



HOUSING INDUSTRY ASSOCIATION



Submission to the

2018 Review of the Model WHS laws

13 April 2018



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Housing Industry Association contacts:

Tony Lopez
Assistant Director OHS Policy
Housing Industry Association



ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

The Housing Industry Association (HIA) welcomes this opportunity to contribute to the 2018 review of the model WHS laws. The review is an important opportunity for stakeholders to provide feedback on operational issues arising from the model WHS legislation and to examine its operation and content to ensure the model legislation is operating as intended and where changes may be needed.

1.1 SCOPE OF THE REVIEW

The terms of reference of the review are to consider whether:

- a. the model WHS laws are operating as intended;
- b. any areas of the model WHS laws have resulted in unintended consequences;
- c. the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships;
- d. the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation;
- e. the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes; and
- f. the model WHS Regulations, model Codes of Practice and National compliance and enforcement policy adequately support the object of the model WHS Act.

The Discussion Paper notes that this review is *“the first holistic review of the model WHS laws since their development”* and that it will *“consider all aspects including the model WHS Act, the model WHS Regulations and the model Codes”*. However, the Discussion Paper predominantly focuses on the provisions of the model WHS Act, only referring to the model WHS Regulations and model Codes of Practice in terms of how those instruments support the objects of the model WHS Act.

HIA's view is that the review must be all-encompassing and expressly consider the model WHS Regulations and model Codes of Practice. These documents provide the essential detail for compliance and articulate what is expected of duty holders. These documents are also the source of most of the operational issues experienced by HIA members.

As such, HIA's submission responds to the terms of reference, the questions posed in the Discussion Paper and addresses the detail of the model WHS Regulations and model Codes of Practice.

HIA is also concerned that previous reviews of the model WHS laws and subsequent recommendations have not been adopted by state based jurisdictions. For example, HIA would strongly encourage the adoption of recommendations that sought to reduce red tape and introduced amendments in relation to the notice period for right of entry permit holders.

In addition, some jurisdictions have made unilateral changes to their safety laws out of step with the model laws and the harmonisation agenda. This is at odds with the objects of the model WHS Act to *maintain(ing) and strengthen(ing) the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction*.

1.2 THE RESIDENTIAL BUILDING INDUSTRY

The construction industry is identified in the discussion paper as being a high risk industry, falling within the top three industries in terms of the number of fatalities, the number of serious claims and the frequency rate of serious claims and HIA supports moves that seek to target these outcomes.

However the sector is not homogenous and while HIA does not seek to delegitimise the risk inherent in working in the building and construction industry, the industry is divided amongst those businesses operating in detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sector. Notably the construction process adopted on a single dwelling residential construction site is, in every way, different from the approach adopted on, for example, a multi storey commercial development.

To that end, a 'one-size-fits-all' approach is inappropriate for the residential building industry and HIA strongly supports the development of industry specific guidance, including the development of a code of practice specifically for the housing sector.

The residential building industry builds, on average, 113,000 houses per year, employs nearly 1 million people and contributes approximately \$100 billion towards the nation's total GDP. It is not unreasonable to concede that a sector that contributes so much to the economy and society be dealt with distinctly from the broader construction industry.

In addition to the above HIA's position and response to this review can be encapsulated in 4 key principles:

- Compliance should take a pragmatic approach.
- Industry participants should have certainty of compliance and be directed towards practical safety solutions for achieving that compliance.
- Enforcement of the laws should be fair.
- Liability should be based on "actual" control. The current notion and application of the 'PCBU' diverges from this approach.

While HIA sees elements of these principles in the model framework, improvements can and should be made.

Our response to the discussion paper provides responses to the key questions of note for our members and includes a number of additional comments specific to the model WHS Regulations and on certain of the model Codes of Practice.

2. RESPONSE TO SPECIFIC QUESTIONS

2.1 THE LEGISLATIVE FRAMEWORK

Question 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?

In HIA's view the three tiered approach while appropriate, could be improved.

Overall the regulatory framework 'fits' together, however not every element operates hand in glove creating problems with implementation. This works against the delivery of better safety outcomes on residential construction sites.

Specifically, in some instances the model Codes of Practices can be unhelpful and rather than providing practical guidance, default to a 'one size fits all' approach that creates problems for PCBUs.

The residential building industry requires practical, focused and effective regulations and guidance.

HIA recommends that the residential building industry would be better served by a Code of Practice specifically for the housing sector, rather than the current approach which sees generic Codes of Practice applying to inappropriate situations

Example – Workplace Aisles and Walkways

The Managing the Work Environment and Facilities Code of Practice, which applies to all workplaces, including construction, provides that workplace aisles and walkways need to be at least 600 mm wide.

This is a problem as it is in direct conflict with the 450 mm access platforms typically used in scaffolds. Such platforms may need to be provided due to site restrictions and would comply with current scaffolding standards but not with the code.

Example – Static Standing Work

The Managing the Work Environment and Facilities Code of Practice requires workers who undertake static standing work be “protected from discomfort and the jarring effects of direct contact with concrete, masonry or steel floors”. This is hardly practical for construction work where workers are often in direct contact with concrete and masonry structures.

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

HIA has a number of concerns with the model WHS Regulations.

These are outlined below and included in Appendix A.

Referencing of Australian Standards

HIA does not support referencing of Australian Standards in the model WHS laws. Recommendations for compliance should be in guidance material and not mandated by the calling up of Australian Standards in regulations.

This approach is at odds with the objects of the model WHS Act which looks to assist PCBU's and workers achieve a healthier and safer working environment.¹

HIA notes that the model WHS Regulations mandate 19 Australian Standards.

Example – Model WHS Regulation 163

Model WHS Regulations 163 mandates compliance with AS/NZS 3012:2010: Electrical installations - Construction and demolition sites.

This standard in turn references 26 other standards as ‘normative’ also requiring compliance.

Furthermore, each of these standards would similarly reference other ancillary standards, and so on. It is usually not easy to ascertain which ancillary standards are relevant to the issue at hand. A perverse twist is that some of these documents may turn out to be of no relevance to the matter at hand, their lack of relevance being only apparent after the purchase and perusal of the documents.

This approach represents a highly unreasonable level of prescription for the construction industry, with PCBUs forced to obtain many standards in order to gain a complete understanding of what they need to do to fully comply.

The enormous cost and administrative burden to obtain all the standards is an unreasonable impost on PCBUs potentially having an adverse effect on compliance.

Further the process of developing Australian Standards are outside the control of SWA. Referenced standards are not developed with WHS laws in mind and are not subject to the same level of scrutiny.

¹ s3(c)

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

HIA is concerned that the use of Codes of Practice is at odds with the objects of the model WHS Act, specifically:

- they are often used as quasi-regulations;
- can be unresponsive to change; and
- inappropriately reference Australian Standards

Quasi – Regulation

Feedback from HIA members indicates that Codes of Practice are being applied as a 'one size fits all' safety solutions and are often treated as quasi regulations.

In some instances, WHS regulators view model Codes of Practice as a chance for prescribing further 'obligations' that do not exist in the model WHS laws. This is often under the guise of what they perceive to be 'reasonably practicable' or the need to 'improve safety', but doing so removes the ability of a PCBU to determine what is reasonably practicable in their circumstances undermining the credibility of codes as "practical guidance".

It is also not unusual for inspectors to apply the provisions of a code as if they were mandatory and issue notices to enforce compliance with the provisions of a code.

The need to keep pace with industry practice – non-regulatory approaches

Model Codes of Practice cannot be reviewed and modified quickly. HIA considers that there are more appropriate and effective approaches that should be considered. For example, in some instances industry focused guidance may be a more appropriate approach.

HIA submits that there should be a greater balance between the use of Codes of Practice and other non-regulatory approaches which are equally effective at improving safety outcomes. Industry is often better served by, and is likely to better relate to relevant and appropriate practical guidance rather than 'one size fits all' or quasi-mandatory provisions in codes of practice.

Any guidance must be developed in direct consultation with employer associations, such as HIA, that understand what works in practice and the drivers that operate to achieve (or defeat) sustainable safety improvements.

Referencing of Australian Standards

The issue of referencing Australian Standards identified in the answer to the previous question is also of concern in relation to the model Codes of Practice. Most of the model Codes of Practice also reference Australian Standards, and other technical standards, such as international standards and do so to a greater extent than the model WHS Regulations.

As noted above HIA does not support the referencing of Australian Standards in the model Codes of Practice.

For example the *Code of Practice Managing risks of plant in the workplace* references in excess of 120 standards.

The table below provides some examples of the number of technical standards referenced in some of the codes.

Model Code of Practice	Number of standards referenced	Examples
Preventing falls in housing construction	29	AS/NZS 1576 series --Scaffolding
Preventing falls in general construction	28	AS 1657 – Fixed platforms, walkways, stairways and ladders - Design, construction and installation.

Managing risks of hazardous chemicals in the workplace	23	AS 1940:2017. The storage and handling of flammable and combustible liquids
Welding	25	AS 1674.2-2007. Safety in welding and allied processes Electrical
Work Environment and Facilities	6	AS/NZS 3666 – Air handling and water systems of buildings
Managing electrical risks in the workplace	11	AS/NZS 3760:2010 In-service safety inspection and testing of electrical equipment
Managing risks of plant in the workplace	>120	AS 1419 series - Cranes, including hoists and winches

The effect of one standard referencing ancillary standards is more severe. Whilst this is ostensibly to provide additional guidance on how a PCBU may discharge its duty under the model WHS Act and WHS Regulations, it requires PCBUs to potentially obtain many documents at great cost.

As noted above the sheer volume of standards that would need to be obtained to ensure compliance is unrealistic and impractical particularly for small and medium businesses who do not necessarily have the resources or expertise to interpret the requirements.

HIA notes that the forward to all the model Codes of Practice states that:

*“An approved code of practice is a **practical guide** to achieving the standards of health and safety...”*
(our emphasis added).

Having to refer to numerous ancillary documents is at odds with this stated intent and ultimately undermines the credibility of the code.

Currently the model Code of Practice for Construction Work, does not reference any Australian Standards. HIA is concerned that the current context provides little comfort that that arrangement will be maintained.

Other issues in relation to codes of practice, along with proposed solutions are detailed in Appendix B.

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

The answer to Questions 1, 2 and 3 are relevant in this context.

HIA members are experts in their own right, they must for example understand, apply and interpret complex building plans and designs and detailed technical specifications including the Building Code of Australia (BCA) and the technical standards referenced with the BCA, yet members still lament the complexities in the current WHS legislative framework. The plethora of rules are often difficult to implement in a practical way particularly for small business. What compliance ‘looks like’ can often be vague and uncertain.

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

HIA recognises the current trend to apply a more holistic approach to the issue of psychological health and wellbeing however the model WHS laws already provide an effective framework for the management of risks to psychological health in the workplace. Regulators must be mindful of expanding safety legislation beyond its intended scope.

The WHS Act currently applies psychological health, for example, part 3.1 of the model WHS Regulations provide obligations to identify foreseeable hazards, and to manage any risks arising from the hazards, including risks to health from stress, fatigue and bullying.

Attempts to introduce additional prescription to address psychological health issues would be ill-advised, instead, the focus should be on greater education of the responsibilities of PCBU's in relation to the existing obligations that arise under the model laws.

Question 9: Are there any remaining, emerging or re-emerging WHS hazards or risks that are not effectively covered by the model WHS legislation?

HIA is not aware of any.

2.2 DUTIES OF CARE

DUTY OF PCBU's

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

In HIA's view the current definition of PCBU is appropriate to respond to changes in the nature of work and work relationships.

New and evolving styles of workplace organisation have been a feature of the Australian economy for decades with celebrated court cases establishing the status of encyclopaedia salespeople, bicycle riding couriers and labour hire workers, in fact, as noted in the Discussion Paper the shift in terminology was aimed at being broad enough and flexible enough to incorporate changes in the way we work and the way work is carried out.

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

A PCBU's primary duty of care should be limited by the extent that the person is in actual control of a certain activity such that the subsequent liability is apportioned based on the level of control.

Actual control is an integral element that must be included in the consideration of what is 'reasonably practicable'.

The term 'control' should be taken to mean 'exercising actual and direct control' over the relevant 'worker' and 'workplace'.

In practical terms for the construction industry a PCBU builder or principal contractor (PC) is often held responsible for all the risks created by subcontractors, even in circumstances where a PC has no particular expertise in the work of the subcontractors

In any review of the laws, consideration should be given to including 'actual control' as an element of what is considered to be reasonably practicable.

The current approach also has the potential to lead to poorer safety outcomes as subcontractors and safety inspectors take the view that the principal contractor (PC) is wholly responsible for managing all risks to health and safety.

Health Monitoring Section 19(3)(g)

Section 19(3)(g) provides that a PCBU ensure that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

The requirement for monitoring the health of workers is confusing and impractical particularly where multiple PCBUs are involved.

Example - Engaging a licenced asbestos removal subcontractor to remove asbestos prior to refurbishing an building

Section 19(3)(g) requires both the licenced asbestos removal contractor and the PC to ensure the monitoring of the health of the asbestos removal workers. The details of the monitoring required are prescribed in model WHS Regulations 435 to 444 and essentially mean monitoring of the asbestos removal workers by a registered medical practitioner to identify changes in the person's health status because of exposure to asbestos.

Both the licenced asbestos removal contractor and the PC are required to ensure the health monitoring obligations of the WHS Regulations are met, including: properly informing the workers in relation to the monitoring; ensuring that appropriate health monitoring is provided; obtaining and giving relevant reports to the workers and the regulator; and, ensuring records of that monitoring are kept.

Although the 'health monitoring' duty of the WHS Act is qualified "reasonably practicable", the obligations of WHS Regulations 435 to 444 are not so qualified, and arguably the PC may have some capacity to influence or control the asbestos removalist with respect to the health monitoring. It is however, unclear to some PCs that engage asbestos removalists what is expected of them. How can they be expected to ensure that the requirements of the WHS Regulations have been met, and will be met by the asbestos removalist? How far should they go? What proof should they seek?

The above example demonstrates the need for the Model WHS laws to be amended to limit the health monitoring obligations to the relationship between the PCBU and their direct employees/workers.

Design, Manufacture and Supply Duties

The Act imposes a number of unrealistic duties on persons who design, manufacture, and supply structures, such as 'buildability' and 'lifecycle' duties for example:

- Designers should not have safety duties in relation to the buildability of a structure and more particularly a residential home.
- Manufacturers and suppliers should not have a duty in relation to the end users of structures as they do not have control over how that building may be used in the future.

Building legislation already requires buildings and certain structures to be designed and constructed in accordance with the Building Code of Australia (BCA), which covers fire and structural safety, amenity, etc. to ensure a building is fit for occupation. The WHS Act should not prescribe requirements over and above the requirements of the BCA which are already adequate.

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

'Reasonably practicable' is an appropriate qualifier of the WHS duties of PCBU's and guidance on its interpretation is developing.

However in practice, the concept is often difficult to understand when, for example, weighing risks of a short term nature against the cost of implementing the available ways of eliminating or minimising risk, objectively.

For example, what would be a reasonable control measure when adjusting an antenna located 3 metres up on the roof of a single storey domestic dwelling - a job expected to take not more than 10 minutes? A guard rail or a cherry picker would provide the highest possible means of protection, but is this reasonable? Or would an administrative control measure be appropriate given the low level of risk?

Further it is recognised that this standard is not a defence, as was recently observed in a decision of the NSW Industrial Relations Commission:

"Under the current regime, the offence requires the employer, or person conducting the business undertaking, to ensure the health and safety of workers only so far as it is reasonably practicable and the

test of reasonable practicability is an element of the offence. No longer is “reasonable practicability” a defence to an offence of absolute liability: s 19 of the Work Health and Safety Act.”²

Under these circumstances (and as noted above in response to question 11) HIA recommends that “actual control” be an element of what is considered to be reasonably practicable. In HIA’s view this would provide greater certainty and clarity as to what is considered to be reasonably practicable in any given situation.

Of note, recent amendments to the South Australian *Work, Health and Safety Act 2012* sought to clarify the importance of the control test. Section 17 was amended to include subsection 2 outlined below:

(1) A duty imposed on a person to ensure health and safety requires the person—

(a) to eliminate risks to health and safety, so far as is reasonably practicable; and
(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

(2) A person must comply with subsection (1) to the extent to which the person has the capacity to influence and control the matter or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

HIA would recommend that this current review consider the South Australian approach for inclusion in the model WHS laws.

DUTY OF OFFICERS

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

The current interpretation and application of the due diligence provisions for officers is overly onerous.

HIA acknowledge that while the duty is qualified by a requirement to take “reasonable steps” the obligation however remains vague.

The current ‘one size fits all’ approach to the application of these duties does not take into account the specific circumstances of the residential building industry, particularly that site supervisors and onsite managers are often in the best position to understand and manage the hazards and risks on a building site.

Of note, in some states, as companies are able to obtain a building license by employing an individual who holds a builders license for the class the company is applying for, directors rely on the expertise of that individual.

Any review should consider the introduction of a defence for those officers who can prove that others in the organisation have direct or operational responsibilities for the duty.

Unless it can be demonstrated that the company has endemic and systemic WHS failures and inadequacies (for instance a lack of proper systems), it would seem at odds with the objects of the model Act to hold all directors accountable for the day to day management of the site-based hazards and risks.

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

As noted above in response to question 10 the current definition of ‘worker’ is appropriate to respond to changes in the nature of work and work relationships.

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

In HIA’s view, the outcomes in the Queensland cases highlighted in the Discussion Paper reflects the appropriate application and interpretation of a workers duty of care. However, feedback from HIA members indicates that this approach is not consistent across those jurisdictions who have adopted the model laws.

² *Hunter Quarries Pty Limited v Morrison; Badior v Morrison* [2017] NSWCCA 326

In fact, when there is an investigation arising from a workplace accident and one of several entities including workers may be culpable there would seem to be discretion as to which entities are prosecuted including that in some instances only the head contractor is prosecuted or held accountable.

PRINCIPLES APPLYING TO DUTIES

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

See question 11 above.

2.3 CONSULTATION, REPRESENTATION AND PARTICIPATION

CONSULTATION WITH OTHER PCBU'S

Question 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?

The model Construction Work Code of Practice provides some practical guidance in relation to the section 47 *Duty to consult with workers* and the section 46 *Duty to consult, cooperate and coordinate activities with other duty holders*. The guidance is useful as it covers the most common construction relationships where these duties are relevant for example PCBU's and workers and PCBU's and subcontractors.

However, a matter of particular concern is the interpretation of the s46 duty, specifically the extension of that concept along the procurement chain, even to operations that take place overseas.

Section 46 states:

If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

In the recent *Draft Guide for Managing Workplace Health Safety and Welfare in Supply Chains and Networks* the underlying legal duty of s46 have been usurped to inappropriately and unreasonably extend the responsibilities of PCBU's to encompass supply chains where a PCBU's has little or tenuous influence or control.

In a further extension of the obligations, the s46 duties are also conflated with 'moral obligations' to seek to impose accountability for the health, safety and welfare of workers all along the supply chain, rather than the immediate work and workplaces concerned. It even seeks to extend accountability to operations that take place in other countries ignoring the fact that the s46 duties apply if the other PCBU's have a WHS duty in relation to the same matter.

This is a worrying example of the WHS duties being interpreted to extend much further than is reasonable, or required by the Act.

Most small business do not control and are not able to influence the activities, safety practices or otherwise that take place within the supply chain leading to the provision of a good or service, indeed these matters are mostly likely to be hidden to them.

The draft guide provides no practical guidance but mainly suggests adopting "ethical" or "corporate social responsibility" to drive potential improvement.

Given its clear overreach, HIA recommends that the *Draft Guide for Managing Workplace Health Safety and Welfare in Supply Chains and Networks* be abandoned.

CONSULTATION WITH WORKERS

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

Powers of HSR's

The powers of HSR's to direct that work cease or to issue Provisional Improvement Notices (PINs), can have major economic implications for PCBU's. It is HIA's view that the regulator should be the only one able to exercise those powers.

To the extent that these powers remain the amendments made to the model WHS Act in 2016 clarifying that PINs issued by HSRs may include 'recommendations' to remedy a contravention rather than 'directions' (s93 of the model WHS Act) needs to be implemented by the WHS jurisdictions.

Training of HSR's

Regulation 21 of the model WHS Regulations requires the training of HSRs. HIA support the implementation by WHS jurisdictions of the amendments made to the model WHS laws in 2016. This includes inserting of the words 'up to' in relation to HSR training courses, i.e., providing for an initial course of training of *up to five* days and refresher training of *up to one* day.

HIA strongly opposes any push for increasing the number of training days as has been done in South Australia, which now allow for:

- 5 days during the 1st year of the HSR's term of office; and
- 3 days during the 2nd year; and
- 2 days during the 3rd year.

These provisions present an unreasonable cost impost on PCBU's and employers. There is no justification to support such changes.

List of HSR's

HIA support the implementation by the WHS jurisdictions of the amendment made in 2016 that would see the removal of the requirement for PCBU's to provide a list of HSRs to the regulator.

Question 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?

HIA is not aware of any classes of workers for whom the current consultation requirements are not effective in construction. HIA notes that there is adequate guidance in the Construction Work Code of Practice in relation to this duty and that the guidance is clear, effective and includes practical examples that enable duty holders to understand what is required of them.

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

As mentioned above, in HIA's view the current WHS framework is appropriate and flexible enough to respond to the changing nature of work.

ISSUE RESOLUTION

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

HIA is not aware of any issues in relation to issue resolution procedures but would support replacing the provision with appropriate guidance that can address industry specific matters.

DISCRIMINATORY, COERCIVE AND MISLEADING CONDUCT

Question 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?

HIA is not aware of any problems. The provisions appear to be working well.

RIGHT OF ENTRY BY WHS ENTRY PERMIT HOLDERS

Question 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?

HIA does not support the current right of entry provisions.

Adequate right of entry provisions are already provided for within the *Fair Work Act 2009* and the regulatory overlap between the WHS and workplace relations laws have led to construction unions exploiting entry on WHS grounds when the more stringent industrial law provisions do not suit their purposes.

Of note, the recent decision of the High Court held that under Australian law, union officials are required to hold a valid federal right of entry permit even when invited onto site to assist a health and safety representative (HSR) under a State or Territory OHS law.³ The model Act should be amended to codify and clarify the interaction between the two regulatory frameworks.

Additionally there is no evidence to suggest that such a right has led to better safety outcomes.

HIA recommends that the current right of entry provisions be amended in the following ways:

- Training requirements for WHS permit holders should be provided only by the regulator. This will ensure that regulators can make their expectations regarding compliance with the right of entry requirements clear.
- Photo ID must be added as a minimum requirement for an entry permit.
- The notice of entry should always include the reason why they are on the site and a requirement to state this clearly with reference to the legislation. This would create more credibility and better define the visitor's role. It would also provide limits to the visitor to only talk to those people affected by the suspected contravention, at times that are reasonable.
- As a minimum, the following amendments made to the model WHS laws on 21 March 2016 need to be implemented by all jurisdictions.
 - A minimum notice period of 24 hours and a maximum of 14 days for union officials and those assisting HSRs when entering a workplace (sections 68 and 117 of the model WHS Act).
 - An increase to penalties associated with contravening the conditions of WHS entry permits from \$10,000 to \$20,000 (section 123 of the model WHS Act).
 - Minor technical amendments relating to WHS entry permit holders.

HIA supports the recent changes made by the Queensland Government, including the doubling of penalties for non-compliance. The model WHS Act should include similar penalties.

2.4 COMPLIANCE AND ENFORCEMENT

REGULATOR FUNCTIONS

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

HIA considers that the functions and powers of the regulator are sufficiently broad to ensure compliance.

INSPECTORS' POWERS AND FUNCTIONS

Question 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?

³ *Powell v Australian Building and Construction Commissioner & Anor; Victorian WorkCover Authority v Australian Building and Construction Commissioner & Anor* [2017] HCATrans 239 (17 November 2017)

While HIA considers that the functions and powers of regulator inspectors are sufficiently broad it is considered that an inspector's role should focus on education and collaboration with industry. From HIA's experience this approach results in better safety outcomes than that of heavy handed enforcement role.

CROSS-JURISDICTIONAL CO-OPERATION

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

HIA is aware of some of collaborations which have resulted in positive safety outcomes.

For example, the ongoing Cross Border Construction Safety Program between SafeWork NSW and WorkSafe Victoria. The safety authorities worked in collaboration with industry to undertake education and compliance activities to improve the safety outcomes for construction workplaces.

The program included inspectors of both safety authorities undertaking joint workplace health and safety inspections on either side of Victoria/NSW border towns. A key factor for the success of the program has been the coordinated engagement/educational approach in consultation with industry, and a focus on providing education, advice and assistance to construction workplaces.

INCIDENT NOTIFICATION

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

By and large, the incident notification provisions of the model WHS Act seem to be working well. However, one matter of concern is the inappropriate content of the Incident Notification Information Sheet produced by SWA in relation to the trigger for notification of incidents requiring 'immediate treatment'.

The SWA Information Sheet states (at p 4) that:

Even if immediate treatment is not readily available, for example because the incident site is rural or remote or because the relevant specialist treatment is not available, the notification must still be made.

And also at p 6:

In general a person conducting a business or undertaking 'becomes aware' of a notifiable incident at the time that any of their workers in supervisory or managerial roles become aware of that incident. For example if a worker suffers a serious injury and notifies their immediate supervisor it is at this point that the PCBU is considered to be aware of the incident.

HIA considers that the above interpretation of the triggers for the notification obligation relating to incidents requiring immediate treatment are incorrect and inconsistent with the provisions of the Model WHS Act.

The model WHS Act clearly provides that the incident is notifiable if it requires "immediate treatment", either as an in-patient in a hospital or otherwise 'immediate treatment' for the injuries listed. It also clearly specifies that the requirement to notify applies after the PCBU becomes aware of the notifiable incident, i.e., aware of the fact that the incident requires the person to have 'immediate treatment'. It requires a PCBU to know whether or not the person requires 'immediate treatment'.

While in some serious cases this will be obvious it will not always be so and many incidents occur for which a person is taken to a medical facility and diagnosed and discharged without 'immediate treatment'. However, the guide essentially requires a non-medically qualified PCBU to make a premature judgement that the incident requires 'immediate treatment'.

HIA does not consider it appropriate for the SWA guide to inaccurately paraphrase the provisions of the WHS Act and to encourage unnecessary notifications. As such, HIA recommends that this provision of the SWA guide be revised and made consistent with the model WHS Act.

2.5 NATIONAL COMPLIANCE AND ENFORCEMENT DATA

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

The National Compliance and Enforcement Policy (NCEP) contains principles that are relevant to how WHS regulators should perform their monitoring and enforcement activities. The purpose of the NCEP is to support the model WHS laws by ensuring a nationally consistent approach to compliance and enforcement. HIA considers that consistent implementation of the policy by the jurisdictions, particularly in relation to the use of enforceable undertakings is an important matter that the review should address.

Stakeholder Engagement

HIA notes that the NCEP focuses on the key elements of how compliance is determined, or monitored, the enforcement tools to be used, and the criteria for deciding on the most appropriate enforcement action to take. In HIA's view one key element that is missing from the NCEP, but that is crucial to achieving better health and safety outcomes, is how the regulators should engage with key stakeholders. HIA notes and welcomes that in section 2 of the NCEP there is recognition of the need to “*work with industry, workplace parties and stakeholders to continue to promote innovation and continuous improvements in health and safety standards*” however, the NCEP provides no detail of how these matters should be undertaken.

HIA recommends that the NCEP would benefit from a clear articulation of the important role that key stakeholders can play at improving health and safety outcomes, and what the regulators should do to consult with and support workplace parties and stakeholder bodies to achieve sustainable health and safety improvements. The NCEP should explicitly emphasise engaging directly with key stakeholders.

Plain Language

Another matter worth considering is the need for clearer articulation of the elements of the policy in language that readers other than regulators would find reasonably easy to understand. For instance, section 7 outlines the criteria that ostensibly guide enforcement decision-making, but some of the criteria are vague and open to broad interpretation. It is difficult to understand what it actually means in practice. For example, what determines the “*attitude of the duty holder*”? How do regulators determine this? How are all the criteria weighed in making decisions on the most appropriate action to take? How do the regulators exercise discretion in relation to the criteria?

It's important to develop a document that is easy to understand, sets out what each element of the policy does, and provides an explanation of what that means. This could be done within the NCEP or in a separate companion document. Regulators and other readers would benefit from it and it would assist achieving a more level playing field in the application of the NCEP.

Question 32: Have you any 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?

HIA members have not raised issues that would point to a problem in this area. However, the balance between compliance and enforcement activities and the impost of unnecessary regulatory burden on business, particularly small business, must be monitored and maintained to ensure that, in practical terms, a workplace can comply with its health and safety obligations. All workplace health and safety regulators need to strive to become more empathetic regulators and to constantly remind their staff that what works well in one part of the construction industry will not necessarily be appropriate, or work well in another part. In the residential building industry, in particular, regulators should be encouraged to move away from the tendency to apply what is perceived as ‘best practice’ in general construction to the residential building industry. This has occurred with some WHS regulations and with quasi-regulatory approaches in codes of practice.

More generally, regulators need to find better and more specific ways of delivering safety messages to small business, who typically receive the highest number of visits by WHS inspectors. Information and guidance material must be tailored to meet the needs of small business and specific industry sectors, such as the residential building

industry. Such moves would greatly assist understanding of, and compliance with, WHS legislation and associated guidance.

2.6 PROSECUTIONS AND LEGAL PROCEEDINGS

Question 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?

The current penalty levels across the range of WHS offences seem appropriate. Any change should be supported by evidence substantiating their deterrent effect.

Further additional punitive measures, such as the industrial manslaughter provisions recently introduced in Queensland, are not needed.

HIA would strongly oppose the inclusion of an offence for industrial manslaughter in WHS legislation. It is HIA's view that the offence of manslaughter (whether the death occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for industrial manslaughter and other criminal offences should take place in the criminal law jurisdiction, be conducted by public prosecutors (not safety officials) and be heard before a proper criminal court with a criminal onus or proof and normal rights of appeal.

Further, workplace incidents that result in fatalities are already covered adequately under the provisions for Category 1 offences in the WHS Act, and under existing criminal law.

LEGAL PROCEEDINGS

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

HIA supports the current approach taken in the model laws that the burden of proof rests with the prosecutor.

SENTENCING

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

In line with the HIA view that consistency in work, health and safety laws should be the ultimate aim of the current model framework, HIA would see value in exploring the utility of sentencing guidelines for work, health and safety matters.

ENFORCEABLE UNDERTAKINGS

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

HIA supports options that promote voluntary compliance including the use of enforceable undertakings .

INSURANCE AGAINST FINES AND PENALTIES

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

HIA does not oppose PCBUs being entitled to avail themselves of ways to minimise and mitigate their risk.

SAFETY EXPERTS

The use of experts, who are accredited or licensed is widely used within the residential building industry. For example a builder must engage a licensed scaffolder, a licensed electrician or a licensed plumber to carry out specialists work. The builder can then rely on the expertise of the licensed trade to ensure the work is appropriately carried out.

Similarly a PCBU should be able to rely on the expertise of a WHS expert to establish and implement appropriate safety solutions. This could be recognised in the legislative framework.

APPENDIX A - ISSUES WITH THE MODEL WHS REGULATIONS

WHS Regulations Record keeping regulatory burden	<p>ISSUE</p> <ul style="list-style-type: none"> Various parts of the Model WHS Regulations mandate the keeping of records for two years where there has been a notifiable incident, e.g., regulations 77, 58, 162, 182, 303, 304 313, 465. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> There is no valid justification for mandating the keeping of these records. This is an unnecessary regulatory burden that should be removed. Record keeping requirements should not be designed to facilitate the investigation by regulators. While some PCBU's may want to keep such records that should be a business decision for the PCBU.
WHS Regulation 25 Training requirements for WHS entry permits	This training should be carried out by the WHS regulator. This will ensure that the training is appropriate, provides the necessary skills and avoids the conflict of interest that currently exists.
WHS Regulation 28(a) Additional requirements—entry under section 117	The term 'so far as is practicable' should be removed, as it is always practicable to provide written particulars of the suspected contravention in the notice of entry.
WHS Regulations 37-38 Maintenance of control measures Review of control measures	These regulations are unnecessary as requirements to maintain and review control measures are implicit and are already adequately dealt with in the <i>How to Manage Work Health and Safety Risks Code of Practice</i> .
WHS Regulation 39 Provision of information, training and instruction	This regulation duplicates section 19(3)(f) of the WHS Act and should be removed. If not removed it should at least be subject to reasonably practicable as it is in the WHS Act.
WHS Regulations 40-41 Duty in relation to general workplace facilities Duty to provide and maintain adequate and accessible facilities	These regulations are unnecessary. The provisions can be dealt with quite adequately via guidance. It should be noted that some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non WHS jurisdictions such as Victoria successfully continue to do so.
WHS Regulation 42 Duty to provide first aid	<p>The provisions are unnecessary and should be removed.</p> <p>In the alternative, these provisions should be simplified to a general duty to ensure that first aid is provided.</p> <p>Provisions for first aid can be dealt adequately via guidance. It should be noted some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non-WHS jurisdictions such as Victoria successfully continues to do so.</p>
WHS Regulation 43 Duty to prepare, maintain and implement emergency plan	These provisions should be simplified to a general duty to ensure emergency arrangements are provided. However, the provisions are unnecessary and should be removed. Provisions for emergency plans can be dealt adequately with via guidance. It should be noted that some jurisdictions had previously managed these issues appropriately via guidance or a code of practice without specific regulations and that non-WHS jurisdictions such as Victoria successfully continues to do so.
WHS Regulations 44-45 Personal protective equipment	These regulations are unnecessary and should be removed. The prescribed hierarchy of control makes this duty implicit and alternatively can be dealt with via guidance.
WHS Regulations 54, 55(1), 55(2) Managing risks of falling objects	These regulations reiterate the provisions of Part 3.1 and are unnecessary. The regulations should be removed.

WHS Regulation 55(3) Minimising risk associated with falling objects	<p>This regulation is unnecessary because risks arising from falling objects must be managed in accordance with the general hierarchy of control prescribed by regulation 36.</p> <p>Although regulation 55(3) at face value appears like it is a 'deemed to comply' provision, the means of controlling falling objects can be interpreted as possibly restricted to the matters and examples in this regulation. It is also unclear whether reliance on the general hierarchy of control would be acceptable. Accordingly, it is very confusing for PCBUs to figure out what is/isn't acceptable.</p> <p>The existing <i>Fact Sheet - Falling Objects</i> could stand alone and be sufficient without the need for Division 10. On this basis Division 10 should be removed.</p>
WHS Regulation 58 Audiometric testing	<p>Audiometric testing requirements are not supported. The tests do not guarantee any WHS improvement. Furthermore, it is difficult to understand who has the duty where more than one PCBU is involved and what 'frequently' required to use PPE means.</p>
WHS Regulations Part 4.4 Falls	<p>ISSUE</p> <ul style="list-style-type: none"> The scope of the falls provisions and the subsequent hierarchies of control contained in the Model WHS Regulations could lead to the use of physical fall prevention measures at any height, which is impractical and cause a significant amount of uncertainty over what type of control measures should be used for low risk height issues. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Single story residential construction should be excluded from the falls provisions of the Model WHS Regulations. Alternatively, the threshold for providing physical fall prevention measures should be no less than 3 metres.
WHS Regulation 78(1) Management of risk of fall	<p>ISSUE</p> <p>Regulation 78(1) specifies that if it is not reasonably practicable to eliminate fall risks they must be minimised in accordance with Part 3.1, i.e, by:</p> <ul style="list-style-type: none"> substitution/ isolation/engineering controls , administrative controls PPE <p>But regulation 79 introduces additional specific requirements to minimise risk as a hierarchy of controls, i.e, by :</p> <ul style="list-style-type: none"> A fall prevention device A work positioning system A fall arrest system <p>This combination of hierarchies of control is very confusing. This makes it difficult for PCBUs to be certain of what is required for compliance.</p> <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Regulation 79 should be removed to avoid confusion, i.e. rely on the provisions of Part 3.1 and guidance.
WHS Regulation 85(4) Evidence of licence – duty of PCBU	<p>ISSUE</p> <ul style="list-style-type: none"> This regulation prescribes that PCBUs must keep evidentiary records of licences of workers engaged for 1 year. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> This is unnecessary red tape that should be removed.
WHS Regulations Schedule 3 High risk work licence – description of high risk work	<p>ISSUE</p> <ul style="list-style-type: none"> Schedule 3 describes some of the HRW as 'use of' rather than 'operation of', e.g. use of a forklift; use of a crane and the regulations refers to the carrying out of a class of HRW as the trigger for the licencing requirement.

	<ul style="list-style-type: none"> The language used may be taken to catch anyone making use of the plant, not just the person operating the plant, for example, a builder making use of a hoist to carry out work. Are both the 'builder as a 'user' and the operator required to have a licence? <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Schedule 3 should be modified to make it clear that the operator or erector of the plant – not the user – is the person who must be licenced.
WHS Regulation 142 Notice of demolition work	<p>The requirement to provide 5 day notice prior to demolition work is an unnecessary regulatory burden.</p> <p>The compulsory demolition notification requirements are a duplication of existing requirements to notify building agencies in some jurisdictions and represent an additional unnecessary burden that will require contractors to deal with several separate agencies. The requirement to notify demolition work should be removed.</p>
WHS Regulation 156 De-energised equipment must not be inadvertently reenergised	<p>ISSUE</p> <ul style="list-style-type: none"> This regulation is unrealistic. It will not always be possible for PCBUs to prevent inadvertent re-energisation in an absolute sense. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> It should be subject to 'so far as it is reasonably practicable'.
WHS Regulation 163 Electrical equipment and installations and construction work — additional duties Duty of PCBU	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to comply with AS/NZS 3012 Electrical Installations – construction and demolition sites represents an inappropriate level of prescription for the construction industry. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Specific recommendations for construction should be in guidance material and not mandated in an Australian Standard which is outside the control of SWA Referencing of standards in regulations is not supported.
WHS Regulation 166(2)(b)(ii) Overhead and Underground Electric Lines – Duty of PCBU	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to ensure that control measures implemented are consistent with any requirements of an electricity supply authority is unnecessary and may lead to electricity supply authorities prescribing unwarranted conditions based on a perception that this regulation allows them to impose 'requirements'. This could also lead to inconsistencies between such authorities. For example one authority may require that power lines be de-energised in low risk instances but another authority may not require this. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> If an electricity supply authority has any power conferred upon it in relation to risk control when PCBUs seek to operate near power lines, then there is no need for this regulation. It is unwarranted and potentially problematic The regulation should be removed.
WHS Regulation 223(6) Lasers	<p>ISSUE</p> <ul style="list-style-type: none"> This regulation is inconsistent with AS 2397:1993 – Safe use of lasers in the building and construction industry and with the provisions of the current SWA information sheet Laser classifications and potential hazards, both of which allow Class 3B (Restricted) lasers to be used in the construction industry. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> The regulation should be modified to allow for the use of Class 3B (Restricted) lasers in building and construction industry.
WHS Regulation 225(5) Scaffolds	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to prevent access to an incomplete scaffold is unrealistically onerous as it will not always be possible for a PCBU to prevent access to an

	<p>incomplete scaffold in absolute sense, e.g., if workers disregard the measures implemented by a PCBU to prevent such access.</p> <p>RECOMMENDATION</p> <ul style="list-style-type: none"> This regulation should be subject to the qualifier 'so far as it is reasonably practicable'.
<p>WHS Regulation 237 Records of plant</p>	<p>ISSUE</p> <ul style="list-style-type: none"> The requirement to keep records of commissioning/decommissioning, dismantling and alterations imposes an extensive but unwarranted administrative burden for PCBUs in relation to plant such as prefabricated scaffolds that are constantly commissioned/ decommissioned, dismantled and altered. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> The requirement to keep records of commissioning/decommissioning, dismantling and alterations should be removed.
<p>WHS Regulations 289, 290 Meaning of construction work</p> <p>Meaning of Structure</p>	<p>ISSUE</p> <ul style="list-style-type: none"> The definitions capture a very broad range of tasks that have not traditionally been considered to be construction work. The capture of minor work, such as for example installation of an antenna, adding a sky light to a home; adding extra power points, lights, or computer data cables in a home, has particular impact when determining who requires a general safety induction card, SWMS and what administrative provisions apply for that workplace <p>RECOMENDATION</p> <ul style="list-style-type: none"> A review of the definition of 'construction work' for the purpose of the construction part of the Regulations is necessary.
<p>WHS Regulation 289 Meaning of high risk construction work</p>	<p>ISSUE</p> <ul style="list-style-type: none"> The tasks identified as high risk construction work (HRCW) are defined without regard to whether or not there are risks and inappropriately label all such work as 'high risk'. It is possible for some of these identified tasks to not pose a risk to health & safety. E.g. painting a wall behind live power cables would be classed as HRCW by virtue of being work carried out near energised electrical installations or services, even if a risk assessment has been carried out and concluded that there is no possibility of contacting the live cables by carrying out the work. SA and Qld have made changes to the definition of high risk construction work as including the risk of falling more than 3m rather than 2m. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> If the SWMS provisions are retained this regulation should be modified so that the work is only HRCW if a there is a risk to health and safety from the carrying out of that work, or alternatively, that the requirement for a SWMS and associated duties are only triggered if there is a risk to health and safety from the carrying out of the work. If the SWMS duty is retained, the fall risk threshold in the definition of HRCW should be changed more than 3m.

<p>WHS Regulation 292 Meaning of construction project</p>	<p>ISSUE</p> <ul style="list-style-type: none"> The current value of \$250,000 in the definition of a construction project is unreasonably low, capturing projects that simply do not warrant the higher PC duties and obligations. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Rather than looking to a monetary trigger for the threshold, domestic housing construction work should be completely excluded from the meaning of a construction project. However if the monetary threshold is to be retained it should be increased. It should be noted that the Northern Territory has \$500 000, South Australia has \$450,000 and Victoria \$350,000. <p>ISSUE</p> <p>For the purposes of defining “housing construction work”, it should be noted that the 2013 Code of Practice – Construction Work defines housing construction as construction work relating to the following:</p> <ul style="list-style-type: none"> detached houses attached dwellings, separated from each other by a fire resisting wall, such as terrace, row or town houses villa-homes, strata or company title home units or residential flats boarding and guest houses, hostels or similar with a floor area <300m², and ancillary buildings to the above, such as private garages, gazeboes and carports. <p>Work on multi-storey buildings, i.e. above three habitable storeys is not considered housing construction work and accordingly would be covered.</p>
<p>WHS Regulation 298 Security of the workplace</p>	<p>This regulation should be removed. It is unnecessarily prescriptive and adequate guidance is provided in the <i>Code of Practice – Construction Work</i>.</p>

<p>WHS Regulations 299, 300 Safe Work Method Statements (SWMS)</p>	<p>ISSUE</p> <p>A range of issues have been identified by HIA members and by others in relation to the efficacy of the SWMS obligations. Of particular note is the research carried out by the ANU on behalf of SWA (<i>National Research Centre for OHS Regulation, Australian National University, The Efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia. February 2017 (unpublished report)</i>). The ANU research uncovered an extensive list of mostly negative issues and observations about the use of SWMS, and the report acknowledges that “<i>there are grave concerns about the efficacy of SWMS in the construction industry</i>”.</p> <p>HIA considers that:</p> <ul style="list-style-type: none"> • The SWMS provisions have been in place in most jurisdictions for some time with no demonstrated benefit. • The provisions have proven to be quite problematic and counterproductive and there is evidence that: <ul style="list-style-type: none"> ○ Many PCBU's, including subcontractors ignore the SWMS duties and only produce SWMS when demand by a principal contractor or other customer requiring the paperwork to demonstrate compliance. ○ When SWMS are produced by PCBU's the SWMS are usually poor and non-compliant. ○ They are often copied from a sample SWMS or plagiarised from others with little or no regard to the actual hazards or risks onsite or whether control measures are appropriate for the work. ○ Once produced the SWMS tend to be placed in a folder and ignored and onsite safety practices are not necessarily carried out in accordance with the SWMS. • SWMS have proven to be administratively burdensome for builders, who spend a disproportionate amount of time and effort to ensure the paperwork is produced but reap little or no safety benefit from it. • There is also considerable confusion and many different interpretations about what hazards and risks are required in a SWMS, as evidenced by the many problems identified by stakeholders in relation to the requirements for Federal Safety Commissioner accreditation, which have made SWMS unnecessarily complex.
<p>WHS Regulation 302 Review of SWMS</p>	<p>ISSUE</p> <ul style="list-style-type: none"> • The requirements to review control measures and SWMS can be adequately dealt with in the <i>Construction Work Code of Practice</i>. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> • This regulation is unnecessary and should be removed.

<p>WHS Regulations 209-311 WHS management plans</p>	<p>ISSUE</p> <ul style="list-style-type: none"> • Builders have questioned the requirements to include the following arrangements and are uncertain about what to include: <ul style="list-style-type: none"> • arrangements for cooperation and coordination; • arrangements to assess, monitor, and review SWMS • WHS management plans also pose administrative problems for principal contractors, particularly in relation to making sure all workers are aware of the contents of the plan and that it is kept up to date in a constantly changing environment, which is difficult to achieve in practice. Where this has been attempted it has been limited to placing a sign onsite with the following information: <ul style="list-style-type: none"> • contact details of the PC and site supervisor • arrangements for managing incidents • site safety rules <p>RECOMMENDATION</p> <ul style="list-style-type: none"> • Limiting the plan to this information is what seems to work in practice. • The WHS management plan duty poses an unnecessary administrative burden and should be removed and replaced by guidance. Alternatively it should be simplified or limited to include only the matters listed above.
<p>WHS Regulations 314 - 315 Further health and safety duties</p>	<p>ISSUE</p> <ul style="list-style-type: none"> • The requirement for the Principal Contractor (PC) to put in place arrangements for ensuring compliance with duties is unnecessarily prescriptive, confusing and counterproductive. It is not clear what arrangement would be acceptable, and what would it matter, as long as compliance is achieved? • The requirement for PCs to manage the risks stated in regulation 315 is unnecessary given the general requirements of part 3.1 to manage all risks and can be adequately addressed by guidance. • Of more concern is that this regulation can potentially give subcontractors the wrong message that the PC is the sole party responsible for ensuring compliance. This can be counterproductive and could significantly lead to poor safety by subcontractors on a construction site. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> • It is recommended that these regulations be removed.
<p>WHS Regulation 317 Duty to ensure worker has been trained (CIT training)</p>	<p>ISSUE</p> <ul style="list-style-type: none"> • This requirement is unjustifiably onerous. It will not always be possible for a domestic house builder to make absolutely sure that untrained workers do not carry out construction work. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> • It should be subject to the qualifier 'so far as it is reasonably practicable'.

APPENDIX B - ISSUES WITH THE MODEL WHS CODES OF PRACTICE

WHS Codes of Practice	<p>ISSUE</p> <ul style="list-style-type: none"> Existing codes of practice should be reviewed with a view to simplifying the codes and developing supportive guidance material. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> If any codes of practice are considered necessary these should be industry specific and should contain 'deem to comply provisions' and options for PCBU's to consider in order to help them to comply with WHS laws, rather than be used by regulators as a defacto or quasi regulation to impose a further layers of obligation and mandatory requirements. A code of practice should not make recommendations for keeping records or paperwork that is not required by the WHS laws. Technical standards, such as Australian Standards, should not form part of a code of practice. Where such standards are included in a code, the standards should be described as 'optional information that may be considered by duty holders.
WHS Codes of Practice Jurisdictional flexibility	<p>ISSUE</p> <ul style="list-style-type: none"> The current model provisions are too restrictive on the relevant state government's capacity to introduce specific codes of practice and to review and if necessary revoke a model code of practice that is not working for their jurisdiction. Some of the model codes of practice that have been approved through the current process have been flawed and can be damaging for an individual state or territory (for instance the Code of Practice for the Prevention of Falls in Housing). <p>RECOMMENDATION</p> <ul style="list-style-type: none"> Regulators should have the power to develop codes specific to their jurisdiction and to vary, revoke or substitute a code of practice without reference to the Safe Work Australia processes.
WHS Codes of Practice Falls Codes	<p>ISSUE</p> <ul style="list-style-type: none"> The fact that the general falls code also applies to housing causes confusion that may leads to a perception by some that the WHS codes are unrealistic and should be ignored. <p>RECOMMENDATION</p> <ul style="list-style-type: none"> HIA recommends that application of the two codes be clarified, for example, by stating in the scope of the general falls code that: <p><i>This Code is not specifically tailored to housing construction work. The Code of Practice, Managing the risk of Falls in Housing Construction should be used in the first instance for such work.</i></p>