

PUBLIC COMMENT

Consultation on the model Work Health and Safety Regulations relating to Major Hazard Facilities

Instructions

To complete this online submission:

- Download and save this submission document to your computer.
- Use the saved version to enter your responses under each question below. These questions are from the [Consultation Paper on the model Work Health and Safety Regulations relating to Major Hazard Facilities \(MHFs\)](#).
- Once you have completed your submission, save it and upload it using the upload your submission link on the [Engage submission form](#).
- You can also upload any other documents needed to support your submission to the [Engage submission form](#).

Submissions will be accepted until **11:59 pm (AEDT) on Thursday 3 November 2022**.

Help

If you are experiencing difficulties making your submission online, please contact us at chemicals@swa.gov.au.

Respondents may choose how their submission is published on the Safe Work Australia website by choosing from the following options:

- submission published
- submission published anonymously
- submission not published

For further information on the publication of submissions on Engage, please refer to the [Safe Work Australia Privacy Policy](#) and the [Engagement HQ privacy policy](#).

Please note the following are unlikely to be published:

- submissions containing defamatory material, and

- submissions containing views or information identifying parties involved in hearings or inquests which are currently in progress.

Your details and background

(Please leave blank if you wish to remain anonymous)

1. Name or organisation

R2A Due Diligence Engineers

2. Email used to log into Engage

████████████████████

Questionnaire

(Consultation document questions)

Your response should identify the specific regulation/s involved and, where possible, provide evidence to support your statement.

Evidence demonstrating issues raised in the Review (Section 4.1)

4.1a) What evidence do you have of inconsistencies in the application of the model WHS Regulations relating to MHFs across jurisdictions?

No Answer

4.1b) What are the issues around duplication for businesses with MHFs, particularly those that fall under multiple jurisdictions?

Click or tap here to enter text.

4.1c) What concerns do you have with expectations of what should be included in a safety case?

Click or tap here to enter text.

4.1d) What duplication or overlap is there between the MHF Regulations and other legislation?

Click or tap here to enter text.

4.1e) What do you consider contributes to regulatory complexity for MHFs?

Inconsistency between the Hierarchy of Control used in different jurisdictions. The courts use three: elimination, prevention (precautions that reduce the likelihood of the event) and mitigations (consequence minimisation). The Commonwealth and NSW uses three levels that are close to this. Victoria uses four. Most other jurisdictions use six; elimination, substitution, isolation, engineering, administrative and PPE.

This is very confusing especially when some of these controls like engineering can eliminate , prevent or mitigate can act in all three judicial categories.

Technical and administrative amendments needed in the MHF Regulations (Section 4.2)

4.2a) What administrative or technical changes could be made to the current MHF Regulations to improve application and consistency of the MHF laws across jurisdictions?

Have a common hierarchy of controls for all jurisdictions consistent with decisions of the High Court of Australia. The WHS legislation has two, elimination and minimisation. The courts use three, elimination, prevention (likelihood reduction) and mitigation (consequence reduction). The Cth and NSW have three, similar to the judicial view. Victoria has four but many have six like WA, elimination, substitution, isolation, engineering, administration and PPE.

It's very confusing especially as engineering controls, for example, can eliminate, prevent and mitigate. I've attached a diagram to illustrate the point.

4.2b) What other non-regulatory changes could be made (e.g. additional or improved guidance) to improve application and consistency of the MHF laws across jurisdictions?

Click or tap here to enter text.

Other issues with the model WHS regulations for MHFs? (Section 4.3)

4.3a) How well do you think the current model MHF Regulations meet the intended policy objectives outlined in section 2 of the model WHS Act, particularly with advances in technology and emerging industries?

Do you mean Division 2, the primary duty of care? As in, eliminating risk so far as is reasonably practicable (SFAIRP), and if not, reduced them SFAIRP? Not well.

Most jurisdictions are still trying to maintain the ISO 31000 ALARP - tolerable or acceptable) target level of risk approach in some way. This flows into the next section. Also very difficult to get industry to look across to other industry sectors for further possible practicable controls to be tested for SFAIRP.

4.3b) What other issues do you have relating to the model MHF Regulations that were not raised in the Review of the model WHS laws or otherwise addressed in the previous questions?

Most jurisdictions are still trying to sterilise land near MHFs using some form of risk criteria. This is not SFAIRP. The WHS legislation is not about the degree of hazard, it's about the effectiveness of (and who is responsible for) the controls. For example, you can live adjacent to any MHF if there are enough precautions in place. It might be an underground reinforced concrete bunker with its own oxygen supply, very unattractive, hugely expensive and so entirely uncommercial, but it would be safe. I've added a diagram to support this point as an attachment.

Generally, the closer to the hazardous site any facility is, the greater the level of control required. What is considered 'safe' is determined on the balance of the significance of the risk versus the effort required to control it per Justice Mason's decision in Wyong Shire Council vs Shirt (1980): " The perception of a reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have."

- What changes to the model MHF Regulations do you consider would address these issues?

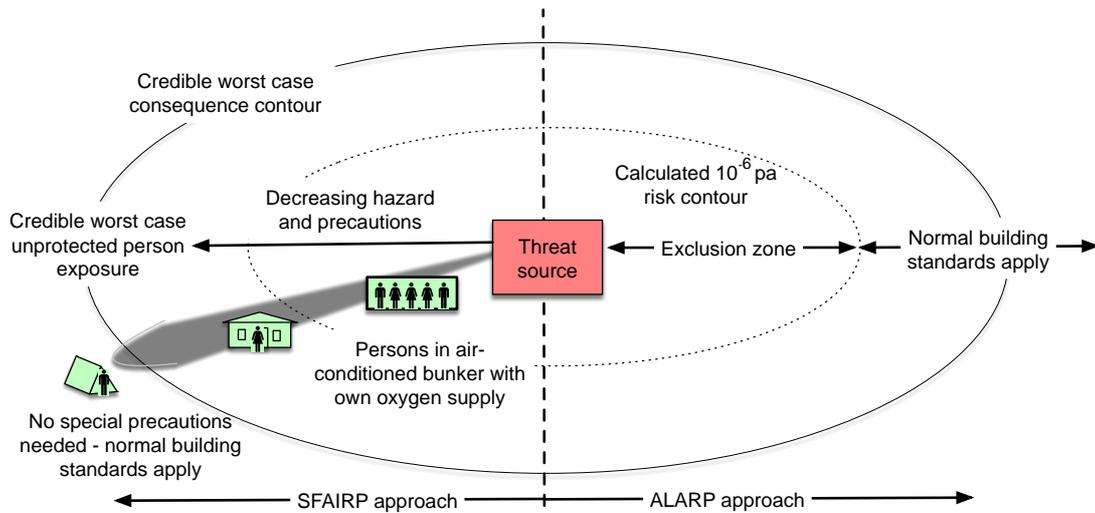
Make the point above.

- What new or updated guidance would assist in addressing these issues?

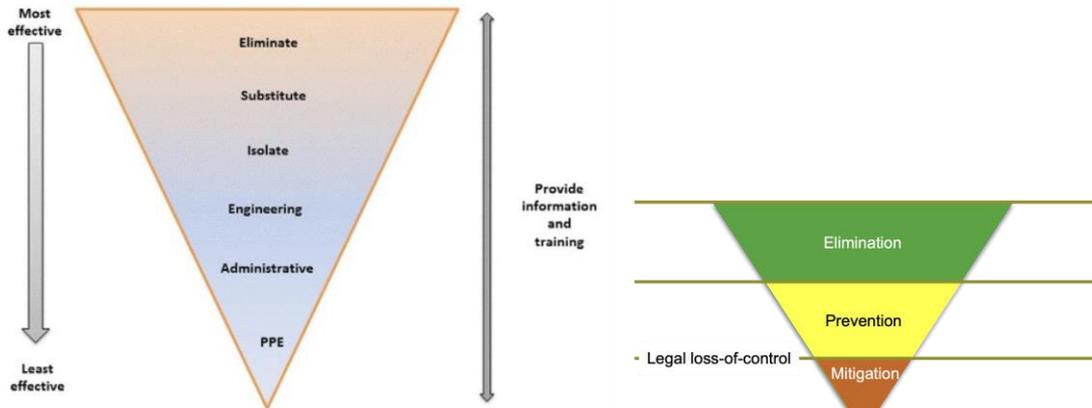
Click or tap here to enter text.

4.3c) Are there any aspects of jurisdictional MHF laws or international regulatory frameworks for MHFs that you think should be considered for the model MHF Regulations?

Since the Australia Act's of 1986 ditched appeal to the Privy Council, the High Court of Australia is the paramount court in the land. Better to refer to relevant Australian case law than the UK where possible when trying to provide guidance on 'reasonably practicable'.



Land use exclusion v WHS (precautionary) approach



Hierarchy of control

<https://www.commerce.wa.gov.au/atom/4194> viewed 1st December 2021

WA Hierarchy v the courts (expert witness) hierarchy