, or in the case of ACT omitted the chemical section (Part 7) of the Model WHS Regulations from adoption, have provisions to "accept" labels and SDS meeting Model WHS law requirements, the practical implications of this is unclear.

For example, Victoria has stated that it has provisions in its OHS Regulations recognising equivalent WHS legislation (4.1.4(2), 4.1.5(2), 4.1.10(1) (a)), which allows determinations, SDSs and labels developed under WHS legislation to be acceptable in Victoria. However, when

questioned with a specific example (lithium batteries), it was clear that additional requirements apply in Victoria.

Example:

Lithium ion batteries are not hazardous chemicals and SDS are not required in those jurisdictions where the Model Work Health and Safety (WHS) Regulations have been implemented (including the section on hazardous chemicals).

Victoria has stated that an SDS will be required for storage and handling of substances that are dangerous goods but are not classified as hazardous chemicals such as lithium batteries (see sub-regulation 20(1)(b), Dangerous Goods (Storage and Handling) Regulations 2012 (Vic))

Centralised database of State/Territory exemptions for GHS compliance.

Case Example Model code of practice on labelling of hazardous chemicals

Page 23, 5. Other duties in relation to labelling

In the model Code review, Victoria raised that this part needed to be updated to reflect the decision made at SWA 35 (item 8.2) in regards to supply chain-relabelling requirements.

SWA noted this however commented that the supply chain relabelling requirements are not included in the model WHS regulations; they were implemented by the states and territories individually. SWA recommended against including information about state and territory exemptions in the code, as the code is intended to be consistent with the regulations and the exemptions vary between jurisdictions.

We agreed that this information should not be included in the Code and pointed out that this is also because they are constantly updated by state/territory jurisdictions. However, we argued there needs to be some mechanism such that SWA holds a database of all current labelling /supply amendments held by all jurisdictions that affect hazardous chemicals (including AgVet) that is readily available for industry to access (i.e. on SWA website).

Labelling

In Australia, the proportion of hazardous ingredients needs to be disclosed on labels for workplaces. This is duplicative in nature and out of step with most international practices.

We don't believe there is discernible benefit for this practice, as workplaces are required to have an SDS which discloses the hazardous ingredient proportion and this information should be readily available at workplaces.

GHS compliant safety data sheets (SDS) for de-listed products

During the Code review process the Australian Chamber sought a change to requirements in relation to de-listed products. We were advised that a Regulation change was necessary however, it was believed this issue was only transitional.

This is not a transitional issue. New products replace old products continually in the marketplace. According to regulation 330(5), a current SDS has to be provided for products that have been discontinued for up to five years.

Example:

Company ABC removed product X from its distribution/sales list on 1 March 2018. At the time of "delisting", the SDS for product X was current e.g. updated in August 2015. On 1 February 2022, a customer requests an SDS for product X for disposal purposes. The SDS for product X updated in August 2015 is no longer current and therefore the company must review and re-issue the SDS for a product that they have not sold since 1 March 2018.

This will be an ongoing cost to industry, and in many cases, the IT systems in companies will not be able to issue new compliance document like SDS for delisted products that have been archived in their system.

10.3 Major hazard facilities (MHF)

Industry believes that consideration of significant reforms is needed in relation to WHS in MHF operations.

This review is an opportunity to start a dialogue aimed at delivering reforms that will benefit all MHF operators by reducing costs, improving safety outcomes, improving Australia's international competitiveness and ensuring that the costs of MHF regulation do not act as a disincentive to new and on-going investment in Australia.

Ongoing barriers exist including:

- **Jurisdictional differences**

  The costs of being an MHF are significant. Where businesses operate MHFs in multiple jurisdictions, the costs are exacerbated by regulatory differences between jurisdictions.

- "**Red tape" and regulatory duplication**.

  MHF operators will be subject to regulation under MHF provisions, WHS provisions and environmental legislation (at the very least). All compliance activities associated with these different regulations principally revolve around the controls, which are documented in the MHF safety case.

Australian
Chamber of Commerce
and Industry

About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia, speaking on behalf of Australian business at home and abroad.

The Australian Chamber represents more than 300,000 businesses of all sizes, across all industries and all parts of the country employing over 4 million people. It advocates on behalf of the business community on issues including economics, tax, trade, workplace relations, education and training and work health and safety.

The Australian Chamber represents Australian business in international forums including the International Chamber of Commerce, the International Organisation of Employers and the OECD's Business and Industry Advisory Council.

Our vision

To make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

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