

Australian Industry Group

New South Wales
Statutory review of the
Work Health and Safety Act 2011

Submission to
New South Wales Government

DECEMBER 2016

Ai
GROUP

STATUTORY REVIEW OF THE WORK HEALTH AND SAFETY ACT 2011

SUBMISSION TO NEW SOUTH WALES GOVERNMENT

Introduction

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Ai Group is a member of Safe Work Australia (SWA) and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety Laws. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have ongoing contact and engagement with employers in all Australian jurisdictions on workplace safety issues, including informing them of regulatory changes, discussing proposed regulatory change, discussing industry practices as well as providing consulting and training services. We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to workplace health and safety.

Ai Group welcomes the opportunity to make a submission in relation to the statutory review of the operation of the NSW WHS Act. We note that the [Discussion Paper](#) has identified that the review will only be focusing on the operation of the provisions of the Act that vary from the Model WHS Laws; we respond accordingly.

We will provide detailed input on broader issues when the national review of the Model WHS Laws occurs in 2018.

1. Do you wish for your feedback to remain confidential

No

2. Contact information

Name: Tracey Browne
Industry: Multiple
Region: Multiple
Email address: tracey.browne@aigroup.com.au

3. Type of business

Employer Association

4. Are the objects of the Act still valid?

The objects align with the Model WHS Act and continue to be valid. The 2018 review of the Model WHS Act should consider the advancement of Object (1)(g) providing a framework for continuous improvement and progressively higher standards of work health and safety, in line with technological and other progress, within a framework that does not increase unnecessary regulatory burden.

5. Are the terms of the Act appropriate for achieving the stated objectives?

Broadly the Act meets the objectives which include the overarching objective to achieve national consistency. However, any material variations from the Model, such as the continuation of the ability of unions to prosecute, detract from that objective.

6. Could the objectives of the Act be achieved in ways that do not cost business as much time, resources or financial expenditure?

The unnecessary costs to business are created more by the detail of Regulations than the Act itself.

Consideration needs to be given to administrative requirements such as notification of demolition work under Part 4.6; plant registration under Part 5.3, and various record keeping requirements. For these, and similar provisions, the Regulator should be required to demonstrate how these requirements increase work health and safety; in relation to notifications and registrations this should include providing information about what SafeWork NSW does with the information they receive.

7. Are any of the objectives causing unnecessary costs for business?

The objectives are not directly causing any unnecessary costs for business.

8. Are the NSW-specific definitions in section 4 of the Act working effectively?

Ai Group is not aware of any issues arising from these definitions.

9. Are these definitions clear? Please provide examples of circumstances where any definitions are not clear.

As a standalone definition, it is not clear what is meant by the *authorising authority*; it would be helpful if the definition stated that it is the authorising authority for the purposes of Part 7 of the Act.

Otherwise the definitions are clear.

10. Do you have any comments about how the strict liability provision is working?

The concept of strict liability is not generally understood by businesses. It is not something that would generally be considered by a PCBU until a prosecution is being brought against the organisation or its officers. For this reason, it is not an issue which Ai Group will be commenting on in this submission.

It should be noted that a major change that occurred in NSW with the adoption of the Model WHS Laws was the removal of the reverse onus of proof. This was understood and welcomed by Ai Group and our members.

11. Do you have any comment regarding the provision that prevents duplication of incident notifications where they must be notified to the Resources Regulator?

It is important that duplication is avoided. This is an appropriate provision.

12. Do you have any comment to make regarding the IRC being the forum that can receive and decide whether to disqualify a HSR?

This appears to be an appropriate forum for this action. To the best of our knowledge no actions have been taken under this provision, and our experience in other jurisdictions that have had HSRs for a long period of time indicates that this is a very rare occurrence.

13. Are the additional provisions that have been inserted for health and safety committee's in coal mines working well?

Ai Group is not in a position to comment on this issue.

14. Are the provisions relating to prisoners, working well?

Ai Group is not in a position to comment on this issue.

15. Are the organisations listed to clarify who is an emergency services worker, appropriate?

16. Are there any other organisations that should be listed?

17. Are there any organisations listed, that should not be?

In relation to questions 15 to 17, Ai Group is not aware of any issues arising from the current definition of an emergency services worker.

18. Do you have any comment to make regarding the District Court being the forum that can receive applications about civil proceedings in relation to discriminatory, coercive and misleading conduct?

Ai Group is unaware of any civil proceedings being issued under these provisions. At present, the District Court would appear to be an appropriate forum.

19. Do you wish to comment about the IRC being the Authorising Authority for NSW?

The IRC is the appropriate organisation to be the Authorising Authority for the purposes of Part 7 of the Act (Issuing Union Right of Entry Permits).

20. Do you wish to comment on the *Industrial Relations Act 1996* being named as the relevant state or industrial law in NSW?

This is the relevant Act for the purposes of Part 7.

21. Is the definition of ‘authorised person’ working well? If no, please provide details and examples about how this could be improved for your particular circumstance.

Ai Group is not aware of any issues associated with the operation of the authorised person definition.

22. Are the classes of persons that the regulator may appoint as an inspector, working well?

Ai Group is not aware of any issues associated with the appointment of inspectors.

23. Are the provisions for Inspectors to obtain a search warrant to obtain information about a suspected WHS breach clear?

Ai Group has not had direct exposure to any situations where warrants have been utilised. Accordingly, we are unable to respond to this question. We will be interested in the views expressed by any organisation that has had these experiences.

24. Do the references to the *Law Enforcement (Powers and Responsibilities) Act 2002* provide suitable powers for the WHS Inspector and NSW Police to cooperate and obtain information about a suspected WHS breach?

It is Ai Group’s view that only SafeWork NSW and the NSW Police are in a position to answer this question.

25. Are any other provisions needed for the WHS Inspector and NSW Police to cooperate and obtain information about a suspected WHS breach via a search warrant?

It is Ai Group's view that only SafeWork NSW and the NSW Police are in a position to answer this question.

26. Do you wish to comment on the provisions that NSW currently provides for an Inspector to obtain a person's name and address?

Ai Group notes that the NSW variation to this provision is the removal of clause 185(1)(c) which allow an inspector to obtain these details if "the inspector reasonably believes that the person may be able to assist in the investigation of an offence against this Act". Hence the NSW provisions only relate to a person suspected of committing an offence.

As written, the provisions appear to be appropriate. However, as we have not been directly involved in their application we are unable to make any detailed comment.

27. Do you wish to comment on the provision regarding a person who fails to prove that the name or address they provided to an inspector, is correct?

The NSW wording of sections (3) and (4) of this provision make minor changes to the obligations to provide proof of identity and places the obligation on the person to show that they had a reasonable excuse for not providing such information.

These are relatively minor changes, but they may have a significant impact in individual cases.

Ai Group has not been directly exposed to any situations where this has occurred. It is not possible for us to comment on their application without individual examples of where this may have been applied.

28. Do you have any comment to make regarding the District Court being the forum that can receive applications by the regulator, about noncompliance with notices?

It would appear that the District Court is the appropriate jurisdiction for the regulator to seek an injunction to require a duty holder to comply with a notice. Ai Group has not had direct exposure to these circumstances. Accordingly, we are unable to respond to this question. We will be interested in the views expressed by any organisation that has had these experiences.

29. Do you wish to comment about the District Court being the nominated forum to receive and hear an application for orders where a person is alleged to have contravened a WHS undertaking in NSW?

It would appear that the District Court is the appropriate jurisdiction for the regulator to enforce compliance with an undertaking, impose a fine or commence a prosecution. Ai Group has not had direct exposure to these circumstances. Accordingly, we are unable to respond to this question. We will be interested in the views expressed by any organisation that has had these experiences.

30. Do you wish to comment about the IRC being the nominated external body to receive and decide an application for review of a reviewable decision made by the regulator?

Ai Group has not had any direct involvement in the external review of decisions made by the regulator.

However, in considering whether the IRC is the appropriate body for this activity it is interesting to note that the various jurisdictions have adopted a range of different approaches (as summarised below).

It would be beneficial if the 2018 review of the Model WHS Laws considered how the various bodies manage these reviews; if it was found that a particular type of jurisdiction gave the best outcomes it could be recommended that jurisdictions adopt a consistent approach.

Approaches to external review

Administrative “Tribunals” – VIC, ACT, TAS

Victoria, which has had similar provisions under their OHS Act since 2004, utilise the Victorian Civil and Administrative Tribunal (CAT). The ACT also nominates their CAT. Tasmania utilises the Administrative Appeals Division of the Magistrates Court.

Option for either Administrative Tribunal or Industrial Body - QLD

The legislation which establishes the Queensland CAT allows for external reviews to be referred to them; however, the QLD WHS Act also establishes that an external review can be heard by the QLD Industrial Relations Commission.

Industrial Bodies – SA, CWTH, (AND NSW)

South Australia establishes the Industrial Relations Commission as its external review body; this will soon be changed to the South Australian Employment Tribunal (SAET) with the abolition of the IRC to occur in 2017. The Commonwealth Act nominates the Fair Work Commission.

Specialist Court – NT

The Northern Territory utilises the Work Health Court, which is a Magistrates Court established predominantly to deal with workers’ compensation cases, but referenced many times throughout the WHS Act.

31. Do you wish to comment about the IRC being the nominated external body to receive and hear an application for review of a decision made, or taken to have been made, on an internal review by the regulator?

See answer to question 30.

32. Is the forum for proceedings for an offence against the WHS laws (except category 3 offences) being the Local Court or the District Court in its summary jurisdiction, working well?

Ai Group has not had direct exposure to these circumstances. Accordingly, we are unable to respond to this question. We will be interested in the views expressed by any organisation that has had these experiences.

33. Is the requirement for proceedings about category 3 offences to be dealt with summarily, working well?

Ai Group has not had direct exposure to these circumstances. Accordingly, we are unable to respond to this question. We will be interested in the views expressed by any organisation that has had these experiences.

34. Are the provisions of the *Industrial Relations Act 1996* that relate to appeals under the Act working well?

Ai Group has not had direct exposure to these circumstances. Accordingly, we are unable to respond to this question. We will be interested in the views expressed by any organisation that has had these experiences.

35. Do you wish to comment about the provision for the secretary of a union to bring proceedings for an offence against the Act?

Ai Group strongly opposes a provision which allows for the secretary of a union to bring proceedings for an offence against the Act. As criminal law it is only appropriate for the regulator or the Director of Public Prosecutions (DPP) to initiate a prosecution, having considered all appropriate factors.

In relation to Work Health and Safety laws, these factors are detailed in section 14 of the [National Compliance and Enforcement Policy](#), consistent with DPP requirements, agreed by members of Safe Work Australia, and adopted by NSW. The factors are reproduced below:

- the existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings
- a reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court (taking into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence, and any lines of defence available to the defendant)
- a public interest test which may include the following considerations:
 - a) the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
 - b) any mitigating or aggravating circumstances
 - c) the characteristics of the duty holder—any special infirmities, prior compliance history and background
 - d) the age of the alleged offence
 - e) the degree of culpability of the alleged offender
 - f) whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
 - g) the efficacy of any alternatives to prosecution
 - h) the prevalence of the alleged offence and the need for deterrence, both specific and general, and
 - i) whether the alleged offence is of considerable public concern.

A union initiated prosecution would potentially override all these considerations.

We understand that the rationale for this power has been described as follows: *if the regulator does not take action the union should be able to.*

However, section 231 of the WHS Act (reproduced below) allows for a person to request that the regulator investigate an issue if no prosecution has been brought within 6 months; and to escalate this to the Director of Public Prosecutions if they are not satisfied with the outcome of the regulator's consideration.

231 Procedure if prosecution is not brought

- (1) If:
 - (a) a person reasonably considers that the occurrence of an act, matter or thing constitutes a Category 1 offence or a Category 2 offence, and
 - (b) no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after that occurrence, the person may make a written request to the regulator that a prosecution be brought.
- (2) Within 3 months after the regulator receives a request the regulator must:
 - (a) advise the person (in writing):
 - (i) whether the investigation is complete, and
 - (ii) if the investigation is complete, whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought, and
 - (b) advise the person who the applicant believes committed the offence of the application and of the matters set out in paragraph (a).
- (3) If the regulator advises the person that a prosecution for a Category 1 or Category 2 offence will not be brought, the regulator must:
 - (a) advise the person that the person may ask the regulator to refer the matter to the Director of Public Prosecutions for consideration, and
 - (b) if the person makes a written request to the regulator to do so, refer the matter to the Director of Public Prosecutions within 1 month of the request.
- (4) The Director of Public Prosecutions must consider the matter and advise (in writing) the regulator within 1 month as to whether the Director considers that a prosecution should be brought.
- (5) The regulator must ensure a copy of the advice is given to:
 - (a) the person who made the request, and
 - (b) the person who the applicant believes committed the offence.
- (6) If the regulator declines to follow the advice of the Director of Public Prosecutions to bring proceedings, the regulator must give written reasons for the decision to any person to whom a copy of the advice is given under subsection (5).
- (7) In this section a reference to the occurrence of an act, matter or thing includes a reference to a failure in relation to an act, matter or thing.

This is the appropriate course of action for the Secretary of a union to undertake if they believe a prosecution should be commenced.

A union has, or may have, an ongoing relationship with a PCBU centred around other issues such as wages and conditions of work for their members, or those entitled to become their members, engaged by that PCBU or related commercial entities. It is anomalous and risks real conflicts of interest to give a union the power to initiate, or threaten to initiate proceedings under the WHS laws (even in limited circumstances) when they have this ongoing relationship. They are not disinterested or objective parties.

36. Do you wish to comment on the penalty notice scheme being made under the *Fines Act 1996*?

It would seem to be appropriate for the penalty notice scheme to sit within the same legislative provisions as other fines, i.e. to be created by the Fines Act.

The Regulations clearly outline the offences that can attract a penalty notice and the size of penalty involved. Hence, PCBUs do not have to understand the Fines Act in order to understand their potential liabilities.

Ai Group does not see any issue with this approach.

See also our answer to question 76.

37. Do you wish to comment on the provisions for sharing information by the NSW WHS Regulators?

These provisions appear to be appropriate.

38. Do you have any comment regarding ongoing reviews of the Act?

In order to ensure that national consistency is maintained, it is Ai Group's view that NSW should actively participate in any reviews of the Model WHS Laws. If recommendations are then made to modify the laws, these should be considered by Safe Work Australia members. In line with the previous agreements of jurisdictional governments, all jurisdictions should then adopt any amendments that are agreed through the voting processes established under the Safe Work Australia Act.

39. What is/isn't working well for small business in relation to the NSW-specific provisions of the WHS laws?

During our engagement with small businesses in NSW, Ai Group has not identified any specific parts of the WHS laws that have been identified as particularly working, or not working, well for those businesses.

However, we do continue to get general feedback from employers about administrative requirements that do not directly relate to increasing health and safety in the workplace, as outlined elsewhere in this submission.

40. What has/hasn't improved for PCBUs or workers operating in more than one jurisdiction?

Generally, the harmonised laws have made it easier for businesses that operate in more than one jurisdiction to understand their obligations. In most cases the variations that have occurred in the laws at a jurisdictional level are *at the margins* and consistency of key provisions and messages has largely been maintained.

Employers certainly welcomed the removal of the *reverse onus of proof* that existed in NSW and QLD under previous laws.

The adoption of the concepts of PCBU (person conducting a business or undertaking) and workers, rather than employers and employees, has aided clarification about duties owed to contractors and labour hire workers.

However, it has created some concern about a broadening of scope to increase the obligations beyond traditional OHS boundaries, e.g. in relation to volunteer organisations and bodies corporate.

The most significant confusion caused by the terminology is a continuing confusion about whether the PCBU is the legal entity, or the senior individuals within that entity, due to the use of the term *person*.

Two key areas that assist organisations like ours to educate PCBUs and their officers about their broad obligations are the due diligence provisions and the requirement to consult, cooperate and coordinate with other duties holders.

The full benefits of harmonisation have not been realised due to Victoria withdrawing from the process. The delays in Western Australia do not generally have as much impact, as there are far more businesses operating between Victoria and NSW, than between Western Australia and NSW.

To assist our members to understand the variations between the Model WHS Laws and those that are proposed for WA and those applied in Victoria, Ai Group has developed comparison documents that use the Model WHS Laws as a base, and identify the variations. This is something that we could not have easily provided to employers when each jurisdiction had completely different laws, with major variations in structure.

41. Are there differences between how the NSW regulators are applying the legislation compared to other states, territories and the commonwealth? If yes, please provide a detailed response.

Ai Group has not identified any specific situations where the laws are being applied differently across jurisdictions. However, it would be very unlikely for an example to arise where it can be clearly identified that situations where the exact circumstances applied were treated differently.

As part of the 2018 review it would be appropriate for Safe Work Australia to undertake evaluation activities which looked at how the regulators are responding to various scenarios. This could include, for example: the types of enforceable undertakings accepted and rejected; when infringement notices are being utilised; or responses to disputes about union right of entry.

42. Are there differences between how the NSW regulators are providing advice and assistance compared to the other states, territories and the commonwealth? If yes, please provide a detailed response.

This is a particularly broad question that can encompass everything from information available on the website, through to telephone advice and the approach when an inspector engages with a PCBU.

There are some differences to the provision of advice and assistance that are easy to identify. For example, SafeWork SA has recently restructured to establish a separate part of the organisation to provide this support; this division is staffed by people that do not have the powers of inspectors.

However, a key area of consideration is the direct engagement between a PCBU and an inspector during a site visit. It will never be possible to identify, in any representative manner, the level of advice and assistance provided by inspectors, as much of this will come down to the discussions held and the ability of the PCBU's representative to understand and adopt that advice.

The detail provided on Improvement Notices and Prohibition Notices could provide insight as to the level of written information PCBUs are provided during inspector visits and in relation to how to comply with a notice issued by an inspector.

43. Are the provisions that relate to two WHS regulators working well?

Ai Group is not aware of any circumstances where this has caused difficulties.

44. Are any additional provisions needed to provide for easier communication and exchange of information between the regulators?

It is our view that this is a question that could only be answered by the two regulators.

45. Do you have any comments to make about the forums nominated to conduct reviews under the WHS Regulation in NSW?

We have not received any feedback to indicate that these forums are not working. However, there does not appear to be information available publicly to understand the outcomes of reviews undertaken by these forums.

46. Do any parts or sections of schedule 4 require updating? If yes, please provide sufficient details about what the provision is, why it is out of date or not working well, and what can be done to improve it.

Some of the provisions in this Schedule are clearly out of date and should be removed, for example clause 5 which refers to things that cannot be done after 31 December 2012. Identification of redundant provisions should be easily done by SafeWork NSW or Parliamentary Council.

General comments in relation to the current Regulation being due for staged repeal on 1 September 2017.

It is Ai Group's view that the repeal of the current Regulation should be postponed. With a national review of the Model WHS Laws planned for 2018, it would not be appropriate to initiate a consultation process in order to remake the NSW Regulations by 1 September 2017.

Once the national review is completed, this decision could be revisited taking into account any recommendations for changes to the Model WHS Laws.

47. Are the above-mentioned definitions working effectively? (clause 5 and 7)

We have commented on specific issues related to competent person in other parts of our submission. We do not have any comment to make on any of the other definitions listed on pages 30 to 32 of the discussion paper.

48. Do you wish to comment on provisions for the Act to apply (or may apply) to dangerous goods and high risk plant that are not at a workplace? (clause 10)

Ai Group does not have a comment to make on these provisions.

49. Do you wish to comment on the exclusions that mean the Act does not apply (or may not apply) to dangerous goods and high risk plant that are not at a workplace? (clause 10)

Ai Group does not have a comment to make on these provisions.

50. Is the above note about training for health and safety representatives helpful?

This note is helpful as it may assist in avoiding unnecessary disputes about training that would occur if the provisions were not understood.

51. Is any additional information required to make it easier to understand that the requirements for demolition licensing continue to apply from chapter 10 of the former legislation? If information is needed, please provide examples of situations where the information has been needed.

When the Model WHS Regulations were drafted the issue of demolition licensing was considered, in the context of the work being undertaken to introduce an *Occupational Licensing National Law*. In this context, it was appropriate for jurisdictions that had this licensing within the existing OHS laws to continue the licensing until the other laws were developed.

As an interim measure it was appropriate for NSW to reference the recently repealed OHS Regulations as part of transitional arrangements.

However, work on a national approach to occupational licensing was discontinued a number of years ago. As such, NSW's approach to demolition licensing needs to be reconsidered.

If demolition licensing is to continue to be legislated under WHS Laws in NSW the requirements should be incorporated into the WHS Regulations, rather than continuing a repealed regulation only for the purposes of this licensing category.

We do note, however, that clear [Guidance](#) about demolition licensing requirements is provided on SafeWork NSW's website, which does reduce the need for a person to reference the source legislation.

52. Is the meaning of electrical equipment clear? (clause 144)

The amendment that NSW has made to the definition is to add sub clause (3) which reads “In this clause, motor vehicle means a vehicle that is built to be propelled by a motor that forms part of the vehicle.

This is designed to aid clarity but does not change the intent of the Regulation.

Otherwise the definition aligns with the Model WHS Regulations and should not be amended further.

53. Do you wish to comment on the term ‘authorised’ that has been inserted by NSW? (clause 146)

Ai Group does not have any comments in relation to this amendment.

54. Do you wish to comment on the exclusion that applies to an electricity supply authority, or a person accredited and providing contestable services? (clause 152)

Ai Group does not have any comments to make on how this jurisdictional exclusion has been made.

55. Is the note that advises that residual current devices (RCD’s) are also regulated under the *Electricity (Consumer Safety) Act 2004*, helpful? (clause 164)

This is a helpful note. Without it readers may assume that this is the only legislation that creates a requirement for RCDs.

56. Is the note that advises the *Electricity (Consumer Safety) Act 2004* and the *Electricity Supply (Safety and Network Management) Regulation 2008* also apply to the PCBU, helpful? (clause 166)

This is a helpful note to ensure that PCBUs understand that there may be further related obligations under different legislation.

57. Are the professional organisations or associations provided for determining a competent person to conduct a major inspection of registered mobile cranes and tower cranes appropriate? (clause 235)

The Model WHS Regulations state:

- (4) In this regulation, a **competent person** is a person who:
 - (a) complies with both of the following:
 - (i) has acquired through training, qualification or experience the knowledge and skills to carry out a major inspection of the plant; and
 - (ii) is registered under a law that provides for the registration of professional engineers; or

Note

See the jurisdictional note in the Appendix.

- (b) is determined by the regulator to be a competent person.

The jurisdictional note states:

Jurisdictions that do not have legislation addressing the registration of professional engineers will replace subparagraph (ii) with a provision referring to any professional organisation or association to which the competent person must belong.

The amendments made by NSW do not appear to be addressing the intent of the jurisdictional note, as they both refer to membership of a national organisation. It is noted that NSW is not the only jurisdiction to have taken this approach; although the wording varies across jurisdictions.

It is Ai Group's view that this issue should be considered by Safe Work Australia members during the 2018 review of the Model WHS Laws.

58. Do the local laws that NSW added for exemptions to clause 328 remain appropriate?

Ai Group is not in a position to comment on this issue.

59. Do you wish to comment on the *Pesticides Act 1999* being specified to provide for an exemption, meaning identification of physical or chemical reaction is not required when the chemical is being used for agricultural purposes? (clause 354)

The Model WHS Regulations allow for this exclusion to apply, with reference to the relevant Act within the jurisdiction. To this extent the exemption is appropriate.

Ai Group is not in a position to determine if this is the appropriate NSW legislation.

60. Do you wish to comment on the exemption that means a license is not required for work involving transport and disposal of asbestos or asbestos waste – that is done in accordance with the *Protection of the Environment Operations Act 1997*? (clause 419)

The Model WHS Regulations allow for this exclusion to apply, with reference to the relevant Act within the jurisdiction. It would appear that this is the correct legislation to utilise for this exemption.

61. Do you wish to comment on the requirement for the regulator to be satisfied that the applicant is able to ensure the licensed work will be done safely, competently and in compliance with the conditions of the license, working well? (clauses 497 and 500)

Ai Group does not have the necessary information to form a view on this question.

62. Do you wish to comment on the exclusion that means chapter 9 does not apply to a facility that is regulated by the National Offshore Petroleum Safety and Environmental Management Authority under the *Offshore Petroleum and Greenhouse Gas storage Act 2006* of the Commonwealth? (clause 530(1))

The Model WHS Regulations allow for this exclusion to apply, with reference to the relevant Act within the jurisdiction. To this extent the exemption is appropriate. Ai Group is not in a position to determine if this is the appropriate NSW legislation.

63. Do you wish to comment on the exclusion that means chapter 9 does not apply to a port operational area under the control of a port authority? (clause 530(2)(a))

The Model WHS Regulations allow for this exclusion to apply, with reference to the relevant Act within the jurisdiction. To this extent the exemption is appropriate. Ai Group is not in a position to determine if this is the appropriate NSW legislation

64. Do you wish to comment on the exclusion that means chapter 9 does not apply to a pipeline to which the *Gas Supply Act 1996* or the *Pipelines Act 1967*? (clause 530(2)(b))

The Model WHS Regulations allow for this exclusion to apply, with reference to the relevant Act within the jurisdiction. To this extent the exemption is appropriate. Ai Group is not in a position to determine if this is the appropriate NSW legislation

65. Do you wish to comment on the exclusion that means chapter 9 does not apply to a mine or petroleum site? (clause 530(2)(e))

Ai Group supports the exclusion of mines and petroleum sites from the requirements of the Major Hazard Facilities regulations as they are adequately regulated through other laws.

66. Is the example under the heading ‘arrangements for preventing unauthorised access to the major hazard facility’ helpful? (clause 552)

Ai Group does not believe that the example adds much value, as it would seem to be one of the most obvious requirements in relation to the security of the facility. We also note that the example is included in the Model WHS Regulations; we are unclear as to why this question was asked in this paper.

67. Do you wish to comment on the requirement to consult with Fire & Rescue NSW in preparing an emergency plan for a major hazard facility? (clause 557(2)(a)(i))

The emergency service organisation outlined in (2)(a) appear to be the appropriate ones for NSW. We note that other jurisdictions have not utilised the jurisdictional note, using instead the words in the Model WHS Laws, i.e. “the emergency service organisations with responsibility for the area in which the major hazard facility is located”.

The approach taken by NSW provides better clarify for PCBUs about the extent of their obligations to consult. Without this detail, PCBUs may think that they also need to consult with police and ambulance services.

68. Do you wish to comment on the requirement to consult with the NSW Rural Fire Service in preparing an emergency plan for a major hazard facility?

See answer to question 67.

69. Do you wish to comment on the requirement for the operator of a major hazard facility, to provide the content for a safety case, as stated in schedule 18? (clause 561)

There do not appear to be any NSW-specific provisions in this Regulation or the Schedule. It is not clear why this question is being asked. Accordingly, Ai Group has no comment to make.

70. Do you wish to comment on the Civil and Administrative Tribunal being the forum for external review following the regulator's decision to refuse to renew a MHF license? (clause 599)

Ai Group does not have a specific view on this question. See also, our response to question 30.

71. Do you wish to comment on the period of 21 days for the internal reviewer to review the previous decision? (clause 680)

Ai Group does not support the extended time period allowed for the internal reviewer to review the decision. The Model WHS Laws allow 14 days and this should be sufficient time for the reviewer to make a decision.

We note that section 228 of the Act provides for a stay of a decision on an improvement notice if an internal review application is made; this is not the case for a prohibition notice (although a stay may be granted by the internal reviewer).

Hence, as currently written, a NSW PCBU could find themselves with a prohibition notice in place for 21 days, with a subsequent decision being made that the prohibition notice was not warranted. This could have a major detrimental effect on the viability of the business, without any health and safety benefit.

Even where an improvement notice is stayed, the uncertainty created for the PCBU and the workers could be destabilising in the workplace.

It is highlighted that the internal review provisions that are in the Model WHS Laws are based on similar provisions that have been in the Victorian OHS Act since 2004. In the Victorian Act, the general timeframe for making a decision is 14 days; this is reduced to 7 days if the matter relates to a prohibition notice or an improvement notice that includes a direction that work must cease if the contravention is not addressed within a [usually short] timeframe.

It would be helpful to understand the current statistics associated with internal review. If all decisions are being made in a timeframe that is much shorter than 21 days, the legislative timeframe may not be an issue.

**72. Do you wish to comment on the period of 21 days for the internal reviewer to give notice of the decision and the reasons for the decision?
(clause 681)**

See answer to question 71

73. Do you wish to comment on the Civil and Administrative Tribunal being the forum that is nominated to hear and decide applications for external review of a decision? (clause 683)

Ai Group has no specific comment to make on this issue. See also our response to question 30.

74. Is the note advising that the *Public Health Act 2010* also imposes obligations relating to the notification of certain medical conditions, helpful? (clause 699)

This is an important note as it ensures that PCBUs are aware of additional obligations created under other laws that they may not otherwise consider.

75. Do you wish to comment on the Acts that have been prescribed in the Regulation for the purposes of section 271 (3) (c) (ii) of the Act? (clause 702)

Ai Group does not have a view on whether this list encompasses all relevant legislation.

76. Do you wish to comment on the penalty notice offences listed in schedule 18A? (clause 702A)

Ai Group does not support the use of penalty notices (infringement notices under the Model WHS Laws), as they distort the messages about non-compliance. Penalty notices can only be utilised for “black and white” breaches that are not qualified by reasonably practicable. Hence, there will be a number of more significant breaches that go *unpunished* because: they do not meet the criteria for a penalty notice, so no fine can be obtained; and they are not serious enough for a prosecution.

Penalty notices within the WHS laws create a disjointed approach and have the potential to send mixed messages. An inspector who identifies that the PCBU is not displaying a list of elected HSRs could issue a penalty notice with an attached fine of up to \$1200. However, if the inspector found a significant breach related to hazardous manual handling they could only issue an improvement notice. This creates a risk that the PCBU would be more concerned about an administrative breach than about a failure to meet the general duties under the Act.

Penalty notices are only appropriate in circumstances where a sliding scale of increasing penalty is applied, e.g. breaching the road rules which escalate from demerit points and fines, through to loss of license and potential prosecution.

Having said that, the penalty notice offences listed in schedule 18 align with the intent of the Model WHS Laws. A comparison with other jurisdictions that have implemented these provisions identifies a strong alignment of both the offences that attract penalties and the quantum of the penalties.

As part of the 2018 review of the Model WHS Laws we will be seeking feedback from all regulators about the operation of their penalty notice (infringement notice) scheme. This will include: the extent of their use; the offences that they are generally being utilised for; the industries in which they are being applied; and the number and success of appeals.

This information can then be utilised to identify whether the penalty notice regime is delivering the outcomes expected by the regulators.

20 pre-WHS Codes

The 20 pre-WHS Codes relate to some very specific risks and/or industries. We have not been able to identify any recent use of these Codes by Ai Group staff to assist members to comply with their obligations.

Therefore, we are unable to answer the specific questions outlined below.

However, it is noted that a number of these Codes relate to topics which have been addressed in National Guidance Material developed as part of the Model WHS Laws process. Many of these were originally drafted as Codes of Practice, but converted to guidance material, information sheets or fact sheets in line with the decision of Ministers.

To aid national consistency, consideration should be given to referencing the national guidance material, rather than continuing the use of these state-based Codes.

77. Which of the pre-WHS codes listed above do you still use?

See introductory comments.

78. How often do you use the pre-WHS codes you have listed? Please explain how often you use each code you named for the question above.

See introductory comments.

79. What parts of the pre-WHS codes have you looked up in the last 18 months? Please describe the situation and whether the part you looked up was useful, or not, and why.

See introductory comments.

80. What parts of the pre-WHS codes do you or persons you represent find useful? Please describe which parts are useful, when and how these are useful to you or persons you represent.

See introductory comments.

81. Are there any parts of the pre-WHS codes that are unclear or confusing? If yes, please state which codes, which parts and what is unclear or confusing.

See introductory comments.

82. Are there any documents that cover the same subject matter as any pre-WHS codes, but are inconsistent with the codes

See introductory comments.

83. Is additional guidance needed for any of the subjects covered by the pre-WHS codes? If additional guidance is needed, please explain what guidance would be useful with practical examples of when you (or persons you represent) would use it.

See introductory comments.