Australian Industry Group

2018 Review of the Model WHS Laws Discussion Paper

Submission to
Independent Reviewer

APRIL 2018

2018 REVIEW OF THE MODEL WHS LAWS

SUBMISSION TO INDEPENDENT REVIEWER

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 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 (WHS) 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 2018 Review of the Model WHS Laws, with a focus on the issues raised in the Discussion Paper. We also appreciated the efforts of Ms Boland, and Safe Work Australia staff, to attend consultative meetings with our members in QLD, VIC, NSW, SA, and WA.

SUPPORTING HARMONISATION

Ai Group, and our members generally, are strong supporters of harmonisation. Whilst it is argued that harmonisation is mostly only relevant to multistate businesses, many single-jurisdiction businesses also interact with suppliers and/or customers in other jurisdictions. A common language of WHS helps to send a consistent message about what needs to be done to enhance risk management and reduce the level of injury and fatality within Australia.

Throughout the development of the laws there were compromises made by all participants and, ultimately, there are some things in the Model WHS Laws that are not the preferred position of our members. However, we have continued to argue, through reviews and legislative change, that the concept of harmonisation is important and should not be put at risk due to jurisdictional pressures or political leanings.

The initial adoption of the laws involved some necessary variations at jurisdictional level, as reflected by jurisdictional notes in the Model WHS Laws. These were designed predominantly to allow the Model to interact appropriately with other laws in each jurisdiction.

The unfortunate political reality was that other amendments were made when the laws proceeded through individual jurisdictional legislative processes. These amendments included, but are not limited to: union right to prosecute in NSW; a modified approach to union right of entry in SA; QLD maintaining work related electrical safety provisions in separate legislation; and some jurisdictions not adopting the mines chapter of the Regulations.

However, for many years, the integrity of the key parts of the legislation remained largely intact; obligations of duty holders; consultation provisions; and penalty regimes. However, the recent amendments to the QLD WHS Act have created a fissure which puts at risk the collaborative approach to maintaining a harmonised system, particularly in relation to the industrial manslaughter provisions.

These provisions change the focus of the legislation from one that is about level of risk to which people are exposed (category 1, 2, or 3) to one where the outcome becomes a determinant, with industrial manslaughter provisions triggered by a death in circumstances that may have less culpability than a similar incident that does not result in death.

Ai Group continues to hold the position that harmonisation of WHS laws is important to Australian businesses and workers. We are pleased to see that Western Australia is currently progressing the development of its laws. Members continue to express frustration that Victoria is relying on an incomplete Supplementary Impact Assessment (SIA) undertaken in 2012 to justify retention of its Occupational Health and Safety (OHS) laws, even where there are provisions of the Model WHS Act which undoubtedly increase organisational focus on risk management, i.e. the officer duty to exercise due diligence.

OTHER REVIEWS AND SUBMISSIONS ON WHS LAWS

Ai Group has previously made a range of submissions to reviews of the Model WHS laws, undertaken both nationally and at jurisdictional levels. In some cases, this has been in response to legislated reviews; in others it was in response to proposed legislative amendments at a jurisdictional level.

A significant national review of the Model WHS Act was initiated by COAG (Council of Australia Governments) in 2014. This review resulted in a number of amendments to the Model WHS Act, none of which have been adopted by any jurisdiction.

A review of the Model WHS Regulations was initiated by WHS Ministers in December 2014, with 16 amendments agreed at a Safe Work Australia Members meeting in February 2015 and referred to the WHS Ministers for approval. More than three years on these amendments are still being progressed by Safe Work Australia, in conjunction with members.

A process is currently underway within Safe Work Australia to undertake a review of the Model WHS Codes of Practice, engaging with members of the SIG-WHS and nominated technical experts. The review has a narrow scope, examining the technical accuracy, usability and readability of the documents.

Considering the inertia of jurisdictions to adopt any amendments that are agreed by Safe Work Australia members and approved by WHS Ministers, and the actions taken within jurisdictions to make their own amendments to legislation that are not in line with agreed positions, it is debatable whether:

- this, and any future, review will result in tangible enhancement to the laws and their operations;
- there is an ongoing commitment by jurisdictions, and the relevant political parties, to support the maintenance of harmonised laws; and
- there is any value proposing or supporting amendments to the Model WHS Laws.

Despite the above commentary, Ai Group will continue to work with Safe Work Australia and individual jurisdictions to promote and support the maintenance and development of harmonised Model WHS Laws that contribute to a greater understanding of WHS obligations, increased compliance and better outcomes in the form of reduced injuries and fatalities.

RESPONSE TO THE SPECIFIC QUESTIONS IN THE DISCUSSION PAPER

3 Legislative Framework

3.1 The model WHS laws

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

The structure of Australia's WHS/OHS laws has followed this concept for many years, and is unlikely to change in the near future. However, it is Ai Group's view that the strong focus on Regulations is unhelpful.

Whilst the Act establishes general duties to eliminate or reduce risk so far as is reasonably practicable, regulations are predominantly designed to deal with a specific issue or industry, usually where there is a high risk and specific control measures are agreed; the majority of Codes of Practice are designed to provide practical guidance on how to comply with the Regulations.

The challenge with Regulations, and Codes, is that they can create a perception that if there is no Regulation or Code for a particular issue, there is either:

- No need to do anything (in the view of duty holders); or
- No obligation that can be enforced in the absence of a Regulation, or at least a Code, (in the view of unions and regulators).

The view that a Regulation creates an extra duty was illustrated in the SIA commissioned by a previous Victorian Government when they announced that they would not be adopting the Model WHS Laws.

Amongst other things, the SIA considered regulation 48 that requires a PCBU to manage the risks associated with remote and isolated work, and specifically at 48(1), requires the provision of a system of work that includes effective communication with the worker.

The SIA estimated that this Regulation alone would cost Victoria $63m (nett present value) over five years, with an ongoing cost of $8m per year. This costing was despite WorkSafe Victoria producing an Information Sheet, in May 2011, which told employers what they already expected in relation to people working alone; this included a statement that "having systems that can quickly locate workers or enable quick communication will help in directing assistance".

It is our experience that the majority of small to medium businesses seek simple information which is relevant to their circumstances, giving them practical assistance in what they need to do to reduce risks and comply with the law.

This is best achieved by providing guidance material which contributes to the state of knowledge and can therefore be considered as demonstrating what is reasonably practicable for a PCBU to do.

Into the future, we may be better served by reducing the amount of Regulations and Codes and providing more practical advice on a broader range of topics.

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

The current suite of Regulations is based on historical precedent. There was significant guidance on the development of the Act from the National OHS Review and subsequent decisions of COAG and WHS Ministers. The Regulations followed a different path, with the following principles applied:

- There were some Regulations that needed to be developed in conjunction with the Model WHS Act to ensure that the recommendations associated with the Act were sufficiently implemented.
- Where there was an existing national standard, it was to be incorporated into the Model WHS Regulations
- Where matters were already included in two thirds of the jurisdictions, or more, there would need to be a very strong argument mounted to have those provisions NOT included in the Model WHS Regulations

- Where matters were already included in the Regulations in one or more jurisdictions, but less than two thirds, there would need to be a strong argument presented for the Regulations to be included in the Model WHS Laws.

For this reason, the Model WHS Regulations are a consolidation of previous approaches, rather than looking towards the future. The same can be said for Codes of Practice.

From previous experience we anticipate that the submissions to this review may include a call to increase the level of regulation and develop new Regulations for "new" risks. We do not believe that this is the best way to get better WHS outcomes. As we stated in relation to Question 1, we may be better served by reducing the amount of Regulations and Codes and providing more practical advice on a broader range of topics.

There are a number of provisions within the Regulations that establish reporting and notification obligations with questionable value to work health and safety. There should be a full assessment of all Regulations that require a PCBU to maintain records and/or notify the Regulator of an occurrence.

This assessment should start with a position that regulated record keeping, notification and authorisation requirements are unnecessary. For the requirements to be maintained, Regulators should be required to justify the benefit to health and safety of these processes, and report on how they utilise the records maintained by a PCBU, the notifications they receive from PCBUs, and the authorisations they consider.

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Please refer to our answer to Question 2.

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

As outlined in response to earlier questions, the current framework reflects a history that was established in response to the Robens Inquiry of the 1970s, in the UK. The Act provides a good overarching structure of duties, including the duty to consult. With the exception of the issues we raise in relation to union involvement in workplaces, Ai Group has no significant issues with the Act.

To summarise our responses to earlier questions, we believe a stronger message would be received by small to medium businesses if, rather than having a focus on specific risks, the focus was on:

- the general duty to identify hazards and eliminate or minimise risks so far as reasonably practicable;
- the officer duty to exercise due diligence, which includes having an understanding of the risks; and
- the obligations to consult workers, and to consult, cooperate and coordinate with other duty holders.

3.2 Scope and application

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

The Act establishes the general duty to do all that is reasonably practicable to eliminate or minimise risks, both physical and psychological. In recent years there has been broad community discussion about psychological issues, both in the workplace and outside the workplace. This has helped to highlight that PCBU obligations cover psychological risk, as well as physical.

Dealing with psychological risks in the workplace is a very difficult thing to do. Whilst there is a strong body of evidence about the factors that increase risk for "an average person", there is no one way to address all the psychological risk factors in a workplace.

When considering noise, we know that the risk of noise induced hearing loss will be reduced if we lower the noise levels. There is no similar solution for psychological risks. A task with high cognitive demands might be stressful for one person, and highly motivational for another; one person may thrive on having an autonomous approach to work, whilst another might want to be told exactly what to do and when.

With this in mind, it is not appropriate to consider the development of either Regulations or Codes of Practice to address this issue.

At their May 2018 meeting, Safe Work Australia members will be asked to approve publication of a new guide on a systematic approach to managing health and safety and worker's compensation related duties and obligations related to psychological risk. This has been developed through a collaborative process involving regulators, employer representatives and union representatives. It is expected that this will be a document that helps PCBUs to understand the full range of their obligations, from prevention through to rehabilitation and return to work. There are also many other resources and tools available to assist duty holders in relation to this complex area.

It is Ai Group's view that this is the best way to approach this difficult issue.

It is also our view that there needs to be a recognition that dealing with psychological risks, and responses, is a combined responsibility. As indicated earlier, work-related solutions may be individual in nature, and this can only be achieved through open discussions between the PCBU and affected worker(s).

Once an employer has done all that is reasonably practicable to address psychological risks in the workplace, the specific response of individuals will play a part in determining the level of potential harm. We must be prepared to have a robust discussion around the role that individual resilience plays in minimising risk.

If we fail to acknowledge that increasing resilience is part of the solution, we will be doing workers a disservice, especially those that work in industries where some jobs will always have stress involved, e.g. first responders.

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

Employers find it frustrating when there are a range of laws that impact on how they manage health and safety in their business, especially having to access multiple documents to identify duties, and having different and often duplicative requirements for notification and reporting to regulators. Some of these multiple obligations occur within the WHS laws themselves, whilst other arise from other jurisdictions.

Within the WHS laws, the major overlapping requirements relate to the licensing of Major Hazard Facilities (MHFs) and the requirements of the Mines Regulations. There are also overlapping, and sometimes contradictory, licensing requirements between MHFs and organisations handling explosives.

It is Ai Group's view that work that takes place under explosives legislation and/or mines legislation should be excluded from the requirement to hold a licence under MHF Regulations. We note the provision that existed in section 15.3 of the National Code of Practice for the Control of Major Hazard Facilities [NOHSC: 2016 (1996)], which stated:

> *The relevant public authority should accept an Operator's compliance with existing legislation which matches or exceeds the requirements of the national standard. The aim of this section of the national standard is to avoid duplication of effort by Operators in meeting regulatory requirements and in operating safely."*

It is our view that a similar approach should be applied under the Model WHS Regulations.

A detailed submission has been made by the Australian Explosives Industry and Safety Group (AEISG), and we expect that bodies representing the minerals industry will make a similar submission.

Other areas of overlapping legislative requirements are not as easy to address.

The National Regulation of heavy vehicle safety has many of the same principles as the Model WHS Laws, overlaid with some specific areas of risk being regulated, such as fatigue and load restraint. It may be appropriate for the Safe Work Australia website to highlight other areas of national regulation, with links to the relevant regulators.

State based variations on issues such as environmental obligations and electrical licensing and notification of incidents are unlikely to be resolved through any recommendations made as part of this review. Harmonisation of some other areas of state-based legislation would be much welcomed by businesses operating across jurisdictions, and would enable Safe Work Australia, national Regulators, and other relevant bodies to better promote each other's areas of focus.

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

It is Ai Group's view that this is generally a matter of concern for the Regulators. Our only comment is that it would not meet the intent of WHS legislation to have legislation that could not be applied in an extraterritorial manner; nor would it create a fair and even playing field for small to medium employers who are most likely to only have operations in one jurisdiction.

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

The Model WHS Laws establish obligations relating to the health and safety of other persons, and place duties on designers, manufacturers, and suppliers; it is appropriate to do so.

In light of this, Ai Group does not believe it is possible to ever create a clear boundary between work health and safety and public health and safety. This could only be achieved by rewriting the legislation in a way that specifically excludes particular categories of activity from the Act; that would then require other legislation, and potentially other regulators, to deal with those risks and incidents arising from them.

The challenge for regulators, and the community at large, is to identify when the nexus between the work activity and a negative outcome starts and ceases; this will be different for every set of circumstances.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

The Future of Work is a topic that is getting much attention at present. It is important that a focus is maintained on possible changes to how the world operates when considering WHS laws.

The gig economy

The gig economy is often referred to as an area that will challenge the operation of the laws. It is not entirely clear whether this is the case, or whether it may result in more flexibility and control for workers (who have become independent contractors) with more autonomy.

Where gig workers are engaged by a PCBU the laws are broad enough to capture that relationship.

Artificial intelligence

Another area of focus for the future is the impact of artificial intelligence, where machines do their own thinking and respond according to the messages they receive back from the environment.

Utilising artificial intelligence as a higher order control for WHS risks is a positive outcome of this technology.

However, there is some concern that as artificial intelligence becomes more prominent in the community and workplaces, it may be difficult to identify the duty holders associated with a potential failure of artificial intelligence. It may not be possible to identify a PCBU that is in control of that activity.

There is an interesting paper available via this link, which considers two different types of artificial intelligence: transparent operations where the machine is able to explain the logic as to why it is doing something; and opaque operations where the machine is unable to explain why it did something.

It is Ai Group's view that the implications of artificial intelligence is an area that requires ongoing examination and consideration. Care must be taken before determining where to allocate responsibility, in terms of both effectiveness and fairness, on one or more duty holders involved in the technology

Perceptions that there is an increase in casualisation of the workforce

Based on Ai Group experience in relation to discussions of WHS laws and other related issues such as workers' compensation and workplace relations, we expect that an issue will be raised about the increasing casualisation of the workforce.

Ai Group is regularly required to highlight to a range of commentators that there is no evidence to support the view that casualisation is increasing.

We draw your attention to The Fact Check released by www.theconversation.com.au in March 2016, which concludes that "The Ai Group is correct. Its assertion that the level of casual employment has not increased in Australia for the past 18 years is supported by ABS data."

In a recent media release, dated 21 March 2018, Ai Group presented the following information in response to ACTU assertions on these issues:

ACTU Assertion	The Facts	
1	That casual employment is increasing in Australia	ABS statistics show that casual employment has been stable in Australia for the past 20 years at about 20% of the workforce.[1]
2	That labour hire is increasing in Australia	ABS statistics show that approximately 1% of all employed persons across Australia are labour hire employees.[2] This remains a very small proportion of the workforce.
3	That independent contracting is increasing in Australia	ABS statistics show that self-employed independent contractors make up about 8.5% of employed people. This proportion has decreased from 9.1% in 2014. By far, the biggest group of independent contractors are engaged in the construction industry (e.g. plumbers and electricians).[3]

[1] ABS Catalogue 6333.0 - Characteristics of Employment

[2] ABS Catalogue 6333.0 - Characteristics of Employment

[3] ABS Catalogue 6333.0 - Characteristics of Employment

4 Duties of Care

4.1 Duty of PCBUs

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

PCBU (person conducting a business or undertaking) gives a very broad application of duties that should be adaptable to future change in working relationships.

However, there continues to be confusion caused by the terminology; person conducting a business or undertaking is often taken to refer to the *individual* in charge of part of the business, rather than recognising that it is the *legal entity* of the business. This is because workplace parties consider the common usage definition of person, rather than the legal construct.

At the time the laws were being developed, Ai Group argued that a better terminology would have been "a business or undertaking". We still think this would have been a better approach, but it may be too late to change this now as PCBU is in common usage. The term PCBU should not be used without explanation.

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

The primary duty of care encompasses everything that it should. It must continue to be qualified by what is reasonably practicable.

We note that the Best Practice Review of WHSQ included a recommendation that: "The Queensland Government raise the issue of reintroducing a reverse onus of proof as part of the 2018 review of the model work health and safety laws". The 2018 review should consider what effect the change has had nationally on patterns of enforcement, the success rates of prosecutions and safety outcomes."

It is Ai Group's long held view that there is no place for a reverse onus of proof in laws which are criminal in nature and carry a jail term of up to five years for reckless conduct, let alone in the case of QLD, 20 years for industrial manslaughter.

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

The Interpretive Guideline and the relevant Codes of Practice provide good information to duty holders about what is meant by reasonably practicable. The challenge arises when translating that into every WHS situation that a duty holder faces on a daily basis. Both PCBUs and workers generally have an incomplete perception of the risks of the routine work they do each day. Hence the practical application may underestimate the level of risks associated with tasks and workplaces.

Regulators, Safe Work Australia and other interested parties have a role to play in increasing the awareness of what is expected of PCBUs in relation to applying the test of what is reasonably practicable, particularly in relation to known high risk activities.

4.2 Duty of officers

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

The duties

We have received strong feedback from members that indicates the officer duty to exercise due diligence has been very useful in increasing the clarity and awareness of the WHS responsibilities vesting in those that have management control of workplaces.

We received feedback that it has been particularly valuable in increasing the focus of officers that may not previously have seen themselves as having any role in the health and safety of production related activities, (e.g. financial controllers) even though it was most likely that they did hold such responsibilities in many jurisdictions prior to harmonisation.

The positive nature of the duty compares favourably with the derived nature of previous constructs. The approach in the WHS laws is much clearer than the "liability" provisions that were in place under previous laws, which still exist in VIC and WA. In the VIC and WA laws the officer liability is outlined later in the Act under a heading "offences by bodies corporate", and exists if the officer failed to take reasonable care (VIC) or it is found that the offence was attributable to the neglect of the officer (WA).

The positive due diligence obligations provide clear guidance as to what is expected of officers, through the six-step criteria included in the Model WHS Act. The location of the duties, directly after the duties of various PCBUs, also provides visibility.

It is our view that the VIC legislation lacks this level of transparency, and we continue to encourage WorkSafe Victoria and the Victorian Government to adopt these provisions, if not the whole Model WHS Act. We do note that the Victorian SIA estimated that the due diligence obligations of the Model WHS Act would cost Victorian businesses $402m (nett present value) over five years, with ongoing annual costs of $82m. It is Ai Group's view that this analysis did not consider the actions that officers were already required to undertake under the current OHS Act to be able to demonstrate reasonable care if defending a prosecution.

The definition

We regularly receive feedback that the definition of officer is not always fully understood within organisations; middle managers who are unlikely to be officers may be concerned that they will be found to be officers and subject to higher penalties accordingly.

To address this concern some organisations expend time, energy and money to get legal advice as to who is an officer in that organisation. Others approach the uncertainty by saying to senior managers that they should act like an officer anyway, i.e. exercise due diligence in relation to the areas over which they have control. This latter approach contributes to safer workplaces and enables managers to demonstrate that they have met their duty as a worker to "take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons".

Ultimately the definition will only be important if a regulator is considering enforcement action, particularly prosecution.

It may be helpful to have a provision that makes it clear that a person will not automatically be considered to be an officer merely because they acted like one and took a significant personal interest in ensuring compliance with WHS laws.

Some employers would like to see a clearer definition of officer that gets around this problem. We are not sure that is achievable in any event, and it is our view that it is best to stay with a definition that aligns with the Corporations law, as businesses already need to understand who has obligations under those laws.

There is also risk in attempting to create a definition purely for WHS laws. We note that QLD have introduced a concept of "senior officer" with the adoption of the industrial manslaughter provisions. In the first instance it appears that they were trying to narrow the definition to a smaller group of people than those encompassed by the officer definition. However, the definition that has been adopted is the same as existed under the previous QLD Act; one which was interpreted to embrace lower level managers.

4.3 Duty of workers

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

The definition of worker is sufficiently broad to encompass current and future working arrangements.

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

The duties are appropriate.

4.4 Duty of other persons at the workplace

Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?

The duties are appropriate.

4.5 Principles applying to duties

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

The principles are relevant and appropriate. They can be utilised to assist duty holders to understand that if they have a duty, they will always have that duty. However, few people in workplaces read the Model WHS Act in detail and the principles do not have much visibility elsewhere, even within the Codes of Practice.

Later in this submission we have recommended that further guidance is provided about the obligation to consult, co-operate and co-ordinate with other duty holders. It may be appropriate to have some increased focus on the practical application of these principles, in the workplace and in commercial interactions, within that additional material.

5 Consultation, representation and participation

5.1 Consultation with other PCBUs

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

The Model WHS Laws state what was already expected, and mostly understood, in relation to labour hire and contractors. It is important to continue to articulate that the duty is about cooperating and coordinating, not just consulting.

The expansion of these duties to others within the supply chain are not as well understood. Further guidance would be helpful.

In relation to the more traditional approach to multiple duty holders, some organisations at the peak of contractual chains have felt their only proper response (and protection) is additional processes and paperwork. Smaller employers often see the requirements as excessive and do not understand how to comply.

PCBUs are looking for better guidance on how to practically apply these obligations in a range of different commercial circumstances. It would be beneficial if the information about this duty was in a stand-alone Code of Practice, or guidance material, rather than being tacked onto the end of the Code of Practice that focuses predominantly on consultation with workers.

5.2 Consultation with workers

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

The consultation provisions are generally appropriate, and should contribute to increased compliance and improved WHS performance in workplaces. However, it can be difficult to translate these provisions into practical application within workplaces. Some workers have no interest in providing their views to the PCBU, for a range of reasons including that "it isn't my job to do that". Others can be very accusative in their approach, inviting defensive responses. For their part, some managers and supervisors within PCBUs may not have the skills to optimally engage with workers about WHS issues, even when they do have good intentions.

Ai Group believes there are significant opportunities to increase the effectiveness of consultation in workplaces by removing the perception that "consultation" is something complicated and formulaic that we have to go through to comply. The message should be that consultation is about having conversations in the workplace that are about finding out what could be done better.

Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

Improving consultation is not about changing the legislative requirements for consultation; they are more than satisfactory. If there are groups of workers for whom consultation is not working, it should be about providing support and assistance to enhance consultation in these workplaces.

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

HSRs can play a valuable role in an organisation by assisting the consultation process and raising issues in the workplace. However, if the role is used for purposes other than the way the WHS laws intended, it can lead to unnecessary effort being put into managing a difficult situation and diverting attention away from health and safety. It may even lead to a "crying wolf" syndrome in the medium to long term, with HSRs' subsequent real concerns being ignored.

This can be exacerbated by the fact that HSRs do not have to participate in training (although it is necessary in harmonised jurisdictions for training to be undertaken before an HSR can exercise their powers to issue a PIN or direct a cessation of work). If the HSR does attend training there is no requirement for the HSR's level of competency to be assessed or assured. It is Ai Group's view that HSRs are being done a disservice by the laws not requiring trainers to ensure understanding and competence.

It is important to recognise that the election of HSRs is only one way that consultation may occur in the workplace. Many workplaces have effective processes for consulting on WHS issues without HSRs; this is particularly the case in smaller businesses where it is possible to engage directly with all workers on a regular basis.

In response to the specific question about the effectiveness of the functions and powers, our feedback is focused on the current situation in some workplaces rather than on the changing nature of work.

HSRs can seek assistance of any person

It has been the experience of some of our members that the broad power of the HSR, to "*whenever necessary request the assistance of any person*" (see section 68(2)(g)) has not been properly or appropriately exercised in some workplaces.

In particular, what we see are a large number of HSRs in heavily unionised workplaces, who are contacted by union organisers (often through a work email address) advising them to provide access to the site under the provision for the purposes of enquiring into a “safety issue” that the union wish to raise. That is, the HSR may have no concern or even know of the issue, but are being used as a means, by virtue of this provision, to allow the union organiser entry to the site. In our members’ experience it is often in circumstances where some other industrial issue exists, such as enterprise bargaining or union membership.

This approach is a concern for PCBUs, as it circumvents the general right of entry provisions. However, it should also be a concern for the HSR(s) who are put in a difficult position by being pressured into becoming involved in non-WHS issues advanced by permit holders.

In our experience when this occurs, it is near impossible for the PCBU to do anything other than allow the union organiser on site, and none of the rules that apply to the general right of entry provisions can be applied.

We consider it appropriate that the Regulations be amended to include at least some guidelines for a HSR utilising the power, not to reduce their capacity to enquire into a genuine safety matter, but to ensure the provision is not manipulated to be used for right of entry alternatives. Perhaps the HSR could be required to:

- consult with the PCBU to identify the safety issue/concern they have identified;
- work with the PCBU to resolve the issue/concern utilising issue resolution processes where appropriate;
- identify the need or the necessity for having the assistance sought;
- identify the particular skill or expertise that they require from the person (such as the union organiser) from whom they intend to seek assistance.

In order to make it less attractive to utilise this provision to circumvent general right of entry provisions, a notice period should be required.

Further, when permit holders are assisting an HSR, they should also be obliged to comply with the requirements established by the Act and Regulations relevant to entering the site to consult and advise workers.

We note that the Model WHS Act was amended following the 2014 COAG review to require notice to be given, in the same terms as union right of entry provisions, if the person assisting the HSR was required to enter a site to provide that assistance. Unfortunately, no jurisdiction has adopted this amended provision; this is the case even though South Australia recently amended their Act to align with the Model WHS Act, choosing to adopt the old version of the Act, not the new one.

The Discussion Paper highlights the decision of the Full Federal Court, in *Australian Building and Construction Commission v. Powell,* that held that a union official must have an entry permit under the Fair Work Act to enter a workplace to assist an HSR under the Victorian Occupational Health and Safety Act. This decision was welcomed, and is considered to apply to the Model WHS Laws, due to the similar construction of the provisions.

We do note, however, that the Model WHS Laws have a specific reference (at s.71(4)) that a PCBU is not required to allow access to a person who has had their permit revoked or suspended, or a person who is disqualified from holding a permit. This is an important provision and must be maintained in the laws to ensure that these provisions are not utilised to circumvent actions taken by the courts to sanction union organisers who abuse their powers in other jurisdictions.

Finally, we repeat the view that we have put forward since work on the Model WHS Laws commenced. As the Model WHS Laws give entry permit holders the right to enter for the purposes of consulting and advising, the power to seek assistance is redundant. The power should be removed, or as previously indicated modified to mirror the requirements associated with entry to consult and advise workers, and contain additional requirements for HSRs to discuss the issue with the PCBU prior to seeking that assistance.

Issuing provisional improvement notices

Section 90(3) imposes a requirement on HSRs to consult with the PCBU prior to issuing a provisional improvement notice (PIN). Presently, there is no process to ensure this requirement is met.

In recognition of issuing a PIN being a significant power that can positively or negatively affect safety, productivity and efficiency in the workplace we believe that the legislation should be modified to specifically state that where a PIN is issued without consultation, it is invalid.

This could be achieved by either: amending s90(3) which establishes the requirement to consult; or by amending s.98 to clearly identify failure to consult would be a defect that would result in a notice being invalid (noting that section 98 is currently designed to identify what does not make a notice invalid, and there are no specific provisions that specify what would make a notice invalid).

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

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

We are not suggesting that the power to issue a PIN should be removed, only that it not be misused, either intentionally or unintentionally.

Directing a cessation of work

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

As with the issuing of PINS outlined above, we suggest that there be some implication for an HSR when directing a cessation of work inappropriately or for improper purposes, such as to address industrial matters or in pursuit of personal matters.

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

Training of HSRs

During the 2014 COAG review, consideration was giving to removing the requirement that HSR training be five days in duration. Ai Group supported this proposal on the basis that five days training is not necessary for a course that does not deliver any competencies.

This proposal was not supported by the majority of Safe Work Australia members. It is Ai Group's view that this matter should be reconsidered.

Conversely, Ai Group has a strong view that HSR training should, in fact, be competency based, HSRs are given powers and rights that must be exercised with appropriate care; they cannot be expected to do this if trainers and assessors are able to complete the course without ensuring that the HSR is competent, and therefore confident, to exercise their powers appropriately.

Providing a list of HSRs to the Regulator

Section 74(2) of the original Model WHS Act requires a PCBU to provide the regulator with a current list of HSRs. This is an unnecessary administrative burden which adds no value to health and safety. It could also be argued that the employer is not legally able to provide this information without obtaining the express consent of the worker. This provision was removed from the Model WHS Act in 2016; no jurisdiction has adopted this amendment.

Ai Group believes the removal of this provision should be adopted by all jurisdictions.

If jurisdictions want to retain this provision, it would be helpful for the review to seek feedback from regulators about how they currently use this information and why the provision should be maintained.

5.3 Issue resolution

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

Section 81 of the Model WHS Act states:

> (1) This section applies if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussion between the parties to the issue.
>
> (2) The parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed in the regulations.

Regulations 22 then states that "this regulation sets out the minimum requirements for an agreed procedure for issue resolution at a workplace", specifying that an agreed procedure must include the steps outlined in Regulation 23. Regulation 23 is also the default procedure.

The construction of these provisions is not helpful to the PCBU, as the Model WHS Act does not indicate that there is any need to consider the Regulations unless you do not have an agreed procedure. Hence, a workplace could inadvertently develop an agreed procedure that is in breach of the regulations.

Further, it is not appropriate to set the default procedure as a minimum requirement for an agreed procedure.

Ai Group believes that the Regulations should be amended to remove reference to minimum requirements for an agreed procedure. Detail about options for an agreed procedure could be provided in guidance material.

If the minimum requirements remain in the Regulations the Act should be amended to clearly identify that the Regulations set a minimum requirement.

5.4 Discriminatory, coercive and misleading conduct

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?

We have not had any direct exposure to these issues via our members. For this reason, we will not be making any comment on this question.

5.5 Workplace entry by WHS entry permit holders

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

General feedback regarding WHS entry permit holders and provisions

Ai Group acknowledges that there are times when union organisers, particularly those with a role that is focused on health and safety, can make a positive contribution to work health and safety within workplaces.

However, the lack of notice required in order to enter a site to "inquire into a suspected contravention" creates an opportunity for this power to be abused.

A major area of concern has been in the construction industry where unions have widely misused entry rights, confirmed by evidence and findings of at least two Royal Commissions. Given the widespread misuse of entry rights it is not surprising that the federal *Code for Tendering and Performance of Building Work 2016* requires employers to strictly enforce right of entry provisions, particularly the 24-hour notice requirements under the Fair Work legislation, if they want to obtain and retain federal government work.

It has been our experience that union officials from construction industry unions have frequently used WHS/OHS entry powers to access sites for industrial purposes, as has been well-documented in Court decisions relating to prosecutions pursued by the ABCC and its predecessor the FWBC. They have also been utilising the HSR assistance provisions which we have addressed earlier.

The widespread misuse by construction unions of WHS entry rights for industrial purposes is creating WHS risks because it understandably leads to employer cynicism (and worker cynicism) about safety issues raised by those unions, which is not in anyone's interests. The problem needs to be addressed without delay.

A notice period should be required

It is Ai Group's view that all union access to a site for WHS purposes should be subject to the notice period in the Fair Work Act for entry to investigate suspected breaches of workplace relations laws or to hold discussions with employees - not less than 24 hours, and no more than 14 days.

A 24-hour notice requirement will not create risks to WHS, as is often asserted, as there is little to no evidence that the immediate entry power for WHS is, or has proven, necessary for maintaining safe workplaces. Unions cannot guarantee to provide an instant response to a member's request for them to come to their workplace to address a WHS issue, and in such cases they would, or at least would be expected to, advise their member of the alternatives available to them to address an issue that is time critical, including notifying their employer, notifying their HSR, exercising their right to cease unsafe work or notifying the regulator.

The Discussion Paper highlights that the Model WHS Act was amended following the 2014 COAG Review, to require that a permit holder give notice of the entry to inquire into a suspected contravention at least 24 hours, but not more than 14 days, before (s.117(3)-(5)).

This aligns to the requirements under the Fair Work Act, making it less attractive to the permit holder to utilise WHS entry provisions, to circumvent Fair Work provisions. The notice requirements were qualified by allowing the regulator (at s.117(6)-(8)) to grant an exemption certificate for the entry, under specified circumstances.

Ai Group welcomed the introduction of the notice period. The exemption provisions seemed unnecessary; if the regulator was going to take time to grant an exemption, they could utilise that time to attend to the issue raised by the permit holder.

It is extremely disappointing that no jurisdiction has adopted this amendment; noting that Queensland did have this notice requirement in their version of the laws for a short period of time, prior to removing it before the Model WHS Laws were amended.

6 Compliance and Enforcement

6.1 Regulator functions

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

There is often discussion about the correct balance of functions between information/advice and compliance/enforcement. Regulators are often criticised for not issuing enough notices and/or not commencing enough prosecutions. Whilst these are important compliance and enforcement tools and processes, the provision of guidance material and one-on-one advice can play a major role in increasing the understanding, and buy in, of PCBUs who may be struggling with understanding how to comply with the laws.

6.2 Inspectors' powers and functions

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

Inspectors have a range of tools available to them in relation to ensuring compliance with the WHS laws. However, the issuing of improvement notices and prohibition notices (the most utilised tools) are quite short term in nature, allowing for quick fixes, but being mostly inadequate to deal with situations where more time will be needed to plan and implement detailed controls. Further these notices are often issued with a specific solution recommended with no consideration of any input from workers, thus circumventing the consultation obligations.

Where there are a range of issues in the workplace, or a risk that is imbedded into the organisational processes, consideration should be given to an approach that allows the PCBU to develop a structured plan for improvement, in consultation with their workers and, if applicable, elected HSRs. This tool, which could be referred to as an improvement plan or risk control plan, would be more likely to create long term change in a business than any number of improvement notices.

6.3 Internal and external review of decisions

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?

Ai Group has always supported the implementation of processes which allow for duty holders, and other impacted by the decisions of inspectors, to have the opportunity to have that decision reviewed.

It increases transparency, creates an opportunity for a counter view to be considered by a relatively independent body, and provides learnings for the inspectors and the Regulator.

We have not received any recent feedback, positive or negative, about the current application of these provisions across the jurisdictions.

6.4 Exemptions

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

Ai Group has not had any involvement in an exemption application.

6.5 Cross-jurisdictional co-operation

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

We do not have any information about how these processes have operated.

6.6 Incident notification

Question 30: Have you any comments on the incident notification provisions?

Incident notification definitions

The wording of the types of injuries and incidents that must be notified has created some confusion; and the inclusion of some additional reporting requirements in the regulations, rather than the Act, makes it difficult for employers to navigate the provisions, and understand the totality of the obligations. This is particularly the case as the Act says "…and includes any other injury or illness prescribed by the regulations but does not include an illness or injury of a prescribed kind".

Additional notification requirements are included at Regulation 699 because they were added after the Act was finalised. Consideration should be given to moving the additional notifiable incidents into the Act; alternatively, there should be a direct reference to Regulation 699 being the location at which the additional requirements have now been located.

Requirement to keep notification for five years

There is currently a requirement to keep copies of incident notification forms for five years. The 2014 COAG review of the Regulations resulted in agreement to reduce that time period to two years; this amendment has not been made to the Model WHS Laws as yet. It is Ai Group's view that there should not be any requirement to keep copies of this notification.

Incident notifications are sent to the Regulator and the Regulator then makes a determination whether to follow up that notification with compliance and enforcement activity, or not. There are no safety benefits of the PCBU being required to also maintain a copy of this document for five years, or even two.

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

As part of this review it would be helpful if some further information could be gathered about the number of notifications received by each regulator, with a breakdown by incident type. This could be helpful in identifying if there is any correlation between the number of notified incidents and the occurrence of serious claims and fatalities.

6.7 National compliance and enforcement data

No question was posed in relation to this data.

Ai Group refers to our earlier comment in relation to the balance of information/advice and compliance/enforcement. The data presented in Figure 5 on page 32 is likely to be interpreted by some commentators as indicating that inspectors and regulators have "gone soft" on PCBUs. However, without understanding the back story that has led to this change, this could be a totally incorrect conclusion.

7 National Compliance and Enforcement Policy

Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

The National Compliance and Enforcement Policy (the Policy) is a high-level document that sets general agreed approaches for regulators and inspectors.

The need for the Policy was driven by a collective understanding that harmonised laws would not achieve any improvements in consistency across the county unless it was accompanied by a commitment to regulate in a similar manner.

There is inconsistency about how the Policy has been adopted; some jurisdictions refer directly to the document on the Safe Work Australia website; others have rebranded the document but retained the content; others have adopted the Policy as an overarching approach and then supplemented it with more detailed information.

It is our view that the Policy has not yet achieved, on its own, the desired outcome of consistency of approach.

We recognise that Regulators have processes in place, through HWSA (Heads of Workplace Safety Authorities) to identify opportunities to work more closely together on high priority issues. It may be that HWSA could consider how they could more cooperatively identify areas of inconsistency that add complexity and cost to business operations and implement solutions to reduce the variations.

Ai Group regularly receives feedback about variability in expectations of inspectors across jurisdictions and within jurisdictions. During this consultation process we received specific feedback about high levels of inconsistency in relation to the oversight of Major Hazard Facilities (MHFs) and different expectations for Safety Cases.

Significant resources are utilised by MHFs to establish and maintain Safety Cases; it is totally inappropriate for individual jurisdictions to establish different requirements for a PCBU that is effectively operating identical facilities in more than one jurisdiction. It would seem that this might be a priority for any work that HWSA does on increasing consistency.

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

We have not identified any obvious changes.

8 Prosecutions and Legal Proceedings

8.1 Offences and penalties

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

Level of penalties

The WHS Act sets a maximum penalty for offending conduct; the approach is similar to that taken by Crimes legislation. Sentencing procedure legislation sets the principles the Courts must apply and consider in setting an appropriate sentence (penalty) for an offender. Deterrence (both general and specific) is one of the main purposes of a sentence and a significant consideration for the court in determining the appropriate penalty (e.g. see section 3A NSW Sentencing Act).

We consider the current maximum penalties set in the WHS Act to be more than capable of having a deterrent effect to poor health and safety practices in the workplace, and for providing an appropriate penalty for breaches of the legislation. There is no evidence that this is not the case.

We also note the threat of a penalty or prosecution is not the only deterrent to poor health and safety practices, with the direct costs of injury and the reputational and subsequent commercial costs of not being a good performer being significant additional deterrents.

It is important to note that many defendants to prosecutions are nevertheless from workplaces where there has been significant investment in WHS/OHS resources and sophisticated safety systems in place, that may have failed or been incompletely administered. The notion that employers are doing nothing in response to weak penalties is not supported.

The impact on harmonisation on penalty levels

There have been at least two recent cases in Queensland where the penalties applied in other jurisdictions have been used as precedent when appeals to sentencing have been made by WHSQ.

In *Williamson v VH&MG Imports Pty Ltd [2017] QDC 56* it was stated that "sentencing in respect of harmonised work safety laws in Queensland is analogous to the sentencing in federal offences by state courts", and the Court should look to relevant decisions in other harmonised jurisdictions for guidance on sentencing. The penalties applied were increased accordingly,

However, it was also stated that the penalty would not be as high as it might otherwise be for a range of reasons, including that it was the first appeal to address the issue of the harmonised national work health and safety laws. This has sent a clear message that future prosecutions should more closely consider interstate penalties.

In *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QLD* the appellant Judge determined that the original decision had placed too much weight on there being only a minor injury; she referred to the principles of a NSW case where it was highlighted that "the risk to be assessed is not the risk of the consequence, to the extent that the worker is in fact injured, but the potential risk arising for the failure to take reasonably practicable steps to avoid the injury occurring".

The fines were increased significantly. (We note, in passing, the conflict between the reasoning in this decision, which is consistent with the intent of the WHS laws, and the concept of industrial manslaughter under which consequence is an element of the offence – see below).

These cases highlight that the harmonised laws are creating an approach which should see more consistency of the application of the laws across jurisdictions and ensure increased consistency of decisions and penalties.

Industrial manslaughter as an additional penalty

There has been much debate over the last 20 years about whether there is a need for industrial manslaughter offences in OHS/WHS legislation. In recent times, various parties have made policy statements and/or sponsored Bills in an attempt to have industrial manslaughter provisions included in legislation.

Ai Group does not believe that it is necessary or appropriate to have specific industrial manslaughter legislation incorporated into a WHS/OHS Act.

Recent legislative changes in QLD, incorporated an industrial manslaughter provision into the WHS Act by including a new Part 2A (s.34A to 34D) making it an offence for a person conducting a business or undertaking (PCBU), or a senior officer, to *negligently* cause the death of a worker. An individual can face 20 years imprisonment; there is a maximum fine of $10mfor a body corporate.

It is important to note the existing manslaughter offences in each jurisdiction, under general criminal law. For example, the *Crimes Act 1900* NSW (Crimes Act) incorporates a charge for manslaughter (s.18), with a maximum penalty of 25 years imprisonment. The legislation allows the prosecution to establish a manslaughter charge by criminal negligence, unlawful and dangerous act, excessive self-defence or by omission.

Under the Crimes Act, in order to find manslaughter by negligence, the prosecutor must establish:

1. that the accused had a duty of care to the deceased – in the case of a workplace fatality, that is easily established by way of the primary duty of care owed in the Model WHS Act (see section 19).

2. that the accused was negligent in that by the accused's act or omission, the accused was in breach of that duty of care – in the case of a workplace fatality this could be established by a failure to identify the risk which led to the injury being sustained or a failure to provide a mechanism to control or eliminate the risk which caused the injury.

3. that such act of the accused [caused/accelerated] the death of the deceased, otherwise referenced as the causal connection between the act or omission of the employer and the death of the worker; and

4. that such act warrants criminal punishment because:

   (i) it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and

   (ii) involved such a high risk that death or really serious bodily harm would follow; and

   (iii) the degree of negligence involved in the conduct is so serious that it should be treated as criminal conduct.

In circumstances where the legislation is already equipped to respond to the specific conduct, we can see no reasonable or legal basis to introduce industrial manslaughter charges within the WHS regime.

We note that, over recent years, there have been successful prosecutions of officers under the general crime of manslaughter.

In April 2017 the South Australian Court of Criminal Appeal confirmed the 12-year jail sentence imposed on a company director who was found guilty of manslaughter under general criminal laws.

In March 2018, the Queensland Supreme Court sentenced a company director to seven years' jail, with a non-parole period of two years, for manslaughter under general criminal laws.

It has been reported publicly that another Queensland company director is facing two charges of manslaughter under general criminal laws.

These cases confirm our view that the law can prosecute individual officers for manslaughter, with penalties that are higher than those in the WHS laws, under current general criminal laws. It is unnecessary, and unhelpful, to continue the debate on industrial manslaughter laws.

8.2 Legal proceedings

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

We note the legislation allows the Regulator to bring a prosecution within two years after the offence first comes to the notice of the Regulator (see section 232). It has been our experience that Regulators often take the full two years to bring a prosecution.

It would be helpful if there was a public examination of why regulators take so long to complete investigations and decide to launch prosecutions, or not.

It is Ai Group's view that attempts should be made by all Regulators to speed up the investigations process, with an aim to decide about whether or not to pursue a prosecution, within 12 months.

A shorter time frame would be of benefit to all involved in the scenario, injured workers, the family of a person who has been killed at work, co-workers and managers who are all being required to continually recall events in order to make their contribution to an outcome.

Until a prosecution is completed, or the potential defendants are advised that there will be no prosecution commenced, there is a natural defensiveness which reduces the opportunity to learn from an incident in order to improve future health and safety outcomes.

8.3 Sentencing

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

We consider it necessary and appropriate for there to be a separation of the role of those who make/amend the legislation and those who apply the penalties when there is a significant breach of the legislation. We do not believe that a sentencing guideline would be an appropriate matter for the legislation or the regulator to impose/introduce.

It is our general position that the judiciary is well equipped, skilled and experienced in imposing sentences in criminal matters including, WHS matters. We refer to the significant lack of appeals to Courts of Criminal Appeal in WHS matters by both parties generally, particularly when having regard to the number of appeals in the jurisdiction generally.

We do not consider it appropriate for the WHS Act to produce a sentencing guideline or that the regulator would be an appropriate body to do so.

8.4 Enforceable undertakings

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

Ai Group has always been a strong supporter of enforceable undertakings. We see them as an opportunity for a PCBU to focus on improving health and safety in their business, the industry and/or the community, rather than focusing on lengthy court proceedings that cost the business and the Regulator a significant amount of money.

To ensure the ongoing support of EUs, by businesses and workers generally, and most importantly any worker who is directly affected by the breach, it is essential that the EUs that are accepted can stand up to robust scrutiny.

We note, for example, that the SA guidelines for the acceptance of EUs state that they will consider a range of things, including "the degree to which the undertaking delivers benefits beyond compliance with the law".

8.5 Insurance against fines and penalties

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

We would strongly oppose any legislative amendments that precluded companies and officers from accessing insurance or indemnity for legal costs incurred in defending a prosecution.

On the issue of indemnity for fines, there is some confusion evident in the insurance market as to the status of WHS fines, and whether they are criminal in nature. That gives rise to a question as to whether insurance for cover is voidable or not.

More broadly, companies and officers most likely feel justified in taking up such insurance due to the nature of WHS offences, where intention is not an element.

Most distinguish to some degree between what they may see as crimes of individual intention such as those in the corporations law or environmental offences (or say, driving offences) which they accept as not insurable and WHS offences. There is a perception that WHS is akin to strict liability offence.

Judicial responses

The recent High Court Decision in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor [2018] HCA3* indicates that the courts may be able to order that insurance policies cannot be accessed to pay WHS fines.

The case arose from a decision in the Federal Court of Australia where the primary judge directed that the CFMEU could not directly or indirectly indemnify the individual organiser in relation to the penalty imposed. The case was appealed to the Full Court of the Federal Court where it was determined that the primary judge did not have the power to direct non-indemnification.

The High Court ultimately held that section 546 of the Fair Work Act:

> Expressly confers power on the court to make an order that a person pay a pecuniary penalty. From that express conferral of power arises an implied power to make such other orders as are necessary for or facilitative of the type of orders expressly provided for … that implied power under s. 546 includes power to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity form a co-contravener, otherwise known as a personal payment order. [para 115].

It may be that a similar interpretation would be made of the penalty provisions within the Model WHS Act.

Further, in the case of Hillman v Ferro Con (SA) Pty Ltd (in liquidation) Anor [2013] SAIRC 22 the Magistrate commented on the decision by the company and the director to draw on insurance which would result in the director having to only pay the “excess” with the insurance company paying the balance of the fine.

The view that was expressed was that the guilty plea was outweighed by the call on insurance and he determined it was not appropriate to reduce the fine as would normally occur for a guilty plea.

These two cases indicate that the courts have found ways to address the issue of indemnity for fines in appropriate cases.