INTRODUCTION

Australian Industry Group (Ai Group) is a national employer association with 10,000 members concentrated in the manufacturing, construction, telecommunication, IT, call centre and related sectors. Nationally, our members employ over a million Australians, turnover in excess of $100 billion per year and have exports worth $25 billion.

Ai Group welcomed the opportunity to participate in the review of the Victorian Occupational Health and Safety Regulations. Tracey Browne (Principal Adviser, Workers Compensation and Occupational Health and Safety) has participated in many of the Stakeholder Reference Groups and Topic Specific Working Groups, ensuring that we have had an opportunity to express employer views during the process.

The views expressed in this submission have been developed through:

- the knowledge of Ai Group's OHS advisers who have extensive experience in the practical application of the Act and Regulations within a broad range of industries;
- views of members expressed through day-to-day contact with them as we provide membership advice, training and consulting services; and
- specific issues of concern raised through consultative mechanisms with our members following the release of the draft Regulations.

Our submission is presented in three sections:

Section 1 Major policy issues requiring attention during the public comment process. These issues have been raised during the development of the draft Regulations, and will be no surprise to WorkSafe Victoria.

Section 2 Additional policy issues and associated matters.

Section 3 Recommendations to enhance interpretation and aid navigation of the Regulations.

MAJOR POLICY ISSUES

The major policy issues considered in the development of this submission are:

- The Consultation Regulation
  – the role of elected Health and Safety Representatives (HSRs)
- Asbestos
  – union pressure for change
- New Construction Regulations
- Licensing of High Risk Work
  (previously Certification of Plant Users and Operators)
- Removal of risk assessment obligations in most Regulations

CONSULTATION

Background

Section 21 of the Occupational Health and Safety Act 2004 (and the 1985 Act) clearly establishes the obligation for an employer to "… so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health".

It is clear that these obligations can only be met if the employer has access to all necessary and relevant information about the issues being considered.

Section 31(2)(c) of the1985 Act required an employer to consult with elected Health and Safety Representatives (HSRs) on a range of issues. However, if there were no HSRs, there were not specific provisions in the Act to require the employer to consult with their employees.

Specific regulations also required that the employer consult with elected HSRs in certain circumstances; predominantly during risk assessment and risk control processes. In a small number of Regulations, there was a requirement to consult with employees, if there was no HSR. However, it is our understanding that these requirements were "out of power", as the 1985 Act did not establish a specific requirement to consult with employees.

To ensure a better approach to consultation in all workplaces, many of which do not have elected HSRs, Ai Group has supported the inclusion of broad, flexible consultation provisions within the Act.

Context – The 2004 Act

For the reasons outlined above, Ai Group welcomed the introduction of specific provisions regarding consultation in the 2004 Act.

Section 35 and 36 clearly establish the requirements of employers to consult with employees on issues related to occupational health and safety, and outline how employees are to be consulted.

Section 36(2) specifically states that, "If the employees are represented by a health and safety representative, the consultation must involve that representative (with or without the involvement of the employees directly)".

Part 7 of the Act ***enables*** the establishment of designated working groups (DWGs) ***if requested***, for the purpose of electing health and safety representatives (HSRs). This part also ***enables*** an employer to initiate the establishment of DWGs.

Proposed Regulations

Since the passing of the OHS Act 2004, Ai Group has been extensively involved in stakeholder consultation in relation the development of the Regulations, Compliance Codes and Section 12 Guidelines. During this process, WorkSafe developed a document entitled "OHS Compliance Framework", which stated, amongst other things:

> ***Removing Duplication***
>
> Regulations should not duplicate the Act…. Regulatory provisions will be assessed (e.g. those relating to employee duties and workplace consultation) in light of the need to avoid duplicating or creating inconsistencies with the Act.

At the first meeting of the Working Group for the General Provisions Chapter (February 2006), WorkSafe clearly stated its position, regarding the need to deal with consultation in the regulations as follows:

> "Consultation will not be in the regulations. The Act is sufficiently prescriptive".

This position was reiterated at the second meeting of the Working Group for the General Provisions (March 2006). This view was supported by employer representatives, but rejected by union representatives.

The union view, as recorded in the minutes of the March 2006 meeting, is that the "regulations should reinforce the primacy of the role of the HSR; need to recognise and give greater priority to the importance of the HSRs in having a representative approach to health and safety".

It is the contention of the unions that this argument is supported with reference to section 4 of the Act which states that "employees are entitled, and should be encouraged, to be represented in relation to health and safety issues".

It is Ai Group's view that representation does not immediately "disentitle" an individual employee from being consulted about OHS issues. Yet, creating a primacy of the HSR role, is likely to lead to this outcome.

Due to the controversial nature of this issue, it was referred to the broader Stakeholder Reference Group for further consideration and discussion.

In July 2006, it was reported by WorkSafe that they were "investigating whether the regulations should and can give greater definitional or procedural certainty to the consultation duty (including the role of the HSR)".

As indicated by WorkSafe in July 2006, Regulation 2.1.5 of the General Provisions Chapter proposes specific requirements in relation to consultation, as follows:

2.1.5 How to involve health and safety representatives in consultation

(1) This regulation applies if an employer is required under the Act to consult with employees on a matter and the employees are represented by a health and safety representative

(2) For the purposes of section 36(2) of the Act, the employer must involve the health and safety representative in the consultation by –

- *(a) providing the health and safety representative with all of the information about the matter that the employer provides or intends to provide, to the employees; and*
- *(b) unless it is not reasonably practicable to do so, providing that information to the health and safety representative a reasonable time before providing the information to the employees; and*
- *(c) inviting the health and safety representative to meet with the employer to consult about the matter; and*
- *(d) if the invitation is accepted, or if otherwise requested by the health and safety representative, meeting with the health and safety representative to consult about the matter; and*
- *(e) giving the health and safety representative a reasonable opportunity to express their views about the matter; and*
- *(f) taking into account the health and safety representative's views about the matter.*

Ai Group Response to Consultation Regulation

Ai Group has six major concerns about the proposed consultation provisions:

1 – Duplication and Contradiction

As stated by WorkSafe at the commencement of consultation with stakeholders, the Act provides sufficient clarity and prescription to enable employers and employees, including HSRs, to understand when and how an employer must consult with employees and HSRs.

Inclusion of a consultation provision in the Regulations is unnecessary, and duplicates the provisions of the Act. This is inconsistent with the principles set out in WorkSafe's OHS Compliance Framework.

Furthermore, the provisions in the Regulations potentially contradict the Act, which requires consultation with employees and the involvement of the HSR.

2 – Implication that HSRs must be part of the consultation process

The greater definitional and procedural certainty relates only to circumstances where there are elected HSRs. This creates two significant problems:

- It does not assist employers or employees to fulfill their obligations to consult in the (many) workplaces that do not have HSRs; and

- Prescribing how to consult when there are HSRs, and not prescribing how to consult when there are no HSRs, implies that HSRs are a required part of the consultation process.

3 – Requirements in current proposed Regulations are "out of power"

A significant part of *Section 2.1.5 – Minimum requirements when consulting health and safety representatives,* restates the obligations under the Act. They do nothing more than outlining that the HSR must:

- receive information (a);
- have an opportunity to respond (e); and
- have the employer take their views into account (f).

However, other sections create additional obligations on the employer

- unless it is not reasonably practicable to do so, to provide the information to the HSR a reasonable time before providing it to other employees (b);
- invite the HSR to a separate meeting to discuss the issues (c); and
- participate in a separate meeting with the HSR if the invitation is accepted (d).

Further, it is our understanding the union position is that:

- the words "unless it is not reasonably practicable to do so" should be removed from 2.1.5(b); and
- 2.1.5(e) be amended to include a "reasonable opportunity to consult with their designated work group"

Section 36(2) states that, if there is an elected HSR, they must be **involved** in the consultation process. The prescription outlined in Section 2.1.5 (b) to (d) goes beyond this, imposing a greater obligation on the employer; hence it must be seen as "out of power".

In relation to the union position:

- to remove the reference to "reasonably practicable" in 2.1.5(d) would create an absolute duty, and subsequently a much greater obligation than that currently established under the Act; and
- to include further obligations in 2.1.5(e) as requested by the unions would also establish further obligations on the employer, which are considered to be "out of power".

4 – The requirements of the Regulation are unworkable

Consultation is a dynamic process that should have a natural flow and progression. In most circumstances, consultation does not allow an exact "before" and "after" – as required in 2.1.5(b). The consultation process starts; more information is requested and provided; dialogue continues; options are considered; decisions are made and communicated. This makes a regulation which requires an employer to provide information to an HSR "before" consulting very problematic.

Further, there are many occasions where an employer may find themselves in technical non-compliance; the following are but a small example of those anticipated in workplaces:

> If an employer has an OHS Committee which has a membership of management, HSRs and other employees, it will apparently be ***ILLEGAL*** to consult on an issue at the committee unless the employer has previously provided the HSR with the information that is to be discussed at the committee, and to have done so a reasonable time before providing it to any other committee members.
>
> If an employer wants to consult on an issue and they have an unexpected opportunity to discuss it with one of their employees who has expert knowledge about the issue, it will apparently be ***ILLEGAL*** to talk to that person, if the employer has not previously provided information to the HSR.
>
> If the HSR wants to meet [separately] with the employer to discuss an issue, it will apparently be ***ILLEGAL*** to involve other employees at the same time.
>
> If an employee approaches the employer with a proposal to improve safety, it will apparently be ***ILLEGAL*** for the employer to have a discussion with that employee; they will need to delay the discussion until they have provided information to the HSR.

5 – Potential to disrupt effective consultation processes

In his review of the Act, Maxwell (ss. 883 and 884) stated that the views of the Robens Committee were still valid today, specifically:

> The form and manner of such consultation and participation should not be specified in detail, so as to provide the flexibility needed to suit a wide variety of particular circumstances and to avoid prejudicing satisfactory existing arrangements.

Further, at s. 878, Maxwell stated "it is of fundamental importance that all persons who work at a workplace … be able to participate in and be consulted about health and safety matters at that workplace."

Finally, Maxwelll stated, at s. 925, the "form and manner of consultation should be a matter for the particular workplace, within these general parameters … there must be flexibility in allowing employers and employees to develop consultative processes which are adapted to the needs of particular workplaces."

The 2004 Act established an increased obligation for employers to consult with employees. In doing so, section 35 and 36 are sufficiently prescriptive to detail the obligations, whilst maintaining the necessary flexibility to enable workplaces to put in place consultation processes that are effective for their circumstances.

In workplaces where the HSR is the primary channel of consultation for the employer, the requirements in 2.1.5 (b) to (d) might be applicable.

However, in many workplaces where OHS is being successfully managed, a culture of full involvement is utilised; HSRs are included in the process, and continue to have the ability to exercise any of their powers under the Act; all employees have an equal opportunity be involved in consultation. The requirement to separately consult with the HSR may be counterproductive and result in employees removing themselves from the process. Hence, it is not appropriate to prescribe such requirements, which may reduce the overall effectiveness of consultation in the workplace.

It is important to remember that a DWG must be established if one person requests that this occur. If, in an election, there is only one nomination for HSR, that person will be deemed to have been elected. Hence, it is possible for an individual to cause a DWG to be established, and have themself "elected" as HSR, even if the rest of the DWG do not want, or need, representation.

6 – There is no demonstrated need for the Regulation and implementation has not been costed in the Regulatory Impact Statement (RIS)

As stated in the RIS (page 7) "the role of an RIS is to ensure that due consideration is given to the regulatory proposal and feasible alternatives, so that regulation is only implemented where justified, and only the most effective forms or regulation are adopted…"

The discussion on pages 45 to 46 of the RIS are focused on the need to increase consultation in the workplace, and support the role of the HSR. Yet there is no information to suggest that the absence of a "predominant" role for an HSR has influenced the current position, nor reduced the level of OHS in the workplace.

In a workplace which currently has effective methods for involving a range of employees, including the HSR, in consultation, the introduction of this Regulation will impose a significant time burden on the employer, without improving OHS outcomes. The requirement to provide information in advance, and meet [separately] with the HSR will slow down the process of consultation and has the potential to double the time taken, and cost involved, to consult.

This increased cost has not been considered in the RIS.

Conclusion

It is Ai Group's view that regulation 2.1.5 has been included to meet the union's requirements to create a "primacy" of HSRs, rather than to better facilitate consultation, and improve OHS, in Victorian workplaces.

This is not an appropriate use of Regulations, and has not been supported through the RIS process.

Recommendation:

Primary Position

It is Ai Group's primary position that Regulation 2.1.5 is not necessary, and that in its current form it is out of power and interferes with good consultative processes that involve all employees. As such, it should be deleted from the Regulations.

Secondary Position

Without diminishing our view that the regulation should be removed, if the government determines that Regulation 2.1.5 be maintained, the following changes are necessary:

- *removal of 2.1.5 (b) to (d); or*
- *if 2.1.5 (b) to (d) are maintained:*
    - *there can be no further strengthening of the HSRs role by the addition of words suggested by the unions, in these sub-sections, or in 2.1.5(e); and*
    - *the qualification of "reasonably practicable" must be applied to all of Regulation 2.1.5, not just 2.1.5(b);*

ASBESTOS

Under existing regulations, unlicensed removal is allowed for fixed or installed non-friable asbestos that is less than 10 square metres and where removal takes no more than one hour within a period of seven days.

Dangerous Goods Order No s.239, 2003 extends unlicensed removal to allow removal of unfixed or uninstalled asbestos (i.e. asbestos containing material in the form of debris and asbestos contaminated dust)

It is our understanding that VTHC are strongly opposed to this regulation, as outlined on their website.

Ai Group supports the proposed asbestos regulations which will maintain the ability to undertake minor asbestos removal work without the requirement to utilise a licensed asbestos removalist (4.3.45).

The proposed Regulations maintain the status quo, and do not reduce the level of protection provided to workers who might be involved. All work with asbestos must comply with the Regulations which require training of workers, specific methods of removal and processes for decontamination.

If the government considers any change to this position, it would need to be costed and reflected in an RIS.

Recommendation:

Maintain the asbestos regulations as currently drafted.

CONSTRUCTION REGULATIONS

Overarching Policy Issue

Throughout the development of the consolidated regulations, Ai Group has stated that we do not believe it is appropriate to adopt the National Standard as part of the "translation" to consolidated regulations.

As a policy decision has been made by WorkSafe to include this Regulation, we do welcome the following:

- later implementation date of 1 July 2008, reflecting the "greenfields" status of the Regulations;
- the specific exclusion of "manufacture" in the definition; and
- the introduction of a process for "construction induction" which will enable mutual recognition across jurisdictions.

However, there are a number of issues which are of concern, as outlined below.

The application to "fixed plant" (and other types of structures) and the potential unintended impact in non construction workplaces

Many organisations undertake significant maintenance work on fixed plant (often referred to as shutdowns), on a regular basis.

The work undertaken at this time is "scheduled maintenance", not construction work, and should not attract the obligations outlined in the construction regulations, particularly the requirement to have general construction induction training.

Yet the current definition does have the potential to inadvertently include these types of activities and/or cause major disagreement on interpretation. For example:

- If the maintenance work involves the replacement of valves, is it refurbishment, and therefore a construction site?
- If the maintenance work involves a change of energy source, from natural gas to LPG, is it a conversion, and therefore a construction site?
- If the maintenance work involves disconnecting some old plant, without removing it, is it a decommissioning, and therefore a construction site?

In addition, many organisations that are not traditionally considered to be in the business of "construction" may inadvertently be captured by this definition.

It should be noted that the RIS has not emphasised the impact of this very broad definition, nor considered the impact of requiring "construction induction cards" for maintenance employees who are working in their normal environment, undertaking major maintenance work.

Recommendation:

Ai Group believes that the Victorian regulations should reflect the Natrional Standard definition which links "construction work" to work undertaken on a "construction site".

Further, the definition should be modified to specifically exclude circumstances where the work carried out is clearly maintenance work, even if it is done in connection with the activities cited in the definition.

If the definition remains as it is, clear guidance material will be required to assist employers, and contractors, to understand their obligations, particularly in relation to the requirement for construction induction cards.

Non-compliance with safe work method statements

Regulation 5.1.9(c) states "if there is a non-compliance with the statement, the work is stopped immediately…".

This is a very strong statement, and does not reflect the general approach to cessation of work, with it occurring only if there is an "immediate risk". In its current form, the regulations may result in work ceasing due to a very minor non-compliance, which may identify a need to modify the SWMS, but not create an immediate risk.

Recommendation:

Ai Group believes the wording should be modified to state "if there is a non-compliance with the statement which creates an immediate risk, the work is stopped immediately. In all other circumstances a non-compliance should lead to a review of the SWMS".

Construction Induction

Temporary Exemptions

It is essential that a temporary exemption is applied to enable a person to commence work on a construction site, without first obtaining the induction card. However, Ai Group is concerned about the manner in which these exemptions will apply, particularly as they can only be granted once in a two year period.

Consider the example of a person who obtains temporary short-term employment in the industry; they are granted an exemption from Division 3 of the Regulations and apply to undertake training (at the employer's expense). Before the training occurs, the employment ceases, and the worker does not attend training. This worker will be excluded from working in the industry for two years unless they are prepared to pay for their own training and certification.

This scenario does not apply in relation to licensing of high risk work, and should not apply in the construction industry.

Recommendation:

Consideration needs to be given to a more appropriate, and workable, exemption provision.

Threshold for Health and Safety Coordination Plans

Ai Group is concerned that the threshold is too low, and will capture relatively small construction activities that do not have the characteristics that are mentioned in the RIS as warranting closer control (more people at any one time, as well as overall, and a greater number of different trades … use more heavy machinery and have more workers working at heights – page 110).

There is also concern that a threshold which is not indexed will result in many construction activities which are intended to be excluded, being automatically included as time progresses.

Recommendation:

Consideration should be given to implementing a higher threshold, and to applying an indexation factor which ensures that this part of the regulations only cover those to which they are intended it would apply.

There also needs to be clear guidance as to how cost is determined. Is it the cost of the materials; the cost of labour; the cost to the principal contractor; or the price paid by the customer?

Unintended inclusion of domestic premises

Throughout consultation on the development of the construction regulations it was clearly stated that there was no intention to include the owner of domestic premises in the scope of the regulations.

In drafting the Regulations attempts have been made to give effect to this intention. However, Ai Group does not believe that this has been successful.

There is a general exclusion if:

- The owner is personally doing the work (5.1.1(2)(a)); or
- The owner engages a person to manage or control the workplace (5.1.1(2)(b)).

However, these two exclusions do not cover the situation of a home owner engaging a builder, electrician and plumber to undertake work, and coordinating the work themselves. This is a common occurrence in home renovations and the erection of sheds and pergolas.

Recommendation:

These exclusions need to be modified to ensure they deliver the intention of excluding domestic premises.

LICENSING OF HIGH RISK WORK

Ai Group is concerned about the cost to employers and licence holders in relation to the adoption of the new national standard for high risk work. However, we do recognise the importance of maintaining a national licencing scheme which reduces the risk of fraud.

We welcome the 5 year phase in period and the policy position that the cost to licence holders, or their employers, will be no more than "cost recovery".

Recommendation:

There will need to be a well-structured process to make employers and licence holders aware of nominal "expiry" dates to trigger the seeking of a new licence.

In addition, further consultation will be required between WorkSafe and stakeholders to effectively implement the transition to the VET sector for licence assessors.

REMOVAL OF MANDATORY REQUIREMENT FOR RISK ASSESSMENT

Ai Group strongly supports the decision to remove mandatory risk assessment from most parts of the regulations. It has been our experience that the risk assessment process is often undertaken only to achieve legislative compliance; significant effort can go into attempting to reach agreement about the "weighting" of the risk assessment; and the process can actually delay the implementation of risk controls.

In today's environment there is relatively easy access to information from regulators and industry about many of the common risks and their appropriate control measures; this removes the need to undertake a risk assessment.

This new approach should result in a greater focus on implementing risk controls and provide greater credibility for the risk assessment process when it is needed to analyse risks to determine control measures.

Recommendation:

The policy position to remove mandatory risk assessments should be maintained and implemented.

GENERAL POLICY ISSUES AND ASSOCIATED COMMENTS

REVIEW OF RISK CONTROLS

The draft Regulations have included a provision in relation to each risk type, which identifies when Risk Controls are to be reviewed.

These "triggers" include a request by an HSR, and is worded on each occasion as follows:

> (1) An employer must ensure that any measures implemented to control any risk … are reviewed and, if necessary revised –
> (x) after receiving a request from a health and safety representative
>
> (2) A health and safety representative may make a request under subregulation (1)(x) if the health and safety representative believes on reasonable grounds that – ……

Recommendation:

It is the view of Ai Group that this provision would read more clearly if the regulation (1) was reworded to:

> *(1) An employer must ensure that any measures implemented to control any risk are reviewed and, if necessary revised –*
> *(x) after receiving a **reasonable** request from a health and safety representative **in line with regulation (2).***

This minor change, which does not affect the application of the provisions, would ensure that any reference to regulation (1) would be automatically referenced to regulation (2); giving the necessary guidance to health and safety representatives and employers about how these provisions should be applied.

CHAPTER 2 – GENERAL DUTIES AND ISSUE RESOLUTION.

2.1.1 and 2.1.2 – Consistency of terminology

Regulations 2.1.1 and 2.1.2 both have provisions which indicate that other Regulations have additional or specific requirements. In 2.1.1 this is achieved by excluding Part 5.2 and Part 5.3. In 2.1.2 it is achieved by stating that the obligation is in addition to any other obligation imposed … by these Regulations.

Recommendation:

For the purpose of consistency, it may be beneficial to utilise the same words in 2.1.1, as have been utilised in 2.1.2(2).

2.1.3 – Medical examinations and health surveillance

Regulation 2.1.3 specifies that the employer must provide information about medical examinations and health surveillance, and the examination or surveillance must be at the employer's expense.

These are reasonable provisions, except that they become difficult to administer when there are sub-contracting arrangements.

Regulation 1.1.8 specifically states that the obligations of an employer extend to an independent contractor and the employees of an independent contractor.

Whilst the dual obligation on the employer and a "host" employer is appropriate in many circumstances it makes it extremely difficult in relation to medical examinations and health surveillance.

Both employers may be able to provide information. However, a dual obligation for both employers to pay for the examinations will ultimately result in a technical breach by one of the employers.

If the worker has a regular presence on a site which has, for example, a lead risk, then clearly it is the responsibility of the operator of the site to provide information and pay for the costs of the medical examination.

However, if the worker is being exposed to risks such as noise across many sites attended during the year, it would only be appropriate for any health surveillance to be undertaken, and paid for, by the contractor, not the owner of each individual site.

Recommendation:

The practical application of these Regulations needs to be considered and addressed in the Regulations.

Part 2.2 – Issue Resolution

General

The modifications which have been made to the Issue Resolution regulations enable a much clearer understanding of the steps to be taken to minimise risk, whilst the issue is being addressed.

During the process of stakeholder consultation, there was some discussion about the status of the Regulations.

The Act clearly outlines in section 73 that the Regulations apply if an agreed procedure is not in place. However, the unions argued that the Regulations should set a minimum standard for "agreed procedures". It is important that the principle of a "fall-back" regulation continues to apply. It is not appropriate for the Regulations to become the starting point for discussion around agreed procedures.

Recommendation:

WorkSafe guidance material and enforcement activity must reflect the true status of this Regulation when Agreed Procedures are being considered.

Defining Issue

The RIS identifies that:

- some stakeholders would like the words "issue" and "issue resolution" defined; and
- "unions believe that the term "issue" captures any health and safety issue including hazards, risks, processes and procedural matters, and does not need defining."

It is the view of Ai Group that an "issue" arises when an employee or HSR believes that something is not being addressed in a workplace, or when there is fundamental disagreement about the circumstances. If productive discussion is occurring about a matter, the process is consultation, not issue resolution.

Ai Group acknowledges that the inclusion of the Issue Resolution Regulations is predominantly a "translation" of the current Regulations; as such the definitional difficulties are not new, and will require the same clarification as under the previous Regulations.

Recommendation:

Ai Group repeat the need for a clear definition of "issue". However, if this does not occur, it is essential that WorkSafe guidance material and operational procedures clearly identify the difference between "issue resolution" and "consultation".

PART 3.2 – NOISE

3.2.5 – Written Record of Risk Control Measures

This section of the Regulations has been translated from the 2004 Regulations and requires the employer to document any control measures identified if it is "not reasonably practicable [to implement them] within 6 months of making the decision…"

This provision has an historical context which does not increase the safety of people at work.

The 1992 Noise Regulations introduced new obligations on employers in relation to engineering controls to reduce noise exposure. These requirements were to be phased in, with employers having a period of time to adopt the higher level controls. Accordingly, the Regulations included a requirement to have a Noise Control Plan, which documented how the employer was going to comply with the Regulations when the phase-in period was completed.

The requirement to have a written record of risk control measures was included in the 2004 Noise Regulations as a compromise position. It was agreed that the requirement to document controls that had been implemented (as required in a Noise Control Plan) was a waste of time. However, agreement could not be reached about the requirement to document future control measures. In the context of reviewing a single Regulation, it was agreed that a written record of planned risk control measures was a feasible compromise.

However, it does not seem appropriate to maintain this provision in a set of consolidated Regulations which do not require the documentation of any other risk controls.

Recommendation:

Delete this Regulation

3.2.7 – Determination of exposure to noise

Ai Group supports the amendments to the requirement to undertake noise level assessments. These assessments can be time consuming, and expensive. Yet, they do not contribute to the improvement of OHS in workplaces where noise levels are obviously above the noise exposure standards.

We welcome the focus on controlling noise first, and measuring noise levels only when there is doubt about whether the exposure standard is being exceeded.

Recommendation:

Maintain the policy position in relation to this Regulation.

3.2.7 (2) and 3.2.7(3)(b) – Repetition

These two provisions are repetitive, with both of them requiring that the determination of noise exposure is not to take into account the effect of hearing protection.

Recommendation:

Remove either 3.2.7(2) or 3.2.7(3)(b)

PART 3.3 – PREVENTION OF FALLS

Lack of visibility of definition of "fall"

A "fall" is defined in 1.1.5 as "a person's involuntary fall of more than 2 metres". This definition is not repeated in the content of Part 3.3, with the potential that the "2 metre" definition may not be considered when reading this Part.

This has been a difficulty in the reading of the Prevention of Falls Regulations since they were made in 2003; as "fall" is a commonly used word, people are less likely to refer to definitions. The movement of definitions even further away from the chapter is likely to exacerbate the confusion.

Recommendation:

Use notes to either repeat the definition of "fall" or cross-reference to 1.1.5, at the start of the Part, and at Regulation 3.3.3.

PART 3.4 – CONFINED SPACES

Definition

Ai Group support the direct translation of the definition of a confined space, without expanding it to include "stored liquids"

Recommendation:

Maintain the current definition of confined spaces

3.4.1 – Application of Part

This Regulation specifies that if there is an inconsistency between the provisions of the confined spaces regulations, and Part 3.4 and Parts 3.5 (Plant), Part 4.1 (Hazardous Substances) or Part 4.2 (Carcinogenic Substances), the requirements of the confined spaces regulations will apply.

These provisions are different to the current Regulations which state at R5:

> (1) If, in relation to plant, these Regulations impose on any person a requirement which is inconsistent with or equivalent to a requirement imposed by the Occupational Health and Safety (Plant) Regulations 1995, the person is only required to comply with the requirement imposed by these Regulations.
>
> (2) If, in relation to a confined space, any regulation made under the Act (other than these Regulations) which deals with a specific hazard imposes on any person a requirement which is inconsistent with or equivalent to a requirement imposed by these Regulations, the person is only required to comply with the requirement imposed by the regulation which deals with a specific hazard.

Given the nature of risks associated with confined spaces, Ai Group supports the general approach in the proposed regulations that gives primacy to the requirements of the confined spaces regulations. However, it is unclear why this has not also been applied in relation to regulations such as manual handling.

Recommendation:

Consideration should be given to broadening the range of Parts to which 3.4.1 would apply.

PART 3.5 – PLANT

3.5.1 – Application

During the process of drafting these Regulations, consideration was given to adopting the application provisions in the National Model Regulations. If this had been adopted, the following exclusion would have been removed from the Regulations:

> 3.5.1(3) Subregulations (1)(a) and (1)(b) do not include –
>
> (a) plant that relies exclusively on manual power for its operations; and
>
> (b) plant that is designed to be primarily supported by hand

Ai Group supports the policy decision to maintain this exclusion, as the practical implications of its removal would have been wide-ranging and costly, particularly in relation to the documentation required to be provided by designers, manufacturers, and suppliers.

Recommendation:

Maintain the current exclusions to the definition of Plant.

PART 4.4 – LEAD

The hierarchy of control

4.4.8 of the lead chapter outlines the risk control hierarchy for lead, and states in (2) If it is not reasonably practicable to eliminate …. Must reduce the risk so far as is reasonably practicable by (a) substituting lead with (i) a substance that is less hazardous.

It would seem to Ai Group that this control measure is actually eliminating the risk of exposure to lead, not reducing the risk.

Recommendation:

Consider rewording the hierarchy to reflect substitution as a risk elimination option in this context.

Defining a lead-risk job

4.4.17 clearly defines a lead-risk job using the words “a job that involves work in a lead process in which the blood lead level of the employee is likely to exceed …”

Subsequent sections require the employer to consider whether a lead process is “reasonably likely to lead to blood lead levels of employees greater than those set out in regulation 4.4.17”

This is a very repetitive approach, the lack of clarity of which is made worse by the words “lead” and “lead” in the same sentence with different meanings.

Recommendation:

It is recommended that 4.4.18, and subsequent similar sections are reworded as:

An employer must identify if a lead process is either:

(a) reasonably likely to be a lead-risk job; or

(b) reasonably likely not to be a lead-risk job.

Arranging health surveillance

The Regulation states that the employer must **arrange** for health surveillance. Previous regulations (2000) state that the employer must **provide** for health surveillance.

Although 4.4.29 provides for specific employee duties, cooperating with the employer in relation to health surveillance is not included.

As this is an invasive test, an employer cannot force a worker to participate. However, there is no information about what an employer can do to meet their obligations, if the worker refuses to undertake a blood test.

Recommendation:

The regulations should include, possibly as a note, information about what an employer should do if a worker in a lead risk job refuses to undertake a blood test.

Independent Contractors

4.4.20(3) and 4.4.23(2) specifically include independent contractors. This does not appear to occur anywhere else in the Regulations and is inconsistent with the statement in the RIS that the issue of independent contractors is "by the inclusion of a declaratory regulation", presumably Regulation 1.1.8.

Recommendation:

Remove these regulations and replace them with a note to cross-reference to regulations 1.1.8.

PART 5.1 – CONSTRUCTION REGULATIONS

Ai Group's substantive concerns about this Part are outlined in an earlier section of this submission. In addition to these issues, we would like to highlight the difficulties associated with reading the part as it is currently written.

Terminology – Registration

The terminology used in the regulation to describe the issuing of construction induction cards as "registration", is confusing and misleading.

Recommendation:

It is recommended that alternative terminology be utilised.

Structure of Regulations

This part of the regulations is structured in a very confusing manner, as outlined below:

General issues that are relevant to all construction activities are covered in Regulations

- 5.1.7 to 5.1.8 (risk control)
- 5.1.12 (site-specific training)
- 5.1.19 to 5.1.25 (construction induction)

These provisions are interspersed with duties relating to:

- High risk construction work (5.1.9 to 5.1.11);
- Duties of principal contractors, if the threshold is exceeded (5.1.13 to 5.1.18); and
- Notification of construction excavation work (5.1.26 to 5.1.27)

The location of construction induction after the provisions relating to "principal contractors" may lead the reader to think that construction induction is only applicable to projects with a cost exceeding the threshold.

Recommendation:

It is suggested that the following changes be made to this Part to assist navigation and interpretation:

Definitions

The question "what is a structure?" (5.1.4) should follow on from "what is construction work?" (5.1.2) as the two definitions are directly related. This would then enable a more logical flow also between the questions relating to "high risk construction work" and "safe work method statements".

Alternatively, to maintain consistency and establish one place for definitions, these questions could be reworded and placed in the overall definitions section.

General Structure

It is recommended that the following order be adopted for sections within this Part:

Requirements for all construction work:
- *Risk control*
- *Construction induction*
- *Site-specific training*

Specific requirements for high risk construction work and excavation

Duties of principal contractors

CHAPTER 6 – LICENSING AND REGISTRATION

6.1.4 Time for processing applications

The regulation establishes timeframes within which the Authority must give the applicant a written notice stating the Authority's intention to grant, or to propose to refuse to grant a licence.

However, there does not appear to be any regulation which states what will occur if the Authority does not meet its timelines; are there penalties payable by the Authority; automatic granting of a licence; or recommencement of the process?

Recommendation:

A regulation should be added, or a note included, to identify what happens if the Authority does not meet its required timelines.

Review of Decisions

Explanation of VCAT and process review

6.1.34 refers to the continued effect of a licence if the licence holder applies for a a "process review" or takes the matter to VCAT. The note at the bottom of the Regulation refers the reader to 6.3 to obtain further information about VCAT, but does not include information about where to find out about a "process review".

Recommendation:

It is suggested that information about "process review" be included in the note.

Definition of reviewable decisions

Part 6.3 establishes how decisions will be reviewed and defines a reviewable decision. These "reviewable decisions" are in addition to those established under the Act, and appear to have a different focus for review, i.e. under the Act the merit of the decision is considered, whereas under the Regulations it appears that only the process can be considered.

It appears that, under Part 6.3, as long as the process was correct, the Authority could still refuse to grant a licence, if the decision was found to be incorrect when considering issues of merit.

It is the view of Ai Group that unnecessary confusion is created by having two different types of reviewable decisions (one in the Act; one in the Regulations) with different levels of outcomes.

Recommendation:

It is recommended that the reviewable decisions under 6.3 be treated in the same manner as reviewable decisions under Part 10 of the Act. Alternatively, the reviews under Part 6.3 should be given a different name in order to remove confusion.

PART 7.2 – EXEMPTIONS

Ai Group is of the view that the Regulations should include an all encompassing exemption provision that can be applied to any relevant circumstances, within appropriate processes of control and review.

Whilst there are some specific exemption categories, an exemption is most likely to be required to address unexpected circumstances. The expected will be regulated. Hence, attempts to contain the range of exemptions that the Authority can grant appears to be illogical.

Recommendation:

It is recommended that this part include a general exemption provision, to enable WorkSafe Victoria to respond to unexpected situations.

COMMENT ON STRUCTURE AND NAVIGATION OF THE REGULATIONS

How to read the Regulations

Throughout discussions about the development of consolidated Regulations there was much discussion about the importance of ensuring that duty holders could effectively navigate the Regulations. Specifically, there was concern that employers may read risk-specific chapters/parts in isolation, without referring to related chapters/parts.

Recommendation:

It would be beneficial to have some form of explanatory section at the start of the Regulation which outlines how the Regulations need to be read.

Definitions

Lack of Clarity

It is the view of Ai Group that some of the definitions are lacking in clarity and require modification.

Issues and Recommendations:

The table below outlines the issues identified and the recommended solutions.

Term	*Current Definition*	*Comments and Recommendations*
Administrative Control	*Means a system of work or a work procedure that is designed to eliminate or reduce risk, but does not include* *(a) a physical control; or* *(b) the use of personal protective equipment*	*These definitions seem to rely on what they do not include, in order for them to be complete. It would be beneficial if the actual control type could be better described. This is done well in relation to "fall arrest system" and "work positioning systems".*

Term	*Current Definition*	*Comments and Recommendations*
Engineering Control	*Means a physical control of any kind that is designed to eliminate or reduce risk, but does not include –* *(a) a system of work or a work procedure; or* *(b) the use of personal protective equipment*	*Administrative controls could include examples like job rotation, safe work procedures, and job safety analysis* *Engineering controls could include examples such as guarding, robotics, conveyors etc.*
Personal Protective Equipment	*Includes respiratory protective equipment and personal protective clothing*	*This definition is really just a couple of examples, and could be better explained by stating that PPE is equipment that is worn by the worker to protect them from injury or illness.*
Hazardous manual handling	*An example is provided in relation to "application of high force", and yet it is not provided for any of the other characteristics, some of which are much harder to understand, e.g. repetitive or sustained.*	*This example should be excluded, or examples provided for each of the other characteristics*
Reviewable decision	*Has the meaning set out in 6.3.1*	*It would be helpful to have a note in either the definition or at the bottom of 6.3.1 to outline that there are other reviewable decisions under the Act, with a cross reference to them.*

Inconsistent location and/or cross-referencing of definitions.

A number of the definitions refer the reader to a specific regulation, e.g. in 1.1.5 it is stated that "construction work has the meaning given in regulation 5.1.2".

However, there appears to be some inconsistency with this, as indicated by the following examples:

- Specific exposure standards for asbestos and noise are stated in the definitions. However, the exposure standard for lead is outlined in Regulations 4.4.10 and cross-referenced in the definitions.

- In relation to the Falls Chapter, work positioning systems and fall arrest systems are defined in the definitions. Solid construction is mentioned in 3.3.4(1) as the primary control measure. Other control measures are then identified in 3.3.4 (2) to (5) with reference to examples and definitions in 1.1.5. Solid construction is eventually defined in 3.3.4(6) and not listed in the definitions, even as a cross-reference.

- In the Confined Spaces Regulations, there is reference to the LEL in 3.4.12(1), which is then defined in 3.4.12(2) and there is no cross-reference in the definitions.

Recommendations:

It is suggested that the location of definitions, and the use of cross-referencing, are dealt with consistently throughout the regulations.

Recommendations related to other issues relevant to definitions:

For the purpose of high risk work, it would be beneficial to have a definition of "direct supervision".

Regulation 1.2.3 refers to "incorporated documents"; a definition or explanation of what an incorporated document is would be beneficial.

Reference to sub-contractors

On page 52 of the RIS, it is stated that the inclusion of independent contractors as employees has been addressed by the inclusion of a "declaratory" statement; this statement is reflected in Regulation 1.1.8. Yet, in other parts of the Regulations there is specific reference to independent contractors; hence, creating some confusion.

Recommendation:

It is recommended that regulations, other than 1.1.8, that currently refer to independent contractors, are removed, and replaced with notes that cross-reference to regulation 1.1.8.

Reference to self-employed persons

Throughout the Regulations there appears to be inconsistent references to self-employed persons.

Recommendation:

It would be helpful to remove individual references to self-employed person, and have a "declaratory statement" similar to that relating to independent contractors that states:

> *A self-employed person has the same duties of an employer to ensure, so far as is reasonably practicable, that persons are not exposed to risks to their health and safety arising from the conduct of the undertaking of the self-employed person. Accordingly, a self-employed person must comply with these Regulations as if that person were an employer, if others might be exposed to risk.*

Provisions relating to Hazard Identification and Risk Control

At the commencement of the Regulation Review process, it was intended to include provisions requiring hazard identification and risk control, in the general chapter. Hence, in most cases the topic specific working groups did not review the provisions in individual chapters.

It appears that, with the exception of risk control in the manual handling chapter, these provisions have been directly translated across from the current regulations.

As the current regulations were all written at different times, there is a variation in the way that they are presented.

In spite of consolidating the regulations, there does not appear to have been an attempt to develop consistent approaches (where appropriate) to identification and risk control.

Hazard Identification

What to identify

What is required to be identified varies between regulations, as summarised below:

- Identify any task that involves hazardous manual handling – 3.1.1
- Determine whether the noise exposure is being exceeded – 3.2.7
- Identify any task that involves a fall hazard – 3.3.3
- Identify all hazards associated with work in a confined space – 3.4.7
- Identify all hazards to health and safety associated with plant – 3.5.23
- Determine exposure to asbestos – 4.3.2 (as a subset of control) and 4.3.4
- Identify asbestos (not the hazards / risks) – 4.3.20 and 4.3.27
- Determine exposure to lead – 4.4.10
- Identify lead risk jobs – 4.4.38
- Identify major incidents and major incident hazards – 5.2.6
- Identify all mining hazards

There are no specific requirements to identify hazards or risks within the hazardous substances or construction regulations.

It may be that there are specific reasons, relevant to each risk topic, which results in the different approach to identification or determination. However, there is nothing to indicate that this comparative analysis has been done.

Identification for "classes" of hazards/tasks

The ability of a duty holder to undertake a broad identification process is established in the following regulations:

3.1.1(2) – Manual handling
3.2.7(4) – Noise
3.4.7(2) – Confined spaces

However, similar provisions do not apply for other regulations; and there does not appear to be a logical reason for the difference.

Control of Risk

The control hierarchies have maintained some historical variations which do not appear to be relevant within a consolidated set of regulations, as illustrated below.

The Plant regulations state at 3.5.24

> (3) If it is not reasonably practicable for an employer to reduce a risk associated with plant in accordance with subregulation (2), the employer may control that risk by the use of administrative controls or personal protective equipment.

The Hazardous Substances regulations state at 4.1.24

> (3) If an employer has complied with subregulations (1) and (2) so far as is reasonably practicable and a risk associated with the use of a hazardous substance at the workplace remains, the employer must use administrative controls to reduce the risk so far as is reasonably practicable.
>
> (4) If an employer has complied with subregulations (1), (2) and (3) so far as is reasonably practicable and a risk associated with the use of a hazardous substance at the workplace remains, the employer must control the risk by providing appropriate personal protective equipment to employees at risk.

There are a number of obvious anomalies when these two provisions, addressing administrative controls (ACs) and personal protective equipment (PPE) are compared:

- The plant regulations imply that ACs and PPE are at the same level in the hierarchy; whilst the hazardous substances regulations clearly see them as a different level of control;
- The hazardous substances regulations make it clear that you must have done everything you can under each subregulation to control risk, before you can apply subregulations (3) or (4); the plant regulations imply that you can go straight to ACs or PPE if you decide higher levels of control are not reasonably practicable;
- The plant regulations say you “may” control risk using ACs or PPE, whilst the hazardous substances regulations state that you must.

If we then consider the construction regulations, the reference to PPE has a more specific requirement to provide "… appropriate personal protective equipment that is suitable to the task …"

Recommendation:

It is recommended that a comparative analysis be done between all the hazard identification and risk control provisions to determine whether there are specific reasons why the wording should be different. If so, this should be documented for the education of readers; if not, the wording should be modified to achieve consistency.

Compliance and Penalty Information

The format of the draft Regulations includes two types of information which may appear at the end of a Regulation, regarding compliance and penalty information.

The first of these are Act Compliance Notes, explained in Regulation 1.1.7 as follows:

> If a note at the foot of a provision of these Regulations states "Act Compliance" followed by a reference to a section number, the regulation provisions sets out ways in which a person's duty or obligation under that section of the Act is to be performed in relation to the matters and to the extent set out in the regulation provision.
>
> Note
>
> A failure to comply with a duty or obligation under a section of the Act referred to in an "Act Compliance" note is an offence to which a penalty applies.

The initial reading of this Regulation gives the impression that if there is not an "Act Compliance" note, there is no penalty.

However, some of the Regulations which do not have "Act Compliance" notes, have penalty units listed. Penalty units are not defined in the Act or the Regulations, and their relationship to Act Compliance is not explained.

Further the table presented on page 55 of the RIS outlines that, in some circumstances, an employer may be liable for prosecution under either the Act or the Regulations. The example cited in the table is in relation to an employer who breaches the Plant Part by failing to hold a licence for working a forklift [sic]. Yet, Regulation 3.6.2 – "Employer must not use unlicensed employees to do high risk work", only lists the penalty units, and does not provide an indication that "Act compliance" is also relevant.

There also appears to be some inconsistency with use of notes, with references to sections of the Act, rather than Act Compliance Notes. For example, in Division 7 of the Plant Chapter and in the Licensing of High Risk Work Chapter, Act Compliance notes do not appear, but there are notes which say, for example, "See section 40(2) of the Act".

Recommendation:

In order to effectively advise duty holders of the potential penalties associated with breaches of the Regulations, the following solutions are proposed:

- *A definition/explanation of penalty units to be included in Regulation 1.1.5; possibly with either the inclusion of the current amount, or reference to the Monetary Units Act 2004.*
- *Where it is possible for breach of a Regulation to be prosecuted either under the Regulations or under the Act, both the Act Compliance Note, and the penalty units should be listed at the end of the Regulation.*
- *Amendment to Regulation 1.1.7 to outline how compliance and penalties are identified throughout the document. This could outline the difference between breaches of the Act and breaches of the Regulations, and detail the manner in which penalty units are applied.*
- *To aid transparency and clarity, it would also be beneficial to include the penalty units associated with each Act Compliance note, or include them in a schedule at the back of the Regulations.*

Cross-referencing to divisions and sub-divisions

Throughout the Regulations there is regular reference to divisions and sub-divisions, particularly outlining the application and/or exclusions related to such a division or sub-division. However, as you move across pages, it is not always easy to identify which Regulations fall within that division or sub-division.

For example the note in 6.1.1 states "for high risk work licenses see subdivision 2: for asbestos removal licences see subdivision 3 …"

A modified version of this could be one of the following:

> "for high risk work licenses see Subdivision 2 (regulations 6.1.9 to 6.1.10); for asbestos removal licences see subdivision 3 (regulations 6.1.11 to 6.1.14) …"; or
>
> "for high risk work licenses see regulations 6.1.9 to 6.1.10: for asbestos removal licences see regulations 6.1.11 to 6.1.14 …"

Recommendation:

When referencing other parts of the Regulations, refer to regulations numbers instead of, or as well as, division and subdivisions.

Inquiries should be directed to:

Tracey Browne
Principal Adviser
Workers Compensation and Occupational Health and Safety
Australian Industry Group

20 Queens Road
Melbourne Vic 3004

(03) 9867 0255