

2018 Review of the model WHS laws
<i>Question 7/29 Extraterritorial / cross-jurisdictional.</i>
Suggested change: Clarify the issue of inspectors (or indeed 'The Regulator') in relation to the use of their powers in other jurisdictions.
Rationale: While there has been one case (as referenced in footnote 23 [page16]) which supported the use of extraterritorial powers, section 6.5 (page 30) notes that "from a legal perspective there is no clear authority (for use of extraterritorial powers)". To remove doubt on any future occasion, this should be clarified.
<i>Question 9 WHS hazards...not effectively covered</i>
Suggested change: Review regulation 299 (SWMS) against other SWMS 'descriptions' (e.g., reg 224, OHS Regulation 2001 (NSW)) with a view to increasing its efficacy.
Rationale: Regulation 299 (2) identifies what a SWMS must include. As a safety practitioner when the NSW WHS Regulation 2001 was introduced, I found the NSW requirements to be very helpful in facilitating a meaningful SWMS that almost by definition fulfilled the requirements of the current 299(3)(b) <i>"be set out and expressed in a way that is readily accessible and understandable to persons who use it"</i> . One challenge we face is the acceptance of SWMSs as meaningful 'living' documents, I believe the current requirements could be improved/expanded to help facilitate this. I have included the old NSW wording in Appendix 1 below.
<i>Question 20 consultation.</i>
Suggested change: Add 'guidance' in the regulations to delineate a minimum consultation requirements for workplaces that have neither a HSR nor a committee (i.e., no 'agreed arrangements').
Rationale: As confirmed in section 5.2 (footnote 45) only a minority of small firms have a HSR. While the section also says consultation on "health and safety decisions occurs in many but not all businesses" it would appear that a substantial number, therefore, do not (NB: many does not mean most). Further direction on minimum requirements might assist with both compliance and enforcement.
<i>Question 30 Incident Notification (and site preservation); s35-39.</i>
Suggested change: Divide notifiable incidents into two categories. The first, containing the most serious cases (e.g., death, serious injury or an incident of high safety potential) to be notified immediately by 'phone ('orally') to the regulator. The second category of incidents to be notified by one of a number of means (on-line, fax, phone etc.) within a defined period. Regulation 39 (Duty to preserve incident sites) to refer to the serious category of incidents only.
Rationale: While the current requirement is to notify <i>"By the fastest possible means"</i> [s38 (2)] it can be given <i>"in writing"</i> [s38(3)(b)]. This introduces the likelihood that out of business hours the response by the regulator to a reported notifiable incident will be delayed. Introducing an immediate notification (by 'phone) category will remove this delay. Section 39 "Duty to preserve incident sites" currently applies to all notifiable incidents. It might be more appropriate for this section to apply to more serious immediately notifiable incidents where attendance by an inspector becomes more likely, removing the duty to preserve an incident site for a notifiable, but less serious incident. Note: Rail Safety Law National Regulations 2012 No. 57 is an example of, in this case, Category A & B notifiable occurrences and reporting requirements which can be referred to by way of comparison.
<i>Question 37 insurance</i>
Suggested change: If practicable this type of insurance, or the payment of fines by the employer, should be outlawed or restricted.
Rationale: As per section 8.5.

Other: sections 20 and 21:
Suggested change: Unless a jurisdiction is contemplating a class of ' <i>prescribed person</i> ' delete this reference in sections 20 and 21.
Rationale: To remove any confusion or doubt.

Appendix 1 (extract from OHS Regulation 2001 (NSW))

"224 Definition

In this Part:

safe work method statement means a statement that:

- (a) describes how work is to be carried out, and*
- (b) identifies the work activities assessed as having safety risks, and*
- (c) identifies the safety risks, and*
- (d) describes the control measures that will be applied to the work activities,*

and includes a description of the equipment used in the work, the standards or codes to be complied with, the qualifications of the personnel doing the work and the training required to do the work.

Note. See Chapter 2 for provisions relating to the identification, assessment and control of risks."