



Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**

Modernising work health and safety laws in Western Australia

Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia

Ministerial Advisory Panel
Chairperson: Stephanie Mayman

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Foreword by the Chair

Dear Minister Johnston

I have great pleasure in reporting that your initiative to create an advisory panel on work health and safety reform has now resulted in the completion of the first stage of deliberations by the panel, and its recommendations are provided to you today.

As you requested, the Ministerial Advisory Panel (MAP) was formed to advise on the development of a single harmonised and amalgamated Work Health and Safety Act (WHS Act). The amalgamated WHS Act will cover general industry and the resources sector in Western Australia (WA), and be aligned with the legislation in other Australian jurisdictions.

It is a privilege to be a part of the modernisation of Western Australia's legislation on work health and safety, and I would like to thank you for allowing me the opportunity to chair the MAP in their consideration of this important process.

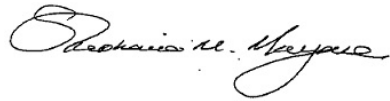
The recommendations provided to you reflect the MAP's decisions in consideration of Western Australian harmonisation with the Model Bill. The majority of these recommendations were agreed by consensus. On the few occasions where consensus was not possible the decision to recommend change was made by majority vote, and the Panel members' views are reflected in the recommendations.

I would like to acknowledge the hard work and commitment that has been given to this process by all the members of your Panel, including those representatives who occasionally acted as proxy on behalf of their members. They worked tirelessly and in good faith, with the intent to provide the best outcome possible for Western Australia. Their contributions have been greatly appreciated.

I would also like to acknowledge the work of the Department of Mines, Industry Regulation and Safety, in particular their representatives on the Panel and also their resourcing provided to support the Panel process.

I have pleasure in enclosing those members' responses received following the MAP's review of their recommendations.

Kind regards

A handwritten signature in black ink, appearing to read "Stephanie M. Mayman". The signature is fluid and cursive, with a large initial 'S' and a long, sweeping tail.

Stephanie Mayman

16 April 2018

Background – a brief history of harmonisation

For both humanitarian and economic reasons, no society can accept with complacency that such levels of death, injury, disease and waste must be regarded as the inevitable price of meeting its needs for goods and services.

Safety and Health at Work – Report of the Committee 1970-72 (the Robens Report)

Chair – Lord Robens

Occupational health and safety laws based on the model outlined in the Robens Report were introduced across Australia in the 1980s. While born from the same principles, each Australian jurisdiction implemented laws that reflected the political landscape at the time. They were enacted derived from legacy health and safety laws based predominantly on the factory and construction industries. This approach inevitably resulted in significant variations between jurisdictions. For employers that operated across state and territory borders each variation imposed additional costs to track and comply with diverse requirements.

Early attempts to align health and safety requirements in Australia were conducted under the auspices of the National Occupational Health and Safety Commission (NOHSC). This included the development of national standards and codes of practice for priority areas such as the construction industry, asbestos removal and the licensing of high risk work. While this approach had some success in achieving greater consistency across state and territory borders, it was not uniformly adopted in each jurisdiction.

On 3 July 2008, the Council of Australian Governments (COAG) formally committed to harmonising the occupational safety and health laws in Australia by signing the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the OHS IGA). The primary goal of the OHS IGA was to develop harmonised legislation, regulations and codes of practice that could be adopted in all Australian jurisdictions.

In its communique, the COAG noted:

The harmonisation of occupational health and safety regimes has long been identified as a key issue for business, with the inconsistencies of current approaches resulting in unnecessary cost and complexity, particularly for those businesses that operate across jurisdictions. COAG recognised legitimate concerns about workplace safety and reaffirmed its requirement that there be no reduction or compromise in workplace safety.

The harmonisation process was commenced by the National Review into Model Occupational Health and Safety Laws (the National Review) which was tasked with making recommendations on the optimal structure and content of model laws that were capable of being adopted in all jurisdictions.

The National Review was conducted by a panel of three independent experts and involved extensive public consultation with regulators, union and employer organisations, industry representatives, legal professionals, academics and health and safety professionals.

As a result of its deliberations, the panel published reports in October 2008 and January 2009 (the National Review Reports) that provided 232 recommendations for the development of a contemporary model Work Health and Safety (WHS) Act to be adopted in all Australian jurisdictions. In May 2009, the Workplace Relations Ministers Council (WRMC) responded to the recommendations of the National Review and framed the process for drafting the model WHS laws. This included the creation of an Australian Government statutory body to support the development of the harmonised laws. The body now known as Safe Work Australia (SWA) is a tripartite national policy body and includes members representing the Commonwealth, each state and territory, employers and worker groups.

A model WHS Bill was developed by SWA and, following extensive public consultation, endorsed by the WRMC on 11 December 2009. Model WHS Regulations and supporting model codes of practice and guidance material were published between 2010 and 2012.

With two exceptions, all states, both territories and the Commonwealth have adopted the model WHS laws. New Zealand has also updated its safety and health laws based on the model WHS Bill. Western Australia and Victoria have not adopted the model WHS laws.

The *Occupational Safety and Health Act 1984* (the OSH Act) has served the Western Australian community well since its introduction, but some of its key principles have become outdated in the past thirty years. In particular, the reliance on the employer/employee relationship has not kept pace with modern work practices.

On 12 July 2017, the McGowan Government announced that work would commence to develop modernised health and safety laws for Western Australia. The new laws would:

- be substantially based on the model WHS Bill, to improve consistency with the rest of Australia;
- provide the primary legislation for workplace safety and health across all Western Australian industries;
- be supported by a number of industry specific regulations to suit the State's unique conditions, enabling the resources sector to continue to use a risk-based approach; and
- continue to support the safety-case approach for petroleum and major hazard facilities.

Consistent with the Government's commitment to reducing red tape, the Government will consider replacing and consolidating the following:

- *Occupational Safety and Health Act 1984*;
- *Mines Safety and Inspection Act 1994*;
- *Petroleum and Geothermal Energy Resources Act 1967*;
- *Petroleum (Submerged Lands) Act 1982*;
- *Pipelines Act 1969*; and
- *Petroleum and Geothermal Energy Safety Levies Act 2011*.

To facilitate the process of modernising Western Australia's safety and health laws, Cabinet established the Ministerial Advisory Panel on Work Health and Safety Reform (MAP).

The National Mine Safety Framework

The Ministerial Council on Mineral and Petroleum Resources (MCMPR) was established by the COAG in June 2001 to deal with issues affecting the minerals and petroleum industries.

At its first meeting in Melbourne on 4 March 2002, the MCMPR launched the Strategic Framework for Mine Safety - *Realising a Safe and Healthy Mining Industry – The Contribution of Government*. In its first communique, the MCMPR noted:

Mining safety is the priority for both government and industry. While industry must play its part in delivering mining safety to employees, the role of government in ensuring its delivery is crucial. Governments considered their mine safety regulation and have agreed to pursue a uniform, consistent approach across jurisdictions.

This became known as the National Mine Safety Framework (NMSF).

In November 2005, a tripartite NMSF Steering Group (made up of representatives of the Commonwealth, all states and the Northern Territory, and relevant industry associations and trade unions) was established to guide the development and implementation of the NMSF.

The work of the NMSF Steering Group was integrated with SWA's development of model WHS laws, which commenced in April 2008 with the National Review. Draft model WHS (Mines) regulations and a series of codes of practice for mining were developed, based on drafting instructions developed under the NMSF.

In May 2010, the MCMPR agreed that further non-core work would be prepared to supplement the model WHS (Mines) regulations in the mine safety legislation of New South Wales, Queensland and Western Australia, to ensure the maintenance of safety standards in these three states.

Ministers endorsed a set of non-core drafting instructions in August 2011, and in November 2011 signed an inter-governmental agreement outlining their commitment to ensure consistency in the adoption of the non-core drafting instructions, and ongoing consistency over time.

The NMSF Steering Group was formally concluded in April 2013, with final implementation of the NMSF work to be progressed by state and territory governments.

Ministerial Advisory Panel

Introduction

During July 2017, the Western Australian Cabinet approved the establishment of the MAP to advise the Minister for Mines and Petroleum; Commerce and Industrial Relations, the Hon Bill Johnston MLA (the Minister), on the development of a single harmonised and amalgamated Work Health and Safety Act for Western Australia (the WHS Act (WA)). The amalgamated WHS Act (WA) would be intended to cover general, mines and critical risk industries in Western Australia.

Terms of reference

The MAP was constituted to provide recommendations to the Minister concerning WHS legislative reforms, with the following terms of reference:

The Government intends to introduce into Parliament, as soon as possible, but no later than mid-2019, a single WHS Act (the Act) regulating occupational health and safety in Western Australia. The Act will be administered by the Department of Mines, Industry Regulation and Safety.

The MAP will advise the Minister on the content of the Act, having regard to:

- the current legislation, being the:
 - *Occupational Safety and Health Act 1984*;
 - *Mines Safety and Inspection Act 1994*;
 - *Petroleum and Geothermal Energy Resources Act 1967*;
 - *Petroleum (Submerged Lands) Act 1982*;
 - *Pipelines Act 1969*; and
 - *Petroleum and Geothermal Energy Safety Levies Act 2011*; and
- the importance of implementing harmonised laws in Australia generally, implement the optimal structure and content of the Model WHS Bill in drafting the single Act;
- whether the matters regulated under the *Dangerous Goods Safety Act 2004* should:
 1. be incorporated into the single Act; or
 2. remain as a standalone, but modernised Act; and

- to facilitate consultation in the most effective manner, the MAP will utilise the Commission for Occupational Safety and Health (COSH) and the Mining Industry Advisory Committee (MIAC) as a means of consulting with industry more broadly. Additionally, the MAP Chair will report on developments at the COSH and MIAC meetings.

The MAP will not become involved in the day-to-day functioning, processes and structure of the department.

Membership

As agreed by the Minister, the initial membership of the MAP comprised the following:

- Stephanie Mayman - Chair
- Penny Bond - Minister's Senior Policy Adviser
- Rachael Lincoln - Chamber of Commerce and Industry WA (CCI)
- Nicole Roocke - Chamber of Minerals and Energy WA (CME)
- Owen Whittle - UnionsWA
- Hon Simon Millman MLA - Member for Mount Lawley
- Lex McCulloch - Deputy Director General Safety, Department of Mines, Industry Regulation and Safety (DMIRS)
- Simon Ridge - Executive Director Resources Safety, DMIRS

Adrienne LaBombard represented the CME from 9 October 2017 and Keith Black represented the CCI from 10 January 2018. The DMIRS membership also changed in January 2018, with Ian Munns taking the A/Deputy Director General Safety role, and Andrew Chaplyn taking the role of Director Mines/Critical Risk.

References to the Regulator and the Commissioner

Section 9 of the OSH Act establishes the WorkSafe Western Australia Commissioner (the Commissioner) as the regulator in Western Australia. A range of statutory powers and functions are provided to the Commissioner, including the appointment of inspectors, the resolution of issues arising from the election of safety and health representatives, the provision of exemptions from the application of the Occupational Safety and Health Regulations 1996 (the OSH Regulations), and powers prescribed in regulations. Some of the powers and functions of the Commissioner may be delegated.

Similar powers and functions exist under the model WHS Bill and are provided to the Regulator. Each jurisdiction is permitted, when drafting their WHS laws, to specify their Regulator for the purpose of administering the WHS laws.

The modernisation of work health and safety laws in Western Australia will incorporate regulations for mines, petroleum and general workplaces under a single Act based on the model WHS Bill. Additional statutory duty holders exist under mines and petroleum laws in Western Australia (for example, the State Mining Engineer).

The Minister has determined the role of the **Regulator** will be the WorkSafe Commissioner who will have responsibility for health and safety in Western Australia.

Additionally, the WorkSafe Commissioner will hold the power to appoint other industry-specific experts, as the need arises (for example, Construction Sector Engineer). This power to delegate will give effect to the Minister's intention of creating a *single safety regulator* in Western Australia, with industry-specific directorates.

References in the recommendations are made to the **Regulator** in reference to discussion of clauses in the model WHS Bill. Full titles are used when referring to the current statutory office holder.

Making a submission

The purpose of this document is to encourage workplace participants, or any person interested in workplace health and safety in Western Australia, to provide comments on the recommendations to modify the model WHS Bill for adoption in Western Australia.

The intention of the Government is to adopt the model WHS Bill with appropriate changes made:

- in response to the recommendations made by the MAP;
- to implement local arrangements permitted by jurisdictional notes; and
- to facilitate the incorporation of regulations for mines, petroleum and general workplaces under a single, modern WHS Act.

It is important that new WHS laws are appropriate for Western Australia's unique geographic and economic circumstances. Your views are sought on any aspect of the model WHS laws that might impact the Western Australian workplace and the community, including issues specific to your business or daily work. You may also wish to provide additional or alternative proposals to those recommended by the MAP.

Questions you may wish to consider include:

1. What is the likely cost for you, your business, or the Regulator to implement a specific proposal?
2. What is the benefit to workplace participants?
3. Is a specific recommendation likely to be effective in achieving safer workplaces?
4. Are there any unintended consequences of a proposal?
5. If a new requirement is proposed, what are the costs and benefits?

Details on how to make a submission are provided in Appendix G and on the DMIRS website. While printable versions of the submission templates are provided in Appendix G, you are encouraged to make use of the Word versions of the templates that are available on the DMIRS website to assist in preparing a consultation report for the Minister.

The public consultation period commences on 30 June 2018 and closes on 31 August 2018. All submissions will be published on the DMIRS website soon after the public comment period ends unless you specify that it is confidential.

Next steps

After the public consultation period ends, the submissions will be analysed and a public consultation report will be prepared for the Minister that will include proposals for changes supported by public submissions. Once the public consultation is endorsed by the Minister, drafting instructions will be prepared for a Western Australian version of the model WHS Bill for approval by Cabinet.

Work has also commenced on regulations to support the single, modern WHS Act (WA) for mines, petroleum and general workplaces. Public comment will be solicited on proposals for these regulations at a later date.

Structure of Recommendations

Introduction

The MAP recommended either adopting provisions of the Model Work Health and Safety Bill 2016 (the model WHS Bill 2016), or making modifications or amendments to the model WHS Bill 2016.

Sections in Part 7 (Right of Entry) of the model WHS Bill 2016 have not been adopted in any Australian jurisdiction and those harmonised jurisdictions continue to operate under clauses provided in the 2011 version of the model WHS Bill (the model WHS Bill 2011). Consistent with the Government's intention to harmonise, some recommendations relating to Part 7, sections 117-123) are based on the WHS Bill 2011.

Both the WHS Bill 2016 and relevant sections of the WHS Bill 2011 are available on the DMIRS website on the public consultation page. The versions referenced are:

- Model WHS Bill 2016 (PCC: [358] 21 March 2016); and
- Model WHS Bill 2011, sections 117 – 123 (PCC: [358] 23 June 2011).

Each recommendation notes the clause(s) to be amended which you can review in the relevant version of the model WHS laws.

The recommendations of the MAP are presented in a structured format for ease of reference, following the structure of the model WHS Bill. The information in each section is presented as follows:

Recommendation XX

Recommendations are numbered for ease of reference and the title of each recommendation forms a brief summary of the purpose of the recommendation. The title is followed by a text box that provides:

A brief, plain English summary of the recommendation.
Clause(s) to be amended: The specific numbers of the clauses to be amended for ease of reference.

Background

This section provides information on the clauses of the model WHS Bill that are to be amended, including information on the purpose of the original clause and the rationale for the proposed amendment. Additional information may be provided on the operation of the current OSH Act or other applicable Western Australian laws.

Some recommendations are required to address 'jurisdictional notes'. These are notes in the model WHS Bill that permit each state, territory or the Commonwealth to customise the laws for local circumstances. For example, a jurisdictional note permits a local external review body to be established to handle requests for review of decisions by the **Regulator** (see Recommendation 38 establishing the Work Health and Safety Tribunal). Where a recommendation addresses a jurisdictional note, this is mentioned in the background material. A complete list of jurisdictional notes relevant to Western Australia can be found in **Appendix B**.

Related recommendations

Some recommendations form part of a series of recommendations for change. Where it assists in understanding the context of a recommendation, a table of related recommendations is provided.

#	Title of related recommendation.
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Clauses to be amended

In some cases the number of clauses to be amended is substantial. For example, a jurisdictional note permits jurisdictions to refer to the appropriate state or territory industrial law. This results in eight amendments.

In some cases, clauses are to be inserted and appropriately amended from other sources. One example is where sections of the OSH Act will be amended and incorporated in the WHS Act (WA) to establish the Work Health and Safety Tribunal (WHST).

In these instances, an additional table is provided to expand on the proposed amendments.

Clause	Title	Amendment
#	Title of clause.	Brief summary of amendment.

Recommendations

Objects of the Act

Contemporary laws include object or purposive provisions to assist with the interpretation of legislation. Where a clause may have alternative meanings, the courts will favour the interpretation that is more directly supported by the objects of the Act. This is often known as the ‘purposive’ approach and, in Western Australia, is enshrined in the *Interpretation Act 1984* (the Interpretation Act).

18. Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

All of the Acts proposed for amalgamation into a new, modernised WHS Act (WA) for Western Australia have Objects. The OSH Act, and the *Mines Safety and Inspection Act 1994* (the MSI Act) share a similar heritage and objects to those declared in the model WHS Bill. However, the MAP identified some key differences between the existing laws and the model WHS Bill that required amendment.

Recommendation 1 – Foster cooperation

Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.

Clause to be amended: 3(1)(c).

Background

The Objects of the model WHS Bill include a clause:

...encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment...

The OSH Act includes an Objects clause that is similar to the one noted previously:

... to foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development

The OSH Act clause is considered to be more effective in achieving a consultative approach to health and safety than the corresponding clause in the model WHS Bill because it:

- more strongly emphasises cooperation and consultation between parties; and
- includes employers and employees as active participants in the process of formulating and implementing health and safety standards rather than as passive recipients of this process.

The MAP recommends replacing the model Object clause in 3(1)(c) with the cited OSH Act clause (with appropriate amendments such as inserting PCBU for employer and worker for employee).

Related recommendations

2	Refer to Western Australia.
3	Administration and policy development.

Recommendation 2 – Refer to Western Australia

Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.
--

Clause to be amended: 3(1)(h).

Background

The Object of the model WHS Bill includes a clause that supports the principle of harmonisation, and requires the:

...maintaining and strengthening 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.

The phrase ‘...in this jurisdiction’ is generic and it is preferred that reference is made specifically to Western Australia.

Related recommendations

1	Foster cooperation.
3	Administration and policy development.

Recommendation 3 – Administration and policy development

Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act (WA).

Clause to be amended: 3(1).

Background

One object provided in the OSH Act, that is not included in the model WHS Bill, enables the activities of the COSH.

Section 5(f) of the OSH Act currently states:

5. Objects

The objects of this Act are —

...

(f) to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;

The MSI Act does not contain a similar object as its primary consultative arrangement (the Mining Industry Advisory Committee) was established under the OSH Act.

A jurisdictional note permits each state, territory and the Commonwealth to include appropriate local consultative provisions, and Recommendation 36 addresses this by establishing the Work Health and Safety Commission (WHSC, currently known as the Commission for Occupational Safety and Health). The inclusion of section 5(f) of the OSH Act is consequential to establishing the WHSC.

Related recommendations

1	Foster cooperation.
2	Refer to Western Australia.

Definitions

Legislation includes defined words or phrases to assist with the interpretation of clauses. The model WHS Bill includes a dictionary of defined terms in section 4. Where a defined term has broad application in the model WHS Bill, it is fully defined in section 4.

In certain cases the defined word or phrase is provided in another part, division or section of the model WHS Bill. This happens where the definition:

- is complex (e.g the definition of supply which is provided in section 6); or
- is limited to a specific, part, division or section (e.g. the definition of notifiable incident which is provided in section 35).

In both cases, a reference to the defined term is provided in section 4.

This approach will be retained in Western Australia's version of the model WHS Bill, consistent with Parliamentary drafting guidelines.

Where a word or phrase is not defined, its interpretation may be subject to previous rulings by the courts (case law) or its dictionary interpretation. This is referred to as its 'ordinary meaning'.

Jurisdictional notes permit each state, territory or the Commonwealth to tailor definitions to their particular legislative environments. A complete list of jurisdictional notes, and the proposed response, is provided in **Appendix B**. In addition, the MAP recommended a number of refinements to the definitions for use in Western Australia.

Recommendation 4 - Chief Inspector of Mines and Chief Inspector of Critical Risks

Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.

Clause to be amended: 4

Background

One of the key requirements of the process to modernise Western Australia's work health and safety laws was to prepare a single Act to encompass laws for general workplaces, mines and on-shore petroleum sites.

In the mining and petroleum sector, three statutory office holders have roles in workplace safety and health:

Current title	Act	New title
State Mining Engineer	<i>Mines Safety and Inspection Act 1994</i>	Chief Inspector of Mines
State Coal Mining Engineer		
Chief Dangerous Goods Officer	<i>Dangerous Goods Safety Act 2004</i>	Chief Inspector of Critical Risks

The powers and functions of these statutory offices will be further delineated in their respective regulations.

Related recommendation

35	Dangerous goods jurisdiction
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Note: Recommendation 34 proposes a staged approach to modernising the dangerous goods jurisdiction. The proposed definition of 'Chief Inspector of Critical Risks' may be modified by this process.

Recommendation 5 - Definition of *import*

Amend the definition of <i>import</i> to include importation from another state or territory into Western Australia.

Clause to be amended: 4.

Background

A range of duties in the model WHS Bill and the model WHS regulations are imposed on importers of plant, substances or structures. For example, importers of chemicals must ensure the chemical is tested, or has been tested, to identify any hazardous properties and that this information, and the means to use the chemical safely, is provided to each person they provide with the chemical.

The definition of import provided in the model WHS Bill is:

import means to bring into the jurisdiction from outside Australia.

This limits the duty of importers to the import of plant, substances or structures that are supplied from outside of Australia and consequently limits the enforcement powers of the Western Australian Regulator.

Significant enforcement difficulties arise when plant, substances or structures are imported into another state or territory, and then shipped to Western Australia. The duties under section 24 of the model WHS Bill may arise outside Western Australia's jurisdiction but non-compliance may not be identified until the product crosses the State border.

For example, chemicals may not be correctly labelled by the importer and the Regulator will have no power to correct the problem at its source (the interstate importer) which is outside Western Australia's natural jurisdiction.

The OSH Act and the MSI Act use the same definition of import:

import means to bring into the State, whether from outside Australia or otherwise...

A definition such as the one presently used in Western Australia, that captures imports into the State, would allow continued enforcement of the duties for importers when plant, substances or structures are brought into the State.

Recommendation 6 - Supply to include a loan

Amend the meaning of supply to include the loan of an item.
--

Clause to be amended: 6(1).

Background

The primary duty holder in the model WHS Bill is the person conducting a business or undertaking (PCBU). The model WHS Bill includes a range of duties for PCBUs in relation to the supply of plant, substances or structures. These include duties such as ensuring:

- the thing supplied is without risk to health and safety and is fit for purpose; and
- that appropriate information is provided to the recipient of the supply.

This duty is framed by the meaning of **supply** in clause 6(1) which provides an inclusive list of activities which will meet the definition of supply:

*A **supply** of a thing includes a supply and a resupply of the thing by way of sale, exchange, lease, hire or hire-purchase, whether as principal or agent.*

The purpose of an inclusive list is to provide examples of items that are definitively included in the meaning of the clause and which may also act as synonyms for items that have not been specified.

The previously noted list includes transactions in the nature of a loan, such as the lease, hire or hire-purchase of a thing. However, these are formal arrangements that do not capture all of the activities that might constitute a loan, particularly if the arrangement is informal.

Inserting the word 'loan' into section 6(1) ensures that all possible forms of supply, where the grant of the use of something is temporary, are captured in the definition of **supply**.

Loan will take its ordinary meaning but, as the definition relates only to the **supply** of physical things (plant, substances or structures), it will not capture financial arrangements.

Recommendation 7 – Clarify that certain natural persons are excluded from the meaning of *person conducting business or undertaking*

Amend the meaning of <i>person conducting business or undertaking</i> to ensure only <i>workers</i> and <i>officers</i> who are ‘natural persons’ are excluded.
--

Clause to be amended: 5(4).

Background

Modern workplace health and safety laws were developed in response to the Robens Report. One of the key recommendations of the Robens report was to place a statutory duty on employers by having a central statement in legislation that:

...should spell out the basic duty of an employer to provide a safe working system including safe premises, a safe working environment, safe equipment, trained and competent personnel, and adequate instruction and supervision.

This duty of care became the foundation of health and safety laws in Australia and many other countries.

The general duty of care in the OSH Act codifies this approach by placing statutory duties on employers. It provides the foundation on which more specific duties are constructed, and permits enforcement and prosecution action to be taken where the OSH Act is otherwise silent. However, the employer/employee relationship has evolved and diversified in recent decades. For example, share fishing and labour hire arrangements may not be captured by the employer/employee relationship.

This issue was identified in the National Review which recommended a broader approach to the primary duty holder:

We recommend that the model Act place the primary duty of care on those who conduct a business or undertaking to all persons who may be put at risk from the conduct of the business or undertaking. The objective of doing so is to move away from the emphasis on the employment relationship as the determiner of the primary duty, to provide greater health and safety protection for all persons involved in, or affected by, work activity.

This recommendation was reflected in the model WHS Bill by placing the primary duty of care on the PCBU. As it is integral to function of the primary duty of care in the model WHS Bill, the definition of PCBU is crucial to the effective operation of the law.

When considering the primary duty of care on a PCBU, the National Review acknowledged concerns regarding:

...the potential liability of a middle manager or supervisor with practical day to day control of a workplace, for and on behalf of the employer, for a breach of the duty of care of a person with management or control of a workplace. The application of such duties to individual 'functionaries' within an organisation is problematic. It imposes obligations on the individual to be proactive so far as is reasonably practicable, rather than merely exercising reasonable care as is required of other employees.

In addressing these issues, the National Review proposed:

The express exclusion of 'workers' and 'officers' in those capacities from the class of persons who owe the primary duty of care would achieve the desired outcome. We note that such persons will be subject to other duties of care.

Recommendation 13 of the National Review summarised the preferred approach:

The primary duty of care should exclude workers and officers to the extent they are not conducting a business or undertaking in their own right.

Section 5(4) of the model WHS Bill implements Recommendation 13 in the following way:

5(4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.

However, the definition of **worker** (section 7 of the model WHS Bill) and the definition of **officer** (by reference to section 9 of the *Corporations Act 2001 (Cth)*) are framed by the word 'person'. In most jurisdictions, including Western Australia, the word person can refer to an individual, a public body, a corporation or a body corporate (section 5 of the *Interpretation Act 1984*).

The construction in these definitions was done purposely to reflect the reality of self-employed persons, who may be considered as both **workers** and PCBUs in some circumstances.

An unintended consequence of this approach was noted in *Work Health & Safety Regulation in Australia: The Model Act* by Richard Johnstone and Michael Tooma. In summarising their position, the authors noted:

.....while it is clearly the intention of the National Review that a contractor or subcontractor in a contractual chain can be a worker and be owed a duty by all PCBUs further up the chain, and at the same time be a PCBU and

owe duties to those further down the chain, the clumsy drafting of section 5(4) has failed to express this intention clearly. We argue that the courts should interpret s 5(4) to exclude from the definition of PCBU 'workers' who are natural persons, who are 'solely' working within the PCBU's organisation and who do not operate a business (for example, as a contractor) 'in their own right'. Section 5(4) should be redrafted at the earliest opportunity to capture the intention of the National Review and clearly put the issue beyond doubt.

Limiting the definitions of **worker** and **officer** to natural persons may have unintended consequences for other duties and responsibilities in the model WHS Bill. Consequently, it is recommended to limit the clarification by only amending the exclusion in section 5(4) to **workers** and **officers** who are 'natural persons', as proposed by Johnstone and Tooma.

The *Interpretation Act 1984* defines an **individual** as a 'natural person' and Parliamentary Counsel will be consulted regarding the best approach to redraft this clause.

Duty of care

Part 2 of the model WHS Bill imposes a 'duty of care' on specified duty holders. While the primary duty of care in the model WHS Bill resides with the PCBU, other duties are imposed for persons with a specified role, or in specified circumstances.

The duties of care in the model WHS Bill are:

Section	Specified duties
Duties for PCBUs	
19	Primary duty of care
20	... management or control of workplaces
21	... management or control of fixtures, fittings or plant at workplaces
22	... design plant, substances or structures
23	... manufacture plant, substances or structures
24	... import plant, substances or structures
25	... supply plant, substances or structures
26	... install, construct or commission plant or structures
Other duty holders	
27	Officers
28	Workers
29	Other persons at the workplace

A person with a duty of care must:

...discharge the person's duty to the extent to which the person has the capacity to influence and control the matter...

Similar duties exist in the current OSH and MSI Acts.

Recommendation 8 - Duty of care for providers of WHS advice, services or products

Include a new duty of care on the providers of workplace health and safety advice, services or products.

Clause to be added: New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.

Background

The National Review included recommendations regarding the provision of occupational health and safety (OHS) services.

37	The model Act should place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act.
38	The model Act should include a definition of a 'relevant service' and a 'service provider' to make it clear what activities fall within the duty and

who owes the duty. The definition will be discussed in our second report.

Some submissions to the National Review suggested people or organisations that provide health and safety information, advice or services (including the provision of safety management systems) to the workplace should be subject to a specific duty of care.

The National Review noted:

The justification for placing a duty of care on providers of OHS services is that these persons may, in providing the services, materially influence health or safety by directing or influencing things done or provided for health or safety...

The authors of the National Review noted that such a duty would require clear definitions of **relevant service** and **service provider** to ensure the scope of the duty does not extend beyond the nature of the services provided. The National Review suggested the class of persons within the definition of a **service provider** might include:

- *a health and safety organisation;*
- *consultants providing advice or intellectual property (e.g. policies, systems);*
- *training providers;*
- *lawyers;*
- *occupational hygienists or others undertaking environmental or biological testing or analysis; or*
- *any person or entity (claiming to have knowledge and/or expertise in the area of occupational health and safety) providing a service to a business or undertaking.*

The recommendations of the National Review in relation to OHS services were not endorsed by the Workplace Relations Ministers' Council on the basis they were already covered by the primary duty of care for PCBUs.

The MAP recommended inclusion of a specific duty in Western Australia's version of the WHS Act (WA) and also agreed that appropriate definitions will be drafted in consultation with Parliamentary Counsel, informed by submissions made by interested parties during the public comment period.

Notifiable incidents

The model WHS Bill imposes a duty on a PCBU to advise the Regulator of a **notifiable incident**. This ensures the Regulator is able to investigate the most serious incidents at a workplace.

A **notifiable incident** is defined in section 35 as:

- a) the death of a person; or
- b) a serious injury or illness of a person; or
- c) a dangerous incident.

Similar duties exist in the OSH Act and the MSI Act.

Recommendation 9 - Remove requirement for treatment to be in a hospital

Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.
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36(a).

Background

Incidents involving serious injury or illness are further defined in section 36 of the model WHS Bill and include illness or injury that requires 'immediate treatment as an in-patient in a hospital'.

In Western Australia, **hospital** is defined in the *Health Services Act 2016* and includes a range of facilities such as day hospital facilities and nursing posts. While 'in-patient' is not defined, the Department of Health website notes:

If your GP or specialist decides you need a test, operation or other hospital treatment, he or she will ask the hospital to admit you as an inpatient. Inpatients stay in hospital overnight or for a few days for medical, surgical, paediatric, obstetric and rehabilitation services.

While the phrase 'immediate treatment as an in-patient in a hospital' is likely to cover most circumstances where a notifiable incident will occur, there is the potential for some situations to fall outside this part of the definition.

For example, Western Australia's geographical area may mean that a person will receive in-patient treatment at a private facility that does not meet the definition of **hospital**. Further, the rapidly evolving nature of medical treatment such as remote diagnosis may permit patients to be assessed by a doctor in Perth, for admission to a capable facility in a remote town. Consequently, it is proposed to provide more flexibility by removing the requirement for the admission to be at a **hospital**.

Advice will be sought from Parliamentary Counsel during drafting to ensure the intent of this recommendation can be implemented.

Recommendation 10 - Duty to report Incapacity of ten or more days

Include incapacity to work for 10 or more days as a category of <i>serious injury or illness</i> .

Clause to be amended: 36.

Background

A list of illnesses and injuries that require notification, such as burns and amputations, is included in section 36 of the model WHS Bill. In addition, there is a clause that permits the inclusion or exclusion of specified illnesses or injuries in the regulations.

The OSH Act includes a similar notification requirement although, other than those involving the death of a person, specific illnesses and injuries are prescribed in the OSH Regulations.

One item specified in the OSH Regulations that is not included in the model WHS Bill or the model WHS regulations is a general requirement to report:

...any injury other than an injury of a kind referred to in paragraphs (a) to (d) which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred.

The purpose of this clause is to capture significant injury or illness that is not specified elsewhere in the clause. This clause can also capture long latency illnesses (such as post-traumatic stress disorder) as it is not limited to 'immediate treatment'.

The MAP recommended including the above notification requirement, consistent with the current approach in Western Australia.

Health and Safety Representatives and consultative arrangements

Part 5 of the model WHS Bill provides for consultation in the workplace, including arrangements for HSRs. Workplace consultation is a vital part of improving health and safety outcomes. The involvement of workers and representatives of the PCBU with direct familiarity in the work is likely to achieve the best outcomes for all involved.

Current safety and health legislation in Western Australia includes similar arrangements to those provided in the model WHS Bill.

Recommendation 11 - Negotiations for determination for work group

Amend the heading 'Negotiations for agreement for work group' to 'Negotiations for determination for work group'.

Clause to be amended: 52 (heading only).
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Background

The model WHS Bill includes requirements for consultation, representation and participation about safety and health issues in the workplace, including the election of HSRs. To enable the representation of workers by one or more HSRs, the PCBU must facilitate the determination of work groups.

Work groups represent a discrete group of workers who may be represented by one or more HSRs. Work groups may be delineated, for example, by location, plant used, shift worked, or common activities. The determination of a work group is negotiated between the PCBU and the workers who will form part of the work group or their representatives. This negotiation should result in an agreement between the parties.

Section 52 of the model WHS Bill prescribes what is required to achieve the determination of work groups and describes the negotiated outcome as an 'agreement'. The word 'agreement' is not used in a formal sense and confusion is added by the heading of section 52 which is 'Negotiations for agreement for work group'

The heading of this section is misleading as the discussions are more accurately characterised as negotiating the determination of a work group which results in an agreement between the parties.

The *Interpretation Act 1984* prescribes that:

...a heading to a section, regulation, rule, local law, by-law, or clause of a written law, or to a portion of a section, regulation, rule, local law, by-law or clause of a written law, shall be taken not to be part of the written law.

This means the title of section 52 does not have interpretative value in Western Australia. However, in its current form it may be confusing to a lay reader. This is to be resolved by changing the title of section 52 to **Negotiations for determination for work group** consistent with the intent of the subdivision.

Recommendation 12 - Clarify that health and safety representatives have power to assist other work groups to all PCBUs at workplace

Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.

Clause to be amended: 69(3).

Background

The powers and functions of HSRs are generally limited to the work group they were elected to represent. There are two exceptions where the HSR for **another work group** is unavailable, and:

- there is a serious risk to health or safety from an immediate or imminent exposure to a hazard that affects or may affect members of another work group; or
- a member of another work group asks the HSR for assistance.

The definition of **another work group** provides a further limitation on these exceptions, requiring that:

...another work group means another work group of workers carrying out work for a business or undertaking to which the work group that the health and safety representative represents relates.

This definition suggests the power for HSRs to assist another work group could only be applied to related PCBUs at the workplace. The nature of such a relationship is undefined but it could be considered that PCBUs must be formally related (e.g. in a joint venture) or conducting work in a coordinated fashion (e.g. under a principal contractor).

The undefined nature of the relationship may cause confusion and unduly inhibit action in the event of a serious risk to health and/or safety. This situation will be particularly acute at workplaces with complex working arrangements, such as large-scale construction projects involving multiple PCBUs working in physical proximity but under different jurisdictions (for example, Comcare self-insured licensees working at the same location as state-system workers).

To remove potential confusion, Parliamentary Counsel will be requested to consider whether the existing construction of the clause is sufficient to ensure an HSR can assist other workgroups at the workplace, or whether the definition of **another work group** should be amended to include the work groups of any PCBU at the workplace.

Recommendation 13 - Work Health and Safety Commission to approve health and safety representative training courses

Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.

Clause to be amended: 72(1)(a).

Background

The model WHS Bill includes an obligation for PCBUs to ensure that HSRs attend a training course selected by the HSR within three months of the request being made (modified by practicability). Course fees and other reasonable costs must be paid by the PCBU, and the HSR is entitled to be paid as if performing her or his normal duties during that period. An HSR is not able to perform some of their functions, such as issuing provisional improvement notices, until they have completed this training. This is similar to the approach taken in the OSH Act.

In most other Australian jurisdictions the course that an HSR may undertake is approved by the **regulator**. In Western Australia, under the OSH Act, the COSH performs this function.

Application is made by registered training organisations to the Executive Officer of the COSH, who arranges for the Regulator to assess the application according to guidelines endorsed by the COSH. These guidelines are also available to applicants. Applications are then presented to COSH for formal endorsement at their monthly meetings.

It is proposed to retain the current approach in Western Australia for the approval of HSR courses. This approach should be reconsidered in the first statutory review of the WHS Act (WA).

Related recommendation

14	Clarify that HSRs are 'required' to attend training courses.
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Recommendation 14 - Clarify that health and safety representatives are required to attend training courses

Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.
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Clause to be amended: 72(1)(b).

Background

A PCBU is required to ensure an HSR is provided with approved training as soon as practicable within three months after the request is made. The WHS regulations will prescribe some aspects of the course to be attended and courses will be approved by the WHSC (see **Recommendation 13** for further details).

The obligation of the PCBU to ensure the HSR attends appropriate training is phrased as an entitlement. The word 'entitled' is not defined in the model WHS Bill or the *Interpretation Act 1984* and may infer a level of discretion that is not intended. To remove doubt, the word 'entitled' is to be replaced with the word 'required'.

Related recommendation

13	WHS Commission to approve HSR training courses.
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Recommendation 15 - Constitution of health and safety committee

Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.

Clause to be added: New clause to be added to section 76.

Background

Consultation is a significant factor in improving workplace health and safety. An important consultative feature in the WHS Bill is the health and safety committee (HSC) which can be established at the request of a health and safety representative, or five or more workers at the workplace. HSCs are also a feature of the OSH Act.

Division 4 of Part 5 of the model WHS Bill provides duties for a PCBU in relation to HSCs, including requirements for membership. At least half of the members of the HSC must be workers who are not nominated by the PCBU with the remaining members being nominated by the PCBU.

While an HSR may be included in the membership, there are no other requirements regarding the qualifications or seniority of members. This can limit the effectiveness of the HSC as its recommendations must be referred and considered separately by senior decision makers. Consequently, it can take multiple meetings for a solution to be determined to be practicable which, depending on the frequency of meetings, may take months to achieve.

The proposed amendment adds an additional requirement for the PCBU to provide a senior management representative who is able to authorise the decisions and recommendations of the committee.

Recommendation 16 – Right to cease unsafe work to include hazards posed to other persons

Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.

Clause to be amended: 84.

Background

The model WHS Bill codifies the common law right for a worker to cease unsafe work. Rights and duties under this provision allow or require the worker to:

- cease or refuse to carry out work based on a reasonable concern about a risk emanating from an immediate or imminent exposure to a health or safety hazard;
- notify the PCBU as soon as practicable after ceasing unsafe work;
- be available for reasonable alternative work if provided by the PCBU; and
- to have continuity of employment in relation to prescribed matters (such as pay and entitlements).

While the common law right extends to ceasing unsafe work if it puts another person at risk, the model WHS Bill does not include this provision and instead relies solely on section 28(b) that requires a worker to:

...take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons.

Presently in Western Australia, under section 26 of the OSH Act, an employee is also permitted to refuse work if it would expose ‘any other person’ to a risk of serious injury or imminent and serious harm to his or her health consistent with the common law right. The inclusion of a reasonable concern regarding a risk to any other person as a threshold for the right to cease unsafe work was also supported in Recommendation 121(a) of the National Review.

This proposal was discussed by the MAP, but members did not formally conclude their deliberations. It is important this right is codified in Western Australia’s WHS law to maintain safety standards and, in particular, to protect bystanders from harm. Consequently, this recommendation has been included to ensure common law rights, and the current situation under the OSH Act, are retained.

Related recommendation

17	External review of right to cease unsafe work.
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Recommendation 17 - External review of right to cease unsafe work

Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).

Clauses to be amended: 89, 229.

Background

As noted under Recommendation 16, workers have the right to cease unsafe work under specified circumstances. In addition, the model WHS Bill also provides health and safety representatives with the right to direct that unsafe work is ceased. Important features of the right for HSRs include:

Health and Safety Representative (HSR)

- may direct workers in their work group to cease unsafe work based on a reasonable concern about a risk emanating from an immediate or imminent exposure to a health or safety hazard;
- must not issue such a direction without first consulting with the PCBU and attempting to resolve the matter under requirements for dispute resolution; and
- must have received appropriate training as an HSR before issuing such a direction.

Any of the parties involved in an issue arising out of the cessation of unsafe work may request the Regulator to appoint an inspector to assist. However, the Regulator is not provided with any powers to direct a particular resolution of the issue, and consequently does not make a reviewable decision on this matter.

While the dispute resolution procedure enables the inspector to use their powers and functions, some issues may arise that are not work health and safety issues such as the appropriate pay and entitlements for continuity of employment.

Related recommendation

16	Right to cease unsafe work to include hazards posed to other persons
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A refusal by an individual employee to work in certain cases under the current OSH Act is a matter that is capable of being referred by any party to the Occupational Safety and Health Tribunal (OSHT) pursuant to 28(2) for determination as to:

- whether a person is entitled to any pay or benefit; or
- the pay or benefit to which a person is entitled.

Consequently, if an inspector is unable to assist in resolving the matter, it is proposed to include the right for any party to the dispute to apply directly to the Work Health and Safety Tribunal (WHST) for review (established under Recommendation 39 to take on the role of the OSHT).

The power for an HSR to direct the cessation of unsafe work will be new to Western Australia, and it is important the HSR is included as a party that may refer the matter to the WHST.

Recommendation 18 – Health and safety representative to be notified where a review is sought

Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.

Clause to be added: New clause to be added to section 100.

Background

The model WHS Bill provides health and safety representatives (HSRs) with the power to issue a provisional improvement notice (PIN) when there is a reasonable belief that a person is:

- contravening a provision of the Act; or
- has contravened a provision of the Act in circumstances that make it likely the contravention will be repeated.

A PIN requires the person or the PCBU to remedy the identified contravention within a specified timeframe (which must be at least eight days after the PIN was issued). An HSR may only issue a PIN after consultation with the PCBU. PINs provide HSRs with a significant compliance tool and are an essential component of health and safety laws.

The PCBU/person who was issued the PIN may request a review of the PIN by an inspector. That request must be made within seven days after the PIN was issued. On review of the PIN, the inspector may confirm, vary or overturn the notice. If confirmed or varied, the PIN becomes an improvement notice as if it has been issued by the inspector and is subject to further review by the Regulator on that basis.

While the model WHS Bill requires consultation between workplace participants there is no specific duty for an HSR to be informed if a request is made for an inspector to review the PIN.

Right of entry

The model WHS Bill includes Part 7 providing the rights and limitations on authorised union representatives to enter a workplace in relation to WHS issues.

At present, in Western Australia, the right for an authorised union representative to enter a workplace is provided under the *Industrial Relations Act 1979* (the IR Act) Division 2G of Part II – ‘Right of entry and inspection by authorised representatives’.

The IR Act permits representatives to enter a workplace during working hours where relevant employees work:

- for discussions with employees;
- to investigate certain breaches; and
- at a mutually convenient time and place require any documents or employment records related to the suspected breach.

Division 2G also provides for notice to the employer, with different timeframes for different purposes. The **Registrar** administers the entry permit system. Importantly, the IR Act limits right of entry by authorised representatives to employees on an award, order, industrial agreement or employee-employer agreement.

Significantly, workplace entry rights under the IR Act are precisely confined to the employer/employee relationship and further restricted by the applicable awards.

The model WHS Bill recognises the diversity of contractual relationships in the workplace by placing the primary duty of care on the **person conducting a business or undertaking**. Limiting workplace entry rights to the employer/employee relationship, while expanding the primary duty of care to the PCBU, would significantly limit the ability of entry permit holders (EPHs) to perform their role in diverse workplaces.

Recommendation 19 - Right of entry

Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.
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Clauses in WHS Bill 2011 to be amended: 117, 119, 120, 123.

Background

The right for a union representative to enter a workplace to investigate suspected contraventions of WHS laws is included in Part 7 of the model WHS Bill. To lawfully enter a workplace, a union representative must hold an entry permit issued by the **authorising authority** in relation to health and safety, and an entry permit issued under the relevant industrial relations law (the *Fair Work Act 2009(Cth)* for constitutionally covered corporations and Commonwealth workplaces, or the IR Act for all other workplaces in Western Australia).

Under Part 7 of the model WHS Bill, it is intended that EPHs will undergo one day of face-to-face training in occupational health and safety in order to gain their permit in occupational health and safety matters in Western Australia.

When the model WHS Bill was originally published by SWA in 2011, for adoption in all Australian jurisdictions, it included rights and duties in relation to workplace entry by an EPH.

The requirement to notify a PCBU when an EPH is entering the workplace differs based on the right to be asserted.

Notice requirement: As soon as practicable after entering the workplace in relation to a suspected contravention of the Act or Regulations:

- to investigate the suspected contravention;
- to consult with workers and the PCBU;
- inspect things such as plant, substances or structures; and
- make copies of relevant documents.

Notice requirement: At least 24 hours but not more than 14 days prior to entry:

- to examine employee records or information held by another person, in relation to a suspected contravention; and
- when consulting with and advising workers on safety and health matters generally.

In 2016, Part 7 of the model WHS Bill was amended to:

- require at least 24 hours' notice prior to entering the workplace under all circumstances (unless the **authorising authority** has issued an exemption certificate); and
- double the penalty for contravention of the conditions of a WHS entry permit from \$10,000 to \$20,000.

All harmonised jurisdictions presently operate under the 2011 right of entry provisions.

In its second review of the operation of the *Work Health and Safety Act 2012 (SA)* (WHS Act 2012(SA)) SafeWork South Australia addressed the 2016 amendments and noted:

Given the differing opinions on the effectiveness of section 117 of the WHS Act (SA), the lack of empirical evidence to support these opinions, it is recommended that section 117 of the WHS Act (SA) is retained in its current form.

Queensland introduced similar right of entry limitations to those that were later included in the 2016 version of the model WHS Bill. Those amendments were reversed in the *Work Health and Safety and Other Legislation Amendment Act 2015*.

The recent *NSW Work Health and Safety Statutory Review Report – June 2017*, made a number of recommendations but did not address the option of adopting the 2016 amendments to the model WHS Bill.

Consequently, it is proposed to adopt the relevant provisions of the model WHS Bill as originally published in 2011, consistent with all harmonised jurisdictions.

Related recommendations

20	WHS entry permit holder may inform Regulator prior to entry
21	Registrar to be the authorising authority for the WHS entry permit system.
22	Work Health and Safety Tribunal to be the authorising authority for certain WHS entry permit matters.
23	References to the <i>Industrial Relations Act 1979</i>
24	Registrar to be added as an eligible party to make applications to the WHS Tribunal on specified matters

Recommendation 20 - WHS entry permit holder may inform Regulator prior to entry

Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.

Clauses to be added: New clauses inserted in section 117.

Background

South Australia has implemented additional obligations for the Regulator and the EPH in relation to workplace entry. These obligations:

- allow the EPH to consider if it is practicable to notify the Regulator prior to entry to provide the opportunity for an inspector to attend at the time of entry;
- where an inspector does not attend, requires the EPH to provide a report on the outcome of her or his inquiries to the Regulator; and
- requires the Regulator to give consideration of any action that should be taken on any suspected contravention outlined in the report.

These amendments provide the Regulator with the opportunity to investigate the suspected contravention at the same time as the EPH, and minimise disruption to the workplace. Where an inspector does not attend, the SA amendments require a report to be prepared for the Regulator. Combined, these amendments ensure the Regulator is made aware of any suspected contravention the EPH considers serious to invoke their right of entry.

The MAP recommends adopting the intent of the South Australian amendments in Western Australia by incorporating the equivalent of subsections 117(3) and 117(6) of the WHS Act 2012 (SA) with the following variations:

- amend SA clause 117(6)(a) to provide the EPH with discretion to provide the report to the Regulator (i.e. 'may' rather than 'must').
- amend SA Clause 117(6)(b) to include a requirement for the Regulator to provide a response to the PCBU in addition to the EPH in response to the Report issued by the EPH; and
- amend 'Executive Director' to 'Regulator' consistent with the Western Australian drafting approach.

Related recommendations

19	Right of entry
21	Registrar to be the authorising authority for the WHS entry permit system.
22	Work Health and Safety Tribunal to be the authorising authority for certain WHS entry permit matters .
23	References to the <i>Industrial Relations Act 1979</i>
24	Registrar to be added as an eligible party to make applications to the WHS Tribunal on specified matters

Recommendation 21 - Registrar to be the *authorising authority* for the Work Health and Safety entry permit system

Insert the Registrar of the Western Australian Industrial Relations Commission as the <i>authorising authority</i> for the WHS entry permit system.
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Clauses to be amended: 4, 116, 131, 132, 134, 135, 149, 150 and 151.
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Background

Part 7 of the model WHS Bill provides a right of entry to authorised union representatives for matters related to health and safety, and will be adopted in Western Australia (see Recommendation 17).

Western Australia presently administers an entry permit system under the IR Act, in relation to industrial matters and health and safety matters. The system is administered by the **Registrar**, who is:

*The Chief Executive Officer of the Department of the Registrar – Western Australia Industrial Relations Commission, or any other person designated as **Registrar** under the Industrial Relations Act 1979.*

The entry permit system under the IR Act and the model WHS Bill are similar from an administrative perspective. While it would be feasible to establish the WHS entry permit system in another agency, such as within the Regulator or the Labour Relations Division of the DMIRS, it would be more efficient and cost-effective for matters to be dealt with by the **Registrar** who already has relevant expertise and systems in place.

The model WHS Bill will also need to be amended to include an appropriate definition of **Registrar**.

Related recommendations

19	Right of entry
20	WHS entry permit holder may inform Regulator prior to entry
22	Work Health and Safety Tribunal to be the <i>authorising authority</i> for certain WHS entry permit matters.
23	References to the <i>Industrial Relations Act 1979</i>
24	Registrar to be added as an eligible party to make applications to the WHS Tribunal on specified matters

Clauses to be amended

Clause	Title	Amendment
4	Definitions	Delete definition of authorising authority . Insert definition of registrar .
131	Application for WHS entry permit	Replace authorising authority with new defined term registrar .
132	Consideration of application	
134	Issue of WHS entry permit	
135	Conditions on WHS entry permit	
149	Return of WHS entry permits	
150	Union to provide information to authorising authority	
151	Register of WHS entry permit holders	

Recommendation 22 - Work Health and Safety Tribunal to be the authorising authority for certain WHS entry permit matters

Insert the <i>WHS Tribunal</i> as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.
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Clauses to be amended: 138, 139, 140 and 142.

Background

The WHST will be established as the external review body for the WHS Act (WA).

The WHST will perform the role of the existing OSHD as the external review body for decisions made by the Regulator and in relation to other matters specified in the model WHS Bill. The role of the WHST will include an enhanced ability to conduct conciliation of certain disputes related to work health and safety. More information on the role of the WHST can be found in Recommendation 37.

The model WHS Bill provides the definition of **authorising authority** as a generic term for the body that administers the work health and safety entry permit system. Recommendation 21 inserts the **Registrar** as the **authorising authority** for administration of the WHS entry permit system.

Two elements of the WHS entry permit system were considered serious enough to require the attention of the WHST. These are:

- consideration of an application to revoke a WHS entry permit; and
- dealing with disputes about right of entry.

Recommendation 24 also proposes the inclusion of the Registrar as a party that can refer these matters to the WHST.

Related recommendations

19	Right of entry
20	WHS entry permit holder may inform Regulator prior to entry
21	Registrar to be authorising authority for the WHS entry permit system.
23	References to the <i>Industrial Relations Act 1979</i>
24	Registrar to be added as an eligible party to make applications to the WHST on specified matterspermits

Clauses to be amended

Clause	Title	Amendment
138	Application to revoke WHS entry permit	Replace references to authorising authority with the defined term tribunal
139	Authorising Authority must permit WHS entry permit holder to show cause	
140	Determination of application	
142	Authorising Authority may deal with a dispute about right of entry	

Recommendation 23 – References to the *Industrial Relations Act 1979*

Replace references to the defined phrase **relevant state or territory industrial law** with the *Industrial Relations Act 1979*

4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)

Background

The right of entry provisions of the model WHS Bill are intended to work in conjunction with applicable industrial relations laws:

Jurisdiction	Industrial law
Federal (constitutionally covered corporations and Commonwealth workplaces)	<i>Fair Work Act 2009</i>
State-system workplaces in Western Australia	<i>Industrial Relations Act 1979</i>

To investigate a suspected contravention, or to consult with workers on health and safety matters, a WHS entry permit holder must also hold a valid permit issued under the applicable industrial law.

The model WHS bill uses the phrase **relevant state or territory industrial law** as a placeholder for a specific reference to the applicable state-system law. In Western Australia, the applicable state-system law is the IR Act which is to be used in place of the placeholder phrase. All of the clauses in the model WHS Bill that reference the **relevant state or territory industrial law** relate to right of entry.

Related recommendations

19	Right of entry
20	WHS entry permit holder may inform Regulator prior to entry
21	Registrar to be the authorising authority for the WHS entry permit system.
22	Work Health and Safety Tribunal to be the authorising authority for certain WHS entry permit matters.
24	Registrar to be added as an eligible party to make applications to the WHS Tribunal on specified matters entry permits

Clauses to be amended

Clause	Title	Amendment
4	Reference to definition of relevant State or Territory industrial law	Delete reference
116	definition of relevant State or Territory industrial law	Delete definition
124	WHS entry permit holder must also hold permit under other law	Replace relevant state or territory industrial law with <i>Industrial Relations Act 1979</i>
131(2)(c)(ii)	Application for WHS entry permit	
133(c)(ii)	Eligibility criteria	
137(1)(b)(ii), 137(1)(d)(ii)	Expiry of WHS entry permit	
138(2)	Application to revoke WHS entry permit	
150(b), 150(c)(ii)	Union to provide information to authorising authority	

Recommendation 24 - Registrar to be added as an eligible party to make applications to the WHS Tribunal on specified matters

The **Registrar** to be included as an eligible party to apply to the **WHS Tribunal** to revoke a WHS permit, or deal with a dispute about a WHS entry permit.

Clauses to be amended: 138(1), 142(4).

Background

Recommendation 21 inserts the **Registrar** as the **authorising authority** in the WHS Bill in relation to administering the WHS entry permit system.

Recommendation 22 inserts the WHST as the **authorising authority** in relation to the revocation of WHS entry permits and to deal with disputes about right of entry.

The model WHS Bill lists the parties that may apply to the WHST to revoke a WHS entry permit or deal with a dispute. These are:

Revocation of WHS entry permit	Dispute about right of entry
	a WHS entry permit holder;
	the relevant union;
the regulator;	the regulator;
the relevant person conducting a business or undertaking;	the relevant person conducting a business or undertaking;
any other person in relation to whom the WHS entry permit holder has exercised or purported to exercise a right under this Part;	any other person in relation to whom the WHS entry permit holder has exercised or purported to exercise the right of entry;
any other person affected by the exercise or purported exercise of a right under this Part by a WHS entry permit holder.	any other person affected by the exercise or purported exercise of the right of entry by a WHS entry permit holder;

The proposal to provide the **Registrar** with the administration of the WHS entry permit system makes it likely the **Registrar** will become aware of matters that involve a dispute about right of entry or may require revocation of a WHS entry permit. Rather than requiring the **Registrar** to refer the matter to another party (such as the Regulator), which may raise privacy concerns, it is proposed to add the **Registrar** as an eligible party to make application directly to the **WHST**.

Related recommendations

19	Right of entry
20	WHS entry permit holder may inform Regulator prior to entry
21	Registrar to be the authorising authority for the WHS entry permit system.
22	Work Health and Safety Tribunal to be the authorising authority for certain WHS entry permit matters.
23	References to the <i>Industrial Relations Act 1979</i>

General powers of Regulator

Part 8 of the model WHS Bill provides the Regulator with the power to appoint inspectors, and provides inspectors with a range of tools to encourage or require compliance with WHS laws. Many of these powers already exist in Western Australia, including the power to issue improvement and prohibition notices. Other powers are new to Western Australia, including the power to issue non-disturbance notices or to apply for search warrants.

A number of recommendations were made by the MAP to refine the powers and duties of the regulator, based on experience in other jurisdictions and the geographical challenges of a state the size of Western Australia.

Recommendation 25 - Certain inspector powers not limited to entry

Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.

Clauses to be amended: 171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).

Background

Western Australia is the largest Australian jurisdiction in terms of geographical area, with a highly centralised inspectorate. Consequently, under present safety and health laws, inspectors may request documents or interview people without needing to enter the workplace. Using these powers, an inspector may be able to resolve an incident without incurring travel expenses, or conclude that a physical workplace visit is required.

The model WHS Bill limits the power to request documents or conduct interviews only in relation to physical entry to a workplace.

These limitations were recognised in the *Best Practice Review of Workplace Health and Safety Queensland – Final Report* (the Best Practice Review) which was published on 3 July 2017 in response to fatalities at Dreamworld and at an Eagle Farm workplace in 2016.

In relation to the powers of inspectors, the Best Practice Review noted that:

The current wording of section 171 may result in some unintended consequences that have the potential to limit and/or complicate the use of inspector powers in a manner not intended by Parliament. This has ramifications for the management of WHSQ investigations, particularly in the case of remote workplaces and the increasing trend of decentralised workplaces. It is the view of the Review that this is contrary to the intention of the inspector powers and that minor amendments should be made to the WHS Act 2011 to clarify that section 171 powers are not strictly limited to

circumstances where an inspector ‘enters’ a workplace. This is intended to ensure that investigations are not inappropriately limited by a legal technicality.

Recommendation 8 of the Best Practice Review proposed amendments to address the issue:

Section 171 of Work Health and Safety Act 2011 be amended to provide that:

- a. the exercise of the power be extended to an inspector who has entered a workplace on a previous occasion;*
- b. section 171(1)(b) apply where a document is located at any place, not just the workplace;*
- c. the production of the document to be made at any place, not just the workplace;*
- d. require a relevant person to answer questions at any time and place convenient; and*
- e. provide that anything done by an inspector who has not entered a workplace is lawfully done if another inspector has entered the workplace.*

These recommendations were implemented by the Queensland Government in the Work Health and Safety and Other Legislation Amendment Bill 2017.

Similar challenges to those outlined by the Best Practice Review (particularly remote and decentralised workplaces) are evident in Western Australia and the proposed changes are consistent with the current approach under the OSH Act. Consequently, it is proposed to adopt the essence of Recommendation 8 in Western Australia.

Consequential changes will need to be made to the headings of Division 3 of Part 9 and Subdivision 4 of Division 3 of Part 9 for consistency with the recommended approach.

Clause	Old heading	New heading
Division 3 of Part 9	Powers relating to entry	Powers relating to investigations
Subdivision 4 of Division 3 of Part 9	Specific powers on entry	Specific powers of inspectors

Related recommendation

26	Clarify that interviews by inspectors may be recorded
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Recommendation 26 - Clarify that interviews by inspectors may be recorded

Clarify that the power of inspectors to conduct interviews includes the power to record the interview.
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Clause to be amended: 171.

Background

The model WHS Bill provides inspectors with a range of powers to compel interviews similar to those found in the OSH Act. While the OSH Act implicitly permits the recording of interviews, a recent review of the *Work Health and Safety Act 2011(NSW)* found deficiencies in the drafting of similar model clauses:

Section 155(2)(c) of the WHS Act allows the Regulator to require a person to appear and give evidence. Section 171 of the WHS Act confers on inspectors the power to require the production of documents and the answering of questions. Currently, the Regulators may arrange to record an interview with the consent of the interviewee; however, the Regulators do not have the power to record the interview if the interviewee withholds his or her consent. Currently, if the person withholds their consent which is time consuming for both the Regulator and the person being interviewed and results in a loss of time and subsequent increase in cost to business.

Clarifying that an interview can be recorded using sound recording or audio visual equipment without the consent of the person being interviewed does not increase any of the inspector's current powers in relation to obtaining information. It simply speeds up the recording process, making it more efficient and effective for all concerned.

Further, the benefit of having an audio recording of an interview over a hand written or typed record is that an audio recording provides a clear, accurate and objective record of the interview. This reduces the scope for dispute as to the content of any representation made in interviews.

For these reasons, the review finds that there is merit in authorising the Regulators to record an interview without consent, after giving notice that the recording is taking place. In such instances, the Regulator would also be required to provide a copy of the recording to the interviewee as soon as practicable after it is made.

The recording of interviews ensures that testimony is accurately conveyed which is beneficial to both the inspector and the witness. The guarantee against self-incrimination will be unaffected by this proposal.

Consequently, it is recommended the powers of inspectors be modified to include specific reference to recording of interviews.

Related recommendation

25	Certain inspector powers not limited to entry.
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Recommendation 27 - Requirement to notify Regulator of compliance with improvement notice

Include a requirement for the person issued an improvement notice to notify the regulator of their compliance.
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Clause to be amended: 193.

Background

The model WHS Bill includes a range of enforcement measures that may be used by inspectors, including the power to issue improvement notices. This power has been a feature of safety and health laws in Australia since their introduction in the 1980s, and is included in the OSH Act. An improvement notice permits the inspector to remedy or prevent a contravention of the Act.

The model WHS Bill requires the person who is issued with the notice to comply with it within the period specified in the notice. However, no mechanism is provided that alerts the Regulator of the duty holder's compliance in the absence of a follow-up visit.

The OSH and MSI Acts includes similar provisions requiring the person who is issued the notice to inform the Regulator of their compliance. The DMIRS presently has systems in place to ensure this requirement imposes a minimal burden on the duty holder and ensures the loop is closed on the hazard that prompted the issue of the notice. The DMIRS also has systems in place to randomly follow-up a sample of these notifications.

Recommendation 28 - Power of Regulator to require independent evaluation

Include the power for the Regulator to request an independent evaluation consistent with current practice.
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Clause to be added: New clause to be added to Division 2, Part 8
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Background

The MSI Act presently provides the State Mining Engineer with the power to require an independent study at a mine:

- concerning health and safety at the mine, generally; or
- in some particular respect specified by the State Mining Engineer; or
- safety of all or some specified part of the mine's plant, buildings, operations, or structures; or
- with respect to an accident or a dangerous occurrence at the mine that an inspector is investigating.

Western Australia's petroleum laws include similar requirements, linked to the validation of safety cases:

- Regulation 49 of the Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 2007;
- Regulation 41 of the Petroleum Pipelines (Management of Safety on Pipeline Operations) Regulations 2010;
- Regulation 41 of the Petroleum and Geothermal Energy Resources Pipelines (Management of Safety) Regulation 2010; and
- Regulation 4 of the Petroleum (Submerged Lands) (Pipelines) Regulations 2007.

The study is to be provided at the principal employer's expense.

This power is not specifically replicated in the model WHS Bill although section 153 provides the Regulator with the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

This was also provided for in the *National Mine Safety Framework Drafting Instructions June 2011* (the NMSF Drafting Instructions) which stated:

...the power for the regulator to impose, based on a reasonable opinion in relation to risk formed by an inspector, proactive directions in relation to action required of the mine operator including the power to require an independent technical study or expert report to be carried out...

While the NMSF Drafting Instructions proposed including this power in the regulations, given the potential cost to a PCBU of providing an independent evaluation, it is recommended the WHS Act (WA) should provide the authority for this request with administrative details prescribed in the WHS Regulations (WA).

Recommendation 29 - Amend the function and powers of inspectors in relation to coronial inquests

For consistency with the *Coroner's Act 1996*, remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.

Clauses to be deleted: 160(f) and 187.

Background

In Western Australia, section 53 of the *Coroner's Act 1996* requires the Coroner to cease, or not commence, an inquest after being informed a person has been charged with a criminal offence. This included proceedings under the current OSH Act, and will include proceedings under Western Australia's Work Health and Safety Act, involving the death of a worker at a workplace.

The model WHS Bill provides inspectors with the power to attend Coronial Inquests and to examine witnesses.

However, there is limited value to this power being enacted in Western Australia. When any criminal charges have been dealt with in the appropriate Court, the role of a WHS Inspector is at an end and there is no practical need for an inspector to further examine witnesses. As noted previously, the Coronial Inquiry will only commence after the criminal charges have been disposed. Even if an inspector was permitted to examine witnesses at an inquest, any new information would have little consequence as the *Coroner's Act 1996* also requires that the Coroner must not make a finding inconsistent with the result of any proceedings for an indictable offence.

From the construction of section 53, it is arguably the intent of Parliament that a coronial inquest is not to be used as a means to gather evidence for a prosecution under the OSH Act.

WHS inspectors are able to be called as witnesses and may voluntarily attend an inquest.

Reviews and proceedings

The model WHS Bill provides a tiered process for reviews of decisions made by the Regulator. If a person is unhappy with a decision, such as a requirement to comply with an improvement notice, that person is entitled to request a review of the decision by the Regulator. For most of these decisions there is also a further avenue of review to the WHST. A table showing which decisions are reviewable, and who can request a review is provided in section 223 of the model WHS Bill. Recommendation 31 proposes amendments to this table.

There are also provisions permitting the Regulator to initiate prosecution action for breaches of the model WHS Bill. These provisions are similar to those in current safety and health laws. Recommendation 33 proposes amendments to the WHS civil penalty provisions.

Recommendation 30 - Enforceable undertakings not permitted for Category 2 offences involving a fatality

Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.
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Clause to be added: New sub-clause to be added to section 216.
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Background

The model WHS Bill provides the option of an enforceable undertaking as an alternative to prosecution and the imposition of penalties where a contravention or alleged contravention of the Act has occurred.

SWA's *National Compliance and Enforcement Policy* summarise an enforceable undertaking as:

... a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for a contravention of the Act. An enforceable undertaking provides an opportunity for significant work health and safety reform to be undertaken.

An enforceable undertaking may be entered into by the Regulator and the person at any time prior to the conclusion of proceedings. A similar alternative exists under the OSH Act but can only be entered into after a conviction.

Enforceable undertakings cannot be entered into for a contravention or alleged contravention that involves reckless conduct (a Category 1 offence).

Category 2 offences in the model WHS Bill do not preclude entry into an enforceable undertaking. However, charges for Category 2 offences may be laid due to a contravention of the Act resulting in the death of a worker, where reckless conduct did not occur or cannot be established. This is a serious matter and enforceable undertakings are generally only permitted in exceptional circumstances (codified in guidance provided by each jurisdiction's regulator).

Queensland's Best Practice Review published on 3 July 2017 considered the incongruity of entering into an enforceable undertaking after a fatality, and noted a 'strong view from the majority of stakeholders...that enforceable undertakings should not be permissible in circumstances where a fatality is involved'.

The Best Practice Review further noted:

The genesis of this view is that public perception dictates that there should be a prosecution or punishment for a fatality and that an enforceable undertaking does not reflect the seriousness of the incident. The Review supports this assertion and is of the view that there is a need for clear expectations around when an enforceable undertaking will be accepted and that the acceptance of enforceable undertakings should be mindful of community expectations.

The Best Practice Review's preferred recommendation to expressly prohibit circumstances that involved fatalities for access to enforceable undertakings was implemented by the Queensland Government in the Work Health and Safety and Other Legislation Amendment Bill 2017.

It is recommended that Western Australia adopt the Queensland approach to prohibiting enforceable undertakings for Category 2 offences that involve a fatality.

Recommendation 31 - Include unions as an eligible person who may request certain decisions to be reviewed

Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.
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Clause to be amended: 223.

Background

The model WHS Bill provides a structured review process that permits an **eligible person** to request a review of a decision made by the Regulator. An **eligible person** who is not satisfied with the Regulator's decision after review, may apply to the WHST for further review of the case.

An **eligible person** is someone whose interests are affected by the decision including the worker, the PCBU, or an HSR. For each type of reviewable decision, an **eligible person** who may request a review is specified in the table provided in Part 12 of the Model WHS Bill.

While a union may be called on to provide assistance to their member, they are not specified as an **eligible person** who may request a review of a decision on behalf of their member.

Under present arrangements in Western Australia, where a decision affects multiple workers, each worker must separately request a review of the decision. If this results in a further appeal to the Occupational Safety and Health Tribunal, each request must be dealt with as a separate matter, which may result in multiple agents bringing multiple proceedings for the same factual circumstances.

Permitting a union to bring matters to the WHST on behalf of its members would significantly reduce the administrative burden for employers and employees where more than one worker is affected. A union would be required to establish it has standing (i.e. that one or more of its members is affected) and that the facts and principles of law are identical for each person included in the submission. The WHST will ultimately determine if a submission made by a union is suitable to be dealt with as a single matter under the proposed amendment.

Items to be amended

Note: The highlighted items are to be amended to include the phrase ‘...or his or her union.’

Item	Provision under which reviewable decision is made	Eligible person in relation to reviewable decision
1	Section 54(2) (decision following failure to commence negotiations)	<p>(1) A worker whose interests are affected by the decision or his or her representative appointed for the purpose of section 52(1)(b).</p> <p>(2) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(3) A health and safety representative who represents a worker whose interests are affected by the decision.</p>
2	Section 72(6) (decision in relation to training of health and safety representative)	<p>(1) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(2) A health and safety representative whose interests are affected by the decision.</p>
3	Section 76(6) (decision relating to health and safety committee)	<p>(1) A worker whose interests are affected by the decision.</p> <p>(2) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(3) A health and safety representative who represents a worker whose interests are affected by the decision.</p>
4	Section 102 (decision on review of provisional improvement notice)	<p>(1) The person to whom the provisional improvement notice was issued.</p> <p>(2) The health and safety representative who issued the provisional improvement notice.</p> <p>(3) A worker whose interests are affected by the decision.</p> <p>(4) A health and safety representative who represents a worker whose interests are affected by the decision.</p> <p>(5) A person conducting a business or undertaking whose interests are affected by the decision.</p>
5	Section 179 (forfeiture of thing)	The person entitled to the thing.

Item	Provision under which reviewable decision is made	Eligible person in relation to reviewable decision
6	Section 180 (Return of seized things)	The person entitled to the thing.
7	Section 191 (issue of improvement notice)	<p>(1) The person to whom the notice was issued.</p> <p>(2) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(3) A worker whose interests are affected by the decision.</p> <p>(4) A health and safety representative who represents a worker whose interests are affected by the decision.</p>
8	Section 194 (extension of time for compliance with improvement notice)	<p>(1) The person to whom the notice was issued.</p> <p>(2) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(3) A worker whose interests are affected by the decision.</p> <p>(4) A health and safety representative who represents a worker whose interests are affected by the decision.</p>
9	Section 195 (issue of prohibition notice)	<p>(1) The person to whom the notice was issued.</p> <p>(2) The person with management or control of the workplace, plant or substance.</p> <p>(3) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(4) A worker whose interests are affected by the decision.</p> <p>(5) A health and safety representative who represents a worker whose interests are affected by the decision.</p> <p>(6) A health and safety representative who gave a direction under section 85 to cease work, that is relevant to the prohibition notice.</p>
10	Section 198 (issue of a non-disturbance notice)	<p>(1) The person to whom the notice was issued.</p> <p>(2) The person with management or control of the workplace.</p> <p>(3) A person conducting a business or</p>

Item	Provision under which reviewable decision is made	Eligible person in relation to reviewable decision
		<p>undertaking whose interests are affected by the decision.</p> <p>(4) A worker whose interests are affected by the decision.</p> <p>(5) A health and safety representative who represents a worker whose interests are affected by the decision.</p>
11	Section 201 (issue of subsequent notice)	<p>(1) The person to whom the notice was issued.</p> <p>(2) The person with management or control of the workplace.</p> <p>(3) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(4) A worker whose interests are affected by the decision.</p> <p>(5) A health and safety representative who represents a worker whose interests are affected by the decision.</p>
12	Section 207 (Decision of regulator to vary or cancel notice)	<p>(1) The person to whom the notice was issued.</p> <p>(2) The person with management or control of the workplace.</p> <p>(3) A person conducting a business or undertaking whose interests are affected by the decision.</p> <p>(4) A worker whose interests are affected by the decision.</p> <p>(5) A health and safety representative who represents a worker whose interests are affected by the decision.</p> <p>(6) In the case of a prohibition notice, a health and safety representative whose direction under section 85 to cease work gave rise to the notice.</p>
13	A prescribed provision of the regulations	A person prescribed by the regulations as eligible to apply for review of the reviewable decision.

Recommendation 32 - Permit any person to be appointed by the Regulator to initiate a prosecution

Permit the Regulator to appoint any person to initiate a prosecution.

Clauses to be amended: 230(b) and 260(b).

Background

The model WHS Bill provides the Regulator with the power to commence proceedings for offences against the Act (section 230) or for a contravention of WHS civil penalty provisions. In both cases, the model WHS Bill specifies that proceedings may only be brought by the Regulator or by an inspector with the written authorisation of the Regulator.

Presently, under the OSH Act, proceedings may be instituted by any person authorised by the Commissioner. Similarly, under the MSI Act, proceedings may be brought by an inspector or by a member of the Public Service authorised in writing for the purpose. These provisions provide some flexibility in relation to prosecutions. For example, prosecutions under the OSH Act are currently brought by lawyers in the DMIRS Legal Services team. This ensures that appropriate expertise is applied to prosecutions and that inspectors are able to focus their resources on enforcement activities.

Recommendation 33 - Right for union to initiate prosecution for WHS civil penalty provision

Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.

Clause to be added: New paragraph to be added to 260.

Background

WHS civil penalties are imposed for a range of contraventions in relation to entry into a workplace by a WHS EPH. The EPH, a union, a person, and the PCBU are all capable of contravening specific provisions in relation to workplace entry.

The model WHS Bill only permits the Regulator, or an inspector who is authorised in writing by the Regulator, to initiate proceedings for a breach of the WHS civil penalty provisions. It is proposed to extend this right to a union.

The right for a union to initiate prosecution for a contravention of the WHS civil penalty provisions will naturally be limited by the circumstances of the alleged breach. For example, it is unlikely a union will take action for a breach by an EPH when other disciplinary avenues are available. The cost of entering into proceedings will also provide a limitation on actions that may be undertaken.

A complete list of WHS civil penalty provisions:

Section	Title	Proceedings against...
118(1)(d)	Rights that may be exercised at a workplace	PCBU
123	Contravening WHS entry permit conditions	EPH
125	WHS entry permit to be available for inspection	EPH
126	When right may be exercised	EPH
128	Work health and safety requirements	EPH
129	Residential premises	EPH
143	Contravening order made to deal with dispute	EPH Possibly any person
144	Person must not refuse or delay entry of WHS entry permit holder	Person
145	Person must not hinder or obstruct WHS entry permit holder	Person
146	WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace	EPH

Section	Title	Proceedings against...
147	Misrepresentations about things authorised by this Part	EPH May be some circumstances where it is another person
148	Unauthorised use or disclosure of information or documents	EPH
149	Return of WHS entry permits	EPH
150	Union to provide information to authorising authority	Union

Related recommendation

32	Permit any person appointed by the Regulator to initiate a prosecution.
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Codes of practice

The primary duty of care under work health and safety laws is modified by practicability. Unless the means of controlling a particular hazard is specified in regulations it is up to the PCBU, using best industry practice and in consultation with their workers, to establish the appropriate safe systems of work. To support workplace participants in developing safe systems of work, codes of practice are an important contributor in establishing what is practicable in a specific industry or in response to a specific hazard.

In the model WHS Bill, codes of practice:

- may be approved, varied or revoked by the Minister; and
- are admissible as evidence of whether or not a duty or obligation under this Act has been complied with.

Codes of practice are a key feature of the model WHS laws and present occupational safety and health laws in Western Australia.

Recommendation 34 - Codes of practice to require consultation only in Western Australia

Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.

Clause to be deleted: 274(2)(b).

Background

A new requirement of the model WHS Bill is that the responsible Minister is required to consult with other Australian jurisdictions, unions and employer groups, before approving, varying or revoking a code of practice. The purpose of this is to ensure harmonisation of the model laws is maintained.

However, this requirement exceeds the scope of the OHS IGA which requires only that participating jurisdictions consult in relation to proposed amendments to legislation. Codes of practice are quasi-regulatory instruments in Western Australia.

Codes of practice may be introduced in response to community concerns, Coronial or other judicial recommendations, or in response to specific incidents or trends. Consulting with other harmonised jurisdictions may unduly delay implementation of a code of practice for hazards or industries that are specific to Western Australia.

While consultation at the national level is supported, it should not be expressed as a legislated constraint on the Minister's capacity to act.

Dangerous goods jurisdiction

The regulation of dangerous goods is focussed on storage and transport of specified materials and substances and is not limited to workplaces. Public safety is a significant issue for the regulation of dangerous goods, while work health and safety laws are limited to other persons only to the extent they might be exposed to hazards as a result of work. The model WHS regulations also include chapters on hazardous chemicals and major hazard facilities. The intersection of these approaches creates challenges for the drafters of legislation in ensuring safety standards are maintained without creating regulatory overlap.

Presently in Western Australia, the *Dangerous Goods Safety Act 2004* (DGSA) is supported by the following six subordinate regulations:

- Dangerous Goods Safety (General) Regulations 2007;
- Dangerous Goods Safety (Explosives) Regulations 2007;
- Dangerous Goods Safety (Security Sensitive Ammonium Nitrate) Regulations 2007;
- Dangerous Goods Safety (Storage and Handling of Non-explosives) Regulations 2007;
- Dangerous Goods Safety (Major Hazard Facilities) Regulations 2007; and
- Dangerous Goods Safety (Road and Rail Transport of Non-explosives) Regulations 2007.

Recommendation 35 – Dangerous goods jurisdiction

Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.

Clauses to be adopted: Section 3 references to 'dangerous goods' and Schedule 1.
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Background

The terms of reference of the MAP included a request to consider incorporating the regulation of dangerous goods into the proposed single WHS Act (WA). The model WHS Bill currently provides jurisdictions with the option to include dangerous goods by the provision of jurisdictional notes to include Schedule 1 (Application of Act to dangerous goods and high risk plant) and related changes to the objects of the Act.

A two-stage process is proposed to the reform of dangerous goods laws in Western Australia.

Stage One: Reduce the existing regulation framework for dangerous goods.

Stage Two: Review approaches to incorporate dangerous goods laws in the WHS laws.

Stage One: Reducing the existing regulatory framework

The DGSA will continue to be a standalone Act but will be modernised and streamlined by reducing the existing six sets of regulations to two:

- Dangerous Goods Safety Regulations; and
- Dangerous Goods Safety (Road and Rail Transport of Non-explosives) Regulations 2007.

This approach will ensure continuity of the dangerous goods regulations and allow for effective dangerous goods risk reduction to protect people, property and environment while the WHS Act (WA) is introduced.

As is currently the case an interface between the WHS Act (WA) and the DGSA will be in place as:

- The former Worksafe Division of the DMIRS will continue to regulate occupational health and safety including occupational safety and hygiene issues (lead, asbestos and carcinogens, exposure to airborne contaminants by workers etc.) in the workplace
- The Dangerous Goods and Critical Risks Directorate will regulate emergency management and process safety including engineering controls to prevent loss of containment, explosions and fires in process vessels, transfer and storage of dangerous goods.

There are currently 16 different site or activity based licences relating to dangerous goods management in Western Australia. To simplify and streamline the current system and to reduce red tape, amalgamation of the regulations will allow these licences to be brought together under a single licensing system. There will be an overall reduction in regulatory burden and cost.

Stage Two: Review approaches to incorporate dangerous goods laws in the WHS laws

Schedule 1 of the Model WHS Bill relates to application of the Act to dangerous goods and high risk plant. Schedule 1 is proposed to be retained as is, but with the approach to dangerous goods to be reviewed within two years of proclamation of the WHS Act (WA), with a view to determining whether Dangerous Goods and Critical Risks regulations be brought under the WHS Act (WA).

The timing of implementation of the first stage of this proposal (the reduction in the regulatory framework) will be subject to a number of steps including the policy development, consultation processes and finalisation of the position and engagement of Parliamentary Counsel for drafting. This is anticipated to take approximately 18 months to two years.

It is recommended that a Dangerous Goods Regulatory Group is formed within the DMIRS to examine approaches to:

- amalgamating the dangerous goods legislation with the exception of the transport regulations;
- implementing a single licence system; and
- determining if dangerous goods can successfully be brought under Schedule 1 of the WHS Act (WA).

Work Health and Safety Commission

The tripartite COSH consists of employers, employees and government representatives and people with expertise and knowledge in occupational safety and health matters. The COSH:

- is the peak consultative forum on occupational safety and health in Western Australia;
- is the driving force behind Western Australia's workplace safety laws, policies and programs; and
- liaises with the Department of Mines, Industry Regulation and Safety in relation to the administration and enforcement of safety and health laws in Western Australia.

The COSH comprises:

- an independent chair nominated by the Minister;
- the WorkSafe Western Australia Commissioner;
- two officers of the Public Service nominated by the Minister(s) responsible for the administration of the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994*;
- two members nominated by the Chamber of Commerce and Industry WA;
- one member nominated by the Chamber of Minerals and Energy WA;
- three members nominated by UnionsWA, one of whom must have knowledge and experience in the mining industry; and
- three members with expertise and knowledge of occupational safety and health, nominated by the Minister.

The COSH has a range of functions, including the provision of advice to the Minister, the formulation of material such as codes of practice, the promotion of education and training in work safety and health, and the collection and dissemination of information.

The COSH has been a key feature of Western Australia's safety and health laws, under various names, since 1984 and is considered a valuable forum for safety and health matters. The COSH is one of the few remaining tripartite bodies in Australia.

Jurisdictional notes in the model WHS Bill permit each jurisdiction to implement local tripartite consultation arrangements and other local arrangements in Schedule 2.

Recommendation 36 – Establish the Work Health and Safety Commission

Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.

Clauses to be amended: Schedule 2 to include clauses establishing the WHSC.

Background

The MAP agreed to retain Western Australia’s consultative arrangements and include clauses from the OSH Act relevant to establishing the COSH, its membership and functions and other matters, adapted for the terminology used in the model WHS Bill. The name of the new body will be the Work Health and Safety Commission (WHSC).

Related recommendations

37	Establish Mining and Critical Risk Advisory Committee
38	Work Health and Safety Commission (WHSC) payments

Clauses to be amended

The following sections of the OSH Act will need to be inserted into Schedule 2 of the WHS Act (WA), and amended for consistency with the terminology of the WHS laws, and to incorporate changes made in other related recommendations.

OSH Act sections		
Clause	Title	Notes
Part 2	Commission for Occupational Safety and Health	References to the 'Commission for Occupational Safety and Health' or 'the Commission' to be changed to the 'Work Health and Safety Commission' or the 'WHS Commission' respectively. References to 'employers, self-employed persons and employees' to be changed for consistency with WHS Bill (e.g. employer becomes PCBU). References to 'safety and health' to be changed to 'health and safety'.
6	Commission, creation membership of, etc.	
6A	Deputy Chairperson	
7	Acting members	
8	Terms and conditions of appointed members	Remuneration to be considered in Recommendation 38
10	Vacation of office	
11	Leave of absence	
12	Casual vacancies	
13	Meetings of Commission	
14	Functions of Commission	Reference to the NOHSC to be changed to Safe Work Australia.
15	Other advisory committees, appointment of etc.	To be amended, if required, for consistency with the approach agreed to establishing the Resources Advisory Committee (see Recommendation 37).
16	Annual Report	Annual reporting cycle may require amendment for consistency with other boards.
17	Staff to assist Commission	

Recommendation 37 – Establish Mining and Critical Risk Advisory Committee

Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)
--

Clause to be added: Include a section establishing the MACRAC in Schedule 2.
--

Background

The Mining Industry Advisory Committee (MIAC) was established as a permanent advisory committee to the Commission for Occupational Safety and Health (the COSH) in 2004, in response to a recommendation of the 2002 review of the OSH Act by R Laing.

The need for specialised expertise in the mining sector has not changed since the MIAC was originally established. Consistent with the proposal to establish the WHSC, it is proposed to establish a new permanent committee specialised in mining and related fields, to replace the MIAC. The new permanent advisory committee is to be called the Mining and Critical Risk Advisory Committee (MACRAC).

The primary function of the MACRAC is to advise and make recommendations to the Minister and the WHSC on work health and safety matters, including matters covered by the WHS Bill concerning work health and safety in the resources industry (including the onshore petroleum industry).

Given the broader nature of matters/industries that can be considered by the MACRAC it is proposed that membership consists of persons appointed by the Minister after consultation with the following bodies:

- the Chamber of Minerals and Energy of Western Australia; and
- the Association of Mining and Exploration Companies;
- the Australian Petroleum Production and Exploration Association;
- the Australian Pipelines and Gas Association;
- Unions WA; and
- the DMIRS Mines Safety mining and critical risk branches.

At least two of the members will be, in the Minister's opinion, independent of the bodies referred to above. One of the independent members will be appointed by the Minister as chairperson.

This approach will be prescribed in the WHS Act (WA) and will enable the Minister to ensure:

- equal representation across industry, expert, and union members;
- the size of the advisory committee does not impact its ability to function effectively; and
- appointment of an independent Chair.

Regulations will specify the role and function of the MACRAC which could include making recommendations to the Minister on the legislation including on the development, repeal, or amendment of supporting codes of practice and guidance material. This role and function should not be unique to the WHS Commission given there are likely to be resources sector specific matters covered by the legislation on which the MACRAC is best placed to advise.

Changes to the names of any of the bodies with which the Minister can consult is to be managed by the regulations.

Related recommendations

36	Establish the Work Health and Safety Commission
38	Work Health and Safety Commission (WHSC) payments

Clauses to be amended

Sections of the OSH Act, appropriately amended, will be incorporated into Schedule 2 of the model WHS Bill, implementing this recommendation.

Recommendation 38 – Work Health and Safety Commission (WHSC) payments

Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.

Clause to be amended: Remuneration clause for inclusion in Schedule 2.
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Background

Appointed members of the COSH, who are not employed by Government, are entitled to receive remuneration under section 8(2) of the OSH Act.

Remuneration is determined by the Minister on advice from the Public Sector Commissioner.

Non-Government members of the COSH are nominated by the specified organisations (CCI, CME and UnionsWA) or by the Minister (experts) and are appointed by the Governor in Executive Council. Appointments are then published in the *Western Australian Government Gazette* (the Gazette).

The Australian Taxation Office has advised that, as non-Government members of the Commission are appointed as individuals, their remuneration must be treated as wages and taxed accordingly. This approach has caused significant difficulties for appointed members. Union members are unable to accept individual payments for attendance at meetings. For members that do receive payment, the amounts require the organisation they represent to adjust salaries which can result in too much tax being paid, or disrupt safety net benefits.

These issues are acting to thwart the purpose of the clause, which is to ensure that members are remunerated for their contributions.

MAP discussed these issues and agreed to request the drafting officer to consider alternative approaches to remuneration (such as making payments to the nominating organisation as a fee for service).

Related recommendations

36	Establish the Work Health and Safety Commission
37	Establish Mining and Critical Risk Advisory Committee

WHS Tribunal and Registrar

The OSHT is the current review body for certain matters that may be referred to it under the OSH Act. These matters range from external review of decisions made by the Commissioner, to the resolution of issues related to establishing a scheme for the election of HSRs. The following recommendations establish the WHST to continue the work of the OSHT, with amendments necessary due to the nature of the model WHS Bill, or refinements appropriate to the introduction of matters such as right of entry.

Recommendation 39 - Establish the Work Health and Safety Tribunal

Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.

Clauses to be added: Include new Part/Schedule.

Background

The OSHT may currently hear matters referred under safety and health laws, including reviews of decisions made by the Regulators (WorkSafe, Mines and Petroleum). The current OSHT is set up within the structure of the Western Australian Industrial Relations Commission (WAIRC).

The model WHS Bill permits jurisdictions to establish the appropriate *external review body*:

A jurisdiction may provide for the nature and scope of the external review and the powers that may be exercised by the external review body in relation to an external review if this is not provided for in other laws. An external review is intended to be a merits review and the external review body is to be able to affirm or overturn the decision reviewed or to substitute its own decision for that decision.

The structure for external review in Western Australia is to be retained. Clauses establishing the WHST will be modelled on the clauses found in Part VIB of the OSH Act.

A number of additional recommendations modify or clarify the procedures and processes carried out within the WHST.

Related recommendations

40	Application for external review – procedural matters
41	Provide WHST with power to direct Registrar to investigate matters
42	Specify that WHS matters are not industrial matters
43	Extend conciliation powers of the WHST
44	WHST to be the designated court or tribunal in certain matters

Recommendation 40 - Application for external review – procedural matters

Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal

Clauses to be added: New clauses to be added to section 229.
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Background

The WHST will be established as the external review body for decisions of the Regulator, and for other matters that may be referred (see Recommendation 39).

Section 229 of the model WHS Bill provides administrative requirements in relation to applications for external review and frames some of the powers of the WHST. A number of amendments are proposed to section 229 to facilitate the operation of the WHST.

The proposed amendments are consistent with those permitted by a jurisdictional note:

Amendment	Purpose
Add the right for an eligible person to apply to the WHST for review of any other matter that may be referred under the Act.	Recommendation 28 permits an interested party to request the WHST to review matters relating to the cessation of unsafe work. This is not a decision subject to internal review.
Specify the procedure for application is to be in accordance with the requirements of Part 10 of the Industrial Relations Commission Regulations 2005.	Ensures consistency with existing requirements of the WAIRC.
Include the power for the WHST to stay the operation of a decision during the review.	Certain decisions may be stayed during an internal review, but the stay is lifted on application for external review. This amendment permits the WHST to stay a decision.
Specify the application for review is dealt with by way of a hearing <i>de novo</i> .	A hearing <i>de novo</i> means the hearing is conducted on its own merits and is not bound by evidence or decisions made previously. The current OSHS has operated on this basis, and the proposed amendment will put the question beyond doubt.

Amendment	Purpose
Include the power for the WHST to affirm, vary or revoke the decision concerned.	Sets out the options available to the WHST.
The WHST may revoke the decision at any time after application before the hearing.	Enables the WHST to cancel a notice issued by the Regulator with the consent of the parties, without the need for a hearing.

Related recommendations

39	Establish the WHS Tribunal.
41	Provide WHST with power to direct Registrar to investigate matters
42	Specify that WHS matters are not industrial matters
43	Extend conciliation powers of the WHST
44	WHST to be the designated court or tribunal in certain matters

Recommendation 41 - Provide Work Health and Safety Tribunal with power to direct Registrar to investigate matters

Provide the Work Health and Safety Tribunal (WHST) with power to direct the **Registrar** to investigate and report on matters.

Clause to be amended: 51G(1) of the OSH Act to be incorporated into the WHS Bill.

Background

Part V of the IR Act establishes the Registrar and other officers of the Western Australian Industrial Relations Commission (the Commission), and specifies the powers and functions for these office holders. This includes the power for the Commission to:

...at any time of its own motion direct the Registrar or any other officer of the Commission to make such investigations and reports in relation to any matter within the jurisdiction of the Commission as it deems necessary.

The jurisdiction of the Commission, acting as the OSHT, is provided in section 51G of the OHS Act. The power to direct the **Registrar** to investigate is not presently included in the jurisdiction of the OSHT.

Recommendation 39 proposes establishing the WHST to continue the role of the OSHT under the WHS Act (WA). Recommendation 21 provides the role of **authorising authority** to the **Registrar** for the administration of the workplace entry permit system, and Recommendation 24 permits the **Registrar** to refer certain matters to the WHST.

The role of the WHST in resolving WHS matters, including those mentioned in other recommendations, can be enhanced by including the power to direct the Registrar to investigate in the WHS Act (WA).

Related recommendations

21	<i>Registrar</i> to be the <i>authorising authority</i> for the Work Health and Safety entry permit system
24	Registrar to be added as an eligible party to make applications to the WHS Tribunal on specified matters
39	Establish the Work Health and Safety Tribunal.

Clause to be amended

Recommendation 39 establishes the WHST based on the existing provisions of Part VIB of the OSH Act. Parliamentary Counsel will be consulted regarding the appropriate location for clauses establishing the WHST, which might be in a new Part or Schedule. New numbering will be developed as a result of this decision.

The clause of the OSH Act to be amended when establishing the WHST is 51G(1).

Recommendation 42 - Specify that WHS matters are not industrial matters

Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .
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Clause to be added: Equivalent of 51G(3) of the OSH Act.
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Background

The IR Act refers to matters dealt with before the jurisdiction of the current Occupational Safety and Health Tribunal. Certain matters are excluded from the definition of **industrial matters** in section 7(3) that might otherwise be referred to the Commission, including matters under the OSH Act, the MSI Act, and associated petroleum Acts.

This recommendation proposes to include a clause in the model WHS Act (WA) that mirrors the exclusions in the IR Act. Health and safety practitioners are not industrial relations practitioners, and are often unaware of the exclusions in the IR Act when referring matters. The proposal does not extend the current law, but provides clarity for those working in the field of health and safety.

Related recommendations

39	Establish the Work Health and Safety Tribunal.
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Clause to be amended

Recommendation 39 establishes the WHST based on the existing provisions of Part VIB of the OSH Act. Parliamentary Counsel will be consulted regarding the appropriate location for clauses establishing the WHST, which might be in a new Part or Schedule. New numbering will be developed as a result of this decision.

The clause of the OSH Act to be added when establishing the WHST will be the equivalent of 51G(3).

Recommendation 43 - Extend conciliation powers of the Work Health and Safety Tribunal

Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.

Clause to be amended: 51J of the OSH Act to be incorporated into the WHS Bill.

Background

Recommendation 39 establishes the WHST to take on the role and functions of the OSH Act under the WHS Act (WA). Clauses establishing the WHST will be included in a new Part or Schedule to be determined in consultation with the Parliamentary Counsel.

The note that permits jurisdictions to establish the appropriate external review body is general in nature and does not anticipate the powers and functions of these bodies in every participating jurisdiction. Under present arrangements, the OSH Act is able to provide conciliation of certain matters referred to it under the OSH Act. The matters that may be subject to conciliation are specified:

Section	Matter (OSH Act)
28(2)	Disputes arising about entitlement to pay or benefits after cessation of unsafe work.
30(6)	Specified matters relating to the election of safety and health representatives that are not able to be resolved.
30A(4)	Inability of consulting parties to reach agreement on election scheme.
31(11)	Questions relating to election may be referred.
35(3)	Entitlements of safety and health representatives.
39G	Review of Commissioner's decisions: <ul style="list-style-type: none"> • request for establishment of a safety and health committee; • composition and membership of safety and health committees; and • abolition of safety and health committee.

One of the objects of the model WHS Bill is:

...providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety.

The resolution of issues at the workplace is an important means to improve health and safety outcomes. Where matters cannot be resolved at the workplace, they may ultimately be referred to the WHST for consideration. The capacity for the WHST to use its conciliation powers to resolve matters that may be referred is an effective extension of the objects of the WHS Act (WA). Consequently, the MAP agreed that any matter that may be referred to the WHST that does not relate to enforcement activities of the Regulator should be able to be dealt with through conciliation.

Matters that may be considered for conciliation under the WHS Act (WA)

Section	Matter
54(2)	Decision following failure to commence negotiations.
65	Disqualification of a health and safety representative
72(6)	Decision in relation to training of health and safety representative.
76(6)	Decision relating to health and safety committee.
89	Dispute about entitlements after cessation of unsafe work unable to be resolved by inspector
112	Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct
138	Application to revoke WHS entry permit
142	Authorising Authority may deal with a dispute about right of entry
**	A prescribed provision of the regulations

A number of enforcement options are available to the inspector, including the issue of improvement, and prohibition notices. These require:

- the inspector to form a reasonable belief in relation to contraventions of the Act (improvement notice); or
- a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard (prohibition notice).

An Inspector may also issue a non-disturbance notice if the Inspector reasonably believes that it is necessary to do so to facilitate the exercise of his or her compliance powers.

These enforcement measures are an application of the law to a specific set of facts and circumstances by an inspector. While a review of these notices may determine there were errors in the application of the law, or a misapprehension of the facts, these are not matters that are suitable for conciliation. The WHST will continue to be able to review these matters.

Related recommendations

39	Establish the WHS Tribunal.
40	Application for external review – procedural matters
41	Provide WHST with power to direct Registrar to investigate matters
42	Specify that WHS matters are not industrial matters
44	WHST to be the designated court or tribunal in certain matters

Clauses to be amended

Recommendation 39 establishes the WHST based on the existing provisions of Part VIB of the OSH Act. Parliamentary Counsel will be consulted regarding the appropriate location for clauses establishing the WHST, which might be in a new Part or Schedule. New numbering will be developed as a result of this decision.

The clause of the OSH Act to be amended when establishing the WHST is 51J.

Recommendation 44 - WHS Tribunal to be the designated court or tribunal in certain matters

Insert the WHS Tribunal as the designated court or tribunal for specific matters.
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Clauses to be amended: 65, 112, 114, 215, and 229.
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Background

The WHST will be established as the external review body for the WHS Act (WA) (see Recommendation 39).

The WHST will perform the role of the existing OSHT as the external review body for decisions made by the Regulator and in relation to other matters specified in the WHS Act (WA). The role of the WHST will include an enhanced ability to conduct conciliation of certain disputes related to work health and safety. More information on the role of the WHST can be found in Recommendation 39.

The model WHS Bill provides the placeholder phrases ‘designated court’ and ‘designated court or tribunal’ for matters such as civil proceedings for engaging in or inducing discriminatory or coercive conduct.

The matters assigned to the ‘designated court’ or ‘designated court or tribunal’ in the model WHS Bill are matters that are presently dealt with by the OSHT, or that are consistent with the role of the OSHT. Consequently it is proposed this role will continue under the WHST.

Related recommendations

39	Establish the WHS Tribunal.
40	Application for external review – procedural matters
41	Provide WHST with power to direct Registrar to investigate matters
42	Specify that WHS matters are not industrial matters
43	Extend conciliation powers of the WHST

Clauses to be amended

Note: The definition of WHS Tribunal is inserted by Recommendation 38.

Clause	Title	Amendment
65	Disqualification of a health and safety representative	Replace references to [designated court or tribunal] with the defined term <i>tribunal</i>
112	Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct	
114	General provisions relating to orders	
215	Injunctions for non-compliance with notices	
229	Application for external review	

Appendices

Appendix A: Index of recommendations

#	Recommendation	Clauses
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act (WA).	3(1).
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.
6	Amend the meaning of supply to include the loan of an item.	6(1).
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a).
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36.
11	Amend the heading 'Negotiations for agreement for work group' to 'Negotiations for determination for work group'.	52 (heading only).
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a).

#	Recommendation	Clauses
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76.
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100.
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).

#	Recommendation	Clauses
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b).
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2.
38	Review approach to remuneration for appointed members of the WHSC in consultation with the Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.

#	Recommendation	Clauses
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act.
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.

Appendix B: Jurisdictional Notes

Section	Jurisdictional note	Comments
1	Appropriate local provisions to be inserted. However, a uniform form of citation is suggested, for example, the <i>Work Health and Safety Act 2010</i> .	PCO to draft
2	Appropriate local provisions to be inserted with a view to commencing the model provisions on the same date in each jurisdiction.	PCO/Government
3(1)	The words in brackets are optional for jurisdictions. They may only be included if the relevant provisions of Schedule 1 are included.	To be included
3(2)	The words in brackets are optional for jurisdictions. They may only be included if the relevant provisions of Schedule 1 are included.	To be included
4 authorising authority	Each jurisdiction will need to specify the court or tribunal or body to be the authorising authority for that jurisdiction. If the term regulator or designated court or tribunal or both is to be used in Part 7 instead of authorising authority, this definition is to be deleted.	Recommendations 20 and 21

Section	Jurisdictional note	Comments
4 <i>corresponding WHS law</i>	<p>Each jurisdiction will specify the Acts that are to be corresponding Acts and may include a power to prescribe corresponding Acts by regulation.</p> <p>A jurisdiction may extend the operation of a provision that applies to a corresponding WHS law to specified laws of the jurisdiction. This should be dealt with separately in the provision or regulations under the provision.</p> <p>This term is used in the definition of corresponding regulator in clause 4, and in sections 85, 90, 113, 138, 156 and 271 and item 7.2 of Schedule 3 to refer to training and other requirements, eligibility criteria, appointments, authorisations and information-sharing under corresponding WHS laws.</p>	DMIRS to determine in consultation with PCO
4 <i>court</i>	Each jurisdiction will specify the relevant court or courts for the Act or specified provisions of the Act.	Ministerial decision.
4 <i>local authority</i>	Each jurisdiction will determine the local authorities for its jurisdiction.	PCO to draft
4 <i>medical treatment</i>	Each jurisdiction will specify the relevant registration Act which will be the Health Practitioner Regulation National Law of that jurisdiction.	PCO to draft

Section	Jurisdictional note	Comments
4 public authority	Each jurisdiction will determine the public authorities for its jurisdiction.	PCO to draft
4 regulator	Each jurisdiction will specify the relevant regulator for its jurisdiction, for example WorkSafe Victoria.	See Recommendation 36
4 this Act	Some jurisdictions may need to disapply the meaning of this term in their Interpretation Acts.	Delete: Same definition already contained in the <i>Interpretation Act 1984</i>

Section	Jurisdictional note	Comments
7	<p>A jurisdiction may amend section 7(1) to add additional classes of persons to the list of 'workers'. For example, the Commonwealth may add members of the defence forces and cadets. Statutory office holders and members of statutory or public authorities could also be added. Jurisdictions may also specify classes of persons who are to be taken to be carrying out work for a business or undertaking and persons who are to be taken to be the employer of specified classes of persons. For example the classes of persons specified by a jurisdiction may include police officers, defence force members and cadets (in the case of the Commonwealth), statutory office holders and members of statutory or public authorities.</p> <p>Each jurisdiction may vary section 7(2)(b) as necessary for consistency with jurisdictional police laws (for example, to limit the application of section 7(2)(b) in jurisdictions where police are taken always to be on duty).</p>	<p>Definition of financier to be clarified in regulations.</p> <p>Reference to Police to be retained as drafted.</p> <p>Note for PCO regarding application to gig economy (SSO advice).</p>
9	<p>Jurisdictions may have to disapply the provisions of their Interpretations Acts relating to examples and notes.</p> <p>Jurisdictions may use a different style to identify examples and notes from that in the model Bill.</p>	<p>Consult with PCO. MAP preference is for examples to be retained.</p>

Section	Jurisdictional note	Comments
10	<p>Each jurisdiction will, if necessary, enact a provision to ensure that the Crown in right of the jurisdiction and also in all its other capacities is bound by the model provisions. For example, the Australian Capital Territory can omit this provision because of the effect of section 121 of its <i>Legislation Act 2001</i>.</p> <p>Some jurisdictions may need to refer to the State rather than the Crown throughout the Bill.</p>	Consult with PCO. MAP prefers model WHS as drafted.
11	Each jurisdiction may insert a local provision relating to extraterritorial application including the extraterritorial reach of offences.	PCO to provide advice in context of recent NSW amendments and related court case. MAP prefers inclusion of a clause modelled on NSW.
12	Each jurisdiction may insert local provisions to establish the relationship between the model provisions and other Acts in the jurisdiction.	MAP notes this issue to be queried as part of drafting instructions.
38	A jurisdiction may remove this reporting requirement to the extent that similar reporting arrangements exist under local laws.	No change required.
65 (and sections 112, 114, 215, 220, 236 and Schedule 3)	Jurisdictions will designate the relevant courts and tribunals and specify the relevant jurisdiction in relation to any matter conferred on a court or tribunal under any provision of the Model Bill or the regulations and make any necessary consequential amendments including the amendment or addition of definitions.	Ministerial decision in consultation with AG – MAP views noted.

Section	Jurisdictional note	Comments
103	Each jurisdiction may need to make appropriate amendments to this provision to ensure it conforms to local legislation.	Appropriate reference in WA is 'lock-up'
108	Jurisdictions may need to include their own definitions of emergency services worker.	PCO. Ordinary meaning may be sufficient.
110	A jurisdiction may omit subsection (1)(c) and substitute the following for subsection (2): '(2) If it is alleged that the discriminatory conduct was engaged in for a prohibited reason, that reason is presumed to be the dominant reason for that conduct unless the accused proves on the balance of probabilities, that the reason was not the dominant reason for the conduct.'	MAP did not express opinion. Consult PCO.
Part 7 (and sections 138 and 142)	A jurisdiction may use regulator rather than authorising authority for some or all of the provisions of Part 7 and make any necessary consequential changes. This will be necessary for jurisdictions where the regulator performs some or all of the functions of the authorising authority.	Regulator will not be the authorising authority for any clause in Part 7.
116 (and sections 124, 131, 133, 137, 138 and 150)	A State or Territory may insert its relevant industrial law.	See Recommendation 22

Section	Jurisdictional note	Comments
152	Jurisdictions may add to the list of functions.	MAP did NOT add functions.
154	A jurisdiction may specify local delegation requirements and the persons to whom a delegation may be made and may rely on its standard delegation provisions.	No change proposed but noted to clarify if 'any person' is limited to person appointed under <i>Public Sector Management Act 1994</i> .
156	A jurisdiction will need to include local provisions to ensure that appropriate arrangements are made for the appointment as an inspector of a person who is an inspector under a corresponding WHS law. A jurisdiction may need to include local provisions to ensure that the dual appointments are made in a manner consistent with any applicable public service laws. For example, section 51 of the <i>Occupational Health and Safety Act 1991</i> of the Commonwealth. A jurisdiction may replace the term public servant with the corresponding or appropriate term used in the jurisdiction.	No change. Noted that definition appears broad enough to cover MRD inspectors.
157	Jurisdictions may need to specify local provisions for identity cards.	N/a
160	A jurisdiction may omit paragraph (f) if this matter is dealt with in other laws of the jurisdiction.	See Recommendation 29
165	A jurisdiction may omit the words 'without paying for it' in subsection (1)(e).	MAP no comment

Section	Jurisdictional note	Comments
Part 9, Division 3, Subdivision 2	A jurisdiction will need to make appropriate adjustments to the search warrant provisions to enable them to operate in its jurisdiction.	Consult with PCO
172	A jurisdiction may adjust this provision as necessary to accord with the legal or legislative or human rights principles applying in its jurisdiction.	Agreed to retain as drafted consistent with current approach in OSH Act.
184 (and sections 179, 220, 262, 270 and 274)	Jurisdictions will need to replace 'State' with 'Territory' or 'the Commonwealth' as is relevant to the jurisdiction. A jurisdiction may include an alternative provision that deals with compensation for acquisition of property under this Act.	The <i>Interpretation Act 1984</i> uses the word State to refer to Western Australia. Consult with PCO.
185	A jurisdiction may amend section 185 to align it with its human rights charter or other legislative protocols. A jurisdiction may amend or remove the offence in subsection (4) if this is inconsistent with the powers of police in that jurisdiction.	N/a
187	A jurisdiction may omit this provision if this matter is dealt with in other laws of its jurisdiction.	See Recommendation 29
189	A jurisdiction which has a Criminal Code may displace the default element of intention that applies in that jurisdiction by stating that recklessness will apply.	Jurisdictional note is not relevant.

Section	Jurisdictional note	Comments
223	<p>A jurisdiction may provide for the following decisions to be reviewable decisions where the regulator is the authorising authority:</p> <ul style="list-style-type: none"> (a) a decision under section 134 to refuse to issue a WHS permit; (b) a decision under section 140 to revoke, suspend or take other action in relation to a WHS entry permit. <p>The eligible persons in relation to the reviewable decision would be:</p> <ul style="list-style-type: none"> (a) the relevant union; (b) the person for whom the entry permit is sought, in relation to section 134; (c) the WHS permit holder, in relation to section 140. 	Regulator is not the <i>authorising authority</i>

Section	Jurisdictional note	Comments
229	<p>Each jurisdiction must specify the appropriate external review body.</p> <p>A jurisdiction may provide for the nature and scope of the external review and the powers that may be exercised by the external review body in relation to an external review if this is not provided for in other laws. An external review is intended to be a merits review and the external review body is to be able to affirm or overturn the decision reviewed or to substitute its own decision for that decision.</p> <p>An external review body is intended to be able to stay the decision that is the subject of the external review pending the decision on the external review.</p>	See Recommendation 38
230	<p>In relation to section 230(1), a jurisdiction may add other public officials who hold a relevant public office or administer this Act to bring proceedings for an offence against this Act, with the written authorisation of the regulator.</p>	Recommendation 31 provides the Regulator with the power to appoint any person.
	<p>In relation to section 230(4), amendments may be necessary in some jurisdictions to ensure that this provision does not conflict with arrangements under other legislation in that jurisdiction.</p> <p>A jurisdiction may confer jurisdiction on courts to hear prosecutions and appeals in relation to offences under this Act.</p>	Consult with PCO/DPP

Section	Jurisdictional note	Comments
231	A jurisdiction may amend subsections (2), (3), (4), (5) and (6) to reflect the role of the Director of Public Prosecutions in that jurisdiction or omit the provisions if they are inconsistent with prosecutorial policy and practice in that jurisdiction.	Consult with PCO/DPP
232	A jurisdiction may specify other types of official inquiries for the purposes of subsection (1)(b), as appropriate to that jurisdiction.	Consult with PCO/DPP
243	Jurisdictions must enact provisions as necessary to: <ul style="list-style-type: none"> • enable an infringement scheme to be established in relation to this Act; and • prescribe the offences for which infringement notices may be issued consistent with the model regulations. 	MAP decided not to include an infringement notice scheme
244	A jurisdiction may omit this section if the relevant laws of the jurisdiction already provide for this.	Consult with PCO
245	A jurisdiction may need to adjust this section in relation to its jurisdiction.	TBD (presumably consistency with current OSH)
246	A jurisdiction may need to adjust this section in relation to its jurisdiction	TBD (presumably consistency with current OSH)
268	The Commonwealth may rely on the provisions of the Criminal Code in place of this offence.	N/a

Section	Jurisdictional note	Comments
274	Jurisdictions may need to adjust the references to the Government Gazette as relevant to the jurisdiction.	PCO
276	Jurisdictions may replace Governor in Council with the appropriate term for that jurisdiction. A jurisdiction can include a provision clarifying that the regulation-making powers do not limit the powers already provided in their interpretation legislation.	'Governor' is defined in the <i>Interpretation Act 1984</i> as: <i>the Governor of the State and includes the officer for the time being administering the Government of the State...</i>
Schedule 1	This Schedule is optional for jurisdictions. A jurisdiction may choose to regulate high risk plant or dangerous goods or both.	To be included as drafted.
Schedule 2	A jurisdiction may use this Schedule to establish the regulator and to provide for local consultation arrangements and for local arrangements for the collection of money and the provision of data.	Recommendation 35-37

Appendix C: Matters to be included in regulations

During its consideration of the model WHS Bill, the MAP agreed that a recommendation be made for a number of proposals to be included in the regulations. These matters will be further considered as the regulations for mines, petroleum and general safety are being developed.

Clause	Title	Proposal
4	Definitions – Officer	CME raised a concern that persons appointed for the purpose of mines regulations (e.g. registered manager of a mine) would be construed as an ‘officer’ for the purpose of the Act. Note that being an ‘officer’ is a matter of fact and in (Commonwealth) law the regulations cannot override.
6	Meaning of supply	<i>Financier</i> may require further clarification
7	Meaning of worker	Person of prescribed class to include (if needed) workers under the ‘gig’ economy.
18	What is reasonably practicable in ensuring health and safety	Further definition of ‘risk’ in resource specific regulations (noting it is defined under Standard 4801).
37	What is a dangerous incident?	Further clarification required in relation to illnesses of long latency (e.g. asbestos exposure).
55	Determination of work groups of multiple businesses	Clarify that multiple PCBUs may form a single work group if appropriate.
72	Obligation to train health and safety representatives	Further clarification required that HSR must be no worse off when attending training than if they had been attending work (e.g. shift allowances etc.).
72	Obligation to train health and safety representatives	Consider clarification that training course should not exceed five days.
81	Resolution of health and safety issues	Definition of ‘ <i>relevant agreed procedure</i> ’ to be in the regulations.
88	Continuity of engagement of worker	Clarification should be included in the regulations.
122	Notice of entry	Consider clarification adding that ‘person with management or control of the workplace’ is also notified.
155	Powers of	Head of power added to Act – details to be

	Inspectors to obtain information	in the regulations.
165	General powers on entry	Clarify the level of assistance to be provided (e.g. inspector to be provided with transport to offshore facilities).
129	Schedule 1	General requirement to minimise regulatory overlap with DGSA

Appendix D: Matters to be included in guidance material

During discussions by the MAP, a number of areas were highlighted that might require additional clarification in related codes of practice or guidance material. Specific proposals have been captured in the following table.

Clause	Title	Proposal
3	Object	Clarification of the word 'welfare' to be provided in guidance material
52	Negotiations for agreement for work group	Guidelines for what may be considered are crucial.
91	Provisional improvement notice must be in writing	Clarification that 'in writing' can include digital methods of communication.
92	Contents of provisional improvement notice	Clarification that '...at least 8 days after...' gives a clear 7 days or 1 week.
129	Residential premises	Guidance material on what constitutes residential premises to be provided.

Appendix E: Dictionary of acronyms

Abbreviation	Phrase
Best Practice Review	<i>Best Practice Review of Workplace Health and Safety Queensland – Final Report</i>
CCI	Chamber of Commerce and Industry WA
CME	Chamber of Minerals and Energy WA
COAG	Council of Australian Governments
The Commission	The Western Australian Industrial Relations Commission
Commissioner	WorkSafe Western Australia Commissioner
COSH	The Commission for Occupational Safety and Health
DMIRS	Department of Mines, Industry Regulation and Safety
DGSA	<i>Dangerous Goods Safety Act 2004</i>
EPH	Entry permit holder
Gazette	Western Australian Government Gazette
HSC	Health and Safety Committee
HSR	Health and safety representative
IR Act	<i>The Industrial Relations Act 1979</i>
MACRAC	Mining and Critical Risk Advisory Committee
Mining Industry Advisory Committee	MIAC
MCMPR	Ministerial Council on Mineral and Petroleum Resources
Model WHS Bill; and Model WHS Bill 2016	The current version of the model Work Health and Safety Bill
Model WHS Bill 2011	A previous version of the model WHS Bill
Model WHS laws	The model WHS Bill and the model WHS regulations
Model WHS regulations	The current version of the model Work Health and Safety Regulations
MSI Act	<i>The Mines Safety and Inspection Act 1994</i>
National Mine Safety Framework	NMSF

Abbreviation	Phrase
NMSF Drafting Instructions	<i>National Mine Safety Framework Drafting Instructions June 2011</i>
National Review	National Review into Model Occupational Health and Safety Laws
National Review Reports	Reports of the National Review
NOHSC	National Occupational Health and Safety Commission
OSHT	Occupational Safety and Health Tribunal
OHS	Occupational Health and Safety (commonly used in other Australian jurisdictions prior to harmonisation)
OSH Act	<i>The Occupational Safety and Health Act 1984</i>
OHS IGA	<i>Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety</i>
OSH laws	The OSH Act and the OSH regulations
OSH Regulations	The Occupational Safety and Health Regulations 1996
OSHT	Occupational Safety and Health Tribunal
PIN	Provisional improvement notice
PCBU	Person conducting a business or undertaking
SWA	Safe Work Australia
WHS	Work Health and Safety
WHSC	Work Health and Safety Commission
WHS Act (WA)	The propose Western Australian Work Health and Safety Act
WHS regulations (WA)	Work Health and Safety Regulations for Western Australia
WRMC	Workplace Relations Ministers Council
WHST	Work Health and Safety Tribunal

Appendix F: Referenced publications and cited legislation

Referenced publications
<i>Best Practice Review of Workplace Health and Safety Queensland – Final Report</i>
<i>Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety</i>
<i>National Compliance and Enforcement Policy</i>
<i>Safety and Health at Work – Report of the Committee 1970-72 (the Robens Report)</i>
<i>Western Australian Government Gazette</i>
<i>Work Health & Safety Regulation in Australia: The Model Act</i> by Richard Johnstone and Michael Tooma
Legislation cited
<i>Coroner’s Act 1996</i>
<i>Corporations Act 2001 (Cth)</i>
<i>Dangerous Goods Safety Act 2004</i>
<i>Dangerous Goods Safety (General) Regulations 2007</i>
<i>Dangerous Goods Safety (Explosives) Regulations 2007</i>
<i>Dangerous Goods Safety (Security Sensitive Ammonium Nitrate) Regulations 2007</i>
<i>Dangerous Goods Safety (Storage and Handling of Non-explosives) Regulations 2007</i>
<i>Dangerous Goods Safety (Major Hazard Facilities) Regulations 2007</i>
<i>Dangerous Goods Safety (Road and Rail Transport of Non-explosives) Regulations 2007</i>
<i>Fair Work Act 2009 (Cth)</i>
<i>Industrial Relations Act 1979</i>
<i>Industrial Relations Commission Regulations 2005</i>
<i>Interpretation Act 1984</i>
<i>Mines Safety and Inspection Act 1994</i>
<i>National Mine Safety Framework Drafting Instructions June 2011</i>
<i>NSW Work Health and Safety Statutory Review Report – June 2017</i>
<i>Occupational Safety and Health Act 1984</i>
<i>Occupational Safety and Health Regulations 1996</i>
<i>Petroleum and Geothermal Energy Resources Act 1967</i>

Referenced publications
<i>Petroleum (Submerged Lands) Act 1982</i>
<i>Pipelines Act 1969</i>
<i>Petroleum and Geothermal Energy Safety Levies Act 2011</i>
<i>Work Health and Safety and Other Legislation Amendment Bill 2017</i>
<i>Work Health and Safety Act 2011 (NSW)</i>
<i>Work Health and Safety Act 2012 (SA)</i>
<i>Work Health and Safety and Other Legislation Amendment Bill 2015</i>

Appendix G – Submission templates and coversheet

Making a submission

Anyone with an interest in workplace health and safety is invited to make a submission on the proposals provided in this paper, or on any other matter related to safety legislation in Western Australia.

All submissions must be accompanied by a cover sheet and you are encouraged to use one of the templates provided to assist organising your submission.

The simple template provides a blank table to enter your comments. The comprehensive template includes the complete list of recommendations from the Consultation Paper and permits you to specifically address any that interest you.

Your completed coversheet and submissions may be provided by mail or email as outlined below:

Mail: WHS Reform
Locked Bag 14
CLOISTERS SQUARE WA 6850

PLEASE MARK YOUR ENVELOPE 'FOR THE ATTENTION OF THE A/DIRECTOR GENERAL, SAFETY REGULATION – SUBMISSION ON WHS REFORM'

Email: WHSreform@dmirs.wa.gov.au

Note: All commonly accessible electronic formats will be accepted for submissions but Word documents are preferred.

The closing date for submissions is **31 August 2018**.

Coversheet

A version of this document is available on the DMIRS website that permits you to enter your comments into the form.

Contact name			
Organisation			
Contact telephone number (optional)			
Employment status (if applicable)	<input type="checkbox"/> Worker	<input type="checkbox"/> Principal contractor	
	<input type="checkbox"/> Employer	<input type="checkbox"/> Contractor	
	<input type="checkbox"/> Self-employed	<input type="checkbox"/> OSH professional	
	<input type="checkbox"/> Other (enter details)		
Size of workplace	<input type="checkbox"/> Small (0-9)	<input type="checkbox"/> Medium (20-199)	<input type="checkbox"/> Large (200+)
Please indicate how you are making this submission (select one of the following categories)	<input type="checkbox"/> Individual	<input type="checkbox"/> Academic	
	<input type="checkbox"/> Business	<input type="checkbox"/> Government representative	
	<input type="checkbox"/> Community organisation	<input type="checkbox"/> Professional	
	<input type="checkbox"/> Employer organisation		
	<input type="checkbox"/> Industry representative		
	<input type="checkbox"/> Other (enter details)		
Which industry sector do you operate in?			
Your type of job or business (if applicable)			
Is your submission confidential?	<input type="checkbox"/> Yes <input type="checkbox"/> No		
Your submission will be published if you do not indicate a preference.			
Number of pages in your submission			

Simple template

A version of this document is available on the DMIRS website that permits you to enter your comments into the table.

Questions for you to consider:

1. What is the likely cost to implement a specific proposal?
2. What is the benefit to workplace participants?
3. Is a specific recommendation likely to be effective in achieving safer workplaces?
4. Are there any unintended consequences of a proposal?
5. If a new requirement is proposed, what are the costs and benefits?

Recommendation number in the Consultation Paper and/or section number in the model WHS Bill.

Comment (including costs and benefits)

Recommendation number in the Consultation Paper and/or section number in the model WHS Bill.	Comment (including costs and benefits)

Submission template (including all recommendations)

A version of this document is available on the DMIRS website that permits you to enter your comments into the table.

#	Recommendation	Clauses	Comments
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).	
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.	3(1).	
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	
6	Amend the meaning of supply to include the loan of an item.	6(1).	
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	

#	Recommendation	Clauses	Comments
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.	
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a).	
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36.	
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a).	
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).	

#	Recommendation	Clauses	Comments
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76.	
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.	
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100.	
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.	
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	

#	Recommendation	Clauses	Comments
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)	
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).	
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.	
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.	

#	Recommendation	Clauses	Comments
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b).	
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.	
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.	
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2.	

#	Recommendation	Clauses	Comments
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.	
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.	
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act.	
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.	
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	

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