

20 March 2019

Hon Rob Lucas MLC
Treasurer
Minister for Industrial Relations
GPO Box 2264
ADELAIDE SA 5001

Dear Minister,

Boland Review of the Model Work Health & Safety Laws

Further to our meeting on 8th March 2019, SISA has finalised its comments on the recommendations of the report of the Review of the Model Work Health & Safety Laws.

The comments are attached for your consideration. While the comments have been disseminated to other business and employer associations for comment, we have not up to now been able to convene to discuss the report or the SISA comments. However I do not expect that there would be a great deal of disagreement among the associations as to their positions on the recommendations.

Please contact me if you or your staff would like to discuss these comments or we can otherwise be of further assistance.

Yours sincerely



Robin Shaw
Manager

Self Insurers of South Australia
Comments on recommendations of the Review of the Model WHS Laws

Recommendations	Agree/disagree	Comments
Chapter 1: Legislative framework		
<i>Recommendation 1: Review the model WHS Regulations and model Codes</i>		
Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven Australian Strategy priority industries.	Agree	Improving the clarity for small business in particular would be a significant step forward.
<i>Recommendation 2: Make regulations dealing with psychological health</i>		
Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.	Disagree	<p>To suggest that there can be regulations that meaningfully address these mental health challenges is to suggest that there can be a one-size-fits-all approach.</p> <p>SISA acknowledges the great importance of mental health in the workplace and in broader society, and our members are leaders in progressing sustainable solutions. However in our experience, the issues and challenges facing workplaces and individuals within them are highly contextual and circumstantial. In terms of the identification and management of psychosocial risk and the development and use of proactive measures, there manifestly can be no one-size-fits-all approach.</p>

Recommendations	Agree/disagree	Comments
		<p>This recommendation could lead to regulations that have no meaningful application to specific workplaces or individuals, yet carry substantial penalties for non-compliance. The alternative would be regulations so vague that they would be impossible to enforce – a negation of the very basis of having regulations.</p> <p>An alternative approach to regulation might be to review the UK Health & Safety Executive's Management Standards with a view to promoting improved management approaches to issues such as stress and other influences on mental health.</p>
<p><i>Recommendation 3: Continuously assess new industries, hazards and working arrangements</i></p>		
<p>Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.</p>	<p>Agree</p>	<p>It would be important to improve the ability to assess whether emerging trends are in fact risks requiring management and regulation. An example is manufactured nanoparticles, whose effects are still not well understood. The current situation where new technologies etc are coming into widespread use before the risks are understood is becoming ever more risky. However we caution that regulations and Codes of Practice are not a panacea for risk.</p>
<p>Chapter 2: Duties of care</p>		
<p><i>Recommendation 4: Clarify that a person can be both a worker and a PCBU</i></p>		
<p>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.</p>	<p>Agree</p>	<p>This is particularly a problem for small business and subcontracted work, where duties can be both concurrent and overlapping. More easily understood guidance on identifying and complying with duties would help.</p>

Recommendations	Agree/disagree	Comments
<i>Recommendation 5: Develop a new model Code on the principles that apply to duties</i>		
<p>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), including examples of:</p> <ul style="list-style-type: none"> the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act). 	<p>Agree</p> <p>Agree</p> <p>Agree</p>	<p>Examples are useful in a limited sense provided they at least resemble the majority of situations. The regulator should be available to provide detailed advice where there is uncertainty.</p> <p>As above.</p>
Chapter 3: Consultation, representation and participation		
<i>Recommendation 6: Provide practical examples of how to consult with workers</i>		
<p>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.</p>	<p>Agree with provisos</p>	<p>It is important to keep at the forefront of any guidance or Code that forming work groups and facilitating the election of an HSR is only mandatory if one or more workers request it. There are workplaces where the workforce is satisfied with the management of health and safety without the existence of work groups, elections and so on.</p>
<i>Recommendation 7a: New arrangements for HSRs and work groups in small businesses</i>		

Recommendations	Agree/disagree	Comments
<p>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 as per the requirements of the model WHS laws, the PCBU will only be required to form one work group for all workers represented by one HSR and a deputy HSR unless otherwise agreed between the workers and the PCBU.</p>	<p>No view</p>	<p>We defer to the views of organisations representing small business. We observe that it would be especially important that the cautionary comment we make under Recommendation 6 be made clear to smaller businesses that might not have a grasp of the non-mandatory element of Part 5 of the WHS Act.</p>
<p><i>Recommendation 7b: Work group is negotiated with proposed workers</i></p>		
<p>Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.</p>	<p>No view</p>	<p>As per our comments under Recommendations 6 and 7a.</p>
<p><i>Recommendation 8: Workplace entry of union officials when providing assistance to an HSR</i></p>		
<p>Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.</p>	<p>Disagree</p>	<p>We remain of the view that this ought not to be the 'policy intention'. To reiterate our position expressed when the SA WHS Bill was being debated, if the integrity of the entry permit arrangements set out in Part 7 of the WHS Act is to be preserved, there should not be this 'back door'. We submit that the interpretation of the current arrangements expressed in <i>Australian Building and Construction Commissioner v Powell [2017] FCAFC 89</i> should be maintained. We note that the reviewer provides no evidence or substantiation for this recommendation other than references to other parts of the Act dealing with the exercise of HSR powers which, in our view, place no temporal constraints on the misuse of the s.68(2)(g) power.</p>

Recommendations	Agree/disagree	Comments
<i>Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN</i>		
Amend the model WHS Act 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 dealt with by the inspector under s 82 of the model WHS Act.	Agree with proviso	This would be a useful change provided that: <ol style="list-style-type: none"> 1. The technical reason was purely that; and 2. There was a genuine safety issue that prompted the PIN to be issued. There is potential for disputes to be generated over what is technical and what is either a trivial or a genuine safety issue.
<i>Recommendation 10: HSR choice of training provider</i>		
Amend the model WHS Act to make it clear that for the purposes of s 72: <ul style="list-style-type: none"> • the HSR is entitled to choose the course of training, and • if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter. 	Disagree	HSR training should remain a workplace-specific arrangement. Since all providers of HSR training are regulated and approved, choice should not be an issue.
<i>Recommendation 11: Provide examples of HSC constitutions, agendas and minutes</i>		
Update the model Codes and guidance with examples of HSC constitutions, agendas and minutes.	Agree with proviso	We note that the reviewer received input about the mandatory nature of holding HSC meetings within timeframes being at times

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		onerous and potentially redundant (p.73) yet there is no recommendation to reflect this. Examples and templates would be useful but the statutory rigidity of holding HSC meetings, even when the HSC itself sees no need, should also be reviewed. The current arrangement seems to present an opportunity to issue notices that have no real merit from a WHS standpoint.
<i>Recommendation 12: Update guidance on issue resolution process and participants</i>		
<p>Update the worker representation and participation guide to include:</p> <ul style="list-style-type: none"> • 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. 	<p>Agree</p> <p>Agree</p>	<p>As long as it remains a guide and does not become a Code of Practice.</p>
<i>Recommendation 13: Resolving outstanding disputes after 48 hours</i>		
<p>Amend the model WHS Act to provide for:</p> <p>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</p>	<p>Partly agree</p>	<p>1. In some cases, disputes can take more than 48 hours to adequately investigate, so there needs to be an exception clause.</p>

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<p>disputes under the default or agreed procedures and with cease work disputes</p> <p>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</p> <p>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</p> <p>d. appeal rights from decisions of the court or tribunal to apply in the normal way.</p>	<p>Partly agree</p> <p>Agree</p> <p>Agree</p>	<p>2. We would also need to hear the views of the President of the SAET as to whether the SAET, which is already overloaded, could handle such referrals.</p> <p>Should require that all other parties to the dispute be consulted or at least notified.</p>
<p><i>Recommendation 14: Clarify court powers for cases of discriminatory or coercive conduct</i></p>		
<p>Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.</p>	<p>Agree</p>	
<p><i>Recommendation 15: Remove 24-hour notice period for entry permit holders</i></p>		
<p>Amend the model WHS Act to retain previous wording in s 117.</p>	<p>Disagree</p>	<p>The 24-hour notice provision is important in that it:</p> <ul style="list-style-type: none"> • Allows the regulator time to decide whether an inspector should attend • Allows the PCBU time to understand the suspected contravention and, if necessary, remedy it

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		<ul style="list-style-type: none"> Reduces the scope for abuse of the EP provisions There should be a 24-hour notice provision in the SA s.117. Otherwise, the SA version of s.117 should be retained.
Chapter 4: Compliance and enforcement		
<i>Recommendation 16: Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency</i>		
Amend the model WHS Act to align the service of notices provisions under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.	Agree	
<i>Recommendation 17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace</i>		
Amend the model WHS Act to provide that, instead of being limited to the inspector who enters (or has entered) a workplace, the powers to require production of documents and answers to questions can be exercised by any inspector within 30 days following an inspector's entry to that workplace.	Disagree	There is a possibility that two differing inspectors will question a person a number of days apart about what happened and what was said. With the passage of time, memory changes and the information may not be quite the same. This can then be brought up during a trial and used to portray the person, now a witness, as untruthful, confused, unreliable, thereby weakening the evidence. Only one inspector should be interviewing a person.
<i>Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction</i>		

Recommendations	Agree/disagree	Comments
Amend the model WHS Act to clarify that the regulator's power to obtain information under s 155 has extraterritorial application.	Agree	
<i>Recommendation 19: Enable cross-border information sharing between regulators</i>		
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.	Agree	
<i>Recommendation 20: Review incident notification provisions</i>		
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.	Disagree with notification provisions for psychological injuries	<p>This would infer that psychological injuries are of the same nature, and can be treated the same way as physical injuries. This is obviously not the case. This recommendation is impractical and unworkable because of the sheer complexity and variability of psychological issues. Furthermore, were a regulator to be notified of a psychological injury, what would inspectors do with the information? They are not trained in the investigation of such complex and at times subjective matters that often involve highly sensitive factors outside the workplace.</p> <p>These comments should be read in conjunction with our comments under recommendation 2.</p>
Chapter 5: National Compliance and Enforcement Policy		

Recommendations	Agree/disagree	Comments
<i>Recommendation 21: Review the National Compliance and Enforcement Policy (NCEP)</i>		
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.	Agree	
Chapter 6: Prosecutions and legal proceedings		
<i>Recommendation 22: Increase penalty levels</i>		
<ul style="list-style-type: none"> Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and 	Disagree	There is no evidence that we are aware of that setting ever-higher penalty levels has any material or cultural effect on workplace health and safety. We recall that in the years after the Queensland WHS Act took effect, the workplace fatality rate increased. Unless there is a body of data that indicates that workplace injuries reduce after higher penalties are introduced, we submit that the assertion that higher penalties increase WHS compliance levels is just an assumption.
<ul style="list-style-type: none"> 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. 		
<i>Recommendation 23a: Enhance Category 1 offence</i>		
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.	Agree	

Recommendations	Agree/disagree	Comments
<i>Recommendation 23b: Industrial manslaughter</i>		
<p>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:</p> <ul style="list-style-type: none"> • 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. <p>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).</p>	Disagree	<p>The SISA position on this has not changed since our submission to and appearance before the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation (24/2/2016) during its hearings on the then <i>Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015</i>. A copy can be provided on request. The current criminal law is both adequate and appropriate for charges of this gravity.</p> <p>Furthermore, we see no valid distinction between manslaughter committed, for example, on the road and manslaughter committed in a workplace and we consequently see no valid reason to address them differently in criminal law. If there was a valid reason to do so, we would need separate pieces of law to prosecute manslaughter on the road, in the commission of a violent crime, and so on.</p>
<i>Recommendation 24: Improve WHS regulator accountability for investigation progress</i>		

Recommendations	Agree/disagree	Comments
<p>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.</p>	<p>Agree in principle</p>	<p>Could help to discourage regulators from running the clock down to the last minute before laying charges. With no time limit, excessive delay reflects badly on the regulator. An alternative is a longer timeframe, though this would be of questionable value.</p>
<p><i>Recommendation 25: Consistent approach to sentencing</i></p>		
<p>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. (I note that the work required by Recommendation 22 ('Increase penalty levels'), Recommendation 23a ('Enhance Category 1 offence') and Recommendation 23b ('Industrial manslaughter') could be combined with the work required by this recommendation).</p>	<p>Reserve position</p>	<p>We would need to see what is proposed as the guidelines and seek legal advice before commenting. A level of consistency in sentencing could be supported in principle provided that striving for consistency does not become an end in itself that compromises the aim of objective justice.</p> <p>The interplay with each jurisdiction's criminal justice systems will be very complex.</p>
<p><i>Recommendation 26: Prohibit insurance for WHS fines</i></p>		
<p>Amend the model WHS Act to make it an offence to:</p> <ul style="list-style-type: none"> enter into a contract of insurance or other arrangement under which the person or another 	<p>Agree</p>	

Recommendations	Agree/disagree	Comments
<p>person is covered for liability for a monetary penalty under the model WHS Act</p> <ul style="list-style-type: none"> provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and take the benefit of such insurance or such an indemnity. 		<p>The use of insurance for fines undermines the safety duties of PCBUs and officers and defeats the deterrent and punitive value of fines.</p>
<p>Chapter 7: Model Work Health and Safety Regulations</p>		
<p><i>Recommendation 27: Clarify the risk management process in the model WHS Act</i></p>		
<p>Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with reg 36) and making any corresponding amendments necessary to the model WHS Regulations.</p>	<p>Agree</p>	<p>Would provide more clarity for smaller business and would probably reflect current practice among larger businesses.</p>
<p><i>Recommendation 28: Improved recording of amusement device infringements and operator training</i></p>		
<p>Amend reg 242 of the model WHS Regulations to ensure that details of statutory notices issued by any WHS regulator and evidence of operator training and instruction are included in the device's log book.</p>	<p>Agree in principle</p>	<p>Subject to the views of amusement ride operators and event managers.</p>
<p><i>Recommendation 29a: Add a SWMS template to the WHS Regulations</i></p>		

Recommendations	Agree/disagree	Comments
Amend the model WHS Regulations to prescribe a SWMS template.	Agree	It appears from the narrative that SWMS has in some cases become a compliance-only function. In high-risk construction, this needs to be corrected.
<i>Recommendation 29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS</i>		
Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.	Agree	As above
<i>Recommendation 30: Photographic ID on White Cards</i>		
Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.	Agree	The quality of induction training content is obviously a major problem and needs to be addressed as a priority by the VET sector and AQSA.
<i>Recommendation 31a: Consider removing references to Standards in model WHS Regulations</i>		
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.	Tentatively agree	<p>The issue of referencing standards generates divided opinion among our members – some find the standards very useful while others find that they introduce additional complexity without a corresponding benefit.</p> <p>The current system of requiring compliance with standards results in an excessive, in many cases unnecessary, cost burden to employers with often little or no added value. The reason for this is the poor specification as to which part of a standard, or standard in a set, is applicable. For example, many standards are comprised of multiple sections, some of which may not be applicable to the</p>

Recommendations	Agree/disagree	Comments
		<p>end user, (such as sections dealing with design, development and design integrity testing.</p> <p>If compliance to standards is to be mandatory then the standard should be freely available and the mandatory parts concisely identified in the relevant regulation, thereby removing the current excessive cost and providing clarity to the user.</p> <p>Removing at least some references could be supported if they are replaced with something more effective and practical.</p>
<i>Recommendation 31b: Compliance with Standards not mandatory unless specified</i>		
<p>Amend reg 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.</p>	<p>Agree</p>	<p>The high cost of accessing standards must be addressed as a priority regardless of its relevance to the scope of this review. The current monopoly control (and therefore unfettered pricing) of the standards is unacceptable, especially if compliance with standards continues to be mandated in WHS and other law.</p> <p>The current excessive cost of standards presents a real risk of non-compliance by some organisations, particularly small businesses, as they cannot afford to purchase all the applicable documents.</p>
<i>Recommendation 32: Review MHF Regulations</i>		
<p>Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.</p>	<p>Defer to the views of MHF operators</p>	<p>Problems highlight the complexities of trying to integrate regulation at a national level with various State and Territory laws without loss of consistency.</p>

Recommendations	Agree/disagree	Comments
<i>Recommendation 33: Review crane licence classes</i>		
Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.	Agree	The WHS regulations must keep pace with advancing technology and work activities.
<i>Recommendation 34a: Improving the quality of asbestos registers</i>		
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.	Agree	
<i>Recommendation 34b: Competent persons in relation to asbestos</i>		
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.	Agree	