

VACC Submission 2018 Review of the Model WHS Laws

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Contents

About VACC	4
Terms of Reference	5
Background	5
Scope of the review	5
Discussion Paper Questions and Answers	6
Legislative Framework	6
The model WHS Laws	6
Scope and Application	7
Duty of PCBUs	9
Duty of Officers	11
Duty of Workers	11
Duty of other persons at the workplace	12
Principles applying to duties	12
Consultation, Representation and Participation	12
Consultation with other PCBUs	12
Consultation with workers	13
Issue Resolution	14
Discriminatory, coercive and misleading conduct	14
Workplace entry by WHS entry permit holders	15
Compliance and Enforcement	15
Regulator functions	15
Inspectors' powers and functions	16
Internal and external review and decisions	17
Exemptions	17
Cross-jurisdictional co-operation	17
Incident notification	17
National Compliance and Enforcement Policy	18
Prosecutions and Legal Proceedings	18
Offences and penalties	18
Legal Proceedings	19
Sentencing	19
Enforceable undertakings	20
Insurance against fines and penalties	20

About VACC

Since 1918, the Victorian Automobile Chamber of Commerce (VACC) has represented the interest of small and medium businesses in the automotive industry. Currently, its 5,500 members in Victoria and Tasmania employ approximately 50,000 people and provide key services in the repair, services and retail sectors of the motor industry. VACC member businesses also reside in other states in Australia that have implemented the model Work Health and Safety (WHS) legislation.

VACC represents some 29 different sectors in the industry. Some of the various divisions in the retail motor industry are mechanical repair, body repair (including spray painting), automotive dealers, used car traders, auto electrical, engine re-conditioners, tyre dealers, radiator services, farm machinery, motorcycle dealers, service stations and convenience stores and towing operators.

VACC provides comprehensive advice and assistance to help members run their businesses more effectively. VACC, on behalf of its members, tenders this submission in response to the 2018 Review of the Model WHS Laws.

The views expressed in this submission have been developed through a number of avenues:

- VACC's Occupational Health, Safety and Environment Department which have extensive experience in the practical application of Work Health and Safety legislation, Environmental Protection legislation, Dangerous Goods legislation, and its interaction with industrial instruments and other legislative provisions regulating the employment relationship in the retail motor industry;
- Views of members expressed through day-to-day contact who use VACC's advice, training and consultation services; and
- Discussions with other key stakeholders.

Terms of Reference

Background

1. In February 2008, the then Workplace Relations Ministers Council agreed that model legislation was the most effective way to achieve harmonisation of Work Health and Safety (WHS) laws.
2. Safe Work Australia (SWA) was established by the Safe Work Australia Act 2008 with primary responsibility to lead the development of policy to improve WHS and workers' compensation arrangements across Australia. One of SWA's statutory functions is to prepare, and if necessary revise, model WHS laws for approval by ministers with responsibility for WHS (WHS ministers), and for adoption as laws of the Commonwealth, each of the States and each of the Territories.
3. The model laws comprise the model WHS Act, model WHS Regulations and model Codes of Practice. These elements are supported by the National compliance and enforcement policy which sets out principles of how WHS regulators monitor and enforce compliance with WHS laws.
4. Seven of the nine jurisdictions have implemented the model WHS laws. The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the model WHS laws on 1 January 2012; South Australia and Tasmania implemented the laws on 1 January 2013. Western Australia and Victoria have not implemented the model WHS laws in their jurisdictions.

Scope of the review

5. As agreed by WHS ministers, SWA is asked to examine and report on the content and operation of the model WHS laws.
6. The review will be evidenced-based and propose actions that may be taken by WHS ministers to improve the model WHS laws, or identify areas of the model WHS laws that require further assessment and analysis following the review.
7. In undertaking the review, SWA will have regard to the object of the model WHS Act (section 3).
8. The review will 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.
9. The review will be finalised by the end of 2018.
10. SWA will provide a written report for the consideration of WHS ministers.

Discussion Paper Questions and Answers

The questions below have been taken from the discussion paper '2018 Review of the model WHS Laws' by Marie Boland, February 2018. The answers to the questions are the responses from the Victorian Automobile Chamber of Commerce (VACC).

Legislative Framework

The model WHS Laws

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?

VACC believes the three-tiered approach has been a consistent regulatory structure for health and safety legislation across Australia. This is also evident with the states that have not endorsed the model Work Health and Safety Laws. VACC is of the opinion that the three-tiered laws structure and approach allows businesses the flexibility in application required, while not being too prescriptive or procedural. This is exceptionally important for small and medium sized businesses.

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

The WHS Regulations support the model WHS Act by stipulating the hazard focused requirements that follow the duties and basic concept of risk management outlined in the WHS Act. The biggest issue with the WHS Regulations relates to the volume of regulations that businesses need to follow and understand. The majority of VACC Members are small to medium sized businesses. These members would not necessarily access the WHS Act or Regulations if they have a health and safety concern. However, it is important to highlight that when a Health and Safety Inspector is issuing an improvement or prohibition notice, the notice stipulates all the legislation they have not complied with. It has been a well-documented fact that small to medium sized business owners do not have the expertise, time or resources to interpret health and safety legislation.

It is for this reason that VACC recommends that the government minimises the amount of regulation and simplify regulation into concepts. Furthermore, we espouse that simple industry specific guidance should always be developed in collaboration with industry. This allows industry experts to provide input and appropriate knowledge to ensure that the guidance is clear and practical.

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

The VACC perceives the WHS Codes as a summary of the WHS Act duties and relevant WHS Regulations for the WHS Code title. The WHS Codes were produced with a one size fits all approach. They are lengthy and complex to read for small to medium sized businesses. Codes need to be practical and allow for workplaces to be able to implement the outcomes into their individual businesses workplaces.

Significant feedback has been sought from VACC members and where it was ascertained that a majority of VACC members do not utilise Codes. VACC members stated that they do not have the time to read multiple documents that are long and appear to have very little applicability with their business. VACC Members would like practical solutions to their specific workplace issues and would prefer specific practical guidance.

It is recommended that government provide practical guidance based on simple health and safety solutions and show realistic diagrams that businesses can see and apply. Such guidance and solutions should always be developed in collaboration with industry associations and educational awareness programs.

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 WHS Act and Regulations requirements are somewhat effective and achieve adequate outcomes, however the codes are not utilised by small and medium sized businesses, as mentioned in question 3 response. The WHS regulators will always place more emphasis on the Act and Regulations as it is the legislation that is used for enforcement and litigation. VACC urges government to shift its focus and look at industry specific solutions that will drive a specific safety outcome.

Scope and Application

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

VACC opinion is that the model WHS laws outlines the duty to manage psychological health in the workplace. However, there is some perception that the WHS laws are not as effective in supporting the management of risks to psychological health. Any psychological risk and injury, whether work related or personal are complex to deal with. The WHS laws may outline the duty, but the laws, government, health and safety authorities and businesses are still in the early stages of understanding what prevention is needed. Furthermore, a common mistake seen through guidance is that psychological hazards and risk are treated like a physical hazard.

It is recommended that further regulation is not needed, and therefore urge the government to not implement further regulations in this area. The health and safety authorities are struggling to enforce psychological hazards and are often on the reactive rather than preventative. VACC urges government to conduct research and consult with industry into work-related psychological preventions and controls. From this, businesses and workers need further awareness programs that will be realistic to implement and achieve a desired outcome.

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

The model WHS laws casts a wide net on duty holders and onto those that could be affected by duty holder's actions. VACC has found that there is some overlapping with other legislation and it can cause confusion and additional burden on businesses. The VACC members in the automotive industry find crossover with the following legislation:

- Environmental Protection law
- Road Safety Chain of Responsibility Law
- Road Authority Licensing requirements
- Building Regulations- Essential Safety Measures
- Water Authorities
- Fire Authorities

Health and safety is often the cornerstone of the above listed laws and it is there to protect the community, environment, road users, customers or broader public from the business impacts. VACC members are often concerned that this overlapping and overregulation, places an unnecessary strain on businesses. This is especially evident when more than one of the regulatory authorities conduct enforcement visits on similar matters and often in similar timeframes. An example of crossover legislation and enforcement is evident with regards to bulk dangerous goods. VACC members were visited by EPA, the local fire authorities, the WHS Authority and the local council requirements for Essential Safety Measures. In one VACC member case, the local council permit requirements for dangerous goods were out of date and out of sync with the current Dangerous Goods Regulations.

VACC recommends government commit to cross jurisdictional strategising and planning. Furthermore, where there is crossover of legislation, the government bodies should delineate what is to be enforced and who will be enforcing. This would remove confusion for businesses and not waste business time on multiple visits.

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

No comment. VACC Members are not affected by extraterritorial operation of the WHS laws.

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

VACC members in the automotive industry interact with general public in and around the business, as well as when test driving vehicles on the road. The automotive industry has always considered the general public's health and safety previous to the introduction of the model WHS laws. In the automotive industry, the traffic management risk between vehicle movement and the general public poses the same risk on workers.

Most often when workplace vehicles are in a public road accident with public or another workplace vehicle, the Police are often the enforcement body with the WHS authorities rarely involved in road incidents and accidents. WHS authorities only get involved in public safety where there is a fixed workplace and/or the plant is legislated, for example, amusement rides.

The discussion paper references the example of the issue of quad bike safety debate in the context of both WHS and consumer laws. This statement is incorrect because the only area the WHS authorities are regulating is if the quad bike is used in a workplace setting with workers. The VACC members who sell and service quadbikes are encountering farmers who have a farm as a workplace with workers, that are receiving notices from WorkSafe. If the farm is a hobby farm or the quadbike is used for recreational activities, the WHS laws have no jurisdiction to enforce.

VACC recommends that a guideline should be developed to clarify where the WHS legislation and other jurisdictions are responsible for enforcement.

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

The automotive industry is seeing rapid change in technology and similar changes are occurring in other industries. With the changes in technology there will be changes in the work environment and the work arrangements. The newer technology is currently allowing a person to start a business easily and not need to depend on having as many workers, or no workers, and work in remote locations. The current model WHS laws are broad enough to respond to the smaller workplace changes that could bring new hazards, however, VACC is of the view that the WHS laws will not adapt quickly enough to allow for any changes in work arrangements.

VACC opinion is that the WHS regulators will not be prepared with changes in technology and work environment changes. It could be said that the changes in technology may drive safer work environments, for example, there are predictions that with driverless cars may drive down the road toll as well as, result in lower car ownership. Driverless vehicles may be managed by several companies and the need for service and repair industry may diminish as vehicles will be easier to repair and replace. Or, repairing of vehicles may get that simple that a car owner will be able to attach and dis-attach the necessary parts, therefore, the automotive workplace may diminish. Furthermore, WHS regulators may find that there will not be as many high risk and fixed location workplaces to visit.

The only way government could possibly adapt to change is by consulting and collaborating with the industry stakeholders.

Duty of PCBUs

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?

VACC is of the view that the definition of PCBU for a simple business with a single owner hasn't had a major impact and remains sufficient. The issue seen with the definition of PCBU is regarding workplaces with multiple duty holders present or that have layers of PCBUs existing in a contract. In the drafting of the model WHS laws, the definition of PCBU was intended to extend outside of the

traditional definition of 'Employer', however, the PCBU definition is not responsive to change in the changes to work relationships.

The VACC has encountered franchise relationships that have multiple PCBUs, for example, a petrol station site had a PCBU who ran the petrol station, a PCBU who was the franchiser, a PCBU who owned the building, a PCBU who owned the petroleum infrastructure and a PCBU who conducted repairs onsite. In this situation the WHS authority could only issue a notice on the site occupier, however, the matter needed to go through internal review to change the notice as the building and infrastructure is controlled by other PCBUs.

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

As highlighted in the answer in question 10, the VACC has not encountered any difficulties when the site is a single site PCBU. The issues arise with the PCBU's primary duty of care when there are concurrent duty holders. The issue for the PCBUs and the WHS authorities will be determining who has control and who is deemed the PCBU in certain circumstances.

VACC recommends that a definition for control is needed and that there is clarification of control so PCBUs and WHS authorities have an understanding. If it is documented in the WHS Act or position paper, it should be developed in a way that segregates the primary duties for concurrent PCBUs under certain factors and work arrangements.

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

The 'reasonably practicable' term has existed in health and safety legislation across Australia prior to the model WHS Laws. Any of the Australian health and safety laws that use the term of 'reasonably practicable' usually has the main elements of:

- a) the likelihood of the hazard or the risk concerned occurring; and
- b) the degree of harm that might result from the hazard or the risk; and
- c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

VACC is of the opinion that small business owners struggle to understand the terms elements. Based on VACC member feedback, most concerns expressed is based on the elements of 'state of knowledge'. Small and medium sized business owners in the automotive industry struggle to open an email, but there is a legal expectation that they should know everything in the way of changes to the way a hazard should be controlled. VACC has been involved with WHS authority investigations and the line that has been said repeatedly by the authorities is "ignorance is no defence", however, a lot of small businesses are not aware of what they should know as they are struggling to keep their business running, and don't have the time or know-how to research the answers. During VACC

member queries a member often say, “just tell me what to do and I will do it”, yet the courts insist that businesses have the hindsight, and hold PCBU accountable.

In addition, what confuses the VACC and PCBUs further is that the term has always been open to interpretation in courts. Lawyers have been debating the interpretation of ‘reasonably practicable’ and it has led to inconsistent decisions made in the courts which has resulted in PCBU duties being made unclear.

VACC recommends that the WHS laws and authorities have consideration for small and medium sized businesses regarding ‘state of knowledge’, and have some understanding of ‘reasonably practicable’ application. Furthermore, a review should take place on the various interpretations of ‘reasonably practicable’, and the objective of the review is to seek clarification for application in courts and for PCBU.

Duty of Officers

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

The VACC is in support of the officer’s duty of care under the model WHS Act. The VACC has not received any negative feedback from the officer’s duty or care. VACC is of the opinion that the due diligence definition and list items in section 27, paragraph 5 a) to f) outlines for an Officer a reasonable structure to demonstrate compliance.

Duty of Workers

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?

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. VACC supports the current model WHS law worker definition and would not expect it to change.

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

The worker’s duty of care under the model WHS Act would not require amending, however, there will be a need for education of responsibilities in the changing of work environments, especially with working from home arrangements.

Duty of other persons at the workplace

Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?

VACC has no comments relating to the 'other person at a workplace' duty of care under the model WHS Act.

Principles applying to duties

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

The principles that apply to health and safety duties under sections 13 -16 stipulates the non-transferrable duties and a person may have more than one duty, however, in reality it doesn't occur as per the principles. VACC is of the opinion that PCBUs, WHS authorities and the courts do acknowledge some transferable duties in the workplace. Examples where this occurs every day is when a person or PCBU engages an independent contractor to carry out a job that the person or PCBU is not skilled or licensed to carry out.

VACC also suggests that the principles that apply the duties is lacking a control test, as there are circumstances were a contractor takes control of an area while conducting the work.

VACC puts forward that a control test is needed in the section 13 -16 of WHS Act. Furthermore, Safe Work Australia should develop guidance to provide persons and PCBUs on the methods of safe engagement of expert independent contractors.

Consultation, Representation and Participation

Consultation with other PCBUs

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?

Over the past years, VACC members who are mainly small and medium sized businesses have been heavily impacted by larger PCBUs who are imposing overwhelming WHS requirements through tenders and contracts. In many of the tenders or contracts VACC assisted members with, the VACC Members are only supplying plant to a PCBU such as a local council, or conducting the service on their own sites, therefore, not on the customers site of control.

VACC strongly believes that the WHS consultation duties has driven this issue for small and medium sized businesses. The larger PCBUs have primarily focused on paperwork and it has been advised my contract managers in the larger PCBUs that they don't review or audit the documents provided.

Below are examples of the WHS requirements that larger PCBUs are imposing on automotive small and medium sized businesses:

- Asking for Occupational Health and Safety Management Systems.
- Having the VACC member pay a subscription to another company for the contracts contractor management.
- Supply full WHS Manuals, policy and procedures, even if not relevant to the job.
- Provide detailed Safe Work Method Statements for service work to a vehicle.
- Provide proof of competency and licensing.
- Outline full incident and safety record history.
- Conduct a site induction even when not conducting work onsite.
- Needing to show evidence of membership to associations and accreditations.
- Completing contractor work permit systems.

Some VACC members have refused work with larger companies as the cost and effort to comply is burdensome, while other members have included an addition charge for the administration of paperwork for the job. The cost of doing business in a heavily regulated country such as Australia is one of the main reasons Australia has lost its manufacturing capability.

VACC has raised complaints with the large PCBUs directly, with WHS authorities and some associations. The large PCBU will not change their stance as it was advised by their legal teams and upper management. The WHS authorities have nothing to gain in telling a large PCBU to step down and some of the associations cannot influence their members.

VACC recommends that the government reviews the impacts of WHS on small and medium sized businesses. It is possible to have effective work health and safety without imposing overwhelming paperwork and systems on small and medium sized business. Government and large PCBUs cannot expect small and medium sized businesses to survive and have over the top WHS paperwork systems that don't result in improve safety outcomes.

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?

The VACC is of the view that the role of the consultation, representation and participation provisions in the model WHS law are fair and effective in consulting with workers in relation to work health and safety.

The majority of VACC members are small and medium sized businesses, and there is a very low percentage that would have proper elected Health and Safety Representatives (HSR). VACC has not encountered any issues with the low HSR numbers as there are other mechanisms for consultation.

The general small member is usually a one site workshop business, and consultation is simply conducted at the end of the week over an employer provided lunch. For some of the medium sized businesses, the manager conducts a tool box talk at the start of the week when the jobs are being handed out. Workers in the industry are satisfied with this style of consultation. The various mechanisms in the model WHS laws allows for basic consultation, or scaled up with designated work groups, HSRs and committees.

VACC recommends the consultation, representation and participation provisions remain the same as it allows flexibility based on the size or complexity of business.

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

VACC members workers are mostly a standard fixed workplace location and at standard working hours. There are no other classes of workers that would not receive consultation with the PCBU because of their work arrangements.

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 noted above in the answer in 19, VACC membership have low HSR numbers and of the members that have HSRs, their functions and powers have not been affected. There is no changing nature of work currently in the fixed workplace locations that would affect HSR functions and powers.

Issue Resolution

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

The issue resolution provisions in the model WHS laws are mostly the same as previous laws. VACC has not received feedback or complaints regarding the effectiveness of the issue resolution procedures.

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 a HSR or member of a HSC, or who raise WHS issues in their workplace?

VACC is of the opinion that the model WHS Act provisions for discriminatory, coercive and misleading conduct in protecting workers has been effective. The seriousness of breaching this provision is known to the industry due to the large penalties. Furthermore, this provision of WHS law is an overlapping duty as workers are covered under the Discrimination laws as well.

Workplace 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?

The VACC is aware of issues in industry where WHS Entry Permits have been utilised for industrial relation purposes. The WHS entry permit provisions were drafted to align with Fair Work Act permitting, however, in some workplaces, the two entry permit jurisdictions have caused some angst for PCBUs.

VACC members have been fortunate to resolve any confusion when WHS entry permits were issued and there hasn't been any unreasonable delaying, hindering or obstructing of any person or disruption of work at VACC member workplaces yet. However, VACC recommends consistent application and enforcement across WHS jurisdictions of entry permit requirements as each state WHS authority deals with it in their own way.

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?

The model WHS Laws, section 152 Function of Regulator, sets out a well balance list that would be expected of a modern regulator. VACC has strong views that a WHS regulator/authority is there to oversee the WHS legislation and to ensure duty holders know what to do through education and enforce the WHS laws. A WHS regulator cannot solely enforce because to enforce the regulator needs to explain why there are non-conformances and advise what is expected. The VACC has collaborated with regulators in the past on focus areas and it was a successful enforcement program. What made the programs successful was:

1. The regulator consulted and collaborated with the specific industry stakeholders, therefore employer associations and unions.
2. Developed the strategy, guidance and focus points of the visits.
3. Distributed and communicated the strategy, guidance and focus points collaboratively with the stakeholders out to industry.
4. Industry was given a grace period to comply.
5. Once the grace period was over, the regulator enforced and reference the guidance and solutions during enforcement.
6. After the visits/enforcement were concluded, the regulator and industry stakeholders evaluated the program to identify key outcomes and issues.

WorkSafe Victoria conducted the above program format with VACC when focusing on vehicle body repair industry, service stations, forklift/traffic management and tyre fitting industry.

VACC supports the current functions of the regulator. The functions are balanced and achieve effective results.

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?

VACC is of the opinion that the model WHS Act provides sufficient and appropriate functions and powers to an inspector. The issues VACC has with inspectors is not the functions set out under the WHS Act, the issues are based on the way the state regulator direct, train and resource inspectors.

When VACC assists VACC members with inspector notices or enforcement, there is a lack of consistency in enforcement, inspectors lack industry knowledge and inspectors are being stretched thin across the various strategy areas. Below are examples of the issues reported by VACC members to the VACC:

Consistency Issues

A few WorkSafe Inspectors were carrying out audits across a town and industrial business street which has a lot of automotive businesses. A VACC member received improvement notices on plant and equipment issues. When the VACC members spoke with a friend who owned an automotive business further down the road, the friend advised that a different WorkSafe Inspector visited as well and he didn't receive a notice. The VACC member reported that his friend had the same plant and equipment breaches that he had and didn't receive a notice.

Inspectors Lacking Industry Knowledge

The VACC Occupational Health, Safety and Environment (OHSE) Unit conduct free Health and Safety consultancy audits for its members. A VACC member contacted the unit and advised that he received several notices which he needs advice and assistance on and wanted an audit to check that everything else is okay before WorkSafe revisit. This type of request is very common from VACC members. When the VACC OHSE Professional visited the member, and reviewed the site and WorkSafe entry report and notices, it was apparent from the report that the WorkSafe Inspector was conducting a manual handling focused program visit. The issue was that of the notices, there were no manual handling related notices, however the VACC OHSE Professional identified several manual handling issues. This is a very common occurrence with WorkSafe Inspectors as they lack knowledge in the focus points for that industry.

Inspectors being stretched

VACC has been involved and consulted in the strategy and operational programming in various regulators. VACC has observed times when WorkSafe Inspectors were expected to overlay multiple programs and modules into workplace visits. Furthermore, the resourcing and setting of KPIs on visits doesn't allow an inspector quality time to properly focus on the more important elements of the visit.

VACC recommends that the model WHS laws are not modified for inspectors, however, WHS authorities need to analyse the notices and correct inconsistency. Also, the authorities need to collaborate with the specific industry stakeholders for shared learnings and expectations. Furthermore, the authorities need to be smart with the strategy programs and don't over commit for the sake of achieving quantities of visits, instead of quality of visits.

Internal and external review and decisions

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

The VACC has experience with its members in dealing with the internal review process under the WHS laws and across various state authorities. The VACC and its members are satisfied with the process as it is fair, simple and at no cost.

Exemptions

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

VACC has no comments regarding this question.

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?

VACC has no comments regarding this question.

Incident notification

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

The incident notification provisions of the model WHS laws are similar to past state legislation incident notification provisions. VACC Members have experienced very little issues with the incident notification provisions.

The only concerns relating to incident notification is regarding the preservation of the site. Some VACC Members have not had a response from the authority after reporting an incident and preserving the scene. Preserving an incident scene in a small and medium sized business can place a strain on a business due to lack of space, as well as, the loss of business if the plant or equipment is not put back into operation. Often VACC instructs it members to take photos, drawings, conduct an extensive incident report and preserve individual items where possible. Then VACC advise to contact the

authority to ask for an update as to whether a WorkSafe Inspector will be visiting and whether the incident scene can be re-established.

VACC recommends that the model WHS laws incident reporting provisions implements a timeframe for the WHS authority to report back to PCBU.

National Compliance and Enforcement Policy

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?

VACC opinion is that there is consistency in the application of the National Compliance and Enforcement Policy. VACC is in support of the policy and would encourage all state WHS regulators to revisit and evaluate the policy. The evaluation should be conducted in consultation and collaboration with industry stakeholders to ensure the WHS regulator are following the policies intent.

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?

Based on VACC member feedback, the exercise of inspector's powers since the introduction of the model WHS laws have not changed within the context of applying the graduated compliance and enforcement principles. A lot of the states had similar approaches to the model WHS laws and the only slight changes noticed by VACC members was regarding the formatting and paperwork of entry reports and notices.

On average, the majority of VACC members have experienced a random visit, program based visit and response visits. Most of compliance tools issued on VACC members have been guidance, voluntary compliance (i.e. issue rectified in the presence of an inspector) and improvement notices. The VACC supports the current compliance tools that are being issued to gain compliance.

Prosecutions and Legal Proceedings

Offences and penalties

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 penalties in the model WHS Act influences a lot of businesses and PCBU to improve their health and safety practices. In VACC experience, when VACC members are briefed on the maximum

categories penalties, coupled with the fact that WHS law is criminal law, businesses, PCBU and Officers are surprised and realise the impact. VACC members are mostly small and medium sized businesses and even a minor penalty could force a business to close.

A concern VACC does have, when examining prosecutions and the reporting out of those prosecutions via the WHS authorities marketing department, the prosecutions are focused more on discipline. As well as, the prosecutors appear to only try to find something that can be prosecuted on, rather than prosecuting on the true root cause of the incident, and what should have realistically been done to prevent the incident.

Recently, a VACC member was prosecuted due to a vehicle hoist failure and a vehicle fell and crushed a worker. The worker was seriously injured. The VACC member was prosecuted on not enforcing technicians to conduct a daily pre-operational check of the hoist. The pre-operational check of the hoist, first thing in the morning, would not have identified the issue of an automatic lock mechanism being unlocked as the check is a basic visual and operational check. The true cause of the issue was that a technician had overridden the safety feature which the PCBU would not and could not be aware. After the penalty and legal fees, that small business owner had to pay \$70,000. Today that small business owner is self-employed and will not employ another worker again. As for the learning outcomes from that prosecution, VACC promoted the true root cause and are conducting audits and checks on its members regarding hoist compliance.

VACC recommends that the WHS authorities need to review how they pursue prosecutions from a prevention point of view and should focus on how best to promote learnings. If the VACC and other associations did not promote cases and learnings, most of small and medium businesses would not know and respond to the incidents and true outcomes.

Legal Proceedings

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

VACC supports the current processes and procedures relating to legal proceedings for offence under the model WHS laws. The model WHS Act duty of care offences are criminal offences and therefore the burden of proof rest with the prosecution as it does with other criminal law.

VACC would not recommend any change to the proceedings for an offence against the model WHS Act. Also, the proceedings should only be brought by a WHS regulator or an acting inspector with the authorisation of the regulator as well as the Director of Public of Prosecutions (DPP).

Sentencing

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

VACC is of the view that the development of a nationally consistent sentencing guideline for work health and safety offenders would be a waste of time and resource. VACC believe it will not be

endorsed by all Australian states and territories. The reason it will not be endorsed and used is that there are states that have not endorsed the model WHS laws and each state and territories generally deal with it in the general sentencing laws or criminal procedure legislation. Furthermore, there will not be any additional benefits from the change.

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?

The VACC supports enforceable undertakings being used as a compliance tool. If the enforceable undertakings are used well, it could transform a negative event into a positive outcome and benefit for the industry, workers and community. The other compliance tools and penalties cannot achieve the same broader benefits that could be achieved with enforceable undertakings.

Currently, the regulators across Australia are not consistent regarding the categories and circumstances when an enforceable undertaking could be utilised. Furthermore, VACC believes that more enforceable undertakings should be enacted.

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?

VACC is aware of the availability of insurance products which allege the coverage of the cost of work health and safety penalties. Significant feedback has been sought by VACC from its members, and has found insurance companies approach HR consultants, WHS consultants and companies that sell WHS products to broker/sell the insurance with the service they are going to deliver. Below are real examples of VACC members that were sold such insurance with the service:

Example 1- A small country mechanical business was visited by an EmploySure sales representative. The sales representative with no health and safety qualification, glances briefly over the workshop from the customer waiting room and stated that the business does not comply, and could be prosecuted. The VACC member's husband had passed away and she was trying to run the business to the best of her abilities with a workshop manager. With the threat of prosecution and not knowing any better, she signed for the service and insurance at the cost of \$15,000 for a 3-year contract. The sales representative did not explain what they were going to do to improve the business. The VACC member after receiving some paperwork was concerned as the paperwork reflected the QBE insurance policy. The member contacted the VACC, advised of the situation and sent in the paperwork. A VACC lawyer and Health and Safety Manager advised against it and she cancelled the service, thankfully there was a cooling off period. The VACC Health and Safety Manager offered a free health and safety consultancy audit and service to assist the business. The Health and Safety Manager found the business to be very good with compliance and provided minor advice to improve the business.

Click on the link to EmploySure promotion- <https://employsure.com.au/what-we-offer/insurance/>

Example 2- A husband, wife and son locksmith business in a country location was also a member of another association who affiliated with a WHS online service called MONIT. The locksmith business wanted to ensure the business was safe for their family and decided to take up the service. The business was charged \$5,500 plus an ongoing month subscription charge. The business was only provided one A4 sized Microsoft Word document with four dot pointed health and safety items. When contacting MONIT, they were advised that the WHS consultant cannot be contacted and owes other people money too. The member immediately cancelled the monthly subscription and MONIT did not refund the money or provide any Product Disclosure Statement on the insurance that was covered.

Click on the link to MONIT promotion- <http://www.monit.com.au/pages/what-is---why-monit.php>

Example 3- A VACC member was recently prosecuted due to a serious incident that resulted in a technician being seriously injured. The VACC member advised VACC that he has insurance and it will cover the penalties and court fees. The insurance he had, which he did not disclose which insurance he was with, did not pay the penalty or court costs.

VACC is concerned and disagrees with the selling of insurance to cover criminal proceedings as it undermines the court's sentencing powers and diminishes the deterrent effect of the WHS law penalties.

Over the past years the VACC has seen the uprise of such insurances but also has noted the increase in WHS service providers. VACC members have been approached by aggressive WHS service providers that threaten prosecution and jail terms because the small and medium sized businesses didn't have elaborate WHS policies and systems. When VACC members contact the VACC for advice on such services and the VACC qualified WHS professionals analyse the service or service that was provided, there have been a cascade of issues such as:

- Misleading the business to think that the system was mandatory under WHS laws
- Poor advice
- Incorrect references to legislation
- Very poor interpretation of the WHS laws
- Recommendations that lead to exorbitant cost on the business to implement and was not required
- Creating more administration work and red tape for the business than what was necessary
- Lacking important industry specific requirements
- The WHS service provider failed to identify important safety issues

The costs of such services have put small and medium sized business out of pocket on average of up to \$20,000 per year, with very little safety improvement.

VACC recommends and urges the model WHS laws to implement a specific duty of care on WHS service providers and WHS professionals. The poor service or incorrect advice from a WHS service provider or professional could lead to a fatality or serious incident. A PCBU or officer of a company engages the service and assistance of a WHS company or person to respond to their duty of care obligations. With a duty and liability risk on the WHS service provider or professional could diminish the illegitimate service providers and people from the industry.

End