Australian Government

Department of Jobs and Small Business

2018 Review of the Model Work Health and Safety Laws

May 2018

Introduction

The Department of Jobs and Small Business (the Department) welcomes the opportunity to make a written submission to the 2018 Review of the model work health and safety (WHS) laws (the Review). The Department has had regard to the issues and questions set out in the February 2018 discussion paper.

The purpose of the model WHS laws is to reduce the incidence of work-related injuries and the serious economic and social impact they can have. Work-related deaths, injury and illness have a significant impact on workers, businesses and the community.

Safe Work Australia (SWA) data shows the overall number of worker fatalities and the fatality rate across all industries has been trending down since 2007. According to SWA's latest Traumatic Injuries and Fatalities report, injuries at work resulted in the deaths of 182 workers in 2016, 29 less than in 2015, and the lowest number since the full collection of data began in 2003. Similarly, the fatality rate was 1.5 fatalities per 100,000 workers in 2016, which is the lowest since the series began and is around half the rate recorded at the peak in 2007.[1]

The Department notes that the harmonisation of WHS laws reflects a decision made by the Council of Australian Governments' National Reform Agenda that aimed to achieve the best possible approach to health and safety for all Australian workers, reduce regulatory burden and create a seamless national economy.[2]

The Review provides an opportunity to assess the content and effectiveness of the model WHS laws to determine if they are operating as intended and evaluate whether they are flexible and robust enough to respond to emerging issues and the changing nature of work.

The Department's overarching view is that the model WHS laws are operating effectively. The submission will address the reviewer's key questions of what is working, why this is the case and suggests areas for potential improvement.

<u>The role of the Commonwealth</u>

The model WHS laws were implemented in the Commonwealth on 1 January 2012 through the *Work Health and Safety Act 2011* (Cth) (WHS Act), which is supported by the Work Health and Safety Regulations 2011 (WHS Regulations). These laws apply to the Commonwealth, Commonwealth Authorities, and non-Commonwealth licensees (that is, some corporations that hold a license to self-insure their workers' compensation liabilities under the *Safety, Rehabilitation and Compensation Act 1988* (Cth)).

The Department has responsibility for administering the WHS Act and advising the Government on its application. The Department also has policy responsibility for WHS in the Commonwealth context, including harmonisation of WHS laws, which is underpinned by the 2008 *Inter-*

[1] Safe Work Australia, *Work-related Traumatic Injury Fatalities, Australia, 2016*.

[2] *Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers' Council Friday 25 September 2009*

Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (Inter-Governmental Agreement).

The Department also has responsibility for the WHS Accreditation Scheme for Australian Government funded building work. In addition to obligations imposed by WHS laws, some organisations in the building and construction industry are also accredited under the scheme to carry out Australian Government funded building work.

Comcare is the national regulator of the Commonwealth jurisdiction, with functions to monitor and enforce compliance with the WHS Act and WHS Regulations. Comcare plays a vital role in working with employers, employees and other stakeholders to improve work health, safety and rehabilitation outcomes through consistent, risk-based regulation.

Approach of this submission

Consistent with the key questions posed in the Review's discussion paper, the Department's submission is set out in two sections:

- What works well and why?
- Potential areas for improvement (i.e. what is not working?)

The discussion paper also considers whether the model laws will continue to work as work practices and environments evolve.

The submission follows the structure of the specific questions set out in the Review's discussion paper but does not address each question.

Broadly, the areas where the Department considers the model WHS laws are working well are:

- Duty of person conducting a business or undertaking (PCBU)
- Duties of care
- Reasonably practicable – meaning and application
- Duty of officers
- Duty of workers
- Principles applying to duties
- Consultation with other PCBUs
- Consultation with workers
- Health and Safety Representative (HSR) framework
- Discriminatory, coercive and misleading conduct, and
- Compliance and enforcement

The areas where the Department considers there is potential for improvements to the model WHS laws are:

- Public health and safety
- Workplace entry by WHS permit holders
- Cross-jurisdictional co-operation
- Incident notification
- Penalty levels
- Sentencing guidelines
- Workplace deaths, and
- Insurance for WHS penalties

What works well and why?

The areas below have been identified as areas where the model WHS laws work well. Overall, the Department's view is that the model WHS laws are effective because they:

- place broad duties on PCBUs, officers, workers and other persons and establish clear duties of care;
- have a strong sanctions regime for non-compliance with those duties; and
- provide workers with a direct participative role in work health and safety matters in the workplace or an indirect role through worker representatives.

Duty of PCBUs

Definition of PCBU

Question 10 of the discussion paper asks for comments on the sufficiency of the definition of PCBU in ensuring that the primary duty of care continues to be responsive to changes in the nature of work and work relationships.

Contemporary work relationships extend beyond the traditional employer/employee relationship to include contractors, labour hire, franchisors, outworkers and volunteers. In order to capture these relationships, the model WHS laws introduced the concept of PCBU.

PCBU is defined in subsection 5(1) of the WHS Act as a person conducting a business or undertaking alone or with others, whether or not for profit or gain. The WHS Act does not define what is a 'business or undertaking'. This is despite the issue being considered by the National Review into model Occupational Health and Safety laws (National Review into model OHS laws), who at Recommendation 81 recommended that the model WHS Act should define a 'business or undertaking'.[3]

When the model laws were being developed it was decided to define the term PCBU, which could be a corporation, partnership, unincorporated association, a self-employed person or a sole trader, instead of 'business or undertaking'. The debate now hinges on whether a key objective of the model laws, that is to cover new and evolving working arrangements, has been achieved through the inclusion of the PCBU concept.

The Department considers that the PCBU concept works well for the following reasons:

- The broader scope of the definition of PCBU has already proven that the model WHS Act can remain relevant in the face of the changing nature of work in the case of the 'gig economy'. As noted in the discussion paper, the PCBU concept is intended to enable the model WHS laws to be flexible enough to adapt to the changing nature of work by capturing changing

[3] Safe Work Australia, *Interpretive Guidelines – Model Work Health and Safety Act: The meaning of reasonably Practicable*, Safe Work Australia, Canberra, 2011.

business models and new ways of working. It was recognised that PCBU was an unfamiliar concept when developing the model WHS laws, but that over time it would become understood and accurately describe the primary duty holder.

- It is a better approach than the way many pre-harmonised laws operated which extended WHS duties by using sometimes-cumbersome deeming provisions to extend coverage to contractors and others. The effect of this was that the term 'employer' had different meanings under different legislation, which led to confusion and perceived loopholes. By adopting the single inclusive PCBU term the model WHS Act clarifies that an overarching duty is owed for the health and safety of 'workers' and 'others' who may be put at risk by the conduct of the business or undertaking. 'Gig work' has been the first real test of the model WHS laws' ability to deal with significant change in work practices and relationships since being developed. The nature and extent of the duties owed will depend on circumstances, such as how the platform engages a gig worker to perform work, who has influence over the way that work is performed, and what is reasonably practicable in the circumstances.

The Department submits that the PCBU concept is working well and is robust enough to respond to new and evolving work relationships, however given the model laws are still in their infancy the PCBU concept should continue to be monitored to ensure it remains relevant into the future.

Duties of care

Question 11 of the discussion paper asks for comments on the PCBUs primary duty of care under the model WHS Act.

As discussed previously, a significant benefit of the model WHS laws is the way they cover non-traditional, new and evolving working arrangements, as well as ensuring protections for persons who not only carry out work but also those that can be harmed from the carrying out of work. In this context, the Department considers the duties contained in s19 of the model WHS Act to be appropriately framed. In addition, alongside the primary duty of care, the model WHS Act also places duties on specified classes of PCBUs, who in the course of a business or undertaking, undertake activities that may materially affect the health and safety of persons at work. For example, those who design, manufacture, import or supply certain things to workplaces (upstream duty holders).

The Department considers the duties of care work well for the following reasons:

- As workplaces become more automated and supply chains expand, it is important that the duties to protect the health and safety of those at work or affected by the activities of a business or undertaking, apply across the whole of the supply chain including suppliers, designers and programmers. The model WHS laws address these workplace changes by placing duties on upstream duty holders to consider health and safety at all stages of the supply chain. For example, in the case of increasing automation, where risks to health and safety can become embedded in the early stages including at the programming stage.
- When the model WHS laws were being developed, the term 'health' was defined broadly to mean 'physical and psychological health' so as to capture physical as well as psychological risks that may arise such as stress, fatigue and workplace bullying. As automation and

artificial intelligence (AI) increases and the nature of work changes to less physically-demanding and arguably physically safer tasks, the nature of risks may shift away from physical to more psychological risks. The broad nature of the duties means that the model WHS laws are well equipped to deal with both physical and psychological risks that may arise now and in the future.

- The principles that apply to the duties, for example overlapping and non-delegable duties, minimise coverage gaps and ensure new and evolving work arrangements are captured. These are discussed later in the submission.

The model WHS laws are able to accommodate new and evolving work arrangements, but will need to be reviewed as workplaces continue to transform and new risks arise. The Department submits that while the model WHS laws appear capable of dealing with the hazards and risks that come with the changing nature of work and workplaces, the laws are still in their infancy and therefore there will be a need to keep a watching brief and see how these matters are dealt with by the courts.

Reasonably Practicable – meaning and application

Question 12 of the discussion paper asks for comments on the approach to the meaning of 'reasonably practicable'.

Reasonably practicable has been accepted as the qualifier for duties under WHS legislation in Australia for decades. The term first appeared in the South Australian *Industrial Safety Health and Welfare Act 1972* and subsequently in WHS legislation in Tasmania in 1977, Victoria in 1981 and New South Wales in 1983. Having a qualified duty, as opposed to an absolute one, requires that risks be properly assessed and managed rather than requiring all risks to be completely eliminated.

The Department considers the qualifier works well for a number of reasons:

- It is an objective test which means a duty-holder must meet the standard of behaviour expected of a reasonable person in the duty-holder's position who is required to comply with the same duty.
- The two stage nature of the test means that consideration of *what can be done* occurs before the duty-holder considers what is *reasonable in the circumstances* to be done to address the hazard or risk. It requires a person to take into account and weigh up all relevant matters, including the likelihood of the hazard or risk occurring, the degree of harm that might result, what the person knows or ought reasonably know about the hazard or risk, and the availability and suitability of ways to eliminate or minimise the risk.
- It is flexible enough to accommodate both high risk and low risk situations. Importantly, the qualifier enables inherently dangerous work activities in the public interest to take place such as defence force activities, emergency services and police work, provided work health and safety risks are managed appropriately.[4] Section 12C-12E of the Commonwealth WHS Act were included for the avoidance of doubt and operate consistent with the qualifier of reasonably

[4] Safe Work Australia, *Interpretive Guidelines – Model Work Health and Safety Act: The meaning of reasonably Practicable*, Safe Work Australia, Canberra, 2011.

practicable. The public interest is a relevant matter that can be taken into account in determining what is reasonably practicable.

- There is a clear presumption in favour of safety ahead of cost. 'Cost' is a factor in weighing up what is reasonably practicable to do and is not a determinative factor. Cost is relevant only if it is 'grossly disporportionate' after assessing the risk and the available ways of eliminating or minising that risk.

- It recognises that some matters may be beyond a person's control. The 2008 National Review into the model OHS laws recommended that control should *not* be a separate element used to limit the extent of the primary duty of care, or expressly included in the definition of what is 'reasonably practicable' for two key reasons[5]:
    - Firstly, the inclusion of 'control' in the primary duty of care can result in the focus being on whether or not a duty applies, rather than on what needs to be done to ensure the health and safety of workers. In other words, a control test encourages arrangements to be put in place to avoid control in order to avoid the duty.
    - Secondly, case law provides that control is relevant in determining what is reasonably practicable in the circumstances. An inability to control relevant matters must necessarily imply that it is either not possible for duty holders to do anything, or it is not reasonable to expect them to do so.
- It is consistent with the International Labour Organisation's *Occupational Safety and Health Convention No.155*. Article 4, Clause 2 provides that the aim of national policy on occupational safety, occupational health and the working environment "*shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment*".[6]

The Department considers that the term "reasonably practicable" appropriately qualifies the duties.

Duty of officers

Question 13 of the discussion paper asks for comments on the officer's duty of care.

In broad terms, an officer is an individual who makes, or participates in making, decisions that affect the whole, or a substantial part of, a business or undertaking (for example, a director of a company, a chief executive officer or a chief financial officer).

The Department considers that the positive duty of an officer to exercise 'due diligence' to ensure a PCBU complies with its duties is fundamental and works well for the following reasons:

- by picking up the meaning of an officer in section 9 of the *Corporations Act 2001* (Cth) (Corporations Act), it adopts a concept that was familiar to, and readily understood by,

[5] National Review into Model Occupational Health and Safety Laws, First Report, October 2008, p46.
[6] International Labour Organization, *Occupational Safety and Health Convention*, 1981.

corporations (who should have already identified their 'officers' for the purposes of that legislation);

- it appropriately allocates responsibility to the most senior people in an organisation who have the authority to make and resource key strategic decisions and, as such, can directly influence health and safety outcomes;
- the duty is modelled on governance approaches for officers as applied across other areas of risk, such as financial, security, human resource and political risk. This emphasises that managing work health and safety risks is part of good governance and should be embedded in an organisation's processes and practices;
- it promotes safety leadership from the top tiers of the organisation and has the potential to foster positive safety cultures within an organisation;
- it encourages the flow of information from middle managers to officers and vice versa. For example, it requires officers to have information gathering processes in place so that middle managers or subject matter experts can provide advice on WHS risks. In addition, it requires officers to report to middle managers on any decisions they are required to implement to control those risks;
- the duty is continuous in nature and encourages a preventative rather than reactive approach to safety;
- where an officer wants to rely on the advice of others to exercise due diligence, the duty requires the officer to be satisfied that the person relied on has relevant expertise upon which to base their advice;
- for the purposes of prosecution, there is no need to tie an officer's failure to any particular failure or breach of the PCBU or the outcome of that breach (ie. death of a worker);
- penalties for a breach of the officer duty are set at an appropriate deterrent level to ensure the focus remains on safety and not on finding ways to avoid exposure to criminal liability, although requiring some adjustments (see page 24 for discussion on penalty levels); and
- a vast majority of stakeholders support the existence and retention of the officer duty (as seen in feedback to the Decision Regulation Impact Statement on Improving the Model WHS Laws).

The Department notes that Queensland introduced the concept of a 'senior officer' into its WHS Act last year when it established a new industrial manslaughter offence applicable to senior officers as defined.

A senior officer is defined more broadly for this purpose as any person who is concerned with, or takes part in, the corporation's management, regardless of whether the person is a director or the person's position is given the name of executive officer.

This definition has the potential to pick up managers involved in day-to-day decision-making related to specific activities and expose them to significant criminal liability (when they would otherwise, as workers, only owe a duty to take reasonable care of their own and others' health and safety).

This is not consistent with the original intention of the model WHS laws, as is made clear below:

> *The role of an officer in the governance of a corporation is clearly different from the role of providing information upon which the decision makers will act, or implementing the decisions. There is a clear difference between making decisions that provide for the governance of the entity, and making decisions on action to be taken in relation to an item of work or specific activity. The definition of officer should not blur the line between these different roles.*[7]
>
> *It would, in our view, be inappropriate for a person who is not sufficiently empowered to affect the key decisions of a corporation to be subject to an onerous duty relating to the making of those decisions.*[8]

This distinction was relied upon by the ACT Industrial Magistrate in *Mckie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC[9] in finding that the project manager (while having an important role in managing certain large scale projects) was not an officer for the purposes of the WHS Act.

The Department considers that all workers, including those involved in the corporation's management are already subject to an appropriate obligation to play their own part in ensuring the company meets its safety duties under s 28 of the model Act (see below). The duty of officers to exercise due diligence assumes a capacity to influence critical decisions affecting the organisation that typically fall to only the most senior officers to make.

Any expansion of the duty would require the nature of the duty to also be revisited to ensure criminal liability is not imposed on managers in relation to matters which they could not reasonably be expected to have known, or had no reasonable capacity to influence or control.

<u>Duty of workers</u>

Questions 14 and 15 of the discussion paper ask for comments on the worker duty, including whether the 'worker' definition is broad enough to ensure the duties of care continue to be responsive to the changing nature of work.

The Department considers the worker duty works well for the following reasons:

- the definition of a worker includes anyone who carries out work in any capacity for a PCBU including an employee, contractor, subcontractor, employee of a labour hire company, apprentice, trainee, work experience student, outworker or volunteer;
- this broad definition enables new and evolving work relationships to be captured, as was recognised by the National Review into the model OHS laws. The broad definition of a workplace, which includes any place where a worker goes, or is likely to be, while at work, assists with making this responsive to the changing nature of work;

[7] National Review into Model Occupational Health and Safety Laws, Second Report, January 2009, p134.
[8] Ibid.
[9] *Mckie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq) [2015] ACTIC*

- in most situations, it will be easy to identify when a person is carrying out a business or activity and therefore has a duty to ensure their own and others' health and safety. This means that work health and safety is still taken into account even where it may be difficult to establish who, if anyone, has the primary duty to ensure health and safety (for example, where work is conducted via a gig platform and there is doubt as to who is the PCBU);
- the duty recognises that there should be limits on a PCBU's duty (and liability), such as in situations where:
    - a worker engages in skylarking or horseplay. This has been explored in a number of cases, for instance in *WorkSafe Victoria v Trevor Domaille*[10], Mr Domaille was convicted of an offence and fined $3,000 after deliberately pointing and firing a nail gun at an apprentice that resulted in the apprentice sustaining serious injuries to his arm requiring surgery.
    - a worker is negligent or engages in reckless behaviour. A recent case in the ACT involving a crane at a construction site that resulted in a workplace fatality illustrates this point with the range of charges reflecting the shared responsibilities under the WHS Act from the boardroom to the workers conducting the activity.[11] In this case, WorkSafe ACT and ACT Policing laid significant charges, including Category 1 charges, against several workers for engaging in reckless conduct despite the risks at the worksite being obvious and readily apparent.
- the duty is not absolute but is qualified by the standard of 'reasonable care'. While the model WHS laws are silent in respect of what taking 'reasonable care' means, case law over many decades has clarified that what is reasonable will be determined by what a reasonable person would expect of the worker given the circumstances, including their knowledge and training.

<u>Principles applying to duties</u>

Question 17 of the discussion paper asks for comments relating to the principles that apply to health and safety duties. These principles are:

- a duty cannot be transferred to another person;
- a person can have more than one duty;
- more than one person can have the same duty at the same time; and
- if more than one person has the same duty, they must each comply with that duty to the extent to which they have the capacity to influence and control the relevant work health and safety matter.

The Department considers these principles work well for the following reasons:

[10] WorkSafe Victoria v Trevor Domaille (Wodonga Magistrate's Court, 12 June 2012).
[11] http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/access-canberra/2018/manslaughter-and-other-charges-laid-following-fatal-worksite-incident

- they make it clear that you cannot contract out of or delegate your WHS duties;
- they make it clear that duty holders share responsibility for the WHS matters that they have in common and, as such, are well suited to ensuring health and safety in a supply chain and labour hire context;
- they make it clear that, in the case of multiple duty holders, the level of control and influence a PCBU has over a WHS matter is important in determining what must be done to discharge their duty; and
- they are supported by an express duty to consult, cooperate and coordinate with other PCBUs who have overlapping duties in relation to the same WHS matter.

Consultation with other PCBUs

Question 18 asks for 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.

The Department's position is that the requirement for multiple duty holders to consult, cooperate and coordinate activities is fundamental to ensuring workers and others directly affected by the conduct of work are given the highest level of protection from harm. When implemented appropriately, the Department considers the duty to consult with other PCBUs works well for the following reasons:

- it recognises the practical reality that duty holders' work activities may overlap and interact at particular times;
- it prevents any gaps in the management of WHS risks by promoting information sharing between all duty holders;
- It can:
    - ensure there is no misunderstanding about how the activities of each duty holder may add to the hazards and risks to which others are exposed;
    - help prevent duty holders assuming that someone else is taking care of the WHS matter;
    - help ensure the duty holder who takes action to deal with a hazard or risk is the best person to do so;
    - reduce duplication of effort when a duty holder is undertaking the same mitigation activities;
- it is not an absolute duty and is qualified by what is reasonably practicable. This means that the consultation process can be adapted to suit a range of circumstances. For example, it is adaptable to the needs of small business, a diverse workforce, supply chain situations and labour hire;
- it reinforces the principle that a duty cannot be transferred to another person and that duty holders have a shared responsibility for WHS matters that they share; and

- it can increase a duty holder's level of commitment to working in a safe and healthy way where other duty holders are seen to be taking WHS seriously.

Consultation with workers

Question 19 of the discussion paper asks for 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.

The Department considers the consultation with workers provisions work well for the following reasons:

- PCBUs cannot unilaterally decide how WHS matters will be managed at a workplace, but must instead give workers a reasonable opportunity to express their views and contribute to decision-making. This requirement recognises that the workers who carry out the work have the greatest understanding of the hazards and risks involved with the work;
- the triggers for consultation (see s49 of the model WHS Act) are appropriate and there are no apparent problems with consultation occurring at these times;
- there is flexibility for consultation to occur either directly with workers or through formal mechanisms designed to facilitate worker representation and participation, such as, health and safety representatives and health and safety committees;
- the duty to consult with workers is not absolute and is qualified by what is reasonably practicable. This allows the particular circumstances of the workplace to be taken into account (for example, whether there is a geographically diverse workforce) and for different communication methods to be used (for example, online communication). This means there is no reason why the duty to consult with workers shouldn't be onerous for PCBUs to undertake; and
- the consultation provisions combined with the ability for workers to cease unsafe work with or without HSRs enables them to get involved in WHS issues in the workplace.

Question 20 of the discussion paper asks whether there are classes of workers for whom the current consultation requirements are not effective and, if so, how consultation requirements for these workers could be made more effective.

The Department does not think that any classes of workers are excluded from the current consultation requirements in the model WHS Act due to the broad nature of the requirements applying to workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to WHS.

The Department notes that working arrangements may become even more isolated, remote or geographically diverse (for instance, people working alone, working from home or multiple locations) and that this may present challenges for consultation on WHS matters. However, the Department is of the view that consultation with workers in such circumstances is possible given the duty to consult with workers is qualified by what is reasonably practicable and technology is

providing new ways of communication with people remotely (for example Skype, platforms, and mobile phone applications). However, it may be necessary to monitor the situation to ensure that these methods or communication are utilised.

The Department considers that as the model WHS laws allow for direct consultation between PCBUs and workers (without HSRs or HSCs) they are able to adapt to the changing nature of work. Direct consultation with workers is important in the context of declining rates of union membership in Australia and limited representation among some classes of workers.

HSR framework

Question 21 of the discussion paper asks for comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work.

The Department notes that the HSR and HSC model of consultation first appeared in WHS regulations in the United Kingdom in 1977[12] and was subsequently adopted in Australian jurisdictions. This model of consultation is best suited to traditional workplaces, such as manufacturing, mining and construction.

Since the 1970s the manufacturing industry has been experiencing a long-term decline in its share of employment in Australia. In 1970, the manufacturing industry accounted for 25 per cent of total employment, compared to now where it sits at around 9 per cent,[13] although the manufacturing industry remains a relatively large employing industry.

Although it is evident that the Australian economy is experiencing a long-term structural shift in employment towards services industries, there is no doubt that HSRs continue to serve a useful purpose in many Australian workplaces.

However, as industries and workplaces continue to evolve the model WHS laws need to be flexible enough to respond to changes. Given working arrangements are moving further away from a traditional model, and direct consultation with workers is required under current WHS laws, the Department considers it appropriate to move the more prescriptive provisions relating to HSRs and HSCs, such as the election provisions, to model regulations. Including this detail in delegated legislation would allow these provisions to be amended to respond to future changes in work practices in a more streamlined and timely way.

[12] Safety Representatives and Safety Committees Regulations 1977 (S.I. 1977/500) referred to at http://www.hse.gov.uk/aboutus/timeline/

[13] http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Manufacturing%20industry~147 and https://cica.org.au/wp-content/uploads/2015-Manufacturing-Industry-Outlook.pdf

Discriminatory, coercive and misleading conduct

Question 23 of the discussion paper asks for comments on the effectiveness of provisions relating to protections for workers who take on a representative role under the model WHS Act.

The Department provides the following comments:

- it is important that these protections are available to provide workers with the confidence to raise WHS issues;
- the provisions do not appear to have been used much to date;
- the provisions can overlap with the general protection provisions of the *Fair Work Act 2009* (FW Act);
- the benefit of these provisions over the FW Act general protection provisions is that the WHS regulator or an investigator can instigate criminal proceedings in relation to offences involving discriminatory or coercive conduct.

Compliance and enforcement

Question 29 of the discussion paper seeks 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.

The Department submits that consideration should be given as to whether the settings are right for regulators to share information when conducting investigations concerning breaches of WHS laws. See the 'Cross-jurisdictional co-operation' section on page 22 for a more detailed discussion.

Question 31 of the discussion paper asks for comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act.

The Department's view is that the National Compliance and Enforcement Policy is effective in securing compliance with the model WHS Act through effective and appropriate compliance and enforcement measures, by laying the foundation for a nationally consistent approach to contraventions of work health and safety laws across Australian workplaces. This is a necessary adjunct to maintaining the harmonised system of WHS laws, which would otherwise be undermined by different approaches to compliance and enforcement activities across the jurisdictions.

Further benefits of the National Compliance and Enforcement Policy are set out below:

- a common approach to compliance and enforcement is useful when WHS incidents occur across jurisdictions;
- improved consistency in the action taken in response breaches of WHS duties upholds principles of fairness and gives duty holders across Australia more certainty as to the level of action regulators are likely to take for failing to meet their duty in a similar situation;
- the policy is publicly available so there is transparency and accountability in relation to the enforcement of WHS laws; and

- the policy recognises that a range of compliance and enforcement tools should be available to WHS regulators and that incentives (such as training and awareness raising) and deterrents (such as the issuing of notices or prosecutions) are both necessary to achieve better work health and safety outcomes.

The Department notes, however, that a review of the National Compliance and Enforcement Policy is due given it was to be reviewed at the same time as the review of the model WHS laws.

Potential areas for improvement

The Department's overarching view is that the model WHS laws are working well, although we have identified some areas where they are not working as well and could be improved. These are the intersection of the model WHS laws with public health and safety, workplace entry for WHS purposes, cross-jurisdictional cooperation on WHS investigations, incident notifications to regulators, penalty levels for breaches of the laws including the provisions relating to workplace deaths and insurance against penalties.

Public Health and Safety

Question 8 of the discussion paper seeks comments on the effectiveness of the model WHS in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections connected to work.

Prior to the harmonisation of Australia's WHS laws, each jurisdiction had provisions within their own legislation that sought to protect persons other than workers (such as members of the public) from harm occurring from the performance of work or from the escape of harmful things at or from a workplace. To this extent, WHS laws have always operated in the realm of public safety.

The issue of the extent to which the model WHS laws should apply to public safety was considered in detail in the development of the model WHS laws and a recommendation was made that the underlying objectives of the model WHS Act should be clearly articulated to include the protection of all persons from work-related harm.

In accordance with this recommendation, the object of the model WHS Act is clearly expressed to include "protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimization of risks *arising from work*" (see section 3(1)(a)). This requirement that there be a clearly identifiable link between the conduct of work and the risk of harm was intended to set an appropriate limit on the application of the model WHS laws to public safety.

However, the line between WHS and public safety (where the common law imposes a duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour[14]) continues to be blurred.

The recent decision in *Boland v Safe is Safe Pty Ltd* [2017] SAIRC 17 appears to suggest that the results of work could be considered for the scope of the duty in s 19(2) of the WHS Act, although this was in a lower court and turned on the circumstances of the case. The Department supports the view of the National Review into model OHS laws that made the distinction between the performance of work and risks arising from that work.

The uncertainty of this line has significant financial implications for businesses and organisations that pay workers' compensation premiums to cover employees and take out public liability insurance to

[14] Donoghue v Stevenson (1932)

protect against the financial risk of being found to have been negligent under their common law duty of care.

The existence of public liability insurance may suggest that the scope of involvement of WHS regulators should be limited, given this provides for payments to third parties harmed by activities carried out in connection with that business or organisation. Further, too broad a scope for the model WHS Act in relation to public safety could stretch the resources of regulators, especially in NSW, Victoria and Queensland where regulators are funded solely through premiums for workers' compensation, and impact on the overall effectiveness and impact of the WHS laws.

A question remains as to whether regulators should be involved regardless of this in order to determine whether businesses or organisations should be prosecuted under WHS legislation for breaching their duty of care to other persons. Businesses or organisations might argue that this results in 'double jeopardy' where they have paid premiums for workers' compensation and public liability insurance, yet the one incident, where both 'workers' and 'other persons' are involved, is taken into account in the calculation of both premiums.

Amendments to the model WHS laws to draw a clearer boundary line between the domain of WHS laws and public safety would be useful, but the Department acknowledges that this would be a particularly challenging exercise and may not be possible.

In 2015, SWA members sought to provide a simple formula for determining when and how an appropriate boundary should be drawn between the scope of the model WHS Act and the wider protection of public safety. This was unsuccessful.

The Department notes that an underlying principle can be applied to determine the extent of the duty to ensure the health and safety of other persons as far as is reasonably practicable under the model WHS laws. This principle is that the duty is designed to cover the case where it is *the carrying out of work* as part of a business or undertaking, at a designated workplace, which poses a risk to the health and safety of other persons. A distinction must be made between this situation and the case where *the end product or result of the work* may itself, when it passes into commerce or the wider community, pose a risk to the health and safety of other persons.

Workplace entry by WHS permit holders

Question 24 of the discussion paper asks for comments on the effectiveness of whether provisions for WHS entry by WHS entry permit holders support the object of the model WHS laws.

Statutory right of entry provisions provide an enforceable legal right to enter a worksite in the absence of the occupier or owner's consent. Right of entry laws exist under both Part 3-4 of the *Fair Work Act 2009* (Cth) (FW Act) and Part 7 of the WHS Act. The respective legislative schemes interact, as a WHS right of entry permit holder is required to hold a right of entry permit under the FW Act[15]. Further, ss 494 to 499 of the FW Act deal with requirements for permits, notice and compliance

[15]s 124 of the WHS Act.

when exercising a 'State or Territory OHS right' – relevantly a right conferred by a State or Territory WHS law.

The WHS Act enables a union to apply to the authorising authority for an official of that union to become a WHS entry permit holder. The framework provides union inspectors with the ability to enter a workplace to inquire into safety issues and consult and advise workers on WHS matters in certain circumstances. The object at s 3(1)(c) of the WHS Act encourages unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and at s 3(1)(d), provides for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to WHS. These points acknowledge the role of both unions and employer organisations in raising awareness of WHS issues and the potential for union officials to assist with securing improved compliance with WHS laws.

The right of entry provisions in the model WHS laws are beneficial in that they facilitate the entry of union officials into a workplace to inquire into suspected contraventions of WHS laws. The right of entry provisions also help to ensure that object 3(1)(c) of the model WHS laws is met by encouraging unions to take a constructive role in promoting improvements in WHS practices. Indeed the National Review into model OHS laws found considerable evidence to suggest that union monitoring and enforcement of compliance with OHS laws increases workplace health and safety outcomes.

However, concerns continue to be expressed about union entry rights under the WHS laws being used for other purposes: in particular, for industrial purposes.[16] Indeed, the issue of misuse and abuse of right of entry for safety purposes by union officials has been well documented by a number of Federal Court and Federal Circuit Court decisions and two Royal Commissions (the Cole Royal Commission and the Trade Union Royal Commission). The 2013 Cole Royal Commission, for example, found that the misuse of right of entry compromises safety by trivialising genuine safety concerns and deflecting attention and resources away from dealing with WHS issues.[17]

The National Review into model OHS laws identified the significant changes that have occurred in industry, including the reduction of union density across Australia, the impact of those changes and the changed nature of employment, that have affected the capacity of WHS laws to balance the interests and roles of the various parties at a workplace level. It concluded that WHS laws should continue to protect workers and others through the establishment of clear duties of care and by providing workers and their representatives with a direct participative role at a workplace level. Accordingly, the National Review into model OHS laws also recommended right of entry under the model WHS Act and that it be subject to safeguards to ensure it is carried out in an effective and fair manner.

The National Review into model OHS laws made a series of recommendations about how right of entry should be dealt with under the model WHS laws. The Review recommended, among other things, providing rights of entry for occupational health and safety (OHS) purposes to union officials under the model WHS Act (Rec 204) to investigate suspected contraventions and consult and advise

[16] *Final Report of the Royal Commission into Trade Union Governance and Corruption*, Volume 5, December 2015, p 607.
[17] *Final Report of the Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, Volume 6, February 2003, p 108.

workers and PCBUs on OHS issues (Rec 211) and specified the grounds for suspension or revocation of an entry permit (Rec 218). The Review cited several reasons in support of including right of entry in the model WHS laws. These reasons included that union monitoring and enforcement of compliance with OHS laws would positively contribute to compliance with work health and safety obligations, that union right of entry is mandated in the ILO's *Occupational Safety and Health Convention 1981* and that most jurisdictions already had right of entry provisions in their WHS legislation.

The issue of whether to include right of entry for WHS purposes in the model WHS laws or in Commonwealth workplace relations legislation was considered in the context of the National Review into model OHS laws. The National Review into model OHS laws did not support including WHS right of entry laws in Commonwealth workplace relations legislation. The Review was considering these issues ahead of the implementation of a national workplace relations system for the private sector, and at the time negotiations for the referral of powers from the states to the Commonwealth had not been finalised. The subsequent implementation of the national workplace relations system resolved these issues raised by the Review. This is due to the FW Act already containing powers that extend to the majority of workplaces, and also containing provisions for right of entry under State and Territory OHS laws.

In considering the framework for the model WHS laws, the former Workplace Relations Ministerial Council agreed to recommendations that the model WHS laws should be based on the right of entry provisions contained in the FW Act.

Although the right of entry provisions in the model WHS Act were largely modelled on the FW Act, the lack of complete alignment, combined with the fact that two separate regimes are in operation, and that the FW Act contains rules about 'state or territory OHS rights', is resulting in conflict and confusion.

The Department notes the right of entry provisions in the FW Act and the Commonwealth WHS Act differ in several ways.

- Grounds for entry – the Commonwealth WHS Act provisions are broader than those in the FW Act as they allow access to all employee records, not just the records of members. In addition, under the FW Act a permit holder can enter to *investigate* a suspected contravention whereas under the model WHS Act a permit holder can enter to *inquire* into a suspected contravention.
- Notice of entry – the FW Act requires the giving of at least 24 hours, but no more than 14 days, before the entry. While changes made in the 2014 to the model WHS, created a similar requirement for union officials to provide a least 24 hours but no more than 14 days' notice in most circumstances, this has not been adopted by any jurisdiction, with the exception of South Australia. The Commonwealth and most other WHS Acts diverge from the model WHS laws in this respect. The Department notes that reason often cited for this is that contraventions of WHS laws require more immediate attention because safety concerns may give rise to potential consequences including injury and death.
- Revocation/suspension of entry permits – the FW Act requires that an application may only be made by an inspector or a person prescribed by the regulations to impose conditions on,

suspend or revoke an entry permit. However, under the Commonwealth WHS Act, the scope to revoke an entry permit is much wider. The regulator, relevant PCBU, or any other person in relation to whom the permit holder has exercised a right of entry, or *any other person who may be affected* by the exercise or purported exercise of such a right can apply for permit revocation under Commonwealth WHS legislation.

A recent example of the confusion and overlap between the FW Act and the WHS Act is the right of entry dispute between Geofabrics Pty Ltd (Geofabrics) and the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). Geofabrics applied under s 505 of the FW Act for the Fair Work Commission (FWC) to deal with a right of entry dispute. Geofabrics allege that 5 CFMMEU officials attempted to exercise right of entry to hold discussions at its South Queensland site in January and February 2018. Geofabrics has also applied under the Queensland WHS Act for the Queensland Industrial Relations Commission (QIRC) to deal with a dispute concerning substantially the same facts. The CFMMEU applied to the FWC to stay the FWC proceedings as an abuse of process, given the matter is the subject of the QIRC proceedings. Gostencnik DP dismissed the CFMMEU's application, noting that while there is clear overlap between the allegations, the FWC proceeding is not an abuse of process[18]. Gostencnik DP relevantly found that a person exercising a State OHS right is subject to the restrictions of the FW Act. Under the current law, there are now two parallel proceedings relating to substantially the same allegations in the FWC and the QIRC.

While the Department considers that a single entry regime contained in one Act would address many of the complexities surrounding entry for WHS purposes, the Department nevertheless considers the most pragmatic approach is for the two entry regimes to be better aligned. This would not only ensure greater consistency and reduce duplication but may also help with addressing concerns regarding the misuse of right of entry by unions, particularly at construction sites.

For example, under s 486 of the FW Act a permit holder is not authorised to enter or remain on premises, or exercise any other right if they contravene a requirement on permit holders. There is no such provision regarding remaining on premises in the WHS Act. The WHS Act could be amended to align with s 486 of the FW Act.

The FWC does not have the express power to revoke a WHS entry permit if the person's FW Act entry permit has been suspended. Section 138 of the FW Act could be amended to expressly provide the FWC with the power to revoke a WHS permit where a FW Act permit has been suspended, revoked or expired.

By way of further example, the WHS Act provides broader grounds for entry, including enabling access to all employee records in specified circumstances, rather than only member records. The rationale for this is the importance of safety in the workplace where all employees should benefit, rather than just union members.

[18] *Geofabrics Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWC 1904.

Cross-jurisdictional cooperation

Question 29 of the discussion paper seeks 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.

Some regulators have raised concerns in relation to a lack of clarity around whether a regulator's powers to carry out investigations and conduct a prosecution are enlivened by breaches that occur in another state or territory, and therefore how the regulator's powers would interact in relation to the breach.

The National Review into model OHS laws proposed a range of options to facilitate cross-jurisdictional investigations, including raising the possibility of enabling the Commonwealth, States and Territories to share investigative resources by allowing for inspectors to be appointed in more than one jurisdiction. The National Review into model OHS laws argued this would allow for flexibility and efficiency to meet particular circumstances or requirements through cost savings, optimising inspector numbers and expertise across the country, and limiting the duplication of the costly and time-consuming training necessary to ensure and maintain the requisite levels of competence and expertise.

Taking these steps would require the Commonwealth, States and Territories to coordinate inspector appointment processes, training, qualification, investigation techniques, evidence gathering, compliance activities, educational campaigns and intelligence sharing, amongst other considerations. This would be especially relevant for incidents that occurred under dual Commonwealth and State/Territory jurisdictions, as there could be situations where an incident occurs on a worksite covered by both regimes, where two potentially different outcomes may arise depending on what jurisdiction investigates the WHS breach.

The Department suggests that consideration should be given as to whether the settings are right for regulators to conduct investigations concerning breaches of WHS laws. While the existing powers under the model WHS laws allow for sharing of information between jurisdictions, issues arise when investigators from one jurisdiction wish to conduct an investigation into a suspected WHS breach in another jurisdiction. The Department considers that it could be beneficial to include a specific power in the model WHS Act enabling regulators to share information between jurisdictions in situations where it would aid the regulators in performing their functions in accordance with WHS laws.

Incident notification

Question 30 of the discussion paper asks for comments on the incident notification provisions of the model WHS laws.

The National Review into model OHS laws noted that the primary purpose of incident notification is to ensure regulators are able to investigate incidents in a timely fashion. The incident notification provisions along with the requirement to preserve a site until an inspector arrives (s39 (1) of the WHS Act) ensures that incidents can be appropriately investigated.

The National Review into model OHS laws recommended that only the most serious incidents should be notified to the regulator, those causing or which could cause fatality, serious injury or illness. The rationale was to reduce the compliance burden this imposes on obligation holders. The National Review into model OHS laws considered there to be a significant amount of underreporting of serious incidents that did not result in fatality under the pre-harmonised laws.[19]

Under section 38 of the model WHS Act, PCBUs have a duty to notify the regulator of notifiable incidents 'arising out of the conduct of the business or undertaking'.

Section 35 of the model WHS Act defines a notifiable incident for the purposes of this section as:

- the death of a person;
- a serious injury or illness of a person; or
- a dangerous incident (as defined in s37 of the model WHS Act).

SWA published an Incident Notification fact sheet in December 2015 that provided guidance on the reporting requirements under the model WHS laws[20]. This fact sheet includes the following relevant information in relation to determining whether something does, or does not, arise out of the conduct of a business or undertaking:

- a notifiable incident does not arise out of the conduct of the business or undertaking just because it happens at or near a workplace; and
- a notifiable incident may happen at a workplace but have nothing to do with work or the conduct of the business or undertaking.

While this is helpful, the Department suggests that the issue of what constitutes a notifiable incident arising from the conduct of a business or undertaking be revisited with a view to developing further guidance for PCBUs. This guidance should focus on the need for there to be a causal connection between the notifiable incident and the conduct of the PCBU's business or undertaking, and provide some general principles for establishing whether this connection exists. The Department recognises, however, that notification requirements may ultimately depend on the specific circumstances that give rise to each incident.

Work-related psychological injuries

Work-related psychological injuries have become a major concern in Australian workplaces due to the negative impact on individual employees, the costs associated with the long periods away from work and the difficulty of managing return to work that are typical of these claims. Work-related psychological injuries can result from exposure to a range of factors in the workplace including a traumatic event, bullying and harassment, and workplace violence. SWA data shows that, each year:

- 7,500 Australians are compensated for work-related psychological injuries, equating to around 6 per cent of workers' compensation claims and

[19] National Review into Model Occupational Health and Safety Laws, Second Report, January 2009, p232.
[20] https://www.safeworkaustralia.gov.au/doc/incident-notification-fact-sheet

- approximately $480 million is paid in workers' compensation for work-related psychological injuries (with the typical payment for a psychological injury being $23,600 per claim compared to $8,700 for other types of claims).

While data on mental health issues experienced by workers can be collected through workers' compensation claims, the data received under incident notification provisions is generally more timely and is used by regulators to target their activities and identify emerging trends in incidents, injury and illnesses. It is therefore arguable that the notification provisions should be appropriately designed to ensure, so far as possible, that incident data provides an accurate reflection of the level of psychological harm occurring as a result of work.

Consideration could be given to whether the existing definition of a serious illness or injury in s36 of the model WHS Act is sufficient for the purposes of ensuring serious psychological illnesses and injuries are reported to regulators. Currently, psychological injury or illness, including incidents of workplace violence, would only constitute a serious injury or illness for the purposes of s36, and therefore be a notifiable incident under s35, if it required a person to have immediate treatment as an in-patient in a hospital or medical treatment within 48 hours of exposure to a substance.

In order to reduce compliance burdens on duty holders it could be useful to specify that only serious psychological injuries be notified as this would help to ensure an appropriate level of information capture, reporting and analysis.

The approach of defining illness and injury by setting a threshold level of medical intervention or incapacitation before notification is required (for example, non-attendance at work for a period of days) may work better in this regard than specifying the types of illness or injuries that must be notified. This approach had formed the basis of incident notification provisions in several jurisdictions prior to the introduction of the model WHS laws. It is understood that the requirement to preserve an incident site would have very limited application in these situations.

Penalty levels

Question 33 of the discussion papers asks about the deterrent effect of penalties in the model WHS laws.

The Department's view is that it is timely to consider the penalty levels which have been set for the 'duty of care' offences and other offences within the Act. The penalty levels in the model WHS regulations should also be considered for consistency.

When the model WHS Act exposure draft was approved for release in 2009, the then Workplace Relations Ministerial Council agreed that the model WHS Act should express penalties as dollar amounts, but allow for conversion into penalty units by each jurisdiction if appropriate. This was considered necessary as penalty units have different values in each jurisdiction, and it was considered important for penalty levels to remain the same across the jurisdictions. The jurisdictions that enacted the model WHS Act have therefore used dollar amounts when legislating their penalties, with the exception of Queensland, which included penalty units in their legislation.

When the Commonwealth WHS Act came into effect in 2011, the penalty for a Category 1 offence was $3,000,000 for a body corporate, an amount that has not changed since the introduction of the legislation.[21] However, the Department calculates that a Commonwealth Category 1 penalty for a body corporate would now be around $5,727,000 if the penalty was instead expressed as penalty units and indexed to the Commonwealth penalty unit value.[22] This represents a 90.9 per cent increase over the 2011 penalty amount.

The increasing of maximum financial penalties over time ensures that financial penalties remain an effective punishment and deterrent to the commission of offences. In the Commonwealth jurisdiction, the value of a penalty unit will automatically increase according to inflation every three years, beginning from 1 July 2020.

Although Queensland included penalty units in their legislation, the value of a penalty unit in the *Penalties and Sentences Act 1992* (Qld) for a WHS offence was $100 in 2011, which and has not changed, so a Queensland body corporate penalty for a Category 1 offence remains at $3,000,000.[23] To ensure the deterrent effect of the WHS penalty regime, the Department supports consideration on whether the penalties remain appropriate, as it was never intended that they remain stagnant. This includes consideration on whether penalty levels remain appropriate across the laws, for the 'duty of care' offences and proportionately later to the WHS Regulations for other WHS offences in the model WHS Act and Regulations, which should be increased.

Consideration should also be given to a mechanism for the indexation of penalty values. This would bring the model WHS laws into line with penalty increases that have occurred across the various jurisdictions in relation to offences in other laws, and continue to maintain the deterrent effect of these penalties through a consistent and transparent mechanism.

Sentencing guidelines

Question 35 of the discussion paper seeks comments on the value of implementing sentencing guidelines for work health and safety offenders.

Nationally consistent sentencing guidelines may also not be necessary at this stage as the model WHS Act itself provides sufficient guidance on the laying of charges based on risk and culpability. The maximum penalties a court may impose are different depending on the category of the offence and whether the offender is an individual (e.g. a worker, or a PCBU), an officer or a body corporate. This contrasts with the recommendation made by the Queensland Review to adopt the British sentencing guidelines.[24]

[21] The WHS Act came into force originally on 29 November 2011, with the current in force compilation (20 September 2017) reflecting no changes to the penalty amount set out at subparagraph 31(1)(c).
[22] In 2011 a penalty unit was $110, making a Category 1 offence equate to around 27,270 penalty units. A Commonwealth penalty unit is currently valued at $210 as of the time of this submission.
[23] As of 29 March 2018, Subsection 5(1)(d) of the *Penalties and Sentences Act 1992 (Qld)* sets the penalty unit value at $100 for offences against the *Work Health and Safety Act 2011 (QLD).*
[24] Best Practice Review of Workplace Health and Safety Queensland, Final Report, 3 July 2017, Recommendation 49, p120.

Independent analysis of the British sentencing guidelines concluded there was a significant increase in the total number and dollar value of fines imposed by UK courts on companies and individuals prosecuted under the *Health and Safety at Work Act etc. 1974* (UK) and associated regulations. However, this was mainly because:

> *…criminal courts, often used to dealing with individual criminal defendants and low-level corporate offences, were left with little or no guidance. This was leading to a lack of consistency or predictability about the size of penalty that a defendant could receive from the court.*[25]

The Australian situation is not directly comparable. Further questions arise as scaling a penalty's size to the size of a corporation may not result in modifying the behaviour and approaches of corporations to WHS. It gives business a false impression as to the real cost of safety when it comes to running their business, which needs to be factored in regardless of business size.

Workplace deaths

As part of the discussion under question 33, industrial manslaughter was raised as an issue in the context of recent WHS legislation amendments in Queensland.

For a number of years, including prior to the National Review into model OHS laws, there has been ongoing debate over an appropriate response to workplace deaths. As the discussion paper outlines for duty of care breaches, the model WHS Act has three categories of offences which are based on the degree of culpability, risk and harm, and not on the actual consequence or outcome of the breach. This means that a duty holder can be held to account for a breach, even when it has not resulted in an injury, illness or death.

There are two aspects to this issue:

- The ongoing debate about whether 'gross negligence' as well as 'recklessness' should be a trigger for prosecution of the Category 1 offence under the Act; and
- The amendments made by Queensland and the ACT to address negligent behaviour by corporations and/or senior officers resulting in a worker death.

Workplace deaths - gross negligence and recklessness

The National Review into model OHS laws recommended that:

> *The model Act should provide that in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was serious harm (fatality or serious injury) to any person or a high risk of such harm, the highest of the penalties under the Act should apply.*[26]

[25] *Health and safety sentencing guidelines one year on*; Institution of Occupational Safety and Health, 24 January 2017: https://www.iosh.co.uk/Books-and-resources/Health-and-safety-sentencing-guidelines.aspx.
[26] Australia Government, *National Review into Model Occupational Health and Safety Laws, Second Report*, January 2009, Recommendation 56.

The National Review into model OHS laws did not propose a definition of 'gross negligence', although it did reference s.18A of the Western Australian *Occupational Safety and Health Act 1984*. That section specifically requires that the offender *knew* that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed but acted or failed to act in disregard of that likelihood. This definition is more reflective of the criminal standard of 'recklessness' rather than 'gross negligence'.

The then Workplace Relations Ministerial Council decided that 'gross negligence' offences should be dealt with outside the model WHS Act as they would otherwise cut across local criminal laws and manslaughter offences. The fact is this cross-over occurs whether or not 'gross negligence' is dealt with in Category 1.

The First Report of the National Review into model OHS laws makes clear (in its discussion leading to recommendation 56) that the offences in the model WHS laws will necessarily overlap with general criminal law and offences in other statutory regimes (such as road safety and mining industry regimes).

Workplace deaths - Queensland Industrial Manslaughter offence

The Queensland Government made a number of changes to Queensland WHS laws in October 2017, which included new industrial manslaughter offences with a maximum custodial sentence for an individual of 20 years and maximum fine for a body corporate of $10 million. The changes represented significant departures from the model WHS laws.

The Queensland amendments result in a higher penalty being imposed for negligent conduct (which requires a lower level of culpability) than reckless conduct. When a person causes the death of another, the criminal law distinguishes between different levels of culpability. Although the distinction can be fine, intentionally causing death is the highest level of culpability, followed by recklessness, then negligence (including gross negligence). Under the *Work Health and Safety Act 2011* (QLD) (Queensland WHS Act), *recklessly* exposing a worker to death will now attract a maximum penalty of 5 years imprisonment, and *negligently* causing the death of a worker will attract 20 years imprisonment. This is because the penalty attaches to the outcome (death of a worker) rather than culpability. This is inconsistent with the preventative (rather than punitive) nature of the model WHS framework.

The Queensland amendments also include a new 'senior officer' offence, incorporating definitions used in the former Queensland *Work Health and Safety Act 1995.* The new provisions mean that company managers, who are not considered senior enough to be officers with due diligence duties under section 27 of the Queensland WHS Act, could instead be categorised as 'senior officers' and jailed for up to 20 years under Queensland's new industrial manslaughter laws. This is inconsistent with the approach taken with the model WHS laws, where due diligence duties are placed on 'officers' in recognition of their capacity to direct resources and processes to address WHS risks in an organisation.

It is noted that part of the justification for the Queensland industrial manslaughter provisions being introduced were the tragic fatalities at Dreamworld and the Eagle Farm Racecourse.[27] In relation to the Dreamworld case, the new laws would not apply as they only apply to fatailities of workers and not others in the workplace. In the Eagle Farm Racecourse case, manslaughter charges have been brought against the builder under the criminal code, which questions the need for the new laws.

The Department notes that Queensland's new industrial manslaughter provisions significantly depart from the model WHS laws, and have the potential to create confusion and could lead to negative unintended consequences. While acknowledging this type of industrial manslaughter offence is intended to have a general deterrent effect, the Department does not believe it will lead to improved safety outcomes. The Australian Capital Territory introduced similar offences in 2003, however, there is no clear evidence that the legislation has reduced the incidence of workplace fatalities.

The Department's view is that existing offences in the model WHS Act are appropriately focused on culpability rather than outcome. Specifically, the model WHS laws place an appropriate focus on the intent of the duty holder when determining the penalties for failure to meet a duty. However, if it was considered necessary to address the concerns of those seeking an additional deterrent in the model WHS Act, then the Department considers the best approach is to include gross negligence within the category 1 offence given the closeness of the standards for recklessness and gross negligence.

Insurance for WHS Penalties

Question 37 of the discussion paper asks for comments on the availability of insurance products which cover the costs of WHS penalties.

The penalties for breaches of WHS duties are intended to deter poor safety performance by organisations, their decision-makers, and workers. This deterrent effect is likely to be reduced if businesses believe they are able to take out insurance policies to indemnify against WHS penalties. These policies are also contrary to a best practice WHS mindset, and there is a lack of clarity surrounding the legal effect of these policies.

The Department considers the public interest is best served when liability for penalties rests with those culpable for breaches of the law. The availability and use of insurance in such circumstances may create the moral hazard that duty holders will become less vigilant in carrying out their duties under the WHS Act. There is also a question of fairness to fellow insurance holders, who may potentially be subsidising someone operating in breach of the law.

Of course, notwithstanding legal uncertainty, the prevalence of insurance products in the market suggests that insurance companies are profiting from providing such policies and paying out claims. While insurance policies are currently being offered by insurance companies that indemnify against

[27] *Report No. 46 - Work Health and Safety and Other Legislation Amendment Bill 2017:* 55th Parliament Finance and Administration Committee; Queensland Government; p.41*;* http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1870.pdf.

WHS penalties, it is unclear whether claims for indemnity under these policies will be enforced by courts. This is because penalties under the model WHS laws are criminal in nature and it is a legal principle that you cannot insure against a criminal act[28]. Further, as argued by Michael Tooma, "any contract for insurance against OHS liability and/or serious environment offences is void against public policy"[29].

However, some legal professionals have suggested that not all criminal acts are uninsurable on public policy grounds, and that whether courts will enforce a claim for indemnity depends upon an examination and consideration of all the relevant circumstances, such as whether the consequences of an offence were intended or unintended. Section 272 of the WHS Act provides that a term of a contract or agreement seeking to "contract out" a duty owed under the Act, or to transfer the duty to another person is of no effect. It is not clear whether this limitation would extend to indemnification via insurance arrangements. Expressly prohibiting insurance contracts which indemnify against WHS breaches, or purport to do so, would resolve this situation and provide additional incentive for duty holders (in particular, officers) to exercise due diligence in regard to issues affecting the health and safety of workers.

In terms of how this issue has been dealt with elsewhere, New Zealand has declared contracts for insurance against the payment of fines and penalties to be void under section 29 of its *Health and Safety at Work Act 2015* and makes it an offence to enter into such a contract or offer such an indemnity. It is also noted that provisions limiting the scope of protection that can be afforded to companies and directors under insurance policies already exist in the Corporations Act.

The Department's view is that the model WHS Act should expressly prohibit insurance contracts which indemnify, or purport to indemnify, against penalties imposed for WHS breaches. Recent reviews into Queensland and South Australia's WHS laws have also recommended an express prohibition on insurance contracts covering WHS penalties and fines.

[28] Burrows v Rhodes [1899] 1 QB 816 at 828, cited and approved by Hope JA in Australian Aviation Underwriting v Henry (1988) 12 NSWLR 121, at 123G.
[29] Safety, Security, Health and Environment Law, Michael Tooma, Federation Press, 2008.

Conclusion

The Department submits that many elements of the model WHS laws are effective. The model WHS laws were developed taking into account previous reviews of health and safety laws both within Australia and internationally and thus the laws reflect international best practice. The model WHS laws were also developed to ensure continued compliance with ILO conventions and recommendations.

The Department, however notes that the model laws are still relatively new. At this time, the model WHS laws appear to be sufficiently robust to respond to challenges presented by the evolving nature of work and workplaces. However, this may change after the five year review and we may be in a better position to judge if change is needed particularly around the duty of care structure and worker consultation and representation.

It could be regarded that the number of prosecutions brought under jurisdictional laws giving effect to the model WHS laws have been relatively low to date. This should not be used as an indicator when considering the efficacy of the laws for two key reasons. First, the model WHS laws establish a preventative framework that seeks to ensure hazards and risks are either eliminated or managed so as not to create harm. Second, there often is a lag time associated with transition to new laws and so the oftentimes lengthy timeframe for a prosecution to be heard in court is not a consequence of the laws, but rather due to the general timeframes and evidentiary requirements for hearing matters before courts across Australia.