Australian Industry Group

Consultation regulation impact statement:

Workplace exposure standards framework under the model work health and safety laws

Submission to
Safe Work Australia

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CONSULTATION REGULATION IMPACT STATEMENT:

WORKPLACE EXPOSURE STANDARDS FRAMEWORK UNDER THE MODEL WORK HEALTH AND SAFETY LAWS

SUBMISSION TO SAFE WORK AUSTRALIA

INTRODUCTION

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

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

We have ongoing contact and engagement with employers in all Australian jurisdictions on workplace safety issues, including informing them of regulatory changes, discussing proposed regulatory change, discussing industry practices as well as providing consulting and training services. We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to workplace health and safety.

The need to make changes to Australia's approach to the establishment of workplace exposure standards has been a topic for consideration at Safe Work Australia meetings for a significant period of time.

We welcome the opportunity to make a submission in relation to the Consultation regulation impact statement: Workplace exposure standards framework under the model work health and safety laws.

As many of the specific questions in the consultation regulation impact statement (CRIS) are designed to gather cost data for specific workplaces, we have not addressed these questions. Instead we provide overarching feedback about the proposed approaches.

CONTEXT

Generally, Workplace Exposure Standards (WES) represent the airborne concentration of a particular substance or mixture that should not be exceeded.

Under the model work health and safety (WHS) laws, section 17 of the Act creates an obligation to eliminate or minimise risk so far as is reasonably practicable; this includes reducing the airborne concentration of a chemical to as low as reasonably practicable.

Regulation 36 specifies that, if it is not reasonably practicable to eliminate a risk, the hierarchy of control measures must be applied. A duty holder can only rely on administrative controls and personal protective equipment (PPE) if it is not reasonably practicable to control the risk solely using one or more of the higher order controls: elimination; substitution; isolation; or engineering controls.

Further, Regulation 49 requires that "no person at the workplace is to be exposed to a substance or mixture in an airborne concentration that exceeds the exposure standard [WES]".

THE NEED FOR CHANGE

The Consultation RIS provides strong reasons for implementing a streamlined methodology to assess and adopt new WES, as appropriate.

Ai Group recognises this need and supports the adoption of a streamlined methodology, subject to addressing concerns about the application of this approach.

In relation to adopting this streamlined approach, in paragraph 163 it is stated that "Safe Work Australia would initially undertake a full review and update of the current workplace exposure standards in 2018-19". Elsewhere in the document it is identified that: 35 per cent of WES (225) are likely to be under-protective (p.28); 4 per cent (26) are overprotective (p.41); and 70 chemicals do not have WES (p.70).

This means that 321 WES need to be reviewed. It is unlikely that the Decision RIS will be finalised within a timeframe that allows for this work to be completed by July 2019, particularly as it is most likely that there will be a requirement for regulatory impact documents to be developed.

It is recommended that an alternate, more realistic, timeframe is included in the Decision RIS.

Ai Group strongly supports the inclusion of Regulation Impact Statements as part of the modification of WES, especially if the WES is to be lowered. The illustrated process on page 35 does not include any time for the development of regulatory impact documents. This should be reviewed and realistic timeframes for the development and approval of these document should be included in a finalised timeframe.

This illustration also indicates that the stakeholder consultation process will be reduced from six months to one month. One month is insufficient time for an effective consultation process to be undertaken, particularly as affected workplaces may be difficult to identify for some of the chemicals being considered.

MANDATORY VS ADVISORY STANDARDS

Ai Group notes that there is no explanation of what is meant by "mandatory" within the context of the Consultation RIS, resulting in some ambiguity and the possibility of alternate interpretations. The reason for the ambiguity is outlined below.

Section 1.4 of Safe Work Australia's *Guidance on the interpretation of workplace exposures standards for airborne contaminants, April 2013* states: "Exposure standard means an exposure standard listed in the *Workplace Exposure Standards for Airborne Contaminants* and represents **the airborne concentration of a particular substance or mixture that must not be exceeded**", (emphasis added).

When read in isolation, this implies that at no time can the level of contaminant in the air be above the WES. If this interpretation is applied, a mandatory WES would create significant issues in workplaces where, after application of all other control measures, compliance with the current and future exposure levels can only be achieved through the adoption of administrative controls or personal protective equipment (PPE).

It is clear from the regulations that this is not the intention of the WES, other than in the case of asbestos, as indicated in the table below.

As illustrated in the following table, noise and chemicals both refer to a worker not being exposed to the hazard at a level above the exposure standard, whilst the asbestos regulation requires that the standard is not exceeded at the workplace.

Noise	Chemicals	Asbestos
Regulation 57(2) A person conducting a business or undertaking at a workplace must ensure that the noise that a worker is exposed to at the workplace does not exceed the exposure standard for noise.	Regulation 49 A person conducting a business or undertaking at a workplace must ensure that no person at the workplace is exposed to a substance or mixture in airborne concentration that exceeds the exposure standard for the substance or mixture.	Regulation 420(2) A person conducting a business or undertaking at a workplace must ensure that the exposure standard for asbestos is not exceeded at the workplace.
Regulation 57(1) A person conducting a business or undertaking must manage, in accordance with Part 3.1, risks to health and safety relating to hearing loss associated with noise.	Regulation 351 A person conducting a business or undertaking must manage, in accordance with Part 3.1 risks to health and safety associated with using, handling, generating or storing a hazardous chemical at a workplace.	

Prior to the development of this Consultation RIS, Safe Work Australia issued a Discussion Paper *The role of chemical exposure standards in work health and safety laws, November 2015*. In this document WES were described as follows:

> "Exposure standards represent airborne concentrations of individual chemical substances in the workers' breathing zone which, according to current knowledge, should neither cause adverse health effects or undue discomfort to nearly all workers". (p.7)

Further it was stated:

> "In Australia exposure standards are mandatory in all jurisdictions (i.e. given effect under regulations). They are legally enforceable and not qualified by what is reasonably practicable. To comply with WHS Regulations, businesses must not exceed these minimum standards". (p.7).

The discussion paper had no reference to the hierarchy of controls, and specifically the role of administrative controls and personal protective equipment in achieving the legislative requirement of ensuring a worker was not exposed to a chemical or substance above the WES.

The information in the Consultation RIS does refer to the hierarchy and identifies that administrative controls and PPE are legitimate options for controlling exposure, e.g. paragraphs 60 and 61 on page 17.

It is important that there is a clear explanation of the term in the Decision RIS. Whether the WES remain mandatory, or become advisory, it will be important that guidance material clearly outlines what is meant when there is reference to meeting a WES and complying with the regulations. A form of words such as those below may be appropriate:

> Exposure standards represent airborne concentrations of individual chemical substances in the workers' breathing zone which, according to current knowledge, should neither cause adverse health effects or undue discomfort to nearly all workers.
>
> In line with the hierarchy of controls specified in regulations 35 and 36 of the Model WHS laws, a person conducting a business or undertaking must do all that is reasonably practicable to keep exposure below the WES by reducing the contaminant in the air through the adoption of higher order controls, e.g. elimination, substitution, isolation or engineering controls. However, if the application of those controls does not reduce the air contamination in the worker's breathing zone to below the WES, administrative controls and/or personal protective equipment will be necessary and appropriate.
>
> It is also important to note that an employer is required to eliminate or minimise risk so far as is reasonably practicable. This means that lowering exposure to below the WES is the minimum that must be done and may be insufficient to meet the legislative obligation to do all that is reasonably practicable to eliminate or minimise risk.

Mandatory standards have some difficulties.

Interpretation and application in the workplace.

As outlined earlier there is a requirement in Australian WHS/OHS laws to eliminate or minimise risk so far as is reasonably practicable. However, the existence of mandatory standards can lead an employer to believe that they are meeting their legislative obligations as long as the exposure standard is not exceeded. This may mean that employers meeting the WES are not necessarily minimising the risks so far as is reasonably practicable.

On the other hand, it may be that an employer does all that is reasonably practicable to minimise the level of airborne contaminants in the air through higher order controls, and still has a level of airborne contaminant above the WES. As highlighted earlier, it must be clear in the WES documentation that administrative controls and PPE are legitimate control measures to ensure that a worker is not exposed to an airborne contaminant above the WES.

Exposure standards have not generally been designed to be mandatory

As outlined in paragraph 282 of the Consultation RIS "the original intent of workplace exposure standards was to enable health and safety professionals like occupational hygienists to do their jobs more effectively. The move to make these standards mandatory has provided some clarity for duty holders. However, workplace exposure standards must still be considered in the context of the duty to eliminate or minimise exposure to hazards so far as is reasonably practicable".

If international standards developed to guide occupational hygienists are adopted as mandatory standards in Australia, it is essential that the practical application in the workplace is considered.

Mandatory exposure standards create a range of regulatory issues.

This Consultation RIS is considering the overall benefit of adopting a new approach to establishing WES. However, the mandatory adoption of a specific WES, either now or in the future, may have a much more significant impact on industry than is currently envisaged.

Ministerial approval has recently been granted for the Model WHS regulations to be amended to incorporate a reduced WES for lead. This has only occurred after an extensive consultation process and the development of a Consultation RIS and a Decision RIS.

A RIS is currently required for most major changes to the application of the Model WHS laws. In addition, many states and territories are required to undertake their own RIS and not rely on work done at a national level.

It is unclear how any significant change to a WES could be adopted in Australia without considering the economic impact of such a change. Further the Consultation RIS does not discuss how the quicker adoption of modified WES would address requirements for transitional arrangements. If we consider the recent approach to lowering the WES for lead, which has been adopted in Victoria, a two-year transition period has been applied to allow organisations to meet the new requirements.

Advisory exposure standards allow greater flexibility in the adoption of standards, but also have some difficulties.

Utilisation of exposure standards in an advisory manner would allow for overseas exposure standards to be adopted more readily without the need for a RIS.

This would have the benefit of overcoming the current issues associated with maintaining Australian exposure standards. It would also allow exposure standards to be utilised as part of the complete risk management process, rather than as a baseline which could be seen as all that needs to be done.

However, this approach creates a risk that all overseas exposure standards would be automatically adopted without consideration of the Australian context.

If this resulted in a significant lowering of exposure standards, without consideration of the practical implications, various workplace parties may utilise them in a manner that is not intended. This could especially be the case with mandated exposure standards having been part of the Australian landscape for an extended period of time. It may be that, even as advisory standards, there is a need for consultation to occur with affected businesses.

On page 11 of the Consultation RIS it is stated that "it is expected that some duty holders will experience lower compliance costs if they choose not to comply with advisory workplace exposure standards". This statement is made within a document that states elsewhere that 35 per cent of respondents "…potentially do not use or are unaware of the workplace exposure standards" and approximately 68 per cent of respondents aware of the workplace exposure standards, are perceived to comply (p.24); meaning that 32 per cent are not. This is among organisations that voluntarily participated in providing feedback; it can be expected that overall understanding and compliance is much lower. Clearly there is already an issue with understanding and applying WES that are mandatory.

Employers that are currently utilising WES as part of their chemical risk management programs and understand the overarching obligation to minimise risk as far as reasonably practicable, are unlikely to reduce their level of control if the WES become advisory.

IMPLEMENTING A CHANGE FROM MANDATORY TO ADVISORY STANDARDS

In order to implement a change from mandatory to advisory standards, all participating jurisdictions would need to adopt the proposed amendment to Model WHS regulation 49; the other jurisdictions would need to make changes to comparative provisions of their laws.

Since the adoption of the Model WHS Laws from January 2011, a range of changes have been approved by the majority of jurisdictional ministers and incorporated into the Model WHS Laws. These amendments have not been adopted by any of the WHS jurisdictions.

Further amendments have been approved by Ministers, and are still to be incorporated into the Model WHS Laws.

The process of agreeing changes, incorporating them into the Model WHS laws, and then having those amendments adopted by all jurisdictions is extremely slow.

Ai Group would be very concerned that a process could commence that begins to document modified WES that are intended to be advisory, whilst jurisdictions continued to maintain the current version of regulation 49 or its equivalent.

With this possibility in mind, it would appear that the maintenance of WES as mandatory standards, with appropriate consultation and regulatory impact analysis, would pose the least risk of establishing unreasonable WES that are still treated as mandatory in one or more jurisdictions.

WORKPLACE EXPOSURE STANDARDS ARE NOT WIDELY UNDERSTOOD

The CRIS identifies, at para 41:

- 35% of respondents potentially do not use or are unaware of the workplace exposure standards
- Perceived level of compliance with the workplace exposure standards averages 62% across all industries and business size.

Given the reference to “perceived” in the commentary, we presume that this is self-reported in relation to actively seeking to understand and apply the WES. It may be that these businesses are compliant through the application of control measures, but without specific reference to an individual WES.

It is Ai Group’s view that the increased understanding and application of the WES system, as part of a comprehensive risk management approach to chemicals, would result in better WHS outcomes.

IMPACT ANALYSIS

Addressing under-protection vs over-protection

The Consultation RIS states that 4 per cent of WES may need an increased value, i.e. they are currently being over-protective (p.9). The Consultation RIS indicates that this will be a saving to industry. However, this is unlikely to be the case.

The WHS laws require that the risks are eliminated or minimised so far as is reasonably practicable. If an organisation has implemented controls to reduce exposure to below the current WES, it is unlikely to be effectively argued that it is not reasonably practicable to maintain those control measures and thereby increase the level of airborne contaminants in the worker's breathing zone. Therefore, it is not appropriate to propose that this is a true cost saving.

Costs in the Consultation RIS are not clear

On page 43 to 44, it is stated that "… it could be predicted that:

- A significant change to a WES value would require:
    - An additional engineering control, isolation control and air monitoring, or
    - Application of PPE, and
- A minor change would require:
    - An additional administrative control."

It is not clear on what basis this conclusion has been reached. In all circumstances an employer is required to consider the hierarchy. It cannot be presumed that a minor change in WES will only result in an additional administrative control. Dependant on the circumstances, a minor change could result in significant higher level controls being required.

Benefit and costs are not well supported

Table 2 (page 52) identifies that Option 3 would provide no benefits to workers (or the community), with an increased likelihood of workplace illness and disease. This assumes that an employer will reduce their controls if the WES is advisory. Based on the overall obligation to eliminate or minimise risks, this should not be the case.

It also does not take into account that the advisory WES may be significantly lower than the current WES. Even if these lower WES are advisory, state of knowledge is likely to increase the focus on control measures to move toward an advisory WES.

It is identified that duty holders may have reduced compliance costs if the WES values become less stringent. As outlined earlier in this submission, it is unlikely that it could be argued that previously reasonably practicable control measures to minimise risk are no longer reasonably practicable.

RENAMING AS WORKPLACE EXPOSURE LIMITS

Ai Group does not have a strong view on changing from workplace exposure standards to workplace exposure limits. Both have a risk that workplaces will see themselves as compliant as long as the exposure is below the quoted figure.

The key to achieving the lowest possible level of exposure is to clearly articulate, within all documents that reference to the standard/limit, that there is a requirement to do all that is reasonably practicable to minimise exposure.

TRANSITIONAL ARRANGEMENTS

Transitional arrangements are most important if the WES are mandatory; but they may also be necessary if they are advisory. If there are significant reductions in the WES workplaces may require some significant lead time to adjust their workplace to meet the lowered levels. This needs to be recognised and factored into any reductions in WES.

CONCLUSION

It is Ai Group's view that:

- A streamlined approach to reviewing WES is necessary but must include sufficient scrutiny to ensure that WES are achievable in workplaces, particularly if they remain mandatory.

- When applying the streamlined approach there must be sufficient time for industry consultation and the development of robust regulation impact analysis.

- Irrespective of whether WES are advisory or mandatory, a person conducting a business or undertaking has an obligation to eliminate or minimise risk so far as is reasonably practicable; this must be a clear focus in all communication about WES.

- Whilst Ai Group has a preference for WES to be advisory, the Australian history of mandatory WES and the difficulties with achieving consistent amendments to Model regulation 49 (or its equivalent), leads us to a position that the continuation of mandatory WES is the most practical way forward.

- If the review of a WES results in a significant reduction in that WES, there must be an appropriate transitional period to allow industry to adapt and implement appropriate controls.

- It needs to be clearly articulated, in all relevant documentation, that a person conducting a business or undertaking must apply the hierarchy of controls, and it is acceptable to utilise administrative controls and PPE where higher order controls have not reduced the airborne contamination to below the WES.

- The Decision RIS needs to reflect the legislative reality that an employer is obligated to eliminate or minimise risks so far as is reasonably practicable, and this may require lowering the level of airborne contaminant in a worker's breathing zone to below the WES.

- Ai Group would be comfortable with using the terminology of Workplace Exposure Limits, rather than WES.