

2018 REVIEW OF THE MODEL WHS LAWS

1. What are your views on the effectiveness of the three-tiered approach – model WHS Act supported by model WHS Regulations and model WHS Codes – to achieve the object of the model WHS laws?

Response: Unlike the earlier OHS/WHS Acts of 1983 and 2000, this current WHS Act 2011 is presented in plain and comprehensible English. The three tier approach is well established since the Act of 2000

2. Have you any comments on whether the model WHS Regulations adequately supports the model WHS Act?

Response: The Regulation has a mix composition of ‘generics’ such as Parts 2 and 3, as well as the ‘specifics’ for instance Diving, Construction, Hazards Chemicals, etc. I would recommend that the ‘generics’ such as Ch2 - Representation & Participation, Ch3 - General Risks & Workplace Management, and other overall WHS legislative requirements be transferred from the Regulation to the relevant sections of the WHS Act

3. Have you any comments on whether the model WHS Codes adequately supports the object of the model WHS Act?

Response: The concept of the broader commentary in the WHS Codes of Practice is advantageous. The production of additional WHS Codes would also assist in expanding and standardising elements of the WHS Act

4. Have you any comments on whether the current framework strikes the right balance between the model Act, WHS Regulations and model Codes to ensure that they work effectively to deliver WHS outcomes?

Response: As referenced in the response given in Ques 1 the three-tiered approach is positive

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?

Response: Apart from a general statement that psychological health is a developing hazard there is no broader reference available in the Act, Regulation or Code. This deficiency needs to be addressed

6. Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific legislation (particularly where safety provisions are included in legislation which has other purposes)?

Response: Having industry specific legislation is positive, particularly in high risk areas, such as construction, mining, agriculture, transport

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7. Have you any comments on the extraterritorial operation of the WHS laws?

Response: In an ideal world it would be more efficient and effective if the same WHS legislation covered the whole of Australia, rather than separate state and territory jurisdictions

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 protections and specific health and safety protections that are connected to work?

Response: It is assumed that applying in a practical way the WHS legislation in the workplace that it would have a flow on effect to the general public. This would be achieved through on and off the job training and safety practices transferring to non-workplaces

9. Are there any remaining, emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation

Response: More WHS legislative attention could be given to (a) psychological hazards - bullying, harassment and intimidation, stress and mental health (b) obesity and physical fitness for work, (c) drugs and alcohol

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

Response: The title 'PCBU' is a mouthful and probably confusing to the 'person on the street'; however I believe it captures two important elements. Initially it attempts to personalise the human element, even though a 'Person' may also refer to the name of an organisation. Secondly the breadth of the 'business' and 'undertaking' is quite explicit in the title. Also the multiple 'PCBUs' responsibilities within the one PCBU are also clearly understood

11. Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

Response: Separating the 'primary' duty of care responsibility from that of 'secondary' is a positive step in keeping with those who are ultimately responsible

12. Have you any comments on the approach to the meaning of 'reasonably practicable'?

Response: Although subjective in nature, it is an accepted phrase in the wider legal expression. Again what is a 'reasonably practicable' approach may vary from one person to another. In a business or undertaking the extent of

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‘reasonably practicable’ in addressing a safety matter would be at a higher level for an executive officer than a shop floor worker.

13. Have you any comments relating to an officer’s duty of care under the model WHS Act?

Response: In some cases the meaning of an ‘officer’ in the WHS model is fairly clear. However as the managerial role recedes to lower ranks, the definition of ‘officer’ is not as clear.

As most of us are aware in time this will become clearer with future case law.

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

Response: The categories of workers as outlined in section 7 of the WHS Act appear to encompass all current workplace positions.

15. Have you any comments relating to a worker’s duty of care under the model WHS Act?

Response: The irony exists between the definition of a ‘worker’ in the WHS model Act with a duty (alias responsibility) to take reasonable care for their own health and safety; and in the workers compensation legislation where the PCBU has no alternative but to accept ‘absolute’ responsibility for claims, even when a worker’s injury result from stupidity

16. Have you any comments relating to the ‘other person at workplace’ duty of care under the model WHS Act?

Response: Section 29 of the WHS Act is advantageous to have ‘other persons at workplace’ included in the legislation. It allows PCBUs, workplace supervisors and managers the authority to direct ‘other persons’ such as visitors, clients, customers to comply with the PCBU’s safety obligations

17. Have you any comments relating to the principles that apply to health and safety duties?

Response: The meaning of a ‘duty holder’ in the context of eliminating/controlling risks is rather broad. Notwithstanding the multi person influence in addressing the question of risks and hazards, the question remains who holds the primary responsibility – the PCBU or the Officer?

Reference section 17 ‘A duty imposed on a person to ensure health and safety requires the person’. Who is ‘a person’ or ‘the person’?

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18. Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

Response: From personal experiences I have witnessed multiple PCBU duty holders carry out their risk assessments independently. There does not appear to be a truly combined consultation, co-operation and coordination in compliance with the WHS legislation

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 relations to work health and safety?

Response: The current HSR representation may suit large and medium organisations, and industries such as construction and mining. However other industries and workforces with less than a few hundred workers may require a different representation model

20. Are there classes of workers for whom the current consultation requirements are not effective and if so, how could consultation requirements for these workers be made more effective?

Response: The size or the number of workers, at a particular workplace would influence the consultative requirements. In the case of a small retail shop with two workers (employees/volunteers) there should be provision for an abridge WHS approved course, in preference to the 5 day Health and Safety Representative approved course

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?

Response: Since the introduction of the 2011 WHS legislation I have not witnessed any HSR's exercising their authority in the issue of PINS. In an ideal world along with effective consultation and communication between workers and management on non-related health and safety issues there should be compromise and agreement in maintaining a safe workplace

I do not see any benefit in providing the regulator with lists of elected HSRs. The question arises as to the reason/s why the regulator would need this information, and also whether the lists are current at any given point in time

Section 72 of the WHS Act allows the elected HSR to attend a formal/approved HSR course if such a request is made by the HSR. I believe the prescribed training should be mandatory for a HSR to effectively perform their role and responsibilities

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22. Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

Response: I endorse the current arrangements when issues are raised internally between parties with conflicting views. The majority of notable PCBU's have established in house issue resolution procedures. Only following unsuccessful negotiations should an inspector's assistance be requested

23. Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as an HSR or member of an HSC, or who raise WHS issues in their workplace?

Response: In theory - sections 104 to 109 of the WHS Act are clear in its interpretation with substantial penalties for breaches. However there will always remain a doubt in the minds of a HSR, that other operational/performance reasons may be used to dismiss a HSR from the workforce, if that person is actively involved in their HSR role

24. Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

Response: I have no practical experiences to comment on the 'entry permit holders'. However with the commentary provided in the discussion paper, particularly events in Queensland, future case law will allow more clarification in interpretation

25. Have you any comments on the effectiveness, sufficiency and appropriateness of the function and powers of the regulator (ss152 and 153) to ensure compliance with the model WHS laws?

Response: I believe the function of the Regulator is clearly delineated with its authority and power extending from promoting, advice, information, communication to measures of enforcement as outlined in section 3 of the WHS Act. I also acknowledge the South Australian model in separating the two functions of the 'inspectors' and 'educators'

I do recall with the earlier OHS Act of 1983, WorkCover NSW Inspectors carried out more policing, penalties and fines, whereas with more recent WHS legislation of 2000 and 2011, the Inspectors role has been modified to primarily an advisory function

26. Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

Response: I believe the powers of the inspectors are strong and should be maintained as a minimum at the current level

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27. Have you experienced an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively

Response: I have experienced an external review which was instigated by me under section 96 of the 2001 OHS legislation. I appealed the findings of the Inspector as stated on an Improvement Notice which indicated a correction to an alleged design fault on a machine, which had been certified under an Australian and New Zealand Standard. This machine was less than 4 years old, and continued to be marketed.

The reviewing officer supported the original findings of the inspector as to the design defect. As a follow up I believe the regulator should have contacted the manufacturer/supplier of this equipment and issue an Improvement Notice to correct the defect prior to future sales

28. Have you experience of an exemption application under the model WHS Regulation? Do you consider that the provisions for exemptions are appropriate and working effectively?

Response: I have not experienced an exemption application

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?

Response: It's my opinion to separate state and territory WHS legislations are both operationally ineffective and not cost effective. PCBU's conducting their operation interstate would greatly benefit from having uniform WHS laws.

This legislative uniformity has been partly achieved throughout the existence of the SafeWork Australia's – Codes of Practice.

Similarly the standard approach to the Regulator's Approved Work Health and Safety Representative course would allow these trained HSRs to be recognised throughout Australia's states and territories

30. Have you any comments on the incident notification provisions?

Response: The notifiable incidents under the major categories of 'serious injury or illness' and 'dangerous incidents' is sometimes difficult to determine, particularly the words 'serious' and 'dangerous'.

I maintain that when in doubt to contact the Regulator on 131050 and report the event. They in turn will then determine if any follow up action is required, such as an inspector's visit

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31. Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

Response: The cascading range of compliance tools available to the Regulator from ‘advice and information’ to the ‘civil proceedings and prosecutions’ seem to be sufficient to satisfy all circumstances.

32. Have you comments in relation to your experience of the exercise of Inspector’s powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

Response: It has been my experience over recent years that SafeWork NSW Inspectors commence with the softer options in addressing safer concerns. These are initially expressed in the form of written advice, in preference to Improvement Notices

33. Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices

Response: The fines and penalties have increased dramatically over the period since the OHS Act of 1983. This earlier Act imposed penalties of between \$5,000 for individuals to \$50,000 for corporations. In comparison the WHS current legislation, within the three categories, reveals massive increases in fines and penalties including imprisonment. The effectiveness of these penalties will be determined in time following court decisions

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

Response: no comment – too early to respond, insufficient case law

35. Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

Response: A number of states/territories have introduced legislation in terms of ‘industrial manslaughter’. I recall attending a health and safety seminar on the Gold Coast 15 years ago when I first became aware of this movement. There should be consideration for such severe penalties as a deterrent in at least some of the high risk industries such as construction, mining, heavy transport and agriculture where CEOs choose to ignore active involvement in the health and safety of their workforce

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36. Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

Response: I have not personally experienced enforceable undertakings. However in studying a number of published cases I believe they make a positive contribution to the betterment of a particular industry/profession. This is especially the case if their research and findings are published and widely distributed

37. Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

Response: I agree the fines and penalties for the responsible individual in not complying should not be lessened or indemnified through the availability of an insurance cover. Indeed this would undermine the Court's sentencing powers. As a substitute in negating insurance products may rest in community service orders, imprisonment, or a fine which is over and above the maximum payable from the insurance cover

ADDITIONAL COMMENTS

I am a SafeWork NSW Approved trainer in the (5 day) Health and Safety Representative, and previously a WorkCover NSW Accredited trainer in the (4 day) OHS Consultation course

I would like to recommend a return to the WHS Workplace Committee representatives in preference to the Health and Safety Representatives in working collectively to resolve health and safety workplace issues

The current course, namely the Health and Safety Representative (HSR) training does not allow an approved training course for the PCBU management personnel

Thank you for the opportunity to contribute to the review of the current model WHS laws

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