Australian Industry Group

Recommendations of the 2018 Review of the Model Work Health and Safety Laws

Consultation Regulation Impact Statement (CRIS)

Submission to
Safe Work Australia

AUGUST 2019

RECOMMENDATIONS OF THE 2018 REVIEW OF THE MODEL WORK HEALTH AND SAFETY LAWS CONSULTATION REGULATION IMPACT STATEMENT

SUBMISSION TO SAFE WORK AUSTRALIA

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Ai Group is a member of Safe Work Australia and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety (WHS) Laws. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have ongoing contact and engagement with employers in all Australian jurisdictions on workplace safety issues, including informing them of regulatory changes, discussing proposed regulatory change, discussing industry practices as well as providing consulting and training services. We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to workplace health and safety.

Ai Group welcomes the opportunity to make a submission in relation to the Consultation Regulation Impact Statement associated with the 2018 Review of the Model WHS Laws.

SUPPORTING HARMONISATION

Ai Group, and our members generally, are strong supporters of harmonisation. Whilst it is argued that harmonisation is mostly only relevant to multistate businesses, many single-jurisdiction businesses also interact with suppliers and/or customers in other jurisdictions. A common language of WHS helps to send a consistent message about what needs to be done to enhance risk management and reduce the level of injury and fatality within Australia.

Throughout the development of the laws there were compromises made by all participants and, ultimately, there are some things in the Model WHS Laws that are not the preferred position of our members. However, we have continued to argue, through reviews and legislative change, that the concept of harmonisation is important and should not be put at risk due to jurisdictional pressures.

The initial adoption of the laws involved some necessary variations at jurisdictional level, as reflected by jurisdictional notes in the Model WHS Laws. These were designed predominantly to allow the Model to interact appropriately with other laws in each jurisdiction.

The unfortunate political reality was that other amendments were made when the laws proceeded through individual jurisdictional legislative processes. These amendments included, but are not limited to: union right to prosecute in NSW; a modified approach to union right of entry in SA; QLD maintaining work related electrical safety provisions in separate legislation; and some jurisdictions not adopting the mines chapter of the Regulations.

However, for many years, the integrity of the key parts of the legislation remained largely intact; obligations of duty holders; consultation provisions; and penalty regimes. However, the 2017 amendments to the QLD WHS Act have created a fissure which puts at risk the collaborative approach to maintaining a harmonised system, particularly in relation to the industrial manslaughter provisions.

These provisions change the focus of the legislation from one that is about level of risk to which people are exposed (category 1, 2, or 3) to one where the outcome becomes a determinant, with industrial manslaughter provisions triggered by a death in circumstances that may have less culpability than a similar incident that does not result in death.

We also note that Victoria is working towards implementation of workplace manslaughter laws and the Northern Territory Government has recently confirmed that it will introduce industrial manslaughter legislation.

Ai Group continues to hold the position that harmonisation of WHS laws is important to Australian businesses and workers. We are pleased to see that Western Australia is currently progressing the development of its laws. Members continue to express frustration that Victoria is relying on an incomplete Supplementary Impact Assessment (SIA) undertaken in 2012 to justify retention of its Occupational Health and Safety (OHS) laws, even where there are provisions of the Model WHS Act which undoubtedly increase organisational focus on risk management, i.e. the officer duty to exercise due diligence.

OTHER REVIEWS AND SUBMISSIONS ON WHS LAWS

Ai Group has previously made a range of submissions to reviews of the Model WHS laws, undertaken both nationally and at jurisdictional levels. In some cases, this has been in response to legislated reviews; in others it was in response to proposed legislative amendments at a jurisdictional level.

A significant national review of the Model WHS Act was initiated by COAG (Council of Australia Governments) in 2014. This review resulted in a number of amendments to the Model WHS Act, none of which have been adopted by any jurisdiction.

A review of the Model WHS Regulations was initiated by WHS Ministers in December 2014, with 16 amendments agreed at a Safe Work Australia Members meeting in February 2015 and referred to the WHS Ministers for approval.

Almost four years on these amendments are still being progressed by Safe Work Australia, in conjunction with members.

A process was recently undertaken within Safe Work Australia to review the Model WHS Codes of Practice, engaging with members of the SIG-WHS and nominated technical experts. The review had a narrow scope, examining the technical accuracy, usability and readability of the documents.

Considering the inertia of jurisdictions to adopt any amendments that are agreed by Safe Work Australia members and approved by WHS Ministers, and the actions taken within jurisdictions to make their own amendments to legislation that are not in line with agreed positions, it is debatable whether:

- this, and any future, review will result in tangible enhancement to the laws and their operations;
- there is an ongoing commitment by jurisdictions, and the relevant political parties, to support the maintenance of harmonised laws; and
- there is any value proposing or supporting amendments to the Model WHS Laws.

Despite the above commentary, Ai Group will continue to work with Safe Work Australia and individual jurisdictions to promote and support the maintenance and development of harmonised Model WHS Laws that contribute to a greater understanding of WHS obligations, increased compliance and better outcomes in the form of reduced illness, injuries and fatalities.

RESPONSE TO THE CONSULTATION REGULATION IMPACT STATEMENT

Ai Group notes that the Consultation Regulations Impact Statement (CRIS) focuses on 12 recommendations, with an assessment having been made that the remaining recommendations have minor or no impact.

Having reviewed the recommendations not considered in the CRIS we mostly agree that they do not, in their current form, create any significant impact.

This is largely because many of the recommendations are about undertaking reviews to determine whether change is required. Ai Group will be actively involved in these reviews through our membership of Safe Work Australia. It may be that the outcome of some of this work will result in the need for further regulatory impacts to be assessed.

It is important to emphasise that a lack of commentary on these recommendations in this submission does not necessarily indicate support for the work being undertaken or the potential outcome of the reviews.

In responding to the CRIS, we have adopted an approach which groups like recommendations together and addresses the issues of most significant concern first.

Offences and Penalties

The Category 1 offence and industrial manslaughter

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.

Recommendation 23b: Industrial Manslaughter

Amend the model WHS Act to 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 the body corporate is taken to be conduct engaged in by the body corporate*
- *the body corporate's conduct include 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).

Ai Group has long argued that there is no need for an offence of industrial manslaughter. Our reasons for this have most recently been articulated in our submissions to the Discussion Paper for the 2018 Review of the Model WHS Laws and the Senate Inquiry into Industrial Deaths. We do not intend to restate our views in detail in this submission but encourage interested readers to access our previous submissions.

Instead we will summarise our position and comment specifically on issues raised in the Report and the CRIS.

Summary of the Ai Group position:

- Ai Group does not believe there is a need for industrial manslaughter provisions within WHS/OHS laws.
- We recognise that there is some public advocacy for either corporate manslaughter or industrial manslaughter legislation for a mix of reasons that appear to include deterrence and retribution; this has resulted in a number of jurisdictions having implemented or agreed to implement such offences.
- It also appears that such advocacy conflates notions of corporate manslaughter with a wider concept of industrial manslaughter that applies to individuals.
- Ai Group is not convinced of the deterrent impact of such laws.
- A nationally harmonised approach to the most serious WHS offences is preferred to one that leaves it to jurisdictions to develop their own laws.
- A nationally harmonised approach will ensure that there is certainty of maximum penalties for persons conducting a business or undertaking (PCBUs) and individuals that operate across more than one jurisdiction.
- If provisions are not adopted as a harmonised approach, the issues of extraterritorial application will need to be clearly defined.
- Due to the anomalies within the Queensland legislation, reflected in the Report, that legislation should not be used as the basis for a harmonised approach to industrial manslaughter.

- If corporate/industrial manslaughter provisions are to be adopted, they must be drafted by senior lawyers that understand the nuances of the WHS laws and the general criminal law of manslaughter and how they will interact with each other.
- If corporate/industrial manslaughter provisions are to be introduced it is essential that there is also a review of the Category 1 offence so that the two offences are logically related.
- The laws must be drafted in such a way that they meet the following criteria:
    - In relation to offences by individuals, they should apply to all persons in the workplace; not just officers.
    - They must ensure that:
        - any corporate/industrial manslaughter provisions fit effectively within the WHS legal structure that escalates a breach from a category 1 offence to an industrial manslaughter offence;
        - the burden of proof and processes for prosecuting corporate/industrial manslaughter offences are consistent with those that apply to manslaughter provisions in the general criminal law; and
        - the right to protection from self-incrimination must be enshrined in the law.

Issues from the Report and CRIS

The Structure of the offences

Within the Report it is argued that recklessness (the level of culpability for a Category 1 offence) sets too high a bar for prosecutors and gross negligence would be a more appropriate test.

At pp. 119 to 120 of the Report, the difference between recklessness and negligence is outlined as:

- recklessness in criminal law is intentional and requires the prosecution to prove a conscious choice to take an unjustified risk.
- criminal negligence is usually regarded as not requiring intent.

However, at p. 37 of the CRIS it is stated that:

> It is possible this approach may not lead to an overall increase in the number of Category 1 prosecutions, because the high risk of serious harm required to prove gross negligence is potentially more difficult to establish than the substantial risk of harm required for recklessness.

It is Ai Group's view that this discrepancy in views highlights a lack of clear understanding about the interaction of WHS laws and the criminal law of negligence.

If these recommendations are adopted it is important that changes to the Category 1 offence, and any drafting of an Industrial Manslaughter provision, have input from senior lawyers in both WHS law and criminal law.

Category 1 and industrial manslaughter provisions as a deterrent.

It is argued that including "gross negligence" in the Category 1 offence will "add that extra deterrent in the model WHS offence framework" (p.122).

However, this implies that the average officer and PCBU understand the different level of culpability associated with "gross negligence" compared to "recklessness".

It is Ai Group's view that the average person, who is looking just at the words, would probably believe that gross negligence is a higher bar than recklessness. Hence, increased deterrence will only be achieved if there is significant public discussion of the change and what it means in practice.

The deterrent effect is very debatable.

Applying corporate/industrial manslaughter only to PCBUs and officers.

Given that Category 1 offences apply to all persons in the workplace, it does not seem appropriate to introduce an industrial manslaughter provision that only applies to PCBU or officer.

The Category 1 offence applies if a person is exposed to a significant risk of death or serious injury, and there is recklessness involved on behalf of an individual or a PCBU. Ai Group does not support a higher penalty based on the outcome of that exposure, i.e. if the outcome is a fatality. However, if higher penalties are to apply it is unclear how it can be justified to only apply those to an officer and not to other persons.

Other recommended changes to penalties and prosecutions

Increasing penalties

There is a recommendation to increase all penalties to reflect increases in the consumer price index and in the value of penalty units in participating jurisdictions since 2011 (recommendation 22).

On page 54 of the CRIS it is noted that "increasing penalty levels … would ensure that penalties under the WHS laws retain their real value as a deterrent".

Maintenance of the real value of monetary penalties is appropriate.

Proposed amendments to s.231

Section 231 of the Model WHS Act relates to Category 1 and 2 offences. It allows for a person to make a written request to the regulator to commence a prosecution if "no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after that occurrence".

Recommendation 24 proposes to remove the 12-month limitation due to anomalies that arise when there is a protracted investigation by the regulator.

Ai Group is not opposed to increasing the time frame but would be concerned about an open-ended ability to seek review that could be initiated many years after an incident.

Rather than remove the time-frame completely, it would be more appropriate to either:

- set a longer time-frame in which to make the request; or
- link the time-frame to a decision by the regulator not to prosecute.

This would allow for some level of certainty for all parties involved in the situation, including witnesses and others affected by an incident.

Prohibit insurance for WHS fines

Recommendation 26: Prohibit insurance for WHS fines

Amend the model WHS Act to make it an offence to:

- *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*
- *provide insurance or grant an indemnity for liability for a monetary penalty under the model WHS Act, and*
- *take the benefit of such insurance of indemnity*

Ai Group recognises the perception of incongruity associated with organisations being able to access insurance coverage for fines applied when there is a serious breach of WHS/OHS laws.

Feedback from our members indicates many businesses and their officers do not know whether their insurance policies, and particularly director's liability insurance, covered WHS/OHS breaches. We have looked at a number of policies and the coverage is often vaguely described and would be subject to interpretation if there was cause to claim against them.

If there is to be a prohibition on insurance for some, or all, WHS breaches, Ai Group welcomes the commentary in the Report which specifically states, at p. 137:

> "… I am not suggesting that companies and officers should be precluded from accessing insurance or indemnity for legal costs incurred in defending a prosecution".

Businesses, and their officers, have a higher exposure to potential prosecution than the average person, and may arise from the acts or omissions of others. There should be some ability to access insurance to assist in the defence of such actions.

If a prohibition is advanced, the following principles should apply:

- As recommended in the report, any prohibition should only be on the recovery of fines, and that policies can be utilised to cover legal fees and other costs of defending a prosecution;
- That any prohibition should be on taking the benefit of an indemnity, rather than holding the policy. It is possible that multinationals with overseas parent companies are tied into global insurance arrangements that may provide global cover for fines for WHS breaches, perhaps without the explicit knowledge of local management; and
- Insurance companies selling policies within Australia should be banned from offering protection in line with any prohibition on the coverage being accessed (this will protect employers from being sold policies they cannot claim against).

We note the recent High Court Decision in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor [2018] HCA3* indicates that the courts may be able to order that insurance policies cannot be accessed to pay WHS fines.

The case arose from a decision in the Federal Court of Australia where the primary judge directed that the CFMEU could not directly or indirectly indemnify the individual organiser in relation to the penalty imposed. The case was appealed to the Full Court of the Federal Court where it was determined that the primary judge did not have the power to direct non-indemnification.

The High Court ultimately held that section 546 of the Fair Work Act:

> Expressly confers power on the court to make an order that a person pay a pecuniary penalty. From that express conferral of power arises an implied power to make such other orders as are necessary for or facilitative of the type of orders expressly provided for … that implied power under s. 546 includes power to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity form a co-contravener, otherwise known as a personal payment order. [para 115].

It may be that a similar interpretation would be made of the penalty provisions within the Model WHS Act.

Changes to how duties are specified

Psychological risks

Recommendation 2: Make regulations dealing with psychological health *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*

Other prevention activities associated with psychological risk

Ai Group recognises that psychological risks are an increasing focus for the community, businesses and regulators. Ai Group recently made a submission to the Productivity Inquiry into Mental Health and we encourage Safe Work Australia to consider that submission and the submissions others have made to that inquiry, when moving forward with any further work associated with psychological risks.

We also highlight that Safe Work Australia's Work-related psychological health and safety: A systematic approach to meeting your duties (published in June 2018) was designed to provide detailed guidance to assist PCBUs to meet their legal obligations, both WHS and workers' compensation, in relation to psychological risks. We would encourage an assessment of the uptake and effectiveness of this guide before considering introducing a regulation.

Ai Group response to this recommendation

It is not clear from the recommendation, or the commentary, what any proposed regulation would look like. It may be prescriptive as to processes and controls or it may simply restate the obligation to identify hazards and control risks.

It may be that the regulation would be worded in a way similar to that for noise:

> "a person conducting a business or undertaking must manage risks to the health and safety of a worker associated with psychological risks, in accordance with Part 3.1"

Part 3.1 specifies obligations to:

- identify hazards;
- manage risks in line with the hierarchy of controls;
- maintain control measures; and
- review control measures.

If this is the approach taken, Ai Group does not have any major concerns with the recommendation being adopted. Although it is our view that the obligation already exists within the Act and a regulation is not necessary.

However, if the regulation aims to detail specific control measures it is Ai Group's view that it will not be possible to draft a regulation that addresses all the possible hazards and control measures that need to be considered for the broad range of psychological risks that may occur out of or in the course of work. It will also not be possible for a prescriptive regulation to consider the psychological risks in the context of the full range or organisational issues that need to be considered.

It is Ai Group's view that this RIS will not be able to assess the cost of the proposed regulation. A further RIS may be needed if work on a regulation is progressed at Safe Work Australia. Once there is more certainty about how the regulation might look, it will be possible to identify the costs and benefits of a regulation. There may need to be a separate regulatory impact assessment at a later stage.

Other recommendations associated with psychological risk

It is noted that recommendation 20 proposes a review of the Incident Notification obligations to provide for a notification trigger for psychological injuries. This recommendation is currently identified as having no impact as further work is recommended.

Incident notification obligations require a PCBU to notify the regulator "immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred". The PCBU must also "ensure so far as is reasonably practicable, that the site where the incident occurred is not disturbed until an inspector arrives at the site or any earlier time that an inspector directs."

Psychological injuries are rarely associated with an "incident". They would normally come to the attention of a PCBU during performance management or when a workers' compensation claim is lodged. This can often occur many months, and possibly years, after the circumstances that lead to the injury developing.

Incident notification provisions are not designed to deal with these types of situations.

Accordingly, it is Ai Group's view that this piece of work should not be added to the Agency's work plan, when an effective outcome is unlikely to be achieved.

Clarifying the risk management process in the model WHS Act

Recommendation 27: Clarify the risk management process in the model WHS Act

Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with the model WHS Regulations) and making any corresponding amendments necessary.

The Model WHS Laws include a Code of Practice entitled How to manage work health and safety risks. This Code provides practical guidance for persons who have duties to manage risks to health and safety under the WHS Act and Regulations applying in a jurisdiction. The Code, which applies to all risks not just those for which there are regulations, refers to the hierarchy of controls. Hence, an expectation is already created that a PCBU will apply the hierarchy to all risks.

This is appropriate because considering the hierarchy is a systematic approach to risk control that has been applied by WHS practitioners for many years.

Ai Group does not see a need to include the hierarchy within the Act.

Safe Work Method Statements (SWMS) for High Risk Construction Work

Recommendation 29a: Add a SWMS template to the WHS Regulations

Amend the model WHS Regulations to prescribe a SWMS template

Recommendation 29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS

Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.

These recommendations relate to Safe Work Method Statements for high risk construction work.

In relation to recommendation 29a, a template is already available on the Safe Work Australia website.

It is not appropriate to prescribe a SWMS template for the following reasons:

- it is difficult to see how one template can be fit-for-purpose for every organisation and every high-risk work activity; and
- a range of organisations already provide templates that suit their sector of the industry; and
- adopting a new, prescribed, SWMS could be very disruptive and expensive for organisations that have well-established systems and processes for SWMS

The cost of implementing this recommendation, as a prescribed obligation, is expected to cost the construction industry many millions of dollars, with the majority of costs falling on organisations that already have robust approaches to the utilisation of SWMS.

It is difficult to see how there could be the necessary benefits in improved WHS outcomes to justify this significant expense.

It is essential that the Decision Regulation Impact Statement (DRIS) is informed by discussions with construction companies that can provide estimates of the impact that implementation of this regulation would have taking into account both the financial perspective and the level of disruption and confusion it could create on construction sites.

In relation to recommendation 29b, there are no objections to the development of a tool, as long as it is not prescribed.

Ai Group would also support more guidance that clarifies when and how SWMS should be utilised.

Recommendations related to unions and/or HSRs

Recommendation 8: Clarify workplace entry of union officials providing assistance to an HSR

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 2009 (Cth) or other industrial law.

Ai Group strongly objects to this recommendation. This is not because every person who helps an HSR should have a permit; it is because the HSR powers should not be utilised to allow a union organiser on site when that organiser has been refused a permit or had his/her permit revoked.

It would be a strange outcome if a person was found, because of their conduct, not to be a person who should have a standing right to enter a workplace but who could be asked by an HSR to enter the same workplace without question. It would be even stranger if the reasons they were denied an entry permit included inappropriate use of safety as an industrial weapon.

It has been the experience of some of our members that the broad power of the HSR, to "*whenever necessary request the assistance of any person*" (see section 68(2)(g)) has not been properly or appropriately exercised in some workplaces.

In particular, what we see are a large number of HSRs in heavily unionised workplaces, who are contacted by union organisers (often through a work email address) advising them to provide access to the site under the provision for the purposes of enquiring into a "safety issue" that the union wish to raise. That is, the HSR may have no concern or even know of the issue, but are being used as a means, by virtue of this provision, to allow the union organiser entry to the site. In our members' experience it is often in circumstances where some other industrial issue exists, such as enterprise bargaining or union membership.

This approach is a concern for PCBUs, as it circumvents the general right of entry provisions. However, it should also be a concern for the HSR(s) who are put in a difficult position by being pressured into becoming involved in non-WHS issues advanced by permit holders.

In our experience when this occurs, it can be difficult for the PCBU to do anything other than allow the union organiser on site, and none of the rules that apply to the general right of entry provisions can be applied.

We consider it appropriate that the Regulations be amended to include at least some guidelines for a HSR utilising the power, not to reduce their capacity to enquire into a genuine safety matter, but to ensure the provision is not manipulated to be used for right of entry alternatives. Perhaps the HSR could be required to:

- consult with the PCBU to identify the safety issue/concern they have identified;
- work with the PCBU to resolve the issue/concern utilising issue resolution processes where appropriate;
- identify the need or the necessity for having the assistance sought;
- identify the particular skill or expertise that they require from the person (such as the union organiser) from whom they intend to seek assistance.

In order to make it less attractive to utilise this provision to circumvent general right of entry provisions, a notice period should be required.

Further, when permit holders are assisting an HSR, they should also be obliged to comply with the requirements established by the Act and Regulations relevant to entering the site to consult and advise workers.

We note that the Model WHS Act was amended following the 2014 COAG review to require notice to be given, in the same terms as union right of entry provisions, if the person assisting the HSR was required to enter a site to provide that assistance. Unfortunately, no jurisdiction has adopted this amended provision; this is the case even though South Australia recently amended their Act to align with the Model WHS Act, choosing to adopt the old version of the Act, not the new one.

The Discussion Paper highlighted the decision of the Full Federal Court, in *Australian Building and Construction Commission v. Powell,* that held that a union official must have an entry permit under the Fair Work Act to enter a workplace to assist an HSR under the Victorian Occupational Health and Safety Act. This decision was welcomed, and is considered to apply to the Model WHS Laws, due to the similar construction of the provisions.

We do note, however, that the Model WHS Laws have a specific reference (at s.71(4)) that a PCBU is not required to allow access to a person who has had their permit revoked or suspended, or a person who is disqualified from holding a permit. This is an important provision and must be maintained in the laws to ensure that these provisions are not utilised to circumvent actions taken by the courts to sanction union organisers who abuse their powers in other jurisdictions.

Finally, we repeat the view that we have put forward since work on the Model WHS Laws commenced. As the Model WHS Laws give entry permit holders the right to enter for the purposes of consulting and advising, the power to seek assistance is redundant. The power should be removed, or as previously indicated, modified to mirror the requirements associated with entry to consult and advise workers, and should contain additional requirements for HSRs to discuss the issue with the PCBU prior to seeking that assistance.

Recommendation 15: Remove 24-hour notice period for entry permit holders

Amend the model Act to retain previous wording in s.117 of the model WHS Act [remove requirement to provide 24 hours notice before exercising right of entry for a suspected contravention].

This notice period was introduced into the model to ensure that this provision could not be utilised to override the 24-hour notice provisions in the FW Act. It was in the QLD Act for a short period of time and then repealed; it has not been introduced into any other WHS Act.

A 24-hour notice requirement will not create risks to WHS, as is often asserted, as there is little to no evidence that the immediate entry power for WHS is, or has proven, necessary for maintaining safe workplaces. Unions cannot guarantee to provide an instant response to a member's request for them to come to their workplace to address a WHS issue, and in such cases they would, or at least would be expected to, advise their member of the alternatives available to them to address an issue that is time critical, including notifying their employer, notifying their HSR, exercising their right to cease unsafe work or notifying the regulator.

Ai Group believes 24-hours' notice is important and jurisdictions should be encouraged to adopt the provision which was agreed by Ministers.

Recommendation 10: HSR choice of training

Amend the model WHS Act to make it clear that for the purposes of s.72:

- *the HSR is entitled to choose the course of training; and*
- *if the PCBU and the HSR cannot reach agreement on time off for attendance, payment of fees or the reasonable costs of the training course chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.*

This issue has arisen due to the decision in *Sydney Trains v SafeWork NSW [2017] NSWIRComm 1009.* In this case it was determined that an inspector could not direct which course the HSR attended because there needed to be agreement between the HSR and PCBU (based on reference to consultation).

It is not clear exactly what amendments to the legislation would result from this recommendation. It is important that the obligation to consult with the PCBU is not removed from the legislation, as that consultation goes to the issue of cost and operational requirements.

We do support the ability of an inspector to resolve all issues associated with the choice of training, including the selection of the course. If legislative changes are required to achieve this outcome Ai Group would support the amendments.

Recommendation 7a

Amend the model WHS Act to provide that where the operation 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.

Ai Group supports the default position of a single workgroup for small employers. However, we believe that the default should be limited to the election of one HSR, not the inclusion of a deputy. The election of a deputy would double the training costs for a PCBU and hence increase barriers to the establishment of workgroups and HSRs.

Any changes to the law that implement this recommendation, and any supporting documentation, must not create an impression that there is a legal obligation to have elected HSRs unless they are requested by workers.

Recommendations related to inspectors' powers

Recommendation 13: Introduce referral of outstanding disputes to a court or tribunal after 48 hours

Amend the model WHS Act to achieve a range of things, predominantly that a dispute that has not been resolved by an inspector within 48 hours of seeking their assistance can be referred to the court to be resolved. [full recommendation is more detailed]

This recommendation is designed to fill a gap where the range of inspector powers do not allow, or encourage, them to resolve particular types of disputes. The Report states (at p.77) "… overwhelming response to the issue resolution provisions was that the role of the inspector was ineffective due to a lack of power to definitively decide the issue."

It is in the interests of a PCBU to have disputes resolved efficiently, even if it is the HSR or workers who make the referral.

Accordingly, Ai Group does not object to the intent of this recommendation. However, referral to a court or tribunal may not be the most appropriate course of action.

It is not clear whether the review considered how the powers of inspectors could be amended or clarified to support quicker resolution in the workplace. This should be investigated before further layers of dispute resolution are introduced.

If another layer of dispute resolution is required, it is Ai Group's view that, rather than adopt this recommendation as written, Safe Work Australia should investigate alternative approaches that would provide a timely resolution. Areas for investigation might be to:

- make such a situation a "reviewable decision" which would bring the process in line with timeframes for such activities to occur;
- another mechanism within the regulator to provide assistance to an inspector to resolve the issue; or
- referral to an independent person appointed by the relevant Minister.

An ombudsman may be another source of review, but this may not result in a timely resolution.

Recommendation 9: Requiring inspectors to deal with a safety issue when cancelling a PIN

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.

Ai Group supports this approach as it is within the interests of all involved to have an issue resolved rather than postponed until a valid PIN is issued. However, we do not see that there is currently any barrier to an inspector resolving an issue during such a process.

Recommendation 17: Require the production of documents and answers to questions after entry

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.

Ai Group provides partial conditional support for this provision. It would appear to be appropriate for an inspector who has visited the site to contact an employer to seek additional information.

However, there are some caveats on this view.

The power to do so should only be available to the inspector who undertook the visit. This will ensure that employers have a level of comfort that they are dealing with the regulator, and not be concerned that the request is being made by a third party. In light of issues associated with cyber security and phishing emails this is particularly important.

There is a risk that the ability to keep asking for extra information will allow an inspector to be lazy in their initial or subsequent request for information. It is much more efficient for a PCBU to interrogate their records once to provide answers for an inspector. Multiple requests for further information may lead to multiple searches of the same data for additional information.

It is Ai Group's view that the amendment, whilst currently limited to 30 days, should also be limited to one additional request for information.