Improving the model Work Health and Safety laws

Issues Paper
and
Consultation Regulation Impact Statement

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1. Introduction

On 2 May 2014 the Council of Australian Governments (COAG) agreed at its 37th meeting that all governments would investigate ways in which model Work Health and Safety (WHS) laws could be improved with a particular focus on reducing red tape.

The Agency supporting Safe Work Australia is assisting Ministers responsible for WHS by compiling a draft report and any necessary Regulation Impact Statement (RIS) for consideration and approval prior to submission to COAG.

Scope

The COAG have asked Ministers to consider whether the current system reflects best practice, in that the model WHS laws:

- are evidence based, cost effective and proportional to the health and safety risks they seek to address
- are simple and streamlined for businesses to comply with, and
- where possible, allow duty holders flexibility in how they comply with their obligations.

In addition to identifying areas of regulatory burden potentially imposed by the model WHS laws, this examination also includes:

- officer's duties and if these create a disincentive to take up officer roles, and
- right of entry and other powers of union officials
- powers of health and safety representatives
- model Codes of Practice, including whether they can be made less complex and provide for increased jurisdictional flexibility balanced against the benefits of harmonisation for multi-jurisdictional employers.

The investigation is not a full review of the model WHS laws. It is not intended to examine issues such as the construct of the model WHS framework, nor underpinning concepts such as 'person conducting a business or undertaking', 'worker', or 'reasonably practicable'. Instead, Ministers have been asked to make recommendations to improve implementation of the current framework. A full review of the laws is currently scheduled for 2016.

What is the purpose of this Issues Paper and Consultation Regulation Impact Statement?

This Issues Paper seeks input and evidence regarding issues of regulatory burden that may have become apparent since implementation of the model WHS laws. This includes areas where compliance with the WHS laws has increased costs of business without any health and safety benefits. This will also meet COAG Regulation Impact Assessment requirements.

On the issues identified by COAG, this paper provides detail on the intended operation of the provisions in order to stimulate discussion and encourage feedback. The paper also asks broad questions and provides opportunity to raise further issues that are causing practical difficulties for business and workers trying to comply with the laws.

Feedback should, wherever possible, include evidence and examples to justify a position. This could include the benefits to health and safety and the costs of compliance.

How can I contribute?

This Issues Paper will be used as the basis for local consultation to be managed by WHS regulators in states and territories and by the Australian government. In this way members of the Australian community—including workers, employers, and regulators—will have an opportunity to help improve the model WHS laws.

Each government has been asked to provide the results of their local consultations by **1 August 2014.** Check with your local WHS regulator to see their deadline for accepting feedback.

What happens after the public comment period closes?

Feedback on this Issues Paper will be consolidated with data and results from related research. This will be analysed and used to produce a report with recommendations on how to improve the model WHS laws. This will be provided to COAG by the end of 2014. If required, a Decision RIS will be compiled and provided with the report.

2. Background and problem statement

How were the model WHS laws developed?

In July 2008 COAG signed the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA). The IGA sets out the tripartite collaborative process involving Commonwealth, state and territory governments, employer representatives and unions to implement model WHS laws across all jurisdictions. Through this process the model WHS Act, model WHS Regulations and model Codes of Practice were agreed. Together these make up the model WHS laws. Public comment was sought throughout the development of model WHS laws and played a significant part in their final composition.

Seven of the nine jurisdictions have adopted the model WHS laws. The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the model WHS laws on 1 January 2012; South Australia and Tasmania implemented the laws on 1 January 2013. Western Australia has indicated it intends to adopt elements of the model WHS laws although no timeframe has been provided for when this will occur. Victoria has stated it will not adopt the model WHS laws. Further information on the development of the model WHS laws can be found in Appendix A.

Australia's WHS performance

Work-related deaths, injury and illness have a significant impact on workers, the community and businesses.

The purpose of WHS legislation is to reduce the serious economic and social impact on individuals, businesses and the Australian community of work-related incidents.

The economic burden from workplace incidents is significant. In 1995 an Industry Commission study estimated that only 25 percent of the total cost of work-related injury and disease was due to the direct costs of work-related incidents. The remaining 75 percent was accounted for by indirect costs such as lost productivity, loss of income and quality of life.[1]

In 2012, using the latest available data, the total economic cost of work-related injuries and illnesses was estimated to be $60.6 billion dollars, representing 4.8 percent of GDP for the 2008–09 financial year. In terms of the burden to economic agents, 5 percent of the total cost is borne by employers, 74 percent by workers and 21 percent by the community.[2]

The *National Occupational Health and Safety Strategy 2002–2012* and its replacement, the *Australian Work Health and Safety Strategy 2012–2022,* provide a focus for national prevention activity which is underpinned by WHS legislation.

Australia's WHS performance is improving. The incidence rate of serious workers' compensation claims (claims per 1000 employees) has been falling steadily over the past ten years, as is illustrated in Table 1.

[1] Industry Commission (1995) "*Work, Health and Safety Report No. 47*", Volumes I and II, AGPS, Canberra.
[2] Safe Work Australia (2012) "*The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community: 2008–09"* see http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/660/Cost%20of%20Work-related%20injury%20and%20disease.pdf

Table 1: Compensation claims per year

Year	Number of claims	Incidence rate
2000–01	133226	16.3
2001–02	130190	15.8
2002–03	132531	15.6
2003–04	133411	15.4
2004–05	134404	15.1
2005–06	130339	14.2
2006–07	129711	13.7
2007–08	129686	13.3
2008–09	125401	12.7
2009–10	122491	12.1
2010–11	123937	11.9
2011–12p*	120157	11.4

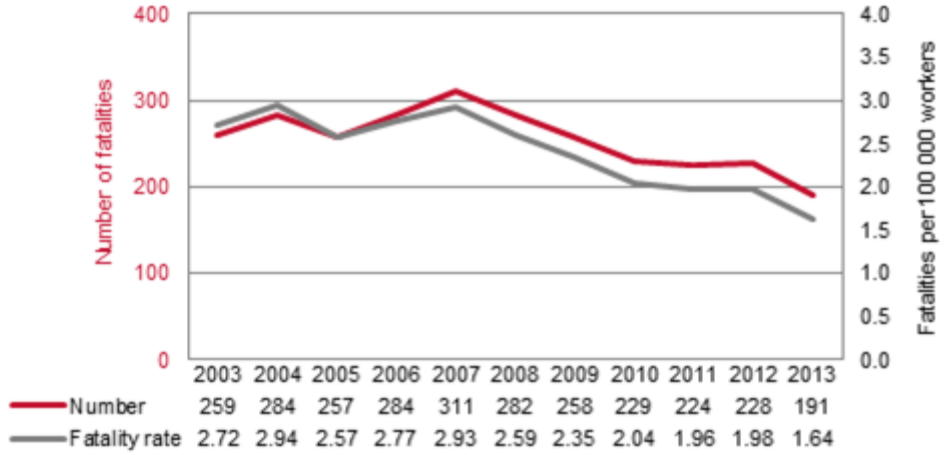
* provisional data

An analysis of the number of workers' compensation claims in 2000–01 in comparison with the number of claims in 2011–12 shows an overall decline during this time period. In 2000–01 there were 133 226 claims but by 2011–12 that number had dropped to 120 157. While these figures alone may not necessarily indicate a decline in workplace injuries, the incidence rates[3] over the same time period have also declined from 16.3 in 2000–01 to 11.4 in 2011–12. The data for 2011–12 is preliminary and expected to rise by around 2–3 percent which would still indicate a fall from the previous year.

Data taken from the Traumatic Injury Fatalities database shows consistent falls in workplace deaths since 2007. While the substantial falls over the 2009 and 2010 period can probably be attributed to the Global Financial Crisis, the figures still show improvements in Australia's performance. The fall in 2013 is linked to fewer workers in trucks and cars being killed on public roads.

Figure 1 shows the number of fatalities in comparison to the overall incident rate.

Figure 1: Number of fatalities compared to overall incident rate



This discussion paper seeks to further improve the operation of the model WHS laws with a view to continuing the downward trend in workplace injuries and deaths without imposing an unreasonable burden on those covered by the laws.

[3] Incidence rates of occupational injuries and diseases are the number of cases expressed as a rate per thousand employees.

What is the problem?

The Government is often called on by the public to legislate to protect against risk. This is particularly the case where death, injury or illness may be a consequence. Regulations should have clear benefits which outweigh the costs.

Regulation has been defined as "Any rule endorsed by government where there is an expectation of compliance". This will include Acts of parliament and their associated regulations. It may also include guidance material where there is an expectation of compliance.

There is a national and international focus on reducing unnecessary regulatory burden on business and individuals. Regulatory burdens are the cost, time and effort necessary to comply with those rules. Unnecessary regulatory burdens are where these burdens outweigh the benefits of compliance.

The Decision RIS for the model WHS Act and Regulations anticipated benefits for multi-jurisdictional businesses, mainly from reducing costs from complying with several sets of legislation.[4] This was also thought to be the case for multi-jurisdictional small businesses. However, small businesses operating in a single jurisdiction were found to have low rates of knowledge of government regulations and consequently low compliance with occupational health and safety regulations in general, making the impact of a model WHS Act hard to determine.[5] Benefits in the long term were expected for government from reducing duplication of effort developing and reviewing legislation and guidance, which could be done nationally under the model WHS legal framework.

Safe Work Australia has established a research program to evaluate the impact of the model WHS laws since implementation in 2012 and 2013. The research includes both quantitative measurement of the impact supplemented by qualitative studies. The quantitative measurements will require some years for trends to become apparent and reliably estimate the impact of the laws. Early qualitative studies have focussed on businesses experience with transition to the model WHS laws.

These early studies reveal the framework provided by the model WHS laws appears to be sound. At this time, no significant issues with the policy underpinning the model WHS laws have been reported either by regulators, persons conducting a business or undertaking, workers or via court proceedings. There are, however, opportunities to assist businesses of differing sizes to comply with the laws and to reduce the burden of the model WHS laws in certain areas. The results of these studies will be available later this year.

Areas of the WHS laws considered by some Safe Work Australia Members to impose unnecessary regulatory burdens include record keeping, notification obligations, first aid requirements, emergency planning and some plant registration requirements where there is no clear safety benefit. These and others are considered in this issues paper.

In considering these burdens a particular focus will be given to benefits to health and safety and the costs of compliance. The model WHS laws need to be necessary, targeted, cost-effective, proportional, flexible and performance-based in order to properly protect workers while avoiding unnecessary regulatory burden.

What is the objective?

As reflected in the scope for examination of the laws, COAG is seeking opportunities to more closely align the model WHS laws with the characteristics of good regulation. This can be achieved by identifying regulations that are more burdensome than beneficial; or are redundant, ambiguous, unnecessarily complex or prescriptive. Options to remove or modify those which are not effective or efficient for business and governments can then be considered.

[4] 2009 Decision RIS for a Model OHS Act and the 2011 Decision RIS for model WHS Regulations and Codes of Practice
[5] Decision RIS for a Model OHS Act, Access Economics, December 2009, pg 60–61.

The fundamental objective of the model WHS laws was to produce the optimal model for a national approach to WHS regulation and operation.[6] The focus was on reducing discrepancies between different jurisdictions without compromising health and safety standards. The current examination is considering whether the model WHS laws reflect best practice, in that they:

- are evidence based, cost effective and proportional to the health and safety risks they seek to address
- are simple and streamlined for businesses to comply with, and
- where possible, allow duty holders flexibility in how they comply with their obligations.

It is acknowledged that differing perceptions of risks and likelihoods of consequences can affect what individuals will consider to be more burdensome than beneficial. Some high risk activities, for example operating major hazard facilities, will, by necessity, be subject to more prescriptive requirements.

Principles and features of good regulation

COAG has articulated what it considers good regulation by developing regulatory principles to assist policymakers.[7] The COAG principles for making good regulation include:

- demonstrating regulation is necessary
- minimising regulation to only what is required to achieve objectives
- minimising impact and restriction on competition
- focusing on outcomes and avoiding unnecessary restriction on how to comply
- ensuring compatibility with internationally accepted standards or practices
- avoiding unnecessary restriction on international trade
- reviewing regulation periodically at least every 10 years
- ensuring regulation can be revised to reflect changed circumstances, and
- increasing consistency of regulators' administrative decisions to reduce discrepancies, uncertainty and compliance costs while permitting flexibility.

COAG considers the features of good regulation to include:

- minimal regulatory burden on the public to achieve objectives
- minimal administrative and enforcement burden on regulators and the community
- regulatory impact assessment
- governmental agreement on matters involving regulatory action
- inclusion of compliance and enforcement strategies
- consideration of secondary effects
- inclusion of standards in appendices
- performance-based regulations
- plain language drafting
- consideration of impact of date of effect
- advertising introduction of standards and regulations, and
- public consultation.

[6] July 2008 *Intergovernmental agreement for regulatory and operational reform in occupational health and safety*

[7] 2004 *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* accessed May 2014

3. The model WHS Act

The Agency has been monitoring implementation of the model WHS laws in jurisdictions. A particular focus has been on minimising regulatory burden. Stakeholders have assisted by identifying provisions in the model WHS laws that may be causing difficulties with compliance and enforcement.

In developing the model WHS laws, separate Decision RISs were prepared for the WHS Act and Regulations outlining the impact the model laws would have in jurisdictions. The benefits and costs to government, business and workers from each 'category' of changes were classified from 'nil' to 'medium'. Any measurements of impact were based in part on consultations with people likely to be affected by changes.

Assistance is required to identify further opportunities to reduce unnecessary regulatory burden imposed by the model WHS laws. This section addresses the specific issues COAG has requested WHS Ministers to consider.

Questions
3.1 What areas in the model WHS Act, other than those identified by COAG and addressed below, have positively or negatively impacted on your organisation and how could they be improved?

Director's liability under the model WHS laws

It is accepted practice in corporation law that 'officers' hold duties regarding the conduct of their organisation. This is because corporations are artificial legal entities that cannot make decisions or act other than through individuals. The model WHS laws recognise this by requiring officers to behave in a way that will provide for compliance by their organisation (i.e. the person conducting a business or undertaking (PCBU)) with the WHS duties.

Ministers were asked to consider the liability of directors under the model WHS laws. The model WHS Act uses the broader category of 'officer' to attribute duties to senior individuals within an organisation, which includes directors.

Definition of officer

The model WHS Act adopts the definition of an officer of a corporation, partnership, or unincorporated association as that under section 9 of the Commonwealth *Corporations Act 2001*. This definition covers people who make, or participate, in making decisions that affect the whole or a substantial part of the business of the corporation, or who have the capacity to affect significantly the corporation's financial standing.

Partners in a partnership are excluded from being an officer of a PCBU.[8] This is to avoid double liability for the partners as they are individually and collectively a PCBU and would owe duties under the Act and have the potential liabilities of a PCBU. Officers include equivalent persons representing the Crown but do not include Commonwealth and State Ministers.

A volunteer may be an officer of a PCBU and would have a duty to exercise due diligence in ensuring the PCBU complies with the model WHS laws. To prevent these duties being a disincentive for volunteers to become officers, they cannot be prosecuted for failing to comply with that duty.[9]

A person may be an officer even though they do not make the relevant decisions or have the authority to do so, if they participate in the making of those decisions. What this means is that the person is actively involved in the process through which the decisions are made and occupies a role that may directly contribute to, promote or affect the decisions.

[8] s.4 of the model WHS Act
[9] s.34(1) of the model WHS Act

Safe Work Australia has released an interpretive guide addressing the health and safety duty of an officer which includes a section on who would be an officer.[10]

All harmonised jurisdictions have adopted the definition without variation. The current Victorian laws also adopt the *Corporation Acts 2001* definition and exclude volunteer officers from liability as in the model WHS Act.[11]

The 2008 Occupational Health and Safety (OHS) Review considered creating a new definition for officers in the model WHS laws. It noted several issues in adopting a new definition including difficulties in expressing who is an officer in a broad and clear manner and that any new definition would probably require interpretation by the courts. It was also acknowledged that a new definition for officer would create confusion when other definitions were being introduced as part of the model WHS laws.[12] The *Corporation Act 2001* definition used in the model WHS laws already has a significant body of case law to assist in determining who would be an officer.

Feedback received during the development of the model WHS laws strongly supported the use of the *Corporations Act 2001* definition rather than developing a new definition. However, since implementation, feedback has suggested some are having difficulty identifying who within their organisation would be considered officers under the WHS laws. It has been suggested further guidance on who is an officer may address this concern.

Officer's duty's under the WHS laws

The model WHS Act places a positive duty on officers to exercise due diligence to ensure their PCBU complies with its WHS obligations.[13] An officer is liable for their own conduct or omission, not that of another person. The Decision RIS for the model WHS laws noted that introducing positive duties of officers represented a change from previous legislation in each jurisdiction to some extent, but the anticipated incremental cost impact would be minimal.[14] The intent of the duty is to ensure that people in leadership roles take work health and safety seriously.

The standard of proof and liability for officers under the model WHS Act vary from those in other statute in ways that make them comparatively less onerous. The onus of proving a failure to meet the standard of due diligence is on the prosecution, meaning the onus of proof has not been reversed. Additionally, there is no attributed liability for officers under the WHS Act meaning an officer will not be automatically found guilty of an offence under the model WHS Act if the PCBU has been found guilty.[15] Feedback received during the development of model WHS laws were strongly supportive of including a positive duty for officers.

Due diligence standard

The model WHS laws states that due diligence includes taking reasonable steps:

- to acquire and keep up-to-date knowledge of WHS matters
- to gain an understanding for the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
- to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking (this includes verifying the provision and use of resources and processes)
- to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and

[11] s.144(5) of the *Occupational Health and Safety Act 2004 (Vic)*
[12] Second Report: *National Review into model Occupational Health and Safety Laws* (January 2009), p71
[13] s.27 of the model WHS Act
[14] Decision RIS on the model Occupational Health and Safety Act, p47
[15] s.27(4) of the model WHS Act

- to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the WHS Act (this includes verifying the provision and use of resources and processes).[16]

Prior to the harmonised WHS laws, due diligence was not defined in any jurisdictional WHS laws. The ACT however provided a shorter list of 'reasonable steps' an officer should take to prevent a contravention by a corporation.[17] The *Corporations Act 2001* does not define due diligence although it does provide a guide that officers "must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise"[18].

The Decision RIS for the model WHS laws noted that introducing positive duties of officers represented a change from previous legislation in each jurisdiction to some extent, but the anticipated incremental cost impact would be minimal.[19]

The feedback received during the development of the model WHS laws was strongly supportive of including a definition for due diligence rather than relying on case law. It was felt this would provide a clear standard of what was required of an officer in achieving compliance with their duties.

Questions
3.2 What impact (positive or negative) has the duty on officers had on your organisation?
3.3 Which aspects of the duty (if any) should be changed?

Powers of Union Officials under the model WHS laws

WHS entry permit holders are defined in the model WHS Act as union officials that have applied for and been granted a WHS entry permit by the authorising authority in their jurisdiction.[20] The model WHS Act confers power on WHS entry permit holders to enter workplaces for the following purposes:

- to inquire into suspected WHS contraventions[21]
- to inspect employee records or information held by another person[22], and
- to consult and advise workers.[23]

WHS Ministers have been asked to consider the powers of union officials under the model WHS laws and whether they should be subject to further limitations. This follows allegations of misuse of union powers under the WHS Act in some jurisdictions, including Queensland, which recently amended its WHS laws to address some of the perceived issues.

Entry to inquire into a suspected WHS contravention

A WHS entry permit holder can enter a workplace to inquire into a suspected WHS contravention where the contravention is in relation to a 'relevant worker'.[24] A relevant worker is a worker who works at the workplace, is a member or eligible member of a relevant union and whose industrial interests the union is entitled to represent. The WHS entry permit holder must 'reasonably suspect' a contravention is occurring or has occurred when entering for this purpose. The entry permit holder is not required to give prior notice of entry, but must give

[16] s27(5) of model WHS Act
[17] s.219(4) of the *Work Safety Act 2008 (ACT)* – now repealed
[18] s.180(1) of the *Corporations Act 2001 (Cth)*
[19] Decision RIS on the model Occupational Health and Safety Act, p47
[20] Section 131 of the model WHS Act
[21] Section 117 of the model WHS Act
[22] Section 120 of the model WHS Act
[23] Section 121 of the model WHS Act
[24] Section 117 of the model WHS Act

notice of the entry and the suspected contravention to the relevant PCBU and the person with management and control of the workplace, as soon as reasonably practicable after entering a workplace.[25]

Appendix B sets out the current jurisdictional approaches to entry by WHS entry permit holders to inquire into a suspected WHS contravention. Western Australia has its right of entry provisions in industrial relations legislation. It considers maintaining right of entry laws in one location avoids duplication and potential inconsistency and confusion. As such, the West Australian government has advised it will not adopt right of entry into WHS laws.

Of the harmonised jurisdictions, Queensland and South Australia have varied the model notification provisions. Queensland recently inserted a requirement for a minimum of 24 hours and maximum of 14 days-notice be provided before entry takes place. South Australia requires WHS entry permit holders consider if it is reasonable to inform the regulator prior to entry. If it is deemed not reasonable, a report must be lodged with the regulator after the entry has occurred.

Many of the submissions from employers during the 2008 OHS Review called for reasonable boundaries to safeguard against potential misuse of any entry power.[26] Since commencement of the model WHS laws some jurisdictions have reported significant regulator resources are being taken up with resolving disputes regarding right of entry.[27] It can be assumed this would be equally time-consuming for employers and permit holders.

The Queensland notice of entry provisions were introduced as a response to Roundtable discussions held with industry and unions on the operation of the harmonised WHS laws in that state.[28] Feedback was received that right of entry was being misused, particularly within the construction industry.[29] This was reflected in submissions to the Queensland parliamentary inquiry into the Bill to amend its WHS Act. It was argued some permit holders were not adequately explaining the reasons for entry. Existing safeguards in the legislation were deemed ineffective because employers advised they were too intimidated to use them.[30]

Other submissions indicated concerns with the impact on health and safety if a notice were introduced. Many union submissions cited case studies of occasions on which the power to enter without notice had prevented a serious health and safety issue. In recommending the Queensland Bill be passed to require prior notice and reason for entry, the report also recommended changes to induction training to ensure workers were clear on their WHS rights and obligations.

The intention of omitting a notice requirement when the model WHS laws were developed was to allow for urgent health and safety matters to be dealt with quickly. It was also intended entry requirements for WHS purposes would be in line with those in the Fair Work Act as far as possible. Insertion of a requirement that notice of entry be provided *prior to* the entry taking place would align the provisions with those in the Fair Work Act and the amended Queensland WHS Act. It would also mirror the notice requirements for the other entry powers set out in sections 120 and 121.

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[25] Section 119 of the model WHS Act
[26] Second Report: *National Review into model Occupational Health and Safety Laws* (January 2009), p386.
[27] See generally Explanatory Speech: Introduction of the Work Health and Safety and Other Legislation Amendment Bill 2014, p235.
[28] See further Discussion Paper: *Proposed outcomes from the review of the model work health and safety laws in Queensland.*
[29] Discussion Paper: *Proposed outcomes from the review of the model work health and safety laws in Queensland*, p23 and Explanatory Speech: Introduction of the Work Health and Safety and Other Legislation Amendment Bill 2014, p235
[30] Queensland Parliament, Finance and Administration Committee Report No. 39 'Work Health and Safety and Other Legislation Amendment Bill 2014' (March 2014) p37.

Inserting a notice requirement before entry to inquire into a suspected WHS contravention allows time for the issue resolution processes set out in the legislation to be applied. This may allow PCBUs and workers to adequately resolve issues before entry is necessary.

Entry to inspect employee records or information held by another person

When a WHS entry permit holder enters a workplace to inquire into a suspected contravention without notice, they may also inspect or make copies of employee records or other documents, related to the contravention, which are held or accessible at that workplace.[31]

The model WHS Act confers a separate power on permit holders to enter *any* workplace to inspect or make copies of employee records or other documents directly relevant to the suspected contravention.[32] Notice of at least 24 hours but not exceeding 14 days must be provided.[33] This provision was intended to cover situations where records are not held at the same workplace as the suspected contravention, such as a recruitment company or in another branch office of the business. It also sought to avoid unfairly burdening people who are in possession of these documents by requiring notice.

Concerns have been raised that the interaction of these provisions makes it unclear which workplaces may be entered without notice to inspect or copy documents related to a suspected contravention. This may lead to disputed entry without notice, unnecessarily burdening regulators, PCBUs and permit holders.

Entry to consult and advise

The model WHS Act confers a power on WHS entry permit holders to enter a workplace to consult and advise on WHS matters.[34] Notice must be given before entry. A WHS entry permit holder must not intentionally or unreasonably delay, hinder or obstruct any person or disrupt work at a workplace.[35] The Safe Work Australia *Interpretative Guideline on WHS entry permit holders* provides additional information on how they can ensure they are not disrupting work when exercising their power to enter to consult and advise.[36]

The 2008 OHS Review recommended that this power be included in the model WHS Act, but be limited to safeguard against misuse.[37]

Limitation of entry powers

There are already safeguards against the misuse of the WHS entry provisions built into the model WHS laws. For example, the model WHS laws confer the power on certain people, including the regulator and a relevant PCBU to apply to the authorising authority for a WHS entry permit held by a person to be revoked.[38] WHS entry permit holders are also prohibited from delaying, hindering or obstructing any person or disrupting work at a workplace.[39] There is also a general prohibition on refusing or delaying entry of WHS entry permit holders to a workplace without reasonable excuse.[40] Once a WHS entry permit holder is in a workplace, people cannot intentionally or unreasonably hinder or obstruct them.[41] The notice requirements also serve to avoid placing an unreasonable burden on the workplace.

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[31] Section 118(1)(d) of the model WHS Act
[32] Section 120 of the model WHS Act
[33] Section 120(3) of the model WHS Act
[34] Section 121 of the model WHS Act
[35] Section 146 of the model WHS Act
[36] See Interpretative Guideline: *Workplace Entry by WHS entry permit holders*
[37] Second Report: *National Review into model Occupational Health and Safety Laws* (January 2009),p398.
[38] Section 138 of the model WHS Act
[39] Section 146 of the model WHS Act
[40] Section 144 of the model WHS Act
[41] Section 145 of the model WHS Act

However, the power to enter a workplace to inquire into a suspected WHS contravention could be further limited by inserting a notice requirement (of at least 24 hours but not more than 14 days) before it is used, as was recently done in Queensland.[42] This would align the provision with the entry power in the Fair Work Act and the other entry powers in the model WHS laws.

Businesses and regulators may experience small benefits if this change is implemented by having more time to promptly respond to identified health and safety issues. Savings may also result for regulators due to fewer disputes between WHS entry permit holders and PCBUs.

Questions
3.4 What impact (positive or negative) have the powers provided to WHS entry permit holders to enter a workplace had on your organisation? Please provide relevant examples and evidence.
3.5 What limitations (if any) do you think should be placed on the powers? Please provide reasons for your suggestions.

Powers of Health and Safety Representatives (HSRs)

WHS Ministers have been asked to consider the powers of HSRs and whether they should be subject to further limitation. Since the implementation of the model WHS laws commenced, two HSR powers included in the model WHS have attracted criticism: the HSR power to request the assistance of 'any person' in exercising their powers and functions and the HSR power to direct unsafe work to cease. Each of these is addressed in this section.

Power of HSRs to request assistance

The model WHS Act sets out an exhaustive list of the powers and functions of HSRs.[43] An HSR is able to request the assistance of 'any person' whenever necessary in exercising a power or carrying out a function under the legislation.[44] There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought. Assistants may include union officials, health and safety consultants, workers from another business or inspectors. HSRs are required to provide reasonable notice prior to inspecting a workplace, unless they are inspecting an incident or situation involving a serious and immediate risk to health and safety.[45]

A PCBU can refuse access to a person assisting an HSR where the assistant has had their WHS entry permit revoked or suspended, or are disqualified from holding a WHS entry permit.[46] The PCBU also has a broad discretion to refuse an HSR assistant access to the workplace on other 'reasonable grounds'[47], which acts as a practical limitation on who can enter a workplace as an HSR assistant. Where a PCBU refuses entry on reasonable grounds, the HSR can still seek assistance from an inspector[48] meaning the HSR need not go without any assistance.

An application can also be made to the appropriate court or tribunal in each jurisdiction to disqualify an HSR.[49] The listed grounds include exercise of a power of performance of a function for an improper purpose. [50] The application can be made by the regulator or any person

[42] The Queensland WHS Regulations also set out what information must be included when notice is provided for entry under its WHS Act. Safe Work Australia will monitor the operation of the Queensland provision to obtain relevant data and information.
[43] Section 68 of the model WHS Act
[44] Section 68(2)(g) of the model WHS Act
[45] HSRs are able to inspect a workplace of a worker in their work group under section 68(2)(a) of the model WHS Act.
[46] Section 71(4) of the model WHS Act
[47] Section 71(5) of the model WHS Act
[48] Section 71(6) of the model WHS Act
[49] Section 65 of the model WHS Act
[50] Section 65(1)(a) of the model WHS Act

adversely affected. As far as the Agency is aware, no orders have been made by the relevant court or body to disqualify a HSR under the provisions.

Appendix C sets out the requirements regarding the HSR power to seek assistance in both harmonised and non-harmonised jurisdictions. Queensland has amended its WHS Act to require HSR assistants provide a minimum of 24 hours and maximum of 14 days-notice of entry. This was to prevent creating a 'loophole' that could potentially allow WHS entry permit holders to enter as HSR assistants without giving notice. South Australia has limited the definition of 'any person' to a person who works at the workplace; a person who is involved in the management of the relevant business or undertaking; or a consultant who has been approved as required by the legislation.

The South Australian approach of limiting the persons from whom assistance can be sought is one option that could be applied in the model laws to limit the breadth of the provision. The power of the PCBU to refuse entry by an assistant on reasonable grounds and the prohibition against persons who have had their WHS entry permits revoked should remain. Views are sought on whether Queensland's, South Australia's or another approach should be adopted in the model WHS laws to limit the breadth of the provision.

Power of HSRs to direct unsafe work to cease

The model WHS Act provides that a HSR who has completed specified training may direct a worker in the HSR's work group to cease unsafe work.[51] To make this direction, the HSR must have a 'reasonable concern' the worker will be exposed to a serious risk to health or safety emanating from an immediate or imminent exposure to a hazard. Before directing a worker to cease work, the HSR must have consulted with the PCBU or used the issue resolution process to resolve the concern.[52] The issue resolution provisions do not need to be used if the risk is so serious, and immediate or imminent, that it is not reasonable to consult.[53]

All harmonised jurisdictions have the same provisions in relation to the power of HSRs to direct unsafe work to cease, except Queensland which removed the provision in April 2014. Western Australia has previously indicated it will not adopt provisions affording HSRs the power to direct unsafe work cease. Both jurisdictions have indicated they consider the power for HSRs to direct unsafe work cease is duplicative and unnecessary given workers also have a right to cease unsafe work .[54] The details of the jurisdictional approaches to this HSR power are set out in Appendix D.

The 2008 OHS Review recommended that both workers and HSRs be afforded the power to cease work. HSRs were considered better placed than individual workers to progress discussions with PCBUs and participate in the issue resolution process.[55]

However, concerns that HSRs may not be competent to exercise the power to cease work have also been raised. HSRs are required to complete training prior to being allowed to exercise the right to direct unsafe work cease. However, the training is not competency-based, meaning no demonstration or assessment of skill or understanding is required for the training to be considered complete.

Similar to the Queensland approach in this area, removal of the power of HSRs to direct unsafe work to cease is one option. Given workers also have this power it is potentially duplicative and unnecessary. This also means the potential cost of the change is likely to be minimal. The safety impact of the change will be minimal provided workers are aware of their legal right to

[51] Section 85(1) of the model WHS Act
[52] Section 85(2) of the model WHS Act
[53] Section 85(3) of the model WHS Act
[54] Section 84 of the model WHS Act
[55] Second Report: *National Review into model Occupational Health and Safety Laws* (January 2009), p184.

cease work when it is ‘unsafe’ and sufficiently confident to exercise this right. Views are sought on whether the Queensland or another approach should be adopted in the model WHS Laws.

Questions
3.6 What impact (positive or negative) have health and safety representatives’ powers and functions had on your organisation? Please provide relevant examples and evidence.
3.7 Which aspects of health and safety representatives’ powers and functions (if any) should be changed?

4. The model WHS Regulations

The model WHS laws consist of broad, outcome-focused duties. This ensures the highest practical level of protection against harm arising from work while allowing businesses flexibility to choose solutions that best suit their circumstances. The model WHS Act relies extensively on this approach, as demonstrated by the primary duty of care and the duties of officers, workers and other persons.[56] However, to understand how to comply with these broad duties, duty holders need guidance either in regulations or in other supporting material.

The development of the model WHS Regulations involved bringing together disparate sets of regulations across nine jurisdictions. The Decision RIS noted that while there would be one-off implementation costs, adopting the model WHS Regulations indicated net benefits (i.e. after implementation costs) of around $250 million per annum to the Australian economy over each of the next 10 years. This estimate did not include expected productivity benefits. Multi-state businesses were expected to benefit from harmonisation by approximately $70 million per annum. It was expected that single-state firms and small businesses would face a net cost of $3.27 per worker per annum (or about $27 million per annum). This was clearly outweighed by the net benefit to society of $21.48 per worker per annum (or about $250 million per annum), before any productivity gains are taken into account.

Although COAG has not specified any issues or provisions in the model WHS Regulations for WHS Ministers to consider, they want recommendations on areas where the laws could be improved in terms of regulations being necessary, cost-effective, proportional, flexible and performance-based. The section below provides examples of regulations that may be more burdensome than beneficial, too prescriptive or too difficult to comply with.

Questions

4.1 Which areas of the model WHS Regulations are concerns for you and how could they be improved?

Regulatory burden

Record keeping and notifications

Administrative requirements such as those relating to record keeping assist duty holders to demonstrate compliance and communicate arrangements for health and safety to those who may be affected by a work activity. Record keeping requirements may be a regulatory burden for business if they do not clearly add to health and safety.

Notifications are intended to assist WHS regulators administer and enforce the WHS laws but can be an administrative burden for duty holders and regulators if notifications are not useful.

Appendix E lists record keeping and notification provisions identified as potentially imposing a burden disproportionate to the risks they seek to address.

Authorisations

The model WHS Regulations include requirements for licenses, registrations and other types of authorisations issued by WHS regulators for certain activities considered to be high risk. These processes can create regulatory burdens and costs for businesses.

For example, the purpose of registering plant items with the WHS regulator is to ensure they are inspected by a competent person and are safe to operate.[57] Item registration lasts for five years, with a renewal then required to enable monitoring of plant and its location. The move to a five year annual registration process reduced costs to businesses in NSW that were previously required to pay a fee for annual registration renewal.

[56] Sections 19, 27, 28 and 29 of the model WHS Act
[57] Regulation 266 of the model WHS Regulations

The need for plant item registration for some categories of plant (particularly where technology has made plant safer and the registration has no clear benefit to health and safety) has now been questioned.

Removing the requirement will result in savings in relation to fees and the time taken to prepare and lodge registration renewals.

Another opportunity to reduce regulatory burden relates to the residency requirements for high risk work licences. A licence applicant must reside in the jurisdiction where they are applying or, if they reside outside the jurisdiction, show circumstances warranting the granting of the licence.[58]

Removing this residency requirement will reduce an administrative burden on businesses and regulators, support competition and improve consumer choice.

Electrical safety

The model WHS Regulations include requirements for testing and tagging electrical equipment in certain circumstances. There are also requirements to fit a residual current device (RCD) in workplaces with 'hostile operating environments'.[59] An RCD automatically disconnects electrical circuits to isolate supply and protect circuits, socket outlets or electrical equipment in the event of a current flow that exceeds a predetermined value.[60]

The requirement for a competent person to "test and tag" electrical equipment used in a workplace[61] where an RCD is fitted and tested has been criticised as unnecessary. Removing this requirement could save businesses the cost of testing and tagging.

Questions
4.2 Which areas of the model WHS regulations (if any) are more burdensome than beneficial?
4.3 How could these requirements be changed and what impact would this have?

Level of prescription

Generally, prescriptive requirements in regulations should be limited to areas of high risk—other detail can be provided in model Codes or guidance material. Removing prescription can improve the flexibility to comply. Some examples where there may be unnecessary prescription are provided below.

Issue Resolution

The model WHS Act requires PCBUs to develop an issues resolution procedure.[62] The model WHS Regulations prescribe minimum requirements and a default procedure.[63] These details in the Regulations could be moved into guidance material.

First aid

The model WHS Regulations sets out the obligation of a PCBU in relation to providing first aid, including first aid equipment, facilities and training.[64] This section could be simplified to provide flexibility in compliance by only requiring a PCBU ensure workers have access to first aid

[58] Regulation 89 of the model WHS Regulations
[59] Regulation 164 of the model WHS Regulations
[60] AS/NZS 3190:2011 (Approval and test specification – Residual current devices), AS/NZS 3012:2010: *Electrical installations: construction and demolition* and AS/NZS 3000:2007: *Electrical installations* specify essential safety requirements for RCDs.
[61] Regulation 150 of the model WHS Regulations
[62] Section 81 of the model WHS Act
[63] Regulations 22 and 23 of the model WHS Regulations
[64] Section 42 of the model WHS Act

treatment. The details regarding first aid equipment, facilities and training are covered in the model *Code of Practice: First Aid in the Workplace.*

Emergency plans

The model WHS Regulations also require a PCBU to develop an emergency plan.[65] The Decision RIS on the model WHS Regulations stated the increased health and safety resulting from detailed emergency plan requirements would outweigh any costs. However, there were expected to be some significant costs—small businesses were expected to be particularly affected.[66]

This burden could be reduced without compromising health and safety standards if these emergency plan requirements were scaled back to rely on the primary duty to provide safe systems of work[67] or to simply require an "effective response to an emergency".

Questions
4.4 Which areas of the model WHS Regulations (if any) are unnecessarily prescriptive and therefore limiting compliance options?
4.5 How could these requirements be changed and what impact would this have?

Practical compliance difficulties

Audiometric testing

The requirement to test the hearing of workers exposed to noise is an example of a regulation that may be difficult to comply with[68] particularly in remote areas because of the lack of appropriately trained and experienced people to conduct testing. The difficulty of finding the 16 hour quiet time needed prior to the test while travelling long distances to access audiometric testing has also been reported. The suggestion is to remove this requirement and provide guidance on when audiometric testing should be conducted in the relevant Code of practice, as was done recently in Queensland.

Questions
4.6 Which areas of the model WHS Regulations are difficult to comply with or unworkable in practice?
4.7 How could these requirements be changed and what impact would this have?

[65] Regulation 43 of the model WHS Regulations
[66] Decision RIS for model WHS Regulations and Codes of Practice, p55
[67] Section 19 of the model WHS Act
[68] Regulation 58 of the model WHS Regulations

5. The model WHS Codes of Practice

Codes of practice provide guidance on what is reasonably practicable and are generally written for the primary duty holder. They need to be useful for various business sizes and for other duty holders including workers.

Under the harmonised framework, approved Codes of Practice have a special status under WHS laws as they are automatically admissible as evidence in court proceedings. Courts may have regard to a code as evidence of what is known about a hazard, risk or control. They may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates. This differentiates approved WHS Codes of Practice from voluntary or industry codes of practice which may be developed by parties under other arrangements.

There is no requirement for model Codes to be complied with. A duty holder can adopt other methods of meeting their obligations if they provide a level of health and safety equal or better to the standard set out in the model Code.

Development of any new model Codes must be agreed by Safe Work Australia, be subject to tripartite consultation, and be approved by Ministers with responsibility for WHS in each jurisdiction. Model Codes are not always the most appropriate way of providing guidance. There are other tools WHS regulators develop to assist duty holders including guidance material and fact sheets. Most regulators have their own range of guidance material targeted to the needs of their jurisdiction.

Complexity

WHS Ministers have been asked to consider ways to make WHS Codes less complex. Codes can be used in many ways; some businesses may use them to inform the development of business specific policies and processes while others may implement health and safety measures directly from the code.

The model Codes were drafted to be inclusive reference documents. This minimises the need to cross reference other documents when using a model Codes.

For example each model Code has sections on risk management and consultation. This is in addition to the:

- model Code of Practice: *How to Manage Work Health and Safety Risks*
- model Code of Practice: *Work Health and Safety Consultation Co-operation and Co-ordination*

As the number of model Codes has increased this duplication has created the potential for inconsistencies to be introduced. It increases the length of each model Code making them appear complex.

At the request of the Select Council Ministers, Safe Work Australia reviewed 12 draft model Codes to ensure they were clear, concise, practical and took into account all sectors of business including small business without compromising health and safety standards or imposing any further regulatory burden.

Safe Work Australia considered the revised draft model Codes on 6 June 2014 and agreed to eight draft documents being revised as guidance material and published on the Safe Work Australia Website.

The Agency will continue to review the remaining four draft documents and provide them to Safe Work Australia for further consideration.

Questions
5.1 What role should approved Codes of Practice have in the legislative framework?
5.2 Which model Codes of Practice do you use and how do you use them?
5.3 What improvements could be made to the model Codes of Practice to make them more useful?
5.4 Does it make any difference to you if guidance is presented in a Code of Practice or in other formats such as guides or fact sheets?
5.5 Is the level of detail in the model Codes of Practice appropriate? Please provide any examples of where material in a model Code is overly complex.

Jurisdictional flexibility

WHS Ministers have been asked to consider ways to increase flexibility for jurisdictions to approve and vary Codes of Practice, noting that any flexibility will need to be balanced against the benefits of harmonisation for multi-jurisdictional employers.

The *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA) gives Safe Work Australia responsibility for coordinating development of the model Codes to support the model WHS Act and Regulations. [69] To be approved by Safe Work Australia, proposed model Codes must receive a two-thirds majority of all Safe Work Australia Members present and voting at the meeting, plus a majority of all votes from Members representing the Commonwealth, States and Territories.

Under the IGA proposed model Codes approved by Safe Work Australia are provided to Workplace Relations Ministers for final approval. Where Workplace Relations Ministers agree to proposed model Codes by consensus, they become agreed model Codes which can then be adopted by jurisdictions under their WHS laws.

The model WHS Act requires the relevant Minister may only approve, vary or revoke a code of practice if the code, variation or revocation was developed by a process involving consultation between Commonwealth, state and territory governments, unions and employer organisations.[70]. This reflects the Safe Work Australia process for developing model Codes.

South Australia included an extra requirement in their WHS Act requiring consultation with the Small Business Commissioner before a code is submitted to the Minister. This provision is designed to allow the Commissioner to assess how the code will affect small business, and provide comments or advice prior to adoption. If the Commissioner recommends a code be varied the South Australian WHS Act allows the Minister to make the variation without the need to go through the consultation process again.[71] Prior to harmonisation all jurisdictions required codes be approved by their WHS Minister. Consultation on the development of codes was mandatory in seven of the nine WHS jurisdictions. The Commonwealth and the Northern Territory did not require consultation.

The current consultation process ensures model Codes are best placed to meet the needs of stakeholders in each jurisdiction so that they can be adopted without variation to maximise uniformity. However, this same process can restrict regulator's ability to quickly respond to emerging issues because of the time required to consult on and approve the model Codes. The current process can take up to 18 months from the time the content of the model Code has been settled to when it becomes an approved model Code. Some jurisdictions have issued the

[69] See Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety accessed 30 May 2014
[70] s274 of the Model WHS Act
[71] s247(3) of the South Australian WHS Act

draft model Codes as guidance material in their jurisdiction to fill the gap in information until a model Code is approved.

As noted above, the IGA sets out a process for Workplace Relations Ministers as a group to approve draft model Codes submitted by Safe Work Australia. However, when read in isolation, the provisions in the model WHS Act do not prevent an individual Minister from approving a model Code developed by SWA even if it does not have the approval of other Ministers.

There are currently over 40 jurisdiction-specific codes across the seven jurisdictions which have adopted model WHS laws. These codes have been preserved from previous legislation. Jurisdiction-specific codes cannot now be approved, varied or revoked unless this is done through a process involving consultation with Commonwealth, state and territory governments, unions and employer organisations.

Queensland amended their WHS Act on 9 April 2014 to remove section 274(2).[72] This change removes all requirements for the minister to consult before approving codes. One option would be to make a similar amendment to the model WHS Act. This may detract from the benefits of harmonisation as businesses may need to refer to multiple codes. Confusion may also arise if these codes provide differing or conflicting guidance.

A second option is to remove the requirement from the IGA which is due to be reviewed this year. This would provide Ministers with flexibility to adopt model Codes developed by Safe Work Australia in accordance with the model WHS Act and may speed up approval processes while still allowing for tripartite consultation.

Questions
5.6 What impact would allowing regulators to develop codes specific to their jurisdiction without national tripartite consultation have? Please provide evidence or examples.
5.7 What alternatives can you suggest to improve timeliness and flexibility in delivering codes? Would these alternatives involve any financial costs or benefits? Please provide evidence or examples.

6. Next steps

Feedback on this Issues Paper will be consolidated with data and results from related research. This will be analysed and used to produce a report with recommendations on how to improve the model WHS laws. This will be provided to COAG by the end of 2014. If required, a Decision RIS will be compiled and provided with the report.

Stakeholders are also invited to provide feedback on any other concerns that have not been identified in the Issues Paper. Feedback should, wherever possible, include evidence and examples to justify a position. This could include the benefits to health and safety and the costs of compliance.

[72] WHS and Other Legislation Amendment Act 2014

Appendix A: Development of the Model WHS laws

In February 2008 federal, state and territory Workplace Relations Ministers agreed the use of model legislation was the most effective way to achieve harmonisation of Work Health and Safety (WHS) laws.

In July 2008 the COAG signed the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA). The IGA sets out the principles and processes for cooperation between the Commonwealth, states and territories to implement model legislation. It was complemented by consistent approaches to achieve compliance and enforcement by the end of 2011.

This was the first time all jurisdictions had made a formal commitment to harmonise WHS laws in Australia within a set timeframe. This commitment included the development and implementation of a complete and fully integrated package. This package consisted of a model WHS Act, supported by model WHS Regulations, model Codes of Practice and a National Compliance and Enforcement Policy.

The IGA recommended a National Review into Model Occupational Health and Safety Laws be conducted to make recommendations on the optimal structure and content of a model Act that was capable of being adopted in all jurisdictions.

Model WHS Act

The National Review into Model Occupational Health and Safety Laws was completed in January 2009 resulting in two comprehensive reports being submitted to Workplace Relations Ministers. The reports made recommendations on the optimal structure and content of the national model WHS Act that could be adopted in all jurisdictions by December 2011.

On 18 May 2009, Workplace Relations Ministers made decisions in relation to the recommendations of the National Occupational Health and Safety Review and requested Safe Work Australia commence the development of the model legislation. An exposure draft of the model WHS Act was released for public comment in late September 2009.

In response to the exposure draft, Safe Work Australia received 480 submissions from individuals, unions, businesses, industry associations, governments, academics and community organisations. Safe Work Australia adopted a number of amendments proposed during the public comment period and submitted a revised version of the model WHS Act to Workplace Relations Ministers. They endorsed the revised laws on 11 December 2009 and authorised Safe Work Australia and the Parliamentary Counsel's Committee to make any further technical and drafting amendments to the model WHS Act to ensure its workability.

The model WHS Act was finalised in June 2011.

Model WHS Regulations

The model WHS Regulations were developed by the Strategic Issues Group on Occupational Health and Safety (SIG-OHS) of Safe Work Australia. This group comprised representatives of all nine jurisdictions, the Australian Industry Group (AI Group), the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU). Development of the model WHS Regulations were based on matters that were:

- covered in existing National Standards
- broadly included in the majority of jurisdictions' regulations, and
- policy decisions of SIG-OHS in line with the guidelines specified in the IGA.

The draft model WHS Regulations and a number of codes of practice were released for public comment for four months from December 2010 to April 2011. A total of 1,343 public submissions were received, 836 from individuals and 507 from organisations.
The model WHS Regulations were finalised in November 2011 and revised to incorporate technical amendments in January 2014.

Model WHS Codes of Practice

The IGA gives Safe Work Australia responsibility for coordinating development of the model Codes to support the model WHS Act and Regulations. Codes of practice provide practical guidance for duty holders on how to comply with the WHS laws. They are also admissible in court proceedings under the WHS laws as evidence of what is known about a particular hazard, risk or control measure. Duty holders can adopt other ways that provide a level of safety equal to or better than the standards set out in the model code of practice.

Where Workplace Relations Ministers agree to the proposed model WHS Codes of Practice by consensus, they become agreed model Codes.
The current agreed model Codes are:

- How to Safely Remove Asbestos
- How to Manage and Control Asbestos in the Workplace
- Abrasive Blasting
- Confined Spaces
- Construction Work
- Work Health and Safety Consultation, Cooperation and Co-ordination
- Demolition Work
- Managing Electrical Risks at the Workplace
- Excavation Work
- Managing the Risk of Falls at the Workplaces
- Preventing Falls in Housing Construction
- Managing the Work Environment and Facilities
- First Aid in the Workplace
- Labelling of the Workplace Hazardous Chemicals
- Preparation of Safety Data Sheets for Hazardous Chemicals
- Managing Risks of Hazardous Chemicals in the Workplace
- Hazardous Manual Tasks
- Managing Noise and Preventing Hearing Loss at Work
- Managing Risks of Plant in the Workplace
- How to Manage Health and Safety Risks
- Safe Design of Structures
- Spray Painting and Powder Coating
- Welding Processes

Decision Regulation Impact Statements

Under the COAG requirements, a RIS is required for all agreements and decisions made by COAG, Commonwealth-State Ministerial Councils and national standard setting bodies.

The development of a COAG RIS is a two-stage process involving a Consultation RIS and a Decision RIS. The purpose of a Consultation RIS is to canvas the regulatory options under consideration through seeking public comment to determine the relative costs and benefits of those options. The purpose of a Decision RIS is to draw final conclusions on whether regulation is necessary and if so, what the most efficient and effective regulatory approach might be, taking into account the outcomes of the consultation process.[73]

The Decision RISs for the Model WHS Act and the Model WHS Regulations and Codes of Practice are available on the Safe Work Australia website.

[73] Council of Australian Governments Best Practice Regulation: A guide for ministerial council and national standard setting bodies, October 2007, p7.

Appendix B: Entry to inquire into a suspected WHS contravention

Jurisdiction	Requirement
Model WHS laws	WHS entry permit holder must give notice of entry and the suspected contravention as soon as reasonably practicable after entry. Notice must be given to the relevant PCBU and the person with management or control of the workplace No notice is necessary if to give the notice would defeat the purpose of the entry or unreasonably delay the WHS entry permit holder in an urgent case Entry can take place in relation to a worker who works at the workplace, is a member or eligible to be a member of a relevant union, whose interests the union is entitled to represent.
Commonwealth **New South Wales** **Northern Territory** **Tasmania** **ACT**	As per the model WHS laws.
Queensland	WHS entry permit holders must provide a minimum of 24 hours and maximum of 14 days-notice before entering a workplace to inquire into a suspected WHS contravention. This amendment was made in 2014 to align WHS entry provisions with the Fair Work Act. All other provisions as per model WHS laws.
South Australia	Before entry to inquire into a suspected WHS contravention, a WHS entry permit holder must give consideration to whether it is reasonably practicable to give the Executive Director (head of Safe Work SA) notice of the entry 'in order to' allow for an inspector to attend the workplace at the time of entry. Executive Director must establish and maintain a publically available policy on the circumstances in which inspectors will attend workplaces following notice from WHS entry permit holders. If a WHS entry permit holder attends a workplace without being accompanied by an inspector, they must furnish a report on the outcome of the inquiries to the Executive Director. All other provisions as per model WHS laws.
Victoria	The Victorian legislation contains similar rights as the model WHS laws however these are framed in slightly different terms. Upon entry to inquire into a suspected WHS contravention an 'authorised representative' (WHS entry permit holder) must take all reasonable steps to give a notice to and produce their entry permit for inspection by: • an employer with management or control of the work, and • an HSR (HSR only if the entry affects members of the designated work group). This is broadly similar to the provisions in the model WHS laws, with the exception of the requirement to give notice and produce the entry

Jurisdiction	Requirement
	permit to the HSR. Entry can take place if suspected contravention: • relates to or affects work being carried out by one or more members of the registered employee organisation or • relates to/affects any of those members or • relates to or affects work being carried out by one or more persons whose employment is subject to a collective agreement, enterprise agreement or certified agreement
WA	No equivalent provision.

Appendix C: HSR Power to request assistance

Jurisdiction	Requirement
Model WHS laws	HSR can seek assistance from 'any person' PCBU can refuse to allow HSR assistant access to the workplace if assistant has had their WHS entry permit revoked or suspended or is disqualified from holding a WHS entry permit OR PCBU can refuse on reasonable grounds to allow HSR assistant access to the workplace Where access of HSR assistant is refused, HSR can ask regulator to appoint an inspector to assist in resolving the matter
Commonwealth **New South Wales** **Northern Territory** **Tasmania** **ACT**	As per the model WHS laws.
Queensland	As per the model WHS laws with an additional requirement for HSR assistants to give notice of entry. This amendment was made in 2014 consistent with the WHS entry permit holders amendments.
South Australia	As per the model WHS laws a HSR can seek assistance from 'any person', but 'any person' is limited to: • a person who works at the workplace; • a person who is involved in the management of the relevant business or undertaking; or • a consultant who has been approved as required by the legislation
Victoria	As per the model WHS laws, a HSR can seek assistance from 'any person'. However, the employer can refuse access to a workplace by an HSR assistant if the employer considers the person is not suitable to assist the HSR by reason of 'insufficient knowledge of occupational health and safety'.
Western Australia	No equivalent provision

Appendix D: HSR power to direct unsafe work cease

Jurisdiction	Requirement
Model WHS laws	HSRs that have completed the required training can direct unsafe work to cease if they first use the issue resolution and consultation provisions in the Act. The HSR must have a 'reasonable concern' that the worker will be exposed to serious risk to their health or safety emanating from an immediate or imminent exposure to a hazard. If the risk is so serious and immediate or imminent that it is not reasonable to consult or use issue resolution provisions before directing unsafe work to cease, the HSR can make the direction without doing so.
Commonwealth **New South Wales** **South Australia** **Northern Territory** **Tasmania** **ACT**	As per model WHS laws
Queensland	No equivalent provision. Relevant amendments were made in 2014 removed HSRs' power to direct unsafe work cease work.
Victoria	Provision is similar to the one under the model WHS laws. It states that if an issue arises that involves an immediate threat to the health and safety of any person and given the nature and degree of risk it is not appropriate to adopt processes set out in the legislation the employer and HSR can direct unsafe work to cease after consultation between them.
WA	No equivalent provision for 'safety and health representatives' under WA legislation.

Appendix E: Record Keeping and Notification Requirements

Record keeping requirements

Reference	Requirement
r.50 Monitoring airborne Contaminant levels	**The PCBU at the workplace must keep records of monitoring airborne contaminant levels be kept for 30 years.**
r.85 High Risk Work - Evidence of Licence— Duty of Person Conducting Business or Undertaking	**A PCBU must see written evidence of a worker having a high risk work licence or having applied for one before they allow them to carry out high risk work for which a licence is required. The PCBU must keep a record of the written evidence provided for at least a year after high risk work is carried out.**
r.170 Diving Work – Duty to Keep a Certificate of Medical Fitness	The PCBU must keep the certificate of medical fitness of a worker who carries out general diving work for 1 year after the work is carried out.
r.175 Diving Work – Evidence of Competence – Duty of Person Conducting a Business or Undertaking	**The PCBU must keep written evidence of competency for 1 year after diving work is carried out or person performs a function.**
r.181 Diving Work – Use of Dive Safety Log	**The PCBU must ensure the dive safety log is kept for 1 year after the last entry is made.**
r.182 Diving Work – Record Keeping	A risk assessment made under r176 must be kept for at least 28 days after work is completed and dive plans under r178 must be kept until the work is completed. **If a notifiable incident occurs both must be kept for at least 2 years after the incident. Copies must be available to workers who undertook the work and inspectors.**
r.230 Additional Duties Relating to Registered Plant and Plant Designs - Records to be Available for Inspection	A designer of plant must keep plant design records for the design life of the plant.
r.242 Additional Duties Relating to Registered Plant and Plant Designs – Log Book and Manuals for Amusement Devices	A PCBU with management or control of an amusement device must ensure details of the erection and storage or the amusement device are kept in a log book. This log book and operation and maintenance manuals must be kept with the amusement device.
r.378 Hazardous Chemicals - Health Monitoring Records	The PCBU must ensure health monitoring reports for workers working with hazardous chemicals are kept for 30 years.
r.415 Lead – Removal of Worker from Lead Risk Work	The PCBU for which a worker is carrying out lead risk work must notify the regulator as soon as practicable if a worker is removed from carrying out lead risk work because health monitoring shows

Reference	Requirement
	they have blood lead levels above the stated levels.
r.425 Asbestos – Asbestos Register	The PCBU with management or control of a workplace must ensure an asbestos register is prepared and kept at the workplace if the workplace was constructed before 31 December 2003 where no asbestos has been identified and no asbestos is likely to be present from time to time.
r.444 Asbestos at the Workplace – Health Monitoring Records	The PCBU must keep health monitoring records for at least 40 years.

Notification requirements

Reference	Requirement
r.142 Demolition Work – Notice of Demolition Work	The PCBU must notify the regulator at least 5 days before commencing certain higher risk demolition work. Emergency services who must undertake demolition work in responding to an emergency must give notices as soon as practicable, either before or after work is carried out.
r.454 Asbestos Demolition and Refurbishment – Emergency Procedure	Applies to a PCBU with management or control of the workplace where an emergency occurs at a workplace (other than a residential premises) requiring the demolition of a structure or plant containing asbestos. The PCBU must reduce the risk of exposure to workers and other persons in the vicinity and give written notice to the regulator about the emergency immediately after the person becomes aware of the emergency and before the demolition starts.
r.454 Asbestos Demolition and Refurbishment – Emergency Procedure Residential Premises	Applies to a PCBU carrying out demolition work where an emergency occurs at a residential premises requiring the demolition of a structure or plant containing asbestos. The PCBU with must reduce the risk of exposure to workers and other persons in the vicinity and give written notice to the regulator about the emergency immediately after the person becomes aware of the emergency and before the demolition starts.
r.466 Asbestos Removal Work - Regulator Must be Notified of Asbestos Removal	A licensed asbestos removalist must give written notice to the regulator at least 5 days before the removalist commences licensed asbestos removal work. It may commence immediately if there is a sudden unexpected event which may cause people to be exposed to respirable asbestos or a breakdown in essential services requiring immediate rectification. If this occurs the removalist must notify the regulator immediately by telephone and in writing within 24 hours.
r.547 Determinations about Major Hazard Facilities - Re-notification if Quantity of Schedule 15 Chemicals Increases	The operator of the MHF or must proposed MHF to re-notify the regulator if notification was given under r536 or r537 and the regulator has not conducted an inquiry or has determined the facility is not a MHF and the quantity of the schedule 15 chemicals increases.