



HOUSING INDUSTRY ASSOCIATION



Submission to the
Standing Committee on Legislation

Part 2 of the *Work Health and Safety Bill 2019*- Western Australia

26 June 2020

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 27 November 2019 the *Work Health and Safety Bill 2019* (the WHS Bill) was introduced to the Western Australian (WA) Parliament and subsequently referred to the Standing Committee on Legislation (the Committee) to conduct an inquiry and report on the policy of Part 2, Health and Safety Duties of the WHS Bill (Part 2).

The Housing Industry Association (HIA) takes this opportunity to provide the Committee with submissions in relation to the proposed WHS Bill.

The WHS Bill proposes to replace the *Occupational Safety and Health Act 1984* (OSH Act) with a new Work Health and Safety (WHS) framework based on the Model Work Health and Safety laws (Model WHS laws). The objective of these reforms is to improve consistency by harmonising WA's safety laws with the rest of Australia, to enable greater certainty of compliance, and reduced associated costs.

While HIA recognises the benefits that a nationally coordinated approach to regulation can create, HIA does not support harmonisation where it aims to achieve a nationally consistent outcome at the expense of genuine, positive reform. Harmonisation should not be an exercise of simply mandating an approach which would unjustifiably increase or decrease regulatory stringency to match other state arrangements.

More broadly HIA has expressed concerns with the adoption of the Model WHS laws in WA and has lodged submissions in response to the proposed adoption of *Model Work Health and Safety Act* on 31 August 2018 (**Attachment 1**) and in response to the proposed Work Health and Safety Regulations Package on 26 November 2019 (**Attachment 2**).

HIA continues to rely on these submissions, and asks the Committee to consider these submission in the context of this inquiry into the WHS Bill.

HIA has a number of concerns with the WHS Bill, key of which include HIA's opposition to:

- Changes to the Duty of Care provisions (Part 2, Division 3 of the WHS Bill) that would see the removal of the 'control test' along with the broadening of those who hold a duty of care at odds with the long standing principle that a person should only be held responsible for those matters within that person's control;
- The introduction of new requirements that impose duties on directors to exercise 'due diligence' to ensure that a PCBU complies with its duties or obligations under the laws (Liability for Officers- Part 2, Division 4 of the WHS Bill). These requirements are burdensome and do not suit the operation of the residential building industry in which site supervisors and on-site managers are in the best position to understand and manage the hazards and risks of a building site. Company directors and officers should be treated the same as others and be required to exercise 'reasonable care'; and
- The broadening of the current consultation requirements that seek to widen the level of communication and engagement for PCBU's. These provisions have proven impractical on residential building sites (New Consultation Requirements- Part 5 of the WHS Bill).

These and other matters are elaborated on in Attachment 1.

A matter of significant concern is the inclusion of the industrial manslaughter offences set out at sections 30A and 30B of the WHS Bill.

HIA opposes the offence of industrial manslaughter on the basis that WHS legislation should be focused on the fundamental duty to provide a safe workplace. This is a duty shared by all people in the workplace. Prosecutions for breaches should not be based merely on whether a death or injury has occurred. Whether a death occurs in the workplace or in a non-industrial context, manslaughter is and should be a matter for criminal law.

It is HIA's view that the inclusion of industrial manslaughter provisions within safety laws is inconsistent with the overall objective of safety legislation which is to prevent workplace deaths rather than impose penalties and punishment after the event. The proposed offence within the WHS Bill is also at odds with the principle that the duty to provide a safe workplace rests on all people in the workplace.

The framework set out in the Model WHS laws continues to be an appropriate mechanism for preventing, investigating and prosecuting a death at a workplace and imposing new offences is unlikely to improve safety outcomes.

In addition, HIA has three specific issues with the proposed industrial manslaughter provisions of the WHS Bill.

Firstly, given there is no requirement for any element of negligence or recklessness to be established, if passed, the industrial manslaughter simple offence would result in WA having a much lower standard than any other State or Territory for an industrial manslaughter charge to be mounted.

Secondly, the provisions have not to date been the subject of any consultation in WA. While HIA is taking the opportunity provided by this inquiry to provide feedback, in HIA's view comprehensive consultation should have been carried out far sooner.

Should the provisions be introduced as per the WHS Bill, they will have been adopted without any examination of the impact of the offence on businesses, employees, workplaces or work, health and safety outcomes.

Finally, the proposed industrial manslaughter offences represent a significant departure from the Model WHS laws. This would seem at odds with the intention for the harmonisation of safety laws. Accordingly it is HIA's view the inclusion of the industrial manslaughter provisions is fundamentally flawed, as it does not meet the intended objectives of harmonisation, consistency, greater certainty of compliance, and reduced associated costs.

It is HIA's view that the WHS Bill should exclude the proposed industrial manslaughter provisions.

2. INDUSTRIAL MANSLAUGHTER

HIA opposes the introduction of industrial manslaughter as a potential charge under WHS legislation.

The offence of manslaughter (whether the death occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for industrial manslaughter and other criminal offences should only be instituted by public prosecutors and should take place before a proper criminal court with a criminal onus of proof and normal rights of appeal.

Public policy, including WHS legislation should be focused on the duties of employers and employees in the workplace, including the fundamental duty to provide a safe workplace. Consequently, prosecutions for breach should not be based merely on whether a death or injury has occurred.

Notably, there is a history of various state parliaments dealing with the adoption and use of the offence of industrial manslaughter.

For example, a South Australian (SA) Parliamentary Committee observed that *'there are adequate legal systems in place to deal with industrial death'* and did not support the adoption of the offence of industrial manslaughter.

Whereas the Best practice review of Workplace Health and Safety Queensland -final report recommended that:

'two new offences be created in the Work Health and Safety Act 2011 to give effect to the policy decision to create the offence of negligence causing death to be called 'Industrial Manslaughter' on the 'basis that the WHS Act provides for imputing a person's conduct to a corporate entity.'

A similar recommendation was made by the final report into the review of the Northern Territory's (NT) workplace regulator, NT WorkSafe released in March 2019.

While the National Review of the Model WHS laws carried out by Marie Boland (Boland Review) recommended an amendment to the Model WHS Act to provide for a new offence of industrial manslaughter no jurisdiction has adopted (or proposed to adopt) mirror offences with drafting differences are evident between Australian Capital Territory (ACT), Queensland (QLD), Victoria (VIC) and NT and the provisions proposed in the WHS Bill, differ yet again.

The implementation of inconsistent industrial manslaughter regimes nationally is at odds with the objective of harmonisation which will undoubtedly increase the complexities associated with compliance. Further there does not seem to be a national consensus regarding the need for an offence of industrial manslaughter or, where it is considered required, its form.

It is also concerning that no jurisdiction has attempted to carry out a Regulatory Impact Statement, for example, neither the QLD *Work Health and Safety and other Legislation Amendment Bill 2017* or the VIC *Workplace Safety Legislation Amendment (Workplace Manslaughter and other matters) Bill 2019* was unaccompanied by a regulatory impact statement and so no examination of the impact of the offence of industrial manslaughter on businesses, employees, workplaces or work, health and safety outcomes has been undertaken.

To HIA's knowledge there is little evidence that the existence of such an offence will lead to better safety outcomes, and until very recently, there had not been any prosecutions under these provisions.

A 2013 study commissioned by Safe Work Australia to examine the effectiveness of WHS interventions by regulators concluded:

“Only a very small number of studies on the impact of prosecutions were located. The results suggest that prosecutions have a small general deterrent effect. Large businesses are more likely to be able to understand and interpret court decisions and how they could apply to their business. Both low average penalties imposed by courts for work health and safety offences and the focus in the court cases on the specifics of the particular events leading up to the death or injury that led to the prosecution may act to limit the deterrent effect of work health and safety prosecutions.”

2.1 THE PROPOSED INDUSTRIAL MANSLAUGHTER OFFENCE

The WHS Bill proposes to establish two offences of industrial manslaughter which applies to both individuals and body corporate entities.

The first tier offence of Industrial manslaughter (offence of Industrial Manslaughter) provides the higher penalty of 20 years imprisonment and a fine of \$10 million for bodies corporate, whereas the second tier offence of industrial manslaughter- simple offence (Industrial Manslaughter- simple offence) provides the lesser penalty of 10 years imprisonment and fine of \$ 5 million for a body corporate.

While HIA opposes the introduction of both offences, the second-tier Industrial Manslaughter – Simple Offence is of substantial concern.

Not only does it represent a significant variation from that recommended by the Boland Review and that adopted in other jurisdictions, it would result in WA having a much lower standard than any other State or Territory for an industrial manslaughter charge to be mounted. It also falls far below the standard test under the Criminal Code and will potentially result in small business owners being jailed for up to ten years for the negligence of others. Under this offence, a PCBU could be convicted of manslaughter without any element of negligence or recklessness in their conduct needing to be established.

If the proposal is to progress and there remains a commitment to establish an offence of industrial manslaughter HIA recommend that the second-tier Industrial Manslaughter – Simple Offence be removed.

Alternative Offences

Proposed section 30A(2) of the WHS Bill provides that if a charge for the first tier industrial manslaughter offence is brought and fails the accused can be convicted of the industrial manslaughter- simple offence under proposed section 30B. Similarly, under proposed section 30B(2) an alternative offence i.e. a category 1,2 or 3 offence is available.

This is not currently in the OSH Act or the Model WHS laws but an alternative verdict provision is in section 10A of the Criminal Code.

While this amendment seems to be included for the sake of consistency with other manslaughter offences the provision represents a somewhat novel approach in the realm of WHS laws. HIA have concerns that a provision

of this nature may encourage unworthy prosecutions on the basis that an alternative verdict is available for unsuccessful industrial manslaughter prosecutions.

HIA recommend that the provision be removed from the WHS Bill.

2.2 EXISTING LAWS AND PENALTIES

The existing rules that deal with serious injuries and incidents at a workplace are robust.

The current framework of WHS laws, supported by regulations, codes of practice and compliance activities is the most appropriate and effective way of preventing, investigating and prosecuting a death at a workplace.

The Model WHS laws provide a framework of existing powers for deterrence and punishment to deal with deaths at a workplace.

The current penalty regime and enforcement approach has seen appropriate and commensurate actions taken in response to WHS incidents. Under the OSH Act, there are criminal penalties available against those guilty of recklessly exposing an individual to a risk of serious illness or injury or death.

An individual can, under existing laws, be sentenced to imprisonment for a breach of safety laws, including a fatality that occurs at a workplace. Additionally under the *Criminal Code Act Compilation Act 1913* individuals can already be charged with manslaughter when they contribute to the death of another person.

Notably in October 2018, the *Occupational Safety and Health Amendment Act 2018* resulted in the maximum penalty for general safety breaches in WA increasing 10-fold and the maximum term of imprisonment for a death or serious injury at a workplace increasing from 2 to 5 years. These penalties are the highest of any jurisdiction in Australia and provide regulators with the necessary tools to respond to a death at a workplace.

There are also a number of recent decision demonstrating the application and use of the current penalty framework as established by the Model WHS laws.

In February 2015, a director of a scaffolding company received a 12-month suspended jail sentence (and a recorded conviction) in QLD after two of the company's workers fell from a high-rise complex after the rigging detached from the swing stage scaffold in which they were located. The director had disregarded engineering instructions relating to how the swing stage rigging was to be erected and also failed to follow relevant Australian Standards. This resulted in the swing stage being erected in a grossly 'negligent' manner.¹

Of note, this penalty was able to be imposed prior to the passage of the *Work, Health, Safety and Other Legislation Amendment Bill 2017* that introduced the offence of industrial manslaughter in QLD.

That same year in SA a director of a transport company was imprisoned for 12 years and 6 months, with a non-parole period of 10 years, for the manslaughter of his employee. The employee was driving a company owned truck when the brakes failed and he had to veer onto the gravel shoulder to avoid colliding with a small car. The truck hit a pole and the driver was killed.

The truck's brakes were found to be in total disrepair and had very little braking capacity for several weeks. Importantly, the director was prosecuted for manslaughter under the SA *Criminal Law Consolidation Act 1935*.

In another example from QLD a director's failure to take reasonable care and precautions as an electrical contractor resulted in the death of a young man on a construction site. In February 2012 an individual was fatally electrocuted when he was asked to hold a temporary construction switchboard during its installation. No safety switch had been installed and fuses designed to prevent electrocution were incorrectly installed. For the charges of manslaughter and perjury, the Court sentenced the director to seven years jail, with a non-parole period of two years.² Again, such a penalty was imposed prior to the introduction of the offence of industrial manslaughter in QLD.

¹ *Department of Workplace Health and Safety v Allscaff Systems and Ralph Michael Smith* 2015
² *R v Day* [2018]

These examples proceeded under existing laws and the penalties set by the Model WHS laws without the need for further regulation including the offence of industrial manslaughter.

Underlying the Model WHS laws is the principle that safety is everyone's responsibility these laws ensure that all individuals at a workplace have WHS responsibilities. This supports the development of a safety culture which is pivotal to better WHS outcomes and supports the spirit of the WHS laws. In HIA's view the adoption of industrial manslaughter laws may sit at odds with that approach.

The imposition of significant penalties, including jail terms, suggest an appetite by Courts across the country to hold officers accountable for their role in serious WHS incidents under existing regulatory arrangements.

The trend towards establishing a discrete criminal offence to respond to deaths at a workplace is an unnecessary step for the WHS legal framework, which may do little to improve safety outcomes.

ATTACHMENT 1





HOUSING INDUSTRY ASSOCIATION



Submission to the
Department of Mines, Industry Regulation and Safety

Modernising work health and safety laws in Western Australia

31 August 2018

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1. INTRODUCTION

The Housing Industry Association (HIA) takes this opportunity to respond to the Consultation Paper released on 20 June 2018 which outlines proposals that would see the adoption of the Model Work, Health and Safety laws (Model WHS Laws) into Western Australia subject to the range of amendments.

Any changes to the current Western Australian safety regime must be about positive reform and health and safety improvement.

However to date, much of the Workplace, Health and Safety (WHS) harmonisation process has not been about positive reform or improvement.

To the contrary and as conceded by SafeWork Australia's then President Tom Phillips in 2012:

"The objective of the harmonisation process is not to reduce the size of Work Health and Safety regulation but to ensure uniform safety standards are in place in each jurisdiction throughout Australia. This is consistent with the requirements of the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. This exercise is about harmonisation and putting everyone on the same page, it is not rationalisation or reform".

The vast majority of Western Australian businesses and employees work and operate solely within Western Australia. Harmonisation per se offers no direct benefits to the mostly small and medium sized businesses that operate in only one jurisdiction, but who consider WHS regulation burdensome and the regulatory area most in need of reform. Further the range of jurisdiction specific amendments proposed lend against the adoption of the Model WHS Laws.

While HIA recognises the benefits that a nationally coordinated approach to regulation can create, HIA does not support harmonisation where it aims to achieve a nationally consistent outcome at the expense of genuine, positive regulatory reform for the residential building industry. Harmonisation should not be an exercise of simply mandating an approach which would unjustifiably increase or decrease regulatory stringency to match other state arrangements.

Certainly, the majority of residential construction businesses that operate in Western Australia are small businesses, who do not operate across intra state boundaries.

For such small businesses, it is unlikely that they will experience any great advantage from harmonised laws. Rather they will experience costs and impacts related to changing their WHS systems and processes (including training) in order to comply with the new requirements imposed in their relevant jurisdiction.

Costs relating to training, supervision, systems development and process changes will not only impose significant financial impact on small business owners but will see these costs passed onto the consumers. In residential construction this will have a large effect on housing affordability.

HIA notes that the Victorian Government released an extensive analysis that indicated the national work health and safety scheme imposes costs on businesses that are in excess of the benefits of harmonisation. The Victorian Government's Regulatory Impact Statement showed the total cost of implementing the laws would be \$3.44 billion (over five years) with small businesses hit with 78 per cent of the transition costs and 74 per cent of ongoing costs.¹

HIA suggests that a similar analysis should be conducted for Western Australia.

A cost benefit analysis (CBA) carried out by KPMG for SafeWork Australia found a huge gap between the estimated net economic impact of harmonisation that was presented in the Worksafe WA 2012 Decision Regulatory Impact Statement for the model WHS regulations and codes of practice (Decision RIS)². While the

¹ See PWC (April 2012) *Impact of the proposed model workplace health and safety laws in Victoria - Summary Report of Supplementary Impact Assessment*.

² Worksafe WA (December 2012) Regulatory Impact Statement: Work Health and Safety Regulations and Codes of Practice

Decision RIS estimated that harmonisation would deliver a net benefit of around \$250 million per annum, the CBA found that harmonisation has in fact delivered a net economic cost of approximately \$1.9 billion since it began and estimated net ongoing costs to be \$1.4 billion in 2013-14³. The CBA authors state that in proportional terms the net ongoing costs will remain fixed into the future but in absolute terms they are expected to increase in line with growth in the economy.

The CBA also found that in general, harmonisation has generated limited benefits for multi-jurisdictional businesses in terms of improved efficiencies.

On this basis, HIA would encourage the WA Government to take a cautious approach when seeking to adopt the Model WHS Laws.

Further the current review of the Model WHS Laws being carried out by Marie Boland weighs against changes at this time.

Ms Boland's review is the first *"holistic review of the model WHS laws since their development"* and will *"consider all aspects including the model WHS Act, the model WHS Regulations and the model Codes"*⁴. HIA's submissions to the review can be found [here](#).

The consultation summary published on the 17 August has already identified a number of key themes emerging from the review including concerns with jurisdiction specific variations, the length and complexity of the Regulations and Codes and the constant tensions between the current principle based legal framework that asks Persons Conducting a Business or Undertaking (PCBU) and workers to consider and respond to risks based on what is 'reasonably practicable' and the need for certainty of compliance.

It would be sensible to await the outcomes of that review prior to legislation being drafted.

1.1 RESIDENTIAL BUILDING INDUSTRY

The unique nature of the residential building industry is an important consideration when adopting and implementing the Model WHS Laws.

The sector is not homogenous, the industry is divided amongst those businesses operating in detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sector.

Notably the construction process adopted on a single dwelling residential construction site is different from the approach adopted on, for example, a multi storey commercial development.

To that end, a 'one-size-fits-all' approach is inappropriate for the residential building industry and HIA strongly supports the development of industry specific guidance, including the development of a code of practice specifically for the housing sector.

In addition to the above HIA's position and response to the Consultation Paper can be encapsulated in 4 key principles:

- Compliance should take a pragmatic approach.
- Industry participants should have certainty of compliance and be directed towards practical safety solutions for achieving that compliance.
- Enforcement of the laws should be fair.
- Liability should be based on "actual" control. The notion and application of the 'PCBU' under the Model WHS Laws diverges from this approach.

HIA's submission provides some general comments in relation to provisions of the Model WHS Laws and responds to a number of the proposed amendments.

³ The economic Impact of WHS harmonisation. SafeWork Australia. November 2014, pgs 5-7

⁴ 2018 Review of the model WHS laws Discussion Paper. February 2018, pg. 10

2. GENERAL COMMENTS

2.1 DUTY OF CARE

Removing the 'Control Test'

The adoption of the Model WHS Laws would see a shift in the primary duty of care to rest with the person conducting business or undertaking (PCBU) rather than an 'employer'. The concept of a PCBU is broader.

Duties would also apply to 'workers' as opposed to 'employees'. The Model WHS Laws would also see the removal of the 'control test' which limits a work, health and safety duty to matters within a person's control.

The modern principles of occupational health and safety were first created in the UK in 1972 under the 'Robens Review'. The principles hold that responsibility for safety is allocated according to what is reasonable and practicable to control.

The current *Occupational Safety and Health Act 1984* (OSH Act) and supporting cases reflect these principles.

As the law presently stands in Western Australia, employers and self-employed persons, employees, occupiers, designers and owners of buildings, manufacturers, owners of plant and all other persons have occupational/workplace health and safety responsibilities.

The control test applies under section 23D of the OSH Act which deems independent contractors to be employees for the purposes of the primary duty of care, but only in relation to matters over which the principal can exercise control. So, if the principal contractor does not have control of the matter in the statutory sense, they do not have a duty of care which extends to subcontractors.

In the case of certain occupations, such as scaffolding or crane operations, the principal contractor has little if any control over the operations of those workers, although they may have control over the circumstances surrounding the work. The current law delineates one party's responsibilities from the other.

The OSH Act is supported by an established body of case law.

For example, in the Western Australian Court of Appeal decision of *Laing O'Rourke (BMC) Pty Ltd v Kirwin*⁵, the Court confirmed that for the purposes of the OSH Act where a principal engages an appropriately experienced and qualified specialist subcontractor, the principal can, in relation to those technical matters in which the subcontractor is expert, be entitled to rely on the expertise of that subcontractor in considering whether the principal contractor is exercising control.

In contrast, under the Model WHS Laws, the primary duty is to be held by any 'person conducting a business or undertaking' (PCBU). This primary duty is to ensure the safety of 'workers'.

The phrase 'person conducting a business or undertaking' and term 'worker' are defined broadly.

A 'worker' includes employees, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company, an outworker, an apprentice or trainee, a student gaining work experience and volunteers.

Subcontractors, including the self-employed, would be considered to be conducting a business or undertaking. Hence a subcontractor would be both a worker and a PCBU for the purposes of the Model WHS Laws.

The PCBU's duty includes the provision and maintenance of a safe work environment, the provision and maintenance of safe plant, structures and systems of work; provision of adequate facilities and the provision of any information, training, instruction or supervision that is necessary to protect persons from risks to their health and safety arising from work carried out as part of the business or undertaking (s.19(3)).

The duty is prescribed to all PCBUs regardless of whether they have actual control thereby resulting in the elimination of the 'control test' which applies to principal/contractor relationships under the OSH Act.

⁵ [2011] WASCA 117

The issue of whether they had control and therefore whether it is reasonably practicable to be able to discharge that duty comes into play at the second level of enquiry; it will no longer govern whether the duty is owed in the first place.

This leaves all PCBUs vulnerable to prosecution if the Regulator forms the view that they could exercise some level of influence and control over a WHS matter.

This change significantly elevates the risk of liability for principal contractors and builders in the residential building industry and for other PCBUs who engage contractors.

In a residential construction context it is neither fair nor practical that a principal contractor/builder (as a PCBU) will not be able to rely on the knowledge and skill of specialist contractors engaged to undertake specific tasks and for whom the PCBU exercises little to no control over. To the contrary it will result in those with no specific expertise attempting to control, supervise and direct persons at work in situations where their employer, who will also be a PCBU, may have implemented conflicting controls, supervision and direction.

The Model WHS Laws make it impossible for either party to know what their duty is, let alone how to discharge it and would place an extremely onerous obligation on PCBUs such as builders who engage specialist contractors over matters for which they have little expertise or real ability to control the actions of the contractors but who could be considered by the regulator to have some limited capacity to influence and control the matter. HIA considers that a PCBU shouldn't be criminally liable for matters that they cannot directly influence and control.

Instead referring to control as a second line of enquiry forces PCBUs to spend considerable money defending themselves in order to demonstrate that it was not reasonably practicable for them to discharge the duty.

In HIA's view, the retention of the control test is vital. The only way to achieve control as first principle is to replicate the current provisions and that there is no duty if a person does not have actual and direct control of a particular risk to health and safety.

Similarly a person is only required to eliminate or minimise the risk to the extent to which the person:

- has the capacity to influence the matter; and
- has the authority to act, and
- it is reasonable in the circumstances for them to have exercised that authority.

Duties of Workers

HIA supports a duty being imposed on workers for WHS.

However the Model WHS Laws excludes important provisions of the current OSH Act which give workers a specific duty to report hazards to their employers.

This should be retained.

Upstream Duties – design/manufacture/supply/construct

The Model WHS Laws impose a number of duties on persons who design, manufacture and supply structures, including 'buildability' and 'lifecycle' duties.

HIA is concerned with the scope and interpretation of these duties.

Designer Duties

Under the Model WHS Laws a designer, who is designing a structure that is to be used as a workplace, must ensure the health and safety of those building the structure, those who will use the structure and those in the vicinity of the workplace.

In relation to the proper construction of the structure, the scope of the duties is broader than current Western Australian provisions and go on to refer to the demolition or disposal of the structure.

A designer does not, and should not be expected to, have the requisite knowledge to be able to provide for safety in the construction process or post construction process (i.e. demolition or disposal of the structure). A designer is generally only engaged to provide a 'drawing' or 'design' or 'plan' and may not be privy to, or have understanding of, the actual demolition or disposal methods, the products or equipment being used or the inherent site conditions that would be needed to make the appropriate safety assessments.

As a result, designers will need to become familiar not only with the building process, but with demolition and disposal methods and their associated systems of work, in order to be able to provide the relevant safe design factors. It is of particular concern to HIA that any failure by the designer in regard to the safe design may then expose the builder to liability via the manufacture and supply duties as outlined below. The Model WHS Laws include additional duties for designers in relation to the range of information that designers must provide to others. This includes information to each person who is provided with the design for the purpose of giving effect to it concerning:

- each purpose for which the plant, substance or structure was designed; and
- the results of calculations, analysis, testing or examination; and
- any conditions necessary to ensure that the plant, substance or structure is without risks to health and safety when used for a purpose for which it was designed or when carrying out any defined activities.

Such additional requirements are onerous.

Manufacture and Supplier (and Construction) Duties

The Model WHS Laws contain separate upstream duties in respect of the 'manufacture', 'supply' and 'construction' of structures, plant and materials.

Whilst all three are notionally distinct activities, the way the duties have been framed in and the expansive definition of 'structure' to include any *'fixed or moveable, temporary or permanent'* building creates the potential for overlap.

For instance, insofar as manufacture of the structure is concerned the obligation is to ensure that the structure (that is to be used as a workplace) is safe to use, maintain and demolish and to provide any necessary information on the safe use, etc. of the structure.

The main concern is that the scopes of the duties refer to those persons who construct the structure at the workplace, carry out activities in relation to the structure (including demolition or decommissioning) and who are in the vicinity of the workplace and whose health and safety may be affected by the activities in relation to the structure. Such a duty is unnecessary as sections 19, 24 and 26 of the Model WHS Laws already captures builders and imposes a duty upon them for the safe construction of structures.

Whilst a manufacturer's duty might extend to a builder making offsite pre-fabricated components, such as window frames, the inclusion of manufacturer or supplier duties on builders of fixed structures is unreasonable, unjustifiable and impractical.

In all instances, these duties have potential to commit a builder to ensure safety well beyond the act of building and beyond the workplace in that they will be responsible for those persons in the vicinity of the structure whose health and safety might be affected by the activities being undertaken in relation to that structure.

HIA recommends that:

- Designers should not have safety duties in relation to the demolition or disposal of a structure and more particularly a residential home.
- Manufacturers and suppliers should not have a duty in relation to the end users of structures as they do not have control over how that building may be used in the future.
- The design, manufacture and supply duties are not imposed on designers or builders of a fixed structure.
- Insert an express definitions of 'manufacturing', 'supply' or 'construction'.
- Provide that the nature of the structure, i.e. fixed or moveable, temporary or permanent, should be an express factor in determining what is reasonably practicable for the purposes of section 26(2)(c) of the Model WHS Laws.

Health Monitoring

The requirement that a PCBU ensures the monitoring of the health of workers is unrealistic and impractical for residential projects where there are multiple PCBUs, and where many workers may be working on multiple projects at one time. The requirement will also create confusion as to what is required to be monitored and who does what where more than one PCBU is responsible for a particular worker. Also of concern is that health monitoring may be construed to extend to personal lifestyle-related health issues such as fitness, obesity or mental wellbeing matters that would be difficult or impossible for a PCBU to control and inappropriate for a PCBU to monitor.

HIA recommends that:

- This duty be limited to the relationship between the PCBU and their employees.
- The section 19 (5) proviso of the Model WHS Laws that a self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work, should be extended to include monitoring their own health.

2.2 LIABILITY FOR OFFICERS

The Model WHS Laws will introduce liability for officers of companies and require that they must exercise 'due diligence' to ensure that the PCBU complies with its duties or obligations under the laws.

The Model WHS Laws place new and burdensome duties on company officers.

Under the Model WHS Laws, an officer of a PCBU 'must exercise 'due diligence' to ensure that the [PCBU] complies with its duties or obligations under the Act. 'Officer' is defined broadly to mean 'officers' as defined in section 9 of the Corporations Act 2001 (Cth), as well as persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the business.

Under the Model WHS Laws officers of corporations will be personally liable to prosecution if they fail to exercise 'due diligence' and are required to proactively ensure compliance with WHS laws, regardless of whether or not their corporation has been convicted or found guilty of an offence under the laws.

This differs to current provisions under the OSH Act which provides that officers of corporations are only personally liable if their corporation is found guilty of an offence under the OSH Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to the neglect of the officer.

The new due diligence provisions create very onerous layers of duties on officers that will be easier to prosecute and difficult to defend.

Company directors and officers should be treated the same as workers and other persons at the workplace and in this regard be required to exercise 'reasonable care'. For liability to exist there must be a personal neglect or involvement on the part of the person whose act or omissions caused the breach.

In the construction industry, in particular site supervisors and on-site managers are in the best position to understand and manage the hazards and risks of a building site. Directors of building companies may have little to no day to day involvement with the onsite activities of the companies, as companies are able to obtain a building license by employing an individual who holds the requisite building license.

Unless it can be demonstrated that the company has endemic and systemic WHS failures and inadequacies and/or the offence occurred with the consent or connivance of, or was attributable to neglect of the officer, then directors and other company officers should not be personally liable for all site-based hazards and risks, when others in the organisation have direct or operational responsibilities for the duty.

HIA recommends that the due diligence duties not be adopted or a defence is included for those officers who can prove that others in the organisation have direct or operational responsibilities for the duty.

2.3 NEW CONSULTATION REQUIREMENTS

The Model WHS Laws broaden the current consultation requirements, including the introduction of an additional requirement to consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same WHS matter. This will widen the required level of communication and engagement for PCBUs.

Currently the OSH Act includes a general requirement to consult with workers on WHS matters that affect them.

In relation to health and safety representatives (HSRs), as there is a requirement to first establish a work group prior to the election of HSRs, principal contractors could potentially end up paying for training of HSRs of subcontractors.

Despite the introduction of reasonable practicability, the proposed additional requirements to consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same WHS matter are very broad and present difficulties in achieving certainty of compliance.

They also have little practical application in a subcontracting environment on a residential building site.

HIA recommends that the consultation requirements be restricted to the employer and employee relationship, with a small business (15 or less employees) exemption.

2.4 DISCRIMINATION AGAINST WORKERS OR PROSPECTIVE WORKERS

The Model WHS Laws contain a series of provisions designed to protect people who engage in health and safety activities.

For instance, section 104 provides that a person must not engage in discriminatory conduct for a prohibited reason.

Discriminatory conduct is defined broadly in section 105 to include dismissing, terminating or altering the position of the person, refusing or failing to engage the person, and refusing or failing to enter into a commercial arrangement with another person.

Further, '*prohibited reason*' is defined broadly and generally involves taking discriminatory action because the person has undertaken a role under the Model WHS Laws, cooperated or assisted a person undertaking such a role, or has raised or proposes to raise a workplace health and safety issue.

HIA recommends that these provisions not be adopted as there is no reasonable case for expanding current provisions for discrimination and particularly for including provisions for civil damages in WHS laws.

2.5 POWERS ON ENTRY

Abrogation of privilege against self-incrimination (section 172)

The Model WHS Laws provide that a person is not excused from answering a question or providing a document or information on the ground that the answer to the questions or the information or document, may incriminate the person or expose them to penalty.

HIA recommends that given the quasi-criminal nature of WHS prosecutions, individuals must be afforded usual criminal law protections, including a right to silence.

Inspector's power to seize dangerous workplaces and things

The power granted to inspectors by clause 176(1)(a) of the Model WHS Laws is much broader than the status quo. If this clause is allowed, it will enable inspectors to seize 'real' property.

HIA does not oppose inspectors having the power to seize a 'thing' or a particular piece of 'plant' or a 'structure' but it has difficulty accepting that inspectors have the power to seize real property.

Giving such a power is also unnecessary as inspectors already have the power to stop work where there is a safety risk.

HIA recommends that section 176(1)(a) not be adopted.

3. RESPONSE TO RECOMMENDATIONS

3.1 OBJECTS OF THE WHS ACT (WA)

Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.

Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.

Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.

HIA does not oppose the proposed changes to the objects of the proposed WA WHS Act.

HIA is concerned that the proposed change to section 3(1)(c) does not require the regulators to consult with affected stakeholders

HIA recommend that an explicit object to consult broadly and inclusively with affected stakeholders including an objective that requires consultation prior to making decisions to change WHS laws, codes of practice and guidance be included.

3.2 DEFINITIONS

Amend the definition of import to include importation from another state or territory into Western Australia.

HIA is not aware of any problems with the operation of this definition in other jurisdictions, so the need for this amendment is unclear and may have unintended consequences. For example, when plant is brought into WA from another jurisdiction, the person who sends the plant, the person who receives the plant, the transport company and the delivery driver could be importers and be required to provide the specified importer information to others.

It is preferred that the definition in the Model WHS Laws be retained.

Amend the meaning of supply to include the loan of an item.

It is HIA's view that this is unnecessary. A loan is implicit in the meaning of supply and has not been identified as a problem in other jurisdictions, so the need for the amendment is unclear.

It is preferred that the definition in the Model WHS Laws be retained.

3.3 NEW DUTY OF CARE

Include a new duty of care on the providers of workplace health and safety advice, services or products.

HIA agrees with the view adopted by the Workplace Relations Ministers Council that a duty of care on the providers of workplace health and safety advice, services or products is already implicit in the primary duty of care of PCBUs and the duty of other persons at the workplace.

However a PCBU should be able to rely on the expertise of a WHS expert to establish and implement appropriate safety solutions. This could be recognised in the legislative framework.

The use of experts, who are accredited or licensed is widely used within the residential building industry. For example a builder must engage a licensed scaffolder, a licensed electrician or a licensed plumber to carry out specialists work. The builder can then rely on the expertise of the licensed trade to ensure the work is appropriately carried out.

3.4 SERIOUS INJURY OR ILLNESS

Include incapacity to work for 10 or more days as a category of serious injury or illness.

It is HIA's view that the proposed amendment is unnecessary. Injuries of this nature would fall under the existing definition of serious injury or illness.

3.5 WORK GROUPS, HSRs & HSCs

If the Model WHS Laws are adopted in WA HSR's will be given the power to direct that unsafe work cease and to issue Provisional Improvement Notices (PINs).

These powers should rest with the regulator.

The Model WHS Laws also facilitates employers being required to consult with non-employees, or across multiple workplaces or businesses. For instance, any 'worker' can request the appointment of a HSR, which means that a subcontractor could request a HSR be appointed and that HSR does not have to be employed by the principal contractor.

These provisions are going to be very difficult to manage on a construction site where there are many different businesses operating.

Additionally under the Model WHS Laws a HSR is given the right to allow access (to the workplace) to any person to provide assistance in WHS disputes. Although there are some restrictions under section 70(g), effectively these provisions provide a back door right of entry to union representatives and have been used by union representatives in some jurisdictions to inappropriately gain entry to construction sites.

In HIA's submission, any entry by industrial officers must be subject to the notice provisions of the *Fair Work Act 2009* (Cth) or, if applicable, the *Industrial Relations Act* (WA).

HIA recommends that:

- Small business (15 or less employees) be exempt from the requirement to have workgroups, HSRs or HSCs and the requirement be restricted to the employer/employee relationship.
- Any access to the workplace to a person to provide assistance to HSRs should be subject to agreement with the relevant PCBU and any such access must be explicitly subject to entry permit and notice conditions of the *Fair Work Act 2009* (Cth) or, if applicable, the *Industrial Relations Act* (WA).

Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.

It is HIA's view that this amendment is unnecessary. The exceptions provided for in section 69(2) of the Model WHS Laws and the definition of 'another work group' in section 69(3) are sufficient to allow HSRs to assist other work groups at the workplace in the specified circumstances.

HIA is concerned that the proposed amendment may lead to an unduly wide application of the provisions leading to significant practical difficulties on a construction site.

Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.

HIA disagrees that the use of the word 'entitlement' may infer a level of discretion that is not intended. Under section 72(1) of the Model WHS Laws it is clear that a PCBU 'must', if requested, allow the HSR to attend a course of training. Further, the ordinary meaning of 'entitle' is to 'give (a person or thing) a title, right or claim to something'.⁶ There is no ambiguity as to the right of a HSR in regard to the provision of training.

There is no doubt as to the obligations on a PCBU in relation to the requirement to provide training to a HSR, as such the amendment is unnecessary.

⁶ Macquarie Essential Dictionary, 4th edition, pg. 263

Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.

The proposed amendment would impose an additional burden on PCBUs. Further, such a requirement may detract from the composition of HSC by requiring the omission of persons the PCBU considers most appropriate.

The justification for this proposal to ‘*expedite recommendations*’ of the HSC is unsatisfactory. The timelines for getting answers or achieving the desired outcomes can be decided by the HSC. In addition, most of the recommendations of a HSC requiring a decision by the PCBU will likely require further consideration by PCBUs. If agreement cannot be reached in a reasonable time, the provisions of sections 76(5) to 76(7) can be invoked.

HIA does not support the adoption of this amendment.

Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.

HIA opposes the proposed amendment.

The ability to direct that work cease is a powerful tool that inherently relies on a subjective judgment of the circumstances. If the power is exercised incorrectly it imposes a considerable impost on the PCBU and may even put other persons in danger.

The proposed change is unnecessary given that, as stated in the Consultation Paper “*the common law right extends to ceasing unsafe work if it puts another person at risk*”. This is codified by section 28(b) of the Model WHS Laws and, in practical terms achieves the same outcome as that proposed to be included.

The relevant PCBU or the regulator should be the only ones able to direct work to stop.

Of note the MAP did not come to a formal concluded view on this matter. In such circumstances the current Model WHS Laws should be maintained.

Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.

The Consultation Paper provides no justification for this requirement.

Section 101(2) of the Model WHS Laws require that an inspector inquire into the circumstances that are the subject of the Provisional Improvement Notice (PIN), this would necessarily include the HSR.

Further, creating an express right that required a HSR be notified of a request to review a PIN may cause industrial problems on a construction site.

3.6 RIGHT OF ENTRY

Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.

HIA does not support the right of entry provisions under the Model WHS Laws. There is no evidence to suggest that such a right has led to better safety outcomes. It is HIA's view that the current provisions in WA relating to union right of entry be retained.

The Decision RIS examining the adoption of the Model Work Health Regulations and Codes of Practice in WA considered the adoption of the right of entry provisions and concluded that the model laws would not deliver direct improvements in safety outcomes in workplaces and that ‘...*right of entry for the purposes of occupational health and safety is already provided for under the Industrial Relations Act 1979. The proposed change is considered to create duplication risking confusion and inconsistencies.*’⁷

⁷ Pg.4

Adequate right of entry provisions are already provided for within the *Fair Work Act 2009* and the regulatory overlap between the WHS and workplace relations laws have led to construction unions exploiting entry on WHS grounds when the more stringent industrial law provisions do not suit their purposes.

If the WA government is minded to adopt the right of entry provisions under the Model WHS Laws HIA recommends that the provisions be amended in the following ways:

- Codify and clarify the interaction between the two regulatory frameworks in light of a recent High Court decision held that under Australian law, union officials are required to hold a valid federal right of entry permit even when invited onto site to assist a health and safety representative (HSR) under a State or Territory OHS law.⁸
- Training requirements for WHS permit holders should be provided only by the regulator. This will ensure that regulators can make their expectations regarding compliance with the right of entry requirements clear.
- Photo ID must be added as a minimum requirement for an entry permit.
- The notice of entry should always include the reason why they are on the site and a requirement to state this clearly with reference to the legislation. This would create more credibility and better define the visitor's role. It would also provide limits to the visitor to only talk to those people affected by the suspected contravention, at times that are reasonable.
- As a minimum, the following amendments made to the model WHS laws on 21 March 2016 need to be implemented:
 - 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.

Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.

HIA does not oppose the adoption of the additional obligations on the Regulator and EPH in relation to workplace entry. However, HIA would recommend that such provisions be adopted unamended.

3.7 POWERS OF INSPECTORS

Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.

In HIA's view the current powers under the Model WHS Laws are adequate.

The requirement that an inspector physically enter a workplace to permit the inspection of documents or interview people is not simply a 'legal technicality'. For work health and safety matters, HIA is of the view that an inspector should be required to attend a construction site to carry out an inspection and then determine if further documentation/investigation is required.

The ability to inspect documents and carry out interviews without attendance at the workplace may lead to an abuse of these powers and less informed investigations at odds with improving safety on construction sites.

Clarify that the power of inspectors to conduct interviews includes the power to record the interview.

HIA does not oppose the adoption of recommendation 26.

Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.

HIA opposes recommendation 27.

What compliance looks like is often not clear cut. In complying with this proposed requirement a PCBU could inadvertently incriminate themselves by reporting compliance in the belief that compliance has been achieved. However, on notification an inspector may form the view that compliance was not in fact achieved. Under these

⁸ *Powell v Australian Building and Construction Commissioner & Anor; Victorian WorkCover Authority v Australian Building and Construction Commissioner & Anor* [2017] HCATrans 239 (17 November 2017)

circumstances a PCBU could potentially be considered to have provided false or misleading information which is a serious offence under the Model WHS Laws.

The best way to unequivocally verify compliance is by the inspector following the matter up with the PCBU.

The recommendation also unduly shifts a responsibility that should squarely sit with the regulator on to a PCBU, adding unjustifiable regulatory burden on business.

Include the power for the Regulator to request an independent evaluation consistent with current practice.

It is unclear from the Consultation Paper whether recommendation 28 is proposed to be confined to the mining and petroleum sectors or is to apply more broadly.

Without more the proposed new clauses to be added to Division 2, Part 8 should be confined to those sectors to which they currently apply under existing WA legislation.

3.8 PENALTIES

The penalties available under the Model WHS Laws are significantly greater than the current penalties under the OSH Act.

Currently the maximum penalties under the OSH Act are:

- Corporations - \$500,000 for 1st offence, \$625,000 for subsequent offence.
- Individuals - \$250,000 and 2 years imprisonment for 1st offence, \$312,500 plus 2 years imprisonment for a subsequent offence.

HIA notes that the following are the proposed penalty levels for duty of care offences:

Category	Description	Maximum Penalty
Category 1	Most serious cases – Breach of the primary (general) duty involving recklessness and serious harm (fatality or serious injury) to a person or a risk of such harm.	Corporation = \$3 million Individual = \$600,000 Imprisonment - up to five years Workers and other persons = \$300,000 Imprisonment - up to five years
Category 2	Breach of the primary (general) duty where serious harm or the risk of it without the element of recklessness.	Corporation = \$1.5 million Individual officers = \$300,000 Workers and other persons = \$150,000
Category 3	Breach of the duty that does not involve high risk of serious harm.	Corporation = \$500,000 Individual officer = \$100,000 Workers and other persons = \$50,000

These penalties are significantly higher than those that currently apply in WA.

Of note the Decision RIS considered that the penalty levels specified in the Model WHS Laws not be adopted because they “*would not deliver direct improvement in safety outcomes in workplaces*”. The Model WHS Law penalty levels were considered “*unreasonably punitive, particularly for small business operators*”⁹

The increases are unnecessary. The penalty provisions should reflect those currently in the OSH Act.

Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.

HIA opposes recommendation 30.

The amendment is unnecessary as the regulator is not compelled to accept an enforceable undertaking and can always refuse to do so.

In any case, an enforceable undertaking can be designed to provide ‘restorative justice’ and to achieve a responsive and timely sanction that is considered to be as effective a deterrent as prosecution.

⁹ Pg.4

Current experience has been that in some cases the value of the enforceable undertaking has been higher than the highest available fine. Enforceable undertakings also provide an opportunity to encourage PCBUs to achieve systematic solutions that address the underlying causes that led to the incident and would be appropriate for Category 2 offences.

3.9 PROCEEDINGS

Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.

HIA opposes recommendation 31.

The reviewable decision provisions of the Model WHS Laws are designed to provide an opportunity to those whose interests are affected by a decision to appeal it.

A union is not a person 'affected by the decision' and should not be permitted to seek such a review. A worker affected by a decision seeking to appeal can always get assistance from their union.

The proposed amendment is inappropriate and unnecessary.

Permit the Regulator to appoint any person to initiate a prosecution.

HIA opposes recommendation 32.

Prosecutions for WHS offences should only be commenced by the regulator and not any other third party.

Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.

HIA opposes recommendation 33.

The extension of this right to unions is inappropriate and unnecessary.

Prosecutions for WHS offences should only be commenced by the regulator and not any other third party including unions.

3.10 CODES OF PRACTICE

Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.

HIA agrees with this proposal provided any new codes of practice or changes to current codes undergo a consultation process that involves specific industry sectors, such as for example HIA.

Any changes must also be subject to a regulatory impact assessment

3.11 WORK HEALTH AND SAFETY COMMISSION

Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.

HIA does not oppose this recommendation.

4. REGULATIONS

Appendix C to the Consultation Paper provides the only indication of the intended content of the regulations. HIA presumes that the model regulations will be adopted with the proposals outlined in that Appendix.

Whilst the core duties in the Act underpin any regulations, the details of the construction regulations in particular, are important as they contain the day to day matters that impact on managing safety on a building site.

HIA have several key issues with the Model Work Health and Safety Regulations (Model Regulations) that have been introduced into the other jurisdictions.

The Model Regulations reflect many of the inherent flaws in the Model Act imposing overlapping duties on PCBU's, both absolute and qualified by so far as is reasonably practicable.

The Decision RIS identified 13 areas where adoption of the Model WHS Laws may result in changes to work practices and associated benefits or costs. The Decision RIS concluded that *"between the two extremes of complete rejection or complete acceptance [of the model WHS laws] a finer consideration is required."*

Key issues in the regulations and codes of practices for HIA remain such as:

- The broadness of the definition of 'construction work'.
- The inadequacy of the \$250,000 monetary threshold for when a principal contractor is required to be appointed and comply with certain obligations;
- Construction Safety Plans and Safe Work Method Statements;
- Duties of designers of structures;
- Working at heights and the lack of a clear threshold for physical fall protection;
- Noise regulations; and
- Plant regulations.

Meaning of Worker

HIA is concerned with the indication that the meaning of 'worker' will specify a prescribed class to include workers under the 'gig' economy. HIA would oppose any such moves.

In HIA's view the current definition of PCBU and 'worker' are appropriate to respond to changes in the nature of work and work relationships.

New and evolving styles of workplace organisation have been a feature of the Australian economy for decades with celebrated court cases establishing the status of encyclopaedia salespeople, bicycle riding couriers and labour hire workers. In fact, as noted in the Review of the Model WHS laws Discussion Paper the shift in terminology was aimed at being broad enough and flexible enough to incorporate changes in the way we work and the way work is carried out.¹⁰

Dangerous incident

While it is not clear what is proposed, HIA does not support any expansion of current OSH Act provisions to include illnesses of "long latency".

Currently OSH regulation 2.4(1)(e) prescribes the reporting of an injury which, *'in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred.'*

This is clearly for injuries that prevent an employee working within 10 days of the day on which the injury occurred. This would capture acute injuries or illnesses that disable immediately or within 10 days. It does not capture illnesses of long latency.

Due to its nature, illnesses of long latency take time to develop and there may be no immediate effect. Further, the day on which the injury first occurred is usually not known as it occurs or develops over a long period. It therefore follows that the current provision is not and could not have been designed to capture "long latency" illnesses and should not be expected to do so.

HSR Training

HIA would agree that the training course for HSR's should not exceed 5 days. This is currently set out under the Model Regulations.

Resolution of health and safety issues

HIA opposes any prescription in relation to the *'relevant agreed procedure'*.

We note that section 81 of the model WHS Act requires issues to be resolved in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed in the model WHS

¹⁰ 2018 Review of the model WHS laws Discussion Paper. February 2018, pg. 18

regulations. Part 2.2 of the model WHS regulations prescribe minimum requirements for an agreed procedure, and requires that an agreed procedure must include the same steps as the default procedure of the regulations.

The matters to be covered in the agreed procedure are clearly articulated in the model WHS regulations and are straightforward. There is no need for a definition.

ATTACHMENT 2





HOUSING INDUSTRY ASSOCIATION



Submission to the
Department of Mines, Industry Regulation and Safety

Work Health and Safety Regulations for Western Australia

26 November 2019

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over \$100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

HIA takes this opportunity to make a submission in response to the 'Consultation Package' released by the Department of Mines, Industry Regulation and Safety to develop regulations in support of the anticipated adoption of the model Work, Health and Safety Act in Western Australia.

Safety is of paramount importance in the residential building industry and in HIA's view any regulatory approach to work, health and safety should be based on four key principles:

- Compliance should take a pragmatic approach.
- Industry participants should have certainty of compliance and be directed towards practical safety solutions for achieving that compliance.
- Enforcement of the laws should be fair.
- Liability should be based on "actual" control. The notion and application of the 'PCBU' under the model work, health and safety laws diverges from this approach.

HIA submits that a number of provisions in the model Work Health Safety Regulations (model WHS Regulations) do not support these principles, are impractical, problematic and bring to light many of the inherent flaws in the model Work Health and Safety Act (model WHS Act) which HIA outlined in submission dated 31 August 2018 (2018 Submission).

In those submissions, HIA also highlighted that any reforms or changes to the laws must be about positive reform and health and safety improvement. HIA remains gravely concerned that there appears to be little to no benefit to the residential building industry arising out of Western Australia adopting its own version of the harmonised WHS legislative and regulatory framework – particularly because of the unique profile of residential construction methods used in Western Australia, which are distinct from those used elsewhere in the country. The new framework will simply impose unnecessary additional cost, red tape and regulation, the burden of which will fall most heavily on small businesses.

Despite the views of the supporters of WHS harmonisation, at no stage has any supporter of "national consistency" or WHS harmonisation been able to demonstrate precisely how business, particularly small businesses, will benefit from a change to the laws. Further, documentation released as part of the Consultation Package outlines a number of ways in which the approach to be taken in Western Australia will depart from the model WHS Regulations.

In reality, the harmonisation of WHS laws, can only affect and benefit that proportion of Australian businesses (and workers employed in those businesses) that operate across borders.

However, the vast majority businesses in Western Australia, including those in the residential building industry, are small to medium sized enterprises that work and operate solely within Western Australia.

The costs imposed forcing harmonisation on these businesses, would largely be deadweight, with business forced to spend money and time to become conversant with, and transition to, new laws and regulations that would not lead to any significant safety improvements but are more onerous and impractical than the current laws in place.

An area of significant concern is the cost implications associated with the adoption of the model WHS falls provisions. If adopted the changes could impose a requirement to provide fall protections on all types of height risks which will substantially increase the cost of housing, particularly for single storey homes. Due to the predominance of double brick construction in Western Australia, more cost-effective single-storey scaffolding approaches such as "bracket scaffolding", which is used in other states where framed construction methods are primarily utilised, is not a viable option in Western Australia. As such, these regulations could potentially see all single storey homes constructed using scaffolding at a cost that would exceed \$6,000 per house and could be up to \$12,000. Such outcomes must be avoided.

While HIA acknowledges that the proposed WA work, health and safety laws will differ in some respects from the model WHS Regulations underpinning the nationally harmonised package in other states, they still largely carry over impractical provisions that have already proven to be ineffective, these include:

- The overlapping duties between principal contractors and other persons who may be conducting a business or undertaking on site work;
- Working at heights and the lack of a clear threshold for physical fall protection;
- The broadness of the definition of ‘construction work’;
- The inadequacy of the monetary threshold for when a principal contractor is required to be appointed and comply with certain obligations; and
- Construction Safety Plans and Safe Work Method Statements.

HIA expands on these matters below.

Also attached to these submissions is Appendix A which provides a summary of a number of concerns with the model WHS Regulations.

1.1 THE REVIEW OF THE MODEL WHS LAWS

In February, the final report on the review of the Model WHS Laws (Boland Report) was released. The Boland Report contained 34 recommendations and substantial commentary.

In its 2018 Submission HIA called on the WA Government to await the outcomes of this national review prior to moving forward with the development of regulatory reforms. HIA again urges the Government to consider the Boland Report and some of the key themes that have emerged including:

- concerns with jurisdiction specific variations;
- the length and complexity of the Regulations and Codes; and
- the constant tension between the current principle based legal framework that asks Persons Conducting a Business or Undertaking (PCBU) and workers to consider and respond to risks based on what is ‘reasonably practicable’ and the need for certainty of compliance.

Responding to these concerns would seem sensible and appropriate.

1.2 THE NEED FOR A GENUINE REGULATORY IMPACT STATEMENT

A West Australian-specific RIS process on the model WHS Regulations was undertaken by independent consulting firm Marsden Jacob Associates. This study, whilst detailed, erroneously did not consider the impact of the substantive changes under the model WHS legislation, in particular the changes to the treatment of duties by eliminating the “control test”.

HIA notes that the Victorian Government released extensive analysis that indicated the national work health and safety scheme imposes costs on businesses that are in excess of the benefits of harmonisation. The Victorian Government’s Regulatory Impact Statement showed the total cost of implementing the laws would be \$3.44 billion (over 5 years) with small businesses hit with 78 percent of the transition costs and 74 percent of ongoing costs.¹

Further, a recent cost benefit analysis carried out by KPMG for Safe Work Australia found a huge gap between the estimated net economic impact of harmonisation that was presented in the 2012 Decision RIS for the model WHS regulations and codes of practice. While the Decision RIS estimated that harmonisation would deliver a net benefit of around \$250 million per annum, the cost benefit analysis found that harmonisation has in fact delivered a net economic cost of approximately \$1.9 billion since it began and estimated net ongoing costs to be \$1.4 billion in 2013-14.² The authors of the cost benefit analysis stated that in proportional terms the net ongoing costs will remain fixed into the future but in absolute terms they are expected to increase in line with growth in the economy.

¹ Impact of the proposed national Model Work Health and Safety Laws Victorian Government in Victoria, PWC.

² The economic Impact of WHS harmonisation. SafeWork Australia. November 2014, pp 5-7

The cost benefit analysis also found that in general, harmonisation has generated limited benefits for multi-jurisdictional businesses in terms of improved efficiencies.³

Accordingly and before proceeding with the Regulations the WA Government must undertake a similar RIS.

³ The economic Impact of WHS harmonisation. Safe Work Australia November 2014, p4



2. KEY ISSUES IN THE MODEL REGULATIONS

2.1 OVERLAPPING DUTIES

The model WHS Act establishes that a Person Conducting a Business or Undertaking (PCBU) must ensure that workers and others are not exposed to risk to their health or safety.

HIA's 2018 Submission highlighted concerns in relation to the overly broad and imprecise framing of duties for the PCBU. Of concern is the failure to articulate "actual control" as an essential element of the test. On a construction site, the PCBU will include the builders/principal contractor, any subcontractors, including subcontractors engaged by the subcontractors (including self employed contractors), along with the client engaging the principal contractor/builder. By virtue of this, there will almost always be more than one PCBU with the same duty on site at the same time meaning that PCBU's will have 'overlapping duties'.

As the law presently stands in Western Australia, employers and self-employed persons, employees, occupiers, designers and owners of buildings, manufacturers, owners of plant and all other persons have occupational/workplace health and safety responsibilities. The extent and degree of any obligations and responsibilities is determined by considering the 'control test'.

The 'control test' applicable pursuant to section 23D of the *Occupational Safety and Health Act 1984* (OSH Act) deems independent contractors to be employees for the purposes of the primary duty of care, but only in relation to matters over which the principal can exercise control. As such, if the principal contractor does not have control of the matter in the statutory sense, they do not have a duty of care which extends to subcontractors.

It has always been HIA's view that the party in the best position to control the work environment should bear the responsibility for the safety aspects of that environment. Although a "builder" or "principal contractor" will be a concurrent duty holder, inevitably the person held responsible by the Regulators will be the builder who on most occasions does not have "actual control" over the work being undertaken by the PCBU they have engaged. With the array of obligations imposed on a PCBU under the model WHS Regulations there has been no contemplation of the scope and extent of these obligations in circumstances where more than one PCBU is responsible.

HIA recommends that the definition of 'PCBU', 'workplace' and 'worker' be revisited in order to resolve the issues with overlapping duties which arise in relation to a range of WHS obligations including, for example, to provide first aid equipment, facilities, and emergency procedures. Additionally, where a duty relates to more than one duty holder then the scope of that duty should be explained for each party.

HIA supports a duty structure that provides for individual responsibility to the extent that the person is in "control" of a certain activity, and that the subsequent liability is apportioned based on the level of control.

The problematic nature of this approach, particularly as it operates in the construction industry, was highlighted in the Boland Report which made the following observation:

"An example of this situation is construction projects, where there are likely to be a range of businesses, labour hire firms, contractors and subcontractors involved in completing a project. Each PCBU will have a particular role and a specific ability to influence or direct particular matters relevant to health and safety for that project. To avoid duplication of effort, or an absence of effort due to presumptions that other PCBUs are managing risks, s 46 of the model WHS Act places a duty on multiple duty holders to properly consult, co-operate and co-ordinate their activities to ensure the health and safety of workers and other persons affected by the work on the project.

I found that those PCBU's who are at the 'top' of the supply chain, project or network were still asking questions like 'Where does my liability end?', 'When can I rely on an expert contractor to take over responsibility for WHS matters?' and 'If I can't control a WHS matter, why should I be liable?'. Those PCBUs who are lower down the chain, network or project consistently provided feedback that the

shared duty principle had become for them an issue of providing paperwork to the PCBU's higher up the chain.”⁴

As a result, the Boland Report recommended that section 5(4) of the model WHS Act be amended to make clear that a person can be both a worker and a PCBU, depending on the circumstances.

In response to the Boland Reports recommendation the NSW Government is proposing legislative amendments to the *Work Health and Safety Act 2011* that would add notes to section 5 (which sets out the meaning of a ‘PCBU’) and section 7 (which sets out the meaning of a ‘worker’)⁵ to make it clear that a person can be both a workers and a PCBU at the same time.⁶

While HIA remains unconvinced that this approach resolves the issues identified, there clearly remains (after some 6 years in operation) uncertainty regarding the operation of the work, health and safety duties under the model laws.

HIA strongly suggest that WA adopt the approach taken in SA which clarifies the importance of the control test. Section 17 of the *Work, Health and Safety Act 2012* was amended to included subsection 2 outlined below:

- (1) *A duty imposed on a person to ensure health and safety requires the person—*
 - (a) *to eliminate risks to health and safety, so far as is reasonably practicable; and*
 - (b) *if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.*
- (2) *A person must comply with subsection (1) to the extent to which the person has the capacity to influence and control the matter or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity.*

HIA sees that the only way to resolve the confusion and complexity associated with the operation of overlapping duties is through the adoption of a ‘control test’.

2.2 DEFINITION OF CONSTRUCTION WORK

The current definition of construction work includes a number of workplaces that are not traditionally considered construction sites such as:

- Routine maintenance, testing and repair work, eg, repainting a home, replacing worn carpet, routine servicing of an air conditioning system;
- Minor work, for example installation of an antenna, adding a sky light to a home, adding extra power points, lights, or computer data cables in a home.

The capture of this type of work has a particular impact when determining who requires a general safety induction card, Safe Work Method Statement (SWMS) and what administrative provisions apply for that workplace. HIA recommends a review of the definition of ‘construction work’ for the purposes of the Regulations.

2.3 THRESHOLD FOR PRINCIPAL CONTRACTORS AND ASSOCIATED OBLIGATIONS

The model WHS Regulations specify that a PCBU who commissions a construction project at a cost of \$250,000 or more is considered to be the principal contractor for that project. As a principal contractor on such a project, certain obligations apply such as the administrative obligations of a WHS Management Plan and collecting SWMS as well as obligations in relation to first aid, site security, falls from height, personal protective equipment, training and consultation.

While a monetary threshold offers more practicality and certainty for builders and for the regulator, the current value of \$250,000 in the definition of a construction project is unreasonably low, capturing projects that simply do not warrant certain administrative obligations and processes. It should be noted that in other jurisdictions, higher thresholds have been implemented. For example, in the Northern Territory, a \$500,000 threshold has

⁴ Page.58

⁵ Also sections 5 and 7 of the Model WHS Act

⁶ *Work Health and Safety Amendment (Review) Bill 2019*

been adopted, in South Australia a \$450,000 threshold has been implemented and in Victoria a threshold of \$350,000 applies.

Most residential construction projects have clear established control measures and do not benefit from (or require) a sophisticated and complex coordination process of paperwork and administration. HIA's view is that rather than looking to a monetary trigger for the threshold, that residential construction work should be completely excluded from the meaning of a construction project. One method of effectively achieving this would be by virtue of a definitional threshold utilising the Building Code of Australia definition of Class 1, 2 and 10 buildings or alternatively increasing the monetary threshold to at least \$1 million to exclude the majority of residential construction projects.

While it is unclear at the stage the intention regarding the adoption of model Codes of Practice it is worth highlighting that the *2013 Code of Practice – Construction Work* defines housing construction as construction work relating to the following:

- detached houses;
- attached dwellings, separated from each other by a fire resisting wall, such as terrace, row or town houses;
- villa-homes, strata or company title home units or residential flats;
- boarding and guest houses, hostels or similar with a floor area <300m²; and
- ancillary buildings to the above, such as private garages, gazebos and carports.

Work on multi-storey buildings, i.e. above three habitable storeys is not considered housing construction work and accordingly would be covered. HIA considers that this approach could be adopted within the regulatory framework more broadly.

2.4 FALLS FROM HEIGHTS

The scope of the falls provisions and the subsequent hierarchies of control contained in the model WHS Regulations could lead to the use of physical fall prevention measures at any height, which is impractical and cause a significant amount of uncertainty over what type of control measures should be used for low risk height issues.

Falls from height risks in a manufacturing, hospitality, farming, and even retail environment are inherently different to those in the residential building industry. Unlike other industries, working at heights is an inherent part of building a house and any regulations or guidance must specifically provide provisions that relate to the process of building.

The falls provisions contained in the model WHS Regulations applies to all types of falls in all types industries with no specific construction provisions.

Part 4.4 of the model WHS Regulations specify a hierarchy of control that a PCBU must use when addressing all falls from height risks. The hierarchy requires that where the work cannot be undertaken from the ground or a solid construction then certain other physical fall prevention measures be used where "reasonably practicable".

This is unsatisfactory in that it is contrary to the current treatment of falls in Western Australia and provides little to no certainty for the residential building industry.

Currently OSH regulation 3.55 provides that for work from a scaffold, fixed stair, landing, suspended slab, formwork and falsework from which there is a risk of falling greater than 2 metres, edge protection (defined as guard railing) is required.

For all other edges from which there is a risk of falling greater than 3 metres edge protection or a "fall injury prevention system" is required.

In residential roof construction work, WorkSafe WA has also developed guidance in conjunction with the residential building industry to support these regulations.

The WorkSafe bulletin “*Domestic construction - Controlling falling risks while working on roof structures*” has for many years provided a range of safety solutions that have been used and accepted as safe and practical for roofing work.

On the other hand, the uncertain requirements under the model WHS Regulations will lead to a significant amount of uncertainty over what type of control measures should be used for low risk height issues, and will undermine the practical controls outlined in the bulletin.

For example, the simple act of fitting cornice plaster, which has traditionally been carried out using a ladder, under the model WHS Regulations could now require a “fall prevention device”, such as mobile scaffold or a step platform with guardrails. In this regard, it could be argued that such devices are “reasonably practicable” because they are readily available and could be considered to provide a “higher level of protection”, even if doing so would introduce much burdensome difficulty and other risks (e.g. increased manual handling) as well as substantial costs to the home owner.

Also confusing is that under the Model WHS Regulation, regulation 78(1) specifies that if it is not reasonably practicable to eliminate fall risks they must be minimised in accordance with Part 3.1 by:

- Substitution/ isolation/engineering controls.
- Administrative controls.
- PPE.

However, regulation 79 introduces additional specific requirements to minimise risk as a hierarchy of controls by:

- A fall prevention device.
- A work positioning system.
- A fall arrest system.

This combination of hierarchies of control is very confusing and makes it difficult for PCBUs to be certain of what is required for compliance.

Regulation 79 should be removed to avoid confusion and reliance placed on the provisions of Part 3.1 and guidance.

The adoption of the model WHS Regulations in WA could see all single storey homes constructed using scaffolding both internally and externally. HIA is concerned that the safety risks associated with the erection, maintenance and dismantling of scaffolding are significantly greater than the risks it is intended to overcome.

Further, imposing a requirement to provide fall protections on all types of height risks will substantially increase the cost of housing. Given the predominance of double brick construction methods in Western Australia, alternative and more cost-effective scaffolding approaches such as “bracket scaffolding” utilised in other states where framed construction methods are primarily utilised is not a viable option in Western Australia. **It is estimated that the cost of providing full perimeter scaffolds on a single storey home would exceed \$6,000 per house and could be up to \$12,000.** With the potential for physical fall protection to be needed internally as well for the types of examples provided above it is likely that this cost will be significantly more.

HIA's view is that single storey residential construction should be excluded from the falls provisions of the Model WHS Regulations. Alternatively, the threshold for providing physical fall prevention measures should be no less than 3 metres, as currently framed in the existing OSH regulations.

2.5 RIGHT OF ENTRY

HIA understands that while Part 7 of the model WHS Bill 2011 is to be adopted, Chapter 2 Representation and participation, Part 2.4 – Workplace entry by WHS entry permit holders of the model WHS Regulations is not.

There is no explanation as to why the WA WHS regulations will not include Part 2.4 of the model WHS Regulations. HIA opposes this approach.



Part 2.4 of the model WHS Regulations sets out a number of important matters regarding:

- The content of the prescribed training that a WHS entry permit holder must undertake in accordance with section 131 and 133 of the model WHS Act;
- The form of a WHS entry permit. Regulation 26 requires that certain important details, such as the permit holders name, the name of the union the permit holder represents, dates of issue and expiry, and conditions that apply etc, be included on the permit.
- The details that must be included in a notice of entry to a workplace
- Additional details that must be included in a notice of entry issued under section 117, 120 and 121 of the model WHS Act.
- Details regarding the information to be published on the publically available register of permit holders prescribed by section 151 of the model WHS Act.

The specification of these details and requirements go some way to ensuring transparency, accountability and certainty regarding the role of an entry permit holder and the operation of the entry permit system. If the WA Government seeks to allow unions the right to enter a workplace on work, health and safety grounds the matters set out in Part 2.4 of the model WHS Regulations must also be adopted.

2.6 PLANT

HIA has a number of concerns with the approach taken in the model WHS Regulation to the regulation of Plant including:

- the application of the section to plant that is designed to be primarily supported by hand and to vehicles;
- the provision of guarding interlocks as a control measure;
- overly prescriptive scaffold inspection requirements;
- overly prescriptive and impractical record-keeping for plant inspections, maintenance, commissioning, dismantling, alterations, registrations; and
- the inclusion of a provisions for 'structures' with similar obligations to that of plant – the definition of structures is the same as that from the model WHS Act and would include houses and other types of buildings therefore potentially imposing record keeping, design and maintenance requirements on residential construction.

HIA is opposed to the inclusion of the above, and is of the view that the overly prescriptive nature of the model Plant regulations is not in line with the original Safe Work Australia policy to develop performance-based regulations. HIA also recommend that plant that is designed to be primarily supported by hand be excluded from the scope of this part of the model WHS Regulations and that the section relating to structures be removed completely.

2.7 WHS MANAGEMENT PLANS

HIA's main concern with WHS Management Plans is that over the last decade these documents have increased in complexity and have become a significant burden on the residential building industry without any evidence that they improve safety on site. WHS Management Plans and their content are frequently the subject of uncertainty.

Of particular concern are the added requirements to include the arrangements for consultation, co-operation and the co-ordination of activities in relation to compliance with the duties under the Act and the Regulations and the arrangements for the collection, assessment, monitoring and reviewing of SWMS.

WHS management plans also pose administrative problems for principal contractors, particularly in relation to making sure all workers are aware of the contents of the plan and that it is kept up to date in a constantly changing environment, which is difficult to achieve in practice.

The model WHS Regulations regarding WHS Management Plans pose an unnecessary administrative burden and should exclude residential construction. This approach could be implemented by virtue of the change to the construction project threshold detailed above.

As an alternative proposal, limiting or simplifying the information required in a WHS Management Plan would work better in practice. On this basis, the WHS management plan duty should be removed and replaced by further practical guidance material.

For example, a practical proposal would be for guidance material to recommend placement of signage onsite with the following limited information:

- contact details of the PC and site supervisor,
- arrangements for managing incidents, and
- site safety rules.

2.8 SAFE WORK METHOD STATEMENTS (SWMS)

A range of issues have been identified by HIA members and others in relation to the efficacy of the SWMS obligations. Of particular note is the research carried out by the ANU on behalf of SWA.⁷ The ANU research uncovered an extensive list of mostly negative issues and observations about the use of SWMS, and the report acknowledges that *“there are grave concerns about the efficacy of SWMS in the construction industry”*.

The Boland Review also identified SMWS as *“an area of the model WHS Regulations which is not operating as intended.”*⁸

SWMS have been in place in most jurisdictions for some time with no demonstrated benefit. Evidence suggests that many PCBU, including subcontractors ignore the SWMS duties and only produce SWMS when demanded by a principal contractor or other customer requiring the paperwork for compliance purposes. Additionally, when SWMS are produced by PCBU, the SWMS are usually not of a high quality and non-compliant. SWMS are often copied or plagiarised from others with little or no regard to the actual hazards or risks onsite or whether control measures are appropriate for the work. Once produced the SWMS tend to be placed in a folder and ignored resulting in onsite safety practices not necessarily being carried out in accordance with the SWMS.

In those jurisdictions that have harmonised, there are reports that SWMS have proven to be administratively burdensome for builders who spend a disproportionate amount of time and effort to ensure the paperwork is produced but reap little or no safety benefit from it. There is also considerable confusion and many different interpretations about what hazards and risks are required in a SWMS, as evidenced by the many problems identified by stakeholders in the research by the ANU commissioned by SWA.⁹

It is also unsatisfactory that the model WHS Regulations require a principal contractor to ensure compliance with and collection of SWMS rather than the person required to complete the SWMS. The obligation to provide and comply with a SWMS should be wholly placed on the person undertaking the work and not jointly on to the principal contractor.

SWMS simply add administrative burden without providing any demonstrable improvement in safety outcomes; their adoption should be reconsidered.

3. SPECIFIC MATTERS RAISED IN THE CONSULTATION PACKAGE

3.1 TREE LOPPING

HIA supports the exemption under Regulation 221 of the model WHS Regulations.

3.2 TOWER AND GANTRY CRANES

HIA supports the exemption of tower and gantry cranes from design registration if moved to a new location.

⁷ National Research Centre for OHS Regulation, Australian National University, The Efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia. February 2017 (unpublished report).

⁸ Pg. 156.

⁹ See note 7.



3.3 HEALTH MONITORING REPORT

HIA does not support Regulation 376 of the model WHS Regulations and proposes that instead, a PCBU provide the report to a worker.

3.4 PHOTOGRAPHIC IDENTIFICATION ON THE CONSTRUCTION INDUSTRY TRAINING CARD

While HIA acknowledges that it may be preferable for photographic identification to enable workers to be readily identified, this is conditional on there being no cost impost for existing card holders by enabling free conversion to a photographic card.

3.5 ASBESTOS

HIA supports that the proposed WHS Regulations prescribe that an asbestos register be created by a competent person and supports the WHS requirement for a competent person to identify asbestos, carry out air monitoring, clearance inspections and issue clearance certificates.



APPENDIX A - ISSUES WITH THE MODEL WHS REGULATIONS

WHS Regulations Record keeping regulatory burden	<p>ISSUE</p> <ul style="list-style-type: none"> Various parts of the Model WHS Regulations mandate the keeping of records for two years where there has been a notifiable incident, e.g., regulations 77, 58, 162, 182, 303, 304 313, 465 <p>RECOMMENDATION</p> <ul style="list-style-type: none"> There is no valid justification for mandating the keeping of these records. This is an unnecessary regulatory burden that should be removed. Record keeping requirements should not be designed to facilitate the investigation by regulators. While some PCBU's may want to keep such records that should be a business decision for the PCBU.
WHS Regulation 25 Training requirements for WHS entry permits	This training should be carried out by the WHS regulator. This will ensure that the training is appropriate, provides the necessary skills and avoids the conflict of interest that currently exists
WHS Regulation 28(a) Additional requirements—entry under section 117	The term 'so far as is practicable' should be removed, as it is always practicable to provide written particulars of the suspected contravention in the notice of entry.
WHS Regulations 37-38 Maintenance of control measures Review of control measures	These regulations are unnecessary as requirements to maintain and review control measures are implicit and are already adequately dealt with in the <i>How to Manage Work Health and Safety Risks Code of Practice</i> .
WHS Regulation 39 Provision of information, training and instruction	This regulation duplicates section 19(3)(f) of the WHS Act and should be removed. If not removed it should at least be subject to reasonably practicable as it is in the WHS Act.
WHS Regulations 40-41 Duty in relation to general workplace facilities Duty to provide and maintain adequate and accessible facilities	These regulations are unnecessary. The provisions can be dealt with quite adequately via guidance. It should be noted that some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non WHS jurisdictions such as Victoria successfully continue to do so.
WHS Regulation 42 Duty to provide first aid	These provisions should be simplified to a general duty to ensure that first aid is provided. However, the provisions are unnecessary and should be removed. Provisions for first aid can be dealt adequately via guidance. It should be noted some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non-WHS jurisdictions such as Victoria successfully continues to do so.
WHS Regulation 43 Duty to prepare, maintain and implement emergency plan	These provisions should be simplified to a general duty to ensure emergency arrangements are provided. However, the provisions are unnecessary and should be removed. Provisions for emergency plans can be dealt adequately with via guidance. It should be noted that some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non-WHS jurisdictions such as Victoria successfully continues to do so.
WHS Regulations 44-45 Personal protective equipment	These regulations are unnecessary and should be removed. The prescribed hierarchy of control makes this duty implicit and alternatively can be dealt with via guidance.
WHS Regulations 54, 55(1), 55(2) Managing risks of falling objects	These regulations reiterate the provisions of Part 3.1 and are unnecessary. The regulations should be removed.
WHS Regulation 55(3) Minimising risk associated with falling objects	This regulation is unnecessary because risks arising from falling objects must be managed in accordance with the general hierarchy of control prescribed by regulation 36.



	<p>Although r 55(3) at face value appears like it is a 'deemed to comply' provision, the means of controlling falling objects can be interpreted as possibly restricted to the matters and examples in this regulation. It is also unclear whether reliance on the general hierarchy of control would be acceptable. Accordingly, it is very confusing for PCBUs to figure out what is/isn't acceptable.</p> <p>The existing <i>Fact Sheet - Falling Objects</i> could stand alone and be sufficient without the need for Division 10. On this basis Division 10 should be removed.</p>
WHS Regulation 58 Audiometric testing	Audiometric testing requirements are not supported. The tests do not guarantee any WHS improvement. Furthermore, it is difficult to understand who has the duty where more than one PCBU is involved and what 'frequently' required to use PPE means.
WHS Regulation 85(4) Evidence of licence – duty of PCBU	<p>ISSUE</p> <ul style="list-style-type: none"> This regulation prescribes that PCBUs must keep evidentiary records of licences of workers engaged for 1 year. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> This is unnecessary red tape that should be removed.
WHS Regulations Schedule 3 High risk work licence – description of high risk work	<p>ISSUE</p> <ul style="list-style-type: none"> Schedule 3 describes some of the HRW as 'use of' rather than 'operation of', e.g. use of a forklift; use of a crane and the regulations refers to the carrying out of a class of HRW as the trigger for the licencing requirement. The language used may be taken to catch anyone making use of the plant, not just the person operating the plant, for example, a builder making use of a hoist to carry out work. Are both the 'builder as a 'user' and the operator required to have a licence? <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Schedule 3 should be modified to make it clear that the operator or erector of the plant – not the user – is the person who must be licenced.
WHS Regulation 142 Notice of demolition work	<p>The requirement to provide 5 day notice prior to demolition work is an unnecessary regulatory burden.</p> <p>The compulsory demolition notification requirements are a duplication of existing requirements to notify building agencies in some jurisdictions and represent an additional unnecessary burden that will require contractors to deal with several separate agencies. The requirement to notify demolition work should be removed.</p>
WHS Regulation 156 De-energised equipment must not be inadvertently reenergised	<p>ISSUE</p> <ul style="list-style-type: none"> This regulation is unrealistic. It will not always be possible for PCBUs to prevent inadvertent re-energisation in an absolute sense. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> It should be subject to 'so far as it is reasonably practicable'.
WHS Regulation 163 Electrical equipment and installations and construction work — additional duties Duty of PCBU	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to comply with AS/NZS 3012 Electrical Installations – construction and demolition sites represents an inappropriate level of prescription for the construction industry. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Specific recommendations for construction should be in guidance material and not mandated in an Australian Standard which is outside the control of SWA Referencing of standards in regulations is not supported.
WHS Regulation 166(2)(b)(ii) Overhead and Underground Electric Lines – Duty of PCBU	The requirement to ensure that control measures implemented are consistent with any requirements of an electricity supply authority is unnecessary and may lead to electricity supply authorities prescribing unwarranted conditions based on a perception that this regulation allows them to impose 'requirements'. This could also lead to inconsistencies between such authorities. For example one authority may require that power lines be de-energised in low risk instances but another authority may not require this.

	<ul style="list-style-type: none"> If an electricity supply authority has any power conferred upon it in relation to risk control when PCBU's seek to operate near power lines, then there is no need for this regulation. It is unwarranted and potentially problematic The regulation should be removed.
WHS Regulation 223(6) Lasers	<p>This regulation is inconsistent with AS 2397:1993 – Safe use of lasers in the building and construction industry and with the provisions of the current SWA information sheet Laser classifications and potential hazards, both of which allow Class 3B (Restricted) lasers to be used in the construction industry.</p> <ul style="list-style-type: none"> The regulation should be modified to allow for the use of Class 3B (Restricted) lasers in building and construction industry.
WHS Regulation 225(5) Scaffolds	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to prevent access to an incomplete scaffold is unrealistically onerous as it will not always be possible for a PCBU to prevent access to an incomplete scaffold in absolute sense, e.g., if workers disregard the measures implemented by a PCBU to prevent such access. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> This regulation should be subject to the qualifier 'so far as it is reasonably practicable'.
WHS Regulation 237 Records of plant	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to keep records of commissioning/decommissioning, dismantling and alterations imposes an extensive but unwarranted administrative burden for PCBU's in relation to plant such as prefabricated scaffolds that are constantly commissioned/ decommissioned, dismantled and altered. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> The requirement to keep records of commissioning/decommissioning, dismantling and alterations should be removed.
WHS Regulation 289 Meaning of high risk construction work	<p>ISSUE</p> <ul style="list-style-type: none"> The tasks defined as high risk construction work (HRCW) are defined without regard to whether or not there are risks and inappropriately label all such work as 'high risk'. It is possible for some of these defined tasks to not pose a risk to health & safety. E.g. painting a wall behind live power cables would be classed as HRCW by virtue of being work carried out near energised electrical installations or services, even if a risk assessment has been carried out and concluded that there is no possibility of contacting the live cables by carrying out the work. SA and Qld have made changes to the definition of high risk construction work as including the risk of falling more than 3m rather than 2m. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> If the SWMS provisions are retained this regulation should be modified so that the work is only HRCW if there is a risk to health and safety from the carrying out of that work, or alternatively, that the requirement for a SWMS and associated duties are only triggered if there is a risk to health and safety from the carrying out of the work. If the SWMS duty is retained, the fall risk threshold in the definition of HRCW should be changed more than 3m.
WHS Regulation 298 Security of the workplace	<p>This regulation should be removed. It is unnecessarily prescriptive and adequate guidance is provided in the <i>Code of Practice – Construction Work</i></p>
WHS Regulations 299, 300 Safe Work Method Statements (SWMS)	<p>See comments at section 3.8.</p>



WHS Regulation 302 Review of SWMS	<p>ISSUE</p> <ul style="list-style-type: none"> The requirements review control measures and SWMS can be adequately dealt with in the <i>Construction Work Code of Practice</i> <p>RECOMMENDATION</p> <ul style="list-style-type: none"> This regulation is unnecessary and should be removed.
WHS Regulations 314 - 315 Further health and safety duties	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement for the Principal Contractor (PC) to put in place arrangements for ensuring compliance with duties is unnecessarily prescriptive, confusing and counterproductive. It is not clear what arrangement would be acceptable, and what would it matter, as long as compliance is achieved? The requirement for PCs to manage the risks stated in regulation 315 is unnecessary given the general requirements of part 3.1 to manage all risks and can be adequately addressed by guidance. Of more concern is that this regulation can potentially give subcontractors the wrong message that the PC is the sole party responsible for ensuring compliance. This can be counterproductive and could significantly lead to poor safety by subcontractors on a construction site. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> It is recommended that these regulations be removed.
WHS Regulation 317 Duty to ensure worker has been trained (CIT training)	<p>ISSUE</p> <ul style="list-style-type: none"> This requirement is unrealistically onerous. It will not always be possible for a domestic house builder to make absolutely sure that untrained workers do not carry out construction work. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> It should be subject to the qualifier 'so far as it is reasonably practicable'.