Decision Regulation Impact Statement

Improving the model **Work Health and Safety** laws

December 2014

Contents

Executive Summary

This Decision Regulation Impact Statement has been developed to assist the Council of Australian Governments (COAG) in considering recommendations to improve the model Work Health and Safety (WHS) laws as requested on 2 May 2014. It examines impacts of options to address the specific issues identified by COAG with reference to the model WHS laws only. The following assessments have been determined for each recommendation made by Ministers with responsibility for WHS.

Director's (officer's) liability

1. *Ministers recommend the officer's duties be retained in its present form, but that further guidance is developed and promoted on:*
   - *who is an officer, and*
   - *what is required to meet the standard of due diligence*

   to improve understanding of the provision.

Issuing additional guidance material to clarify the WHS laws will not impose any significant costs on businesses and should be marginally beneficial in the medium to longer term.

Powers of Union Officials

2. *The majority of Ministers recommend:*
   a. *the model WHS Act and relevant model WHS regulations be amended to require that a minimum of 24 hours and maximum of 14 days' notice be provided for entry into a workplace to inquire into a suspected WHS contravention. The notice should include details of the suspected contravention*
   b. *COAG note WHS Ministers' previous agreement to increase penalties associated with breaching the conditions of WHS entry permits, and*
   c. *Safe Work Australia develop guidance on what records may be accessed and on privacy requirements to assist duty holders to comply with the provisions.*

These changes will reduce costs for businesses that have been subject to union officials using the right of entry powers inappropriately, particularly in the construction industry.

The notification requirement should not have an adverse impact on safety and may help businesses, workers and unions resolve work health and safety issues in a constructive manner.

As with recommendation 1, additional guidance material on records and privacy will not result in any additional costs, and should be beneficial in the longer term by assisting business in complying with the provisions.

Powers of Health and Safety Representatives

3. *The majority of Ministers recommend:*
   a. *COAG note WHS Ministers' previous agreement to require a minimum of 24 hours (maximum of 14 days) notice be provided for entry by an assistant*
   b. *the ability for Health and Safety Representatives to issue PINs is retained, with an amendment to section 93 of the model WHS Act to replace references to 'directions' in PINs with 'recommendations' to clarify the intended operation of the section*
   c. *the ability for Health and Safety Representatives to direct unsafe work cease is retained, and*
   d. *provisions relating to training for Health and Safety Representatives are amended to allow for competency-based training and flexible delivery modes.*

Requiring notification will impose a marginal additional administrative cost to HSRs and therefore to businesses, since HSRs are workers. There may also be some minor delay costs imposed as a result of it taking up to 24 hours longer to address some work health and safety hazards, but this impact would be very small.

Clarifications to section 93 will have no costs on businesses as requirements themselves are unchanged. The clarification may reduce costs for businesses and regulators by reducing the potential for disputes regarding compliance with PINs.

Retaining the existing HSR power to direct unsafe work cease would maintain existing safety protections for workers and mean that there would be no requirement for HSRs, businesses, workers and regulators to adapt to new arrangements.

A shift to competency based training should benefit businesses and workers by introducing a more effective learning structure. Additional flexibility in training delivery modes should improve efficiency of training delivery and reduce costs for businesses.

Improving model WHS Regulations

4. Ministers recommend:

a. *COAG note Ministers have tasked Safe Work Australia with progressing ways to improve the model WHS regulations to reduce unnecessary regulatory burden consistent with the findings in this report. Safe Work Australia will report to Ministers by April 2015, so that Ministers can make a decision on these matters before the end of June 2015, and*
b. *Safe Work Australia develop a tool that will assist duty holders ascertain which WHS regulations apply to their business or undertaking and work with WHS regulators to clarify any misinterpretation of the laws that are contributing to regulatory burden.*

Removing, streamlining or simplifying the model WHS Regulations without compromising safety outcomes should reduce costs for businesses. The report from Safe Work Australia on these proposals will be accompanied by a separate Regulatory Impact Statement.

Improving model Codes of Practice

5. Ministers recommend:

a. *a continuing role for Safe Work Australia in developing national guidance material and, if needed, model Codes of Practice to support the model WHS laws and to maintain consistency*
b. *national guidance material and model Codes of Practice be concise, focussed on a specific hazard or activity and written in a simple easy to understand style*
c. *national guidance material be the preferred format, unless Safe Work Australia Members identify that a model Code of Practice is needed, based on a set of rigorous criteria agreed by Ministers, and*
d. *jurisdictions continue developing their own suite of guidance materials where they need to address local issues.*

Clarifying the processes for developing national guidance and model Codes of Practice and improving the quality of guidance material should make it easier for businesses to understand and comply with their WHS obligations, resulting in lower ongoing compliance costs.

1. Background

On 2 May 2014 the Council of Australian Governments (COAG) agreed all governments would investigate ways in which model Work Health and Safety (WHS) laws could be improved with a focus on reducing regulatory burden and making it easier for business and workers to comply. In particular, COAG requested that Ministers investigate:

1. director's liability provisions (officer's duties), with specific regard whether these create a disincentive to take up officer roles
2. right of entry and other powers of union officials and powers of health and safety representatives (HSRs), including whether these should be subject to further limitations
3. 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, and
4. whether the current WHS system reflects best practice, in that the model WHS laws:
    a. are evidence based, cost effective and proportional to the health and safety risks they seek to address
    b. are simple and streamlined for businesses to comply with, and
    c. where possible, allow duty holders flexibility in how they comply with their obligations.

The investigation has included wide-ranging consultation. A Consultation Regulation Impact Statement (RIS) was published in July 2014. The Consultation RIS asked for input on the specific areas identified by COAG, and for assistance with identifying areas of the model WHS laws where improvements could be made. The investigation has also considered data gathered in research undertaken by Safe Work Australia during 2014 as part of ongoing work to evaluate implementation of the model WHS laws.

2. Problem

The investigation found general support for harmonisation of WHS laws. In relation to the matters identified by COAG, there are a number of areas where the WHS laws are having a positive impact, such as the duty placed on officers. However, submissions also raised the following concerns:

1. for smaller organisations, a lack of clarity regarding who is an officer and how they can meet their due diligence requirements under the model WHS laws
2. potential abuse of powers granted under the model WHS laws to WHS entry permit holders, particularly when entering without notice to inquire into a suspected contravention, and confusion caused by inconsistency in notice provisions both within the model WHS laws and with other laws governing entry
3. the inflexibility and standard of training for HSRs, and
4. model Codes of Practice are too complex for some businesses to easily implement.

This Decision Regulation Impact Statement considers and analyses options to address the problems identified above to allow COAG to make an informed decision on the recommendations in the report: *Improving the Model Work Health and Safety Laws* (the report).

The investigation also identified areas in the model WHS Regulations where:

- the level of prescription was thought to be disproportionate to the risk or unnecessarily limit flexibility in compliance
- the regulations repeat requirements elsewhere in the laws or do not add to or support health and safety outcomes
- provisions are difficult to interpret or comply with, and
- provisions could be streamlined or consolidated to remove duplication.

The report recommends that improvements to the model WHS Regulations be progressed by Safe Work Australia for consideration and decision by Ministers with responsibility for WHS by June 2015. These issues will be addressed in a separate Decision Regulation Impact Statement.

3. Objectives in improving the model WHS laws

The Consultation RIS released in July 2014 included an overarching objective for identifying opportunities to more closely align the model WHS laws with COAG characteristics of good regulation without compromising safety outcomes. These include elements such as:

- minimising regulation to only what is necessary to achieve objectives
- focusing on outcomes and avoiding unnecessary restriction on how to comply
- minimising administrative and enforcement burden on regulators and the community, and
- increasing consistency of regulators' administrative decisions to reduce discrepancies, uncertainty and compliance costs while permitting flexibility.

The investigation sought to identify and address areas in the model WHS laws that are more burdensome than beneficial, or are redundant, confusing, unnecessarily complex or prescriptive.

4. Analysis of policy options

Work health and safety benefits all Australians. Having a safe and healthy work environment means that businesses can operate effectively and workers can focus on improving their performance and productivity. Working adults typically spend approximately one-third of their day at work, therefore preventing harm from occurring at work is essential.

Injuries and illness caused by accidents at work have significant direct impacts on the injured person and their family. These also result in lost productivity for their employer. Studies have shown that long-term absences and disabilities have a negative impact on overall health and wellbeing, highlighting the high and unquantifiable cost of workplace injuries, and also the importance of preventing such injuries from occurring. There is also a cost to government in both investigating workplace incidents and in social services such as medical care and income assistance provided to support recovery.

Work health and safety regulation affects all of Australia's 2 million businesses, 11.6 million employed persons, as well as those working for volunteer or community organisations. Consequently, any changes made to the laws have the potential to affect businesses and undertakings across Australia if adopted in all jurisdictions. However, not all organisations will be affected by changes equally. Businesses engaging in higher risk activities, such as those in the construction, manufacturing, and primary industries, are subject to a greater degree of regulation and therefore are more likely to be affected by changes to the WHS laws.

In a recent survey, a majority of businesses in Australia (78.1 per cent) indicated that they had not made changes to their WHS practices in response to changes to the WHS laws. However, when the survey responses are broken down by size of business, over a quarter of small businesses (26 per cent), and most medium (64 per cent) and large (88.3 per cent) businesses indicated that they had changed practices in response to changes in WHS laws.[1] Forty per cent of small businesses had not undertaken any activities to transition to the model WHS laws. However, harmonisation appears to have prompted around half of smaller businesses to review their WHS practices.

In 2008 all Australian Governments agreed to use model legislation to improve consistency in work health and safety by signing the *Intergovernmental Agreement for Regulatory and*

[1] *Health and Safety at Work: Your experiences and Costs* survey, Safe Work Australia, 2014

Operational Reform of Occupational Health and Safety (the IGA). Safe Work Australia is responsible for developing and maintaining the model legislation and supporting guidance material. Each government must adopt the model legislation in their jurisdiction for the model to become law. Variations to the model are permissible to allow the laws to operate within the jurisdictions broader legislative framework. So far, seven of the nine governments have adopted the model WHS laws. In October 2014, Western Australia introduced a bill based on the model WHS laws into their parliament and is seeking public comment by 30 January 2015.[2]

Where statistics are available that indicate the likely impacts of changes, these have been included in the text. However, it is not possible for the purposes of this RIS to examine the differences between the laws that apply in each jurisdiction and to then calculate the marginal differential impact of each proposed change. A robust data set with sufficient detail about business location, size, industry, and number of employees – which would be a prerequisite for an analysis of this sort – does not currently exist.

4.1 Director (officer) liability under the model WHS laws

The model WHS Act places a positive duty on 'officers' to exercise due diligence to ensure the person conducting the business or undertaking (PCBU) complies with its WHS obligations.

The model WHS Act adopts the definition of an officer of a corporation, partnership, or unincorporated association from section 9 of the Commonwealth *Corporations Act 2001* (Corporations Act). 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.[3]

Due diligence is defined by the WHS Act as including taking reasonable steps to:[4]

- acquire and keep up-to-date knowledge of WHS matters
- gain an understanding of the nature of the operations of the business or undertaking and generally of the hazards and risks associated with those operations
- 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
- 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
- ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the WHS Act, and
- verify the provision and use of these resources and processes.

COAG requested that director liability provisions under the model WHS laws be examined with specific regard to whether these provisions create a disincentive to assume the position of director. The model WHS laws use the broader category of 'officer' to attribute duties to senior individuals within a business or undertaking. This includes directors.

Issues

Use of the Corporations Act definition of an officer was new to health and safety legislation in all jurisdictions which adopted the model WHS Act. The pre-harmonised New South Wales and Queensland laws adopted a specific definition of an officer as including directors and the secretary of the corporation and each person 'concerned in the management of the corporation'. Tasmania and South Australia included appointment of a 'responsible officer' to take

[2] Further information on development and adoption of the model WHS laws can be found on the Safe Work Australia website.
[3] Section 4 of the model WHS Act
[4] Section 27(5) of the model WHS Act

responsibility for WHS within an organisation. New South Wales, Queensland and Tasmania previously deemed officers to be liable for work health and safety offences committed by their company unless they established a defence, including that they exercised due diligence.

The positive nature of the officer duty was also new for all jurisdictions who adopted the model laws. Although all jurisdictions previously had provisions to make directors and senior managers within an organisation accountable for meeting its WHS obligations, the approaches in doing so varied. Under pre-harmonised laws, directors and other officers of companies had liability attributed to them for the conduct of their company in certain circumstances. This required in the first instance a breach of duty by the organisation, with officers liable for any conduct or omission that led to that breach.

The concept of 'due diligence' was not defined in pre-harmonised laws, although the Australian Capital Territory provided a list of 'reasonable steps' an officer should take to prevent a contravention by a corporation.

The previous Decision RIS on the model WHS Act found that the anticipated costs of implementing the duty would be minimal.[5] It was expected that business would benefit with reduced uncertainty and greater compliance with WHS obligations, while the only cost would be training officers to understand the new duty.

Submissions from industry bodies suggested there had been some confusion for small and medium businesses moving to the new officer definition. This was not the case for larger organisations which are more familiar with the concept of officer and how it operates under the Corporations Act. No feedback was received which identified the current arrangements as disincentive for taking up the position of officer.

Options

Two options were considered to address concerns raised with the officer duties; amending the provision or maintaining them as they currently are and issuing guidance to clarify their operation.

Option 1 – Amendment

A small number of submissions suggested making amendments to the either the duty itself or to the definition of 'officer'. For example, it was proposed that a person must have the ability to 'command, direct and compel' to be deemed an officer.

However, this kind of amendment may create more uncertainty while moving away from the original purpose of the duty, which is to focus the officer's attention on the WHS governance and processes of a PCBU rather than day to day management.

Amending the definition of officer so that it is specifically tailored to WHS was also suggested. Adopting a separate definition of 'officer' was considered in the 2008 OHS Review. It noted that any new definition would require interpretation by the courts, creating uncertainty as to who would be considered an officer until a body of case law is established, whereas the Corporations Act definition is well established and known by those who are officers.

A legislative change would not make a substantive difference to the ongoing cost faced by businesses complying with the officer duty, but there would be transitional costs for businesses to understand the change. For example, some businesses may seek legal advice to understand the relevance of the change to their operations. In 2012-13, 8.8 per cent of Australian businesses incurred costs relating to legal or expert advice on WHS activities.[6]

[5] *Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice*, Safe Work Australia, November 2011

[6] *Health and Safety at Work: Your experiences and Costs* survey, Safe Work Australia, 2014

Option 2 – Maintain current arrangements

Maintaining the status quo would see the positive duty on an officer to exercise due diligence remain. Under the current arrangements:

- an officer is only responsible for his or her own actions or failures (not any action or failure on the part of other persons in the organisation of the corporate body itself)
- the onus of proof falls on the prosecution
- the concept of due diligence is clearly defined
- the positive duty to exercise due diligence acts as a driver to ensure that those in leadership roles take an active role in ensuring health and safety at work, and
- by ensuring that a volunteer officer cannot be prosecuted for failing to comply with this duty, the creation of a disincentive to becoming a volunteer officer is avoided.

The impact of retaining the current provision would be to provide certainty for businesses that have already had to adapt to changes from harmonisation. It also retains a common definition for officers that apply across other areas of law, such as corporations and taxation law.

Preferred Option

Given that a legislative change will incur costs to business without materially changing the duties or improving workplace safety, the preferred option is for the officer duties to be retained in its present form. However, to address concerns about confusion regarding the officer duty for small and medium business, further guidance should be developed and promoted on who is an officer, and what is required to meet the standard of due diligence.

4.2 Powers of union officials under the model WHS laws

The model WHS laws allow authorised representatives of unions to enter workplaces for health and safety purposes. This recognises the positive impact that can result from union involvement and representation in WHS matters. Only a small number of Australian businesses (1.5 per cent) have reported one or more incidences of unions requesting access for WHS reasons[7], and the feedback from submissions suggests that many of these access requests occur in the construction industry.

The model WHS Act confers rights on a person who holds an office in, or is an employee of, a union to enter workplaces and exercise certain powers while at those workplaces. Entry permit holders authorised under the model WHS Act[8] may enter a workplace for the following purposes:

- to inquire into suspected contraventions of the WHS Act[9]
- to inspect employee records or other documents relating to a suspected contravention held by another person,[10] and
- to consult or advise workers on WHS matters.[11]

COAG requested that powers of union officials under the model WHS laws be examined, with specific regard to whether further limitations should be applied.

4.2.1 Entry to inquire into a suspected WHS contravention

Entry permit holders are required to provide a minimum 24 hours and maximum 14 days' notice prior to entry for all WHS purposes,[12] except when inquiring into a suspected WHS

[7] *Health and Safety at Work: Your experiences and Costs* survey, Safe Work Australia, 2014
[8] Section 131 of the model WHS Act defines WHS Entry permit holders as union officials that have applied for and been granted a WHS entry permit by the authorising authority in their jurisdiction
[9] Section 117 of the model WHS Act
[10] Section 120 of the model WHS Act
[11] Section 121 of the model WHS Act
[12] Sections 120(3) and 122 of the model WHS Act

contravention. The effect of this is that entry permit holders may enter workplaces at any time during working hours without notice.

The model WHS Act also requires that a WHS entry permit holder must, as soon as is reasonably practicable after entering a workplace to inquire into a suspected contravention, give notice of the entry and the suspected contravention in accordance with the regulations.[13]

Penalties and sanctions apply to entry permit holders who breach conditions of entry. Under Divisions 4 and 7 of the model WHS Act, maximum penalties of $10 000 apply if an entry permit holder is found to have contravened requirements for entry prescribed in the Act. This may include not making their permit available for inspection, entering the workplace outside of the usual working hours or delaying, hindering or obstructing any person or disrupting any work at a workplace.[14] In dealing with a dispute about right of entry for WHS purposes, the authorising authority may make orders to impose conditions on a WHS entry permit or suspend or revoke an entry permit.[15]

Issues

This entry without notice was intended to allow entry by union officials to quickly address urgent WHS concerns in the workplace. The absence of a notice requirement has the potential for abuse by entry permit holders entering the workplace under the guise of WHS concerns to pursue broader industrial agendas. This concern has been realised since implementation of the model WHS laws, with instances of misuse of right of entry powers cited by industry groups and employers especially in the construction industry. One regulator reported responding to 57 requests over a 14 month period to intervene in disputes regarding right of entry.

Stakeholders have also raised concerns that entry by union officials without notice circumvents the opportunity for the PCBU or local manager to properly investigate the WHS concern in the first place and address it, including through use of agreed issue resolution procedures. Employers also argue that the provisions in the model WHS Act for trained HSRs to be on site to respond to any urgent WHS concerns negates the need for any urgent access by union officials. As the current arrangements are inconsistent with notice requirements in other right of entry provisions in the model WHS Act and in the *Fair Work Act 2009*, they also create confusion for employers. Concerns have been raised about the failure by entry permit holders to inform the local manager or PCBU, or to provide sufficient detail, about the nature of the suspected WHS contravention.

Union submissions opposed the removal of right of entry without notice arguing that the current arrangements allow workers and employers to gain an honest perspective from a third party without the need to call a regulator and enable WHS issues to be resolved that otherwise may not be addressed by the employer, resulting in safer workplaces. Unions claim that immediate entry prevents some employers having time to ‘cover up’ safety concerns, and the surprise element of safety inspections keeps employers alert and motivated to meet their WHS obligations and duties. Unions also argue that if the right to entry without notice is removed, many workers will be reluctant to speak up about safety issues for fear of reprisal.

Safe Work Australia and Ministers agreed in early 2014 to amend the model WHS Act to double the penalties for breaching the conditions of an entry permit to a maximum $20 000.

Options

Two options were considered in addressing the concerns raised by stakeholders; maintain the current arrangements for right of entry to inquire into a suspected contravention or amend the notice requirements applying to the entry.

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[13] Section 119 of the model WHS Act
[14] Sections 123-129 and 146 of the model WHS Act
[15] Section 142 of the model WHS Act

Option 1 – Maintain current arrangement

Retaining the right for entry permit holders to enter workplaces without notice to inquire into suspected WHS contraventions would mean that there would be no requirement for PCBUs, workers and entry permit holders to adapt to new arrangements. This option allows permit holders to quickly intervene when WHS issues arise which require urgent attention.

Impacts of this option, however, include continuing:

- scope for abuse by union officials to use the lack of notice as potential means of inappropriate access to workplaces
- unexpected disruption to business operations, and associated loss of productivity and increased production costs, from union officials entering workplaces for alleged WHS purposes and interrupting scheduled work
- confusion among employers associated with inconsistency in notice periods across different types of entry by permit holders, and
- inability of employers and workers to take full advantage of the range of provisions in the model WHS Act to resolve safety concerns without third party intervention, including through consultation, issue resolution and HSRs.

On balance, it was clear this option would not address the myriad of concerns raised by stakeholders and would continue to impose costs on PCBUs in particular, in dealing with unannounced entry and disruption by union officials on issues other than genuine WHS concerns. While the contribution of unions to health and safety in the workplace is acknowledged, it is not the role of entry permit holders to 'catch' non-compliant duty holders or otherwise enforce WHS at a workplace. This is the role of the regulator. The model WHS laws provide other mechanisms for addressing urgent WHS issues within the workplace, such as consultation and issue resolution, the powers of Health and Safety Representatives, and the rights for workers to cease unsafe work.

Option 2 - Amendment

The second option is to require that a minimum 24 hours and maximum 14 days notice be provided for entry into a workplace to inquire into a suspected WHS contravention, and for the notice to include details of the suspected contravention. The proposed amendment will require a consequential amendment to the model WHS regulations[16] to remove the need for notice of the suspected contravention to be provided 'as soon as practicable' after entry.

The impacts of this option include:

- consistency of notice periods for right of entry by union representatives for all purposes under all relevant workplace legislation, as originally intended by Ministers in responding to the recommendations of the 2008 OHS Review, thereby improving clarity for PCBUs, workers and entry permit holders
- limiting the potential for abuse of right of entry by union officials and associated costs to employers and impost on regulator resources
- improving clarity as to the exact details of the suspected contravention as part of the notice so PCBUs are fully informed and can take action as needed, ahead of entry by permit holders, and
- removing the current incongruity where right or entry without notice can be for *any* suspected WHS contravention, not necessarily a serious or urgent matter.

While entry permit holders would cease to have immediate access to workplaces, they would continue to retain the right to enter workplaces for WHS purposes, subject to notice periods. Removing immediate entry could be said to reduce an assumed incentive for PCBUs to maintain high WHS standards at all times, or to quickly address issues. However, providing

[16] Regulation 28(a) of the model WHS Regulations prescribes that the notice of entry must include '*so far as is practicable, the particulars of the suspected contravention to which the notice relates*'

notice of permit holder entry could offer the same or greater incentive for the PCBU to rectify WHS issues without delay, with the benefit of a clearly articulated statement setting out the WHS concerns.

This would also address stakeholder concerns about the failure of some entry permit holders to sufficiently inform the PCBU or local manager about the suspected contravention.

Under this option PCBUs, workers and union officials would be required to become familiar with the new notice period for entry for a suspected WHS contravention. Authorised entry permit officials, in particular, would need to ensure they provide the required notice.

Importantly, this option would not impose any additional costs on PCBUs. The introduction of a notice period and requirement for the permit holder to provide detail of the suspected contravention ahead of entry is expected to result in fewer disputes. This would translate into less need for regulators to make WHS inspectors available to attend the workplace to mediate entry without notice. There would also be reduced costs to the business in terms of the time and effort associated with resolving right of entry disputes, including preparing and pursuing applications to the Fair Work Commission.

This option would also not impose additional costs on union officials in preparing entry notices as the model WHS Act currently requires a notice to be given as soon as is reasonably practicable after entering a workplace.

Preferred Option

While not all Ministers' supported this approach, the preferred option is to amend the model WHS laws to require that a minimum of 24 hours and maximum of 14 days' notice be provided for entry into a workplace to inquire into a suspected WHS contravention. The notice must include details of the suspected contravention.

This option would reduce business disruption and associated costs; reduce costs for regulators in investigating disputes relating to right of entry; enhance clarity and consistency for all parties in terms of right of entry for all purposes; maintain the safety of workers if the consultation, issue resolution and HSR roles are used as intended; and ensure the details of the suspected contravention are clear and advised well in advance of entry.

4.2.2 Entry to inspect employee records or information held by another person

The model WHS Act confers rights on authorised representatives of unions to enter workplaces to inquire into suspected WHS contraventions and to inspect or make copies of employee records that are directly relevant to the contravention which are held or accessible at that, or any, workplace.[17] Prior notice must be provided for entry of this type.[18]

The relevant PCBU must comply with the request to provide documents related to the suspected contravention unless allowing the WHS entry permit holder to access a document would contravene a Commonwealth, State or Territory law[19], for example the *Privacy Act 1988* (Cwth). Extra safeguards are contained in section 148 of the model WHS Act which prohibits the unauthorised use or disclosure of information or documents obtained under entry to inquire into a suspected contravention. The current provisions are modelled on the Fair Work Act.

Issues

The provisions in the Fair Work Act were developed to deal with employee records such as timesheets, leave and wage records, whereas the access to WHS records may include medical or other personal information.

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[17] Sections 117, 118(1)(d) and 120 of the model WHS Act
[18] Section 120(3) of the model WHS Act
[19] Section 148 of the model WHS Act and legislative note under section 118

A number of stakeholders raised concerns regarding privacy in the context of access by entry permit holders to employees' medical and other sensitive information. They also sought that information be de-identified before being provided to entry permit holders unless an individual agrees to their information being provided. It is clear, therefore, that there is a need for greater clarity regarding legislative provisions on access to employee records.

Options

Two options were considered in addressing the concerns raised by stakeholders about access by entry permit holders to sensitive personal information; amend the provisions to clarify privacy requirements, or maintain the current provisions consistent with the Fair Work Act.

Option 1 - Amendment

The model WHS Act could be amended to make it even clearer that PCBUs do not have to comply with requests by entry permit holders for employee records if this would contravene another law. For example, the provisions could be aligned with those governing HSR access to records at section 68(3) of the model WHS Act.

Such an amendment will not result in any change to obligations and therefore has no impact, but it may provide greater clarity of the grounds on which PCBUs can determine that certain employee records will not be made available to entry permit holders. This could reduce the potential for disputes and expedite decisions as to whether certain records are appropriate for release to the entry permit holder. It could also result in stronger protection of employee privacy.

However, this approach would make the provision appear inconsistent with the right of entry requirements under the Fair Work Act.

Option 2 – Maintain current arrangements

An alternative is to maintain relevant provisions in the model WHS laws but provide greater clarity by expanding existing guidance material.

Guidance on the interpretation and application of the right of entry provisions under the model WHS Act is provided in Safe Work Australia's Interpretive Guideline*: Workplace Entry by Work Health and Safety Entry Permit Holders*.[20] This Guideline could be amended to include advice on entry permit holders accessing employee records and when it is appropriate for PCBU's to refuse access.

This option would have minimal impact as businesses would only need to familiarise themselves with the Guideline in cases of uncertainty. Like the first option, the guidance could reduce the potential for disputes and expedite decisions as to whether certain records are appropriate for release to the entry permit holder. It could also result in stronger protection of employee privacy.

Preferred Option

The preferred option is to maintain current provisions and for Safe Work Australia to develop guidance on what records may be accessed and on privacy requirements to assist duty holders to comply with the provisions.

4.3 Powers of Health and Safety Representatives (HSRs)

The model WHS Act sets out an exhaustive list of the powers and functions of HSRs.[21] These powers are intended to enable HSRs to effectively represent the interests of the members of their work group and to encourage worker participation in WHS matters.

The powers and functions of HSRs under the model WHS laws are to:

[20] See Interpretative Guideline: *Workplace Entry by WHS entry permit holders*, accessed on the Safe Work Australia website.
[21] Section 68 of the model WHS Act

- represent the workers in their work group in relation to WHS matters
- monitor the measures taken by the PCBU to comply with the WHS Act in relation to their work group members
- investigate complaints from work group members about WHS, and
- inquire into anything that appears to be a risk to the health or safety of work group members, arising from the conduct of the business or undertaking.

COAG requested that the powers of HSRs in the model WHS Act be examined with specific regard to whether they should be subject to further limitations.

For the purposes of the examination, analysis was confined to three specific powers which were the main focus of stakeholder comment:

- the power to request the assistance of 'any' person in exercising their powers and functions
- the power to direct unsafe work to cease, and
- the power to issue Provisional Improvement Notices (PINs).

Ministers recommended COAG note a previous agreement to require a minimum of 24 hours (maximum of 14 days) notice be provided for entry by an assistant.

Just over 50 per cent of medium and large businesses have one or more HSRs, whereas 19 per cent of small businesses have an HSR.[22] Most businesses with an HSR reported they were useful for consulting with workers and that HSRs made useful suggestions to improve health and safety in their workplace.

4.3.1 Power of HSRs to direct unsafe work to cease

The model WHS Act provides that a HSR who has completed specific training may direct a worker in the HSR's work group to cease work if the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.[23] This provision was included in the model WHS Act together with a provision which enshrines the common law rights of a worker to cease, or refuse to carry out, unsafe work.

There are a number of existing limitations on the power to direct unsafe work cease in addition to the training requirements to exercise this power.

The HSR must also consult with the PCBU or use the issue resolution process under the model WHS Act to resolve the concern, before directing a worker or group of workers to cease work.[24] However, the HSR can consult as soon as practicable after giving the direction if the risk is so serious, and immediate or imminent, that it is not reasonable to consult.[25]

The HSR (or PCBU or worker) may ask the regulator to appoint an inspector to attend the workplace to assist in resolving an issue arising in relation to the cessation of work.[26]

Issues

It was clear from submissions that the role of HSRs is generally viewed by industry, unions and regulators as positive. The important role of HSRs in advocating on behalf of vulnerable, less empowered workers was acknowledged by all stakeholders. There was little evidence that the right to direct a worker or group of workers to cease work has been misused, even in jurisdictions where HSRs have had these powers for decades.

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[22] *Health and Safety at Work: Your experiences and Costs* survey, Safe Work Australia, 2014
[23] Section 85(1) of the model WHS Act
[24] Section 85(2) of the model WHS Act
[25] Section 85(3) of the model WHS Act
[26] Section 89 of the model WHS Act

Safe Work Australia interviews with large businesses in 2013 indicated that there is general satisfaction with the function and role of HSRs. Approximately one in eight Australian businesses with HSRs had one or more instances where the HSR directed that work should cease due to their concerns about a serious risk to a worker's health or safety.[27] There were no concerns raised by these businesses in relation to the HSR powers to direct unsafe work to cease. In addition, union organisations are strongly in favour of retaining all HSR powers in their existing form as they are seen as important safety mechanisms.

However, submissions from employer groups suggested that:

- the HSR power to direct unsafe work cease is duplicative, as workers already have the power to cease their own unsafe work and are best placed to make this decision, therefore the power should be removed or HSR training improved, and
- if HSR powers have been abused, there should be a process for the regulator to suspend the HSR's powers.

Queensland removed the power through its *Work Health and Safety and Other Legislation Amendment Act 2014*, and the Northern Territory has indicated it will also remove the provisions. The Queensland explanatory memorandum on their amendment states:[28]

> *'There is a range of mechanisms in the Act designed to ensure the safety concerns of individual workers are identified and addressed. There is a duty on persons conducting a business or undertaking to consult with workers on health and safety matters and a mandatory issue resolution process. Additionally, workers may raise issues with the health and safety representative for their work group and seek their participation in any interview regarding health and safety concerns with the person conducting the business or undertaking. In any case, safety concerns can be raised directly with the WHS regulator or an inspector anonymously at any time'*

The Queensland explanatory memorandum also states they expect HSRs will advise workers when it may be appropriate to cease unsafe work.

Western Australia has not included the right for HSRs to direct unsafe work cease in their Work Health and Safety Bill 2014 because their view is that this decision should remain with the individual worker and not be placed upon a health and safety representative.[29]

Options

Three options were considered in addressing the concern raised by stakeholders; these were removal of the power, amending the provisions, or maintaining the status quo.

Option 1 – Remove the provision

Arguments for removing the power for HSRs to direct unsafe work cease are based on two factors; potential for abuse of the power and duplication of the workers' statutory right to voluntarily cease unsafe work. The examination was unable to substantiate claims regarding abuse of the power. While the HSRs power does overlap with the workers' statutory right to cease unsafe work, some workers may not have the awareness or the confidence to exercise this right individually.

Impacts of this option may lead to a reduction in health and safety protections, for example:

- Workers who are inexperienced, uneducated in WHS or concerned about their employment may not raise WHS issues with PCBUs, and
- HSRs, given their training and operation on a day to day basis in the workplace, may be better placed than individual workers to progress discussions with PCBUs and

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[27] *Health and Safety at Work: Your experiences and Costs* survey, Safe Work Australia, 2014
[28] Queensland Government, *Explanatory Notes for the Work Health and Safety and Other Legislation Amendment Bill 2014 (Qld)*, p3
[29] Western Australia Government, *Work Health and Safety Model Regulations and Codes of Practice: Consultation Regulation Impact Statement Information and Issues Paper*, (A3819396) August 2012, p4

participate in the issue resolution process, potentially reducing the number of "false alarms" and the amount of cease work periods.

Option 2 - Amendment

Suggestions were made to amend the model WHS Act in relation to the power of HSRs to direct unsafe work cease, including a process for removing or suspending the HSR if powers are abused. However, provisions to remove and disqualify HSRs already exist under the model WHS laws. For example, a person can be removed from the HSR role by a majority of the members of the work group in accordance with the regulations.[30] The model WHS Act also allows the regulator or affected person to apply to have a HSR disqualified by the courts. This can be done on the grounds they have improperly exercised a power or function, or used or disclosed information acquired as a HSR for a purpose other than in connection with their role.[31]

Another suggestion involved amending the provision to clarify that the cease work power could only be exercised to the extent necessary to control the risk. However, this could unintentionally give rise to disputes about the extent to which ceasing work is required to control a risk (which already has to be a serious risk emanating from an imminent or immediate exposure to a hazard).[32]

Option 3 – Maintain current arrangements

Retaining the existing HSR power to direct unsafe work cease would maintain existing safety protections for workers and mean that there would be no requirement for HSRs, PCBUs, workers and regulators to adapt to new arrangements.

Workers ceasing unsafe work is a common law right. The right for workers to cease unsafe work was enshrined in pre-harmonised OHS legislation in some jurisdictions. Others assigned a similar power to HSRs. Only one jurisdiction assigned the right to both.

The provision to allow HSRs to direct unsafe work cease supports vulnerable workers who are unaware or fearful of exercising their right; and may reduce the potential for conflict between a worker and their employer on exercising this right. HSRs must complete training and consult with the PCBU, if possible, prior to exercising their power. The workers right to cease unsafe work is also explicitly included in the model WHS laws as many workplaces will not have HSRs.

In terms of its impact on PCBUs, there is little difference between the HSR or an individual deciding to cease work. Because of this, the HSR power may be seen as duplicating the workers' right and has been removed in one jurisdiction since adopting the model WHS laws. In both circumstances the workers must remain available to carry out suitable alternative work.

Preferred Option

There is little evidence to support the claim that this power is being abused by HSRs and the overlapping of powers has little impact on businesses. The preferred option is to maintain existing safety protections for workers and retain the ability for HSRs to direct unsafe work to cease. Not all Ministers supported this option.

4.3.2 Power of HSRs to issue PINs

A PIN is a written notice issued by a HSR requiring a contravention, of likely contravention, under the model WHS Act or Regulations to be remedied within a certain period.

Before issuing a PIN the HSR must first consult with the person who is to receive the proposed notice. If consultation does not result in the contravention being addressed, then a PIN may be issued in writing. It must state which provision is considered to have been contravened and how it has been contravened. It must also include the date for remedying the contravention, at least

[30] Section 64(2)(d) of the model WHS Act
[31] Section 65 of the model WHS Act
[32] Section 85(1) of the model WHS Act

eight days from the issue date.[33] A PIN can include directions on how to remedy a contravention, including through reference to a code of practice and offering the person a choice of solutions.[34]

The affected person or PCBU issued with a PIN can ask the regulator to have the notice reviewed by an inspector. If no review is sought the PIN must be complied with – that is, the contravention must be remedied within the time allowed or prevented from occurring in the first place, whichever applies.[35]

If a request is made to review the PIN it ceases to have effect until the inspector makes a decision on the review. The inspector must either confirm the PIN, with or without changes, or cancel it. A confirmed PIN, with or without changes, becomes an improvement noticed issued by the inspector under the model WHS Act and must be complied with.

Issues

Only around 3 per cent of Australian businesses with HSRs reported having a PIN issued to them by a HSR.[36]

PINs are an important tool in promoting safety and ensuring compliance in the workplace. The model WHS Act provides that a HSR who has completed prescribed training can issue a PIN if the representative reasonably believes a person is contravening the model WHS laws. HSRs are familiar with the workplace and are considered to have the skills and knowledge to identify and address safety concerns.

Unions are strongly in favour of HSRs retaining the ability to issue PINs as they are seen as an important safety mechanism.

In interviews with businesses, seven of the 34 participants indicated they 'didn't like PINs' when asked whether any elements of the model WHS Act were unnecessary or unreasonable, however, no further detail was provided to indicate an issue with the provisions.[37]

Increased limitations regarding HSR's issuing PINs were suggested by employers and employer groups:

- the power to issue notice should rest with the regulator; if a HSR identifies an issue, there are mechanisms which can be used for resolution, or
- clarification that a PIN is invalid if it is issued without consultation.

In addition, one WHS regulator has raised concerns over the enforceability of directions given under a PIN. Under section 93 of the model WHS Act, a PIN issued by a HSR may include directions to remedy a contravention. Section 93(2) states that a direction may refer to a code of practice and offer the person to whom it is issued a choice of ways in which to remedy the contravention. Section 99 makes it an offence for a person issued with a PIN not to comply with it. At issue is whether there is a difference between failing to comply with a PIN and failing to comply with a direction made under a PIN.

Options

Two options were considered in addressing the concerns raised by stakeholders; removal of the power and retention of the power with clarification.

Option 1 – Remove the provision

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[33] Sections 91 and 92 of the model WHS Act
[34] Section 90(2) of the model WHS Act
[35] Section 100 of the model WHS Act
[36] *Health and Safety at Work: Your experiences and Costs* survey, Safe Work Australia, 2014
[37] *Impacts of Work Health and Safety Harmonisation on Very Large Businesses*, Neil Gunningham, Gunningham and Associates, August 2013, unpublished, p38

A submission suggested the power to issue notices should only be vested in an inspector. However, the ability for appropriately qualified HSRs to issue PINs allows workplaces to address safety issues without third party intervention. Removal of the power to issue PINs may have both a safety impact for workplaces if inspectors are not available; and a cost impact for regulators in additional resources required to meet increased demand for workplace attendance. HSRs are also required to have completed training before they are able to issue PINs,[38] and may be disqualified from office for misuse of a power,[39] therefore reducing the potential that incorrect or improper use occurs.

Option 2 – Maintain current arrangements

Under the model WHS Act, HSRs are required to consult before issuing a PIN.[40] One suggestion was to explicitly state that a PIN would be invalid if issued without consultation. However, the template PIN included in Safe Work Australia's Worker Representation and Participation Guide asks whether consultation has occurred.[41]

Section 93 of the model WHS Act could be amended to clarify that HSRs cannot require one method of compliance when others are available. This could be done by replacing reference to 'directions' with 'recommendations'.

Retaining the existing HSR power to issue PINs would maintain existing safety protections for workers and mean that there would be no requirement for HSRs, PCBUs, workers and regulators to adapt to new arrangements.

Preferred Option

The preferred option is to retain the ability for HSRs to issue PINs, but with amendments to replace references to 'directions' in PINs with 'recommendations'.

4.3.3 HSR training requirement

Under section 72 of the model WHS Act, the PCBU has an obligation to provide training for the HSR; that is to pay for the course and the time away from work to attend.

The training consists of an initial course of training of 5 days and a 1 day refresher training every year[42], and must be:

- approved by the jurisdiction's regulator, and
- chosen by the HSR in consultation with the PCBU.

It is not compulsory for HSRs to be trained however they will not be able to issue PINs or direct work to cease without the prescribed training. Untrained HSRs can perform all other functions.

The HSR may also be able to exercise the additional powers where they have previously completed training when acting as a HSR for another work group, or completed equivalent training under a corresponding WHS law.[43]

The current requirement for HSRs to attend initial course of training of 5 days and a 1 day refresher training every year incurs direct costs to PCBUs, in the form of course fees and lost productivity from the worker being away at the training course. In the *Harmonisation of WHS Regulations and Codes Decision RIS* (2011) HSR training fees were estimated at being approximately $150-300 per day. Survey data gathered by SWA since the harmonisation of WHS laws indicates that HSR training costs during 2012-13 were in this range.

[38] Section 90(4) of the model WHS Act
[39] Sections 64 and 65 of the model WHS Act
[40] Section 90(3) of the model WHS Act
[41] *Worker Representation and Participation Guide*, Safe Work Australia 2012, p34
[42] Regulation 21 of the model WHS Regulations
[43] Section 85(6) of the model WHS Act

To the extent that wages reflect worker productivity, an absence to attend training will cost business approximately $450 gross per worker per day based on standard wages. However, the usual expectation with education and training is that it results in productivity improvements later.

Issues

Although training is time consuming and costly, employers, industry groups and unions agree that HSRs need to be adequately trained, particularly given their range of powers.

Many submissions advocated for training to be competency based and delivered flexibly. Comments included:

- the competency of HSRs should be focussed on specific functions under the WHS Act, not on the number of training days; there should be some meaningful measures of competency rather than mere attendance
- training should be made more accessible and provided online
- the person delivering HSR training should ensure the HSR understands and is competent to exercise these powers; this is a normal expectation in competency based training and assessment, and places an extra obligation on the trainer, not an extra requirement on the trainee, and
- consideration should be given to provision of training by WHS regulators.

In addition, unions raised concerns about delays by PCBUs in arranging training arising from the need for the training to be agreed. They claimed that the current model WHS laws place unnecessary restrictions on the training course that a HSR is entitled to attend. In particular, HSRs may face unnecessary delays if the PCBU refuses to allow the HSR to attend a particular course. This leaves them unable to exercise their powers which may act as a disincentive for PCBUs to enrol HSRs into training as soon as possible. It was suggested that the Victorian provisions related to HSR training where the HSR has the right to choose their own course, but must give at least 14 days' notice to the employer of their intent to attend, may be an option.

Options

Two options were considered in relation to the training arrangements for HSRs – retaining the current provisions or amending them.

Option 1 – Maintain current arrangements

If the current provisions for training HSRs are retained, there would be no requirement for HSRs, PCBUs, workers and regulators to adapt to new arrangements. However, this would not address the concerns raised by stakeholders with the current HSR training requirements.

Option 2 - Amendment

Consistent with the 2008 OHS Review, the model WHS legislation prescribes an initial 5 day training course for HSRs, but the competency based element suggested by the review was not included:

> *'…such training should be competency based, having regard for the rights and powers able to be exercised by the HSR e.g. Issue PINs and direct that unsafe work cease. Importantly the training should provide the knowledge and skills necessary to ensure effective representation.'*[44]

Competency based training could improve health and safety outcomes as participants will need to successfully demonstrate the skills and knowledge required of a HSR before being able to exercise the powers of the role.

[44] Second Report: *National Review into model Occupational Health and Safety Laws* (January 2009), p115

Easy access to competency based training would therefore be needed to provide greater training options for HSRs in a timely way and reduce costs. This could be achieved through use of technology such as online formats. These would result in lower ancillary costs for duty holders arising from expenses such as travel to attend face to face training, particularly for remote or rural workers.

The availability of more flexible training courses would assist in overcoming current concerns about timely access by HSRs to training, particularly for HSRs in rural or remote locations where face to face training opportunities may be limited.

Another suggestion was for WHS regulators to provide training. Although regulators currently approve the provision of HSR courses, the regulators are generally not resourced or set up to conduct such training themselves. A single provider of training may also limit accessibility and increase costs.

Preferred Option

The preferred option is to amend provisions relating to training for HSRs to allow for competency-based training and flexible delivery modes, although not all Ministers supported this option.

4.4 Improving model Codes of Practice

COAG asked Ministers to examine arrangements for model Codes of Practice, including whether they can be made less complex and provide for increased jurisdictional flexibility. They cautioned that this should be balanced against the benefits of harmonisation for multi-jurisdictional employers.

Codes of practice (codes) provide practical examples on how to achieve the standards of health, safety and welfare required under the WHS Act and the WHS Regulations.

There is no requirement to comply with a code. A duty holder can adopt other methods of meeting their obligations if they provide a level of health and safety equal to or better than the standard set out in the code. This allows duty holders to take into account innovation and technological change in meeting their duties and to implement measures that best suit their individual workplaces without reducing health and safety standards.

In practice, codes serve the same purpose as other types of guidance documents and can be used in workplaces in the same way. Codes and guidance material are both tools to assist duty holders comply with their existing obligations under the model WHS laws. The only difference between them is that codes are automatically admissible as evidence in court proceedings. Relevant guidance material may also be used in court but must be specifically proven as evidence.

There are currently 23 model Codes developed by Safe Work Australia. The topics for these model Codes were chosen because they were already the subject of regulation or codes in the majority of jurisdictions prior to harmonisation.

The IGA allows jurisdictions to preserve existing jurisdictional codes until model Codes are developed to replace them.

4.4.1 Flexibility in developing and approving model Codes of Practice

Under the model WHS Act, the process for approving, varying or revoking a code must involve national consultation with the Commonwealth, state and territory governments, unions and employer organisations. This process is conducted through Safe Work Australia. National consultation assists in developing guidance material and model Codes that meet the needs of these stakeholders and are nationally consistent.

Issues

The need to consult nationally and gain the approval of all Ministers is seen as limiting a jurisdiction's ability to make changes or develop its own codes to address local issues. The current process can take up to 18 months from the time the content of the material has been settled to when it becomes an approved model Code. In the past, some jurisdictions have issued the draft model Codes as guidance material in their jurisdiction to fill the gap in information until a model Code is approved.[45]

The development process and approval timeframes have also contributed to a preference for guidance over model Codes.

Options

Two options were considered in relation to increasing jurisdictional flexibility – removing provisions that require national consultation before Ministers can adopt, vary or revoke a code, and maintaining the current arrangements.

Option 1 – Removing the provisions

The model WHS laws could be amended to remove the requirement for national tripartite consultation in the development of model Codes as was recently done in Queensland. Stakeholder feedback strongly opposed adopting this option as it would remove the opportunity for industry and workers to have input in the development of codes. A process which permits jurisdictions to develop their own potentially different codes would also lead to inconsistency and increase regulatory burdens and costs for businesses operating across jurisdictions.

Some safety issues affect only one or two jurisdictions, and so a national response is not needed. A small number of submissions from industry groups, regulators and government agencies suggested allowing jurisdictions to develop Codes without going through the national tripartite consultation process only in these circumstances. However, introducing a subclass of jurisdictional codes of practice could create confusion for duty holders.

Option 2 – Maintain current arrangements

As the model WHS laws have now been adopted in the majority of jurisdictions, it is critical that authoritative guidance on how to comply is nationally consistent. Therefore Safe Work Australia should continue to have a role in developing model Codes. However, if Safe Work Australia makes a decision to develop a guide instead of a code there is nothing in the model WHS laws to prevent a jurisdiction adopting the guide as a code as long as they don't change the content. Material taking on a different status in a jurisdiction without altering the advice it provides maintains consistency.

Jurisdictions currently have the flexibility to develop their own guidance for local issues. A jurisdiction may develop guidance themselves and consult with Safe Work Australia if it believes the material has national application and is suitable as a code.

Preferred Option

The preferred option is for Safe Work Australia to continue developing nationally consistent guidance material and, if needed, model Codes of Practice to support the model WHS laws and to maintain consistency by using established national consultation and approval processes. Jurisdictions can continue developing guidance materials where they need to address local issues.

4.4.2 Status of Codes

The model WHS Act outlines how an approved code can be used in court proceedings. Courts may have regard to a code as evidence of what is known about a hazard, risk or control and

[45] See the WorkCover NSW website, Comcare website

may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

Issues

Given the evidentiary status and development process applied to codes, they are viewed by duty holders as a more authoritative source of advice compared to other types of guidance material.

In practice, there should be no difference in how duty holders use codes compared to other types of guidance material. All will contribute to the state of knowledge about hazards, risks and their control measures and should achieve the same outcome. Yet, it is recognised that more weight and attention is given to codes, therefore it is important that the decision to turn material into a code is consistent and transparent. A set of decision-making criteria may also help define what a code of practice is.

Safe Work Australia's Members decide whether advice is needed on a particular topic and whether it should be developed as a model Code or as other forms of guidance material.

Options

Two options were considered in relation to decisions regarding the status of a document; leave it up to jurisdictions to decide the status of the material developed by Safe Work Australia, or amend the process for determining that status.

Option 1 – Jurisdictions decide the status of national material

Under this option Safe Work Australia would develop documents without attaching the status of code or guide to them. Jurisdictions could then choose what status to give them when they are adopted. This option would ensure consistent content across jurisdictions and consistent interpretation of the model WHS laws, while still satisfying the requirement for national consultation and ministerial approval in the model WHS Act. However, confusion about the difference between codes and guides may increase if material is developed without a status and is not adopted in a consistent way.

Option 2 – Develop model codes in accordance with rigorous criteria

To date, the decisions by Safe Work Australia on whether material should be developed as a code or guide have been inconsistent and generally based on the status material had in a jurisdiction previously. Safe Work Australia has attempted to apply a set of criteria to determine what should be developed as a model Code.[46] Safe Work Australia Members asked that these criteria be reviewed.

The following criteria are proposed:

- there is clear evidence of a national or significant work health and safety risk for which existing guidance material is not sufficient
- there is a need to provide authoritative advice and certainty about acceptable ways to comply
- there are recommended methods to be used (or standards to be met) to achieve compliance, and
- the information on the hazard, risks and control measures is well-established, reflects the state of knowledge and will have minimal regulatory impact.

A document would only be as suitable as a model Code if all these criteria are met.

Having Ministers endorse these criteria is one option to address concerns regarding the status of codes. The impact of using the above criteria is likely to further reduce the number of Codes

[46] See the Safe Work Australia website.

developed by Safe Work Australia and provide transparency and consistency in deciding what topics should be given evidentiary status.

A potential disadvantage of this option is that duty holders with a preference for codes may pay less attention to other types of guidance material or experience a greater degree of uncertainty in relation to their obligations. It may also impact on WHS inspectors who rely on codes for enforcement purposes.

Preferred Option

On balance the best option is for national guidance material to be the preferred format, unless Safe Work Australia Members identify that a model Code of Practice is needed, based on a set of rigorous criteria agreed by Ministers

4.4.3 Complexity in model Codes of Practice

COAG asked Ministers to examine whether model Codes of Practice can be made less complex.

Issues

Currently, model Codes are developed as comprehensive documents designed to be used without much need to reference other documents. Due to their evidentiary status, codes tend to be more prescriptive and legalistic compared to other types of guidance, leading to more complex documents.

Although a number of stakeholders prefer this approach, it tends to make model Codes lengthy and can make it difficult to find specific information within a document. The model Codes seek to be comprehensive and encompass all business sizes and industry sectors.

The approach has resulted in the 23 model Code having an average length of approximately 52 pages. Model Codes vary from 27 pages for *Work Health and Safety Consultation Co-operation and Co-ordination* and *How to Manage Work Health and Safety Risks* to 102 for *Labelling of Workplace Hazardous Chemicals.*[47]

Industry submissions raised concerns about the length and complexity of the model Codes and suggested they try to encompass too wide an audience thereby losing their effectiveness. Union submissions suggested they needed greater detail about the topic they cover and should provide the employer with practical ‘how to’ advice but rejected any suggestion they are too prescriptive.

Options

Two options were considered to satisfy concerns raised by stakeholders; maintain the status quo by continuing to develop stand alone, comprehensive model codes of practice, or modify the format of codes to be shorter and easier for businesses and workers to understand.

Option 1 – Maintain current arrangements

A number of stakeholders prefer comprehensive Codes which consolidate information and minimise the need for cross referencing. This approach means duty holders may only need to access a small number of codes to locate information relevant to their operations. This preference is seen in the frequent requests for Safe Work Australia to develop and approve industry specific codes such as has been done for Construction. The requirement to capture all activities performed in an industry in one document causes the document to be long and complex. It also reduces the likelihood of the document being suitable to multiple audiences and jurisdictions protracting the development and approval process.

[47] Number of pages for Word copies, see the Safe Work Australia website.

Option 2 – Amendment

An alternative to the current approach is to draft model Codes in a simple, easy to understand style to suit the target audience and to focus on a specific hazard or activity. This approach would reduce unnecessary duplication and result in a simpler, more practical document.

This option would reduce regulatory burden for duty holders, particularly small businesses, by reducing the time it takes to find the information they need and saving money that they would otherwise spend on engaging consultants for advice. This approach would also remove a disincentive for smaller businesses in reading current model WHS codes because of the length and perceived complexity created by developing comprehensive codes. Conversely shorter codes focused on a specific hazard or activity may require accessing more than one code to comply with WHS obligations. Where an industry prefers consolidated information relevant to them, this consolidation could be undertaken by industry associations; a preferred source of information for duty holders.

Preferred Option

The preferred option is for national guidance material and model Codes of Practice to be concise, focussed on a specific hazard or activity and written in a simple easy to understand style.

5. Consultation

5.1 Consultation process

A combined Issues Paper and Consultation RIS: *Improving the Work Health and Safety Laws* was developed by the Agency to seek views on the areas COAG asked Ministers to investigate. The Paper was endorsed by senior officials representing Ministers and published on the Office of Best Practice Regulation website on 4 July 2014.

Regulators in each jurisdiction used the Paper as the basis for local consultation. Most regulators called for written submissions on their websites during a four week period in July and August 2014. Regulators in Western Australia, the Commonwealth and the Australian Capital Territory used existing consultation forums to seek input from peak bodies representing those most likely to be affected by changes to the model WHS laws.

Approximately 270 submissions were forwarded to the Agency. One regulator provided a consolidated account of the responses received in that jurisdiction. Submissions were made by businesses, industry groups, unions and government agencies. A number of union submissions represented similar views. 109 submissions from individual businesses contained duplicated comments and addressed only one issue – requirements for testing and tagging electrical devices.

5.2 Feedback on model WHS Act

Director (officer) liability under the model WHS laws

Issues raised regarding the model WHS Act include, for smaller organisations, a lack of clarity regarding who is an officer and how they can meet their due diligence requirements under the model WHS laws.

As per COAG's request, feedback was sought on whether the model WHS laws create a disincentive for officers to take up the role. No feedback was received which identified the officer arrangements as a disincentive for taking up the role.

Feedback was also sought on the positive and negative impacts of the duty on officers and whether any aspects should be changed.

Impacts

The vast majority of feedback stated a positive impact and supported retaining the provisions. Positive impacts cited include:

- the duty improved safety outcomes by encouraging workplace leadership from senior managers and focusing attention on preventing WHS issues
- the use of the Corporations Act definition for officers reduced uncertainty
- the due diligence standard in section 27(5) provided useful guidance, and
- the duty was familiar in that it replicated other duties held by officers in other areas, such as corporations, financial and tax laws.

It was also reported that the changes brought about by harmonisation had improved awareness that senior managers had an important role in WHS, with an increase in advice and training being sought to update officers on the new provisions.

Only a few respondents suggested there should be changes to the duty, including that:

- the Corporations Act definition of officer was too broad and a separate definition in the WHS Act should be adopted
- the due diligence standard was too onerous and uncertain and should be limited to what is required of officers in section 27(5) rather than the non-exhaustive list
- a control element should be included in the definition of officer, whereby an individual is determined to be an officer according to their ability to command, direct and compel
- section 27(5) should be removed and section 27(1) amended with wording similar to section 180(1) of the Corporations Act where officers "must exercise their powers and discharge their duties with the degree of care and diligence" of a reasonable person to allow for more flexible responses, and
- inserting a provision that an officer cannot be liable where the PCBU has complied with its obligations.

Most submissions indicated further guidance was required outlining who was an officer and what they needed to do to meet the due diligence standard. There was particular concern regarding the requirement to have an "up to date knowledge of WHS matters" and what officers had to do to comply with this clause.

Powers of Union Officials under the model WHS laws

Issues raised regarding the model WHS Act include potential for abuse of WHS entry permit powers granted under the model WHS laws, particularly when entering without notice to inquire into a suspected contravention.

Feedback was sought on the positive and negative impacts of powers of union officials to enter workplaces and whether further limitations should be introduced. Views were polarised with unions asserting support for the power, and industry and employer groups calling for further limitations.

Impacts

Submissions from unions reported positive impacts of entry powers, including:

- well established right of entry arrangement for WHS issues, in operation for decades in some jurisdictions, have encouraged a collaborative approach to resolution of WHS issues without the involvement of WHS agencies and enforcement action
- no knowledge of evidence of widespread abuse or WHS permits being revoked, and
- resolution of WHS issue through union involvement that otherwise may not been addressed by the employer, resulting in safer workplaces.

Unions opposed any further limitations being imposed on entry permit holders, arguing:

- there are existing protections against abuse of power whereby a union official found to be abusing their powers may have their license revoked
- there are already strict limitations in place in relation to entry permit holders including training requirements and reapplication for permits every 3 years, and
- powers of union representatives should be extended, rather than limited, especially in areas with a higher than average incidence of workplace fatalities, including powers currently held by HSRs.

Unions provided specific examples in support of their position that, on the whole, the entry permit system is working well and the introduction of permits has had a positive impact on workplaces. It is stated the right of entry allows workers and PCBUs to gain an honest perspective from a third party without the need to call a regulator. Union submissions also cited examples of how right of entry provisions have increased the safety of particular work sites. In one case, the visit by a union representative prompted the employer to ensure all chemicals were appropriately labelled and so eased the concerns of members who had requested the union entry. It was reported that the visit was conducted without hostility and resulted in an improvement in WHS in the workplace.

Another union reported that the right of entry without notice enables them to attend to safety issues on vessels that are only in port for a short period of time, between 8 and 12 hours before they leave.

The overwhelming majority of industry groups and employers argued for the model WHS laws to be changed to include a minimum 24 hour notice period for suspected contraventions, on the basis that:

- managers and workers do not have the opportunity to address workplace incidents and risks in the first instance, but are rather 'informed' by union officials after the entry has occurred
- a notice requirement allows time for PCBUs to appropriately investigate and respond to any health and safety concerns with workers using the issue resolution mechanisms in the WHS Act and Regulations if necessary
- trained HSRs are on site to respond to any urgent WHS concerns, and
- this is consistent with other provisions in the model WHS and Fair Work Acts and related legislation which will reduce confusion and disputes over entry.

The misuse of the right of entry powers is particularly prevalent in the construction industry. Submissions from industry groups and employers also reported examples of failure to comply with obligations placed on entry permit holders. Concerns were raised about legitimacy of entry for WHS purposes and of the entry permit holder themselves, a lack of feedback provided to local management on matters discussed, confusion about application of certain provisions, and the need for appropriate training for entry permit holders.

In particular, these groups suggested introducing further measures to ensure union officials provide details of the suspected contravention to the PCBU. They also suggested entry permit holders be required to give feedback to the PCBU on the WHS issues raised after the entry, as this power had been misused to discuss matters other than WHS.

One regulator noted that right of entry disputes had been taken directly to the Fair Work Commission rather than requests being made for a WHS inspector to assist in resolving the dispute, and therefore questioned the need for section 141 of the WHS Act (application for assistance of inspector to resolve dispute).

Concerns have also been raised that the interaction of the separate entry provisions in the model WHS Act to inspect or copy documents make it unclear which workplaces may be entered without notice.

Powers of Health and Safety Representatives

Issues raised regarding the model WHS Act include doubt regarding the competence of HSRs to appropriately exercise their powers to direct unsafe work cease and to issue provisional improvement notices.

Feedback was sought on the positive and negative impacts of HSR powers and functions and whether any aspects should be changed, particularly to further limit powers.

Impacts

Many submissions pointed to the overall positive role played by HSRs in terms of increasing awareness of WHS issues in the workplace, assisting in educating workgroups about WHS legislation, improving safety culture and creating a more open and collaborative environment.

Submissions, including those from industry and employer groups, indicate that the power to cease unsafe work has not been abused.

Unions provided evidence and examples of the benefits of HSRs in the workplace generally. They argued against removing the powers of HSRs, highlighting the contribution of HSRs to workplace safety. Comments included:

- the HSR powers to stop work and issue PINs are longstanding in many jurisdictions and there is ample evidence to suggest these HSRs do not abuse these powers
- the right of HSRs to direct a cease work is crucial in situations where one section of the workforce is educated and aware of safety but another part of the workforce is not – such as sub-contractors, casuals, temporary or labour hire or apprentices or where workers may be too afraid of risking their job security to speak up
- the ability of HSRs to ask for an assistant is important – this could include many types of people, for example, an electrician or ergonomist who has specialist knowledge of the particular health and safety concern
- concerns about unreasonable delays in training for HSRs preventing them from exercising their power to issue a PIN, and
- the amount of time a PCBU has to comply with a PIN should be reduced.

Suggestions for increased limitations on, or removal of, HSR powers included:

- a HSR must be able to demonstrate that assistance is reasonably necessary in the circumstances and the need for assistance can be objectively proven
- the power for HSRs to ask for an assistant should be removed as it is a duplication of functions of entry permit holders who may already have access to workplaces, including to ‘consult and advise’
- the HSR power to direct unsafe work cease is duplicative, as workers already had the power to cease their own unsafe work and are best placed to make this decision; the power should be removed or HSR training improved
- if HSR powers have been abused, there should be a process for the regulator to suspend the HSR’s powers
- clarification that a PIN is invalid if it is issued without consultation, and
- the power to issue a PIN should properly rest with the regulator; if a HSR identifies an issue, there are mechanisms for resolution.

Two employer groups submitted that the capacity of a HSR to request assistance from any person is so broad as to invite misuse by persons who are otherwise unable to lawfully access premises. While the model WHS laws allows refusal of access to persons who no longer hold a valid right of entry permit, many PCBUs will not know of this. They also will they know what constitutes a valid permit or where to look to confirm this information.

Training

The need for HSRs to be adequately trained, particularly given their range of powers, was raised in many submissions. The majority of industry and some jurisdictions advocated that training become competency based and include the ability for training to be delivered flexibly. Comments included:

- the competency of HSRs should be focussed on specific functions under the WHS Act, not on the number of training days; there should be some meaningful measure of competency rather than mere attendance
- training should be competency based and the frequency of refresher training reduced from annual to biennial
- training should be made more accessible and provided online
- HSRs would be better able to understand and apply their powers if there was an obligation on the person delivering HSR training to ensure the HSR understands and is competent to exercise these powers; this is a normal expectation in competency based training and assessment, and places an extra obligation on the trainer, not an extra requirement on the trainee
- consideration should be given to provision of training by WHS regulators, and
- an assistant should possess sufficient qualifications to enable them to provide assistance to the HSR appropriate to the circumstances.

Unions raised concerns about delays by PCBUs in arranging training arising from the need for the training to be agreed. They claimed that the current model WHS laws place unnecessary restrictions on the training course that a HSR is entitled to attend. In particular, HSRs may face unnecessary delays if the PCBU refuses to allow the HSR to attend a particular course. This leaves them unable to exercise their powers which may act as a disincentive for PCBUs to enrol HSRs into training as soon as possible.

To address these concerns, it was suggested the Victorian provisions where the HSR has the right to choose their own course, but must give at least 14 days' notice to the employer of their intent to attend, may be an option.

Other issues in the model WHS Act

Feedback was sought on the positive and negative impacts of areas in the model WHS Act other than those identified by COAG and how they could be improved.

A small number of industry groups identified penalties as inappropriately high, a disincentive to business, and not risk-based and asked for a comprehensive review of the level of penalties that apply to contraventions of the model WHS Act and Regulations. One industry body identified the penalties for engaging in discriminatory conduct for a prohibited reason and for misrepresentation of WHS rights as being disproportionate to the risk presented by non-compliance. These offences each have a penalty of up to $100 000 for individuals and $500 000 for a body corporate. These penalties were considered disproportionately high, particularly when compared with the penalty of up to $10 000 for impersonating a WHS inspector and with an offence under Fair Work Act 2009 (taking adverse action because a person has a workplace right) with a penalty of 60 units or $10 200.

One regulator and an industry body did not support the reverse onus of proof in cases of discriminatory, coercive and misleading conduct.

A number of unions asked for amendments to training requirements, including requiring all new workers be provided with basic first aid and health and safety training mandatory and not qualifying the requirements to provision of information, training and supervision with "so far as is reasonably practicable".

A number of unions said there was a need to provide unions the right to prosecute, particularly when there is evidence that some regulators are not initiating prosecutions for breaches under the model WHS laws.

Other comments included:

- Two industry groups raised concerns about the application of control, particularly when there are multiple duty holders. One industry body said the term “control’ is not defined and is likely to be interpreted as “control to any extent”. They suggested control should be defined more narrowly to mean “exercising actual or direct control”. On the other hand, one union said disagreement between two or more businesses about who has control of work area could be avoided if the definition of “person with management or control” was more expansive.
- One government agency said lack of guidance on the meaning of terms such as "serious" and "imminent" has caused difficulty with notification and led to over reporting of incidents.
- One submission suggests the definition of plant should include “moving plant”, such as aircraft, vessels and vehicles.
- A number of submissions sought further clarity around the practical application of the definition of “worker”, "officer” and “PCBU”, particularly for contractor groups and government agencies.
- One government agency said more guidance was needed to understand the difference between “as low as is reasonably practicable” and “so far as is reasonably practicable”.
- One business wanted better clarity of the meaning of “grossly disproportionate”.
- One industry group said the term “caused to be engaged” was ambiguous.
- One industry group said the term “labour hire employee” in the definition of ‘worker’ was inconsistent with awards under the Fair Wok Act and was unclear whether it applied to independent contractors. They suggested to replacing the term with ‘on-hire worker’.

An industry body and another submission said the duties on designer, manufacturers, importers, suppliers and installers of plant, substances or structures are unreasonable and unrealistic, particularly the duties relating to build-ability and life cycle. One suggestion was designer and manufacturer duties having a specified time limit and the duties should not extend beyond the safe design for the purpose for which it is intended to be used.

An industry and a government agency raised issues regarding protections workers have under section 172 from self-incrimination when interviewed by inspectors.

The government agency said personal criminal liability has resulted in cautiousness regarding internal investigations. Because regulators have used internal investigations as evidence in court proceedings, some PCBUs have referred WHS incidents to external legal advisors in order to obtain legal privilege. One suggestion to reduce this unnecessary burden was to improve protections for information provided during internal investigations so they cannot be used in court proceeding. They supported limiting inspector’s powers under section 155 to demand any document, which may include a worker’s statement taken during a PCBU’s own internal investigation and thus circumvent workers protections from self-incrimination.

The industry body raised concerns that inspectors are not informing witnesses of their rights under section 172 and 173, particularly asking witnesses to confirm they are giving evidence “voluntarily” without explaining the significance of “volunteering” evidence or providing the warnings required by section 173. They also noted that legislation like section 172, which abrogates civil rights, has been flagged by the Commonwealth Attorney General for review by the Australian Law Reform Commission to determine if this encroachment on civil rights is justified.

5.3 Feedback on model Codes of Practice

Issues raised include concern that model WHS Codes of Practice were too complex for some businesses to easily implement, and the approval process was duplicative and slow.

Views were sought on the role of codes in the legislative framework, any preferences for codes or other forms of guidance, the level of detail in codes and how codes should be developed.

Development process

On the subject of whether jurisdictions should individually be able to develop their own codes without going through the national tripartite consultation process the majority of submissions were against the idea, expressing strong concerns it would introduce inconsistency and erode the benefits of harmonisation for businesses operating across jurisdictions. This would increase the regulatory burden if businesses have to reference different documents.

Other suggestions included:

- allowing jurisdiction specific codes but only where an issue is unique to one or two jurisdictions, an example given was crocodile farming, and
- allowing jurisdictions to make minor amendments where uniformity can be maintained.

Status of codes

Most respondents support the current status of codes within the legislative framework and the majority prefer codes to other forms of guidance material. They see codes as providing authoritative advice, pay more attention to codes and feel codes provide more certainty to duty holders. Some noted their preference for codes or guides would depend on the complexity of the issue and each form of guidance is useful in its own way.

Level of detail in codes

The majority of respondents who provided views on the level of detail in the codes were of the opinion it is appropriate. Less than a third found they are too long, too complex or try to appeal to too wide an audience. A small number suggested they required further detail.

A number of suggestions were made to improve the model Codes, these include:

- adding tools to assist business such as summary sheets, check lists and templates
- simplifying the model Codes
- developing further model Codes
- making codes relevant to specific industries with more practical detail instead of generic advice
- changing the format and design to include more images
- including what doesn't need to be done to address risks, and
- ensuring consistency in format and content across model Codes.

6. Next Steps

The report *Improving the model WHS laws* identified issues with the model WHS Regulations raised in submissions as requiring improvement to reduce regulatory burden without compromising safety outcomes. Due to the detailed nature of these issues, Ministers recommended Safe Work Australia progress these amendments for the approval of Ministers responsible for WHS by no later than June 2015.

Any changes recommended by Safe Work Australia and considered by Ministers will also be subject to a regulation impact assessment requirements. A separate RIS will be developed and provided to Ministers with the Safe Work Australia's Report.

6.1 Implementation and Review

Amendments agreed by COAG will be referred to Safe Work Australia to amend the model WHS laws so that jurisdictions can implement the changes to maintain consistency to the greatest degree possible.

Amendment of the model WHS Act and regulations should be completed by Safe Work Australia during 2015, noting proposals for changes to the model WHS regulations will be considered by Ministers in June 2015. Timing for adopting the model WHS laws will be up to the parliamentary processes in each jurisdiction.

Development of recommended additional guidance material and tools, or variation of existing material will also be undertaken by Safe Work Australia. Indicative timing for development is as follows:

- Recommendation 1 - further guidance on who is an officer, and what is required to meet the standard of due diligence – 6 months from agreement by COAG
- Recommendation 2c - guidance on what records may be accessed and on privacy requirements to assist duty holders to comply with the provisions of entry to inspect records – 3 months from agreement by COAG
- Recommendation 4b - a tool that will assist duty holders ascertain which WHS regulations may apply to their business or undertaking – 6 months from agreement by COAG, and
- Recommendation 5c - provision of a revised set of rigorous criteria for codes of practice provided to Minsters for agreement – 3 months from agreement by COAG.

The 2008 National OHS Review recommended the model WHS laws were subjected to a review within of five years their implementation. The Workplace Relations Ministers Council agreed to this timeframe in the government response to the Review recommendations. The model laws were implemented in most jurisdictions on 1 January 2012. Thus a review of the model WHS Act will need to occur in 2016 so that it may be completed by 1 January 2017.

Safe Work Australia has developed a program to evaluate the model WHS laws by this deadline. The program is seeking to evaluate the impact of the model WHS laws over time to determine if they are achieving their intended outcomes using qualitative and, where possible, quantitative methodologies. Given the amendments to the laws proposed in this examination are likely to be implemented during 2016, a meaningful impact assessment and evaluation of these changes may not be possible during the next planned review.

Safe Work Australia will continue to monitor implementation and address issues raised by stakeholders as they arise.

7. Regulatory Compliance Costs

As part of the Australian Government's deregulation agenda the impacts of any regulatory or administrative changes must be calculated under the Regulatory Burden Measurement Framework.[48]

This framework aims to calculate any administrative costs or savings associated with Government regulation. This includes education, enforcement, notification, permission, procedural, publication and documentation, purchase cost, record keeping, delay and other similar costs.

7.1 Table - Summary of Regulatory Compliance Costs

Proposal	One-off regulatory saving ($m)	Ongoing regulatory saving ($m per annum)
Director Liability – improved guidance	0	2.9
Powers of Union officials - improved guidance for businesses providing access to records	..	0.2
HSR training - increased flexibility	0	27.1
Codes of Practice - reduced complexity	0	12.2
Total	..	42.4

.. not zero, but rounds to zero. This amount is a small regulatory cost.

Costing assumptions

- Time cost for compliance activities has been costed at $34.20 per hour[49], plus 75 per cent on-costs[50].
- Organisational churn (i.e. the number of new businesses per year) is 11.2 per cent.[51]

Director Liability – improved guidance

- There are 1 261 609 WHS officers nationally, according to an estimate based on SWA survey data.
- The current guidance material is a legal interpretative document which is 6 pages long, and it is assumed this guidance took one person 1 hour to read and comprehend. The new guidance is estimated will be a maximum of 8 pages long, but it is assumed it will only take 40 minutes for this material to be read and understood, reflecting the reduced complexity and practical focus of the material.

Powers of Union officials - improved guidance for businesses providing access to records

- There are 1274 permit holders nationally, who will each take 5 minutes to read the new guidance material. This represents a small up-front cost to unions.
- There were 2 079 666 businesses Australia-wide during 2013.[52] SWA survey data indicates that unions request entry to 1.5 per cent of businesses for WHS purposes. It has been assumed that in one-third of those cases, there will be a request for the businesses to produce records.

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[48] Further information on the Regulatory Burden Measurement Framework can be accessed at on the Department of the Prime Minister and Cabinet website.
[49] ABS Cat No. 6302.0, *Average Weekly Earnings, Australia,* May 2014
[50] As per standard Regulatory Burden Measurement calculations
[51] ABS Cat No. 8165.0, *Counts of Australian Businesses, including Entries and Exits, Jun 2009 to Jun 2013*
[52] ibid

- It is assumed that the guidance material will reduce the time taken for businesses subject to a record request to comply by 15 minutes. The current guidance material still refers readers to the model WHS laws; the new guidance material will remove the need to cross reference the primary documents.

HSR training - increased flexibility

- Removing the prescription that HSR training must be a five-day course is assumed will reduce the length of initial courses from five days to four days. This is based on New South Wales and Tasmania having four-day HSR training courses prior to national harmonisation. Also, some training providers suggested that the HSR training course material could be delivered in as little as three days. It is assumed that businesses will benefit from the increased productivity of their workers being at work for one additional day. The gain is assumed to be equal to the workers' wage.
- SWA survey data indicated there were 173 314 instances of HSRs attending training courses nationally during 2012-13. However, it is assumed only one-quarter of these, or 43 328, are the initial 5 day courses. The remaining three-quarters are assumed to be one-day refresher training required annually.
- Current course costs are estimated at $886.00 for a five-day course, based on actual current course cost data from training providers. The direct purchase cost of training will reduce proportionally by 20 per cent, reflecting the reduction in course duration from five days to four days.

Codes of Practice - reduced complexity

- Current drafts of the revised codes of practice are 40 per cent shorter than the existing documents. Current codes are, on average, 52 pages in length.
- SWA survey data indicated that at present, approximately 525 000 businesses refer to SWA codes or other guidance material.
- Businesses that do refer to codes will only refer to codes that are relevant to their operations. It has been assumed that at present, two codes are relevant to businesses that refer to codes.
- The savings reflected by the reduced code length is assumed to only apply to new business entries. The 11.2 per cent business churn figure used previously has also been applied in this costing.

Data limitations

The data used to calculate regulatory compliance costs has been sourced from the Australian Bureau of Statistics, Work Health and Safety regulators' websites and Approved HSR training providers' websites. The remaining gaps have been filled with Safe Work Australia Survey data.

Because survey data asks businesses for information without testing their understanding of the concepts being surveyed or the validity of their responses survey data is the least reliable data source. For this reason survey data has been used only where other options were not available and provides only indicative estimates of the true costs.