The Work Health and Safety and Other Legislation Amendment Bill 2017

Submission to
Parliament of Queensland
Finance and Administration Committee

SEPTEMBER 2017
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 been actively engaged in supporting the effective implementation of the WHS laws, including the Officer Due Diligence provisions and the increased penalties that were introduced under those laws in most states and territories of Australia, including Queensland, and now New Zealand.

We have ongoing contact and engagement with employers on work health and 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 work health and safety.
It is in this context that we make our submission in relation to the *Work Health and Safety and Other Legislation Amendment Bill 2017 (the Bill)*.

We note that the Bill was tabled in Parliament on the same day that the Final Report of the Best Practice Review of Workplace Health and Safety Queensland (The Report) was released. Whilst not all the recommendations of the Report are included in these amendments, we acknowledge that most of the amendments emanate from the Report.

Ai Group welcomed the opportunity to participate in the Review through our membership on the Reference Group. It should be noted, however, that Ai Group did not support all the recommendations that were included in the Report.

Ai Group would also like to express our concern that interested parties have been given less than four weeks to respond to a Bill which includes some complex legal considerations.

In this submission, we will confine our comments to the provisions of the Bill, with reference to recommendations and discussions within the Report where appropriate. Our feedback on the remaining sections of the Report will be provided to the Government through other processes.

**HARMONISED LEGISLATION**

With the passing of the Queensland Work Health and Safety Act 2011, the state adopted the harmonised WHS legislative framework that operates in four states, two territories and the Commonwealth.

A key benefit of the harmonised approach to WHS law within the federation has been to unify and thereby clarify the language and intent of work health and safety law in Australian workplaces.

Those who do not practice work health and safety at a workplace level can underestimate the importance of such a development.
The ability of multi-state organisations to operate under consistent safety practice, language, jargon, systems and descriptions of personal and corporate responsibility across all their operations nationally should be self-evident. Even companies who only operate in Queensland will interact with the national economy and health and safety principles from other states.

A truck loaded at an Adelaide farm and unloaded in a Toowoomba processing facility can currently operate under the same WHS laws at both ends of the journey. Contractor employees from Mt Isa can work at a Moomba gas facility without learning a completely different set of legal responsibilities, regulations and Codes of Practice.

All governments in Australia profess their absolute commitment to ensuring safe workplaces. Harmonisation has been an important signal that they care enough to reconcile historical differences for the sake of clarity and focus, and avoid the trap of too many different voices clouding the message.

The harmonised model provides a process, through the multi-jurisdictional forum of Safe Work Australia, to consider significant amendments to the standards of legal responsibility, such as those prosed in this Bill.

Ai Group and our members strongly support the harmonised model and are very concerned that this Bill has effectively bypassed that process. We would emphasise that we have taken the same view in the past in relation to Queensland amendment proposals that were unambiguously employer friendly.

We are not fair-weather friends of the harmonised model, such is our commitment to its utility.

We would strongly urge that this Bill be submitted to the processes under the harmonisation model.
INDUSTRIAL MANSLAUGHTER

The most significant, and controversial provisions of the Bill are those that relate to the introduction of Industrial Manslaughter provisions into the Work Health and Safety Act.

We note that these amendments follow the tragic multiple fatalities at Dreamworld and Eagle Farm.

However, we do not believe that the Bill is justified when considering the recent improvements in health and safety that have been experienced across Australia.

Clearly, even one fatality is too many. However, recent data published by Safe Work Australia illustrates an ongoing trend in the reduction of fatalities and serious injuries.

The October 2016 Work-related traumatic injury fatalities report highlighted a 44% reduction in Australian work related traumatic deaths from 3.0 fatalities per 100,000 workers in 2007 to 1.6 in 2015.

The July 2017 Comparative Performance Monitor for the year 2014-15 showed a 16% reduction in the Australian serious claim incidence rate since 2010-11. A more significant decrease has occurred in Queensland with a 23% reduction from 14.8 in 2010-11 to 11.5 in 2014-15.

In this environment, it is not clear to us what would be achieved by the introduction of Industrial Manslaughter legislation, when the Work Health and Safety legislation already allows for significant penalties including terms of imprisonment.

We would submit that evidence based policy practice would strongly favour looking at single incidences in the light of longer term trends rather than in isolation, particularly when one of these incidents occurred at a theme park. An open question that has not been addressed is whether WHS laws are the appropriate mechanism to regulate activities that involve consumers voluntarily engaging in activities that are designed to create risk-based thrills.

Ai Group does not support the introduction of industrial manslaughter provisions within the WHS Act.
Our concerns with industrial manslaughter provisions within the Work Health and Safety Laws is broad ranging. Our feedback below focuses on both our considered view that the provisions do not fit within the WHS laws, and the practical implications of how the provisions are currently written and structured.

**It is not appropriate to establish an industrial manslaughter offence within the WHS jurisdiction**

We submit that industrial manslaughter does not fit within the construct of the WHS laws and should not be included in the Act.

The WHS Act and Regulations establish a set of very detailed obligations on employers to ensure health and safety, so far as is reasonably practicable. Breaches can range from the minor (such as failing to display a list of health and safety representatives) through a range of more serious offences. As such the legislation establishes a continuum of offences.

The legislation requires PCBUs to work hard at achieving the required outcomes and they recognise that they will be held to a very high standard within the structure of that law. This invokes, almost by design, a sense of “chronic unease” in the minds of management, as it has been put by safety academics. This is a key to high level safety management, particularly in workplaces with serious hazards. It will be very difficult to explain to company officers and others in management that the law expects them to be eternally vigilant to the point of never really being sure if they have done enough, and at the same time there is a high level criminal consequence in the form of the commonly conceived crime of manslaughter, for getting it wrong – in the same legislation.

It would not be appropriate for the serious criminal offence of industrial manslaughter, with a maximum penalty of 20 years’ imprisonment, to be tried within the health and safety jurisdiction where this notion of chronic unease has been used to progress standards and expectations, rather than in the criminal courts where standards of culpability are expected to be established in more absolute terms.
The sense of unfairness about this confluence of “culpability standards” is likely to infect perceptions of the fairness of WHS offences and penalties generally, seriously undermining the credibility of the jurisdiction. The real risk then becomes a reduced genuine effort to improve safety.

A version of this unfairness phenomenon, leading to unintended consequences, could be seen in NSW prior to the High Court decision in *Kirk v Industrial Relations Commission of NSW [2010] HCA1*. Strong perceptions about an effective reversal of the onus of proof for NSW WHS cases drove a feeling among employers that if there was an accident and you were prosecuted, there was no effective defence, regardless of how much you had done about safety. A result of this there was a perception that doing a little bit was no more risky, legally, than doing a lot. Companies also became loathe to engage with the regulator who would only ask them to do more, but for no legal effect.

The rationale for increasing penalties, and creating or reframing offences, is that regulated persons will change their thinking and behaviour. That is usually correct. However, it is assumed that the thinking and behaviour change will be positive, but that is not always the case.

We contend that mixing industrial manslaughter with the existing WHS framework creates a risk that the legislative change will have the opposite response to that expected.
Significant penalties already exist

The Work Health and Safety (WHS) Act 2011 already provides significant penalties for breaches of WHS laws. These include:

- up to $3,000,000 for a body corporate; and
- up to $600,000 and 5 years’ imprisonment for an officer, or an individual who is a *person conducting a business or undertaking*
- up to $300,000 and 5 years’ imprisonment for an individual (worker or other person)

The penalties outlined above apply to a category 1 offence, described as *reckless conduct* (see definition below).

It is not clear to us how a maximum jail term of 20 years would create any greater deterrence for a *senior officer*, than the current maximum of 5 years. Any potential jail term, should already be a significant deterrent.

**It is unclear how the offences would be distinguished**

The definitions associated with reckless conduct under the WHS Act, and the proposed Industrial Manslaughter offence are very similar, as outlined below:

<table>
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<tr>
<th>Reckless conduct in the WHS Act</th>
<th>Proposed Industrial Manslaughter offence</th>
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<tr>
<td>the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and the person is reckless as to the risk to an individual of death or serious injury or illness</td>
<td>if a worker dies in the course of carrying out work…; or is injured in the course of carrying out work … and later dies; and the person’s / senior officer’s conduct causes the death of the worker; and the person / senior officer is negligent about causing the death of the worker by the conduct</td>
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*Note: in above “person” is the abbreviation for person conducting a business or undertaking.*
It is unclear how the prosecutor, the courts, or the defendant could clearly distinguish between the two, and justify the different penalty regimes. The following definitions are informative:

Recklessness: A person acts recklessly if he is aware of a substantial risk that a certain result will occur as a result of his actions. The risk must be substantial enough that the action represents a gross deviation from what a reasonable law abiding person would do.

Negligence: A person acts negligently if they should have been aware of a substantial and unjustifiable risk that a certain consequence would result from their actions.

Although the level of risk is the same for both recklessness and negligence, the difference between the two is that with recklessness, the actor must be aware of the risk involved with her actions, whereas, for negligence, the actor is not aware of the risks but should have known what those risks were.

Given the apparent similarity in definitions, and the intention to include the offence within the WHS Act, if the only variation in penalties is because of the death, then the provision should be written as “reckless conduct causing death”. Otherwise there will be much debate about the difference between the reckless conduct provision and the new Industrial Manslaughter provision.

The higher penalties will apply to a lower test of culpability

The current reckless endangerment offence requires there to have been recklessness in disregard of actual knowledge that it is likely that death or serious injury may result.

The proposed offence based on negligence does not require the knowledge of the type or degree that is required to prove the reckless endangerment offence. Despite the lower level of proof, it will carry a higher penalty.

Hence, the provisions will introduce a lower level offence with a higher level penalty; justified by calling it industrial manslaughter.
The offence is inconsistent with duties under the WHS Laws

All other offences under the WHS Laws are linked to the breach of duty that is prescribed under the Act, e.g. the officer duty to exercise due diligence.

This offence is a more general offence which does not align with the preventive approach of the WHS Laws.

The proposed penalties would create an artificial delineation between senior managers and officers, and create another “class” of senior officer.

It is not beneficial for organisations to spend significant resources attempting to exclusively identify who within their organisations might be officers for the purpose of due diligence. In many organisations, all senior staff utilise due diligence provisions as a template for how they should behave in relation to health and safety. Despite this some organisations do attempt to identify this delineation in order to assure those that are in middle management that they are not exposed to officer offences.

The inclusive nature of the current penalties within the WHS laws, applying to all individuals who are found guilty of reckless conduct, ensures that there is little artificial delineation between a senior manager and an officer, when it comes to liability. Whilst the maximum financial penalties vary, all persons in the workplace could be subject to a 5-year jail term for reckless conduct

The proposed provisions would create significant doubt in relation to industrial manslaughter provisions with the provisions being applicable to senior officers, which are defined in a different way to officers.

If a new penalty was introduced, which included a potential for an officer to receive a 20-year jail term, just because they were senior officers, we may see many current senior officers resign from their positions, particularly those who are board members without direct involvement in the day to day activities of the business.
We could also see senior managers making elaborate arrangements to distance themselves from taking on responsibilities for health and safety that might make them look like officers or senior officers.

The unintended outcome of such a response is likely to be a reduction in standards of work health and safety.

Definition of senior officer is problematic, reaching lower into a business than current officer definition

The construction of the WHS Laws specifically adopted the officer definition from the Corporations law to ensure that there was a level of consistency and broad jurisprudence about who would be an officer; required to exercise due diligence and be subject to higher penalties than others in the organisation.

At first consideration, from the use of the terminology senior officer, it appears that the Bill is attempting to create a definition that identifies people who have a higher level of responsibility than an officer as defined in the WHS Act.

However, the reverse is true. A senior officer is an executive officer. The definition of an executive officer is the same as the definition that existed under the Workplace Health and Safety Act 1995 (1995 Act):

executive officer, of a corporation, means a person who is concerned with, or takes part in the corporation’s management, whether that person is a director or the person’s position is given the name of executive officer.

Persons who are “concerned in the management” go much further down the managerial chain than the current officer definition; potentially down to middle management.

Section 167 of the 1995 Act required an executive officer to ensure that the corporation complies with the Act. Prosecutions under this section illustrated that middle managers could be prosecuted as an executive officer.
It is clear that it is not the intention of the Bill to create a very serious offence that could apply to middle managers. It is essential that adopting this old definition is reconsidered.

**It is not appropriate to link a penalty to the outcome of an incident**

It should be noted that the categories of offences, and associated penalties, within the WHS Act were settled at the end of an exhaustive national review and public comment and debate on the previous OHS laws, and have been adopted by most Australian jurisdictions.

A very clear decision was made to link the offences to the level of risk involved (i.e. the potential for death or serious injury), not the actual outcome. This is consistent with the principles of risk management which ask managers to assess likelihood and possibility of outcome, not actual outcome; to focus on outcome doesn’t make sense in a proactive scheme.

Introducing a penalty that applies when there is a death, but not when there is a very serious breach that results in a serious injury, or even a lucky escape is not consistent with the approach of the WHS Act and is confusing for the risk management mindset that the Act is otherwise trying to instil in workplaces and their managers.

**It is not clear whether an outcome of an industrial manslaughter prosecution could result in a lesser penalty being applied**

It is important that this is clarified, as the defendant may approach their defence differently, and the court may consider different evidence, for a reckless conduct charge than for an industrial manslaughter charge.

In the case of industrial manslaughter, an essential ingredient of the offence is that the negligent conduct “causes the death of a person”. What underpins the offence under Part 2, Division 5 is the exposure to risk without regard to the consequence. This is fundamentally different.
Furthermore, the defences which might be available under Part 2, Division 5, such as due diligence or reasonable practicability are not available or relevant if a charge is brought under the industrial manslaughter defences.

**There is already an ability to charge a person with manslaughter, under separate crimes legislation**

separate legislation, which singles out senior officers for different attention under WHS laws, is not necessary.

**There would be an Inequitable application to unincorporated persons conducting a business or undertaking.**

Under the reckless conduct provisions, the maximum penalty for an “individual as a person conducting a business or undertaking” is equivalent to that of an “officer”; i.e. $600,000 or 5 years’ imprisonment.

Under the proposed industrial manslaughter provisions, a PCBU operating as a corporation will have a maximum penalty of $10m, whilst an unincorporated PCBU will face up to 20 years’ imprisonment, with no monetary alternative.

If this is considered in the context of a small business Joe Bloggs Pty Ltd could receive just a fine, whilst the only possible penalty facing Joe Bloggs (partner or sole trader) would be a prison term. Acknowledging that a senior officer prosecution could also occur in the situation of an incorporated entity, this still seems to be an inequitable scenario.
Rationale for placing the industrial manslaughter provisions in the WHS Act

Historically, industrial manslaughter provisions have been pursued as a way to ensure that officers of organisations can receive high penalties and terms of imprisonment. This has been particularly important where there have been examples of organisations going into liquidation to avoid paying fines if someone was killed at work. The introduction of the "reckless conduct" provisions, initially in Victoria and then through harmonisation, was established in part to address this; these provisions also recognised that it was important to have a potential term of imprisonment for any person in the workplace.

Notably, the Report provides a different rationale for incorporating industrial manslaughter provisions in to the WHS Act.

The reviewer acknowledges that an officer could be prosecuted under general manslaughter provisions. The intention of the Bill is to create an ability to prosecute the corporation for manslaughter. The imputation provisions of the WHS Act allow for the actions of individuals to be combined to allow the corporation to be prosecuted for manslaughter with high financial penalties, rather than it being limited to an individual. However, we note that the current imputation provisions reference proof of knowledge, intention or recklessness. We have not identified any amendments in the Bill that would amend this to include negligence.

From the Report, commencing at page 111.

The rationale for addressing industrial manslaughter as a new and separate offence in the ACT was based on the view that the existing manslaughter provisions in criminal law could only be applied to individuals rather than to corporations. This meant that, before a corporation could be found criminally responsible, an individual director or employee must be identified as the directing mind and will of the corporation and have, in effect, committed the offence. This generally required proof of fault by a top-level manager or director that is difficult to establish in the case of large corporations, where offences are generally only visible at the middle-management level. Similar limitations exist for manslaughter under the Queensland Criminal Code.

In addition, under the Crimes Act, the only penalty for manslaughter is imprisonment (as is the case under the Queensland Criminal Code) – clearly this penalty can only apply to a natural person, not a corporation. Subsequently, the [ACT] 'industrial manslaughter' provisions provide for maximum fines of $200,000 and/or imprisonment for 20 year for corporate entities, and allow the courts to combine fines with orders for companies to undertake ‘community service’ projects, up to a total cost of $5 million.
Design and statutory location of the offence

There are two statutes in which an offence of negligence causing death could appropriately be placed. The first is within the WHS Act 2011, the second the Queensland Criminal Code. Upon analysis of the two statutes it is considered that the WHS Act 2011 would be the most appropriate on the basis that it provides for imputing a person’s conduct to a corporate entity.

Sections 244, 245 and 251 of the WHS Act 2011 apply to bodies corporate, States and the Commonwealth, and public authorities respectively (‘organisation’). These sections apply where there is an employee/agent/officer (‘individual’) of the relevant organisation who engages in conduct either within the actual or apparent scope of their employment, or within their actual or apparent authority. In these circumstances, any conduct by the individual is to be taken to be conduct by the organisation.

This imputation also applies to proving elements of an offence that need to be proved, e.g. knowledge, intention, and recklessness. Likewise, any (reasonable) mistake of fact made by the individual is attributable to the organisation.

This mechanism (imputing individual conduct to an organisation where the criteria are met) enables the relevant elements of an offence to be proved in prosecution for an offence, e.g. a category 1 offence. Prosecution of the organisation would not prevent prosecution of the individual where the conduct of the individual in failing to comply with their own duties (e.g. as an officer or worker) could also be imputed to the organisation. Of course, if the individual acted outside the scope of their employment or authority, they could still be prosecuted.

Conversely, the Criminal Code does not have any provisions analogous to those in the WHS Act 2011 regarding imputation of conduct to a corporate entity. Of course, responsible individuals (chief executive officers and the like, or even workers) could be prosecuted for manslaughter, even if they are also prosecuted under section 31 of the WHS Act 2011 for a failure of a duty.

We also note that, in relation to imputing conduct to bodies corporate, section 244 encompasses any conduct engaged in by an employee, agent or officer of the body corporate acting within the actual or apparent scope of their employment. This is already a concern to organisations where a worker’s reckless conduct can be imputed to the corporation, even if their own role has not authority within the organisation. However, with significantly higher penalties, and a lower level of proof associated with negligence, the imputation associated with industrial manslaughter, all the way through the organisation, would be a major concern.
Increased fines is not a logical rationale

When there is a breach of health and safety laws, there are usually multiple charges laid against a PCBU. The maximum penalties for a corporation are:

- Category 1 (reckless conduct) $3.0m
- Category 2 $1.5m
- Category 3 $0.5m

Hence if there were multiple serious breaches, it would not take long for the possible maximum fine for a single incident to exceed the $10m maximum proposed in the Bill.

Provisions in the Bill are not within similar laws in other jurisdictions

Significant time and effort has been put into the development and implementation of nationally harmonised laws. Recent prosecution outcomes in Queensland have demonstrated the benefits of jurisprudence that is consistent across the country. Recent appeals by the prosecutor against low penalties in Queensland has led to an increase based on penalties that have been applied in other jurisdictions for similar breaches; it has also been flagged that even higher penalties will be applied in the future now that the precedent of considering interstate penalties has been set.

Introducing a different offence within the Queensland legislation would put this consistency at risk. It could be argued that the existence of a higher penalty for the offence of industrial manslaughter within the WHS Act would reduce the significance of a Category 1 (Reckless conduct) offence, in comparison to other jurisdictions.
Limitation period for industrial manslaughter

Section 232(1) of the WHS Act establishes limitation periods for the commencement of proceedings for an offence. These are:

- within two years after the offence first comes to the attention of the regulator;
- within 1 year after a coronial inquiry if the results indicate that an offence has been committed;
- within 6 months of an enforceable undertaking being contravened or withdrawn.

Section 232(2) allows an extension in relation to a Category 1 offence if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably be discovered within the relevant limitation period.

The current Bill proposes to remove the time limitations established by section 232(1) in cases of industrial manslaughter.

Ai Group is of the view that the application of section 232(2) to industrial manslaughter cases would provide sufficient flexibility for the regulator to commence proceedings beyond the two-year limitation in appropriate circumstances.

An unlimited time to commence proceedings would create unnecessary uncertainty for businesses and senior officers, and is unlikely to be of benefit to families of workers who die in work-related circumstances.

This amendment should not proceed.

ENFORCEABLE UNDERTAKINGS

The WHS Act currently excludes the use of enforceable undertakings (EUs) for category 1 offences. The Bill proposes to extend this to category 2 offences that involve a death and to the industrial manslaughter provisions.
Ai Group does not support the legislative exclusion of the use of EUs for a category 2 offence that involves a death. The regulator should continue to have discretion to accept EUs for all category 2 offences. If there is a need to make any changes to how this occurs when there is a death, this should be addressed administratively.

**CHANGES IN RELATION TO HEALTH AND SAFETY REPRESENTATIVES (HSRs)**

**Provision of Information to HSRs**

Ai Group welcomes the amendment that clarifies that a person conducting a business or undertaking (PCBU) is not required to provide to elected Health and Safety Representatives (HSRs) information that is *commercial in confidence*.

**Training of elected HSRs**

Ai Group supports the concept that HSRs should receive the necessary training to undertake their role in an effective and legally compliant way. We have always argued that the HSR has a right to receive competency based training, that requires the trainer to ensure that participants achieve understanding and knowledge.

This Bill proposes that the PCBU must ensure, so far as is reasonably practicable, that an HSR attends prescribed training. The Report, the *First Reading* and the *Explanatory Notes* all refer to this as mandatory training. The Regulations will be amended so that an HSR must complete the initial five day course of training within 6 months after the day the representative is elected.

We were surprised to find this amendment being recommended by the review, as it has generally been the position of the ACTU throughout the development of the WHS laws, that HSRs should not be forced to undertake training.
It is unclear of the status of the HSRs role if they refuse to attend the training, and if the HSR would be in breach of the law if they agreed to be an HSR but refused to attend training.

If these amendments proceed this clarification will be essential.

**Providing a list of HSRs to the Regulator**

The Report states that “The unavailability of a comprehensive list of HSRs in Queensland workplaces also limits the breadth of support that can be provided by WHSQ. Tailored and targeted communications are only possible where the HSRs are known, and it is unknown whether WHSQ’s current understanding of HSR appointments, as gleaned from inspector workplace visits, is reflective of industry-wide practice”. The recommendation to require employers to provide a list of HSRs follows from this view.

Ai Group has never supported a provision in the legislation that requires a PCBU to send a list of HSRs to the regulator. We do acknowledge that this was a provision of the Model WHS laws in 2011. However, it has since been removed from the Model following agreement by Safe Work Australia Members and the majority of relevant Ministers. It should be noted that the Members represent all Australian work health and safety jurisdictions; their agreement to remove the provision seems to indicate that the regulators did not see value in receiving this information.

It would not be appropriate to reinstate this provision in Queensland which creates an administrative burden for PCBUs, especially in workplaces where manning levels vary on a seasonal basis. In addition, it potentially breaches the privacy of HSRs who may not want their details shared with the regulator.

Whenever information is being provided to the Regulator it should be incumbent on them to demonstrate that the requirements are contributing to health and safety.
If these provisions are reinstated the regulator should be required to report to the Board as to when and how they are using the information, and what is being achieved by its use.

An alternative option would be to establish an opportunity for interested HSRs to register directly with WHSQ; as part of this registration WHSQ would be able to find out much more about the HSR and their areas of interest than through receiving a new list from a PCBU every time there was a change of HSR. It would also address any concerns an HSR might have about privacy.

**Requirement to forward Provisional Improvement Notices (PINs) to the Regulator**

Elected HSRs have a power to issue a Provisional Improvement Notice (PIN) to a PCBU if, after consultation with the PCBU, it is their belief that the PCBU is in breach of WHS laws. The PIN can include a direction as to what the HSR believes the PCBU should do to rectify the breach.

The Report (p.120) states that the QNMU [Queensland Nurses and Midwives Union] “… has called for increased statistical information on provisional improvement notices (PINs) by contemporaneous provision of all PINs to WHSQ. This will provide a more comprehensive reporting system reflective of the true extent of workplace hazards and incidents”. The Report does not investigate whether this would indeed achieve the stated outcome.

It is our view that such a requirement would create a range of unintended consequences, without achieving the stated outcome. PINs are a tool that allow an HSR to escalate an issue within their organisation to get the matter addressed; in many situations, the issue will be addressed without the need for a PIN. PINs have never been intended for use outside the business and the only useful data about PINs relates to those that are disputed.

The Explanatory Notes to the Bill state the amendments will “require a PCBU to forward to the regulator a copy of all PINs issued by HSRs”.

We note that these amendments do not appear in the Bill. It is hoped that this is because there was a last-minute decision not to make these amendments to the Bill.

Ai Group would strongly object to an employer being required to forward this information to the regulator.

If these provisions are pursued, the regulator should be required to report to the Board as to when and how they are using the information, and what is being achieved by its use.

**WORK HEALTH AND SAFETY OFFICERS (WHSOs)**

The Bill proposes the reintroduction of Work Health and Safety Officers (WHSOs). However, unlike the previous WHSO role which was mandatory for prescribed industries with 30 workers or more, the Bill establishes that a PCBU “may appoint, as a work health and safety officer ... a person who holds a certificate of authority for appointment as a work health and safety officer.”

The amended Regulations would state that a certificate could be issued if the person “…had appropriate qualifications or experience necessary to satisfactorily perform the functions of a work health and safety officer”. The predominant way this would be achieved is by the person completing a Certificate IV in Work Health and Safety BSB41412.

**The provisions are unnecessary and may have unintended consequences**

It is Ai Group’s view that the role of a WHSO is unnecessary and detracts from the roles of others in the organisation.
We recently had an opportunity to test this with our members and received feedback such as:

“it just adds another layer where the real people responsible can hide behind”

“from previous experience the WHSO would just be the officer administrator or quite a junior role so a box could be ticked that ‘we have a WHSO’”

“What was never delivered under the old program [of WHSOs] was motivation by the organisation to improve safety.”

Many organisations have maintained a WHSO role without the need for legislation; others have found better and more effective ways to manage their WHS issues. The introduction of a non-mandatory WHSO provision is unlikely to have any impact on businesses that are not currently managing WHS effectively; for those that aren’t the appointment is likely to be for the wrong reasons and not appropriately supported in the workplace.

**The assessment function is inappropriately worded and unnecessarily bureaucratic**

Most of the functions allocated to the WHSO under this Bill replicate those under the 1995 Act. However, the wording associated with the *assessment reports* is different and creates some concern.

If a PCBU chooses to appoint a WHSO under this proposed legislation, the WHSO will be required at least every 12 months, to “…assess risks to health and safety arising from work carried out…” Under the 1995 Act the requirement was to “conduct an assessment of the workplace to identify any hazards and unsafe or unsatisfactory health and safety conditions”.

It is Ai Group’s view that the legislated functions of the WHSO should be sufficient to achieve the intent of the role. However, we do note that there are some omissions from these functions, which should be added, such as facilitating consultation in the workplace and recommending risk controls.
Establishing a requirement to do one specific task, such as a 12-monthly assessment report escalates this task to the most important thing that the WHSO is required to do; in some organisations, it will become the only thing that the WHSO does.

It is recommended that, if a WHSO role is maintained:

- The functions should be reviewed to ensure that they align with the key health and safety focus that is established by the WHS Act
- The assessment requirement should be removed. If there continues to be a specific mandated 12-monthly reporting task, we would strongly recommend adoption of a different set of words that align with the focus of the WHS Act.

This is predominantly because the WHS Act does not require a PCBU to assess risks, other than in some specific circumstances such as confined space entry. This was a deliberate decision to ensure that the focus is on identifying hazards and controlling risks, not on measuring the risks that currently exist. Guidance provided in Model Codes of Practice, clearly state that if there is a known solution the PCBU can go directly to implementing that solution, without undertaking a risk assessment.

**Immunity provisions may not be effective or clear**

The Bill will create an immunity for a WHSO that is not a PCBU from being personally liable for anything done or omitted to be done in good faith. It is not clear how this provision would interact with a Category 1 offence in the current laws.

In addition, it is conceivable that a senior manager WHSO would be deemed to be a senior officer, if the definition within the Bill is adopted. It is not clear how the consideration of an industrial manslaughter offence would be applied in such circumstances.

It is acknowledged that conflicts such as these would have been present in the 1995 Act. However, that was within a regime where maximum penalties for personal failures were much lower.
Evidentiary aids related to WHSOs and HSRs

The Bill proposes to introduce an evidentiary provision at 273A, which states:

Evidence that there was a person holding office as a work health and safety officer or a health and safety representative for the business or undertaking when the offence was alleged to have been committed is admissible in the proceeding as evidence of whether or not a duty or obligation under this Act has been complied with.

Ai Group is very concerned that this provision will mistakenly lead employers to believe that the existence of these roles will reduce their liability. This is despite the separate provisions that state that the appointment of a WHSO does not affect duties and obligations under this Act.

It is particularly concerning in relation to HSRs. This role is a worker representative role, but is often seen as one that undertakes tasks on behalf of the employer. Establishing this evidentiary approach will further confuse the purpose of the role.

In relation to the WHSO role, whilst it might contribute to PCBU compliance and the exercising of due diligence by officers, the mere appointment of a person with this title, and the prescribed qualifications, does not achieve any level of increased compliance.

In addition, creating this specific evidentiary status for WHSOs does not recognise the range of other ways an organisation may improve its WHS knowledge and expertise, and therefore performance. These could include: having multiple people trained in very specific areas of work health and safety competence that are important to the organisation; due diligence activities undertaken by officers that reinforce the importance of WHS within an organisation; engaging consultants to assist in areas where additional expertise is required; and well-structured and engaged WHS committees.
In summary:

- Ai Group does not support the reintroduction of WHSOs in the Queensland system
- A voluntary approach to the appointment of WHSOs is less concerning than if a mandatory system was reintroduced; however, it is still not supported
- The assessment function required of WHSOs is not appropriate within the current legislative framework
- Immunity provisions may create confusion and have unintended consequences
- Creating a specific evidentiary status to the appointment of a WHSO (or an HSR) is inappropriate

CODES OF PRACTICE

Change of evidentiary status

Ai Group does not believe there is any need for the additional provisions to be inserted into the Act; it should be quite clear to PCBUs that following a Code is an accepted way of complying with WHS obligations. If it is felt that a stronger message is needed, this could be achieved through guidance information and promotion of the Codes.

Further, there is a concern that the mandating of Codes in this manner will result in organisations adopting an unthinking compliance with Codes whether or not they are applicable, or the best way to manage the risks.

We are also concerned that inserting words into the Queensland WHS Act that purport to strengthen the obligation of employers to apply the Codes will send a message in other jurisdictions that the obligation in relation to Codes is lower.

In a harmonised system, it is important that actions in one jurisdiction do not have unintended consequences in others.
Expiry of Codes after 5 years

It is Ai Group’s view that the automatic expiry of Codes after 5 years will create unnecessary work for regulators and stakeholders, and confusion for PCBUs, HSRs and workers.

It is appropriate to regularly review Codes and update them as necessary and this is currently occurring at the national level through SafeWork Australia. To introduce a separate review process in Queensland would put the ongoing maintenance of harmonisation at risk.

The provision should be removed from the Bill.

If the automatic expiry does remain in the Bill, it is unclear what will happen to the Codes that were adopted by Queensland prior to 2013. We were not able to identify appropriate transitional arrangements.

NOTIFICATION OF DISPUTES TO THE QUEENSLAND INDUSTRIAL RELATIONS COMMISSION (QIRC)

Ai Group does not have any objections to the specified disputes being referred to the QIRC.

We do however, have concerns about the definition of relevant union in relation to the ability to notify of a dispute. New section 102A would identify that “the relevant union, for a WHS matter, means a union of which a worker who works at the workplace is a member or eligible to be a member”. The disputes that are being referred to in this section are those related to:

- Access to information by an HSR
- A request by an HSR for an assistant to access the workplace
- A matter about work health and safety in relation to issue resolution
- An issue about cessation of work
In all these cases, a worker or HSR is unlikely to seek the involvement of a union of which they are not a member. The provision should be amended, in relation to these provisions, to limit a relevant union to one that has members at the workplace.

In addition, the role of the union should be to initiate the action on behalf of their members, not to become a party to the dispute themselves.

INSPECTOR POWERS

Production of documents and answers to questions

Ai Group accepts that there may be times when an inspector identifies the need for further information after they have concluded a visit. For this reason, we accept the proposed amendment that this information can be sought within 30 days of a site visit.

However, it is not appropriate for the amendment to introduce a requirement for a person to “attend before the inspector at a reasonable time and place to answer any questions put by the inspector”. In the current provision the requirement to answer questions is during attendance at the workplace. This should be maintained; if the inspector requires answers to more questions they should attend the site or do so over the phone.

Dispute in relation to Right of Entry by a WHS entry permit holder

Section 141 of the Act currently establishes that any party to a dispute relating to right of entry by an entry permit holder may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute. The proposed amendments would extend this to allowing the inspector to give the PCBU a direction, in writing, to immediately allow the WHS entry permit holder to enter the workplace, if the inspector was reasonably satisfied that the permit holder has a right of entry.
It is Ai Group’s view that this additional power is inappropriate. If the PCBU is of the view that the right of entry is not valid, and the permit holder may be abusing their powers of entry, there should be an ability to challenge this at a higher level than an individual inspector. This is particularly the case if the PCBU has been provided with legal advice supporting this view.

The union right of entry provisions are not about unions rights per se; they were established to improve health and safety within workplaces. If an inspector is present to deal with a dispute about entry, and it is not possible for the inspector to settle that dispute without exercising specific power, it would be appropriate for the inspector to enter the site to address any immediate concerns of the permit holder.

In this way legitimate health and safety issues will not remain unaddressed. If the refusal by the PCBU to allow the permit holder on site amounts to a breach of the law, it is open to the regulator to initiate enforcement action.

If this provision is progressed, it should have an additional provision that allows the inspector to determine that the permit holder does not have a right of entry and to direct them to desist from pursuing access. Without this provision the role of the inspector in determining these issues would be unbalanced.

NEW WHS PROSECUTOR

Ai Group does not understand the rationale for establishing the Office of the WHS Prosecutor. If this does progress, some areas of concern would need to be addressed.

Interaction between the Office of the WHS Prosecutor and the Regulator

It is unclear how the Office of the WHS Prosecutor will interact with the regulator. The Bill establishes that the WHS Prosecutor may ask the regulator for information and the regulator has a duty to disclose that information. However, it is silent on whether the investigation duties will continue to sit with the regulator or transfer to the WHS Prosecutor.
Further information will need to be made available about the practical aspects of operation, including how decisions will be made about the category of offence, particularly as the WHS Prosecutor will be able to authorise an inspector to prosecute a Category 3 offence, and the regulator will still have carriage of enforceable undertakings.

Limitations on employment

Section 36 limits the WHS Prosecutor’s ability to take on work for a PCBU who has been charged with an offence or consultancy on WHS matters with a PCBU. We do not understand why these restrictions are necessary. If it is necessary to specifically restrict certain types of work, rather than any outside work, it would appear that it should extend to work with others such a union or plaintiff lawyer firm, or advising family members of a worker who has died or been injured at work.