Submission No 7

INQUIRY INTO WORK HEALTH AND SAFETY AMENDMENT (REVIEW) BILL 2019

Organisation: Australian Chamber of Commerce and Industry

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Portfolio Committee No. 1 – Premier and Finance
Via email: PortfolioCommittee1@parliament.nsw.gov.au

Dear Sir/Madam

Inquiry into the provisions of the WHS Amendment (Review) Bill 2019

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a submission to Portfolio Committee No. 1 – Premier and Finance on the inquiry into the provisions of the *WHS Amendment (Review) Bill 2019* (the Bill).

ACCI is Australia's largest and most representative business advocacy network. We represent over 300,000 businesses in every state and territory and across all industries. Our network employs millions of Australians, predominantly in small and medium businesses.

The Bill's explanatory note clarifies that the object of the Bill is to amend the *Work Health and Safety Act 2011* and the regulations under that Act to implement proposals based on recommendations made by the *2018 Review of the model Work Health and Safety laws: Final Report* (the Review). Given a number of proposed amendments are based on recommendations made in the Review, we attach our Consultation Regulatory Impact Statement submission noting they provide the rationale for our opposition to the corresponding proposed amendments in this Bill.

We would draw your attention to the following sections of our submission:

- Section 5: Prohibit Insurance for WHS fines
- Section 7: Choice of HSR training course
- Section 12: Inspector Powers
- Section 14: Increase Penalty Levels

ACCI would also like to take this opportunity to reinforce our opposition to the inclusion of dedicated industrial manslaughter offences in work health and safety legislation.

Industrial accidents, including those leading to fatalities, should remain subject to the existing risk-based regulation framework. Manslaughter prosecutions should only come into play in relation to workplace fatalities subject to existing formulations and tests under the criminal law, without the creation of bespoke or dedicated new offences of industrial manslaughter. Noting this, we welcome amendment schedule 1 [3] which inserts a note into Part 2 explicitly clarifying that manslaughter charges under the *Crimes Act 1900* can be made in certain circumstances where there has been a death of a person at work.

If you require further information, please contact Jennifer Low, Director, WHS and Workers' Compensation Policy

Yours sincerely

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Working for business.
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Consultation Regulation Impact Statement: Recommendations of the 2018 Review of the Model Work Health and Safety Laws

August, 9th, 2019

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1 Introduction

Harmonisation was and is widely welcomed. Industry commends the ongoing efforts to eliminate inconsistencies and duplication in WHS legislation across States and Territories but acknowledges more work is still needed.

We maintain that the model WHS Act, Regulations and Codes must be focused on safety outcomes and that any legislative changes should be thoroughly justified, evidence-based, practical and non-prescriptive, in line with COAG principles.

The Australian Chamber of Commerce and Industry (**Australian Chamber**) welcomes this opportunity to contribute to the *Consultation Regulation Impact Statement: Recommendations of the 2018 Review of the Model Work Health and Safety Laws*. This review is an opportunity to examine the recommendations made in the 2018 Review and their potential impact on business in Australia. We note with disappointment however that the 2018 Final Report failed to acknowledge a number of issues raised and evidence provided by the Australian Chamber and our members.

In regards to the Consultation RIS released for comment, we have a number of concerns with regards to the lack of evidence presented to warrant legislative change, limited risk analysis, no articulated cost-benefit analyses, assessment of compliance costs or assessment of competition effects. We are also disappointed that the RIS does not explore additional non-regulatory options in a number of cases as it should in accordance with the COAG RIS guidelines.

Throughout this submission we have sought to provide data and examples to support our position. Given the concerns articulated above, and not knowing the scope of evidence other submissions may or may not provide to inform decisions, we believe the Decision RIS should be released for public scrutiny and transparency prior to going to WHS Ministers for consideration.

2 Psychosocial Risk

We support the status quo and oppose regulation dealing with psychological risk.

The recommendation proposed in the 2018 Review (option 2) would amend the model WHS Regulations to introduce express requirements for identification and control of psychosocial risks that a PCBU must meet in order to satisfy the existing health and safety duties.

There are two parts to the recommended regulation: identifying psychosocial risks to psychological health and the appropriate measures to control those risks.

The Australian Chamber asserts that new regulation in relation to psychological risk is unnecessary and would be ineffective and potentially detrimental to safety and health outcomes at this point in time.

We would encourage Governments to explore other less prescriptive and more practical measures to assist employers in addressing this issue, particularly in the form of increased education and awareness resources and clear referral pathways.

In addition, work related psychosocial risk and psychological injury are complex issues and continued research is needed into best practice prevention and mitigation strategies. Research outputs should focus on identifying modifiable risk factors, corresponding mitigation or control measures and a cost benefit analysis of these.

2.1 Work-related psychological risk, hazards, assessment and interventions: the research

Consultation RIS Discussion

It is important to note that the Review Report did not provide detail of the content or formulation of these requirements and whether the regulations are to address all psychosocial risks individually, or deal with those risks more broadly as a group. It is **not clear that the current knowledge about identifying and managing work-related risks to psychological health is settled enough to allow narrow prescription of known risks and detail on effective controls that are broadly applicable**, however this may be possible as the evidence base becomes more settled.

Is the state of knowledge on psychosocial hazards, risks and control measures widely accepted and well established? Please support your answer with evidence.

The literature identifies a broad range of workplace psychosocial hazards for psychological harm. Work-related psychological risk isn't however a finite or static risk with academics equivocal as to how to achieve optimal outcomes and in which set of conditions. Maintaining legislation that is non-prescriptive, flexible and adaptive to new evidence and controls is critical. This is even more relevant in the context of the changing nature of[1], and the future of work.

[1]Ikin, H., Carse, T., and Riley, M. 2019, The changing nature of work, InPsych Vol 41. https://www.psychology.org.au/for-members/publications/inpsych/2019/april/The-changing-nature-of-work (accessed 5th August 2019).

Work-related psychological risk and psychosocial hazards

Research has identified numerous categories of risk factors for work-related psychological risk: ***subjective*** *individual risk factors* for individual harm (i.e. job demand-control), ***objective*** *risk factors* (i.e. environmental conditions, remote work), and ***subjective and objective*** *macro-level risk factors* (i.e. organisational justice).

Research has also uncovered a number of issues in evaluating the risk factors for workplace psychological harm and the academic fraternity remain divided in regards to each hazards health outcome, effect size and strength of evidence.

The national guidance produced by SWA through its tripartite processes sought agreement on national 'psychosocial hazards' for the purpose of WHS risk management as jurisdictions had previously identified differing hazards. We note that the list of hazards contained in the guide were agreed to for the purpose of clear and practical guidance to PCBUs and not predicated on a thorough research and evidence base.

In 2017, SafeWork NSW released "*Mentally Healthy Workplaces in NSW – Discussion Paper*" as the foundation for discussions to inform the development of a NSW mentally healthy workplaces strategy[2]. The discussion paper referenced research including the *Review of evidence of psychosocial risks for mental ill-health in the workplace*[3] (the **Review**) and the *Review of evidence of interventions to reduce mental ill-health in the workplace*[4] (**Intervention Review**) completed by Professor Nick Glozier and reviewed by Associate Professor Sam Harvey, UNSW.

The review provides a high-level summary of the strength of the evidence for workplace risk factors for mental ill-health and issues arising when appraising these risks. In the introduction the paper states:

"A broad range of workplace psychosocial risks for mental ill-health are identified. However our understanding of how these risks combine with each other, what thresholds are appropriate, interact with other risks in the workplace (such as trauma, discriminatory behaviour and physical demands), individual health, social, individual and other environmental risks is limited."

It goes on to state that:

"Beyond the standard psychosocial risks of the workplace itself are other external factors that are known to influence mental health, and will be encountered by many employees. Finally, as with all mental health conditions there will be interactions of these environmental risks with individual characteristics; prior experiences, culture, attitudes, coping styles, physical health and substance use. There has been remarkably little work addressing this.

Although many studies control for (take into account) health, demographic and behavioural factors, the psychological characteristics are often seen as either a 'black box' or discounted. Given that many of the psychosocial risk factors seem at face value to reflect core underlying constructs such as coping styles ('demands') or autonomy and self-efficacy ('control') this seems a limitation of the evidence."

[2] SafeWork NSW, 2017, Mentally Healthy Workplaces in NSW Discussion Paper.

[3] Glozier, N 2017, Review of Evidence of Psychosocial Risks for Mental Ill-health in the Workplace, Brain and Mind Centre, University of Sydney.

[4] Glozier, N 2017, Review of Evidence of Interventions to Reduce Mental Ill-health in the Workplace, Brain and Mind Centre, University of Sydney.

The 2018 Review report noted:

"A number of specific psychosocial risks were highlighted in submissions and seen to warrant explicit attention in the development of guidance material or regulations:

- Geographically isolated workers were identified as being at particular risk of psychological harm given they often work alone and can lack access to support.
- The National Disability Services Commission raised the hazards associated with home-based disability support work: the solitary nature of the work environment; lack of peer and supervisory support; and job complexity.
- Migrant workers, especially those on temporary visas, were identified as being particularly vulnerable. Fearing for their job security, these workers were seen as unlikely to take action in their workplaces."

It is important to understand that research in this field to date has predominately been by single studies rather than systematic reviews or meta-analyses and therefore the strength of the findings has been limited. Looking at these studies in isolation you will see inconsistencies. Often these studies have also been conducted with differing variables and overlap and authors have suffered from an inability to bring the research together to draw meaningful conclusions.

For example:

1. Subjective individual risk factors for individual-level outcomes

   Social support

   There is less consistency in the risk of those reporting low levels of either colleague or supervisor support with Theorell suggesting limited evidence supporting this, whilst the other four reviews (with fewer studies in each) reported a 24-44% increased risk. Interestingly there appeared no differences in whether the support was perceived to come from colleagues or supervisor (Nieuwenhuijsen, Bruinvels et al. 2010).

2. Job insecurity

   Job insecurity - a perceived characteristic of the individual's current role continuing, or chances of being employed, whether reflecting reality or not - increases the risk of subsequent mental ill-health by about 30% in the two reviews that reported an effect size (Stansfeld and Candy 2006, Kim and von dem Knesebeck 2016). Therorell suggested the effect was limited, Neiuwenhuisen found an effect only in men, and Kim et al. suggested stronger effects in people under 40 years of age.

3. Macro-level risk factors for individual-level outcomes

   Organisational justice

   This construct captures an overview of the fairness of rules and social norms within an organisation and has been subdivided into interpersonal relationships (interactional justice). Evidence only seems to exist for two aspects: relational justice, the level of respect and dignity received from management and informational justice, the presence or absence of adequate information from management about workplace procedures. Distributive justice, the distribution of resources and benefits, including pay and promotions, and the methods and processes governing that distribution (procedural justice) have not been evaluated. Although one large study (Nieuwenhuijsen, Bruinvels et al. 2010) found a 50% and 75%

increased risk for low relational and procedural justice respectively, other reviews suggested more limited effects (Ndjaboué, Brisson et al. 2012, Theorell, Hammarström et al. 2015) but did not provide an effect size.

In recent years in response to increased regulatory interest and action, and adoption of a conservative and 'blanket' approach to individually ascertained psychosocial risks, researchers have raised several key assumptions and questions that they say must be answered through further research given they place major limitations on the current advice that can be offered to workplaces.

These include:

- *How independent are these risks?* Many appear to have strong overlap which will have implications for auditing approaches and interventions.
- *Can they be traded off or cancel each other out?* Low levels of one stressor can offset the impact of high levels of other stressors.
- *Are there measurable thresholds or tipping points?* Most of the risks are thought of as linear and on a continuum which has yet to be tested with the possible exception of working hours.
- *How do measured risks change by occupation, organisation or industry?* Without thresholds, and with the use of perceptions as the basis for assessing these risks the range of what may be a considered a 'risk factor' could alter dramatically between occupations. Relatively little research has been conducted with small businesses.
- *How do measured risks change by other demographics such as gender, work status and education?*
- *How do measured risks change by whether someone has a mental health problem or not? Or other health conditions?* Almost all the research is from samples where those with mental ill-health are excluded or the levels of symptoms 'controlled for' in the analysis.

Furthermore, most of the evidence around workplace mental health risks is from Northern Europe and Northern Asia. There are a number of broader contextual differences and therefore the outcomes or conclusions reached may not be consistent within an Australia context. This is particularly relevant where the compensation, social security, insurance and health systems differ radically.

Individual factors and assessment of risk

Work Health and Safety (WHS) law focuses on the management and control of risk. A person conducting a business or undertaking (PCBU) has the primary duty to ensure, so far as is reasonably practicable, workers and other people are not exposed to psychological health and safety risks arising from the business or undertaking. This duty requires you to 'manage' risks to psychological health and safety arising from the business or undertaking by eliminating exposure to psychosocial hazards so far as is reasonably practicable. If it is not reasonably practicable to eliminate them, you must then minimise those risks so far as is reasonably practicable.

A central issue still to be effectively addressed is how you assess/measure psychological risk for the purposes of meeting your WHS duties. Given the nature of psychosocial hazards, it may not always be possible or reasonably practicable to eliminate the risk. The expectation is then that PCBU's

minimise those risks so far as is reasonably practicable. The ability to control risks is informed by the identification of a specific hazard and assessment of it.

The Review by Professor Glozier mentioned above noted a number of issues for assessing risk for workplace mental ill-health:

"Without thresholds, and reliance on perceptions as the basis for assessing these risks (and self-report of exposure rather than validated objective measures), the range of what may be a considered a 'risk factor' could alter dramatically. For example, some occupations may tolerate increased working hours, far higher demands, or uncivil behaviour than other organisations and what is considered a risk in one group may be considered low level risk in another. This may in part explain why there is often only minimal correlation between external ratings of the stressors of particular jobs and individual ratings."

People respond to hazards in different ways. Individual differences that may make some workers more susceptible to harm from exposure to the same hazard include: age, experience, an existing disability, injury or illness or currently experiencing difficult personal circumstances.

Further complicating assessment of risk is the fact that workers and others may be exposed to more than one type of psychosocial hazard at any one time and psychosocial hazards interact with each other in different ways.

A key concern raised by businesses and central to the discussion around further regulation is how businesses would comply with these requirements if there is difficulty in conducting the risk assessment process. Although there are a number of valid and reliable measures, we don't have many skilled professionals able to use and interpret these, and certainly not easy access for everyday businesses. The question then becomes about availability and knowledge in this respect.

Expressed here is a fundamental gap and even then, the fact that academics can't reach consensus over which measures to promote to people for use.

Workplace interventions/controls and the evidence

The 'Review of Evidence of Interventions to Reduce Mental Ill-health in the Workplace' found that:

"There are limited systematic estimates of the strength of the effects of many interventions from controlled trials, and where available, the effects seem to be of small to moderate strength.

Conversely there is widespread acceptance that to reduce mental ill-health in employees in the complex systems that are organisations, integrated, multilevel interventions need to be developed, implemented, and evaluated, and those that are effectively scaled up or tailored for different organisations. Interventions that create mentally healthy workplaces may not be the same as those that reduce symptoms and consequently mental ill-health[5]."

The Intervention Review goes on to say, although (the current optimal approach) is "*now endorsed by a range of organisations...the impact of this integrated approach has not yet been assessed, and case studies show few organisations have adopted and evaluated it*."

There has been relatively little research into the effectiveness of controls for work-related psychosocial risks, even less that are specific to Australia.

[5] Glozier, N 2017, Review of Evidence of Interventions to Reduce Mental Ill-health in the Workplace, Brain and Mind Centre, University of Sydney.

In 2018, a systematic review was conducted on a range of international guidelines (from Australia, Canada, Denmark, England, New Zealand, Sweden, the Organization for Economic Cooperation and Development and the World Health Organization) that aimed to help workplaces prevent or detect work-related mental health problems[6]. The paper concluded that few guidelines have been developed with sufficient rigor to help employers prevent or manage work-related mental health problems and evidence of their effectiveness remains scarce.

It added that:
Few of the guidelines considered the limited documented effect of implementing complex workplace interventions to all organizational contexts. Most guidelines recommended interventions that were not feasible without substantial financial and human resources. Although interventions were recommended to all workplaces regardless of size, lack of resources was not considered as a crucial barrier for smaller enterprises[7].

Cost, return on investment and what is 'reasonably practicable'

Although the PWC research is cited widely, we note issues with the assumptions made and therefore the accuracy of the estimated return on investment. The report modelled the impact of mental health conditions as:-

- Mild psychological health condition: 10 fewer productive work hours per year
- Moderate psychological health condition: 52 fewer productive work hours per year, 2 more days absent
- Severe psychological health condition: 127 fewer productive work hours per year, 13 more days absent

It is unclear where these estimates of the impact came from.

Broadly, most evidence cited in the literature comes from samples that are not representative of the wider population, often drawn from individual employers or patients of health service providers, or restricted to coverage of specific occupation or industry groups. Studies that have utilised nationally representative population samples have mostly involved cross-sectional designs.

To challenge the estimates provided in the PWC report, other studies have suggested that the 10% of people with the poorest mental health (a similar figure to national estimates of prevalence of common mental illness in working samples) had a 13% increased rate of paid sick leave. This is much less than the 200% suggested in the PWC model. The effect was stronger for longer term sickness absence, as commonly found.

Additionally, it is known that tertiary interventions that improve return to work rates (decreasing absence periods) will oftentimes increase 'presenteeism'. This highlights the difficulty in establishing independent factors, the false assumptions of much modelling done-to-date and how costs can be measured and shifted between an insurer and employer.

Aside from the PWC and KPMG papers, we note the paper on return on investment prepared by the Centre for Health Economics Research and Evaluation and the Brain and Mind Centre which

[6] Nexø M, Kristensen J, Grønvad M, Kristiansen J, Poulsen O, 2018; Content and quality of workplace guidelines developed to prevent mental health problems: results from a systematic review, ,Scand J Work Environ Health 44(5):443-457 doi:10.5271/sjweh.3731

[7] Ibid.

specifically measured return on investment, including absenteeism and presentism changes when a work-related intervention is implemented[8].

Any proposed intervention should not only clearly demonstrate a reduction in risk of harm but should also have a demonstrated ROI. The research found that only a handful of the moderate and strong interventions met this criteria:

"Job design interventions aimed at reducing psychosocial work stressors can break even or produce small returns if focussed upon those with high levels of such risks. However due to the limited proportion of employees who will benefit and the productivity gains incurred, introducing organisation wide job design interventions would seem unlikely to lead to a positive return on investment unless there were very high levels of such risks in an organisation and/ or these risks were associated with much higher costs than we observed. "

"Whilst there may be good arguments for reducing job insecurity through addressing the increasing casualization of the workforce, we did not identify any cost benefit for organisations in doing so through making these people permanent employees."

"We could not identify any organisational-level interventions with a two or three star ratings for moderate or strong effects on employee mental health/occupational outcomes, e.g. job redesign, employee participation etc."

"We could not find systematic data on employee outcomes to support using two of the interventions suggested in the previous report. Coaching/mentoring had no reviews and variable results from a few small randomized control trials (RCTs). Mental Health First Aid, although highly effective in improving knowledge and supportive behaviour and decreasing negative attitudes, has not been shown to have subsequent effects on the mental health or occupational outcomes of employees."

We also highlight the authors note in this paper which emphasises the further need for evaluations of workplace health interventions in small- and medium-sized businesses, more research into understanding what factors influence participation and changes in health outcomes and what business outcomes and costs are important measures, and finally, that the very limited data on economic evaluation needs addressing.

2.2 Why it is premature to amend WHS laws at this time

Work health and safety legislation and guidance must take a practical and evidenced-based approach to the emerging area of workplace psychosocial risk. Any recommendations must be capable of practical implementation in a diverse range of business environments, including small and family businesses. In accordance with good governance, governments and legislation should seek to ensure that policies to address psychological/psychosocial risk in the workplace do not prescribe or inadvertently impose specific controls or intervention methods particularly whilst there is limited evidence to support the efficacy of any workplace controls.

Blanket 'one-size-fits-all' approaches to psychological risk in workplaces are not effective and the emphasis should be on empowering and assisting workplaces to effectively manage psychological risk relevant to their individual work contexts.

[8] Yu S, Glozier N, 2017, Mentally Healthy workplaces: A return-on-investment study. http://hdl.handle.net/10453/119181

As we articulated earlier:

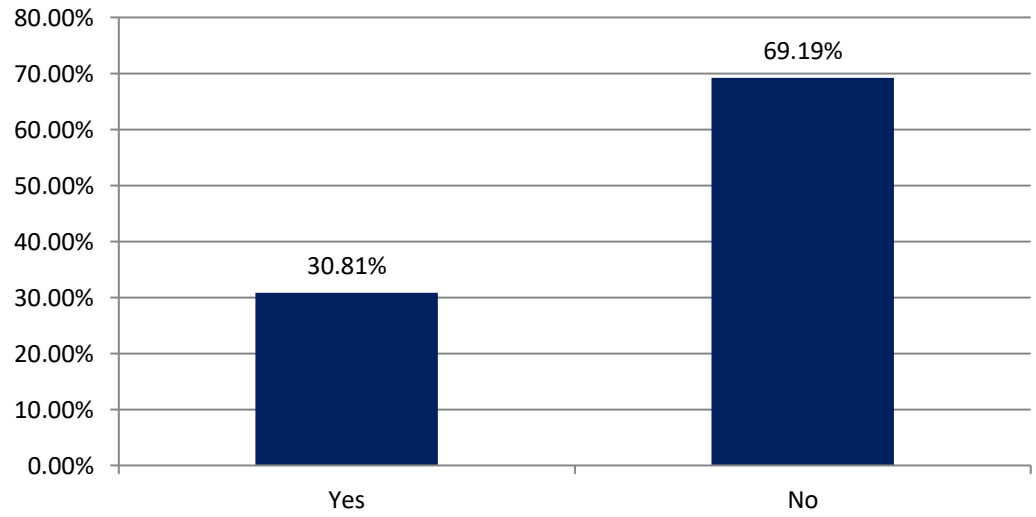
- There is continued debate around work-related psychosocial hazards (ability to identify): research has identified a number of issues in evaluating the risk factors for workplace psychological harm and the academic fraternity remain divided in regards to each hazards health outcome, effect size and strength of evidence.
- There is limited research and tools/resources available for PCBUs to validly and reliably assess psychological risk in their workplace.
- Professional skills and capacity in this area are underdeveloped and scarce.
- There is little research and evidence for the efficacy of specific controls or interventions for any of the known psychosocial hazards that would apply globally, to a diverse range of business environments, including small and family businesses.

Furthermore, the National Guide released during the Review in 2018 is a good first step but time is needed to effectively promote the resource and assess the take-up by PCBU's. Producing further regulatory materials before a review of its effectiveness, usability and accuracy would be premature and inconsistent with principles of good regulation.

Although the National Guide has been promoted through conference presentations, webpage updates and news items on the Safe Work Australia website, social media and established media channels it is still relatively unheard of across industry.

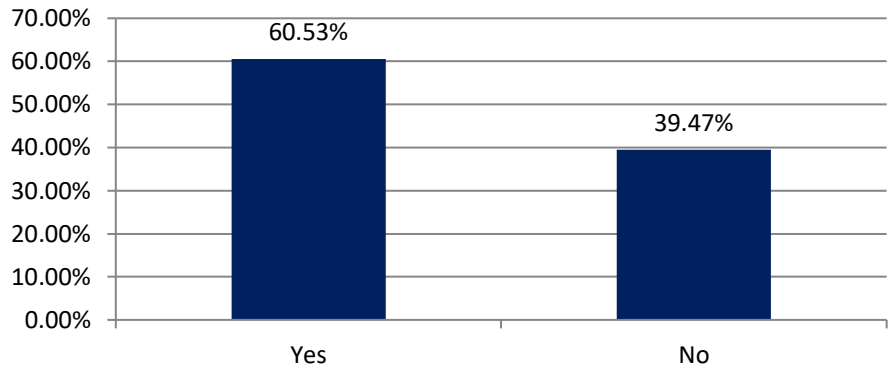
We asked businesses in our member network whether they were familiar with the Safe Work Australia National Guide "Work-related psychological health and safety: A systematic approach to meeting your duties"? Only 30% were.

Figure 1: Response by business – are you familiar with the Safe Work Australia National Guide "Work-related psychological health and safety: A systematic approach to meeting your duties"?



Encouragingly, of those that were familiar with the Guide, the majority found it useful.

Figure 2: Response by business – if you were aware of the SWA National Guide did you find it useful?



The predominant rationale for regulation is to address concerns from businesses that they needed guidance on "what to do".

Regulations are not informative. They don't advise how to conduct the risk management process and implement controls. Businesses would still seek additional resources and support.

Currently there is great confusion between public health preventative measures and psychosocial risk management. There is a significant gap in resources available for the latter. If these resources and support aren't available, there is likely to be significant non-compliance. This is particularly true for small businesses.

Furthermore, clarity would be needed on what regulators consider 'reasonably practicable' and evidence of compliance from SME's as expectations vary along with regulatory guidance and actions currently experienced by industry.

The status quo would allow time for practical guidance (such as the Guide and materials being developed to support it) to become bedded in WHS practice and understanding, and to evaluate if they address the existing confusion and uncertainty. It would also allow evaluation of the state of knowledge on management of work-related psychosocial risks and how it can be best applied in practice. This would support development of evidence-based actions to improve management of work-related psychosocial risks.

2.3 Learnings from the UK experience: Management Standards

Another strong argument against regulation at this time is the failing of the HSE UK standards to improve psychological risk management in the UK. These have been considered 'good practice' and have formed the basis of a number of activities in Australia.

In 2017, the Health and Safety Executive published a position paper by the HSE Workplace Health Expert Committee on Work-related stress and psychological health.

The Workplace Health Expert Committee (WHEC) was formed to provide independent expert advice to the HSE on new and emerging workplace health issues, new and emerging evidence relating to existing workplace health issues and the quality and relevance of the evidence base on workplace health issues.

The work-related stress and psychological health paper reviews the effectiveness of the HSE Management Standards for work-related stress.

HSE Management Standards for work-related stress

In 2004, the HSE developed a process based around a set of Management Standards, to help employers, employees and their representatives manage the issue of work related stress. The Management Standards 'define the characteristics or culture of an organisation where the risks… are being effectively managed' (HSE website). These are categorised into six discrete but related areas, or potential stressors/hazards: Demands; Control; Support; Relationships; Role; and Change.

Guidance not regulation

The Management Standards are designed to: help simplify risk assessment for work-related stress; encourage employers, employees and their representatives to work in partnership to address work-related stress in organisations; and provide a yardstick by which organisations can gauge their performance in tackling the key causes of work-related stress.

Implementation of the Management Standards is not a statutory requirement, but they constitute HSE guidance on undertaking stress risk assessment and one way in which the obligation to conduct such risk assessments can be met.

How it was rolled out

Following their launch, the HSE undertook a range of activities to raise employers' awareness and understanding of the Standards:

- Between 2004 and 2008, the HSE undertook two programmes encouraging uptake of the Management Standards:
    - Stress Management Standards Sector Implementation Plan Phase 1
    - Healthy Workplace Solutions (SIP2) interventions, which were workshops and master-classes, followed up by support from a telephone help line and the inspectorate.
- Stakeholder engagement activities have continued since 2008.

We note that part two (Healthy Workplace Solutions) would be beyond what most WHS Regulators in Australia would offer given current resourcing issues.

In addition to providing the Management Standards and associated guidance on stress risk assessment, the HSE has also provided guidance materials on how line managers' behaviour can prevent and reduce stress at work.

Are the Management Standards working? Implementation, uptake and effectiveness of the Management Standards

So far, evaluation of the Management Standards has included:

- **Psychometric validation of the Management Standards Indicator tool**, which is the questionnaire designed to measure the psychosocial hazard areas set out in the Management Standards
    - Three validation studies have been conducted, which show: the questionnaire is a psychometrically robust instrument for measurement of the seven factors. Also

showed that the questionnaire provide a good fit to the seven-factor structure and are valuable and reliable instruments for use across small-, medium- and large-sized organisations in both the public and the private sectors (Edwards and Webster, 2012).

- **Exploration of the relationship between the Management Standards** (as measured by the indicator tool) and **stress-related work outcomes** (Kerr, McHugh and McCrory, 2009).
    - This study showed that the six areas covered by the Management Standards indicator tool are positively associated with job satisfaction and negatively associated with job-related anxiety, job related depression, and witnessed errors/near misses.
- **Research into organisational responses to the Management Standards**
    - Results of this research suggested that rolling out the Management Standards process across large, complex, multi-site organisations had proved challenging;
    - They had little hard data that could quantify the impact of undertaking some or all of the Management Standards process.
- **Intervention research**
    - Results showed a small intervention effect for one measure of wellbeing (WEMWBS) but no effects on sickness absence, GHQ score or work characteristics.
    - A research project that aimed to answer the question "**can the Management Standards approach be used more widely to address the most common health problems at work**?"
    - The researchers conclude:

        "The prevailing consensus was that although the Management Standards are a needed, innovative, simple, and practical overall approach to managing work-related stress, organisations experience problems following through and implementing risk reduction interventions. Thus, there is still work to be done in terms of how organisations can implement the Standards and what skills and competencies are required. Overall, a question was evident related to whether the Management Standards work in practice or in principle. ***The consensus was that the approach works well in principle but less so in practice.*** *Experts also agreed that the Management Standards approach is generally but not always used as the Health & Safety Executive intended.*

    - The Indicator Tool omits a number of important factors that can impact on work-related health, lacks validity, the assessment can be costly, time consuming, prescriptive and difficult to implement. The overall approach requires additional resources and guidance to be implemented, is not adequately supported by practitioner competencies, and is narrowly focused on stress.

All of these issues and concerns are relevant to the current consideration of prescriptive regulations in Australian WHS laws. Furthermore our WHS Regulators would not be in a position to provide the level of guidance and support that the HSE provided in rolling out their initiative unless additional time and funding where provided to facilitate this.

A series of annual omnibus surveys conducted between 2004 and 2010, designed to monitor changes in the psychosocial working conditions covered by the Management Standards (HSE, 2005-2012). These showed that scores for 'Demand', 'Peer Support', 'Role' and 'Relationships' did not change significantly between 2004 and 2010, remaining positive over the period. Scores on 'Change'

and 'Managerial Support' showed an improvement, and scores on 'Control' showed a worsening over the period. While the early years of the survey showed a decrease in the number of employees reporting that their job was 'very' or 'extremely' stressful, levels subsequently returned to their 2004 level. There was little change in the number of employees stating that they were aware of stress initiatives in their workplace or reporting discussing stress with their line manager.

The report concludes:

> *"The apparent lack of impact to date of the Management Standards could reflect the long latency between organisations first implementing the process and benefits being realised, and with so many other economic and social factors affecting worker perceptions of their working conditions, any effect may be masked. Without a control group, there is no way to assess how conditions may have changed without the management standards, and only in combination with other evidence can the effects of the Management Standards be understood."*
>
> *HSE (2005-2012) in Psychosocial working conditions in Britain in 2010 (p10)*
>
> *In conclusion, the general picture is of little change in psychosocial working conditions in Britain between 2004 and 2010; employees have largely reported positive conditions over this period. There are signs of improvements in of management support, and improvements in management of change, but a decline in control in the most recent data, which is perhaps expected in light of changing economic conditions and insecurities in the jobs market.*
>
> *The proportion of employees reporting their jobs as extremely or very stressful was lowest between 2005 and 2007, and despite the small decrease in 2010 this remains slightly elevated. It is unlikely that the rise and fall in those reporting their jobs as very or extremely stressful over the survey years is directly related to the Management Standards but impacted by additional factors already discussed in this report.*
>
> *HSE (2005-2012) in Psychosocial working conditions in Britain in 2010 (p19)*

Are the Management Standards fit for purpose 12 years on? New evidence, emerging risks and developing thinking

The paper states that:

While the Management Standards were based on sound scientific evidence that remains relevant, more recent research has helped to clarify further the key workplace factors that influence psychological health. Meanwhile, as outlined above, there are a number of emerging risks that are relevant to psychological health, and ***thinking in the field of work-related health has moved on.***

This is relevant today to the proposal for psychological regulation. Given the academic fraternity are not 'settled' and there are still significant research gaps, further clarification and refinement and changes in thinking are expected over the next decade. Regulation is not appropriate for developing areas of risk.

The WHEC paper also identified areas for further research such as:

Mechanisms of action: greater clarity is needed on the mechanisms by which aspects covered by the Management Standards, like job control and social support, lead to psychological health, and

what interventions (e.g. human resource (HR) practices and organisational processes) could help people to use resources such as control and support to cope better with job demands.

2.4 Productivity Commission Inquiry

Currently underway is a Productivity Commission Inquiry into mental health. The outcomes of this review are relevant as it also considers the possibility of further WHS regulation, but is does this with regard to a range of other contexts recognising the need for a holistic approach to be effective.

WHS is just one aspect of workplace regulation and management that impact psychological health. Workplaces have many moving parts.

The management of mental health in the workplace is a complex area. In addition to the legal risks, there are practical difficulties that come with managing employees who are genuinely not well, and who may not attend work or not respond to reasonable requests and directions.

In focusing solely on WHS as the applicable workplace regulation relevant to mental health concerns, we fail to give due regard to the broader statutory framework that governs the employer/worker relationship, and the range of regulatory regimes that are potentially triggered when mental health concerns emerge .

Increasingly, employers are required to manage workplace issues with regard to more than one piece of legislation and in the case of mental health, looking beyond legislation to also have regard to 'good practice'.

These intersecting obligations and expectations add layers of complexity and can make acting in the context of mental illness and psychological risk more difficult.

Workplaces not only have to comply with WHS and worker's compensation obligations in relation to psychological health, they must also comply with the Fair Work Act 2009 (Cth), federal and state anti-discrimination laws and the Commonwealth Privacy Act 1988 (Cth).

The duty for employers to make reasonable adjustments is found in the Commonwealth Disability Discrimination Act 1992 (Cth) (DDA). Additionally, the Fair Work Act 2009 (Cth) provides protection for employees with mental illness against adverse action by employers such as dismissal or discrimination. Other relevant legislation that outlines obligations for employers is the Commonwealth Privacy Act 1988 (Cth) .

2.5 Regulation won't address key barriers

- **Lack of understanding of what best practice is**
  Many employers feel that currently there is no sense of what psychological risk management 'best practice' comprises. There is a large amount of information available about approaches to psychological risk management but there is a lack of clarity around what is agreed best practice by WHS regulators. This is partly attributed to the distinct lack of evaluative evidence on the impact of different approaches/interventions. Without understanding what best practice means, it is difficult to discern whether resources available are of suitable quality and provide guidance aligned to best practice.

- **A lack of guidance focusing on implementation**
  Implementation guidance is limited, and there is a lack of direction to assist employers to find the relevant information and support. Although plenty of information and resources are available, there is still confusion as to how to translate the theoretical concepts described into practice. This is particularly so for small and micro-business.
- **Skills and capabilities**
  Significant deficiency in the training provided in this area and professionals with appropriate capabilities.
- **Small and medium business**
  Small businesses are often not catered for in currently available materials and resources. Despite often acknowledging small businesses, the currently guidance materials generally require extensive time, money and training to implement, which can be out of reach for some small and medium enterprises. This means they are often not appropriate for smaller businesses who do not have access to additional management tools, expertise, or funding.
- **One-size-fits-all and Industry differences**
  Australian workplaces span a wide range of sectors and industries. The perception and prevalence of potential psychological risk factors is different across different work environments (e.g. corporate office environments, remote mining companies, hospitals etc.).

2.6 Hierarchy of controls

Consultation RIS Discussion

It is worth noting Recommendation 27 (discussed in Chapter 15 of this Consultation RIS), recommends regulation 36 of the model WHS Regulations to be moved into the model WHS Act. If accepted, this change would apply the hierarchy to psychosocial risks to psychological health mandatory without further amendment.

*Refer to Chapter 4.

3 The Category 1 offence and Industrial Manslaughter

Option 1	Status quo	Support
Option 2	*Include gross negligence as a fault element in the Category 1 offence (Recommendation 23a only)* Recommendation 23a: Enhance Category 1 offence Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is **grossly negligent** in exposing an individual to a **risk of serious harm** or death.	*Oppose*
Option 3	*Introduce an offence of industrial manslaughter in the model WHS Act (Recommendation 23b only), and* Recommendation 23b: Industrial manslaughter Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following: • The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act. • The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate. • A body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers. • The offence covers the death of an individual to whom a duty is owed. Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).	*Oppose*
Option 4	*Implement both Recommendations 23a and 23b.*	*Oppose*

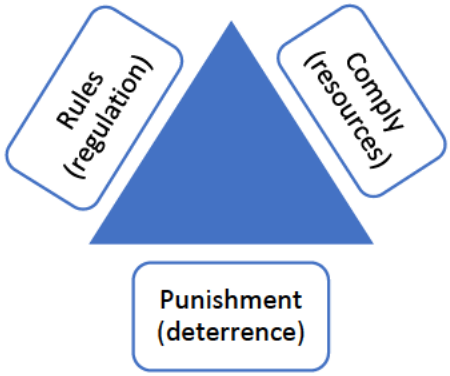
The Australian Chamber opposes the inclusion of dedicated industrial manslaughter offences in workplace health and safety legislation.

Industrial accidents, including those leading to fatalities, should remain subject to regulation via existing workplace health and safety legislation.

Manslaughter prosecutions should only come into play in relation to workplace fatalities subject to existing formulations and tests under the criminal law, without the creation of bespoke or dedicated new offences of industrial manslaughter.

3.1 Alternative options which will improve health and safety outcomes.

Governments and Regulators, in reviewing and implementing regulation, should be mindful of each of the key components of effective compliance – awareness of the rules (regulation), the ability to comply (resources) and punishment (deterrence). Punishment is only one side of this compliance triangle.



Regulators have a number of education and awareness programs, and much of what is done in Australia is world leading. However, measurement of their effectiveness and influence is limited.

Anecdotally, a majority of Australian businesses still struggle to identify regulations specific to their context and struggle to understand how to implement the regulations in a way that actually makes their workplaces safer. This challenge is unrelated to penalties and compliance.

The current system has scope to be made more balanced, through placing more equal emphasis on both prevention and enforcement. Penalties after the fact cannot be the primary driver of safer workplaces. Regulators need to bolster their inspectorate capabilities to ensure active monitoring of compliance before any incident, as well as improved promotion and information to ensure more PCBUs are focussed on making their workplaces safer through practical, implementable means (and such promotion and information which also engenders workplace cultures that support safe working).

Possible alternative options to improve health and safety outcomes include:

- Increase consistency in sentencing, through issuing sentencing guidelines, rather than legislatively increasing penalties. This should be done with sufficient rigour around the selection of sentencing panels.
- Greater resourcing for regulators – increased capacity for education activities particularly in small business, more active compliance monitoring and greater investment in inspector training and capabilities.

  "The regulations and requirements as they currently stand are more than adequate enough to provide for maintaining a safe workplace. What is needed is less lawyers and more "boots on the ground" compliance inspections."

- Increase safety capabilities and skills – focus on embedding safety and health fundamentals in vocational training and tertiary qualifications.

  "More safety training is required earlier in the training of a rookie employee so as each individual is more aware of potential risks." Sole Trader, NSW.

"There is too much emphasis on management penalties and not enough on training and education. Instead of Penalising pcbu's, with financial penalties, implement prescribed "useful" training requirements, (unlike the construction industry induction, white/green card, which is a joke). Minimum ongoing education prior to any accidents and major re-education for all the companies employees post accident. Thereby penalising the company with financial loss (costs of training etc) and providing useful education to the employees." Medium Business, Electricity, Gas, Water and Waster Services, NSW.

"Common sense needs to prevail with education as the key focus regarding WHS. Deterrence through Increasing 'penalties' (financial and the threat of imprisonment) along with additional administrative burdens on business are unlikely to achieve the desired or expected outcomes with some of the proposed legislative changes. Should such changes be implemented, corresponding business assistance (financial and otherwise) from Government along with a review of the scope of Business Insurance coverage should be addressed also." Small Business, Professional Services, SA.

- Prioritise sharing of lessons learnt – prompt identification and circulation of safety lessons to industry.
- Improve the timeliness and adequacy of guidance and alerts published by regulators to industry.
- Develop a small business strategy that addresses key barriers and contextual issues to the traditional approaches to safety and health.

"Small business needs assistance and guidance, not threats, fines and prosecution. Have mandatory training free of cost, and refresher training free.

Who's out there to assist and guide small businesses? I've been trading over 42 years and never had a call even from anyone offering guidance, help etc you just get lumbered with everything to sort out yourself and this is the real problem because as I first said I'm a sparky trying to survive and give jobs to a few others, not really a ceo with a legal team, managers etc." Small Business, Electrical Services, NSW.

"We need to be improving the ability to make the process of safety an effective and efficient one, that it is a living document, able to be used without imposing so much time as to make it cost prohibitive - particularly for small business. We also need to be teaching the process of safety and the expectations of safety from both employer and employee sides and this should be taught in schools particularly in High schools and university courses, not just around specific industry or activity but as a whole world view." Large Business, Arts and Recreation, VIC/

Use of Enforceable Undertakings

In its review of effective WHS interventions[9], Safe Work Australia concluded that different approaches work better for some businesses than for others.

For example, large businesses may respond best to enforcement approaches where their public reputation could be at greater risk (such as with adverse publicity orders), whereas informational and lower level persuasive approaches are often better suited to small businesses.

[9] Safe Work Australia, 2013, The effectiveness of work health and safety interventions by regulators: A literature review. https://www.safeworkaustralia.gov.au/system/files/documents/1702/effectiveness-whs-interventions-by-regulators-literature-review.pdf

Enforceable undertakings (EUs) are another tool available for compliance and are negotiated between the business and the regulator as an alternative to undertaking court proceedings.

Industry welcomed EUs in the model WHS legislation as a legitimate tool in compliance activities, recognising they have been used outside of WHS at the federal level for some time (i.e. ACCC, ASIC etc.). The advantages of enforceable undertakings are that, unlike prosecutions, they can produce better results in respect of lasting compliance and do so across a wider range of workplaces and situations.

EU's are a transparent process, with both company / organisation names, industries of operation and the terms of the EU published on regulator websites.[10]

Example: NSW Resources Regulator

The NSW Resources Regulator accepted the joint EU from Ulan West Mine's mine holder, Ulan Coal Mines Ltd, and operator, Ulan West Operations Pty Ltd, after finding it would deliver better safety outcomes than a prosecution.

In accepting the EU, Resources Regulator chief compliance officer Anthony Keon said "the undertaking is considered significant, and will provide tangible benefits to the mining industry and the community".

Ulan Coal Mines and Ulan West Operations will spend $90,000 on developing and delivering a "skills workshop" for managers and supervisors from mining operations in the Mudgee region, and their contractors according to the EU.

They will also spend $60,000 on mental health training seminars for these organisations and provide $100,000 to surrounding public health facilities to fund equipment for musculoskeletal disorder rehabilitation. The undertaking is estimated to cost $250,000, and the two companies will pay the regulator's costs of $252,744.

Example: SafeWork SA

SafeWork SA alleged SRG Building (Southern) Pty Ltd breached s32 of the State WHS Act. The regulator accepted SRG's enforceable undertaking because it "delivers substantial work health and safety benefits to SRG workers, the construction industry in general and the broader community".

The EU document outlines that the employer was issued a prohibition notice after the fatality, and responded by reviewing its system of work for scissor lifts, and designing and manufacturing early-warning devices to be used on EWPs. It also introduced new safety initiatives and safety standards including a "take five" initiative and requiring executive sign-off for EWP use.

The undertaking is expected to cost $461,920 in the first year, and $449,600 over the following 24 months, taking the total estimated cost to $911,520.

The EU document states that SRG committed to:

> $76,500 on supplying nominated organisations with the early-warning devices to be used throughout the industry, and grant them use of its design and other relevant intellectual property;

"The design and manufacture of such a device is an initiative in the industry that sets a new standard for safety when using a scissor lift," the document says. "It can be further adapted and allow the industry to further improve the current work system".

[10] See for example: https://www.worksafe.vic.gov.au/pages/laws-and-regulations/enforcement/prosecution-result-summaries-and-enforceable-undertakings

$72,010 to delivering safety training to all levels of staff;

$35,200 to implementing a health and wellbeing program targeting manual handling and body awareness;

$56,210 to introducing an intranet documents management system;

$36,200 on establishing an annual safety awards scheme and participating in SafeWork SAs "safe work month";

$169,000 on employing a national quality and system manager; and

$16,800 on strategies that deliver community benefits, including expanding its workplace and graduate programs and presenting health and safety education sessions for TAFE SA.

In 2017, 25 EUs were accepted around Australia with the total value of actions amounting to $7,786,448. The average value of actions under EUs in 2017 was $311,458. However, increasingly there is a trend for larger companies to undertake actions averaging $800,000 to $1 million. This financial cost is not insignificant.

The most frequent type of actions relate to training, information sharing and auditing with an increasing amount also focusing on the development of new preventative or risk minimising technologies.

The use of EU's even where there has been a fatality is welcomed by industry and seen as an effective behavioural change tool beneficial to the community more broadly.

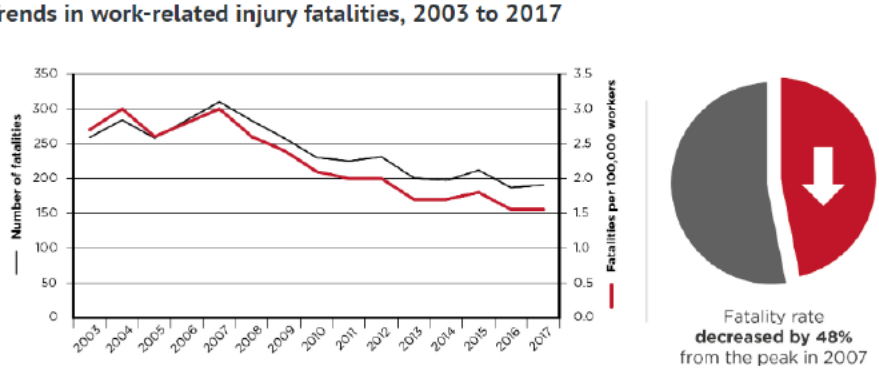
3.2 Support for the status quo

Reductions in the incidence of work-related fatalities, injury and disease

A balanced regulatory approach is the key to achieving safer workplaces, evidenced by the continued decrease in fatalities as well as serious injury claims nationally.

The national fatality incidence rate has been falling steadily over recent years, decreasing by 48% from 2.96 per 100,000 workers in 2007 to 1.5 per 100,000 in 2017 — which is 6 per cent less than the rate in 2016 and the lowest rate since the series began in 2003, as shown in Figure 3.

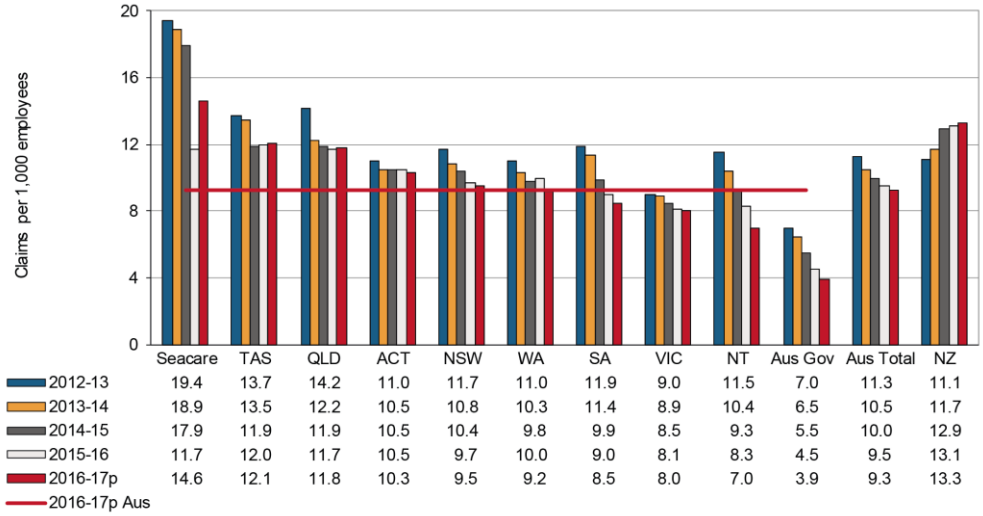
Figure 3: Trends in work-related injury fatalities, 2003 to 2017 (source: Safe Work Australia[11])



[11] Safe Work Australia, 'Key Work Health and Safety Statistics Australia 2018 work-related injury fatalities', https://www.safeworkaustralia.gov.au/book/work-related-injury-fatalities-key-whs-statistics-australia-2018#trends-in-work-related-injury-fatalities (accessed 5 August 2019)

Similarly, the overall Australian incidence rate for serious injury and disease claims has steadily declined over the past four years12, falling by 16 per cent from 11.3 to 9.5 claims per 1,000 employees between 2012–13 and 2015–16 as seen in Figure 4. Preliminary data for 2016–17 show an incidence rate of 9.3 claims per 1,000 employees.

Figure 4: Incidence rates of serious injury and disease claims by jurisdiction, 2012 to 2017 (source: Safe Work Australia)



	Seacare	TAS	QLD	ACT	NSW	WA	SA	VIC	NT	Aus Gov	Aus Total	NZ
2012-13	19.4	13.7	14.2	11.0	11.7	11.0	11.9	9.0	11.5	7.0	11.3	11.1
2013-14	18.9	13.5	12.2	10.5	10.8	10.3	11.4	8.9	10.4	6.5	10.5	11.7
2014-15	17.9	11.9	11.9	10.5	10.4	9.8	9.9	8.5	9.3	5.5	10.0	12.9
2015-16	11.7	12.0	11.7	10.5	9.7	10.0	9.0	8.1	8.3	4.5	9.5	13.1
2016-17p	14.6	12.1	11.8	10.3	9.5	9.2	8.5	8.0	7.0	3.9	9.3	13.3
2016-17p Aus												

It is important that the current law and regulatory frameworks can continue to deliver the real improvements in aggregate safety performance we have seen across the past decade.

The issue of deterrence

There is strong academic evidence to support the conclusion that attempts at engineering criminal law rules to achieve a heightened deterrence effect are generally ineffective.[13]

Regulatory agencies in developed countries have traditionally had broadly two enforcement styles available; the ***deterrence strategy*** that:

> *'emphasises a confrontational style of enforcement and the sanctioning of rule-breaking behaviour.*
>
> *It assumes that those regulated are rational actors capable of responding to incentives, and that if offenders are detected with sufficient frequency and punished with sufficient severity, then they and other potential violators, will be deterred from violations in the future.'*[14]

Or the ***compliance strategy*** that seeks to prevent harm rather than punish it and focuses on cooperation between regulator, enforcement authority and person rather than confrontation, and conciliation rather than coercion.

With the introduction of the model WHS laws, Australia sought to adopt an approach that combined the two styles, termed '**responsive regulation**'. However, governments, regulatory agencies and courts are increasingly reverting to an outdated, deterrence style approach.

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[12] Safe Work Australia, 'Comparative performance monitoring report 20th edition–Part 1', https://www.safeworkaustralia.gov.au/doc/comparative-performance-monitoring-report-20th-edition-part-1 (accessed 5 August 2019)

[13] W. Voermans, *De aspirinewerking van sanction-eren (The Aspirin Effect of Sanctioning)*, (2007), Wolff Legal Publishers.

[14] Neil Gunningham, *Enforcement and Compliance Strategies*, in: Baldwin, Cave and Lodge (eds.), *The Oxford Hand-book of Regulation*, (2010) Oxford University Press, chapter 7 (p. 120-145).

The question and debate on whether penalties are an effective means to ensure regulatory compliance has gone on for centuries. Criminologists, legal economists and forensic psychologists, in particular, have addressed these issues.

Robinson and Darley[15] sought to answer the question "Does criminal law deter?", concluding it didn't after consideration of the behavioural science data. Tombs and Whyte[16] affirmed that across a heterogeneous variety of regulation scholars, there is a generalized rejection of 'deterrence-based' approaches, and Beckett and Harris characterized the use of monetary sanctions as misguided.[17]

Barrett, Lynch, Long and Stretesky conducted a longitudinal study examining the impact of the dollar amount of fines on compliance with environmental laws in Michigan, US. The research suggested that:

> *"While noncompliance may slightly decrease immediately following a fine, there are few changes to a firm's long term compliance behaviour. Furthermore, analyses of these data suggest that total fines levied prior to the most recent fine actually have a positive relationship with noncompliance."*[18]

Lynch, Barrett, Stretesky, and Long[19] simultaneously examined thirty years of US EPA criminal cases and concluded the probability of detection and criminal punishment for a crime is unlikely, casting doubt on the utility of current deterrence-based models.

Overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of "severe sanctions leading to higher compliance", in either criminal justice, or in the enforcement of business regulations.[20]

Research suggests that criminal prosecution is unlikely to be the most appropriate or effective tool to ensure that non-compliance is addressed, or deterrence achieved.

3.3 Consideration of recommendation 23a only - Include gross negligence in the Category 1 offence

Fault element - Recklessness v Gross Negligence

The Review Report suggests that the threshold of recklessness sets the bar for conviction too high and including gross negligence in s 31 of the WHS Act will assist prosecutors to secure convictions for the most egregious breaches of duty.

The introduction of gross negligence as a fault element in the Category 1 provision of the WHS Act would demean the intent behind its original drafting and its adherence to legal principles.

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[15] Robinson, P & Darley, J., *Does Criminal Law Deter?; A Behavioural Science Investigation*, (2004) Oxford Journal of Legal Studies, 42, 2, p. 173-205.
[16] Tombs, S & Whyte, D., *The myths and realities of deterrence in workplace safety regulation*, (2013), British Journal of Criminology, doi:10.1093/bjc/azt024
[17] Beckett, K., & Harris, A., *On cash and conviction: Monetary sanctions as misguided policy, (*2011*)*. Criminology & Public Policy, 10(3), 509–537.
[18] Barrett, K.L., Lynch, M.J., Long, M.A. et al. Am J Crim Just (2017). https://doi.org/10.1007/s12103-017-9428-0
[19] Lynch, M. J., Barrett, K. L., Stretesky, P. B., & Long, M. A. *The weak probability of punishment for environmental offenses and deterrence of environmental offenders: A discussion based on USEPA criminal cases, 1983–2013*, (2016). Deviant Behavior, 37(10), 1095–1109.
[20] Blanc, F., "*Reforming Inspections: Why, How and to What Effect*?", (2012), OECD, Paris.

Currently the Category 1 offence requires the person charged with the offence to have acted recklessly. The element contains a requirement of *mens rea*[21]. *Mens rea* in the context of recklessness is the knowledge that his or her act or omission could lead to serious injury or death. As it stands, the Category 1 offence is linked to the highest degree of culpability and therefore attracts the highest penalty.

Gross negligence as a fault element does not require *mens rea*, rather it acts solely on *actus reus*[22], the physical act or omission. This is considered an objective test with a lower degree of culpability and should, following established principles, be tied to a lower penalty.

Category 1 offences were designed to be used in the most extreme cases of health and safety breaches, where the offender was acting 'knowingly' and recklessly. The definition of recklessness outlines the need for foreseeability of possible harmful consequences occurring, and the offender acting with disregard for the consequences.[23] Recklessness implies something less than intent, but more than negligence, and is treated as the equivalent to intention for the purpose of establishing *mens rea* in some jurisdictions offences.[24]

Culpability is the extent to which an offender is morally responsible for the offence that took place.[25] It is not feasible to allow for two fault elements of such differing levels of subjectivity and culpability to exist in the one offence.

Is there a problem with using the provision?

The Review report only mentions the fact that there are a number of cases that have not proceeded due to issues establishing reckless conduct. It does not provide evidence of the fact or data to suggest it is a relevant issue to prosecutors that would require legislative correction.

Due to the different subjectivity tests, fault elements and levels of culpability, differences in the number of Category 1 and Category 2 prosecutions would be expected. This is reflecting the nature of the offence framework, a distinction between the most grievous breaches of the act, not a deficiency in the Category 1 offence.

It should be noted that in recent years there has been a number of charges laid as well as prosecutions in accordance with s 31 (category 1) of the WHS Act. These include;

- Former Tad-Mar Electrical Pty Ltd site supervisor Jeffrey Rowe pleaded guilty to breaching s 31 ("Reckless conduct–Category 1") of the South Australian *Work Health and Safety Act 2012*. Martyn Campbell v Jeffrey Rowe [2019] SAET 104
- Gary Lavin (owner of Multi-Run Roofing) was charged with category 1 recklessness of the Queensland *Work Health and Safety Act 2011* – conviction appealed. R v Lavin [2019] QCA 109.

[21] *Encyclopaedic Australian Legal Dictionary; a guilty mind. The state of mind required to constitute a particular crime; the mental element of an offence. There must be a temporal connection between the mens rea and the actus reus of the offence*
[22] *Encyclopaedic Australian Legal Dictionary; a guilty act. Voluntary actions or omissions constituting a crime; the physical element of an offence. The actus reus may be a positive act or a failure to act.*
[23] *Encyclopaedic Australian Legal Dictionary*
[24] *Crimes Act 1900* (NSW) s 18(1)(a); *R v Crabbe (*1985) 156 CLR 464.
[25] *Encyclopaedic Australian Legal Dictionary.*

- Director, Michael Joseph Reid, and company, Oil Tech International Pty Ltd, were both charged with breaching s31 ("Reckless conduct–category 1") of the Queensland *Work Health and Safety Act 2011*[26].
- In Victoria, which is not a harmonised jurisdiction, Maria Jackson was sentenced to six months' jail after pleading guilty to breaching s 24 and s32 of the Victorian OHS Act for recklessly engaging in conduct that resulted in the death of a worker.[27] Although Victoria has not implemented the model WHS laws, this case provides supporting evidence that reckless conduct can be successfully prosecuted and result in a jail sentence.
- Schwing and Schwing engineer Phillip James O'Rourke were charged with breaching s 31 ("Reckless conduct–category 1") of the ACT *Work Health and Safety Act 2011*[28].
- Fresh Delight Trading Pty Ltd secretary Yuxue Yan was charged with breaching s 32 and 40(4) of the Victorian OHS Act, in recklessly engaging in conduct that placed a person in danger of serious injury[29].
- Cudal Lime Products Pty Ltd and two workers were charged with category 1 ("Reckless conduct") under s31 of NSW's mirror *Work Health and Safety Act 2011*[30].

There are a number of reasons for prosecutions against Category 1 charges to be unsuccessful that are unrelated to issues with establishing reckless conduct. These were not canvassed in the Review.

For example, plea deals can be made by the parties after charges are laid, such as in the Eagle Farm case. Another is that additional evidence can be presented which removes the prospect of a conviction after charges are laid, such as in the Schwing case.

3.4 Consideration of recommendation 23b only – Introduce an industrial manslaughter offence

The Australian Chamber believes a broad and collaborative approach to improve health and safety in Australian workplaces is needed. We are concerned that a focus on punishment after an incident, instead of reducing the risk, is not the best way to achieve that aim.

No death at work is acceptable. No-one should have to suffer the pain of the loss of a member of their family through a workplace incident. Workplace safety is a key priority for the Australian Chamber and the over 300,000 businesses we represent. We support practical and effective initiatives to increase safety in workplaces throughout Australia. There is no evidence that creating such an offence will improve safety – but there is ample evidence that working together with a focus on prevention does.

The Australian Chamber is a Member of Safe Work Australia (SWA) and we contributed significantly to Marie Boland's review of model Work Health and Safety (WHS) laws (the Boland Review). As part of the national consultation process, Ms Boland was invited to speak to employer forums in each state and territory hosted

[26] OHS Alert, 'Director charged under s 31 after fireball death', 30 October 2017.
[27] OHS Alert, 'Reckless company owner jailed, and employer handed high OHS discrimination fine', 15 January 2019. The Victorian offence (*Occupational Health and Safety Act 2004* (VIC), s 32) is not the same as the model WHS offence, but it does include 'recklessness' as a fault element.
[28] ACT WorkSafe media release, 'Manslaughter and other charges laid following fatal worksite incident', 19 May 2018. A general manslaughter charge was laid against the driver of a crane that tipped over, killing a worker. Category 1 offences were laid against officers, managers and supervisors of the crane company and construction company.
[29] OHS Alert, 'Secretary's safety breach constitutes reckless conduct', 11 April 2019.
[30] OHS Alert, 'Workers face jail in NSW's first category 1 case', 31 August 2016

by the respective Chambers of Commerce. All jurisdictions hosted Ms Boland at employer forums with our industry members.

We do not consider the Review process constituted adequate consultation for the introduction of a substantial new criminal offence of industrial manslaughter occasioning criminal prosecution, possible incarceration and a criminal record.

Consultation was not conducted properly or sufficiently with employer stakeholders on the potential for an industrial manslaughter provision to be introduced to WHS laws. We note that Ms Boland opened our member forums stating clearly that at that time she was not inclined to recommend the inclusion of a new industrial manslaughter offence as she did not see the need for one. As a result, the employers present concentrated on other matters. There was no discussion in relation to industrial manslaughter and no employer engagement with the possibility of such a recommendation.

The Review report which recommends industrial manslaughter lacks sufficient evidence and justification for such a recommendation. Rather, it simply refers to the "strong community expectation … that it should be possible to prosecute for the death of a person under a statutory offence of industrial manslaughter in model WHS laws" as the justification for making such a recommendation. This contrasts with the intent of the model laws review, that before recommending any change to legislation, significant evidence showing the need for such a change would be warranted as well as weighing up of any unintended consequences. The final report does not cite or rely on sufficient objective evidence to support the introduction of very serious new criminal offences.

Industrial manslaughter would be a crime occasioning imprisonment. Incarceration is the most severe sentencing order available restricting an individual's freedom by confining them in prison, and serious offences that occasion imprisonment must be the most rigorously evidenced in any society. The decision to impose a penalty of jail must be confined to the most serious of offences and be based on the best evidence and research. A desire to 'punish' in certain situations is inconsistent with community expectations and is not sufficient justification for removing an individual's freedoms through criminalisation of an offence.

We are not aware of any evidence that threatening longer prison sentences (longer than those long part of existing health and safety legislation) is going to improve WHS behaviours and practices. Legal experts oppose introduction of industrial manslaughter provisions in WHS laws, and ACT and Queensland manslaughter provisions have not been effective, and have not had any demonstrable deterrent effect.

Employers support practical evidenced-based measures that will help employers and workers make workplaces safer. To address fatalities and serious injuries, the focus should be on better use of existing tools, including currently available penalties of jail time and criminal manslaughter charges, before considering any new criminal offences or additional penalties. This includes bolstering the capability of regulators to ensure active monitoring of compliance before any incident, as well as improving education and information to employers.

Unintended and detrimental consequences of

A new industrial manslaughter offence may result in:

- An increase in contested criminal hearings.
    - Individuals and companies will be less inclined to plead guilty to offences with such significant penalties.
- Decreased co-operation with WorkSafe and the Coroner's Court.
    - Individuals and companies will be less inclined to co-operate with WorkSafe and Coronial investigations and seek to be excused from inquests or inquiries on the

grounds of self-incrimination given the potential to be charged with such serious offences.

- Disincentive.
    - Individuals may be less inclined to engage in business or enterprises for fear of personal liability. This will particularly stifle small business.
    - This disincentive may also result in a decrease in those willing to undertake responsibilities for WHS in the workplace e.g. WHS Managers/Officers.
- Injustice
    - Even if an organisation has met all of its obligations under the WHS laws it is possible that a PCBU who has fulfilled its primary duty and provided a safe work environment for its workers, so far as reasonably practicable, could still be subject to an industrial manslaughter charge if:

        (a) the PCBU owes a duty to a person;

        (b) then the acts or omissions of its workers, agents or officers will be considered to be the conduct of the organisation; and

        (c) provided the acts or omissions, either individually or collectively, are considered to be criminally negligent (i.e. a great falling short of the standard of care a reasonable person would have exercised); and

        (d) that conduct causes the death of that person.

    - The mental element of negligence will be imputed to an body corporate provided that individual or collective acts or omissions are considered to be criminally negligent, regardless of the seniority, influence, status or standing of the worker within the organisation.
- Defences are unknown
    - Currently as the provision has not been drafted any defences available are unknown.

Inconsistent use of enforcement tools and delivery mechanisms

There has traditionally been a greater focus on regulation and its design, and on regulatory review, than on delivery mechanisms such as inspections and other enforcement tools.

There is however ample evidence that enforcement and inspections are crucial to how the regulatory sphere affects businesses, safety outcomes and the economy more broadly. In a report to the OECD on inspection reform, Blanc stated that:[31]

> *First, inspections and enforcement actions are generally the primary way through which businesses, in particular SMEs, "experience" regulations and regulators.*
>
> *Second, inadequate approaches or lack of changes in enforcement and inspections can mean that changes in regulations fail to deliver their full benefits.*
>
> *Third, evolutions in inspections and regulatory delivery to make them more compliance-focused, more supportive and risk-based can all lead to real and significant improvements for economic actors, even within the framework of existing regulations (which may, for different reasons, be very difficult to change "on the books" – so the ability to change the way they are enforced in practice matters).*

[31] Blanc, F., "*Reforming Inspections: Why, How and to What Effect?*", (2012), OECD, Paris.

Finally, enforcement and inspections are as much about methods and culture as institutions, and as much about organizational mechanisms as legislation.

Regulatory delivery needs to reflect the intent of the regulation. Any inconsistencies only serve to create further confusion and uncertainty about responsibilities under the law. The more complex the regulations are and the larger the volume of supplementary materials, the more likely you are to have inconsistencies.

The way in which inspections are conducted by individual inspectors (i.e. some may be flexible and look to the 'spirit' of the provision whereas others may stick to the written rules) can make identical regulation translate to very different compliance realities.

Johnstone's report to Safe Work Australia highlighted this reality. He found that different inspectors would factor in a duty holder's attitude or level of cooperation as a criterion in determining the appropriate enforcement response:[32]

[T]hat whole attitude test comes in whereby: 'I'm here to assist you. I've noticed there's a few issues. I can help you, give you that information to get you up to a standard where it complies'. And if you get resistance from there then you have to look at your alternatives. … And that's where you start looking at: 'well I'm in a position where I now need to issue an improvement notice because: 'I've provided you information, I will assist you but you need to meet me halfway'. (inspector).

Compared to:

If there's a matter that requires prohibiting of work because it's unsafe, then that notice is issued. The motivation, level of knowledge or attitude or whatever of the PCBU doesn't come into it because … I think it gets a bit subjective then.

Can you imagine: 'oh, you got a notice because you've got a bad attitude', as opposed to: 'you've got a notice to prohibit this work because it's unsafe and it could seriously injure or harm a person'. And same with improvement notices, if there's a need to improve a system or whatever then that's issued. (manager).

Not only is there evidence of individual differences in inspection style by inspectors and significant overlap and lack of consistency by various regulatory agencies, there is also significant variation in the use of available compliance and enforcement tools by State and Territory Regulators.

In Table 1 below, significant differences in adoption of available compliance and enforcement tools and consistency of their use between each of the WHS regulatory agencies is evident.

[32] Johnstone., 2016, Report to Safe Work Australia "Project 2: Sentencing of Work Health and Safety Offenders", National Research Centre for Occupational Health and Safety Regulation

Table 1: The use of compliance and enforcement tools by the seven regulators in the jurisdictions that had implemented the model WHS laws by January 2014.

Note: These agencies are: WorkSafe ACT, Comcare, WorkCover NSW, NT WorkSafe, Workplace Health and Safety Queensland (WHSQ), SafeWork SA (SWSA) and WorkSafe Tasmania. (Information below has been sourced from SWA commissioned reports and anecdotal experience by industry members)[33].

Category of tools	Tools	Description of activities	Used by	Consistency *(qualitative research measure and anecdotal evidence from industry)*
AWARENESS, INFORMATION AND TRAINING INITIATIVES	General awareness raising Engagement	Media alerts, social media, marketing material, electronic updates and the agency's website Agency convenes meetings and forums with stakeholders	All	Not consistent – materials and use of medium vary.
	Advice and information	Provides advice through face-to-face contact in the workplace (and referring to website information) and in presentations (which may be online as webinars).	All	Not consistent.
	Education and training	Designs and delivers their own education and training programs for PCBUs and other duty holders in their jurisdictions.	Not all	Not consistent.
PROACTIVE INTERVENTIONS	Inspection	Conducts inspections of workplaces, and most regard an 'inspection' as a generic term embracing workplace visits for the purpose of conducting proactive interventions or reactive responses to incidents, complaints or for the resolution of issues and disputes.	All	Not consistent. Different models used.
	Audit	Conducts 'audits' with specific regulatory requirements or of WHS management systems.	All	Not consistent.
REACTIVE RESPONSE	Issue and dispute resolution	Each regulator has processes to respond to requests from workplace parties to assist in resolving issues and disputes over a range of matters under the WHS Acts – negotiating work groups, elections for HSRs, provisional improvement notices, 'cease work' decisions, the constitution of health and safety committees, and entry permit holder (EPH) matters relating to the union entry provisions.	All	Not consistent. Agencies take different approaches to issue and dispute resolution. Some regulators are more proactive and, in some cases, innovative in seeking to minimise issues arising, or to facilitate the resolution of issues that do arise. One agency labels these activities as 'workplace relationship resolution', and also deals with allegations of bullying and harassment through this process.

[33] . Bluff, Johnstone & Gunningham., 2015, Report to Safe Work Australia "Project 3: Regulator Compliance Support, Inspection and Enforcement", National Research Centre for Occupational Health and Safety Regulation. Johnstone., 2016, Report to Safe Work Australia "Project 2: Sentencing of Work Health and Safety Offenders", National Research Centre for Occupational Health and Safety Regulation.

Category of tools	Tools	Description of activities	Used by	Consistency *(qualitative research measure and anecdotal evidence from industry)*
	Dialogue and negotiation	Dialogue is routinely part of inspector visits to workplaces.	Not all	Not consistent. Some inspectors comfortable with the concept of 'negotiation' as part of what they do, but inspectors in two jurisdictions do not get involved in 'negotiation' because the legal requirements must be complied with, within a reasonable time.
	Verbal direction	Most regulators prefer inspectors to put directions in some written form (a notice or written direction as below).	Not all	Not consistent. In some jurisdictions, inspectors give 'verbal' directions where a matter can be, and is, addressed while an inspector is present at the workplace.
	Written directions	Most regulators make use of 'written directions', short of an improvement notice, at the end of an inspection or to address minor issues reported to the regulator without the regulator visiting the workplace. This may be a report/record of inspection indicating matters requiring attention. For lesser matters, regulators can write to a PCBU advising of action needed to comply with the legislation, in lieu of visiting the workplace, as with an 'administrative action letter'.	Not all	Not consistent.
	Letter of statutory obligation	One jurisdiction issues these to formally remind a duty holder of their obligations under the legislation, normally after an inspection or audit where the regulator forms a reasonable belief that a duty holder may be in contravention of, or is not fulfilling their obligations under, the legislation.	Not all	Used only in one jurisdiction.
	Improvement notices	In each jurisdiction inspectors issue improvement notices where they have a reasonable belief that a contravention has occurred, in order to require remedial action within a time limit.	All	Not consistent. The number of improvement notices issued tends to vary from jurisdiction to jurisdiction, and from year to year within each jurisdiction.
	Prohibition notices	Inspectors can issue prohibition notices where there is a serious risk to health and safety emanating from an immediate or imminent exposure to a hazard.	All	Not consistent. The patterns of usage of prohibition notices across jurisdictions resemble the pattern for improvement notices.
	Infringement notices	In all jurisdictions, infringement notices (also known as penalty or expiation notices) are provided for under the WHS Acts, or separate statutes or regulations creating infringement notices generally.	Not all	At the time of data collection they were in use in five jurisdictions. One WHS regulator had decided not to implement this mechanism. Another regulator was still determining how to implement them, and anticipated

Category of tools	Tools	Description of activities	Used by	Consistency *(qualitative research measure and anecdotal evidence from industry)*
				that their use could be an outcome of case conferencing rather than at the sole discretion of an inspector.
	Formal investigation for prosecution	Each regulator has processes for the formal investigation of certain matters with a view to prosecution. Most have specialist investigators: in some jurisdictions these are part of an organisation-wide investigations team or portfolio, and in one jurisdiction investigators are based in regional offices. Investigations are part of the role of generalist inspectors in agencies that do not have specialist investigators, as well as in some areas of the operations of some regulators that do have specialist investigators.	All	Not consistent. Some, but not all, of the WHS regulators have specialist investigators. These people are trained to conduct investigations to criminal prosecution standards, and often have a policing background. In the jurisdictions that do not have specialist investigators, generalist inspectors conduct investigations.
	Letter of caution	This is a warning to an entity or individual that the regulator has detected a breach of the WHS Act and has reasonable prospects of proving this in court.	Not all	Used only in one jurisdiction.
	Required attendance	Mechanism which involves requiring a representative of an organisation to appear to provide information.	Not all	Used only in one jurisdiction.
	WHS undertakings (enforceable undertakings EUs)	As provided in the WHS Acts, each regulator may accept an undertaking from a duty holder in lieu of court proceedings (except for a category one offence). It is the duty holder, not the regulator, which makes the offer of an undertaking.		HWSA (under the leadership of WHSQ) has produced guidelines and information publications for enforceable undertakings. Two regulators have adopted these HWSA guidelines and information publications. One regulator has adopted the information publications, but not the guidelines. Two other regulators have guidelines and information publications with essentially the same information as the HWSA material, but with a few small substantive modifications. One regulator has not yet adopted or developed guidelines or information publications. At the time of data collection, two regulators did not yet have a structure to assess undertakings. Five regulators had established processes to consider offers of enforceable undertakings. There is no common approach.

Category of tools	Tools	Description of activities	Used by	Consistency *(qualitative research measure and anecdotal evidence from industry)*
	Prosecution (and associated fines or orders)	Each regulator can initiate prosecutions for contraventions of their WHS Acts or regulations.	All	In some jurisdictions, prosecutions are conducted by the office of the Director of Public Prosecutions or the Crown Solicitor's Office.
	Licenses, registrations or other authorisations	Each regulator administers a series of authorisations for major hazard facilities, prescribed types of plant and hazardous work, scheduled carcinogens, dangerous substances, training providers (HSR and EPH), and assessors for high risk work which, according to the issue, may be licenses, registrations, accreditations or approvals. These authorisations may impose conditions and may be revoked, suspended or cancelled as a mechanism to deal with unacceptable conduct or practices.	All	Not consistent.
	Fees and charges	This mechanism is only used by one regulator, which charges PCBUs according to the type of regulatory activities it implements with them, and responses to more serious interventions attract higher fees.	Not all	Used only in one jurisdiction.
	Review of decisions	An eligible person may make a written application to each regulator for review of certain decisions by inspectors or other officers (e.g. relating to authorisations).	All	In each jurisdiction, an Internal Review Panel conducts a merits review based on the material available to the original decision maker and new, relevant information, and may confirm, vary, or set aside and substitute the original decision. External review of decisions by the regulator, including internal review, can be conducted by a court, commission or tribunal.

There are significant differences between the regulatory approaches of each of the seven WHS regulatory agencies in the jurisdictions in which the model WHS Act has been enacted. There are key divergences in:

- Agency size and structure.
- Approaches to training inspectors and investigators.
- Whether there are specialist investigators or whether local inspectors carry out investigations.
- Protocols for investigations.
- Approaches to accepting enforceable undertakings.
- Prosecutorial decision-making.[34]

Every one of these identified factors will influence the effectiveness of harmonisation, penalties, safety outcomes and community perceptions.

In addition to the differences in approaches to inspection, investigation and prosecutorial decision-making, there are two significant differences between the jurisdictions in which the model WHS Act has been implemented:

- The type of court in which the prosecution is conducted (and, consequently, the maximum penalty that may be applied) (see Table 2).
- The involvement of the Office of the Director of Public Prosecutions or Crown Law (see Table 3).

Table 2: Comparison of type of court in which the prosecution is conducted for each category 1-3 and use of WHS specialists.

	Magistrates Court/ Local Court (NSW)	Industrial Court	District Court	Supreme Court
Cat 1	SA, NT can elect	ACT	QLD, NSW, SA	TAS, ACT, NT, NSW
Cat 2	TAS, SA, NSW, QLD, NT	ACT	SA & NSW can elect	
Cat 3	TAS, SA, NSW, QLD, NT	ACT NSW can elect	SA can elect	
WHS Specialists	No (NSW) No (QLD) No (SA)	No (ACT)	Some (NSW) No (QLD)	No (TAS)

[34] . Bluff, Johnstone & Gunningham., 2015, Report to Safe Work Australia "Project 3: Regulator Compliance Support, Inspection and Enforcement", National Research Centre for Occupational Health and Safety Regulation.

Table 3: Jurisdictions that have adopted the model WHS Act and the involvement of the Office of the Director of Public Prosecutions or Crown Law.

	NSW	QLD	TAS	ACT	SA	NT
Regulator runs prosecution	Yes	Yes				Yes. Outsources to private Bar
Office of Crown Law involved					Yes	
DPP involved	May take over	S231 procedure/ Cat 1 may be involved	Yes	Yes		

Each of the jurisdictions mentioned have adopted the Director of Public Prosecutions' Prosecution Policy to guide prosecutorial decision-making in all criminal prosecutions, including for WHS offences. In addition, all Australian WHS regulators are signatories to the National Compliance and Enforcement Policy (NCEP[35]).

Irrespective of this, the WHS agencies do not take a common approach to prosecutorial decision-making and use of sentencing options (see Table 4).

[35] Safe Work Australia, 2011, National Compliance and Enforcement Policy, https://www.safeworkaustralia.gov.au/doc/national-compliance-and-enforcement-policy accessed 18 June 2018.

Table 4: Use of sentencing options by jurisdiction (based on RegNet report[36] and search of regulator website and published prosecution and sentencing data)

Sentencing Options	NSW	QLD	TAS	ACT	SA	NT
Conviction & Fine	Yes	Yes	Yes	Yes	Yes	Yes
Fine without conviction	No		Not possible *s7(e) of the Sentencing Act 1997 (Tas)*		No	
Enforceable Undertaking s216	Yes	Yes	No		Yes	Yes
Non-pecuniary sanctions	Yes *However unlikely for District Court*	Yes	No	No	No *(information could not be found)*	No *(information could not be found)*
Adverse publicity orders s236		No				
Restoration order s237	Yes	No				
WHS project order s238		No				
Court-ordered WHS undertaking s239	Yes	Yes				
Injunction						
Good behaviour bonds		Yes				
Training orders s241	Yes	Yes				

[36] Johnstone., 2016, Report to Safe Work Australia "Project 2: Sentencing of Work Health and Safety Offenders", National Research Centre for Occupational Health and Safety Regulation.

Maintaining harmonisation

One of the main arguments for change was to ensure harmonisation is not undermined if jurisdictions each introduce their own industrial manslaughter offence.

On 3 July 2008 the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (OHS) was signed by the Commonwealth and all State and Territory governments. It formalised jurisdictional commitment to harmonise OHS legislation.

OHS harmonisation meant national uniformity of the OHS legislative framework (comprised of a model Act, supported by model regulations and model codes of practice) complemented by a nationally consistent approach to compliance policy and enforcement policy.

All jurisdictions signed the document, yet a number of jurisdictions have acted against the agreed approach to proposed changes.

The Queensland Government has always been in full support of the move to harmonise, recognising that harmonisation would create a more economically competitive and attractive environment to attract and retain national and local businesses. Hence in 2011 significant amendments were made to the WHS legislation and Regulator compliance and enforcement policy. Under the objects of the Act, Queensland committed to maintaining and strengthening national harmonisation — however the Work Health and Safety and Other Legislation Amendment Bill 2017 went against this.

Victoria although a signatory to the IGA has not implemented the model WHS laws along with Western Australia.

Finally, the ACT did introduce an industrial manslaughter offence however, this was prior to the model WHS laws and under separate criminal regulation.

Inconsistency already exists however it has only been Queensland's recent amendments that are relevant to the current model WHS laws and their harmonisation. As stated this amendment was in breach of the agreement in the IGA between all jurisdictions. This is not a reason to introduce a new offence of such significance, particularly when any benefits are well within the realm of the unknown and unmeasurable.

Australian Chamber of Commerce and Industry

4 The Risk Management Process

We support the status quo and oppose Recommendation 27.

Consultation RIS Discussion

It is worth noting Recommendation 27 (discussed in Chapter 15 of this Consultation RIS), recommends regulation 36 of the model WHS Regulations to be moved into the model WHS Act. If accepted, this change would apply the hierarchy to psychosocial risks to psychological health mandatory without further amendment.

The status quo should be retained.

Option 2 proposes to amend the Model WHS Act to include a hierarchy of controls that applies broadly to all risks.

The justification for this recommendation is to make it clear that the risk management process set out in the model WHS Regulations at clause 36 is not limited to the management of risk to health and safety arising from hazards identified in the Model WHS Regulations. It is assumed that this will help businesses (particularly small business) understand 'what they have to do'.

4.1 The 'Hierarchy of controls' and its use for psychosocial hazards

The concept of a hierarchy of controls (HoC) underpins WHS legislation and most workplace control actions.

The HoC was originally developed for occupational hygiene applications[37] in the 1950's, as a problem-solving tool to promote creative thinking when developing options for risk control and to establish the priority order in which hazard and risk controls should be considered.

The traditional hierarchy of control works reasonably well for separate physical risks such as plant or hazardous chemicals; however, it is not suited to all risks, particularly psychosocial risks[38] .

Bryan Bottomley[39] articulated this issue in his submission to the Maxwell Review:

> *"The traditional hierarchy has always encouraged the fiction that risk controls were a matter of one thing or another as you worked your way from the top to the bottom."*
>
> Moreover:
>
> *"With..multi-factorial hazards [such as bullying, occupational violence and fatigue]..the traditional hierarchy has only marginal application and control may be restricted to administrative or organisational measures. It could be argued that forcing hardware solutions has not always been successful. For example,*

[37] The concept was developed in 1950's by the US National Safety Council.
[38] Maxwell, C. (2004, March). Occupational Health and Safety Act Review. State of Victoria.
[39] Bryan Bottomley is a trusted adviser and has prepared numerous reports for the National Occupational Health and Safety Commission. He has played a major role in reforms at both State and national levels. He is the Principal of his own consultancy business that provides specialist advice and services on OHS matters, particularly with regard to legislation, management systems and strategic performance improvement programs. He is a nationally recognised expert in the field of OHSMS and managed the development and implementation of the Australia-wide SafetyMAP audit program.

occupational violence measures such as physical barriers have in some cases created new and greater risks than the ones they sought to control."

Maxwell concluded that "in short, there is no single hierarchy of control which can be applied to every hazard or risk. It would not, therefore, be possible, or desirable, to prescribe a "hierarchy" in the Act".

Contrary to the implication of the legislation that control actions might be identified simply through the application of a hierarchy of control (section 3.1), most hazard-control strategies require a more-or-less-complex set of solutions, and generally a number of controls[40].

Models of causation that consider barriers and defences build on the concept of requisite variety. Barrier theory provides a richer and more comprehensive model than hierarchies of control.

In addition, there has been widespread criticism in academia and by OHS professionals that the hierarchy is an oversimplification. In any situation where a control is imposed, particularly where elimination or substitution is involved, the potential for unintended consequences must be considered.

For example, one researcher noted that elimination of human involvement as a result of automation may change the basis for risk assessment in a fundamental way, and it is not appropriate to claim that such 'elimination' reduces risk unless the short-term and long-term consequences are fully taken into account. Indeed, automation introduces a different range of risks that were not considered in the original risk assessment and therefore necessitates a new assessment[41].

Alternative models for psychosocial risk control used by Regulators and industry

The hierarchy of control is not the only model of risk control currently being used by WHS Regulators and businesses alike.

There are a number of alternative models that are currently being used and promoted by WHS regulators and practitioners in Australia to control psychosocial and health hazards. These notably include:

- LaMontagne, Keegel, Louie, Ostry and Landsbergis[42] . A systems approach to job stress. This uses the intervention levels of primary, secondary and tertiary; and
- De Frank and Cooper[43] which sees interventions targeted at: the individual level, individual/organisational interface level and the organisational level.

The new WA Code *Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors*[44] refers to the first model:

[40] OHS Body of Knowledge, Control: Prevention and Intervention. 2012
[41] Hollnagel, E. (2008). Risk + barriers = safety? Safety Science, 46(2), 221–229.
[42] LaMontagne, A. D., Keegel, T., Louie, A. M., Ostry, A., & Landsbergis, P. A. (2007b). A systematic review of the job-stress intervention evaluation literature, 1990–2005. International Journal of Occupational & Environmental Health, 13(3), 268–280. LaMontagne, A. D., Keegel, T., & Vallance, D. (2007a). Protecting and promoting mental health in the workplace: Developing a systems approach to job stress. Health Promotion Journal of Australia, 18(3), 221–228.
[43] De Frank, R. S., & Cooper, C. L. (1987). Worksite stress management interventions: Their effectiveness and conceptualization. Journal of Managerial Psychology, 2, 4-10.
[44] Commission for Occupational Safety and Health, 2019, Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors – code of practice: Department of Mines, Industry Regulation and Safety, Western Australia.

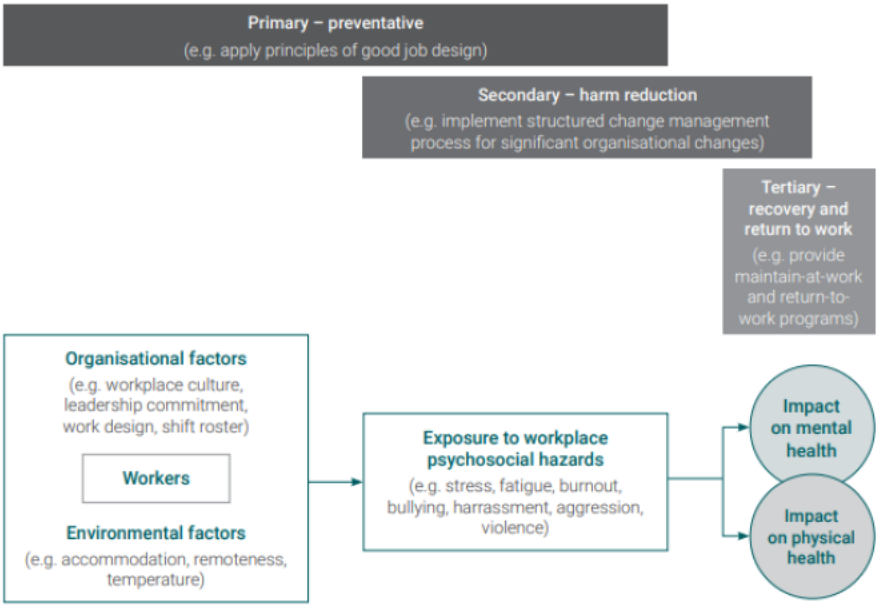

Figure 2.2 Schematic diagram showing the potential for psychosocial risk factors and exposure to psychosocial hazards to affect mental and physical health, and where organisations may apply strategies to help establish and maintain mentally healthy workplaces

The Code makes the following reference to control of psychosocial hazards:

> *Some psychosocial hazards and risk factors relate to the job as a whole, such as organisational change or workplace conflict, whereas others may be relevant to some tasks. To address this, a systematic approach is required to achieve effective control. A combination of controls should be used to minimise the risk to as low as reasonably practicable. There should also be a mechanism for checking that other hazards and risk factors are not introduced when implementing new controls.*
>
> *Primary controls target the organisation and workforce. Secondary and tertiary controls target the workforce.*
>
> *The aim of primary controls is to prevent harm to health, and they are implemented before hazards or injuries are present. This is the most effective control measure and should always be considered before anything else. pg 13*[45]

The way an organisation goes about controlling risks is influenced by its safety culture and the regulatory environment in which it works. By moving to prescribe the use of hierarchy of controls for all risks, we would be moving backwards. Furthermore it would significantly confuse businesses who have followed alternative models of control promoted by their state WHS regulator.

The model *Work Health and Safety Regulations* specify requirements for control of particular hazards. A number of OHS researchers[46] and practitioners have argued that those responsible for safety and risk management need to be able to use a range of system views to suit the complexity of any situation.

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[45] Commission for Occupational Safety and Health, 2019, Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors – code of practice: Department of Mines, Industry Regulation and Safety, Western Australia.
[46] Tepe, S., & Barton, J. (2009, October). OHS world views: Implications for practice of OHS in construction. In H. Lingard, T. Cooke & M. Turner (Eds.), Working Together: Planning, Designing and Building a Healthy and Safe Construction Industry. Proceedings of the CIB W099 Conference. Melbourne, VIC. Gallagher, C. (2001). New directions: Innovative management plus safe place. In W. Pearse, C. Gallagher & L. Bluff (Eds.), Occupational Health & Safety Management Systems: Proceedings of the First National Conference (pp. 65–82). Melbourne, VIC: Crown Content. Hudson, P. (2010, April). Rethinking Safety: It's not Rocket Science, it's Much Harder (Dr Eric Wigglesworth Memorial Lecture), Melbourne.

The causation of work-related fatality, injury, disease and ill health is complex. Control strategies need to be comprehensive to address this complexity. Approaches to control need to move beyond a simplistic application of the hierarchy of control to consider strategies informed by a range of current and relevant models of risk control and not limited to one, particularly one that has significant concerns and limitations articulated if we want to progress and improve safety and health outcomes in Australia.

4.2 Small Business certainty

The Review recommendation suggests amending the model WHS Act to clarify the risk management process by including the hierarchy of controls in the Act for all risks.

The notion that anything other than amending the legislation would address confusion for small business is wrong and one dimensional.

PCBU's want clarity in the form of specific examples and guidance around how to manage risk in unique and varied contexts.

In a survey of businesses conducted by the Australian Chamber, fifty-eight percent preferenced new practical written examples of how to manage psychological risk in their industry over new regulation (11%) (Figure 5).

Figure 5. Response by business - The Reviewer of the WHS laws stated that "business owners are uncertain about how to address psychological health in the workplace", there is "criticism of the absence of specific requirements" and business was saying "just tell us what to do". In regards to managing mental health from a safety perspective, what actions listed below would be most useful for you and your workplace?*Please rank from MOST useful to Least useful

The confusion and uncertainty experienced by small business related to 'how' to implement the requirements. How to apply principles and processes in practice relevant to their industry and business size. The hierarchy of controls ranks the level and reliability of protection a risk control measure will provide. It does not set out in detail the steps a PCBU must take to minimise risks or the control measures that are most suitable in particular circumstances.

Increased administration, record keeping and cost

The proposed amendment to the Act will increase the amount of regulation and could increase costs for some businesses.

It would likely result in an increase in unnecessarily detailed documentation as a way of businesses demonstrating that they have minimised risk according to the hierarchy. This would likely increase costs, particularly for small businesses, and potentially affect business operations (such as delaying the commencement of a particular task until documentation is completed, even where the task involves known risks and controls).

*The current laws are mostly working well, however, we are already struggling to keep up with all the **paperwork and regulations** placed on us as a small business. If the Government were to make the WHS laws **more onerous**, I would start to wonder whether our small organisation could cope. I would like to know when the Government will start listening to small businesses and understand just how tough it is to keep going each day. I have happy staff and our business generates a decent turnover, but the **increasing regulatory burden** makes it increasingly difficult to convince myself to keep our doors open. Small Business, ACT*

*Sole traders are extremely busy already with doing the work safely and organising all aspects of the job. The **burden of extra regulation** is unnecessary. Sole-trader, Electricity, Gas and Water Services, NSW.*

Australian Chamber of Commerce and Industry

5 Prohibit Insurance for WHS fines

We support the status quo.

The recommendation is to prohibit the ability to obtain insurance to cover penalties and fines for breaches of the model WHS laws.

The amendment to the WHS Act as articulated in the recommendation would expressly prohibit a 'person' or 'another person' attaining cover for liability for a monetary penalty under the model WHS Act.

The key assessments of the Review were:

- *"…the **deterrent effect** of the model WHS laws **is reduced** if companies can take out insurance to protect themselves and their officers from liability to pay penalties for non-compliance with WHS laws.";*
- *"There is **uncertainty about the interaction between such arrangements and s 272** of the model WHS Act, which provides that a term of a contract or agreement seeking to contract out a duty owed under the WHS Act or to transfer the duty to another person is of no effect.";* and
- *"The Review ultimately concluded that there is **overwhelming support to prohibit indemnity** insurance…".*

The Review recommendations are based on the author's assessment of the views expressed by the relevant parties. The Review report and the relevant section of the CRIS do not provide any objective assessment of the submissions or substantiate these claims with quantifiable evidence.

The Review report noted the following:

> *Such an insurance policy may be found by a court to be an illegal contract if challenged. The courts, however, have been willing to uphold a contract of insurance in relation to penalties for strict liability offences or offences that did not involve wilful or dishonest conduct. In practice, if an insurance company did not object to meeting a body corporate's claim in relation to such an indemnity, it would be unlikely that there would be scope for a court to consider such a matter. pg 134*

This statement is made with no provision of data or evidence. In which cases have the courts upheld contracts of insurance? How often has this occurred? What were the circumstances and did the insurer honour this claim? The scale and significance of the problem is not well identified.

> *In my consultations, some WHS regulators were aware of instances where those who had been found guilty of a breach of the relevant WHS laws had their fines paid through an insurance policy. Pg 134*

Once again this is a vague statement with no reference to particular instances, the nature of the breach and the circumstances.

> *The ability to obtain insurance to cover penalties and fines for breaches of the model WHS laws was largely unsupported by those consulted, with the majority of written submissions and face-to-face meetings reinforcing this position. Pg 134*

Furthermore, the Review report went on to admit to uncertainty in relation to whether a person "*who is required to pay a penalty for an offence under the WHS laws could recover that penalty under a contract of insurance or indemnification*".

5.1 'Entering into a contract'

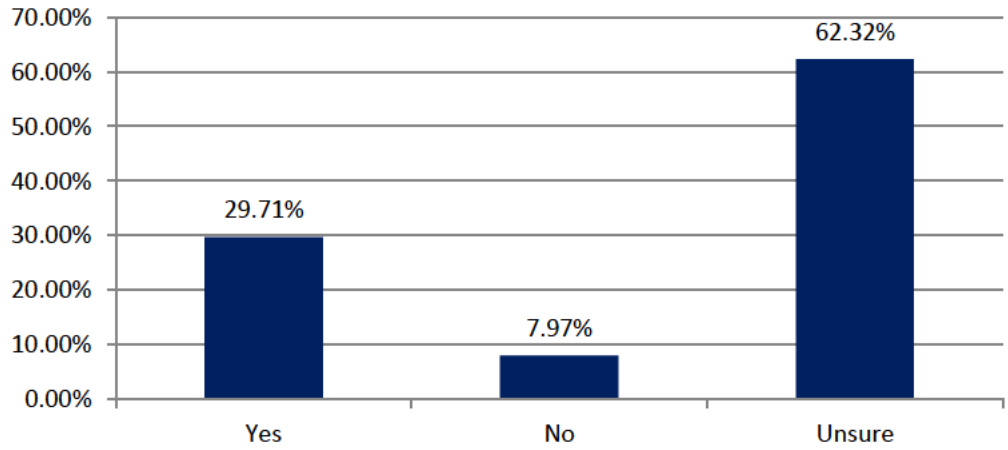
The recommendation in the Review report has three parts:

1. **Enter into** a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act;
2. **Provide** insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act; and
3. **Take** the benefit of such insurance or such an indemnity.

The recommendation would place responsibility on small business owners and officers to not enter into contracts of insurance or other arrangements under which the person or another person is covered for liability for a monetary penalty under the model WHS Act. Making it an offence to "enter into a contract of insurance" would be unduly harsh and unfair to businesses and would likely have little to no deterrence factor. In a majority of cases, businesses were unaware that their insurer provided statutory liabilities cover to this effect. This view is based on the survey we conducted with businesses in our member network.

The survey results show a clear disconnect between those that hold business insurance and whether or not there is the knowledge or understanding that their insurance provider will cover them for statutory liabilities for WHS breaches. Of the 200 respondents, more than 60% were unsure and 7.9% were of the opinion that their insurance policy did not cover them for statutory liabilities (Figure 6).

Figure 6. Business response to – Does your business insurance cover statutory liabilities?



S 272 of the Model WHS Act makes terms of an agreement that 'exclude, limit or modify the operation of the act or any duty under the act' as to be void and therefore unenforceable. The recommendation does not clearly express the downfall of the s 272 provision that has in essence the same effect as is proposed. The 2018 Review although mentioning s 272, does not clear up any misunderstanding or provide any information regarding the use and impact of the provision.

It is the Chambers position that the 2018 Review does not assess the role of the courts as a viable option regarding the insurance debate. ABCC v CFMEU[47] showcased the fact that under the Fair Work Act the Courts are willing to impose personal payment orders for breaches of the Act. The personal payments order would curb the effects of organisations with the resources to cover costs for WHS breaches that could be considered significant or flagrant. In this case the High Court noted that the resources of the CFMEU and their abilities to meet the fines imposed on them, limit the deterrence factor. The order for pecuniary penalties to be paid personally is the courts attempt to increase the deterrence factor for repeat offenders for serious

[47] *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union & Anor* [2018] HCA 3

breaches of the act. These orders are known as non-indemnification orders and would not allow insurance or companies from directly or indirectly indemnifying the person who breached the act.

5.2 Common law legal principles

The common law already adopts a carefully balanced approach to cases involving an insured seeking to claim under a policy with respect to their alleged criminal liability.

Under the common law, the general rule is that a contract of insurance is not enforceable in respect of criminal acts. This rule reflects the long-held principle that the availability of such insurance is contrary to public policy. To the extent that insurance policies are being sold which provide insurance for this type of conduct, they may be deemed unenforceable. In effect, the common law prohibits insurance for intentional criminal acts, but recognises that there are occasions where an honest person may unintentionally commit a criminal offence in the course of their professional duties. Given that many offences impose liability without any fault element, or subject to a negligence-based test, the common law has developed a degree of flexibility by providing capacity for individuals to manage some of the risks associated with their professional or business undertakings, notwithstanding that the conduct may be deemed criminal. Therefore it has become an established legal principle that where a criminal act was unintentional the common law will, in certain circumstances, permit recovery from an insurer. In determining whether the contract of insurance is enforceable, an assessment is undertaken with regard to a number of factors, including the seriousness of the offence, the extent to which a person was involved in the offence, the likelihood that the indemnity will prevent deterrence, the likelihood that enforceability of the contract would promote the interests of innocent victims, and the public interest in the observance of contracts. This multi-factorial test thereby grants the court flexibility to undertake a considered assessments of the specific, often complex, facts before it[48].

5.3 Additional considerations

The lack of coverage would be expected to result in increased difficulty for companies attempting to attract and retain Officers if not able to be indemnified against any penalties.

Many insurance policies provide funding for independent investigations and legal costs associated with responding to a workplace incident. Insurance for such costs ensures Directors and Officers receive appropriate, accurate and rigorous reports and legal advice, thereby enabling directors to properly understand and respond to a safety issue at the workplace.

[48] Australian Institute of Company Directors (AICD) submission to the 2018 model WHS laws review, 20 April 2018.

Australian Chamber of Commerce and Industry

6 Work Groups and HSRs in small business

We support option 3 – provide practical examples of work group and HSR arrangements in small business.

The recommendation is to amend the model WHS Act to provide that where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested, the PCBU will only be required to form one work group represented by one HSR and a deputy HSR unless otherwise agreed.

A common assumption and perceived requirement of the Act is that workplaces must have HSRs and/or Committees to meet their consultation duties. This is reinforced by WHS Inspectors who when enquiring about consultation in the workplace, ask first and specifically about HSRs (as seen in the case study below).

Case Study – Small Transport Company

A WHS regulator sought information on whether a small subcontracting transport company had a HSR and work group(s), through their Prime Contractor for whom the small transport business worked on a itinerate basis.

The small transport company had two trucks, one driven by the owner, the other vehicle driven by a worker and one office administrator.

Even though the small business were satisfied with their current communication arrangement, the regulator sought further action from the prime contractor.

In this case, the prime contractor provided access for the small transport company to its toolbox discussions, and materials including its list of HSRs. This appeared to satisfy the Regulator.

Whilst the Australian Chamber supports provisions for consultation in the model WHS Act, including HSR provisions, we maintain that the method of consultation should be determined at a workplace level. The provisions for consultation should be limited to a general duty to consult, without prescribed mechanisms for when and how this consultation should occur.

Object (1) (b) of the model WHS Act is to provide for "fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety". We would argue however, that that Act is not effective in relation to consultation requirements.

The theory and intent of Part 5 of the model WHS Act is good, however issues remain in regards to practical application, interpretation and supplementary guidance.

Any guidance material should provide practical advice on how PCBUs and workers should approach consultation, what would be the range of matters over which consultation might usually occur, and how any disputes about consultation might be resolved. WHS authorities should provide support to the parties to enable them to create working, effective consultative arrangements.

The model WHS Act promotes a formal structured approach to consultation that is unnecessarily complex, burdensome and impractical for duty holders. The proposed amendment for small business would still impose a formal structured approach.

Enacting the proposed 'default position' will act as a regulatory burden and further barrier for small business in regard to meaningful consultation on safety and health at work

We believe that the introduction of a 'default position' will take away from any consideration of other arrangements in small businesses. The default positon of one work group, a HSR and a deputy HSR may not in the case of many small businesses fulfil the requirements and needs of the business, but under the belief that the default position is what is legislatively required, will be implemented by the small business.

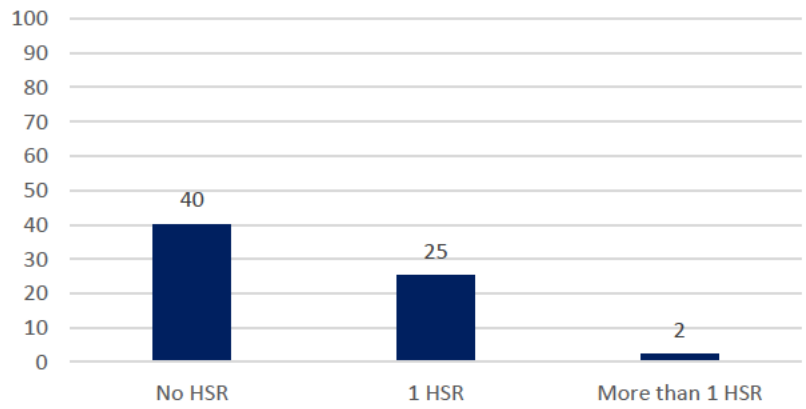
There is already significant confusion amongst small business in regards to the role of HSRs. This is further compounded by differing positions of inspectors and regulators in regards to the requirement for a HSR and the processes that must be followed.

The recommendation will not go towards clearing up the confusion that small business currently has regarding what is required of them to meet HSR and work group needs, as well as issues arising from the unknown role that HSRs and workgroups play in a business.

Small business is also likely to see an increased cost arising from the default position as the number of HSRs would increase with the default from one to two.

The Australian Chamber member network conducted a survey asking how many elected Health and Safety Representative(s) do you have in your workplace? Out of the 102 small businesses who responded, nearly one quarter (25) had one representative (Figure 7). ***Only two had more than one***.

Figure 7: No. of small businesses with a HSR



The average cost of HSR training alone for small businesses was reported as approximately $1700. Additional costs are then incurred in regards to costs for days lost, wages, the potential need to bring in subs for the days the workers are not attending due to training. These costs although they appear minimal, disproportionately impact small businesses who have lower cash reserves and available resources to larger organisations. This is exacerbated for regional and remote businesses who have to send their staff to more populated areas for training.

NT Training
For example, in the Northern Territory the Chamber NT is promoting only two HSR courses from July – December 2019 to its 3000 members.

1. HSR 5 day course, Darwin. Member rate is $$1,235.
2. HSR 1 Day Refresher Course, Alice Springs. Member rate is $395, non-member $425

SA Training
Business SA promotes HSRs to its South Australian members.

Cost of HSR training Year 1 – Member $1166.

As from the 1st of July, no training subsidies will be claimable for training participants form Safework SA nor are they subsidising travel for regional training. This will mean that Business SA will no longer be able to travel to regional areas and train as much as they have in the past severely restricting the training opportunities for regional businesses.

As noted above, some states are seeing declines in regional training opportunities due to lack of funding and increasing associated travel costs.

Addressing the underlying issue

An underlying issue raised by our member network is the general confusion surrounding the role of the HSR and their activities.

It is our understanding that where issues arise with the HSR and work groups in business they are around the lack of understanding of the role HSRs play, when they are required, how many there needs to be and the benefits available to a business if there is a HSR at the work place.

Some businesses still perceive the HSR as the official 'safety officer' of the organisation whereas others associate the role with the unions. Some trainers also perceive that training is only available to workers to the exclusion of advisory and management roles (as seen below).

Example: Push back from RTO's

One organisation wanted to send a HR advisor to the HSR training along with the nominated HSR to better understand the role of the HSR being trained. The trainer did not allow this indicating management couldn't attend, only HSRs.

A HR Advisor is not management but a resource to assist both management and workers in respect to WHS matters. Encouraging attendance by others at the workplace where a business has the means would facilitate greater understanding of the HSR, greater transparency and trust within an organisation.

We generally found that those others at a workplace not involved in the HSR training were not well aware of what the role/requirements/training entails. Creating a default position of more HSRs (primary and deputy) won't clear up this confusion or disputes that arise from it.

Greater clarity on the roles of the HSR, the election process and the training provided is needed and we would support this being addressed in any additional practical guidance being developed.

Australian Chamber of Commerce and Industry

7 Choice of HSR training course

We preference an alternative option: the PCBU has the choice of training provider (after consultation). Dispute processes would remain the same, i.e. if there was a dispute about time off for attendance either party could request a regulator to appoint an inspector to make a decision on the matter.

Our secondary position is to maintain the status quo.

The review found that there was potential room for delay and disputes in regards to the choice of training provider for HSRs. The *Sydney Trains*[49] case outlined that neither PCBUs nor HSRs had unilateral powers to enforce their choice of training provider onto the other party. The proposed solution in the 2018 Review was that in order to limit the disputes, the power for choice of training provider should rest with the HSR.

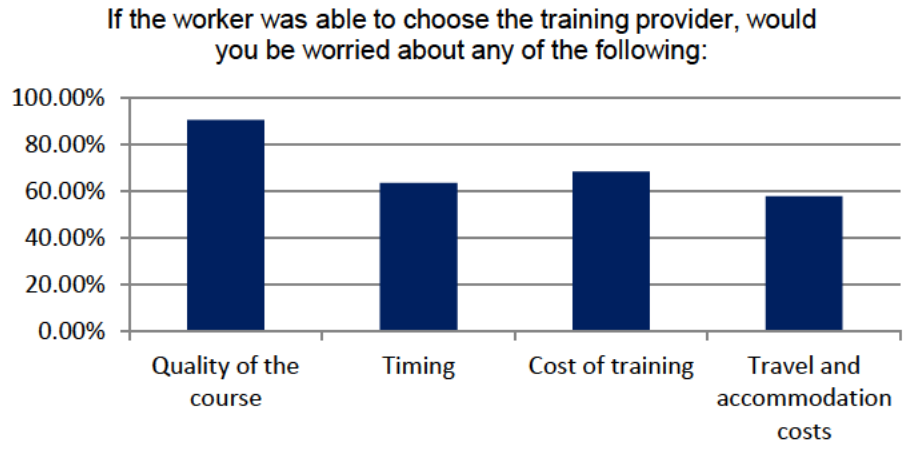
In response to the 2018 Report's recommendation the Consultation RIS acknowledges that the extent of disagreement between HSRs and PCBUs about the choice of training course, and the associated delays are unknown.

The Chamber and the businesses we represent through our network have clear concerns with the recommendation. The recommendation was created in an attempt to simplify the process and reduce the likelihood of disputes for all parties. It is our view that the proposed arrangement would not make the process easier and would likely lead to an increase in disagreements between the parties.

The perception by PCBUs is that a course chosen by HSRs may not appropriately cover content that the PCBU has identified as necessary to meet legislative duties and to carry out activities relevant to its workplace. Quality of training was the top concern of businesses (90%) if HSRs were able to choose the provider, followed by cost as seen in Figure 8 below.

The 2018 Review also noted that there were a number of submissions that articulated concerns around a HSR directing the PCBU to pay certain providers for training, therefore creating an unacceptable scope for corruption.

Figure 8: Top concerns businesses have in relation to choice of HSR training.

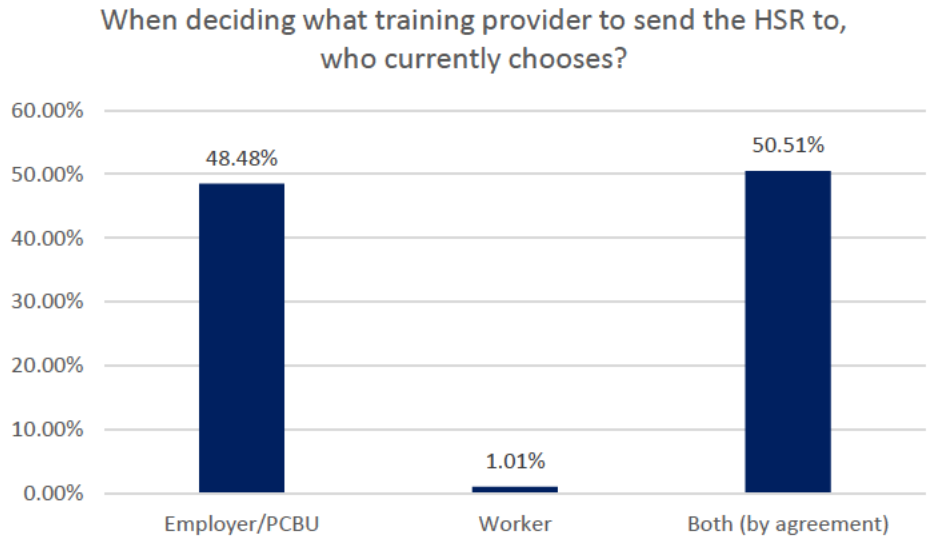


[49] *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009, para 47.

If Option 2 were progressed it would be open to a HSR to decide on the choice of training course including the location, quality, relevance or costs of that training. This would create significant impost on PCBUs in regional or remote areas where the HSR's preference is not available at a location in proximity to the operation and the PCPU is liable for all associated costs of attending.

The majority of businesses we surveyed made it clear that the current arrangements practiced for choice of HSR training provider was either the PCBU chose or a decision was reached by agreement (Figure 9). Only 1% indicated that the worker determined the training provider.

Figure 9: Current choice of training provider.



This supports our preferred position that the PCBU be granted the choice of HSR training provider.

The evidence shows that the course costs vary significantly across providers. As the one responsible for the payment of the course and also the costs involved in attending the course, the decision should rest with the employer/PCBU. Furthermore, this would reflect the practice for the choice of any other safety and health related training to rest with the PCBU who holds the duty to provide appropriate training.

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8 Workplace entry by HSR assistants

We support the status quo.

The recommended amendment to the WHS Act would allow union officials access to a workplace to provide assistance to a HSR, without the requirement to hold a valid entry permit under the work health safety/Fair Work Act.

The Australian Chamber supports union officials being able to assist HSRs where appropriate, however, there is a need to ensure that the assistance will be meaningful and respectful of all relevant laws and corresponding duties.

Australian Chamber members note that there are difficulties distinguishing those that are genuinely entering to assist a HSR. Assistance needs to be clearly defined and applied consistently.

Employers have made it known that there are concerns for potential misuse of HSR assistant provisions to circumvent the FW Act and WHS Act to access workplaces for industrial purposes. The proposed amendment would effectively provide a legal mechanism for union officials (including those who have previously been disqualified from holding a permit or whom have had a permit suspended or revoked) to ignore standard entry requirements and cause unwanted and unproductive disruptions in workplaces under the guise of providing assistance to HSRs.

The Australian Chamber notes that there is an ongoing issue of how the WHS entry permits relate to Fair Work Act permits. These should be consistent. Some members have reported health and safety issues misused for industrial purposes. It must be clear that the person that seeks to rely on a reasonable concern about an imminent risk to his or her health and safety has the burden of proving that the imminent risk exists. This must also be recorded clearly.

Examples of misuse from Members:

Two permit holders arrived at the site without stating what their purpose was. Given it was unclear why they were on site, Site Manager requested they both produce the following:

- Fair Work Entry permit,
- State WHS Entry permit (both are required to be produced in the case of entry relating to suspected WHS breach, and
- Notice of entry stating what the suspected WHS Breach was (if entry was relating to suspected WHS breach).

Both refused to provide entry permits nor any notice. They were consequently advised they would be trespassing if they entered. Both walked onsite and inspected the entire site. The Site Manager 'accompanied' them and after about an hour, they left.

2)

Two permit holders arrived at site. They were both asked to provide:

- Fair Work and State WHS Entry permits (these were provided although one permit holder did not have his Fair Work permit and the second permit holder didn't have the original as required)
- Notice of Entry—(these were provided, however both were non-compliant – one was general in nature and the other was a scrap of notepaper without relevant detail required. It was also general in nature (e.g. AS 3012 breaches rather than "temporary power boards not compliant" for example).

Both walked casually around the site rather than specifically to look at a suspected WHS breach. All work was stopped on site whilst this occurred. Site was closed down for 1 ½ hours.

During the walkthrough, one permit holder turned off all the power boards, which he had no authority to do so, especially when he was unaware of what was being powered by these. He could well have created a situation with far higher risk than what was in place.

3)

"My experience with unions has been mixed. I have had positive interactions but I have also been subjected to a union recruitment drive dressed up as safety inspections where union rep spent entire time trying to convince workers to sign up with no specific discussion of safety or the supposed issue used to justify ROE. Giving them any more mandated influence is not, in my opinion, a productive way forward."

The recommendation (recommendation 8) also refers to the interpretation of these provisions and those governing workplace entry by union officials by the Full Court of the Federal Court of Australia in Australian Building and Construction Commissioner v Powell [2017] FCAFC 89. It does not provide however sufficient justification for why the Full Court decision should be varied by legislative change.

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9 WHS entry permit holders – prior notice of entry

We support the status quo.

Recommendation 15 of the 2018 Review seeks to amend s 117 in the 2016 version of the model Act to revert to the previous wording of the WHS Act (version 2011). This would see the 24-hour notice period requirement for entry permit holders removed.

The Australian Chamber supports notification 24 hours prior to entry or access to a workplace. This should be the minimum allowable standard to provide both consistency with other provisions in the WHS Act and Fair Work legislation, and to provide sufficient time for a PCBU to ensure they can appropriately respond.

The 2014 COAG review originally recommended that a 24-hour prior notice of entry requirement be implemented across jurisdictions through adoption of the amended model provisions. The Decision RIS on the 2014 COAG review stated that the reason for the implementation be that it 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'

Although the provision was not adopted in individual jurisdictions, seventeen businesses in our member network indicated they had received prior notice of entry at least 24 hours before a union official entered their workplace. This occurred regardless of the lack of current regulation.

The 24-hour notice period has a direct impact on small-medium business as it provides an opportunity to seek information regarding their obligations when dealing with a WHS permit holder. Industry associations advise that they regularly receive requests for advice from small-medium business PCBUs who have not previously dealt with right of entry provisions. Without providing the time and opportunity for SME PCBUs to seek advice on their obligations, rights and duties the instance of disputes and disruptions to operations are considerable.

This is detrimental to the relationship between a permit holder and PCBU, and can lead to a significant lack of cooperation from all parties involved.

It is the Australian Chambers understanding that the only time in which a union official would require entry to the workplace immediately would be for instances of imminent safety concerns. An argument put forward for the removal of the 24-hour notice is that by requiring the 24 hour notice period, the relevant safety concern(s) could eventuate in an incident before the official was able to enter the workplace to intervene. Currently, under the model provisions, an exemption to the requirement for notice is allowed that addresses this concern.

S 117(3) does not require the notice to be met if the authorising authority has issued an exemption certificate for the entry under subsection (7) and the WHS entry permit holder gives a copy of the certificate to the persons referred to in subsection (3).

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10 Cancelling a Provisional Improvement Notice (PIN)

We support the status quo which encompasses support for inspectors dealing with a safety issue when cancelling a PIN.

Recommendation 9 would see the model WHS Act be amended to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be resolved by that inspector under s 82 of the WHS Act.

The 2018 Review notes frustrations from both PCBUs and HSRs from inspectors 'often' cancelling PINs on technical grounds without resolving the WHS issue underlying the PIN.

As the CRIS notes, the Review Report did not reference any information or evidence about how often an inspector cancels a PIN for technical reasons, or why an inspector would do this rather than confirm the PIN with changes, if there is evidence of a contravention or likely contravention of the Act that justifies issuing the PIN.

We surveyed our member network and asked if a PCBU had ever had a provisional improvement notice issued. Fifteen respondents (7.2%) indicated in the affirmative.

Out of these fifteen, six (2.9%) advised that the safety inspector had cancelled the PIN they received for technical reasons.

Finally we asked, if the notice was cancelled, did the safety issue which led to the issuing of the notice remain unresolved? There were no "yes" responses (0%) to this question indicating that for those who had had a PIN cancelled, the safety issue was resolved.

It is our view that the recommendation isn't required or supported by evidence. We also believe that the Act currently confers sufficient powers on inspectors and regulators to address any concerns of this nature (for example s 102(1)(c) of the WHS Act outlines the powers of the inspector to approve a PIN with changes after reviewing the PIN or s 82).

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11 Referral of Disputes

We support in principle the Act providing for disputes to be referred to an independent third party.

The proposed amendment is threefold to provide for:

a) disputes under ss 82 and 89 of the model WHS Act to be **referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours** after an inspector is requested to assist with resolving disputes under the default or agreed procedures and with cease work disputes;
b) a PCBU, a worker, an HSR affected by the dispute or any party to the dispute to notify the court or tribunal of the unresolved issue they wish to be heard; and
c) the ability for a court or tribunal to exercise any of its powers (including arbitration, conciliation or dismissing a matter) to settle the dispute, and appeal rights from decisions of the court or tribunal to apply in the normal way.

We note that the 2018 Review does not provide sufficient articulation of the problem that the recommendation is trying to solve, nor any evidence to support it.

We surveyed our member network asking "*Have you ever had a WHS dispute between management and workers that required following the dispute resolution procedure*? Nine (4.3%) responded in the affirmative.

From those nine who had a dispute, two (0.97%) advised that the issue had remained unresolved after 48 hours.

This is positive and reassuring data and it indicates disputes occur relatively infrequently in smaller businesses.

Five (2.4%) businesses advised that they had asked an inspector to assist with resolving a dispute.

Noting that we support the idea in principle or referral to a third party if data was presented indicating there was a broad problem with unresolved disputes, we would raise concerns with the proposal specifying referral to "the relevant court or tribunal" and the stipulation of "after 48 hours if the dispute is unresolved".

This recommendation could see an increase in the regulatory burden on courts. The courts are currently already overworked with significant backlog and time delays recorded.

Looking at how small businesses would view this recommendation, our survey responses indicated that they were not against the idea of an independent third party designated to hear such issues. The businesses were simply unwilling to utilise a court or tribunal process based on the fact that it would be too expensive, time consuming and stressful.

Open responses to the question: Would you seek to refer issues that are not resolved to a court or tribunal?

> *"No. That would be the last place I would want to have issues resolved. We couldn't afford this. I would rather gain advice and support from the regulator."*
>
> *"Prefer to have the matter resolved in-house with the help of the regulator, rather than a tribunal. The latter automatically makes things more complicated and not easily resolved."*
>
> *"This would be a very costly and burdeonsome process. Not inclined to."*
>
> *"No, I can't see how that would result in a better outcome for employee and employer."*
>
> *"I would take as many measures as reasonable to ensure we did not need to go to court or tribunal."*

"No. Time consuming and costly."

"No. Better ways to resolve issues. Courts are last resort, expensive and take too long."

The impact of the recommendation would be to disproportionately affect small businesses and businesses in remote/rural areas in which the ability to reach and travel to a dedicated court/tribunal may not be feasible within a timely period.

Community Costs

The 2018 Review nor the CRIS was able to provide an indication of the cost to the community that an increase in cases heard by the courts/tribunals would likely have. The increase in workloads would potentially push other case hearings back, take up more time for those preparing decisions and hearing the cases. These costs to the community seem significantly disproportionate to the severity of the cases that the courts would actually be hearing.

The Australian Chamber was also concerned with the lack of clear indication as to which court would likely hear such cases. The Review states that which courts/tribunals should hear the cases would be a decision of the jurisdictions. This would likely result in differences between the jurisdictions as to whom heard these cases resulting in substantially different costs, time frames for case turn-around and decisions, based on the powers of the differing courts/tribunals.

The Review did not articulate whether or not the court system and point of entry would be consistent across jurisdictions. It is our understanding that a tribunal in comparison with a magistrate's court would likely result in different avenues of appeal, case handling and procedural processes. The court or tribunal in question is of importance based on the need to know of costs and turnaround times for cases. Again this is particularly relevant for small and regional business owners as the decision to enter into a court or tribunal hearing will likely be of great cost to them.

It should lastly be noted that the 2018 Review did not present any evidence to suggest that what has been implemented in QLD (used as the premise) has actually worked and sped up the resolution times for cases that had remained unresolved after 24/48 hours. To add to this point, it should also be noted that QLD has a dedicated subsidiary court that works independently in industrial relations issues. This is not available across all jurisdictions and would likely skew the wait times for QLD cases to be a lot faster than what would be possible in the rest of the country.

12 Inspectors Powers

We support the status quo.

The 2018 Review found that if an inspector is required to enter into a workplace every time they require the production of documents there is a potential for the investigation to be limited in its efficiency and effectiveness of the investigation. These issues were highlighted for investigations located in rural and regional areas.

The proposed recommendation would amend the WHS Act to give **any** inspector the ability to request documents from businesses up to 30 days after the day an inspector has visited a premises. The inspector that requests the documentation, would not be required to be the same inspector that began the investigation and had initially visited the workplace.

It is our view that inspectors should always be required to enter the workplace before requesting documentation as both inspectors and the PCBU benefit greatly from the face-to-face discussions. When conducting an investigation it is imperative that an inspector understand the context of the business, the workers, the workplace and all the details that one can only gather upon entering the businesses premises and communicating face-to-face.

The requirement for inspectors to enter the premises also provides an opportunity for inspectors to share information and educate PCBUs on related matters that may otherwise not be provided if contact were through email or fax.

The Australian Chamber has concerns with the subject and volume of the documentation that any inspector would be able to request from the business within the 30-day timeframe.

For example:

- Old / historical records which have been archived and require manual retrieval.
- All training records for all workers over the last five years.

The recommendation does not outline any limitations as to what documentation and information can be sought via the request for information. This is unfair and an unreasonable burden for business owners and particularly small businesses to produce a potentially unlimited amount of documentation in short time frames.

The Chamber also has concerns regarding the potential impact on the quality of the initial investigation. Where the ability to seek further information on request by any inspector is available after the initial investigation, this could lead to inspectors spending less time at workplaces and being less thorough relying on the ability to request additional information as needed. To safeguard there should be transparent policies that outline the way the investigations should be conducted to ensure efficiency and accuracy of the initial investigation and to ensure that the request for documents is limited to what is reasonable.

There are no clear provisions and it is not clear from the Review about what options would be available for the businesses if a follow-up inspector requests documentation of a nature that's already been provided. It is more than feasible that a hand-over issue between inspectors could see the business being asked to provide

overlapping or duplicative information. This would cause businesses further stress and be detrimental to productive operations.

Lastly, it is our understanding that s 155 of the Model WHS Act is considered to be an appropriate mechanism to enable regulators to obtain information and documents and address the issue the recommendation seeks to address. No evidence has been provided to indicate that s 155 is unable to be used effectively by inspectors.

Australian Chamber of Commerce and Industry

13 Safe Work Method Statements (SWMS)

We support option 3: develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS

The main issues PCBUs have with SWMS relate to: confusion about their purpose, the varying requirements between clients/principal contractors, timeliness and cost.

Specifically PCBUs in our member network noted:

- ***Confusion about purpose of SWMS***

  "Clients require swms [sic] for work that is not applicable under the requirements of the regulations"

  "Confusion on the use of the SWMS for non-prescribed [sic] activities. Confusion of the definition and understanding of when to use a JSEA or other prestart review."

- ***Varying requirements***

  "Inconsistent format across industry"

  "Too much variation allowed which can cause error in interpreting legislation"

  "Different builders have different standards of SWMS documentation requirements"

  "Clients all want something different"

  "The different requirements of contractors and big companies. All different."

  "Client's misunderstanding SWMS requirements"

  "Customer expectations for documentation in excess of the regulatory requirements or in a different format to our own systems. This paperwork then just becomes nothing more than a legal document to be used against each"

- ***Time, cost considerations***

  "Time taken getting accurate and consistent"

  "Controlling costs so one is competitive still"

  "Cost and time to implement and process"

  "Customer complaints of costs involved"

  "Time lost"

  "Onerous and often impractical"

There was a clear divide between industry and in survey respondents' opinion on whether or not a prescribed template would address the issues above.

It is the Australian Chambers view based on survey responses that a prescribed template may eliminate issues regarding; different jurisdictional requirements, different client and industry expectations and inconsistency of formats and issues with time taken to complete, length and details required of the SWMS.

However, there are concerns that a prescribed template would simply act as an instrument to legally cover businesses rather than having a positive safety benefit and increasing awareness of safety risks. A template will not necessarily help with issues regarding workplace engagement and getting people to read and understand the SWMS requirements for the workplace. There are also potential issues in requiring the SWMS for industries and activities that are not specifically outlined in the Regulations.

We asked businesses a number of questions in relation to SWMS. The results are provided below.

- Do you use Safe Work Method Statements (SWMS)?
  - 52% indicated yes (108).

- Do you already have systems in place for developing customised (workplace specific) SWMS?
  - 88% indicated they did (96 of the 108 that used SWMS).

- Do you think prescribing the SWMS template in the regulations will solve associated problems?
  - 42% said yes.
  - Commentary included:

    "Everything is open to interpretation"

    "Builders have their own versions"

    "It would be good to have a common document but the challenge is meeting everyone's requirements"

    "Has to able to be be customisable to each workplace."

    "SWMS requirements varying across industries, so a specific SWMS is necessary for that industry. Generic SWMS may introduce or omit industry specific risks and how these should be managed."

    "To provide a template would be fine as a minimum standard."

    "This will help within industry where certain business always require additions to be made to templates outside of the Safe Work Australia recommendations. SWMS templates end up containing too much irrelevant information that is often outdated or incorrect."

For this reason we preference the development of an intuitive, interactive tool to support the completion of fit-for-purpose SWMS.

In regards to this recommendation, we asked businesses "What barriers may prevent you using an online SWMS tool in your workplace"?

"Very hands on based workforce that do not regularly access or have access to computers in all work environments"

"I prefer to have a written checklist with me. Electronics are a pain in a harsh work environment"

"Access to technology for field staff"

"Too [sic] hard to use on a mobile phone, we can't have all our staff on tablets"

"Access to electronic hardware"

"Lack of IT infrastructure"

"Training / computer accessibility"

"Data access in the field"

"No access to internet in remote/ rural job sites"

"Internet not always available on sites"

A number of participants supported the option for an online interactive tool. In supporting recommendation 29b the concerns articulated above need to be taken into account.

Lastly, the survey to members asked a question regarding deriving an income from SWMS development and loss of income incurred from the adoption of interactive online SWMS.

From the evidence gathered there was no real concern from our members regarding the loss of income from the use of the tool. Only two responses were from consulting businesses who produced and sold SWMS templates. However, both indicated that they were not concerned with a loss of income due to the adoption of an interactive tool.

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14 Increase Penalty Levels

Support the status quo. Do not support an increase to penalty levels.

The 2018 Review concluded that there was a discrepancy between the current penalties and the principle that penalties act as a deterrent. In response, the recommendation was made that the penalty levels in the model WHS Act be amended to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.

It is the Australian Chambers position that simply increasing the penalty levels and therefore increasing the financial penalty will not succeed in the intended requirements. There is strong academic evidence to support the conclusion that increasing penalties is – most of the time – ineffective. Attempts at engineering criminal law rules to achieve a heightened deterrence effect are also generally ineffective.[50] This is also supported by Beckett and Harris, who characterized the use of monetary sanctions as misguided;[51]

> *"At least in theory, penal policies are aimed at incapacitation, rehabilitation, deterrence, and retribution. Monetary sanctions do not appear to accomplish any of these goals. By definition, monetary sanctions do not prevent crime by incapacitating offenders. Theoretically, monetary sanctions might be rehabilitative if their repeal was offered as a reward for participation in rehabilitative programs or prosocial outcomes. Yet erasure of legal debt generally is not offered as a reward for good behavior. For a penalty to effectively deter wrong-doing, its consequences must be known to potential offenders as they contemplate their options; swiftness and certainty are key. But the assessment of monetary sanctions is characterized by neither swiftness nor certainty."*

Previously we have outlined a number of potential issues with the deterrence arguments and the implications of legislative change on deterrence. In order for deterrence to function to a satisfactory standard a number of characteristics need to be considered, most of these have not been addressed in the recommendation.

As evidence to this fact we will reiterate what was said in Barrett, Lynch, Long and Stretesky who conducted a longitudinal study examining the impact of the dollar amount of fines on compliance with environmental laws in Michigan, US. The research suggested that:

> *"While noncompliance may slightly decrease immediately following a fine, there are few changes to a firm's long term compliance behaviour. Furthermore, analyses of these data suggest that total fines levied prior to the most recent fine actually have a positive relationship with noncompliance."*[52]

Overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of "severe sanctions leading to higher compliance", in either criminal justice, or in the enforcement of business regulations.[53]

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[50] W. Voermans, *De aspirinewerking van sanction-eren (The Aspirin Effect of Sanctioning),* (2007), Wolff Legal Publishers

[51] Beckett, K., & Harris, A., *On cash and conviction: Monetary sanctions as misguided policy, (*2011*)*. Criminology & Public Policy, 10(3), 509–537.

[52] Barrett, K.L., Lynch, M.J., Long, M.A. et al. Am J Crim Just (2017). https://doi.org/10.1007/s12103-017-9428-0

[53] Blanc, F., "*Reforming Inspections: Why, How and to What Effect*?", (2012), OECD, Paris.

The Queensland Review rejected an increase in penalty levels

It should be noted that the 2017 Queensland Review did not recommend an increase in penalty levels, concluding that increases in maximum fines do not result in courts automatically imposing these maximum levels.

Lyons came to the conclusion that instead of more legislative change greater discretion should be given to the courts to impose penalties where appropriate. Lyons specifically outlined the potential to adopt what had been implemented in the UK as an option;

> *"This may be aided by adopting a similar approach to the work health and safety laws in the United Kingdom where discretionary sentencing guidelines provide judicial officers with specific guidance about an appropriate sentencing range. Adoption of such guidelines should be developed nationally to encourage a consistent approach across all harmonised jurisdictions"*

This UK model was also suggested in the Senate inquiry;

> *"We submit that there is a requirement for sentencing guidelines or at the very least 'suggested' penalties in the vein of that which occurs in the UK so that judicial officers are given specific guidance about the appropriate sentencing range. It must be remembered that the legislation is somewhat unfamiliar ground for many members of the Judiciary"*

The senate inquiry was also clear on the findings of the QLD review and their suggestion surrounding the need for harmonised and clear penalties for the courts to implement. The Lyons review found that the absence of a national standard regarding sentencing guidelines was significantly detrimental to the harmonisation of the laws across the differing jurisdictions.

Issues with CPI

Using CPI as an indicator for penalty level increases would create a largely differing set of monetary penalties across jurisdictions.

In Victoria for example under the Financial Management Act 2004, fees and fines for all offences and services are annually indexed. Adopting nationally harmonised indexation would place OHS penalties out of step with other criminal offences in that state.

Indexation is reflective of State based inflation, thus, if penalties are indexed in a harmonised fashion, they may be disproportionate and not reflective of economic growth in that State.

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15 Response to recommendations in Appendix A

Recommendation	Anticipated impacts	Summary	ACCI Comments
4: Clarify that a person can be both a worker and a PCBU Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.	Implementing the recommendation would involve adding an express provision, likely a legislative note, to s 5(4) of the model WHS Act stating that a person can be both a worker and a PCBU. This is already the case under the model WHS Act. This would support ss 15 and 16 of the model WHS Act, which states a person can have more than one duty and more than one person can have the same duty respectively. As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.	No impact – clarification	Oppose legislation change. Regulatory change should not be the preferred response when the objective can be achieved through clearer guidance, particularly for multi-duty holders.
5: Develop a new model Code on the principles that apply to duties Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles.	The recommendation to develop a standalone model Code with practical examples that illustrate how duties can be met will not increase regulatory burden on business. This material is already contained in a model Code; it would just be separated out into a standalone Code under this recommendation. The Code would cover existing duties and only provide additional explanation, not additional obligations. There are no statutory changes associated with this recommendation. There may be a minor benefit if material is easier to find and provides greater clarity on existing provisions.	Minor benefit – additional guidance	Oppose. A new Code should not be the preferred response when the objective can be achieved through clarification in the existing Code. An additional Code on principles would create confusion and likely compound the problem.

6: Provide practical examples of how to consult with workers Update the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.	There is already a model Code on consultation, co-operation and co-ordination. This recommendation aims to improve the useability of that Code through the inclusion of practical examples illustrating how meaningful consultation can be achieved in different workplaces. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.	Minor benefit – additional guidance	Support.
7b: Work group is negotiated with proposed workers Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.	This option would amend the model WHS Act for consistency with the language used in the Explanatory Memorandum – that is that PCBUs must negotiate with the workers who are proposed to form the work group or their representatives. This option would provide clarity for PCBUs on which workers they must negotiate with when forming work groups. This is likely to result in less time required to clarify the duties in the model WHS Act and lower consultation costs if PCBUs are undertaking further consultation during the process to ensure all workers are captured. It may also reduce costs to the PCBU if it prevents the need for specialist advice where PCBUs are unable to determine their obligations.	No impact – clarification	Support.
11: Provide examples of HSC constitutions, agendas and minutes Update the model Codes and guidance with examples of Health and Safety Committee (HSC) constitutions, agendas and minutes.	This recommendation aims to assist those establishing and servicing HSCs by adding practical information to existing model Codes. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.	Minor benefit – additional guidance	Support.

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12: Update guidance on issue resolution process and participants Update the Worker representation and participation guide to include: • practical examples of how the issue resolution process works, and • a list of the various representatives entitled to be parties in relation to the issues under s 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement.	This recommendation aims to improve understanding of the model WHS laws dispute resolution provisions by adding practical examples to existing guidance. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.	Minor benefit – additional guidance	Support.
19: Enable cross-border information sharing between regulators Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.	This recommendation would put beyond doubt that regulators may share information across jurisdictions. As this amendment only clarifies the existing operation of the model WHS Act no significant impacts are expected. However, it may improve information sharing and ensure investigations proceed more efficiently.	No impact – clarification	Support.

20: Review incident notification provisions Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.	A review of the incident notification provisions would be undertaken by Safe Work Australia and would draw on the views of a range of stakeholders including PCBUs, workers, Health and Safety Representatives, union officials, inspectors and WHS experts/academics. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	Oppose in part. Incident notifications – notification trigger for psychological injuries We are concerned about unintended consequences resulting from the proposal to include psychological injury in incident notifications. The proposal is inconsistent with the intentions of the provision. It would create further confusion as well as a significant burden for regulators and businesses. Psychological injuries are distinct and subjective in nature and do not, for the most part, translate well to the concept of a specific 'event' or 'incident'.
21: Review the National Compliance and Enforcement Policy (NCEP) Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.	The review of the NCEP would be undertaken by Safe Work Australia, in consultation with other stakeholders. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	Support in Principle.

24: Improve WHS regulator accountability for investigation progress Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.	A person with an interest or connection to an investigation would be able to request the regulator to bring a prosecution at any time, not just within 12 months of an occurrence. They will also be kept informed until a decision is made on bringing a prosecution. There is a potential benefit to the community in this approach, as it increases transparency and accountability. It could also benefit the community and workers if greater transparency in the progress of investigations results in more timely prosecutions and an increase in safety standards through deterrence. There would be potential resource costs to the regulator in responding to requests and keeping persons informed of investigations. These resource costs are ultimately borne by the taxpayer.	No regulatory cost. Legislative amendment required.	Oppose A power already exists to request an extension. We believe there would be considerable issues with: preservation of evidence, access to witnesses and memory recollection. All these issues need to be explored fully. We would also anticipate significant cost to Regulators.
25: Consistent approach to sentencing Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered.	The development of sentencing guidelines would be a complex undertaking due to variations in general sentencing law, criminal procedure legislation and courts across the jurisdictions. Given the complexities involved, Recommendation 25 would be treated as a recommendation for Safe Work Australia, working with relevant experts, to undertake a review into the feasibility of developing national WHS sentencing guidelines. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	Support. We support the recommendation of a review of the sentencing guidelines but recommend any consideration of increased penalty levels be deferred until after that review is completed. Implementing revised sentencing guidelines is likely to result in an increase in the average financial penalty imposed by the courts. We support a staggered approach to implementing these recommendations with a review of penalty levels following implementation and analysis of new sentencing guidelines.

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30: Photographic ID on White Cards Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.	Amending the WHS Regulations to require photo identification on White Cards is expected to help ensure that the White Card holder is the person who completed the white card training, which is anticipated to improve safety in the construction industry. This requirement will also ensure consistency with HRW licences. However, this option may involve transitional compliance costs for businesses or individuals holding an existing White Card which may need to be reissued. Additionally, individuals may face costs associated with either providing a photo or travelling to a physical location to have the licence issued. These costs will depend on how the card is re-issued. There are also potential costs to the regulator to establish or extend an existing system to issue photographic White Cards.	Minor benefit – if implemented to minimise transitional costs of the new process	Support.

31a: Consider removing references to Standards in model WHS Regulations Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.	The recommendation proposes reviewing the references to the standards and identifying where they can be replaced with a prescribed duty in the Regulations or Codes. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	Our main concern is the reference to standards in Codes of Practice. Cost is an issue but it is also the lack of consistency in how they are referred to and lack of clarity for the PCBU to identify whether they need to purchase the code or not (what is reasonably practicable). The current recommendations won't address this. We previously suggested the addition of Notes in the Codes, clarifying who would be expected to have access to the standard and for what purpose to avoid confusion. *For example: The Code may state that a noise assessment should be undertaken in line with the standard AS/NZ XXX.* *Note: If a PCBU engages a specialist to do the assessment, that PCBU wouldn't be expected to purchase/access the standard but may be expected to ask the supplier/specialist if they have the standard.* In the construction code, one reference states in regards to elevating work platform checklists "*The platforms should only be used as working platforms. They should not be used as a means of access to and egress from a work area unless the conditions set out in AS 2550.10 are met.*" The note may specify that a PCBU supplying the work platforms may be expected to have the standard however a PCBU who purchased and is using the platform may not. They may be expected to enquire with their supplier about the conditions the platform can be used for and if it complies with the standard. It may be that an appendix is added at the back that defines which PCBU is expected to have/access to the standard for what task (what would be reasonably practicable).

31b: Compliance with Standards not mandatory unless specified Amend regulation 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.	This recommendation intends to clarify that compliance with standards is not mandatory under the model WHS laws unless this is specifically stated. All standards referenced in the model WHS Regulations are already mandatory in the circumstances to which the regulations apply. As this amendment only clarifies the existing operation of the model WHS Act, no impacts are expected.	No impact – clarification	Support in Principle.
32: Review MHF Regulations Review the model WHS Regulations dealing with MHFs, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.	This recommendation proposes reviewing the MHF chapter in the model WHS Regulations with a focus on administrative or technical amendments. The intention is to improve the usability of the MHF regulations, without impacting external industries or other regulatory schemes. The review would be undertaken by Safe Work Australia, in consultation with stakeholders, and drawing on appropriate external expertise. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	Support.
34a: Improving the quality of asbestos registers Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.	This recommendation would increase costs for business from engaging a competent person to complete their asbestos register. This cost may be less if the engagement occurred as part of the asbestos identification process, which a competent person is already required to perform. The impact could also be reduced by implementing the new requirement after the review of existing requirements for competent persons (Recommendation 34b) is completed, and time allowed for any new training to be established and to build capacity in the work force to meet market demand. The costs may be offset by improvements in safety through increased quality of information on the register.	Minor benefit – if implemented after the review (Rec 34b)	Support in Principle.

34b: Competent persons in relation to asbestos Review existing requirements for competent persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.	This recommendation proposes a review to be undertaken by Safe Work Australia in consultation with stakeholders. It would examine the existing requirements in the model WHS Regulations for a competent person and identify whether specific competencies, skills and experience should be prescribed for all asbestos related tasks. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	Support in Principle.

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