Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

INTRODUCTION

Ai Group welcomes the 2 May 2014 COAG decision to investigate ways in which model WHS laws can be improved, with a particular focus on reducing red tape. However, we do want to highlight the challenges associated with providing feedback to individual regulators (rather than centrally to Safe Work Australia), and within the timeframes which required us to consolidate this feedback for individual regulators in less than 3 weeks. We acknowledge that there was ultimately a one week extension of timeframes, but the task remained one that is rushed.

It is also noted that this review has occurred: at the same time we have been trying to seek volunteers to talk to KPMG about the Safe Work Australia implementation review; very soon after legislative changes became effective in Queensland; whilst separate reviews are underway in South Australia and the Northern Territory; and whilst Victoria is undergoing a review of their OHS regulations (with some legislative changes occurring with effect from 1 July 2014).

We have found that this has created confusion amongst employers who are not generally focused on legislation or legislative review.

As a member of Safe Work Australia, Ai Group will also be providing our submission directly to the Agency for consideration.

At page 3, the Issues Paper asks the question "What happens after the public comment period closes?". It is then stated that feedback will be consolidated with data and results from related research and then be analysed to produce a report with recommendations on how to improve the model WHS laws; the report will be provided to COAG. It is not clear how this final report will be developed. It is our view that the report should be considered by SIG-WHS and approved by a meeting of the Safe Work Australia members.

It is correct that the IGA established an overarching objective to "produce the optimal model for a national approach to WHS regulation and operation". The development of the Act was driven by the decisions of the Ministerial Council in response to the review of National OHS Laws, undertaken in 2008 and 2009. However, when it came to considering the development of the regulations, there were no specific recommendations on which to rely. Instead, the following principles were applied:

- There were some regulations that needed to be developed in conjunction with the model Act to ensure that the recommendations associated with the Act were sufficiently implemented.
- Where there was an existing national standard, it would be incorporated into the regulations
- Where matters were currently included in two thirds of the jurisdictions, or more, there would need to be a very strong argument mounted to have those provisions NOT included in the regulations
- Where matters were currently included in the regulations in one or more jurisdictions, but less than two thirds, there would need to be a strong argument presented for the regulations to be included.

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Contact name: Tracey Browne

It was always understood by SIG-WHS members that the regulations were being consolidated and harmonised. Opportunities to improve and streamline the regulations would be considered at a later time, once the harmonised regulations had settled in.

We see the current activities as the start of the process to improve the model WHS laws, whilst maintaining harmonisation into the future.

Within this submission we make a number of suggestions for improving the Act, Regulations and Codes of Practice with a view to improve workability of the laws. We have been mindful that there will be claims that the levels of health and safety protection will be reduced if decisions are made to:

- remove regulations;
- relocate information from Regulations to Codes of Practice or Guidance Material; or
- relocate information from Codes of Practice to Guidance Material.

However, it is our view that the *general duty* to eliminate or minimise risks so far as is reasonably practicable, applying the hierarch of controls, establishes a very high standard.

The role of subordinate documents is to assist PCBUs to understand how to meet those obligations. There is an obligation on the regulators and Safe Work Australia to make the provision of the relevant information as accessible to as many people as possible.

Engaging with Small Business

Research has indicated that small businesses do not generally engage with legislation. The sheer volume of the legislative package (Act, Regulations, Codes and Guidance material) acts as a barrier to engagement, comprehension and implementation. This occurs even when individual provisions are clear and make sense.

This often leads to a level of “intermediation”, with businesses relying on secondary sources of information. The information provided by these secondary sources may well be reliable; it could also be misinterpreted or misrepresented, either intentionally or unintentionally. This secondary information often results in over-simplification or over-complication.

Therefore, it is important to make all necessary efforts to make the requirements of WHS laws more digestible as a whole.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 3 – The model WHS Act
3.1 What areas in the model WHS Act, other than those identified by COAG and addressed below, have positively or negatively impacted on your organisation and how could they be improved?
General The process of developing and implementing the Model WHS Laws has increased the level of discussion regarding health and safety in the workplace. However, the major focus of discussion and debate has been on specific areas of concern, rather than on those provisions that are well understood and generally accepted as reasonable. In some cases the concerns relate to changes in duties or entitlements brought in by the Model WHS laws; in others the Model WHS laws appear to have been the catalyst for a heightened understanding of duties and entitlements that predate, and continue, under the Model WHS laws. At the level of the Act, the concerns have largely been around officers' duties, union right of entry and powers and rights of HSRs. All of these issues are discussed below. ***Administrative burden in the Act*** At this point we would also like to highlight a record keeping burden that is created in the Act. Section 38 of the WHS Act establishes the requirement to notify the regulator of certain incidents. The notification must be made immediately, and then be followed by a written notification within 48 hours. It is not clear what benefits there are in providing the written form of the notification, especially if an inspector has already attended the site and obtained far more information than required in the notification. S.38(7) then requires the employer to retain a copy of the notification for a period of five years. This record keeping requirement appears to be particularly redundant when the regulator would have received the notification at the time of the incident and, in the current requirements, have received written notification within 48 hours. Ai Group recommends that the requirement to provide written notification be removed. If the obligation to provide written notification is retained, the requirement for the PCBU to retain that documentation should be removed.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Lack of clarity around notifying the regulator of incidents

It is also important to highlight that the wording of the types of injuries and incidents that must be reported has created some confusion; and the inclusion of some additional reporting requirements in the regulations, rather than the Act, makes it difficult for employers to navigate the provisions, and understand the totality of the obligations. Consideration should be given to rewording these provisions and bringing the additional notifiable incidents into the Act.

In addition, there are specific requirements in the regulations to notify the regulator of *abnormal results*, e.g. if asbestos is detected in the air during removal at a level above 0.02 fibres/ml, or if a worker is removed from lead risk work due to their blood lead levels exceeding the prescribed amount. Whilst these notification requirements relate to specific types of work, it would be valuable to have these notification requirement flagged in the “incident notification” section of the Act, possibly as a note.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Director's liability under the model WHS laws
3.2 What impact (positive or negative) has the duty on officers had on your organisation?
Whilst couched in the words of "director's liability" within the issues paper, Ai Group has always referred to the due diligence provisions as creating a positive duty to ensure safety in the organisation. All previous legislation, and the legislation in the non-harmonised states, created/creates a liability which effectively relies on a reverse onus - if the organisation has failed to meet their duty the officer will also be guilty of an offence unless they can demonstrate that they have taken all reasonable care to ensure the non-compliance would not occur. The issues paper asks whether the officer's duties create a disincentive to take up officers roles. If it has done so, it would be our view that this is only because the duties are more transparent than in non-harmonised laws. In the case of Victoria, for example, the officer liability is in s.144, within a division entitled "offences by bodies corporate"; this compares to the location in the model WHS Act at s.27 within a division entitled "duties of officers, workers and other persons". There has always been a "liability" for officers. The WHS laws advise how to avoid attracting the liability by utilising due diligence to drive compliance with health and safety laws, and subsequently improving WHS performance. The issues paper also identifies that some organisations are having difficulty identifying who would be considered to be an officer. When we have experienced this concern within organisations, we have advised that from a practical perspective it does no harm to more broadly apply the concept of due diligence, i.e. if a manager (who is not an officer) uses the principle of due diligence in relation to the areas they can influence, the organisation will be better off. The question of "who is an officer" will only be pertinent if the regulator is undertaking enforcement action, particularly considering a prosecution. We understand that this does cause some angst in businesses, and that the corporations laws do not provide a perfect definition. However, it is our view that it is better to have a universal definition of officer (which organisations must grapple with in relation to all the other officer duties under corporations law) rather than to introduce another definition which creates another level of confusion. Overall, we believe that the due diligence provisions have created an increased focus on health and safety by officers, with the potential to achieve much improved outcomes in the workplace.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

3.3 Which aspects of the duty (if any) should be changed?
It is Ai Group's view that the Officer definition and duties, as presented in the WHS Act are appropriate; we also strongly support the retention of the six part explanation of due diligence at 27(5). We encourage Victoria to adopt a similar approach in their laws. Whilst we do support the development of further guidance, it is important that the guidance does not create an impression that certain types of employees are not officers, when the courts may take a different view in the future. The legislation might be improved by making it clear, in the Act, that a person, who would not otherwise be seen to be an officer under the WHS laws, does not make themselves an officer simply by undertaking due diligence obligations (in the interests of better WHS management in their organisation).

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Powers of Union Officials under the model WHS laws
3.4 What impact (positive or negative) have the powers provided to WHS entry permit holders to enter a workplace had on your organisation? Please provide relevant examples and evidence.
As indicated in the issues paper, there has been considerable debate about the union right of entry powers in the legislation. It should be noted that the majority of jurisdictions did have right of entry powers in OHS laws prior to harmonisation. Largely these powers were to inquire into a suspected contravention, and 24 hours' notice was not required to exercise these powers. A major area of concern has been in the construction industry where unions have widely misused entry rights. Given the widespread misuse of entry rights it is not surprising that the federal *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* and the State Construction Industry IR Guidelines in Victoria, NSW and Queensland require employers to strictly enforce right of entry provisions, particularly the 24 hour notice requirements under the Fair Work legislation, if they want to obtain and retain government work. It has been our experience that union officials from construction industry unions have frequently used WHS/OHS entry powers to access sites for industrial purposes, as has been well-documented in Court decisions relating to prosecutions pursued by Fair Work Building and Construction and its predecessor the ABCC. They have also been utilising the HSR assistance provisions which we will address further below. The widespread misuse by construction unions of WHS entry rights for industrial purposes is creating WHS risks because it understandably leads to employer cynicism about safety issues raised by those unions, which is not in anyone's interests. The problem needs to be addressed without delay. It is Ai Group's view that all union access to a site for WHS purposes should be subject to the notice period in the Fair Work Act for entry to investigate suspected breaches of workplace relations laws or to hold discussions with employees - not less than 24 hours, and no more than 14 days. A 24 hour notice requirement will not create risks to WHS, as is often asserted, as there is little to no evidence that the immediate entry power for WHS is, or has proven, necessary for maintaining safe workplaces. Unions cannot guarantee to provide an instant response to a member's request for them to come to their workplace to address an WHS issue, and in such cases they would, or at least would be expected to, advise their member of the alternatives available to them to address an issue that is time critical, including notifying their employer, notifying their HSR, exercising their right to cease unsafe work or notifying the regulator. In addition, there are some concerns about the right of an entry permit holder to access personal information. It is crucial that this relates very specifically to the suspected breach, and that the information is de-identified unless individuals agree to their own identifiable information being provided.
3.5 What limitations (if any) do you think should be placed on the powers? Please provide reasons for your suggestions.
All entries should have a 24 hour notice requirement as discussed above.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Powers of Health and Safety Representatives
3.6 What impact (positive or negative) have health and safety representatives' powers and functions had on your organisation? Please provide relevant examples and evidence.
General HSRs can play a valuable role in an organisation by assisting the consultation process and raising issues in the workplace. However, if the role is used for purposes other than the way the WHS laws intended, it can lead to unnecessary effort being put into managing a difficult situation, and diverting attention away from health and safety. It may even lead to a "crying wolf" impact in the medium to long term, with HSRs subsequent real concerns being ignored. This can be exacerbated by the fact that HSRs do not have to participate in training (although it is necessary in harmonised jurisdictions for training to be undertaken before an HSR can exercise their powers to issue a PIN or direct a cessation of work). I the HSR does attend training there is no requirement for the HSRs level of competency to be assessed or assured. It is Ai Group's view that HSRs are being done a disservice by the laws not requiring trainers to ensure understanding and competence.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Seeking assistance

The ability for an HSR to seek the assistance of any person completely overrides any of the controls that are in place to contain union right of entry provisions. In some industries this has been used to bypass union right of entry provisions under WHS laws and the Fair Work Act. The WHS laws do allow an employer to refuse access to a person who has had their entry permit revoked; this is one important level of protection against abuse that should also be adopted in the Victorian OHS laws.

In order to consider this provision it is helpful to understand the background to its inclusion in the laws. The wording is based largely on Victorian provisions that were in the laws long before any right of entry provisions were in place. South Australia previously had a provision which allowed HSRs to seek the assistance of approved consultants, also in the absence of right of entry power in their previous OHS laws.

It is Ai Group's view that the inclusion of right of entry provisions in WHS laws that allow the entry permit holder to exercise a power to enter to "consult and advise" completely overrides any need for the HSR to have a right to seek assistance.

We have been asked to comment on whether the Model WHS laws should be amended to adopt:

- the recent Queensland amendments, which require 24 hours' notice, or alternatively:
- the South Australia provisions where the "assistance" provisions are limited to a person who works at the workplace; a person who is involved in the management of the relevant business or undertaking; or a consultant who has been approved as required by the legislation.

We do not believe that the SA provisions that allow for an approved consultant to provide assistance would be workable outside South Australia; SA already had a provision which involved authorising consultants that would have been relatively easy to maintain the administration within the SA scheme. It is our understanding that other jurisdictions would not introduce the infrastructure required for this to occur. We believe the additional SA provisions are unnecessary as they would be implied in the other rights of an HSR; however, including them for clarity may be beneficial.

If the right to seek assistance provision is to remain in the WHS laws, allowing external persons to access the site, we would support the introduction of a notice period, consistent with the consult and advise entry provisions in the WHS laws. The Queensland amendments would achieve this outcome.

However, it is Ai Group's strong view that the assistance provision became unnecessary as soon as entry permit holders were given the right to enter for the purposes of consulting and advising. For this reason, the provision should be removed.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Issuing Provisional Improvement Notices (PINs)

Section 90(3) imposes a requirement on HSRs to consult with the PCBU prior to issuing a PIN. Presently, there is no process to ensure this requirement is met. In recognition of issuing a PIN being a significant power that can positively or negatively affect safety, productivity and efficiency in the workplace we suggest that the legislation specifically states that where a PIN is issued without consultation, it is invalid. This could be achieved by either: amending s90(3) which establishes the requirement to consult; or by amending s.98 to clearly identify failure to consult would be a defect that would result in a notice being invalid (noting that section 98 is currently designed to identify what does not make a notice invalid, and there are no specific provisions that specify what would make a notice invalid).

Further, we suggest that a regulatory requirement be imposed on a HSR when exercising the power to issue a PIN such as a condition that they notate a date and time of how and when the matter was raised in consultation with the PCBU and what the response was prior to issuing the PIN. We suggest that reference to the consultation requirement being complied with be included on the *Model template for provisional improvement notices* (such as a box that the HSR has to tick to confirm that they have consulted with the PCBU on the issue to be addressed).

We suggest that there be some implication to a HSR when issuing PINs inappropriately or for improper purposes, such as to address industrial matters or in pursuit of personal matters. Whilst we appreciate that a HSR should not be restricted or penalised for issuing a PIN to address an appropriate health and safety risk, given the significant power this bestows on a HSR there should be some remedial action available to a PCBU where a HSR has abused this power. We suggest that where the Regulator has been called in to review a PIN and considers it to be improper (not just an unintentional error, there be a suspension of a HSRs right to issue a PIN for a set period of time, such as 3 months. To ensure fairness and transparency, this would be a reviewable decision.

In recognition of the HSR undertaking training paid for and provided at the expense of a PCBU we suggest some acknowledgement from a Regulator approved trainer that their powers are understood. In particular, a confirmation that they have completed core training on what are appropriate matters to be addressed with the issuing of a PIN.

It is important for us to highlight that we are, in no way, suggesting that the power to issue a PIN should be removed; only that it is important that the power is not misused, either intentionally or unintentionally.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Power to direct a cessation of work

There has been much controversy over this power being conferred on HSRs in the WHS laws; this has particularly been the case in jurisdictions where this power did not exist under previous laws. Whilst we understand that this creates some angst, and may have been used in small pockets of industry, it has not been our experience that this power has generally been abused. The provisions in the Act are quite clear that the power can only be utilised when the HSR has a reasonable belief that to carry on the work would result in a "serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard."

This wording highlights the importance of HSRs achieving competence in their training so that they can effectively make the necessary decisions in relation to this power. It is a significant responsibility to place on someone who is not competent to make the decision.

As with the issuing of PINS outlined above, We suggest that there be some implication to a HSR when directing a cessation of work inappropriately or for improper purposes, such as to address industrial matters or in pursuit of personal matters. Whilst we appreciate that a HSR should not be restricted or penalised for directing a cessation to address a “serious risk arising from an immediate or imminent exposure to a hazard”, given the significant power this bestows on a HSR there should be some remedial action available to a PCBU where a HSR has abused this power. We suggest that where the Regulator has been called in to review a cessation and considers it to be improper (not just an unintentional error, there be a suspension of a HSRs right to direct a cessation for a set period of time, such as 3 months. To ensure fairness and transparency, this would be a reviewable decision.

In recognition of the HSR undertaking training paid for and provided at the expense of a PCBU we suggest some acknowledgement from a Regulator approved trainer that their powers are understood. In particular, a confirmation that they have completed core training on what are appropriate matters to be addressed with by directing a cessation of work.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

3.7 Which aspects of health and safety representatives' powers and functions (if any) should be changed?
The power for HSRs to seek the assistance of any person should be removed, as it is unnecessary when there are powers for the union to use right of entry powers to advise and consult on WHS issues. If the entitlement to seek assistance continues to be in the laws, exercise of the right should require the same notice period as the power to enter to consult and advise, and similar controls should be in place. This would align with the notice requirements of the Fair Work Act. In relation to exercising powers there should be a process which allows for the regulator to suspend the HSRs powers to issue a PIN or direct a cessation of work if this power has clearly been abused; this may be accompanied by a requirement for the HSR to attend additional training (in their own time) in order to understand the extent and limitations of these powers. HSRs would be better able to understand, and apply, their powers in relation to the issuing of PINs and the direction to cease work if there was an obligation on the person delivering HSR training to ensure that the HSR understood and was competent to exercise these powers. This is a normal expectation in competency based training and assessment, and creates an extra obligation on the trainer, not an extra requirement on the trainee.
Additional issues associated with HSRs Section 74(2) of the Act requires a PCBU to provide the regulator with a current list of HSRs. This is an unnecessary administrative burden which adds no value to safety. It could also be argued that the employer is not legally able to provide this information without obtaining the express consent of the worker. In their recent amendments, Queensland removed this from the Act. Ai Group believes this provision should also be removed from the Model WHS laws.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 4 – The model WHS Regulations

4.1 Which areas of the model WHS Regulations are concerns for you and how could they be improved?

The impact of regulations under WHS laws are very different to other regulations that exist. With the exception of regulations that require notification, record-keeping and licensing/authorisation, WHS regulations are designed to outline how to achieve the outcome of a workplace that is, so far as is reasonably practicable, safe and without risks to health. Subsequently, it could be argued that the regulations do not need to provide risk control information, as this could be better handled through Codes of Practice, or practical guidance material. It is Ai Group's view that, if the development of the WHS regulations had started with a blank piece of paper, we would have a very different set of regulations.

Instead, as outlined in our preliminary comments, the process started with guidelines that required a consolidation of regulations with an expectation that a number of regulations would be included, because they were covered by national standards and/or the majority of jurisdictions had them in place.

When considering the cost of the regulations, it is very difficult to specifically allocate a cost to a control measure that is detailed in the regulations. To do so would presume that if the risk control was not in the regulations, the PCBU would not be expected to implement a risk control. If we took that to its logical conclusion, the current WHS laws would not require a PCBU to address bullying, fatigue, work related driving risks etc. This is clearly not the case.

It is Ai Group's view that there are many provision of the regulations which, whilst they do not specifically add costs (as an employer would be expected to do that anyway) they do not really add any value in the regulations either.

This applies to many of the provisions in Part 3.2 - *General Workplace Management*, which appears to have become an area where topics that don't fit elsewhere have been located; as such the information is a bit fragmented. Some areas of this part are also too prescriptive, e.g. regulation 53 requires that a PCBU keep "flammable or combustible substances at the *lowest practicable quantity.* The information in divisions 6 to 10 should be reviewed for relevance in the regulations and appropriateness of location.

The lack of value-adding also applies to much of the specific risk control requirements within the regulations, e.g. it is often argued that the regulations do not need to include all the risk control measures for falls (R.67) as the information provided in this section is merely a further clarification of the hierarchy of controls outlined in regulation 36.

It is Ai Group's view that the major cost implications occur where the regulations are so specific that PCBUs do not have any flexibility in how the employer will comply.

Costs also arise when the laws are interpreted in a way that is not intended by the laws; further effort must be put into clear guidance that articulates the practical implications of the regulations in the circumstances where the regulations are being inappropriately interpreted, to the detriment of the overall credibility and integrity of the laws.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 4 – The model WHS Regulations

Our responses below firstly address topics identified in the Issues Paper; we then provide some additional areas of concern that were not highlighted in that paper.

Regulatory burden

4.2 Which areas of the model WHS regulations (if any) are more burdensome than beneficial?

Record keeping and notifications

It is recognised that there are a number of record keeping and notification requirements in the WHS regulations, and their contribution to health and safety must be considered. However, it should be noted that the WHS laws contain much less of these than in previous laws, and less than was put forward in the draft regulations that went out for public comment. Hence, it is acknowledged that the WHS regulations did, on the whole, decrease the regulatory burden in this area.

Record keeping

The record keeping requirements of the legislation do not, in themselves, improve the health and safety of workers. However, they do provide the evidence that the employer has met the requirements prescribed in the regulations. Some employers will be very comfortable about prescribed time limits (as it allows them to have a clear point after which they can destroy the documents). Others will see the need to keep the documents as a regulatory burden.

Appendix E of the Issues Paper purports to list the record keeping requirements in the regulations; however, some of the more burdensome record keeping requirements do not appear in Appendix E:

- Regulation 162 (relating to risk assessment and SWMS for live electrical work);
- Regulation 303 (relating to SWMS for high risk construction work); and
- Regulation 313 (relating to safety management plans for principle contractors)

These all have requirements that equate to those listed for the diving related regulation (R.182). These regulations require that most (but not all) of the documentation be kept for 28 days and for two years if there is a notifiable incident; further regulation 162 requires that the information is accessible to workers.

Many of these record keeping requirements can only be justified on the basis that it will make it easier for the regulator to determine compliance, or non-compliance. The requirement to keep documentation for 2 years after a notifiable incident is clearly designed to allow the regulator to seek further information from the PCBU during the period in which they have the ability to launch a prosecution.

A review of all record keeping requirements should be undertaken starting from the point that regulated record keeping requirements are unnecessary. In order to maintain any specific record-keeping requirements, there must be a clear benefit to health and safety in the workplace. It is Ai Group's view that the majority of current reporting requirements would not meet this test.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 4 – The model WHS Regulations

Notifications

We have discussed issues around notification of incidents, and abnormal results earlier in this document. There are two remaining types of notification in the legislation. One group are largely "one off" notifications, with related requirements to notify if there are changes: manifest quantifies of specific hazardous substances, lead risk work and major hazard facilities. We do not see these as major regulatory burdens. However, in the case of manifest quantities and lead risk work, the question arises as to what the regulator does with this information and how it is used. We will discuss this further later in this section.

The other areas of notification establish a regular requirement to notify of work to be undertaken, i.e. the requirement to give the regulator 5 days notices before asbestos removal work or demolition work is undertaken.

These notification requirements create a significant administrative burden for organisations that undertake this work on a regular basis, often as their core business. Ai Group can see how this information could be used by regulators: to provide advice to those notifying about any known hazards associated with the particular work they are undertaking; and identifying opportunities for interventions in order to protect the interests of the notifier, the public, and workers.

However, we do not believe that there is currently any transparency around how the information is handled when it is received by the regulator.

The level of administrative burden varies between jurisdictions. For example, the asbestos removal notification in NSW requires the notifier to provide detailed information about the person who will be undertaking the clearance inspection, including date of birth, whilst QLD requires much less information.

Further, some of the notification documents are able to be completed and saved electronically, whilst others need to be downloaded and completed manually. SA has introduced an online system of notification; we were unable to view this to consider the level of detail required, as you need to be a registered user to access the portal.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 4 – The model WHS Regulations

The following recommendations are provided in order to reduce administrative burden and increase user awareness of the manner in which the data is utilised by the regulator.

- Information should be provided on the notification form about how the information may be utilised
- The notification forms/processes should be as simple as possible, and only require the essential information which would enable the regulator to utilise the information in the way in which it is intended
- Information should be gathered and disseminated by the regulators about how the information has been used, e.g. number of notifications received; how the information was utilised; number of interventions facilitated by the notification; outcomes of interventions; this will enable duty holders and those who represent them to see the value of the notifications.
- The information gathered through the process outlined above can then be utilised to inform the 2016 review of the laws to determine whether these notification contribute to improved health and safety, and whether the cost is outweighed by the benefit.

Authorisations - registering plant items

The regulations require an employer to register high risk plant (items listed in schedule 5 of the regulations) with the regulator. The Issues Paper states that the intention of such registration is "to ensure [items of high risk plant] are inspected by a competent person and are safe to operate". PCBUs are required to re-register the plant every five years, or if it is relocated.

Throughout the development of the model WHS regulations Ai Group argued that registration of individual items of plant was an unnecessary regulatory burden for the PCBU and the regulator. Registration, in itself, does not meet the stated intent to "ensure" that plant is inspected and safe to operate.

However, plant registration was a requirement of the 1994 National Standard for Plant, which was progressively adopted by all jurisdictions. Hence, inclusion of plant registration was a natural part of the harmonisation process.

It is Ai Group's view that the registration of individual items of plant does not create any benefit to health and safety. For this reason, we recommend that the provisions be removed. If it is believed that the requirements related to inspection etc. are still required for this plant, this could still be included in the regulations. However, we would argue that the current level of inconsistent detail related to specific items of plant is too prescriptive and based on history, rather than relevance and necessity.

It should be noted that, as part of Victoria's review of their OHS regulations, the requirement to register items of plant has been removed from the Victorian OHS regulations with effect from 1 July 2014.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 4 – The model WHS Regulations

Residency requirement for high risk work

Ai Group understands that there are some difficulties associated with the requirement to be licensed in the state in which the person has residency; this is especially difficult in fly in / fly out scenarios where the person may be working in a different jurisdiction to the one in which they live. However, as noted in the issues paper there are provisions which allow for people to show circumstances warranting the granting of a licence in another jurisdiction.

The issues paper identifies that removal of the residency requirement would reduce administrative burden, support competition and improve customer choice.

It is Ai Group's view that this is not an area where it is appropriate to support competition and improve customer choice.

All other licensing is administered by the jurisdiction where residency applies and this should continue to be the case for high risk work licensing.

Electrical testing and tagging and residual current devices

The regulations require that, when electrical equipment is used in "hostile environments": there must be a residual current device installed; and the equipment must be tested and records of the testing maintained until the next test is undertaken. In most situations the record keeping requirements are met by the placing of a tag on the equipment.

The key shortfall of testing and tagging is that a piece of equipment could be found "safe" one day, and receive serious damage the next day. On the other hand properly maintained and tested RCDs provide ongoing protection.

It is Ai Group's view that it is not necessary to have specific testing requirements when RCDs are in place.

As RCDs are required in the same hostile work environments as testing and tagging, the testing and tagging provision is redundant from a safety perspective and should be removed from the regulations.

4.3 How could these requirements be changed and what impact would this have?

Suggestions for change have been included in the above discussion on each topic.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Level of prescription
4.4 Which areas of the model WHS Regulations (if any) are unnecessarily prescriptive and therefore limiting compliance options?
Issue resolution Ai Group agrees with the concerns raised in the issues paper about the level of prescription created by the establishment of minimum requirements and default procedures. We support the suggestion to move this information to guidance material. ***First Aid*** The first aid regulations are too detailed and prescriptive. Of particular concern is the absolute duty in the regulations to provide access to first aid equipment. Many workers are involved in activities that take them away from workplaces over which the employer has any ability to control, or even influence; this includes people walking between offsite meetings; or travelling in taxis which may, or may not, have a first aid kit and someone capable of using that equipment. This absolute duty has also lead to an expectation that every person who undertakes any form of driving as part of their employment will be provided with a first aid kit for their car. And yet, in most cases when drivers may require first aid they will not be the ones to administer first aid to themselves. Hence, in most cases the provision of a first aid kit does nothing more than allow the person to render assistance to another person (possibly a stranger), with no connection to the work. Ai Group agrees with the proposition in the issues paper to simplify the provisions in the regulations and move the more detailed information to the Code of Practice, or guidance material. ***Emergency Plans*** It is Ai Group's view that the requirements to develop and maintain an emergency plan should be relatively easy for a small business to achieve, through a simple one page plan that is displayed in the workplace. However, there has been much concern that the requirements in the regulations create a much more significant burden. For this reason, we believe that there would be value in removing or simplifying the provision; at the same time simple guidance material should be provided to assist small businesses to understand that they can apply with this requirement in a very straightforward manner.
4.5 How could these requirements be changed and what impact would this have?
Suggestions for change have been included in the above discussions on each topic.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Practical compliance difficulties
4.6 Which areas of the model WHS Regulations are difficult to comply with or unworkable in practice?

Audiometric Testing

It is Ai Group's view that audiometric testing can be a valuable monitoring process to ensure that personal protective equipment (PPE) is being effective in controlling the level of noise that is being experienced by workers, as indicated by hearing loss. The base line monitoring also provides a good reference point in relation to future hearing loss claims. For these reasons Ai Group would always advise employers to implement systems for initial and ongoing audiometric assessment, if a person is going to work in a noisy environment.

However, we do understand that there are some practical difficulties with implementing audiometric testing, particularly in remote locations. For this reason, we support the removal of audiometric testing from the regulations, as proposed in the Issues Paper.

It should be noted that including audiometric testing in a Code of Practice may only achieve a perception that the regulatory burden has been reduced, rather than a real reduction. Our reason for this view is that the Code establishes the following legislative status for information provided in Codes of Practice:

> Codes of practice are admissible in court proceedings under the WHS Act and Regulations. Courts may regard a code of practice as evidence of what is known about a hazard, risk or control and may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates
>
> The WHS Act and Regulations may be complied with by following another method, such as a technical or an industry standard, if it provides an equivalent or higher standard of work health and safety than the code.

It is unclear to us what alternative to audiometric testing might be put forward as providing "an equivalent or higher standard …" For this reason, if audiometric testing were to be moved to a Code, there should also be information provided in the Code to identify other options to achieve the same outcome. Alternatively, guidance material could be developed to outline when and where audiometric testing could be utilised to identify whether PPE is providing the necessary level of protection. Whichever path is chosen, it is essential that the concerns about the "16 hour quiet time" are addressed. In the Queensland review it was specifically stated, and in this issues paper implied, that the 16 hour period of quiet time is required before all audiometric testing.

In relation to audiometric testing the National Model WHS Code of Practice for Managing Noise and Preventing Hearing Loss at Work currently references Australian Standard AS/NZ1269.4:2005 – Occupational Noise Management – Auditory Assessment.

AX/NZ1269.4:2005 clearly establishes the following expectations for audiometric testing:

- 7.4: Reference audiometry: "shall be immediately preceded by a period of quiet (noise exposure which is unlikely to produce temporary threshold shift) of not less than 16 h."
- 7.5: Monitoring audiometry: "the main purpose is to detect threshold shift … the tester shall obtain and record information concerning the noise exposure of the subject in the 16 h prior to the test and including information concerning the use of hearing protectors".

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

4.7 How could these requirements be changed and what impact would this have?
Suggestions for improvements have been included in the discussions above.

OTHER ISSUES IDENTIFIED

Part 4.4 – Falls from all heights

There has been some argument that the application of these regulations to “a fall by a person form one level to another that is reasonably likely to cause injury to the person or any other person” has created a significant regulatory burden related to ALL falls. Ai Group agrees that this does have the potential for there to be a focus on falls with a relatively low risk of injury. However, we also believe that a 2m (or 3m) cut-off for regulation of falls is not risk based. A person can just as easily suffer a serious injury, or die, from a fall from 1.8m.

It would be helpful to have further guidance available about the manner in which PCBUs can comply with the falls regulations in relation to stairs, walkways, road edgings, gutters etc., to achieve a reasonably practicable outcome; hence removing the ridiculous examples that are often provided in relation to the perceived ‘impractical’ nature of the regulations.

Chapter 6 – Construction

The requirements under the construction regulations have attracted a lot of focus and attention; requirements for SWMS for all high risk work, and the overlapping roles of PCBUs generally and the principal contractor have been a major area of concern.

Ai Group understands these concerns. However, it is our view that the sometimes “excessive” requirements articulated in relation to these issues occur due to misinterpretation of the laws, and the expectations of major contractors who may also be influenced by other requirements such as the previous approach of the Federal Safety Commissioner.

It is Ai Group’s view that there needs to be extensive information and education campaign that clearly outlines the requirements set by the laws. The particular focus of this should be on:

- The purpose of a SWMS and the requirement in R.299(3)(b) that the SWMS must “be set out in a way that is readily accessible and understandable to persons that use it”
- How the obligations of a principal contractor interact and overlap with other PCBUs; particularly that the PC obligation does not reduce the obligation of other PCBUs
- How concise safety management plans can be developed for small projects

The need for a principal contractor should be determined by the risk associated with the work (as identified by the interaction between various PCBUs) and not by the monetary value of the project. If the monetary level continues to be the trigger, it should be reviewed, and an annual indexation amount should be set.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Part 6.5 – General construction induction training

The regulations require all individuals undertaking construction work to undertake *general construction induction* training. It is recognised that this training may provide an appropriate base level of training for those entering the construction industry.

However, there should be flexibility for PCBUs to choose to provide other training instead of the general construction induction training, if it is more appropriate to the needs of the organisation.

A need to provide different training is often the case in large plant "rebuilds"; they become a construction activity, but the work bears no resemblance to the type of construction activity covered in the general induction training.

The regulations should be amended to allow for the PCBU to provide alternate training relevant to the work to be undertaken.

Class B Asbestos Removal – Supervisor requirements

An issue was identified by Queensland in relation to Class B asbestos removalists that are sole operators.

In relation to Class B asbestos removal work, the asbestos regulations require that 1 or more supervisors be nominated in the licence application (R.492), and that a supervisor be readily available to a worker (R.459) when the removal work is being carried out.

In order to be a supervisor, the regulations require that in addition to undertaking the appropriate training as a supervisor (additional to the general training for asbestos removalists), the person must have at least twelve months experience. This creates an impossible circular scenario for the sole operator: they cannot undertake Class B asbestos removal work without a supervisor; they cannot get the necessary experience to become a supervisor.

Queensland has recently amended their regulations in an attempt to resolve the issue. The impact of their amendments to regulations 459 and 492 are that, a person who is undertaking Class B asbestos removal work on their own does not need to have a 'supervisor'.

It is Ai Group's view that, whilst this does resolve the issue from a practical perspective, it does not achieve the best safety outcome. The role of a supervisor in this context is to ensure that the work is carried out correctly and that materials are transported and disposed of correctly; it is not about supervising people who do the work. To be a supervisor of this work additional units of competency are required.

A better amendment would be to reword the provisions so that in circumstances where there is only one person undertaking the work, the supervisor can be a person without the 12 months experience as long as they have the appropriate qualifications to be a supervisor.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Reg 447 – Asbestos Registers

Asbestos registers are required for any building built on or before December 2003. This date was chosen as it coincided with the total ban on the importation and use of asbestos in Australia. However, the use of asbestos in buildings generally ceased many years before this, as reflected on page 15 of the Code of Practice for Managing Risks association with asbestos and ACM, where it is stated that "asbestos was widely used …. in buildings until the late 1980s…" Queensland has recently amended their regulations to state that asbestos registers are not required if the building was built after 31 December 1989.

It is Ai Group's view that this is a more relevant date; the Model WHS laws should be amended to align with this date.

Independent third parties

The asbestos regulations and the design registration regulations have requirements for independent third parties.

Asbestos

In the case of asbestos, the independence requirement relates to the person providing the clearance certificate (R.473). It has been identified that this can create difficulties in some locations where there may only be one PCBU undertaking asbestos related work, or if the work is to be undertaken in remote locations. For this reason there is a note at the bottom of the regulation specifying that a removalist may apply for an exemption from this provision. It would be valuable to receive information about how often exemptions have been sought and how many have been granted and rejected.

It may be more appropriate to amend the independence requirement, rather than require exemption processes. This could be achieved by qualifying the requirement, or by specifying that the person must be independent from the removal work, rather than from the PCBU undertaking the work.

Design registration

In relation to design registration it is the design verifier that must be independent. Regulation 252 specifies that a person is not eligible to be a design verifier if: they were involved in the production of the design; or at the time the design was produced, the person was engaged by the PCBU that produced the design. This exclusion does not apply if the PCBU has a certified quality system.

It is Ai Group's view that this creates an unnecessary administrative burden which does not, in itself, add to the level of safety associated with design verification. It may in fact result in a less specialised person verifying the design than would occur if it was done in house. The regulation should be amended to exclude the person if they were involved in production of the design, but not if they were merely engaged by the same organisation.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Section 5 – The model WHS Codes of Practice
Complexity
5.1 What role should approved Codes of Practice have in the legislative framework?
Their current role is appropriate. However, it is Ai Group's view that there is an over-reliance on developing Codes of Practice to seek to "regulate" what has not been detailed in the regulations. Initial moves (some of which were successful) to have Codes for topics such as fatigue, bullying, traffic management, spray painting, abrasive blasting etc. are examples of this. In many cases, guidance material will be better able to provide the information necessary for PCBUs and workers.
5.2 Which model Codes of Practice do you use and how do you use them?
Ai Group refers to Codes to assist in the interpretation of the Act and Regulations, for policy purposes and when providing advice to employers.
5.3 What improvements could be made to the model Codes of Practice to make them more useful?
The Codes tend to focus on the higher risk activities associated with a particular topic. Clearly this is an important role for the codes, but it would also be helpful to be providing more information about what 'doesn't need to be done'. As outlined above, the falls regulations create a high level of angst about low level falls, yet the Code does not outline what is reasonably practicable in those circumstances. Acknowledging that such information may make the Codes even longer than they currently are, this information may be best provided through guidance material.
5.4 Does it make any difference to you if guidance is presented in a Code of Practice or in other formats such as guides or fact sheets?
All information provided is "state of knowledge" and can therefore be used in court, even though there is a different legal status. Short, tailored information provided in guidance material is more useful.
5.5 Is the level of detail in the model Codes of Practice appropriate? Please provide any examples of where material in a model Code is overly complex.
Many of the Codes of Practice are too long and overly complex. Ai Group would be pleased to participate in a review of any of these Codes with a view to making them more accessible and/or relocating some information to guidance material.

Response from: THE Australian Industry Group (Ai Group)

Contact name: Tracey Browne

Jurisdictional flexibility
5.6 What impact would allowing regulators to develop codes specific to their jurisdiction without national tripartite consultation have?
There may be some circumstances where it is relevant to develop a Code for an individual jurisdiction – but only if that industry/issue is unique to that jurisdiction. Where more than one jurisdiction is dealing with a limited risk (e.g. crocodile farming) those jurisdictions should work together on a code. Where the code is describing how a PCBU could meet their general duties, how to comply with a Model regulation, or how to comply with a common industry/issues, it is totally inappropriate to have different information about how to meet that legal requirement in different jurisdictions. Taking something as simple as first aid – imagine if every jurisdiction provided guidance in their uniquely modified code about the number of first aiders and level of training required in an office environment – and each said something different. Harmonisation, and the subsequent Model WHS Laws, was designed to achieve consistency of law and application across Australia. Having Codes of Practice that are amended by individual jurisdictions, without reference to the national tripartite body could lead to a very rapid erosion of the benefits achieved through harmonisation.
5.7 What alternatives can you suggest to improve timeliness and flexibility in delivering codes? Would these alternatives involve any financial costs or benefits?
More consideration needs to be given to the need for, and intent of, Codes of Practice. It has been our experience that the unions, and some regulators, hold a view that the law cannot be enforced unless there is a Regulation or Code of Practice relating to a particular issue. It is important to recognise that the general duty in the Act requires a PCBU to eliminate or minimise risks so far as is reasonably practicable; the regulations provide a general hierarchy of controls (consistent with accepted OHS/WHS thinking) that sets the expectations about how this must be achieved. Any further detail needs to be provided in a way that is easily accessible, and understandable, to allow implementation in the workplace. Practical guidance material about how to address a particular risk is generally more valuable than a detailed Code of Practice which spends the first 8 or 10 pages outlining duties and responsibilities under the Act. Another difficulty with Codes is that their status means that there is a requirement to be very specific about "shoulds","musts" and "mays". Guidance material can be written in a plainer English version, presenting a range of options.

Method of consultation (who was consulted and how):

Ai Group has been receiving feedback about the operation of the WHS laws from employers since the legislation was first developed, and during implementation. In response to this particular review, Ai Group sought input from members through a range of communication processes. Information was also obtained from Ai Group's OHS/WHS consultants and trainers and the Ai Group Workplace Relations team.