



SUBMISSION BY THE
Housing Industry Association

to
Safe Work Australia
on the
Exposure Draft *Safe Work Act 2009*

9 November 2009



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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.





1 Executive Summary

The Housing industry Association Limited (HIA) welcomes the opportunity to make a submission in relation to the Exposure Draft of the *Safe Work Act 2009* ('Model Act')

HIA supports national harmonisation of occupational health and safety (OHS) laws as a way of eliminating unnecessary barriers to businesses operating across jurisdictions. However HIA does not support harmonisation at any cost or to the detriment of existing practical safety solutions.

In this regard the, HIA has considered Model Act provisions and generally supports the moderate and reasonable balance of obligations and liability.

The provisions of the Model Act are a significant improvement to most current OHS legislation providing a fairer framework for balancing the responsibilities of all in the workplace.

HIA has identified specific issues with some provisions and has provided appropriate recommendations for consideration by Safe Work Australia (SWA) and the Workplace Relations Ministers Council (WRMC).

These concerns relate to drafting errors or matters that will result in unintended consequences, or that are not within the intention of the legislation or policy recommendations of the WRMC.

HIA has also considered the content of the Regulatory Impact Statement (RIS). Unfortunately the RIS is not an accurate assessment of the impact that these laws will have on specific industries and individual jurisdictions, particularly where that jurisdiction currently has a substantially different system, to the proposed Model Act.



2 Comments on Key Provisions of the Model Act

2.1 Object and principle of the Act

The objects and principles of the Model Act are far too broad with not all objectives being central to what the Act is trying to achieve. Such broad objectives may lead to unintended interpretations of individual sections of the Act by the courts and regulators. Such interpretations may not reflect the true intention or objectives that WRMC want to achieve from harmonisation.

Recommendation

Delete section 3(1)(c) as union involvement is not paramount in achieving safety outcomes and is purely a bi-product of certain provisions of the legislation.

Amend Section 3(1)(d) to add 'by the regulator' or 'by the authorities' to entrench the role of the regulator in providing advice, education, information and training.

2.2 Definitions

Whilst the definitions contained in the Model Act are generally sufficient, however there are a number that are either too inclusive or too broad which will lead to ambiguity or general confusion of interpretation. In addition to the following comments in paragraphs 2.2.1 – 2.2.4, definitions that need only minor amendment include 'construction', 'demolish', 'plant' and 'structure'.

Recommendation

Replace the word 'includes' in each of the following definitions with 'means'.

- construction
- demolish
- plant
- structure

This will provide greater certainty and be more exhaustive.

2.2.1 Definition of 'Design'

'Design' is defined to include 'redesign'. To a ordinary person, in particular a small business owner, the current definition is unclear and potentially confusing as to its scope. The term 'design' should be defined include its ordinary meaning. The term 'designer' should also be defined, as it is the 'designer' who is central to the interpretation of the safe design duty.

Recommendation

Amend the definition of 'design' to include the ordinary meaning of design.

Define 'designer' as:

"a person who has management or control of the design or redesign functions in relation to plant, substances or structures"



2.2.2 Definition of ‘Officer’

Discussion Question (DQ) 2 - Does the definition of officer clearly capture those individuals who should have ‘officer’ duties under the Model Act?

HIA notes that the definition of ‘officer’ provides is quite broad and could inappropriately capture persons for who the duty was not intended.

2.2.3 Definition of ‘Worker’

DQ 5 – Is the scope of the ‘Worker’ definition appropriate?

HIA does not support the scope of the definition of ‘worker’. By including contractors and self employed persons into this definition the extent of the various obligations that are imposed on different parties for the safety of workers will result in undesirable consequences for those duty holders as outlined further in this submission.

It appears from the definition that a worker can also be a PCBU in certain circumstances. This will result in conflicting duties, such as the consultation duties – where a worker will be required to consult with persons who engage them as well as complying with the duty in relation to their workers.

It may also lead to an extension of the powers of a Health and Safety Representative (HSR) to a much broader range of workers, well beyond the employer and employee relationship, as it currently exists.

These may not be such and a concern in a general office or warehouse environment (where engagement is on an employer/ employee basis) but on a construction site where the method of engagement is via a contract the potential for conflict is likely.

Additionally, this definition is in conflict with many definitions of ‘worker’ contained in various other business related legislation such as workers Compensation, and may lead to confusion for business owners making decisions about the status of their workers.

Recommendation

Delete the definition of ‘worker’ from section 4 and add a definition of ‘employee’ which includes only those persons who are ‘engaged on a contract of service’.

Alternatively, delete the definition of ‘worker’ and add definitions of the terms ‘direct’ and ‘indirect’ workers, which will separate workers for which a person has direct control from those who are under a contractual control.

2.2.4 Definition of a ‘workplace’

DQ 7 – Is the definition of ‘workplace’ appropriate?

A number of questions and uncertainties arise out of this definition for the residential construction industry.

The definition of a ‘workplace’, without an express exclusion, may unintentionally lead to the inclusion of domestic premises that are managed and controlled by a home owner, as a workplace.



It may also extend responsibility on a PCBU for workplaces in which they do not have control of, but for which work is carried out for the PCBU.

For example a builder (and PCBU) may engage a kitchen fabrication business to supply and install a kitchen. Under the proposed provisions, this will result in the kitchen company's workplace becoming a workplace of the builder.

From the current provisions it is unclear in the above situation whether the builder has an obligation for the workers whilst they are in the fabrication workshop or whilst in transit.

To resolve these ambiguities the definitions should be amended to exclude certain places or situations as outlined above.

Recommendation

Amend the definition of 'workplace' to exclude:

- 'domestic premises'
- where the worker is a contractor or self employed person (indirect worker) a 'workers' place of business (i.e. 'workshop')
- a workplace of which the PCBU has no 'actual' or 'notional' control.

2.3 Safety Duties

2.3.1 Duty of a Person Conducting a Business or Undertaking (PCBU)

DQ 8- Do the principles that apply to the duties of care give clear guidance on what is expected?

DQ 11 – Is the proposed scope of the primary duty appropriate?

HIA supports a duty structure that provides for individual responsibility to the extent that the person is in 'control' of a certain activity, and that the subsequent liability is apportioned based on the level of control.

Despite the potential for some unintended consequences (outlined below), the primary duty structure outlined in the Model Act is a positive step away from the strict liability approach that has been taken in numerous state legislations, a structure that has seen unnecessary and unjustifiable prosecutions.

Whilst the notion of individual responsibility is a positive one, the overriding PCBU duty is broad and may bring with it unintended consequences. More specifically, due to the expanded definitions of "worker" and "workplace", the scope of who the PCBU owes a duty is broadened and will expand the obligations of individuals in most jurisdictions.

The Model Act specifies that the duties are non-delegable, that a person may have more than one duty, that more than one person can have a duty and that such duties must be discharged to the "extent that the matter is within the persons capacity to influence and control". However the term 'control' is not defined, which results in the concern that the duty will be interpreted to mean "control to any extent", in line with NSW IRC precedents.

Additionally, the scope does not allow for a PCBU to rely on the knowledge and skill of a worker, nor does it recognise any reliance placed on a person by the PCBU when that



person is engaged as an expert. These are elements of control that are essential to the fair application obligation of these duties.

In the construction industry for example, a builder may engage a qualified scaffolder (where it is a legal requirement) and given the training of the person and the requirement that that scaffolder sign off on the work, the builder has little or no control over this activity. The builder in this example should not be expected to be liable for the actual carrying out of the activity of building the scaffold.

The duty could also catch any other workers whose work forms part of the business or undertaking of the person. This could include workers that are not considered to be performing work directly for the business or undertaking (but incidental to it) such as the workers at a factory manufacturing components (e.g., windows, trusses, kitchens) for a builder. This has potential to widen existing obligations in ways that may not be readily apparent to the PCBU or which were not intended to be captured by this duty.

Recommendation

Insert a provision that excludes the PCBU from liability where they engage an 'expert' to undertake the work.

HIA also recommends that guidance material and enforcement policies be developed in relation to the intended scope of the PCBU duty and the meaning and application of 'control'.

2.3.2 Reasonably practicable

DQ 9 - *Is the definition of 'reasonably practicable' appropriate in this context?*
DQ 10 - *Should the definition of 'reasonably practicable' be exhaustive?*

HIA supports the notion that a duty be exercised to the extent that is 'reasonably practicable', and further supports the inclusion of a definition of what matters are relevant when considering what is 'reasonably practicable'

However, the definition contained in the Model Act falls short of a concise as it does not include (as a relevant factor) "*the extent to which the person has control over the hazard or risk*". This is an important element of the definition as in many circumstances (especially those on a residential construction site) the PCBU may not have 'actual control' over the way in which a hazard or risk is managed.

Without the inclusion of the element of control HIA does not agree that the definition of 'reasonably practicable' should be exhaustive.

Recommendation

Amend the definition of 'reasonably practicable' at section 17 to include:

"the extent to which the person has control over the management of a hazard or risk"

2.3.3 Health monitoring/ surveillance

One particular aspect of the primary duty that seems unintentionally broad is the obligation under section 18(4)(g) to ensure that the health of workers is monitored. This



is also an example of a conflicting duty that may create confusion where more than one PCBU is responsible for a particular worker.

The term 'health monitoring' is not defined, so it is unclear as to the extent of the duty. In some jurisdictions 'health monitoring', by virtue of regulations, only relates to environmental issues such as noise, air pollution or hazardous substances and only obliges employers to monitor the health of those directly engaged to them as employees.

HIA is concerned that 'health monitoring' may extend to personal health related issues such as obesity, UV exposure, sexual health and physical health, all of which are lifestyle issues that would be impossible for a PCBU to 'ensure' are monitored. It is unreasonable to expect a person to monitor another persons health to this extent.

The extent to which monitoring must occur is also unreasonable. This duty should not extend to "all workers" as it is unreasonable to expect a PCBU, especially a residential construction builder, to be able to "ensure" the health monitoring of contractors, when those particular contractors may only do one off projects or work for them for short periods of time.

This element of the legislation was not included in the response from the WRMC to the panel recommendations, and it is unclear to see how such a significant obligation has been included without greater consideration and justification.

Recommendation

Insert a definition of '*health monitoring*' in section 3.

'health monitoring' should defined to exclude lifestyle and personal health matters.

Delete the word 'ensure' from section 18(4)(g)

Amend the Model Act to limit this duty limited to the relationship between the PCBU and their employees. In additions guidance material and enforcement policies must be developed to create certainty.

2.3.4 Provision of facilities

DQ 13 Should section 18(4)(e) be drafted to include 'access to' such facilities rather than 'provision of' such facilities?

Unlike a fixed workplace (such as a workshop or office), a residential construction site is not always conducive in size and functionality for a PCBU to 'provide' such facilities to cater for the welfare of workers such as showering, meal heating and even conventional tables and chairs. However the PCBU can provide 'access to' such essential facilities.

Recommendation

Amend section 18(4)(e) to include 'access to' such facilities.

2.3.5 Upstream duties - design/ manufacture/ supply/ construct

DQ 14 – *Is the scope of the duties related to specific activities appropriate?*



HIA is extremely concerned with the potential scope and interpretation of the duties imposed on the designers, manufacturers, suppliers and builders of structures. The Model Act places specific duties on persons who design, manufacture, supply and construct structures in addition to the existing requirements for plant and substances.

It is HIA's view that these duties can be interpreted as though they are 'lifecycle' duties which are attaching to the structure for its life, including those times when the 'structure' is used as a workplace even if that is of no relevance to the original undertaking.

HIA's concerns are provided in further detail below.

2.3.6 Designer Duties

Under the Model Act a designer, who is designing a structure that is to be used as a workplace, must ensure the health and safety of those building the structure and those who will use the structure.

Whilst this duty is limited to those activities that are 'reasonably foreseeable' in relation to the proper construction of the structure, the scope of the duties go on to refer to those persons who construct the structure at the workplace, carry out an activities in relation to the structure (inc. demolition or decommissioning) and who are in the vicinity of the workplace and who's health and safety may be affected by the activities in relation to the structure.

A designer does not, and should not be expected to, have the requisite knowledge to be able to provide for safety in the construction process or post construction process (i.e. demolition of the structure). A designer is generally only engaged to provide a 'drawing' or 'design' or 'plan' and may not be privy to, or have understanding of, the actual construction methods, the products or equipment being used or the inherent site conditions that would be needed to make the appropriate safety assessments.

As a result, designers will need to become familiar not only with the building process, but with all associated systems of work, in order to be able to provide the relevant safe design factors. It is of particular concern to HIA that any failure by the designer in regard to the safe design may then expose the builder to liability via the manufacture and supply duties as outlined below.

Whilst HIA supports the general principles of safe design, we do not support duties such as those included in the Model Act that impose lifecycle duties for the builder or that impose unrealistic expectations on the designer.

2.3.7 Manufacture and Supplier (and construction) duties

The Model legislation contains separate upstream duties in respect of the "manufacture", "supply" and "construction" of structures, plant and materials.

Whilst all three are notionally distinct activities, the way the duties have been framed in the Model provisions and the expansive definition of "structure" in section 4 to include any "fixed or moveable, temporary or permanent" building create the potential for overlapping.



For instance, insofar as manufacture of the structure is concerned the obligation is to ensure that the structure (that is to be used as a workplace) is safe to use, maintain and demolish and to provide any necessary information on the safe use, etc of the structure.

The main concern is that the scope of the duties refer to those persons who construct the structure at the workplace, carry out an activities in relation to the structure (inc. demolition or decommissioning) and who are in the vicinity of the workplace and who's health and safety may be affected by the activities in relation to the structure. Such a duty is unnecessary as section 25 of the Model Act captures builders and imposes a duty upon them for the construction of structures.

In the absence of express definitions, HIA is concerned that overly zealous OHS regulators will apply unrealistic "life cycle" manufacture and supply duties to builders in circumstances where under section 25 the "construction" duties are less expansive.

Whilst a manufacturer's duty might extend to a builder making off-site pre-fabricated components, such as window frames, the inclusion of manufacturer or supplier duty on builders of fixed structures would be unreasonable, unjustifiable and impractical.

To expand on this further, another noted example is real estate agents and whether under this expanded duty they will be considered "suppliers" of fixed structures.

It must be noted that this is also a good example of why the definition of 'reasonably practicable' should include the element of 'control'.

There is no indication to where these duties stop, to who it applies and how it really applies. The above example and interpretations have been raised as concerns not only by industry but by various regulators. If such ambiguity exists, it is clear that the Model Act requires amendments to create certainty.

It is important to note that a builder is engaged to build a building to a specification. It is unreasonable to expect the builder to know about the future use, demolition etc of that building and therefore may not have ensured the design is appropriate at the outset of the original undertaking. More importantly the builder cannot be expected to provide 'necessary safety information' in relation to activities of which he/she may be unaware of at the time of handing over the project to the client.

It must also be noted that the addition of duties imposed on the designers, manufacturers and suppliers of structures in this way is not apparent in any other jurisdiction and as such its inclusion would be in breach of the CoAG agreement not to impose any additional legislative requirements.

On the proviso that there is more sufficient legislative signposting that the manufacture and supply duties are not intended to capture ordinary house building and construction, HIA is pleased that duties under section 25 (2)(c) of the Model Act do not extend to demolition, but rather only refers "decommissioning or dismantling". However it still not precisely clear what is practically reasonable in these circumstances.



Recommendation

Designers should not have safety duties in relation to the buildability of a structure and more particularly a residential home.

Manufacturers and suppliers should not have a duty in relation to the end users of structures as they do not have control over how that building may be used in the future.

The design, manufacture and supply duties are not imposed on designers or builders of a fixed structure.

Insert into section 3 express definitions of “manufacturing”, “supply” or “construction”.

Additionally section 25(2)(c) could be improved by providing that the nature of the structure, ie fixed or moveable, temporary or permanent, should be an express factor in determining what is reasonably practicable for the purposes of section 26(2)(c).

2.3.8 Duties of Officers of a corporation

The Model Act specifies that officers of a corporation owe a positive duty to exercise 'due diligence' to ensure that the organisation complies with its duties of care, having regard to the officer's responsibilities and position within the organisation. The definition of 'officer' is expansive including directors, any person who participates in decision making for the business and any person “who has the capacity to affect significantly the body's financial standing”.

HIA does not support specific positive duties for officers nor the expansive definition of “officer” provided for at section 4 of the Model Act, as outlined in 2.2.2 of this submission above.

Whilst the notion of 'due diligence' represents a positive shift away from the unfair strict liability approach previously applied in the event of a breach by the company in jurisdictions such as New South Wales and Queensland, it still treats the liability of company directors and officers differently then other employees.

Company directors and officers should be treated the same as workers and other persons at the workplace and in this regard be required to exercise “reasonable care”. For liability to exist there must be a personal neglect or connivance on the part of the person whose act or omissions caused the breach.

In the construction industry, site supervisors and on-site managers are in the best position to understand and manage the hazards and risks of a building site. In some states, directors of building companies will have no day-to-day involvement with the onsite activities of the companies, as companies are able to obtain a building license by employing an individual who hold a building license for the class the company is applying for. Unless it can be demonstrated that the company has endemic and systemic OHS failures and inadequacies the onsite supervisors should be primarily accountable for the effective management of the site-based hazards and risks.

If the due diligence obligations remain, then those obligations should only extend to officers who have direct accountability for OHS matters.



Alternatively, a defense should be available for those officers who can show that they had no control over the conduct of the corporation in relation to the alleged contravention.

Recommendation

Delete subsection (iii) from Section 4 - definition of 'Officer'

Substitute section 26 - Duty of officers with:

"(26) If a person other than an individual (the body) has a duty under this Act, an officer of that body who has direct and operational responsibility for that duty must exercise reasonable care in ensuring that the body complies with that duty."

2.3.9 Duties of workers

HIA supports a duty being imposed on workers for OHS. Whilst we support this duty we believe that adherence to OHS policies and procedures is also a key part of the worker duty, and paramount to ensuring a worker meets their OHS duties.

Recommendation

Amend section 27(c) to:

"co-operate and comply with any reasonable instructions, OHS policies and procedures given by the person conducting the business or undertaking to comply with this Act"

2.4 Offences and Penalties

DQ 17 – are the proposed range and levels of penalties appropriate, taking account of the levels set for breaches of duties of care by the WRMC?

DQ 19 – The intention is that all breaches of the Model Act be criminal Offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions?

HIA believes that OHS breaches should generally be subject to civil proceedings and not criminal proceedings.

HIA does not support the decisions by WRMC to increase the maximum penalty for a corporation to \$3million dollars nor do we support the overall increase in penalties across the range of offences. These penalties are a significant increase in comparison to the highest penalties currently awarded in NSW and as such should not, without reasonable justification, be raised. In addition, HIA does not support terms of imprisonment for any category of offence.

It is HIA's view that such a large increase in penalties may lead to a system where employers are forced by the threat of litigation to simply comply with OHS legislation rather than implement proactive, practical safety solutions. Such a situation will not



deliver a safer workplace or better safety outcomes but result in a fear of regulators and potential 'black market' of engaging trades that are willing to flout the safety laws.

Without the harmonisation of the court systems and venues which OHS prosecutions are heard, HIA is concerned that the penalties given and the precedents set will be different across jurisdictions and will result in gross inconsistencies in enforcement by regulators.

Recommendation

OHS breaches should be generally subject to civil proceedings and not criminal proceedings.

The maximum penalty should be a rate that is an average of the current maximum penalties from the various jurisdictions, with consideration given to the precedent penalties that have been awarded for the most severe cases. The maximum penalty should not exceed the current maximum penalty of \$1.65 million that exists in NSW.

The number of categories for offences should be limited to 3 categories and not expanded to the 7 categories as specified in the Discussion Paper. Other minor or administrative breaches of the legislation should be penalised by a maximum amount of "penalty units". with the dollar value for a penalty unit being consistent across all jurisdictions.

2.5 Consultation

2.5.1 Duty to consult

DQ 21 Is the proposed scope for the duty to consult workers appropriate?

HIA supports effective and practical methods of consultation as a means of improving safety in the workplace and supports of the sharing of responsibility for consultation among employers, PCBU employees and contractors to the extent of the 'actual control' each of these persons may have regarding OHS in the work environment.. The best way to achieve such consultation is via discussion between employers and employees to develop the most appropriate methods of consultation to suit their work environment.

Despite the introduction of reasonable practicability, the proposed consultation requirements are very broad and present difficulties in achieving certainty of compliance.

The duty to consult is complicated by the introduction of the term 'person conducting a business or undertaking' as it effectively creates a conflicting duty where more than one PCBU may hold a duty to consult with the same worker. This will lead to confusion over who will consult with who, when and how, and will result in an onerous and resource intensive requirement that may not ultimately be complied with. Again, the use of the broad term 'workers' has created this undesirable consequence.



2.5.2 Determination of work groups and election of HSRs

The election of HSRs this should be a matter isolated to employee and employer relationships as opposed to a process initiated by the more broadly defined “worker”.

If the determination of workgroups and the appointment of HSRs are initiated at the request of a worker any disgruntled worker could potentially expose businesses to a frivolous request and force the unnecessary formation of a workgroup and election of a HSR. Such a consequence is not intended by the legislation and would not achieve improved safety outcomes or real consultation.

Such consultation requirements are unsuitable for small construction businesses that rely primarily on contracted labour. As an example, a small business may not need a HSR because it engages just a few workers and can easily satisfy all information and consultation requirements via tool-box talks, but could be forced by just one worker to change their consultation processes and have resource intensive workgroups and HSRs.

Section 49 - 50 allow work groups to be determined by negotiation and agreement between a PCBU and the workers who will form the work group or their representatives. Where the work group includes workers of more than one PCBU, there is no provision that provides for negotiation and agreement by all PCBUs involved.

On a building site, with many different PCBUs on site at any given time, the potential exists for these provisions to be exploited for industrial purposes, for example by making requests for the development of work groups or the election of HSRs to one PCBU but not to others. This could not only have the undesired effect of excluding some relevant stakeholders from negotiations but also of forcing the formation of inadequate work groups and providing some HSRs access to businesses to which they have little or no connection.

Recommendation

Restrict the requirement to have workgroups, HSRs or HSCs to the employer and employee relationship. With a small business (15 or less employees) exemption.

or

Excludes small businesses from the requirement to have work groups and the official appointment of a HSR or HSC. Small business should be defined as those with less than 15 workers.

Where a workgroup is made up of workers of more than one PCBU, negotiations and agreements for the formation of the workgroup must be between the workers and all PCBUs.

2.5.3 HSR training

Section 65 requires the costs of training HSRs to be borne by the PCBU. This raises complications and impracticalities where the HSR is not a direct employee of the PCBU. For example, the principal contractor in a building site could potentially end up paying for training of HSRs of several subcontractors as well as the principal contractor’s own HSRs.



Section 66, which allows for the costs of training to be shared where there are several PCBUs, is of little help as some PCBUs may refuse to share the full cost. This may come about from a perception that the HSRs are only needed because of the principal contractor's undertaking rather than the subcontractors undertakings and therefore the majority of the cost should be borne by the principal contractor. This would be a substantial burden, particularly for small businesses.

Recommendation

HSRs should only be direct employees of the PCBU.

Then only the direct employer of the person appointed as the HSR should be responsible for the training costs of the HSR.

2.5.4 HSR powers

The powers of a HSR to direct that work cease or to issue Provisional Improvement Notices (PINs) can have major economic implications for PCBUs. These powers require subjective judgment and if exercised incorrectly may impose considerable impost on the PCBU or even put other persons in danger.

The power to direct that work cease

This power has the potential for abuse, particularly in circumstances where the HSR may be in dispute with the PCBU. HSRs should only be allowed to make a direction to cease work in cases where the relevant PCBU cannot be contacted and there is a serious and immediate risk to health and safety.

Whilst the provision also allows the PCBU to move workers to other tasks, on a small housing construction site it is impracticable as many trades are engaged on a task specific basis, and cannot be removed to perform other tasks.

Provisional Improvement Notices (PINs)

HIA does not support the power of a HSR to issue PINs. Given the expanded and impartial role of the regulator it is unnecessary allow a worker to issue PINs to the PCBU. HIA is concerned that the use of such provision may not be motivated by improvement in safety but by industrial relations issues, which may create disputes between the PCBU and the workers.

If this power is to remain, the power should only be able to be exercised after consultation with all the PCBUs affected by the issuing of the PIN.

HIA does not agree that the failure of a PCBU to adhere to a PIN should be an offence. It would not be unreasonable for a PCBU not to agree with a direction specified in a PIN and deal with the safety issues in a way that is not consistent with the direction - technically contravening the PIN. A HSR may also abuse the power and make directions that are not reasonably practicable in the circumstances.

Additionally, HIA believes that the 8 day period required for compliance with a PIN may not be sufficient in many instances due to the complexities associated with resolving some issues and that 14 days would be a more appropriate timeframe.



Recommendation

Insert a provision at section 76 preventing a HSR from ceasing work unless the PCBU is not contactable and where there is an immediate and serious risk to the health and safety of a person.

Amend section 82 (d) to allow the person 14 days to comply with the PIN

Amend section 89 to include a provision that allows the PCBU to alter the suggested controls where reasonably practicable.

2.5.5 Access of a person assisting a HSR

Section 64(1)(e) allows a HSR to gain assistance from a third party when dealing with a dispute in relation to a OHS matter. This provision does not impose any restrictions on this third party, effectively creating a 'back door' right of entry that has potential to be abused by industrial organisations. A similar provision currently exists in Victorian OHS legislation and has been used extensively by HSRs and unions to by-pass legitimate right of entry requirements.

It would be embarrassing if the Federal Court cancelled a person's right of entry permit under the Fair Work Act (as has recently been done in the construction industry) only to have the person continue to enter workplaces on an unrestricted basis pursuant to this provision of the Model Act. It is also anomalous that a person can have their right of entry permit withdrawn under this Act but may continue to enter 'to provide assistance' to a HSR.

Recommendation

The person asked to enter the site under this provision be subject to agreement by the PCBU.

If the person is a representative of an industrial organisation, they must be a registered permit holder in accordance with the right of entry provisions.

2.5.6 Health and Safety Committees (HSCs)

HSCs generally suit larger workplaces with many employees and employee groups but are not suitable for small businesses where consultation/co-operation can be more efficiently achieved by more practical and direct means.

HIA does not support a mandatory threshold for the formation of HSCs and that the decision as to whether or not a HSC is warranted in a workplace should be subject to consultation and agreement between employers and employees.

Recommendation

Remove the mandatory threshold in section 68 (1) and insert that the establishment of a HSC be subject to consultation and agreement between the employer and the employees.



2.6 Discrimination against workers or prospective workers

DQ 32 – Should the Model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?

The Model Act confers protections against discrimination of workers or prospective workers who engage in certain OHS related activities. HIA notes that these provisions are designed to ensure that persons are not deterred from being involved in activities or exercising rights in relation to OHS matters. HIA does not believe that the provisions need any further expansion to include coercion or induction to exercise ones powers in a particular way.

These provisions provide for wider opportunities for both criminal prosecutions by the regulator and civil action by the person affected. Both types of actions are premised with a reverse onus of proof, and the civil action can be taken in absence of any identified criminal contravention. Additionally, in the case of civil proceedings the defendant would have to show that the discrimination was not the ‘substantial’ reason for the discriminatory conduct – this being a largely subjective test.

HIA does not support the continued reverse onus of proof for criminal prosecutions. The general principles of criminal liability should apply – the prosecution should be required to establish the fault elements of an offence beyond reasonable doubt

Additionally, HIA does not support the inclusion of the civil provisions. Given that the existing criminal provisions already contemplate the possibility of fines, compensation and reinstatement there is no reasonable case for expanding current provisions for discrimination, and particularly for including provisions for civil damages in OHS law. Including such provisions will only encourage unnecessary and possibly frivolous vexatious claims to be made.

Recommendation

Delete section 99 – Defendant to prove reason for conduct is not the dominant reason

Delete Division 3 – Civil proceedings - in its entirety.

2.7 Workplace Entry by OHS Permit Holders

DQ 33 – Are the notice requirements appropriate?

DQ 36 – The right of entry provisions have been drafted to be generally consistent with the Fair Work Act. Do these provisions appropriately apply to the role of a union representative when entering the workplace in relation to OHS rather than in relation to workplace relations?

HIA does not support right of entry for OHS purposes; there is no evidence to suggest that such a right will lead to better safety outcomes.

Where an OHS right of entry exists, that right must be consistent with other right of entry provisions for such organisations which are already provided by the state industrial



relations legislation and under the *Fair Work Act 2009* (Cth). In this regard, the power of entry for OHS purposes should be co-extensive with the powers of entry under the *Fair Work Act*.

The Model Act allows for two main types of entry by unions:

- investigation of a suspected contravention; and
- entry to consult and advise workers.

HIA notes that these provisions whilst closely modelled on commensurate rights provided for under the *Fair Work Act* are still less targeted.

In particular, there are some inconsistencies in the Model Act which, in turn, give rise to a risk of construction unions exploiting entry on OHS grounds when the more stringent industrial law provisions do not suit their purposes.

2.7.1 Entry to enquire into suspected contravention

Under the *Fair Work Act*, there are safeguards on the inappropriate use of alleged breaches to enter workplaces by restricting the right of entry to those workplaces where the union actually has members and requiring the union to provide prior written notice. Importantly, if a union wishes to obtain copies of records of documents affecting non members then they must obtain the consent of the non-member.

Under the Model Act no advance notice is required. Additionally this right of entry is available where there are “relevant workers” which is defined to include “contractors” and “self-employed persons” and is available irrespective of whether those workers are actual members of the union.

Upon entry, union officials have extensive powers including the power to inquire, inspect and take copies of documents and consult in relation to the suspected breach. There is a new power to warn any person of “serious risks”.

If the union wants to inspect or make copies of employee records 24 hours notice is required. However there is no reference to privacy considerations in relation to the collection of employee records and documents, and there is no express requirement to first obtain the consent of workers who are not members. Additionally, there is no express prohibition on union officials engaging in intimidatory or threatening behaviour.

If these provisions remain, they will completely destroy the privacy protections given to employee records under the *Fair Work Act*. The right of entry and inspection provisions under the Model Act should not allow unions to do more than they are permitted to do under the *Fair Work Act*.

Recommendation

Delete from Section 105(a) definition of “relevant worker” the words “or eligible to be a member”.

Insert an additional paragraph in Section 107 (1) that any notice should be given prior to the exercising of any right under this section.



Section 107 (d) - Rights that may be exercised while at workplace insert after the words “any record or document” “(except a non member record or document)”

Substitute current section 107(2) with:

“(2) However the person conducting the business or undertaking is no required under subsection 1(d) to allow the OHS permit holder to inspect a document if:

- (a) to do so would contravene a law of the Commonwealth or a law of a state or territory;*
- or*
- (b) it is a non member document’*

Insert new Section 107 (2A):

“(2A) A non-member record or document is a record or document that:

- (a) relates to the employment of a person who is not a member of the OHS permit holder’s organisation; and*
- (b) does not also substantially relate to the employment of a person who is a member of the OHS permit holder’s organisation; but does not include a record or document that relates only to a person or persons who are not members of the OHS permit holder’s organisation if the person or persons have consented in writing to the record or document being inspected or copied by the OHS permit holder.”*

Insert that a breach of section 107 should be subject to a penalty.

2.7.2 Entry to consult and advise workers

Although, section 484 of the *Fair Work Act* provides a right for unions to enter a workplace for discussion purposes, the right for unions to enter a workplace to consult generally on OHS matters will be new for most jurisdictions.

Rather than achieve the intended purpose of promoting an increased focus on safety in the workplace, HIA is concerned that unions will use these powers to recruit members, incite fears of safety on site and generally disrupt work.

24 hours prior notice is required but unlike the equivalent provisions under the *Fair Work Act* there is no requirement that discussions take place during worker’s break times only. If a union is to enter a workplace for discussions purposes, whether on industrial relations or OHS grounds, such discussions should not be at the employer’s costs.

The specific right to warn workers of perceived risks is also unnecessary and does not contain sufficient measure to prevent its misuse. If a union representative is concerned that there are serious health and safety risks, then those risks should be immediately to the employer and an inspector.

It must also be noted that this is a new right that does not currently exist in relation to OHS in any jurisdiction. The addition of a ‘new’ right imposes additional duties that would be inconsistent with the Council of Australian Government (CoAG) principles that no additional requirements will be introduced.



Recommendation

Amend Part 6 to ensure that there are adequate safeguards to prevent well-meant safety processes being abused in furtherance of other agendas:

Delete section 110 (2)

Delete section 115 and replace with:

“(115) An OHS entry permit holder may exercise a right under Division 2 only during working hours. An OHS entry permit holder may exercise a right under Division 3 only during working hours and during worker’s mealtimes and other breaks.”

The right to consult be restricted to the extent that is reasonably practicable or alternatively a maximum time limit be imposed to control the length of consultation periods.

2.7.3 Dealing with disputes

HIA is concerned that disputes concerning right of entry will be dealt with by the state regulator and state industrial relations courts and tribunals. This may enable unions to bypass more stringent investigation by Fair Work Australia or the Australian Building Construction Commission (ABCC).

Allegations about the misuse of OHS entry powers in furtherance of an industrial dispute will inevitably mean that state regulators become involved in adjudicating actions taken in the course of an industrial dispute which is simultaneously being dealt with by Fair Work Australia. Even with the highest expectations of both bodies acting in comity, there are likely to be significant practical problems of co-ordination and authority. It is most undesirable for the hearing of what is a singly industrial dispute to be split between Federal and State bodies in this way.

A person whose entry permit under the Fair Work Act has been withdrawn should automatically have their entry permit withdrawn under this Act and vice versa.

Recommendation

Amend division 6 – Dealing with Disputes

Insert new subsection 133(6):

(6) If the dispute concerns a matter that could be dealt with or heard by Fair Work Australia under Part 3-4, Division 5 of the Fair Work Act, the authorising authority may refer the dispute to Fair Work Australia.

Insert new subsection 133A:

“133A Authorising may not deal with a dispute begin dealt with by Fair Work Australia, the Federal Court or the Federal Magistrates Court

The authorising authority may not deal with a dispute that is being or has already been dealt with by:



- (a) *Fair Work Australia; or*
(b) *the Federal Court under Part 4-2, Division 2 of the Fair Work Act; or*
(c) *the Federal Magistrates Court under Part 4-2, Division 2 of the Fair Work Act.”*

HIA notes that commensurate amendments will be required to section 505 of the Fair Work Act.

2.7.4 Authorisation

DQ 32 Should the Model Act contain a specific authorization process for an OHS entry permit or can it rely on authorization obtained under other Acts such as the Fair Work Act.

HIA supports a dual authorization system where those exercising their OHS entry rights hold a dual authorization under the Fair Work Act and under OHS legislation. The nature and purpose of entry under OHS legislation compared to Fair Work legislation are very different and a person entering a workplace for OHS purposed needs to have specific knowledge of the OHS legislation.

Additionally given the likely hood that the representative will exercise workplace relations powers and has access to employee records a dual authorization is imperative.

2.7.5 Redress for abuses of the right of entry provisions

HIA notes that if permit holder breaches their permit conditions by causing “undue disruption” to a workplace, they can be subject to a penalty. However the Model Act does not provide for a PCBU to seek redress for loss or damage in cases of proven contraventions or abuses of the right of entry provisions.

A mechanism of redress will go a long way in discouraging abuses of right of entry provisions as well as creating fairness and promoting accountability.

Recommendation

Insert into Part 6:

Loss or damage caused by authorised representative

- (1) If an OHS entry permit holder is convicted or found guilty of an offence against this part, a person who suffers significant loss or damage as a result of the commission of the offence is entitled to recover from that organisation, by action in a court of competent jurisdiction, an amount in respect of that loss or damage.*
- (2) A court may make an order in proceedings for the payment of an amount that the court considers reasonable in the circumstances.*

2.8 The Regulator

HIA generally supports the expanded role for regulators and inspectors outlined, provided that the are adequate compliance and review mechanisms in place, adequate



training and resources of the inspectorate and an overall focus on safety education over strict compliance measures. Such provisions are more likely to lead to improvements in safety outcomes.

The harmonisation process is going to mean a substantial amount of change for a large range of people including the various regulators around the country. It is important that the regulators ensure their inspectorate are provided with the necessary training and enforcement policies to enable them to properly administer, educate and enforce the law.

To ensure accountability and credibility of the inspector powers there should be a formal process by which a person or organisation may make a complaint to the regulator about the actions of an inspector.

Whilst section 154(1)(c) provides that ‘an inspector may give advice about compliance with this Act’, in order to encourage education and improvement in safety outcomes in the workplace this section should require that “inspectors must give advice to a person about compliance where practicable”. In addition to this, section 244 in relation to inspector immunity should be moved into section 154 to ensure certainty for the inspectorate that their advice is protected by immunity.

In a society where security and protection from theft and fraud are important, in order to ensure authenticity of identification, cooperation and compliance when an inspector comes to a workplace, an inspector must properly identify themselves before exercising any powers. Section 148(2) should compel an inspector to identify themselves before exercising their powers not simply on request.

Recommendation

Amend section 154(1)(c) to “*inspectors must give advice to a person about compliance where practicable*”.

Move section 244 to section 154.

Amend section 148 (2) be to compel an inspector to identify themselves prior to exercising any of their powers and upon request.

Insert a mechanism for complaint by a person or organisation to the regulator, in relation to the actions or inactions of an inspector when they are exercising their powers.

2.8.1 Expanded compliance measures

HIA supports the expansion of the options of compliance measures, in particular the introduction of enforceable undertakings, as a sensible and practical means of avoiding unnecessary and potentially costly prosecutions.

2.8.2 Power to require production of documents and answers to questions – Removal of the Right to Silence

HIA is concerned that small business owners, will not have the requisite knowledge and ability to understand the complexities of the provisions relating to the powers of



inspectors when investigating a breach, and their subsequent legal rights. In order to maintain the apparent fairness and integrity of the Model Act, guidance material should be produced in relation to inspector's powers during an investigation, rights of persons when answering questions and detail about legal privilege.

Additionally, the regulators should develop clear and specific guidelines and policies for the inspectors, which outline how they will ensure that persons understand their rights when being questioned or investigated.

The requirement under section 163(1)(c) compelling a person to answer any questions asked by an inspector, effectively removes an individual's right to silence. This section should only compel a person to answer questions in relation to 'relevant documents'. It must also be noted that the decision to remove the right to silence has not been justified by any of the decisions of WRMC.

In addition section 163(3) allows inspectors the power to conduct an interview in private if the inspector considers appropriate. There is nothing in this section that specifies an individual's right to legal representation, and a specific provision should be inserted to allow an individual to suspend an interview in order to gain formal legal representation.

Recommendation

Amend section 163(1)(c) to only compel an individual to answer questions in relation to relevant documents.

Insert an additional section into Section 163(3) to allow an individual to suspend any interview in order to gain legal representation or alternatively the inspector is compelled to advise the individual that they are allowed legal representation prior to commencing any interview.

2.9 Legal proceedings

HIA notes that the Model Act provides that the prosecutor bears the onus of proving there has been a breach of the duty and in considering whether he duty has been complied with so far as reasonably practicable. This is to the criminal standard of proof, which requires the prosecutor to establish the elements of fault beyond reasonable doubt.

HIA supports these provisions. This is a positive move away from the strict liability offences that exist under the current OHS framework in some jurisdictions. In this regard, HIA is not aware of any evidence that the reverse onus of proof has led to better safety outcomes in NSW and Queensland. Defendants to OHS prosecutions should be entitled to the same natural justice process as those as those charged with any other criminal offence.

HIA additionally support the Model Act provisions that only allow prosecutions to be commenced by the public officials and regulators.



2.10 Codes of practice and guidance material

HIA supports the development and use of Codes of Practice and guidance material as a means of showing industry what compliance with a particular law looks like whilst also allowing for freedom of innovation. HIA does not support Codes of Practice or guidance material having evidentiary status as this may stifle innovation and improvements in safety practices.

Codes of Practice should be mandated as 'deemed to comply' documents, in that the Model act should state that if a person complies with a Code of Practice they are 'deemed to comply' with the relevant law or regulation to which it relates.

HIA believes that development of guidance material in relation to various aspects of the Model legislation is important in achieving compliance and getting good safety outcomes. Any such guidance material must be developed in conjunction with industry and be put through a rigorous testing process to ensure that it is easily read and understood by those who will need to use it.

These principles should also apply to the development of guidelines in relation to enforcement or interpretation as set out in section 145 of the Model Act.

Recommendation

Insert at Section 145 a provision that requires the regulator to consult with relevant industry stakeholders in relation to development of any codes of practice guidelines where those guidelines will have a particular impact on a industry or industry sector.

Insert at Section 248 a provision that specifies, if a person complies with a Code of Practice they are deemed to comply with the related law or regulation.

3 National Harmonisation

HIA supports national harmonisation of occupational health and safety (OHS) laws as a way of eliminating unnecessary barriers to businesses operating across jurisdictions, but not any cost and not to the detriment of practical safety solutions.

Fair and reasonable harmonised laws must be uniform and balanced, based on practical safety solutions, provide certainty of compliance, and must be justified by real and accurate data.

The aim of OHS laws are to protect all persons in the workplace whilst also allowing business flexibility to improve safety. With this in mind the process of national harmonisation should be used to find the best possible combination of laws that are justifiable both in a practical and business sense and that do not simply align with the highest possible standard of compliance. By ensuring this, it is more likely that the new laws will be accepted and complied with by industry and will result in improved safety outcomes.



HIA is concerned that those jurisdictions coming from a substantially different regulatory regime will be at a greater detriment in relation to the business impacts of changes to the OHS laws. In order to ensure that harmonisation is accepted and achieved the jurisdictions must provide businesses and workers with substantial opportunity to understand and comply with the new arrangements before an enforcement approach is taken by the regulator.

Recommendation

Enforcement moratoriums must be allowed, for all or certain aspects of the Model Laws in jurisdictions where the laws will result in significant changes to business OHS systems. In particular this will be necessary for South Australia and Tasmania. Such moratoriums should be in place at the date of commencement of the legislation being 1 January 2012 and continue for any timeframe up to 12 months in duration (determined on the impact of the change).

3.1 Jurisdictional Notes

The inclusion of jurisdictional notes into the Model Act has the potential to undermine the achievement of true harmonisation and national consistency. Whilst many of the jurisdictional notes are not crucial to the operation of the Model Act, HIA is concerned that the large number of jurisdiction notes will encourage jurisdictions to shift away from harmonisation in the future.

Every effort should be made to limit such instances as jurisdictional differences in regulator behaviour, court systems will result in different application and interpretation of the model OHS Act. Different interpretation or application in each jurisdiction regarding key concepts such as 'control', 'reasonably practicable' and 'due diligence' will lead to increased compliance costs and uncertainty for businesses and inconsistent outcomes under model legislation.

In order to minimise the jurisdictional notes, it will be necessary to make changes to some of the existing laws that affect the true harmonisation of OHS legislation.

One of the key areas of concern is the jurisdictional note in section 4 allowing different venues for hearing of prosecutions under the Model Act. Having OHS matter heard in different types of courts that have different statuses around the country will most likely result in inconsistency in judgment and penalties. As a priority, each jurisdiction should work towards transitioning to a national court system for hearing of cases for breaches of the model Act.

Other notes that will lead to substantial practical difference between states include:

- Section 11 provides that a jurisdiction may use its own definitions of dangerous goods and high risk plant, leading to differences across jurisdictions.
- Section 35 provides that jurisdictions may define what is meant by 'medical treatment' – this will lead to reporting requirement differences in each jurisdiction. This will also result in inconsistency of statistics and data, something that is key to future improvement of OHS laws.
- Section 102 provides that a jurisdiction may include other relevant local laws in paragraph (b) – it is unclear why this jurisdictional note exists and what type of



- other laws jurisdictions may include – this could lead to unrelated and unnecessary laws being imported into the legislations creating gross inconsistencies.
- Section 143 provides that jurisdictions may add to the list of functions of the regulator – In order to create consistency in enforcement, prosecutions and education it is inappropriate to give this flexibility. All regulators should be given identical powers.
 - Section 225 (1) – it is entirely inappropriate that a jurisdiction may add other officials who hold a relevant public office or administer the Act to bring proceedings for an offence against the Act.
 - Section 227 second jurisdictional note – allowing a jurisdiction to include a local provision allowing proceedings to be brought at any time with the authorisation of the Director of Public Prosecutions will undermine the limitation period for prosecutions and therefore creates unnecessary uncertainty for duty holders. A maximum period should be set to eliminate abuse.

Recommendation

Review all jurisdiction notes be reviewed to remove as far as possible the potential for future inconsistencies.

HIA recommends that each jurisdiction transition towards nationally consistent venues for the hearing of OHS matters.

4 Economic Impact of Harmonisation

There is little doubt that harmonisation of OHS laws will be of financial benefit to large businesses operating in more than one jurisdiction, however when considering the overall statistics of Australian businesses it is clear that majority of business will actually see a negative economic impact.

Multi jurisdiction business account for about 3-4 percent of all Australian businesses, with small business accounting for a staggering 80% of all businesses (source: ABS 8155 Australian Industry). Majority of small businesses would only operated operate in one jurisdiction.

For those 80 percent of small business, it is unlikely that they will experience any great advantage from harmonised laws, rather they will experience costs and impacts related to changing their OHS systems and processes (including training) in order to comply with the new requirements imposed in their relevant jurisdiction. This is particularly going to have a more severe impact on jurisdictions such as South Australia and Tasmania, who's current laws are of a substantially different regime than the rest of the country and in comparison with the proposed model Act.

Costs relating to training, supervision, system development and process changes will not only impose significant financial impact on small business owners but will see these costs passed onto the consumers. In residential construction this will have a large affect housing affordability.



It is HIAs view that a more significant emphasis on calculating the economic impact on small business should have been taken, rather than just focusing on the minor savings that will be made by the small 3-4 percent of businesses nationally.

4.1 Adequacy of the Regulatory Impact Statement

HIA does not believe that the Regulatory Impact Statement (RIS) is an accurate assessment of the impact that the Model Act will have on specific industries and individual jurisdictions, particularly where that jurisdiction has a substantially different system (such as South Australia or Tasmania).

The RIS does not contain a true assessment of the ‘actual’ costs and benefits, but provides broad statements about the potential for larger national business to benefit from net saving without any consideration for the costs to small businesses to make substantial changes to their business.

It seems as though Access Economics have not considered the detail of the Model Act but rather the overall affect of harmonisation on business, an example of this is:

At page 65 it states:

“it is expected that implementation of the model OHS Act will not significantly change current OHS responsibilities”

It is obvious from this statement that the Access Economics have not considered the sections on buildability duties, due diligence provision, HSRs, training of HSRs right of entry, discrimination and the many changes to OHS responsibilities, not to mention the removal of the privilege against self incrimination.

The RIS states many times that the costs and benefits of the Model Act are small but goes to no length of establishing any real costs or substantiating the claims with real and measurable data. It is disappointing to see a RIS that does not in any way assess the true impact of such a significant change to the way in which OHS will operate in Australia.

Recommendation

A more accurate Regulatory Impact Assessment must be undertaken using a more vigorous process which involves greater and broader consultation with industry.