

Australian Industry Group

WORK HEALTH AND SAFETY BILL 2019

Western Australia

Submission to
Standing Committee on Uniform
Legislation and Statutes Review

JUNE 2020



WORK HEALTH AND SAFETY BILL 2020 WESTERN AUSTRALIA

SUBMISSION TO STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REFORM

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines, industrial technology and ICT means we are genuinely representative of Australian industry.

Ai Group is a member of Safe Work Australia (SWA) and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety Laws and continues to actively monitor implementation and amendments. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have been actively engaged in supporting the effective implementation of the Model WHS laws that were introduced in most states and territories of Australia, and in recent times, New Zealand.

We have ongoing contact and engagement with employers on work health and safety issues, including informing them of regulatory changes, discussing proposed regulatory change and industry practices, as well as providing consulting and training services.

We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to work health and safety.

It is in this context that we make our submission in relation to the [Work Health and Safety Bill](#) that was introduced into Parliament on 27 November and referred to Committee on 21 May 2020.

HARMONISED LEGISLATION

Ai Group is pleased that Western Australia is progressing with the adoption of the Model WHS Laws. It is a welcome step toward achieving harmonisation. We continue to hope that Victoria will eventually adopt the Model so that the full benefit of harmonisation can be realised by its application across all states, territories and the Commonwealth.

A key benefit of the harmonised approach to WHS law within the federation has been to unify and thereby clarify the language, signals and intent of work health and safety law in Australian workplaces.

Those who do not practice work health and safety at a workplace level can underestimate the importance of such a development. The ability of multi-state organisations to operate under consistent safety practice, language, jargon, systems and descriptions of personal and corporate responsibility across all their operations nationally should be self-evident. Even companies who only operate in Western Australia will interact daily with the national economy and health and safety principles applying in other states through supply chains, industry networks and the media.

All governments in Australia profess their absolute commitment to ensuring safe workplaces. Harmonisation has been an important sign that they care enough to reconcile historical differences for the sake of clarity and focus and to avoid the trap of too many different dialects clouding the message.

Ai Group and our members strongly support the harmonised model and do not like to see variations proposed or adopted by individual jurisdictions. Through the multi-jurisdictional forum of Safe Work Australia, the harmonised model provides a process to consider significant amendments to the standards of legal responsibility or the administration of the laws.

We are not fair-weather friends of the harmonised model and have previously argued that amendments made by various jurisdictions should not be adopted, even when they are seen to be “employer friendly”. Such is our commitment to the utility of harmonisation.

PREVIOUS CONSULTATION ON THE WA APPROACH TO IMPLEMENTING THE WHS ACT

In August 2018, Ai Group made a submission to the Department of Mines, Industry Regulation and Safety, in response to the Report of the Ministerial Advisory Panel entitled [Modernising work health and safety laws in Western Australia: Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia](#) (the Report).

The Report made 44 recommendations for amendments from the Model WHS Bill.

Consistent with our long-held view, in our submission in response to the Report we reiterated that it is Ai Group’s preference that Western Australia adopt the Model WHS Laws, without amendments other than those identified within the jurisdictional notes.

Despite this, as many of the recommendations for amendments were minor in nature, Ai Group accepted a number of the recommendations, noting in some cases that whilst we could not fully understand the need for the change, there were no strong objections.

In relation to a small number of proposed amendments we expressed our strong concerns. Where these amendments have been introduced in the Bill, we will repeat our concerns later in this submission.

Some amendments made to the Bill were not canvassed in the Report and cause significant concern in the way they are constructed - particularly offences and insurance. We will address these matters first in our submission.

THE WORK HEALTH AND SAFETY BILL

OFFENCES

The Bill has introduced two levels of offence for industrial manslaughter. In addition, whilst adopting the structure of other offences as Category 1, 2 and 3, the detail of Category 1 and 2 offences have been amended from those in the Model WHS Bill.

The reason for this approach is not outlined in either the Explanatory Memorandum or the Second Reading speech.

As outlined below, Ai Group does not support the inclusion of industrial manslaughter provisions within WHS laws. We also express serious concerns about the amendments that have been made to the Category 1 and Category 2 offence as they result in a major divergence from the Model WHS Laws and philosophy behind the structure of offences.

Ai Group strongly encourages the Committee to seek further detail on the rationale for two industrial manslaughter offences and the amendments to the Category 1 and Category 2 offences. It may also be appropriate to seek specialised advice from a legal practitioner who specialises in WHS matters, to consider how the industrial manslaughter and Category 1 and 2 offences interact. The aim of such a review would be to ensure that there is a logical interaction between the offences.

Our concerns about these offences are outlined in the following sections of our submission.

Industrial Manslaughter

There is no place for Industrial Manslaughter offences within WHS laws.

There has been much debate over the last 20 years about whether there is a need for industrial manslaughter offences in OHS/WHS legislation. In recent times, a number of jurisdictions have introduced industrial/workplace manslaughter provisions into their WHS/OHS laws. All have done so in different ways.

Ai Group does not believe that it is necessary or appropriate to have specific industrial manslaughter legislation incorporated into a WHS/OHS Act, noting that there are existing manslaughter offences under general criminal law which can be used, and have been used in some jurisdictions, in relation to a workplace fatality.

In April 2017 the South Australian Court of Criminal Appeal confirmed the 12-year jail sentence imposed on a company director who was found guilty of manslaughter under general criminal laws.

In March 2018, the Queensland Supreme Court sentenced a company director to seven years' jail, with a non-parole period of two years, for manslaughter under general criminal laws.

In circumstances where the legislation is already equipped to respond to the specific conduct, we can see no reasonable or legal basis to introduce industrial manslaughter charges within the WHS regime.

In 2018 an Independent review of the Model WHS Laws was undertaken (The Model Laws Review). One of the recommendations was that industrial manslaughter laws be included within the Model WHS Laws; a consistent approach that could be adopted across all jurisdictions.

Ai Group's major objection to the inclusion of industrial manslaughter provisions within WHS laws is that it changes the focus of the legislation from one that is about level of risk to which people are exposed and the culpability of that exposure (Category 1, 2, or 3) to one where the outcome becomes a determinant of the potential penalty.

Industrial manslaughter provisions could be triggered by a death in circumstances that may have less culpability than a similar incident that does not result in death.

Concerns about the structure of the Industrial Manslaughter provisions within the Bill.

We acknowledge that some jurisdictions are adopting a version of industrial manslaughter and therefore turn to the construction of the offence within the WA legislation.

The Bill establishes two separate offences of industrial manslaughter applicable to persons conducting a business or undertaking (PCBU) and officers:

Section 30A Industrial manslaughter – crime

Penalties:

- 20 years imprisonment and a fine of \$5,000,000 for an individual
- \$10,000,000 fine for a corporation

Section 30B Industrial manslaughter – simple offence

Penalties:

- 10 years imprisonment and a fine of \$2,500,000 for an individual
- \$5,000,000 fine for a corporation

Ai Group is very concerned about the *simple offence*, which carries severe penalties including a potential 10-year prison term for an individual:

- there is no requirement to demonstrate that the person engaged in conduct knowing it was likely to cause death; and
- the officer offence appears to have a very low level of culpability, referring only to neglect, rather than a great falling short of what would be expected.

Failure to comply with a Health and Safety Duty

The Model WHS Laws establish three categories of offence associated with the failure to comply with a health and safety duty. They apply to all persons conducting a business or undertaking (PCBUs), to officers, to workers and to other persons.

They focus on the level of risk to which a person is exposed and, in delineating between Category 1 and Category 2, the level of culpability of the duty holder who fails to comply.

Variation from the Model WHS Laws

At first look, it appears that these categories have been carried through to the WA WHS Bill. However, closer analysis identifies that whilst the title of the offences are the same, the Category 1 and Category 2 offences have been significantly amended. To assist comparison, the offences have been reproduced in Table 1.

The focus should be on risk and culpability, not outcome.

Within the Category 1 offence there has been a move away from a “pure risk” offence. The principle of considering pure risk was clearly established as a result of the 2008 National OHS Review (the 2008 Review) which led to the development of the Model WHS Laws. The first report of that review stated, at page xv:

We propose making sanctions more related to culpability for breaches than to their outcomes, as well as more effective in terms of deterrence.

We propose three categories of offences. Category 1 would relate to the most serious cases of non-compliance, involving recklessness or gross negligence and serious harm (fatality or serious injury) to a person or a risk of such harm. Category 2 would deal with serious harm or the risk of it without recklessness or negligence. Category 3 would apply to other breaches.

Subsequently, Recommendation 51, stated: *Penalties should be clearly related to non-compliance with a duty, the culpability of the offender and the level of risk, not merely the actual consequences of the breach.*

The Category 1 offences are established by section 31. Within the proposed WA laws, Section 31(1) applies to a PCBU and requires that the failure has caused serious harm to an individual. Section 31(2) applies to a person who is not a PCBU and requires that the failure causes death or serious harm to an individual.

This means that a person can only be prosecuted under the proposed Category 1 offence if there is a death or serious harm, not if there is a risk of death or serious injury. This is inconsistent with the principles established by the 2008 Review and agreed to by all Ministers.

Category 1 penalties were designed to address and act as a disincentive against the state of mind that leads to reckless conduct in high risk circumstances.

The penalties associated with the WA Category 1 offence are closely aligned to those in the Model WHS laws, including 5 years imprisonment. Yet there is no requirement to demonstrate recklessness, as is required in the Model WHS laws.

It is not appropriate to have the potential of a 5-year prison term and such high financial penalties for a general breach of the law. Equally, it is not appropriate, equitable or an effective deterrent against recklessness for there to be no risk of a prison term if the conduct is due to reckless conduct, but by sheer fortune does not result in harm.

Category 2 penalties were designed to address serious risks that did not involve reckless conduct

Category 2 offences attract significant financial penalties and were designed within the Model WHS laws to apply when a person was exposed to a risk of death or serious injury or illness.

Category 3 penalties, which have a potential penalty for a body corporate of \$570,000, were designed to address situations where there was a failure to comply with a duty, but a person was not exposed to the risk of death or serious injury or illness.

The amendments to Category 2 in the WHS Bill would mean that the offence could apply if an individual is exposed to a risk of death or **of injury or harm to the individual's health**.

Subsequently, a risk of even minor injury could lead to a Category 2 offence. Within the Model WHS laws, offences resulting in exposure to an injury or illness that is not serious would only attract the Category 3 offence.

**Table 1: Offences for failure to comply with a health and safety duty
Comparison of Model WHS Laws and the WA WHS Bill.**

Model WHS Laws	WA WHS Bill
<p>31 Reckless conduct – Category 1</p> <p>(1) A person commits a Category 1 offence if:</p> <ul style="list-style-type: none"> (a) the person has a health and safety duty; and (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and (c) the person is reckless as to the risk to an individual of death or serious injury or illness. <p>(2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.</p> <p>Penalties: \$3,000,000 for a body corporate \$600,000 or 5 years for an officer \$300,000 or 5 years for an individual</p>	<p>31 Failure to comply with a health and safety duty – Category 1</p> <p>(1) A person commits a Category 1 offence if:</p> <ul style="list-style-type: none"> (a) the person has a health and safety duty as a person conducting a business or undertaking; and (b) the person fails to comply with that duty; and (c) the failure causes serious harm to an individual. <p>(2) A person commits a Category 1 offence if:</p> <ul style="list-style-type: none"> (a) the person has a health and safety duty otherwise than as a person conducting a business or undertaking; and (b) the person fails to comply with that duty; and (c) the failure causes the death of, or serious harm to, an individual. <p>(3) For the purposes of subsections (1)(c) and (2)(c), the failure causes a serious harm to an individual if it causes an injury or illness to the individual that –</p> <ul style="list-style-type: none"> (a) endangers, or is likely to endanger, the individual's life; or (b) results in or is likely to result in, permanent injury or harm to the individual's health. <p>Penalties: \$3,500,000 for a body corporate \$680,000 or 5 years for an officer \$340,000 or 5 years for an individual</p>
<p>32 Failure to comply with a health and safety duty – Category 2</p> <p>(1) A person commits a Category 2 offence if:</p> <ul style="list-style-type: none"> (a) the person has a health and safety duty; and (b) the person fails to comply with that duty; and (c) the failure exposes an individual to a risk of death or serious injury or illness. <p>Penalties: \$1,500,000 for a body corporate \$300,000 for an officer \$150,000 for an individual</p>	<p>32 Failure to comply with a health and safety duty – Category 2</p> <p>(1) A person commits a Category 2 offence if:</p> <ul style="list-style-type: none"> (a) the person has a health and safety duty; and (b) the person fails to comply with that duty; and (c) the failure exposes an individual to a risk of death or of injury or harm to the individual's health. <p>Penalties: \$1,800,000 for a body corporate \$350,000 for an officer \$170,000 for an individual</p>

Table 1: Offences for failure to comply with a health and safety duty Comparison of Model WHS Laws and the WA WHS Bill.	
Model WHS Laws	WA WHS Bill
<p>33 Failure to comply with a health and safety duty – Category 3</p> <p>(1) A person commits a Category 3 offence if:</p> <p>(a) the person has a health and safety duty; and</p> <p>(b) the person fails to comply with that duty.</p> <p>Penalties:</p> <p>\$500,000 for a body corporate</p> <p>\$100,000 for an officer</p> <p>\$ 50,000 for an individual</p>	<p>33 Failure to comply with a health and safety duty – Category 3</p> <p>(1) A person commits a Category 3 offence if:</p> <p>(a) the person has a health and safety duty; and</p> <p>(b) the person fails to comply with that duty.</p> <p>Penalties:</p> <p>\$570,000 for a body corporate</p> <p>\$120,000 for an officer</p> <p>\$ 55,000 for an individual</p>

INSURANCE

The 2018 Review of the Model WHS laws included recommendations in relation to insurance, at recommendation 26.

Amend the model WHS Act to make it an offence to:

- *enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act*
- *provide insurance or grant an indemnity for liability for a monetary penalty under the model WHS Act, and*
- *take the benefit of such insurance or indemnity*

Section 272A of the WA WHS Bill implements this recommendation.

Ai Group recognises the perception of incongruity associated with organisations being able to access insurance coverage for fines applied when there is a serious breach of WHS laws and do not object to the intent of the recommendation or its inclusion in the WA WHS Bill.

Businesses, and their officers, have a higher exposure to potential prosecution than the average person, and liability may arise from the acts or omissions of others. There should be an ability to access insurance to support the defence of such actions and we interpret the provision as continuing to allow such cover for legal and other defence costs, and only excluding monetary penalties.

However, we have repeatedly expressed our concern about creating an offence for holding the policy, rather than for accessing the policy.

It is possible that organisations could inadvertently hold the type of cover prohibited by the proposed s272A, particularly in the following circumstances:

- Where the insurance policy is vague and nuanced as to the extent of cover being offered. Our examination of such documents reveals significant ambiguity, and some internal contradiction, as to whether such cover is indeed provided or not. An insurer may be found to have offered such cover in circumstances where the insured could genuinely not know that was the case.
- Where local arms of multi-national companies are covered by such insurance as part of global insurance bundles negotiated by their parent company overseas. The Bill would make such insurance ineffective upon enactment, however we are concerned that the local arm of the company may be found to be in breach of the proposed s272A(3) despite (1) not taking out the insurance themselves and (2) not knowing that the insurance taken out on their behalf provided the offending level of cover.

The above concerns could be avoided if s272A(3)(a) were deleted and section 272A relied only on rendering the insurance invalid and making unlawful to offer the insurance or take the benefit of it. We do not believe this would weaken the intent or effect of the provision.

We note that NSW recently introduced similar provisions in 272A(a) of their Act but included the words “without reasonable excuse”. Whilst we raised concerns about the effectiveness of this qualification and argued instead for removal of the provision, it would be a worthwhile addition to the WA laws if s272(3)(a) remains.

OTHER PROVISIONS OF CONCERN NOT ADDRESSED IN THE REPORT

Duties of PCBU in relation to Health and Safety Committees – section 79

The functions of a health and safety committee, outlined in section 77, can generally be summarised as facilitating cooperation between the PCBU and workers in developing standards, rules and procedures to ensure workers' health and safety.

Committees are one way to meet the obligations to consult with workers. The nature of consultation is outlined in section 48(1) of the Bill, consistent with the provisions of the Model WHS Bill, as:

- (a) that relevant information about the matter is shared with workers; and
- (b) that workers be given a reasonable opportunity to –
 - (i) express their views and to raise work health or safety issues in relation to the matter; and
 - (ii) to contribute to the decision-making process relating to the matter; and
- (c) that the views of the workers are taken into account by the person conducting the business or undertaking;
- (d) that the workers are advised of the outcome of the consultation in a timely manner.

The Bill introduces very prescriptive requirements on a PCBU, that are not in the Model WHS laws, in relation to how they respond to recommendations of the committee, even though there is no reference to giving recommendations being a function of the committee within section 77. These increased obligations were not a recommendation of the Report and, accordingly, have not previously been considered by Ai Group.

Section 79(5) requires that a PCBU must, without reasonable delay: consider recommendations; provide a response; and if the PCBU agrees with the recommendation, take any action required for implementation. It could be argued that this is a reasonable explanation of obligations to consult and that a timely consideration of recommendations is an appropriate response

However, when read in conjunction with section 79(6) it is clear that the committee is being given considerable power by the Bill. “The person conducting the business or undertaking must not unreasonably withhold the person’s agreement to the implementation of a recommendation or other decision referred to in subsection (5)(a) (wholly or in part)”. These powers go well beyond the consultation provisions.

It is not appropriate to give health and safety committees this level of power, with an associated potential fine of \$55,000 for a body corporate who does not comply with the obligations that use words such as “unreasonably withhold”.

Further, the PCBU and its officers have a very high obligation to ensure health and safety, with associated high penalties for breaching that duty including terms of imprisonment. It is ultimately the decision of a PCBU, informed by its officers, as to which control measures are implemented. Requiring a PCBU to implement measures which may not be the best WHS solutions is interfering with the overarching obligation of the PCBU and its officers.

A potential unintended consequence of this amendment is that PCBUs may be reluctant to engage openly with committees, only responding to issues raised by members rather than proactively putting issues on the table for discussion, and also being cautious about their contribution to the committee discussions.

It is Ai Group’s strong view that sections 79(5) and (6) should be removed from the Bill as they distort the responsibilities and obligations in relation to consultation which are about sharing information and considering views, not being required to act on those views.

If these provisions remain in the Act, they need to be accompanied by guidelines that provide succinct advice to PCBUs about what the regulator expects. There should also be an ability to utilise the issue resolution procedures, including seeking input from the regulator, without the risk of that contact initiating an investigation for prosecution for breaching section 79(6).

Compensation – section 184

Section 184 of the Model WHS Bill establishes an ability for a person to claim compensation from the [state] if they incur loss or expense arising from powers exercised by an inspector, including the seizure of things.

This provision has not been included in the WA WHS Bill.

It is rare that such an action would be initiated. However, it is appropriate for the state/regulator to be held accountable for loss or expense incurred due to inappropriate action by an inspector or regulator. The inclusion of this provision also serves to emphasise, to inspectors and the regulator, that appropriate consideration and care must be taken when making decisions that may lead to a financial impact on a business.

Admission of evidence obtained unlawfully – section 232A

This section of the Bill, which is not part of the Model WHS laws enables a court to decide to admit evidence that would otherwise be inadmissible due to being obtained by, or as a result of, unlawful conduct.

It is Ai Group's strong view that normal judicial process should apply to WHS laws, particularly as breaches of the Act can result in penalties up to 25-year imprisonment and \$16.5m.

It is not appropriate to allow discretion on the admissibility of evidence that was obtained unlawfully.

AMENDMENTS OF CONCERN THAT WERE CONSIDERED IN THE REPORT

Definition of import – section 4

The Model WHS Bill defines import as meaning “to bring into the jurisdiction from outside Australia”. The WA Bill defines import as meaning “to bring into the State, whether from outside Australia or otherwise”.

The Report identified that there were some concerns about the ability to enforce obligations in situations where plant, substances and structures are imported into Australia in another jurisdiction and then transported to Western Australia.

Ai Group understands the concerns raised. However, there may be unintended consequences relating to movement of plant, substances and structures around Australia.

If the new definition is adopted in the WA Bill, the impact should be considered during finalisation of the Regulations to ensure that any unintended consequences are considered and addressed.

Duties of persons conducting businesses or undertakings that provide services relating to work health and safety – section 26A

Recommendation 8 of the Report was to “include a duty of care on the providers of workplace health and safety advice, services or products”. The commentary around the recommendation included:

*The authors of the [2008] National Review noted that such a duty would require clear definitions of **relevant service** and **service provider** to ensure the scope of the duty does not extend beyond the nature of the services provided.*

The recommendations of the National Review in relation to OHS services were not endorsed by the Workplace Relations Ministers’ Council on the basis they were already covered by the primary duty of care for PCBUs.

The MAP [Ministerial Advisory Panel] recommended inclusion of a specific duty in Western Australia’s version of the WHS Act (WA) and also agreed that appropriate definitions will be drafted in consultation with Parliamentary Counsel, informed by submissions made by interested parties during the public comment period.

We note that in relation to its recommendation on a duty for OHS service providers, the 2008 National OHS Review added, at page 101 of Report 1:

In recommending that the model Act impose a duty of care on service providers, we note that this should not require them to do more than they ought be doing under other current laws. The service providers would owe duties of care at common law and owe obligations under the Trade Practices Act 1974 and other consumer protection legislation. They would also owe a duty of care under the primary duty of care that we recommend be placed on a person conducting a business or undertaking.

In response to the recommendation in the Report we stated that “Ai Group believes this is an issue that should be addressed at a national level, possibly as part of the current 5-year review”.

We restate that a similar provision was recommended in 2008 but was not adopted by the Model WHS Laws. The issue does not seem to have received any significant attention in the 2018 review of the Model WHS Laws, undertaken 7 and 8 years after the laws were adopted in most jurisdictions. There was no recommendation for change and no discussion on the merits or need to introduce such a duty in the 2018 Review outcomes.

It continues to be our view that this issue should only be considered at a national level. It is a fundamental alteration to the structure of duties which, until now, have not been amended by individual jurisdictions. Any change at a jurisdictional level is likely to cause significant confusion about its application, particularly for service providers who work across multiple jurisdictions, and their clients.

The provision in the Bill would create a specific new duty at subsection (3).

The WHS services provider must ensure, so far as is reasonably practicable, that the WHS services are provided so that any relevant use of them at, or in relation to, a workplace referred to in subsection (2)(b) will not put at risk the health and safety of persons who are at that workplace.

The notes associated with this subsection indicate that a breach could occur if:

- advice was given that was designed to eliminate a risk, but when implemented the risk was not eliminated.
- testing of plant failed to identify existing risks.
- a training course for workers on how to avoid being exposed to risks is inadequate and they continue to be exposed to those risks.

WHS Services are defined in subsection (2)

This section applies to a WHS service provider who conducts a business or undertaking that provides WHS services -

- (a) to a person who conducts another business or undertaking; and*
- (b) that are to be used, or could reasonably be expected to be used, at, or in relation to, a workplace at which work is carried out for the other business or undertaking.*

The definition of WHS services in subsection (1) states that the following are not included:

- (i) services provided under this Act by a WHS authority, a health and safety representative (or deputy) or a health and safety committee;*
- (ii) services provided under a corresponding WHS law by a person or body corresponding to a WHS authority, a health and safety representative (or deputy) or a health and safety committee;*
- (iii) emergency services provided by police officers, or other emergency services personnel, in situations where there is a serious risk to the health or safety of any individual;*
- (iv) services that are subject to legal professional privilege or that would be subject to legal professional privilege but for that privilege having been waived.*

Within the note for the definition, there are examples of the type of services that could be covered: recommendations or other advice; testing or analysis; other information or documents, for example, a report, plan, programme, strategy, guideline or manual; a training or other educational course.

We are concerned about the potential for these provisions to have unintended consequences on the WHS services marketplace, particularly if there are differential principles applying, or perceived to be applying, in WA. The duty may discourage the development and availability of high utility templates and guidance that are provided by a range of organisations for common industry risks, such as high-risk construction work. These are necessarily generic in nature identify the common risks and controls and requiring the user to consult with workers and adjust to meet their specific circumstances.

It is unclear for example how it would apply to unions as active participants in the giving of advice to workplaces on WHS issues and industry associations and professional bodies that provide advice and training to members and the public more generally.

Ai Group is also concerned about the exclusions to the definition of a WHS Services that are listed, for the reasons summarised below:

- Services provided by health and safety representatives and committees are listed as exclusions in both (i) and (ii). HSRs and committees are not PCBUs and do not provide WHS services; they do not have duties under the Act. To specifically exclude them in this definition will create confusion about their role and responsibilities in workplaces
- Services provided by a WHS Authority are excluded in both (i) and (ii). This risks sending mixed messages to a PCBU who is required to do all that is reasonably practicable to ensure health and safety, if the regulator does not have to exercise the same duty of care when exercising their powers to require specific actions to be taken by a PCBU?

For the reasons outlined above, Ai Group strongly recommends that this specific duty placed on providers of WHS services be removed from the Bill. If implementation of this provision is an important issue for Western Australia it should be referred to Safe Work Australia members for detailed consideration.

If our recommendation to remove the provision from the Bill is not accepted, the committee should seek specialist advice on how to better construct the provision to address the various concerns about unintended consequences outlined above.

If the provision is enacted there will need to be detailed guidance as to how the provisions work and what this means to the broad range of WHS service providers covered by the provision.

Incident Notification – Part 3

The incident notification requirements within the Model WHS laws and in this Bill establish two key obligations: to notify the regulator of a death, serious injury or illness, or a dangerous incident (s.38); and to preserve the incident site, so far as is reasonably practicable (s.39).

The key reason for notification and preservation is to ensure that the regulator can make timely inquiries and investigations to improve safety and consider whether a prosecution should be initiated.

The WA Bill includes two additional categories within the meaning of serious injury or illness in section 36:

- (d) that it occurs in a remote location and requires the person to be transferred urgently to a medical facility for treatment.
- (e) that, in the opinion of a medical practitioner, is likely to prevent the person from being able to do the person's normal work for at least 10 days after the day on which the injury or illness occurs.

The inclusion of (d) seems to create an increased obligation for reporting in relation to remote work, given that immediate treatment in other circumstances is only notifiable if the person received immediate treatment as an in-patient. It is not clear why this extra level of notification is required.

The requirement to notify based on the length of incapacity is inconsistent with the intention of the notification process and site preservation obligations.

Ai Group does not support these amendments. Failure to comply with incident notification obligations and site preservation are each an offence which can attract fines of up to \$55,000 for a body corporate. If the incident notification requirements are amended as proposed, it is essential that there is a high-profile process for advising PCBU's that the notification requirements have changed and that they are not the same as those in the Model WHS Bill.

HSRs being given powers in relation to “another workgroup” – section 69(3)

This amendment to the Model WHS Laws was outlined in recommendation 12 of the report as a means to “clarify the power of HSRs to provide assistance in specified circumstances to all workgroups at the workplace.”

Ai Group expressed a strong objection to this proposal and we repeat this below.

The Act allows for the establishment of multi-PCBU workgroups for the election of HSRs (ss55-59). When this occurs PCBUs would generally reach agreement about how the role of the HSRs will be funded.

If multi-PCBU agreements are not in place, the worker of one PCBU should not become involved in an issue that involves an un-related PCBU. To do so would create difficulties for the HSR, and a potentially unacceptable cost and lost productivity for the PCBU.

Implicit in the concept of the HSR, a position with considerable powers, is that the role lies within a wider employment or engagement relationship that acts as a responsibility and mutuality framework that militates against the powers being used for improper purposes. For the powers to be exercisable outside of such a relationship creates significant risks for conflicts of interest to arise, including conflicting commercial interests.

If this provision remains in the Act, there must be clear guidance for HSRs and PCBUs about when and how the HSR could exercise powers in other workgroups, including clear examples of the circumstances where it would, and would not be appropriate.

Requirement to notify regulator of compliance with improvement notice – section 193

Section 193(2) is a variation from the Model WHS Bill, based on section 48(5) of the current WA OSH Act. It is designed to continue an obligation to notify the regulator of compliance with an improvement notice.

Ai Group is concerned that these provisions put a PCBU in a difficult position when the manner of compliance is not black and white, and expressed this view in response to the Report.

The PCBU may genuinely believe that they have complied, make a declaration to that effect, and later find that their declaration was considered *false or misleading* because the inspector wanted a different outcome to what the PCBU understood to be the case.

We note that, since at least 1 January 2005, there has not been a prosecution for breaching the current provision. This means that either every employer has notified every compliance with an improvement notice; or there is no enforcement action associated with a breach of the section.

Whilst this provision has been in place for many years, a new Act provides an opportunity to reconsider. The first question that arises is whether there is any value in the provision, other than to make it easy for the regulator to “confirm” compliance without the need for the inspector to revisit the workplace and the issue.

If the regulator can demonstrate value, then some variations are warranted, as outlined in our submission in response to the Report:

- The provision should be reworded so that whilst there is a requirement to notify, failing to do so *forthwith* is not an offence attracting a potential penalty of \$55,000
- That a proforma be made available that:
- Utilises words such as “to the best of my knowledge we have complied...”; and
- Includes a section where the action taken is described.

Such an approach would allow the regulator to review the action taken and determine whether further interaction with the PCBU is required to achieve the expected compliance outcomes.

Internal Review – eligible person – section 223

The Model WHS Bill establishes a range of decisions made by inspectors that can be the subject of internal review. Section 223 outlines which decisions are reviewable and who is an *eligible person* to make an application for review.

Within the Model, dependant on the decision, eligible persons include: a worker whose interests are affected; a PCBU impacted by the decision; a health and safety representative (HSR); the person to whom a notice is issued; and the person with management or control of a workplace.

The WA WHS Bill, in line with recommendations of the Report, expands the definition of eligible person to include unions. Ai Group has strong objections to this provision, as outlined in our response to the Report.

It is not appropriate for unions to be given this specific power to intervene within a workplace, and with the issuing of inspector's notices. The union will not generally be directly involved in the decisions made by inspectors and should not be able to intervene at a later stage without fully understanding the context of that decision. It may be that the workers and HSR are comfortable with the decision that has been made; it is not appropriate for the union to make applications that may not be supported by workers.

If this amendment remains in the WA Bill there should be a number of safeguards in place, including some form of confirmation from one or more workers that they support the action being taken. This could be done as part of the lodgement process and may not need to be something that is shared with the PCBU.

Approval of Codes of Practice – section 274(2)

Section 274(2) of the Model WHS Bill prescribes that Codes of Practice cannot be approved unless they have been through a consultative process that includes, at 274(2)(a) "the Governments of the Commonwealth and each State and Territory". This provision is a cornerstone of harmonisation requiring Safe Work Australia members to consider Codes of Practice as part of the full suite of Model WHS Laws.

Ai Group strongly objects to this provision being removed from the WA Bill as it will enable WA to implement Codes of Practice that are not consistent with other jurisdictions. We have made similar objections when other jurisdictions have adopted this approach.

Codes of Practice have a far more significant impact on workplace knowledge and behaviour than the Act, or even the Regulations. When individual jurisdictions start to make changes to agreed Codes without participating in the national consultative process, the efficacy of harmonisation is decayed. There are other tools available to jurisdictions to respond quickly to emerging issues, such as alerts and guidance material.

If WA can make Codes of Practice, or amend agreed Codes of Practice, without reference to Safe Work Australia, there should be:

- A set of criteria established for when this is appropriate
- Advice provided to Safe Work Australia members to consider whether such changes should also be made to Model WHS Codes
- Clear information at the front of each Code about any variations from the corresponding Model WHS Code.