Australian Government
Comcare

2018 REVIEW OF THE MODEL WORK HEALTH AND SAFETY LAWS

Comcare Submission

3 May 2018

Contents

INTRODUCTION

Comcare welcomes the opportunity to provide a response to the *2018 Review of the model WHS laws* (the Review) being undertaken by Ms Marie Boland on behalf of Safe Work Australia.

Comcare notes that the Review is limited to examining the operation and content of the model laws to ensure they are operating as intended.

This submission takes into consideration the Terms of Reference of the Review focusing on the operational and technical aspects of the legislative framework including duties of care; consultation, representation and co-operation; compliance and enforcement; and prosecution and legal proceedings. Comcare does not provide commentary on all the questions in the discussion paper, but raises issues that Comcare has identified as requiring further consideration.

Comcare notes that since the model work health and safety (WHS) framework was implemented, it has served jurisdictions well and provides a certain level of consistency in those jurisdictions that have adopted the model laws. However, Comcare considers that the model WHS laws would benefit from clarification in some areas.

Comcare notes that the Department of Jobs and Small Business will address high level policy matters in their submission to the Review.

Comcare's Role

Comcare is a statutory authority established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). Comcare has a number of powers and functions conferred under the *Work Health and Safety Act 2011* (WHS Act) and SRC Act. Comcare is also responsible for managing the Commonwealth's asbestos-related claims liabilities under the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*.

Comcare supports participation and productivity nationally through healthy and safe workplaces that minimise the impact of harm.

Importance of harmonisation

Comcare is committed to the harmonisation of WHS laws across Australian jurisdictions, consistent with the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA) and agreed by the Council of Australian Governments on 3 July 2008.

Of the jurisdictions that have adopted the model WHS laws, some have made variations to these laws within their jurisdictions. Comcare notes that non-technical variations to the model WHS laws in a single jurisdiction have the potential to introduce regulatory requirements that are different from those applying in other jurisdictions. This can create additional regulatory burden on employers operating across jurisdictions and potentially reduce the safety protection of workers in that jurisdiction compared to workers in other jurisdictions, undermining the intent and benefits of harmonised WHS laws.

LEGISLATIVE FRAMEWORK

The model WHS laws

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Comcare acknowledges that codes provide precise and comprehensive information concerning a hazard or activity that can be referred to during an investigation.

Development of any new codes must be agreed by Safe Work Australia, be subject to tripartite consultation, and be approved by Ministers with responsibility for WHS in each jurisdiction. However, codes are not always the most appropriate way of providing guidance.

Guidance materials generally provide practical advice and solutions, and provide information to assist compliance. They tend to be briefer and simpler than codes, and with the push to reduce regulatory red-tape can be lacking in information and as such have lost some essential details.

Whether codes or guidance material are used, they are both intended to fill in much of the detail which cannot be provided for in the WHS Regulations. They can be used to provide practical and detailed guidance without being overly prescriptive and are much more flexible in that the duty holder can choose the most appropriate risk based way to comply with general WHS duties.

Codes and guidance must remain an important form of reference material, but they need to remain meaningful, need to address issues that result in fatalities or serious injuries, need to be responsive to high risk industries, and need to deal with issues emerging from expansion of the service industry, where risks and hazards are more of a psychological nature rather than physical.

Comcare sees value in both codes and guidance material, but sees the benefits of maintaining and adhering to an agreed set of criteria to assist in making consistent and objective decisions about when a document should be developed as a code or as guidance. This includes ensuring that when there is a significant risk to WHS, the importance of controlling the issue is best dealt with in a code.

Scope and application

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

The first report of the *National Review into Model Occupational Health and Safety Laws* (National Review) noted that the expansion of the service sector and the changing nature of work, work organisation and work relationships was shifting the pattern of occupational injury and disease away from physical harm towards psychological problems and musculoskeletal disorders.

As a result, the model WHS laws were broadened to focus not just on physical health but also to incorporate psychological health. Additionally, the WHS Act definition of health means physical and psychological health, however most material in the regulations, codes and guidance remains focused on the physical risk and relevant control measures, and little on managing psychological hazards, risks and controls.

Over the period 2011-12 through 2015-16 the incidence of mental stress claims[1] across the Comcare scheme has decreased by 42 per cent. Despite this, mental stress claims accounted for approximately 12% of all accepted claims in 2015-16, however these claims represented a higher proportion of incurred cost at 36%, partly due to the longer time it takes claimants to return to work.

Considering the significant rate and impact of psychological claims, Comcare recommends amendments to the model WHS laws to address psychological health.

For example, specific provisions and a definition of psychological health in the WHS Act and Regulations, including a mechanism to require notification of psychological or mental stress injuries or hazards as a notifiable incident under the incident notification provisions in Part 3 of the WHS Act, would send a clear message that this risk category is a priority just like the physical hazards. Safe Work Australia would need to support these changes with the development of national code or guidance material on managing psychological WHS risks, which would support a national and consistent approach to dealing with these issues.

[1] *The Comcare Compendium of WHS and Workers' Compensation Statistics 2015-16* uses the term 'mental stress claims'.

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety provisions and specific health and safety protections that are connected to work?

Comcare is aware that concerns have been raised across jurisdictions with regard to the interaction between the model WHS laws and other protections legislation such as public safety, consumer safety and common law.

While the Explanatory Memorandum to the model WHS Bill is clear in its intention and states that '(the Bill) is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work,'[2] since the implementation of the model WHS laws, there have been a number of high profile incidents that have brought into question the scope of the model WHS Act and whether it is creeping into what could be considered more appropriately as the public and consumer safety domain. This has led to confusion over who is the lead regulatory agency in relation to amusement devices, electrical safety, environment and public health, where these laws overlap with the model WHS laws. In addition, heightened community expectations have placed greater pressure on WHS regulators to intervene into matters that in previous times would not have attracted any action.

The issue of regulatory scope creep was discussed at the Safe Work Australia Members meeting in October 2015. At the meeting, it was originally recommended that Safe Work Australia would lead the development of national guidance material to assist jurisdictions in applying a consistent approach to incidents that could be considered to fall within the context of regulatory scope creep. However, Members agreed that to progress this matter, the Heads of Workplace Safety Authorities (HWSA) would be best placed to take this issue forward.

While this is a standing agenda item on the HWSA work plan and generates robust discussion, due to the complexity of this issue, to date, there has been little progress. While regulators apply a case by case assessment to incidents that border on public safety, it would be beneficial for regulators if a boundary line, supported by clear principles could be drawn between the scope of the model WHS laws and wider public protection and that this work be undertaken by Safe Work Australia who has policy responsibility for the legislative framework.

[2] Explanatory Memorandum, Model WHS Act, at 61, p 10

DUTIES OF CARE

Duty of persons conducting a business or undertaking (PCBUs) and duty of workers – future of work

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

Comcare notes that as technologies such as digitisation, automation and artificial intelligence advance in capability and decrease in cost, this places pressure on how legislative frameworks are able to meet the changing nature of work and work relationships.

The CSIRO Data 61 Insight Team forecast six megatrends that will occur as the nature of work changes over the next 10 – 20 years in its publication *Tomorrow's Digitally Enabled Workforce*. These megatrends include the extending reach of automated systems and robotics; rising work stress and mental health issues; rising screen time, sedentary behaviour and chronic illness; blurring the boundaries between work and home; the gig and entrepreneurial economies; and an ageing workforce. These megatrends have implications for both WHS and workers' compensation.

The emergence of the gig economy and the growth of peer to peer platforms such as Uber, Deliveroo, and Airtasker (among others) have brought into question whether the definitions of 'worker' and 'PCBU' are sufficient to ensure duties of care continue to be responsive to the changing nature of work.

Section 5 of the model WHS Act defines a PCBU as 'a person conducting a business or undertaking alone or with others, whether or not for profit or gain.' A PCBU may be a body corporate or an individual person.

Section 7 of the model WHS Act defines 'worker' as 'any person who carries out work for a PCBU, including work as an employee, contractor, subcontractor, self-employed person, outworker, apprentice or trainee, work experience student, employee of a labour hire company placed with a host employer and volunteers.'

The model WHS Act adopts a broad definition of 'worker' instead of 'employee' to recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers.

However, advancing technologies and the growth in matching services may have some unintended consequences in the way we define PCBU and worker. For example, with the introduction of the National Disability Insurance Scheme (NDIS), the ability for participants to self-direct (or manage) their own NDIS plan and have control over their supports and how they are provided has changed

the way the disability sector operates. Every participant who has a self-directed NDIS plan has the ability to control what, when, where and by whom for most aspects of their support. This includes determining what is provided and potentially being involved in the selection of support workers.

Depending on the level of control the participant has in self-directing, the plan may result in them being inadvertently identified as a PCBU and having responsibility for the health and safety of the 'worker' (support persons). This is evidenced in NDIS guidance which states 'As a self-managed NDIS participant, you can choose your service providers, self-employed contractors or you can become the employer.'[3]

While the participants receive funding for support workers, they are not provided funding for costs associated with managing WHS. Nor are they provided with funding to undertake the necessary training in WHS to effectively manage WHS as a PCBU.

Comcare notes that work is being undertaken by the HWSA to investigate duty holders and the primary duty of care obligations across a variety of working scenarios that occur through the implementation of the NDIS. It is anticipated that HWSA will develop some guidance that can be progressed through the Safe Work Australia processes to provide greater clarity on the duty holders and primary duty of care obligations for those operating in the NDIS. While this guidance is being developed initially for the NDIS, it is anticipated that once developed it could be applied more broadly for similar working arrangements.

[3] National Disability Insurance Agency *Starting my plan as an NDIS self-managed participant* November 2016, p 3

CONSULTATION, REPRESENTATION AND PARTICIPATION

Consultation with workers

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

Section 72 – Obligation to train health and safety representatives (HSRs)

Comcare notes some ambiguity with the drafting of s. 72 of the model WHS Act in relation to the obligation on PCBUs to enable training of HSRs. The ambiguity primarily arises out of s. 72(1)(c).

Section 72 provides that on request, the PCBU has an obligation to allow HSRs, and deputy HSRs (if any), to attend a course of training approved by the regulator. An HSR or deputy HSR is also entitled to attend the course of their choice (e.g. in terms of when and where they propose to attend the course), providing the course is chosen in consultation with the PCBU and the PCBU agrees with that choice (s. 72(1)(c)).

If the parties disagree, the issue resolution provisions (s. 72(5)–(7)) apply. In this case, either party may ask the regulator to appoint an inspector to decide the matters in dispute. The parties are bound by the inspector's determination and non-compliance by the PCBU would constitute an offence.

Comcare notes that while the provisions appear clear that where the parties are unable to come to an agreement, that an inspector be appointed, the inclusion of the word 'may' in s. 72(6) ('The inspector may decide the matter in accordance with this section') suggests that the inspector has discretion as to the matters they make a decision about or even whether they need to make a decision at all.

Further ambiguity arises as s. 72 can reasonably be read in at least three ways:

1. that the PCBU must allow the HSR to choose a training course
2. that the inspector in deciding the matter under s. 72(5) should give more weight to the HSRs choice over the choice of the PCBU
3. that the choice of course is by agreement between the HSR and PCBU so that the HSR can only choose a particular course to the extent the regulator is not requested to decide the matter under s. 72(5).

Comcare notes that the National Review recommended that the model laws should provide that the HSR must attend training and that the approved course may be either the HSRs choice or as directed

by an inspector (Recommendation 110(b)). This suggests that the reviewers gave more weight to the HSR's choice of training course.

Comcare 's view is that point 3 is consistent with the recent decision in *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009.

Comcare would support amendments to s. 72 to provide clarity and in particular to s. 72(1)(c) to clearly state the choice of training course must be by agreement between the HSR and PCBU.

Section 75 – Health and Safety Committees (HSCs)

Section 75 sets out when a PCBU must establish an HSC for the business or undertaking or part of the business or undertaking, including on the request of a HSR or five or more workers. The HSC must be established within two months after the request is made.

Comcare has identified that there is a potential ambiguity arising out of s. 75(1). The provision can reasonably be read in at least two ways. Where requested in accordance with s. 75 of the WHS Act, the PCBU must establish:

1. a new HSC for any part of the business or undertaking, regardless that there is already a national HSC that covers the entire business or undertaking; or

2. a new HSC for a particular part of the business or undertaking only where no HSC covering that part of the business or undertaking already exists.

Comcare would support amendments to this section to make the provisions clearer as to the policy intent.

COMPLIANCE AND ENFORCEMENT

Cross-jurisdictional co-operation

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

There is currently no specific power to share information with corresponding regulators in the model WHS laws. This limits the sort of information that can be disclosed to corresponding regulators due to common law and statutory non-disclosure obligations which can prohibit the disclosure of certain information, such as compulsorily acquired material, and otherwise inhibit effective information sharing when legal advice is required regarding the disclosure.

Comcare notes that the National Review considered that the model Act should expressly provide for 'b) the exercise of powers or the performance of functions of an inspector in one jurisdiction to be valid for the proper purposes of other jurisdictions; and c) information collected during the proper exercise of powers of an inspector in one jurisdiction to be validly usable in proceedings in another, as if that information had been collected in that second jurisdiction during the exercise of the performance of functions under the legislation of the second jurisdiction.'[4]

Comcare would support the drafting of a specific power in the WHS Act to enable the disclosure of relevant confidential and compelled information to corresponding regulators to assist those regulators to perform functions under corresponding WHS laws.

Incident notification

Question 30: Have you any comments on the incident notification provisions?

Incident notification under the WHS Act is an important interface between the regulator and duty holders. Its significance is reflected in the fact that its provisions comprise their own Part of the Act. The provisions serve the purpose of enabling the regulator to investigate serious incidents and potential contraventions in a timely manner and the related purpose of preserving the incident site.

From the regulator's perspective, the priority with incident notification is promptness, to enable the regulator to respond quickly when that is required. To ensure promptness, duty holders must be able to quickly and easily determine whether an incident needs to be notified in accordance with the provisions.

Comcare's experience is that the drafting of the incident notification provisions creates multiple areas of uncertainty and difficulty, for both Comcare and duty holders. These issues detract from the provisions' ability to effectively fulfil their purposes. A couple of examples follow.

[4] *National Review into Model Occupational Health and Safety Laws: Second Report January 2009* p 274-275

Need for treatment—The definition of 'serious injury or illness' in s. 36 refers to an injury or illness of a person 'requiring the person to have' specified types of treatment. The explanatory memorandum tells us that this creates an objective test of whether the injury or illness could reasonably be considered to warrant the relevant type of treatment. This is not well understood by duty holders and there is a tendency to focus on the treatment that is actually administered to the person, leading to questions such as whether a particular medical facility is a 'hospital' or whether a particular laceration is 'serious'.

Timeframe for notifying—Section 38(1) requires a PCBU to ensure Comcare is notified 'immediately after becoming aware' that a notifiable incident arising out of the conduct of the PCBU's business or undertaking. While 'immediately' may seem clear enough, the lack of any specific timeframe in s. 38(1) makes the timing aspect of notification difficult to enforce.

The observations above are based on Comcare's experience of applying the incident notification provisions and trying to provide advice to duty holders. However, there are indications that it is not only Comcare and Commonwealth duty holders that have experienced difficulties with the provisions. An academic review of the impacts of WHS harmonisation found that 'there was almost complete unanimity that the new incident notification requirements are ambiguous and unclear and that this was undesirable, time-consuming and inefficient.'[5]

A possible gap in the current provisions relates to incidents arising from psychosocial factors and slower-onset conditions, which may be increasingly relevant for regulators as the nature of work changes. It may be appropriate to have a notification trigger to capture incidents of this type, which could be based on an incapacity period (as in the former Commonwealth provisions).

Comcare would support redrafting of the incident notification provisions in a way that makes it quicker and easier to determine whether a particular incident must be notified to the regulator and whether site preservation is required. In our view, the issues with the current provisions cannot be fully or adequately addressed by guidance material.

[5] Neil Gunningham, 'Impacts of work health and safety harmonisation on very large businesses' (2015) 28 *Australian Journal of Labour Law* 33.

PROSECUTIONS AND LEGAL PROCEEDINGS

Legal proceedings

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

Section 231 – Procedure if prosecution not brought

If an individual (complainant) considers a Category 1 or 2 offence has occurred but no prosecution has been brought by the Regulator in the period six to twelve months after that occurrence, they can make a written request to the regulator to bring a prosecution.

Section 231 also allows for a review by the Director of Public Prosecutions (DPP) of a regulator's decision not to prosecute a serious offence, that is, a Category 1 or Category 2 offence.

The intent of this section was to ensure a review process by the DPP for those matters that the Regulator was not pursuing.

This results in the following difficulties for the regulator: timeframes used in the provision can be difficult to meet, advising the person under investigation of the investigation can be problematic, and having to provide a brief of evidence to the DPP fetters the discretion of the regulator.

a. Subsection 231(1) requires the written request for a prosecution to be made between six and 12 months from the occurrence of a category 1 or 2 offence. Subsection 231(2)(a) requires the regulator to respond within three months as to whether an investigation has been completed, and if so, to advise the person whether a prosecution will be brought and if the decision has been made to not bring a prosecution, the reasons for that decision. Where the s. 231 request has been the catalyst for the commencement of an investigation, it is unlikely that any complex investigation will be completed in this timeframe.

b. Subsection 231(2)(b) requires the regulator to advise the person to whom the applicant believes committed the offence of the application and of the regulator's response. The subsection is unclear on whether it is the whole (including the responses to matters in s. 231(2)(a)), or just part, of the application that the potential defendant is to be advised of. It is possible such notification could identify the applicant and even expose the applicant to retribution by the person to whom the applicant believes committed the offence.

c. Subsection 231(3) enables the applicant, in certain circumstances, to require the regulator to refer a matter to the DPP. This can undermine the regulator's discretion, or create a conflict between the DPP and the regulator, where other regulatory priorities and factors have led the regulator to otherwise not refer the matter for prosecution.

d. Subsection 231(5) requires the regulator to give the applicant a summary of the reasons why the DPP considers a prosecution should, or should not be brought. This is problematic given there is no requirement for the DPP to provide such reasons to the regulator.

The National Review considered in great detail who may bring a prosecution under the model WHS laws. Four options were considered, and the reviewers recommended that 'Only the Crown may prosecute but with accountability for inaction or a decision not to prosecute.'[6] In giving effect to the preferred option, the reviewers stated that the preferred option was recommended provided it was accompanied by very strong safeguards including that 'a) the process for deciding upon prosecutions must be transparent and taken against a background of clear, publicly available prosecution guidelines (these should be expressed in an overall compliance policy) … c) such a process (which should be based on that under s. 131 of the Vic OHS Act) may be initiated by a person who considers that a particular action or inaction constitutes a serious breach of duty of care…'[7]

However, the drafting of s. 231 of the model WHS Act is only based in part on the Victorian OHS Act. If the review considers amending s. 231 of the WHS Act to reflect s. 131 of the Vic OHS Act, Comcare considers that it would be problematic if the provision was amended to allow certain information to be provided to the person whom the applicant believes committed the offence due to the reasons outlined at point b above.

Comcare would support amendments to s. 231 to provide the regulator with greater discretion to do or not do certain acts and provide certain information to certain persons, while still enabling an independent review of matters surrounding whether a prosecution should or should not be brought.

Section 232 – Limitation period for prosecutions

The limitation periods within s. 232 balances the needs of a duty holder to have proceedings brought and resolved quickly with the public interest in having a matter thoroughly investigated by the regulator to ensure a sound case can be brought.

Section 232 requires all prosecutions be brought within two years after the offence first comes to the notice of the regulator. Extensions of this period can occur in certain circumstances such as within one year after a coronial report was made or a coronial inquiry or inquest has ended if it appeared from the report or proceedings that an offence had been committed against the WHS Act, or if a WHS undertaking has been entered into within six months after the WHS undertaking is contravened, or if it comes to the notice of the regulator that the WHS undertaking has been contravened or the regulator has agreed under s. 221 to withdraw the WHS undertaking.

Proceedings can also be brought in relation to category 1 offences where the court is satisfied fresh evidence has been uncovered that could not reasonably have been uncovered within the limitation period. This could result in matters not able to be prosecuted even though there is a strong public interest in prosecuting that matter.

Comcare considers that s. 232 could be amended to allow for a broader extension to the limitation period such as where the DPP provides written authorisation to allow a prosecution to be brought outside of the limitation period.

[6] *National Review into Model Occupational Health and Safety Laws: Second Report January 2009* p 433
[7] Ibid at 46.91 p 433

Insurance against fines and penalties

Question 37: Have you any comments on the availability of insurance products which cover the cost of WHS penalties?

Comcare notes that concerns have been expressed by jurisdictions in relation to the availability of insurance products such as Directors and Officer Liability Insurance (D&OL) which cover the cost of WHS penalties.

At present, there are no express provisions prohibiting the use of insurance products to cover fines and penalties resulting from a contravention of the WHS legislation.

The discussion paper makes reference to *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22 whereby a worker was killed on a construction site (desalination plant) and his employer and director were charged with breaches of the *Occupational Health, Safety and Welfare Act 1986* (SA) (OHSW Act) and pleaded guilty. The defendants argued for a penalty reduction due to their early guilty pleas, contrition and cooperation with SafeWork SA. During proceedings, the court became aware of an insurance policy that indemnified the director for fines imposed for criminal conduct. The court concluded that in calling upon insurance was 'so contrary to a genuine acceptance of the legal consequences of his criminal offending that they dramatically outweigh the benefits to the justice system of the early guilty plea and statement of remorse.'[8]

While the *Hillman* case was a matter brought under the now repealed South Australian OHSW Act, it demonstrates that these products are available and being used.

In looking at potential ways the WHS legislation could address this, the discussion paper indicates that one of the key concepts of the model WHS framework is the principle that anyone who can influence a WHS outcome should use that influence and not be able to transfer their duty of care to others. Section 272 states that a term of any agreement or contract that purports to exclude, limit or modify the operation of the Act or any duty owed or to transfer to another person any duty owed is void. However, as liability insurance does not limit or transfer duties, it is unlikely that a contract for insurance would contravene s. 272. This has yet to be tested in the courts.

In addition, it appears that contracts of insurance that allow for the payment of penalties is permitted under the *Corporations Act 2001.* Section 199B permits contracts for D&OL Insurance to be entered into provided the policy does not cover liability for 'wilful' breaches of a duty. In effect, this could mean that as long as a breach of the WHS legislation was not intentional, liability insurance products could cover penalties and fines issued under the WHS Act (we note that the common law voids insurance policies for criminal penalties).

Comcare is concerned that the availability of insurance products which cover penalties is contrary to public policy in that the very nature of a penalty is to deter non-compliance with the legislation. The provision of these products has the potential to be detrimental to the effectiveness of the penalty regime under the WHS legislation. As stated in the *Hillman* case, these types of insurance policies

[8] *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIR 22 at 81

'undermine the courts sentencing power by negating the principles of both specific and general deterrence.'[9]

Comcare notes that in separate reviews[10] conducted in South Australia and Queensland, both Reports have recommended a range of options to their corresponding WHS laws including to expressly prohibit insurance contracts being entered into which cover the costs of WHS penalties and fines and making the entering into such contracts an offence.

While Comcare agrees that this issue requires further consideration, in keeping with the commitment to harmonisation, Comcare recommends this issue be progressed by jurisdictions and social partners through the Safe Work Australia tripartite processes.

It may be the case that the issue is better dealt within the context of the *Corporations Act 2001*.

There is a good discussion of the Hillman case and this topic generally in a speech given by the Hon. T.F. Bathurst, Chief Justice of New South Wales, in 2013.[11]

[9] Ibid at 80

[10] Robin Stewart-Crompton, *Review of the Operation of Work Health and Safety Act 2012: Report November 2014* and Tim Lyons, *Best Practice Review of Workplace Health and Safety Queensland: Final Report 3 July 2017*

[11] The Hon. T.F. Bathurst, 'Insurance Law—A View from the Bench', Keynote address delivered to the Australian Insurance Lawyers Association National Conference on 19 September 2013