Review of the *Work Health and Safety Act 2011*

Final Report – December 2022

21 December 2022

The Hon Grace Grace MP
Minister for Education
Minister for Industrial Relations
Minister for Racing
1 William Street
BRISBANE QLD 4000

Dear Minister

We are pleased to present you with the report of the Review of the *Work Health and Safety Act 2011*.

We express our thanks to all the industry and worker representatives and others from the community who contributed to this Review and to the officers of your Department who provided secretariat support to us during this process. We would also like to acknowledge the contribution of Dr Rebecca Loudoun, Associate Professor at Griffith University and Dr Carol Hon, Senior Lecturer and Research Fellow at the Queensland University of Technology. Their assistance and expertise were of great value to the reviewers throughout this process.

Thank you for the opportunity to contribute to the important task of ensuring safety at work and public safety for all Queenslanders.

Yours sincerely

Charles Massy
Independent Reviewer

Craig Allen
Independent Reviewer

Deirdre Swan
Independent Reviewer

Contents

Glossary

Best Practice Review	Best Practice Review of Workplace Health and Safety Queensland
Boland Review	Review of the model Work Health and Safety laws – Final report
DJAG	Department of Justice and Attorney-General (Qld)
EPC	Earthmoving and particular crane certificate
Facilities Code	*Managing the work environment and facilities Code of Practice 2021* (Qld)
FW Act	*Fair Work Act 2009* (Cth)
FW(RO) Act	*Fair Work (Registered Organisations) Act 2009* (Cth)
HSC	Health and safety committee
HSR	Health and safety representative
IR Act	*Industrial Relations Act 2016* (Qld)
IROLA Act	*Industrial Relations and Other Legislation Amendment Act 2022* (Qld)
ISSC	Industry sector standing committee
Licensing Review	Interface with Licensing within the Queensland Construction Industry – a follow-up to the 2018 Review
model WHS laws	Model Work Health and Safety Act, model Work Health and Safety Regulations and model Codes of Practice (developed by Safe Work Australia)
OBPR	Office of Best Practice Regulation
OH&S/OHS	Occupational health and safety
OSHA	Occupational Health and Safety Administration (US)
OWHSP	Office of the Work Health and Safety Prosecutor
OIR	Office of Industrial Relations
PCBU	Person conducting a business or undertaking

PIN	Provisional improvement notice
PPE	Personal protective equipment
QIRC	Queensland Industrial Relations Commission
QTO	Queensland Training Ombudsman
RTO	Registered training organisation
SO Act	*Summary Offences Act 2005* (Qld)
SWA	Safe Work Australia
TOR	Terms of Reference
WHS	Work health and safety
WCR Act	*Workers' Compensation and Rehabilitation Act 2003* (Qld)
WHS Act	*Work Health and Safety Act 2011* (Qld)
WHS Board	Work Health and Safety Board
WHS Regulation	*Work Health and Safety Regulation 2011* (Qld)
WHSO	Work health and safety officer
WHSP	Work Health and Safety Prosecutor
WHSQ	Workplace Health and Safety Queensland
WRPG	Worker Representation and Participation Guide

Executive Summary

On 2 January 2012, the *Work Health and Safety Act 2011* (Qld) (WHS Act) commenced operation. The WHS Act is based on the model work health and safety laws (model WHS laws). The drafting of the model WHS laws was preceded by a thorough and lengthy review process. The result of that process was the National Review into Model Occupational Health and Safety Laws First Report (the National Review First Report) and the National Review into Model Occupational Health and Safety Laws Second Report (the National Review Second Report).

Since its commencement, the WHS Act has been the subject of the Best Practice Review of Workplace Health and Safety Queensland (the Best Practice Review) in 2017.

In 2018, state and territory ministers responsible for work health and safety (WHS) asked Safe Work Australia (SWA) to review the content and operation of the model WHS laws. SWA appointed independent reviewer, Ms Marie Boland, to conduct a review of the model WHS laws, resulting in the Review of the model Work Health and Safety laws – Final report (the Boland Review).

It is in this context that we were asked to conduct a review of the WHS Act. Consistent with the Terms of Reference (ToR), the Review focused on the legislative provisions that relate to the representation and participation of workers in WHS matters and the procedures for the identification and resolution of safety disputes. We examined whether the provisions of the WHS Act were operating effectively and contributing to achieving the WHS Act's primary objective of keeping workers and others safe.

The evidence we considered reveals that where workers are empowered to have an active role in safety matters and where there are high levels of cooperation between persons conducting a business or undertaking (PCBU), workers, and others, safety outcomes improve.[1] Research also shows that healthy and safe workplaces are more productive and make business more sustainable, confirming there is a business case for PCBUs to improve safety.[2] Accordingly, the recommendations made in this review fall into the following three broad categories:

1. elevation of the role of health and safety representative (HSR) at the workplace
2. clarification of the rights of HSRs and worker representatives to permit them to effectively perform the role and functions conferred upon them and to remove unnecessary disputation, and
3. clarification and streamlining of the issues and dispute resolution procedures in the WHS Act.

The following is a summary of the recommendations made in this Review.

---

[1] Nichols, T., Walters, D., & Tasiran, A.C. (2007) Trade unions, institutional mediation and industrial safety: Evidence from the UK. Journal of Industrial Relations., 49(2), 211-225; Trucco, P., Onofrio, R., & Cagliano, R. (Eds.) (2020) AHFE 2020, AISC 1204, pp. 18-25.

[2] Gahan, P., Sievewright, B. & Evans, P. (2014) Workplace Health and Safety, Business Productivity and Sustainability. Centre for Workplace Leadership, University of Melbourne. https://www.safeworkaustralia.gov.au/system/files/documents/1702/workplace-health-safety-business-productivity-sustainability.docx

Given the centrally important role that HSRs perform in achieving the objects of the WHS Act, we consider that steps should be taken to encourage more workers to ask for the formation of work groups and stand for election as an HSR. Accordingly, recommendations have been made which propose amendments to the WHS Act to require PCBUs to explain the role of an HSR to their workers and encourage the establishment of work groups. Other recommendations have also been made to clarify the process for the negotiation of work groups when those negotiations have failed to reach an outcome and applicable dispute resolution procedures.

It is also recommended that various amendments be made to the WHS Act to clarify the role, functions and powers of HSRs.

We concluded that it is of the utmost importance that HSRs are fully informed of all the safety issues that are present at a workplace. To that end, it is recommended that the WHS Act be amended to better provide for HSRs to be integrated into the performance of functions by inspectors and WHS entry permit holders, and to be provided with copies of statutory notices and other relevant information given under the WHS Act.

We also concluded that registered unions have a longstanding interest in WHS matters and have demonstrated expertise in those matters. That expertise is of value to both workers and PCBUs.

Aside from the right to enter in accordance with Part 7 of the WHS Act, at present, registered unions are only involved in consultation, negotiation, and dispute resolution if a worker requests that the PCBU work with the registered organisation as their representative. The reviewers consider that this is suboptimal. There are a variety of reasons why workers would not feel comfortable being the person responsible for requesting that the PCBU negotiate with their union. That then leads to both the workers and the PCBU being denied the benefit of the experience and expertise of the relevant registered organisation. It also gives rise to the prospect of disputation about whether the registered organisation is a representative. Accordingly, recommendations have been made that the WHS Act be amended in various places to recognise the institutional role that registered unions play in respect of the regulation of work for which they have registered coverage.

Various other recommendations have been made clarifying the extent of the rights and entitlement of WHS entry permit holders and removing bureaucratic requirements which lead to disputation. These recommendations are not designed to increase the rights or powers of WHS entry permit holders, but simply reflect the current reality of how those rights are being exercised and to remove the capacity for unnecessary conflict and disputation.

Further, notwithstanding the aims of the model WHS laws that the rights and obligations imposed under the WHS Act would only be capable of being litigated by the regulator[3], it has been well established that, in the case of WHS entry permit holders who are officials of federally registered unions and employers who are regulated by the

[3] The term 'regulator' used in this report means Work Health and Safety Queensland. This office enforces WHS laws, investigates workplace fatalities and serious injuries, prosecutes breaches of legislation, and educates employees and employers on their legal obligations.

Fair Work Act 2009 (Cth) (FW Act), disputes about WHS can be the subject of proceedings in the federal jurisdiction. However, the WHS Act does not permit parties to enforce WHS Act rights directly in a state court or tribunal. Such an outcome is undesirable. Accordingly, it is recommended that the WHS Act be amended to permit PCBUs and WHS entry permit holders a right to commence proceedings in the Queensland Industrial Relations Commission (QIRC) for contraventions of specific WHS civil penalty provisions (sections 126, and 144 to 147 of the WHS Act). This recommendation will not prevent parties from bringing proceedings in the federal jurisdiction. It will simply permit them to enforce rights arising under the WHS Act in a state tribunal.

Presently, there are many and varied pathways for the resolution of WHS disputes. A party to a dispute may ask the regulator to appoint an inspector to assist in resolving the dispute. An inspector may attend the site either in their capacity as a person appointed to resolve a dispute or simply as an inspector exercising their compliance powers. Within 24 hours of an inspector being appointed, if the dispute remains unresolved, one of the parties may seek relief in the QIRC. Further, decisions of the inspectorate[4] in the resolution of the dispute are the subject of the internal and external review regime contained in the WHS Act. This mixing of dispute resolution by both inspectors and the QIRC causes confusion as to who is responsible for resolving the dispute. That is undesirable. Accordingly, recommendations have been made to simplify the dispute resolution process.

A range of other issues were raised during the Review which are the subject of recommendations, including matters relating to the Work Health and Safety Board, industry sector standing committees, the Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee, the hierarchy of controls and other issues. These matters can be found at recommendations 21 to 31.

[4] The term 'inspectorate' used in this report means the enforcement and compliance function carried out by the regulator.

Recommendations

While each of the recommendations will be discussed in detail in the report, it is helpful to set out some of the principles which guided the recommendations.

The first of those principles is that the effective representation of workers in safety matters produces demonstrable improvements in health and safety outcomes. The evidence based academic literature and research reveals that:

- safety performance is improved when there is worker representation in WHS[5]
- some HSRs did not have training within the previous two years and many of them did not have enough time to perform their HSR role[6]
- many HSRs did not have sufficient training and are not automatically consulted by PCBUs and inspectors during workplace visits[7]
- a strengthening of the regulatory framework for worker representation is needed[8]
- worker representation by HSRs and Health and Safety Committees (HSCs) tends to be more effective than direction participation of individuals[9]
- in some cases, the power of worker representation is appropriated by a unitary approach of WHS management,[10] and
- effective worker representation and participation needs to be supported by:
    - inspectorate support of the worker representation provisions
    - management commitment to better health and safety performance and to participative arrangements, coupled with the centrality of the provision for preventive WHS in strategies for ensuring the quality and efficiency of production
    - worker organisation at the workplace that prioritises WHS and integrates it in other aspects of representation on industrial relations, and
    - support for workers' representation from trade unions outside workplaces, especially in the provision of information and training.[11]

---

[5] Graham, C.A.E & Waters, D. (2021) Representation of seafarers' occupational safety and health: Limits of the maritime labour convention. The Economic and Labour Relations Review, 32(2), 266 – 282.
[6] Australian Council of Trade Union (2005) A Report on the 2004 National Survey of Health and Safety Representatives, Australian Council of Trade Unions, Melbourne, November.
[7] Johnstone, R. (2009) The Australian framework for worker participation in occupation health and safety. In D. Walters & T. Nichols (Eds.) Workplace Health and Safety: International Perspectives on Worker Representation (pp. 31-49). UK: Palgrave Macmillan.
[8] Nichols, T., Walters, D., & Tasiran, A.C. (2007) Trade unions, institutional mediation and industrial safety: Evidence from the UK. Journal of Industrial Relations., 49(2), 211-225.
[9] Graham, C.A.E & Waters, D. (2021) Representation of seafarers' occupational safety and health: Limits of the maritime labour convention. The Economic and Labour Relations Review, 32(2), 266 – 282.
[10] Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.
[11] Walters, D., Nichols, T., Connor, J., Tasiran, A.C. & Cam, S. (2005) The Role and Effectiveness of Safety Representatives in Influencing Workplace Health and Safety. Health & Safety Executive Research Report 363. https://www.hse.gov.uk/research/rrhtm/rr363.htm; Walters, D. (2006) One step forward, two steps back: Worker representation and health and safety in the United Kingdom. International Journal of

That the HSR role was intended to be the vehicle for the representation and participation of workers can be seen both from the text of the WHS Act and the historical background to the model WHS laws. However, for the HSR role to achieve this aim, it is necessary for it to be taken up broadly throughout workplaces. The HSR role must also have clear powers and be properly integrated into the identification and resolution of safety issues at a workplace. If the HSR is unaware of safety issues, they cannot provide an effective mechanism for the representation of the workers affected.

Accordingly, many of the recommendations made seek to:

- improve the take up of the HSR role throughout workplaces, and
- ensure that HSRs are better integrated into identification and resolution of safety issues at a workplace.

Another guiding principle for the review was that the involvement of registered unions improves safety outcomes and is an established way for the participation and representation of workers in WHS matters. As Justice Logan observed in *ABCC v CFMMEU (Inner City South State Secondary College)* [2020] FCA 1147 at [6] and [7]:

> *[6] The origins of Australian trade unionism are to be found in the rise and development of trade unions in the United Kingdom. When one has regard to those origins, there is, in my view, a very good case to be made that accident prevention was a concern of trade unions long before it became generally a concern of employers.*
>
> *[7] A very salutary account of the origins of that concern in the United Kingdom is to be found in a paper, Litwin A, "Trade Unions and Industrial Injury in Great Britain" (Future of Trade Unions in Modern Britain program delivered at the London School of Economics and Political Science, London, August 2000). In the introduction to his paper, Mr Litwin observes, by reference to in 1897 by Sidney and Beatrice Webb, founders of the London School of Economics and Political and later Lord and Lady Passfield, the following:*
>
> *... the United Society of Boilermakers has insisted, in its elaborate agreement with the Ship Repairers' Federation of the United Kingdom, upon the following clause: "The employers undertake that, before men are put to work on [repairing the great tank ships for carrying petroleum in bulk, in which dangerous vapour accumulates], an expert's certificate shall be obtained daily to the effect that the tanks are absolutely safe. Such certificate to be posted in some conspicuous place." Innumerable other regulations aim at the removal of the conditions injurious to the workers' health. Thus, the various trade unions of "ovenmen" (potters) have for a whole generation protested against being forced to empty the ovens before these have been allowed to grow cool, on the express ground that this unnecessary exposure to a temperature between 170 and 210 degrees Fahrenheit is seriously*

Health Services, 36(1), 87-111; Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.

detrimental to health. Several strikes have taken place solely on this point, and the Staffordshire Ovenmen's Union now has a by-law authorising the support of any member who is dismissed for refusing to work in a temperature higher than 120 degrees. (Webb and Webb, 1897: 358)

Thus, the birth of an historical expectation that trade unions embrace workplace health and safety as a fundamental responsibility. Sidney and Beatrice Webb (1897) provided one of the earliest descriptions of the means by which trade unions reduce the number of accidents in the workplace, including lobbying for safety legislation and making workplace hazards more costly to employers by raising the tacit risk premia embedded in wages, i.e. compensating wage differentials. ***Unions also take direct action on the shop floor to make the workplace safer.***

[emphasis in original]

Registered unions, with well-established eligibility rules, have a recognised interest in regulating the performance of the way in which work is performed within their area of coverage. It has long been recognised that registered unions' interests extend to the conditions of both members and non-members in the callings which they are responsible.

It also goes without saying that many workers who are members of registered unions are reticent to tell their employer that they are a member of a registered union, or that they have sought the registered union's intervention in the workplace.

Given the strong evidence that registered unions are the most vital source of support for HSRs[12] and that safety outcomes are closely tied to union involvement,[13] many of the

[12] Fan, D., Zhu, C. J., Timming, A. R., Su, Y., Huang, X., & Lu, Y. (2020). Using the past to map out the future of occupational health and safety research: where do we go from here?. The International Journal of Human Resource Management, 31(1), 90-127. See also Walters, D., Quinlan, M., Johnstone, R., & Wadsworth, E. (2016). Cooperation or resistance? Representing workers' health and safety in a hazardous industry. Industrial Relations Journal, 47(4), 379-395; Walters, D., Johnstone, R., Quinlan, M., & Wadsworth, E. (2016). Safeguarding workers: A study of health and safety representatives in the Queensland coalmining industry, 1990-2013. Relations Industrielles/Industrial Relations, 71(3), 418-441.Walters, D., & Wadsworth, E. (2020). Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.

[13] Morantz, A. D. (2013). Coal mine safety: Do unions make a difference?. ILR Review, 66(1), 88-116; Shaw, N. and Turner, R. 2003, The worker safety advisers (WSA) pilot, Health and Safety Executive Research Report RR 144 prepared by York Consulting with Fife College of Further and Higher Education, HSE Books, Sudbury, 2003. Online at http://www.hse.gov.uk.; Walters D. R., Nichols, T., Connor, J., Tasiran, A.C., and Cam, S. (2005), The role and effectiveness of safety representatives in influencing workplace health and safety,' HSE Research Report 363; Zanko, M., & Dawson, P. (2012). Occupational health and safety management in organizations: A review. International Journal of Management Reviews, 14(3), 328-344; Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90; Walters. D. R and Nichols, T. (2007) Worker Representation and Workplace Health and Safety, Palgrave Macmillan, Basingstoke; Walters, D., Quinlan, M., Johnstone, R., & Wadsworth, E. (2016). Cooperation or resistance? Representing workers' health and safety in a hazardous industry. Industrial Relations Journal, 47(4), 379-395; Walters, D., Johnstone, R., Quinlan, M., & Wadsworth, E. (2016).

recommendations recognise that the relevant union, being the union with constitutional coverage of the work being performed, should be involved in the discussions about those issues as a party principal and not just as a mere representative.

Another principle which guided the review was a recognition that industrial relations and matters concerning safety can sometimes be contentious. Unfortunately, legislation cannot imbue parties with the spirit of cooperation and good faith. Those matters are generally developed through hard work. However, the legislation can remove the capacity for parties to argue over technicalities and bureaucratic requirements which do not materially improve safety.

Accordingly, many of the recommendations have either sought to clarify existing powers, remove the capacity for disputation, or remove unnecessary administrative requirements which do not assist in the resolution of substantial issues but give rise to unnecessary disputation between PCBUs, workers and registered unions.

The following recommendations are addressed at the substance of the issues identified in the Review. While some of those suggestions are expressed in proposed amendments to the legislation, those suggestions should not be understood as the actual terms for any amendments.

The full text of each recommendation is set out below.

Recommendation 1

A. That the Minister consider amending Part 5 of the WHS Act to impose an obligation on PCBUs to, at least annually, advise workers in the business or undertaking:
    (a) about Part 5 of the WHS Act, in particular the capacity for workers to request the establishment of a work group, the election of an HSR, and the role, functions and powers of an HSR
    (b) that the PCBU invites a request for the establishment of a work group or work groups and the election of HSRs and deputy HSRs.

B. That the Minister consider the manner and form of the advice by the PCBU to its workers should depend on the size of the business or undertaking. For PCBUs with less than 10 workers, the obligation could be discharged by the provision of a written form or other suitable means of prescribed information.

C. That the Minister consider any necessary action, including amending the WHS Act, that should be taken to prevent PCBUs from discouraging or hindering worker(s) from:
    (a) requesting the establishment of a work group, and/or
    (b) nominating for election as an HSR or deputy HSR.

Safeguarding workers: A study of health and safety representatives in the Queensland coalmining industry, 1990-2013. Relations Industrielles/Industrial Relations, 71(3), 418-441.Walters, D., & Wadsworth, E. (2020). Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.

Recommendation 2

A. That the Minister consider amending Part 5 of the WHS Act to provide that:
   (a) negotiations for a work group be completed within 14 days of the request to establish a work group. This period may be extended by mutual agreement between the parties to the negotiations.
   (b) a party to failed negotiations may request the regulator to appoint an inspector to resolve the dispute.
   (c) Any inspector appointed to resolve the dispute must first attempt to assist the parties to resolve the dispute on their own and if such resolution is not possible, make a decision as to the constitution of the work groups within seven days. This decision would be excluded from the internal and external review process.
   (d) The parties to the negotiations have the capacity to refer a dispute about the inspector's decision to the QIRC for conciliation and/or arbitration, but that subject to any order of the QIRC, the decision of the inspector will stand and be implemented until the matter is heard and determined by the QIRC. Specific legislative provisions will need to be added granting the QIRC power to deal with such matters. These provisions should be based on the usual powers provided to the QIRC to resolve disputes.

B. That the Minister consider amending section 16(b) of the WHS Regulation so the phrase 'readily accessible' expressly incorporates reference to the geographical locations in which work is performed, the work stream or work type, and shift arrangements.

C. That the Minister consider amending section 52(1) of the WHS Act to:
   (a) add a relevant union as a party principal to the negotiations. The phrase 'relevant union' should be defined to mean a union who is entitled to represent the industrial interests of the workers who are a party to the negotiation, and
   (b) provide that the parties are to agree on the details of when and where the negotiations will occur.

Recommendation 3

A. That the Minister consider amending the WHS Act to impose an obligation on PCBUs, so far as is reasonably practicable, to inform an HSR, and where the HSR is present on site make them available, when an inspector or WHS entry permit holder is on site and the visit is relevant to their work group.

B. That the Minister consider amending the WHS Act to impose an obligation on PCBUs to provide HSRs with copies of any:
   (a) statutory notices issued by an inspector
   (b) entry notices issued by WHS entry permit holders, or
   (c) mandatory incident notifications made to the regulator by the PCBU.

C. That the Minister consider amending section 68 of the WHS Act to make clear that:
   (a) HSRs have the capacity to request the provision of information from a PCBU about a safety issue, and
   (b) the PCBU is obliged to comply with such a request.

D. That the Minister consider amending section 68 of the WHS Act to clarify that HSRs are permitted to take photographs, make videos, and take measurements and/or samples in the performance of their role.

E. That the Minster consider introducing a regulation which provides that the resources, facilities, and assistance to be provided to an HSR by a PCBU are consistent with the relevant SWA Guidance.

Recommendation 4

A. That the Minister consider, consistent with recommendation 10 of the Boland Review, HSRs be permitted to choose their training provider.

B. That the Minster consider amending section 21(2) of the WHS Regulation so the requirement for an HSR to complete their initial training in three months be shortened to 28 days, save for any circumstances where training is not available in the 28 day period, or where there is some pressing necessity at the business or undertaking which renders it impractical for the HSR to attend the training in that period.

C. That the Minister consider amending section 21(1) of the WHS Regulation to reduce the requirement that HSRs conduct refresher training every three years to every 12 months.

D. That the Minister consider amending section 72(4) of the WHS Act to reflect that during a period of training, HSRs are entitled to receive payment of the usual remuneration they would have received if they had been at work instead of at training.

Recommendation 5

That the Minister consider amending section 85 of the WHS Act to provide that:

(a) any direction to cease work by an HSR be issued to the PCBU, and
(b) the PCBU has an obligation to cease work that is the subject of the direction until such time as the issue is resolved or the direction is set aside in accordance with the dispute resolution process.

Section 85 of the WHS Act should still maintain the capacity for an HSR to issue a directive to a worker in circumstances where there is an immediate exposure to risk.

Recommendation 6

A. That the Minister consider amending the WHS Act to reduce the time for compliance with a PIN from eight days to four days, except in circumstances where all parties agree to extend the timeframe.

B. That the Minister consider reducing the period for when a person can ask the regulator to review a PIN to three days to align with the proposed timeframe in recommendation 6A.

Recommendation 7

A. That the Minister consider amending the definition of 'discriminatory conduct' in section 105 of the WHS Act to reflect the definition of 'adverse action' in the IR Act.

B. That the Minister consider amending section 112 of the WHS Act to enable proceedings to be conducted in the QIRC and clarify that a relevant union has standing to commence the proceeding. Relevant union should be defined to mean a union who is entitled to represent the industrial interests of the worker/s affected by the contravention.

Recommendation 8

That the Minister consider amending section 47 of the WHS Act to require:

(a) PCBUs to consult with a representative[14] of a worker, where requested by the worker, and

(b) provide that, where a representative is requested by a worker, the parties agree on the details of when and where the consultation will occur.

Recommendation 9

A. That the Minister consider amending section 75 of the WHS Act to provide that an HSC be established as soon as practicable but no later than 28 days after a request is made.

B. That the Minister consider whether section 75 of the WHS Act should permit the making of regulations which identify a definition of high risk work and provide that in the case of such high risk work, an HSC must be established before the commencement of the high risk work.

[14] Note, amendments to the definition of representative are proposed in recommendation 19B.

Recommendation 10

That the Minister consider amending Part 5, Division 4 of the WHS Act to provide that in the event there is a dispute about the formation or composition of an HSC:

(a) A party is entitled, at any time during the 28 day period proposed in recommendation 9A, to request that the regulator appoint an inspector to resolve the dispute.
(b) Within seven days of being appointed, the inspector must first attempt to assist the parties to resolve the dispute on their own and if such resolution is not possible, make a determination about the formation or composition of the HSC. This decision would be excluded from the internal and external review process.
(c) The parties to the dispute may notify the QIRC about a dispute over that determination. However, pending any order of the QIRC, the determination of the inspector will remain in force until the matter is heard and determined by the QIRC. Specific legislative provisions will need to be added granting the QIRC power to deal with such matters.

Recommendation 11

That the Minister consider amending section 118 of the WHS Act to:

(a) provide that WHS entry permit holders are permitted to remain at the premises for so long as is necessary to complete the exercise of their statutory powers, subject to the limitation imposed by section 126 of the WHS Act
(b) confirm that a WHS entry permit holder is entitled to gain access to employee records that relate to the suspected contravention without needing to wait the 24 hours provided for in section 120 of the WHS Act. This would also require changes to allow WHS permit holders to consult with workers about the resolution and finalisation of any suspected contraventions without the need to give 24 hours' notice as required by section 122 of the WHS Act, and
(c) provide that WHS entry permit holders may take photographs, take videos, or make measurements and/or samples while at the premises.

Recommendation 12

That the Minister consider amending section 148(a) of the WHS Act to make clear that the risk of injury or danger to public safety referred to is not related to the suspected contravention, but a risk of injury or danger to public safety at large.

Recommendation 13

That the Minister consider amending section 119 of the WHS Act to clarify that the provision of the notice is not a pre-condition to entry and that any defects or invalidity in the notice issued does not affect the validity of an entry pursuant to section 117 of the WHS Act.

Recommendation 14

That the Minister consider amending section 128 of the WHS Act to clarify that a PCBU cannot require a WHS entry permit holder to comply with an occupational health and safety requirement at the site if compliance with that requirement would unreasonably hinder or delay the exercise of the statutory rights conferred by sections 117 and 118 of the WHS Act or would otherwise defeat the exercise of those rights.

Recommendation 15

That the Minister consider requesting OIR to explore all mechanisms available to ensure the anonymity of the worker and prevention of any adverse action including any necessary amendments to clarify section 130 of the WHS Act.

Recommendation 16

A. That the Minister consider amending the WHS Act to give registered unions, WHS entry permit holders, and persons affected standing to commence civil penalty proceedings for contraventions of sections 126 and 144 to 147 of the WHS Act. Further, in consultation with OIR, consideration be given to whether it is desirable for the persons identified to be given standing to commence civil penalty proceedings for the balance of civil penalty offences contained in Part 7 of the WHS Act.

B. That the Minister consider amending the WHS Act to transfer civil penalty proceedings for a contravention of a WHS civil penalty provision to the QIRC.

Recommendation 17

That the Minister consider amending the WHS Act to provide that, in the case of an application for external review, the costs of the hearing follow the event and that no other order for costs may be made.

Recommendation 18

That the Minister consider amending section 80(1) of the WHS Act to:

A. include a relevant union as a party principal to the dispute. Relevant union should be defined as:
   (a) a union who is entitled to represent the industrial interests of the workers who are affected by the dispute, and
   (b) which has sought to be involved in the resolution of the issue.

B. clarify that where a worker(s) is in a work group where an HSR has not yet been elected, the worker(s) may appoint a representative.

Recommendation 19

A. That the Minister consider amending the definition of a 'union' in Schedule 5 of the WHS Act to delete sub-paragraph (c) which includes "an association of

employees or independent contractors, or both, that is registered or recognised as an association".

B. That the Minister consider amending the definition of 'representative' in Schedule 5 of the WHS Act to exclude an employee or officer of, or acting for, an entity (other than a union as defined in Schedule 5) that purports to represent the industrial interests of employees or employers.

C. That the Minister consider clarifying, to the extent possible, any other circumstances in the WHS Act where ambiguity may persist in relation to the use of terms such as 'union', 'representative', 'person assisting' and the like.

Recommendation 20

A. That the Minister consider amending section 102B(1) of the WHS Act to delete the requirement that the parties first seek to have an inspector appointed to resolve a WHS dispute before notifying a dispute to the QIRC.

B. That the Minister consider requesting the inspectorate to undertake a comprehensive internal review of procedures and conduct an education program to ensure that inspectors are aware that when they are appointed to assist in resolving a dispute, they still retain their compliance powers and that they should exercise those powers if they consider that the circumstances warrant the exercise of a compliance power.

Recommendation 21

That the Minister consider elevating the hierarchy of controls from Part 3.1 of the WHS Regulation to the WHS Act.

Recommendation 22

A. That the Minister consider amending the definition of 'serious injury' to refer to where an employee has been absent from work for four consecutive days, or a more beneficial definition if one is identified through the considerations of incident notification that are occurring nationally in response to the Boland Review.

B. That the Minister consider amending the WHS Act to introduce a new obligation for a PCBU to notify an incident which did not result in a serious injury or illness but had the capacity to do so.

C. That the Minister consider requesting OIR to confer with DJAG as to whether non-compliance with the notifiable incident reporting requirements should be an infringeable offence.

Recommendation 23

That the Minister consider requesting OIR to assess what administrative arrangements may be necessary to ensure that the inspectorate is bringing cases where a PCBU has multiple statutory notices issued to them to the attention of the WHSP. The purpose of this would be to ascertain whether the history of non-compliance reveals a systemic failure to comply with the duties imposed by the WHS Act and whether a prosecution is appropriate.

Recommendation 24

That the Minister consider ensuring effective enforcement action can be taken against an accredited assessor for providing false and misleading information in the context of conducting assessments.

Recommendation 25

That the Minister consider amending the WHS Act to remove the automatic expiry of codes of practice after five years and instead provide for a review of codes of practice at least every five years with the level of review to be determined by OIR.

Recommendation 26

A. That the Minister consider amending the definition of 'high risk plant' in Schedule 1, Part 1 of the WHS Act to reflect Schedule 1, section 6 of the model WHS Act, that high risk plant means plant prescribed as high risk plant.

B. That the Minister consider requesting OIR to assess the definition of plant items included in 'high risk plant' to ensure it is current and achieving intended public health and safety benefits.

C. That the Minister consider whether inspectors should have the ability to issue prohibition notices for plant items that present a risk of catastrophic failure if inspection, maintenance and testing requirements are not evidenced (e.g., amusement devices, cranes and concrete pumping plant).

Recommendation 27

That the Minister consider conducting an annual review for a period of three years, following the introduction of any requirement to report near misses. The purpose of such a review will be to establish the extent of incidents involving mobile plant and whether licensing for mobile plant should be reintroduced.

Recommendation 28

A. That the Minister consider clarifying the role of the WHS Board and the interaction between the WHS Board and OIR to ensure a singular focus on improving WHS outcomes.

B. That the Minister consider reviewing the current ISSCs to ensure appropriate coverage of relevant industries, and that specific consideration given to the size and complexity of the ISSCs. The Minister could consider subsequent legislative or administrative changes.

Recommendation 29

That the Minister consider amending Schedule 2, section 23B of the WHS Act so that the Affected Persons Committee is renamed the Consultative Committee for Work-related Fatalities and Serious Incidents.

Recommendation 30

That the Minister consider elevating existing requirements for toilets in the code of practice into the WHS Regulation and harmonising the language used in the new provisions. Consideration should also be given to, consistent with the *Guidelines for the prescription of penalty infringement notice offences* under the *State Penalties Enforcement Regulation 2014*, prescribing non-compliance with toilet requirements (including the requirements specific to construction workplaces in Schedule 5A of the WHS Regulation) as a penalty infringement notice offence.

Recommendation 31

That the Minister consider establishing a review to examine the scope and application of the industrial manslaughter provisions to determine if amendments are warranted.

Chapter 1: Review background

1.1 Establishment of the Review of the *Work Health and Safety Act 2011*

On 18 August 2022, the Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations, and Minister for Racing, announced a five-year review of the WHS Act (the Review).

The impetus for the Review was to ensure Queensland WHS laws remain robust, effective, and enforceable. In announcing the Review, the Minister reiterated the importance of every worker in Queensland having the right to be safe in the workplace, and to return home safe and healthy to their families and loved ones at the end of the day.

The Review was to focus on the operation of the WHS Act and include consultation with employers, registered unions, the legal profession, academics, and other interested stakeholders.

We were appointed to conduct the Review with the support of two leading academics in WHS regulation, Dr Rebecca Loudoun, Associate Professor at Griffith University and Dr Carol Hon, Senior Lecturer and Research Fellow at the Queensland University of Technology.

The Review builds on the Best Practice Review and the Boland Review. Further information about these reviews is provided in chapter 2.

1.2 Scope of Review

The Review considered the overall effectiveness of key components of the WHS Act in achieving its objects, including:

1. Considering and reporting on any need for amendments to ensure:
    (a) provisions relating to HSRs are effective and operating as intended
    (b) workers are appropriately represented and assisted in the workplace for the purpose of health and safety matters
    (c) the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act, and
    (d) provisions relating to the issue and dispute resolution are effective and operating as intended.
2. Any other matters relating to the WHS Act's overall effectiveness and performance in ensuring a balanced framework to secure health and safety of workers and workplaces and consider whether any legislative or administrative amendments are required.

The Review's ToR are provided at **Appendix A**.

1.3 Review process

The Review commenced on 25 August 2022. A four-week public consultation period was held from 31 August 2022 to 23 September 2022, during which interested stakeholders were invited to provide written submissions on:

- whether the provisions relating to HSRs are effective and operating as intended
- whether workers are appropriately represented and assisted in the workplace for the purposes of health and safety matters (including representation and assistance by WHS entry permit holders)
- the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act, and
- whether the provisions relating to issue and dispute resolution are effective and operating as intended.

Submissions were also requested on any other matters relating to the WHS Act's overall effectiveness and performance in ensuring a balanced framework to secure health and safety of workers and workplaces, and whether any legislative or administrative amendments are required.

A total of 51 written submissions were received. Stakeholders who provided submissions included employer and industry representatives, registered unions, legal representative associations, government departments, businesses and individuals. All submissions were treated as confidential. Where the content of a particular submission is referenced in this report, the authors have not been identified.

Suggestions and recommendations made within the written submissions were wide-ranging. While all issues raised were considered, some fell outside of the Review's scope and were therefore not pursued.

Matters that met the ToR were explored further through a series of targeted face-to-face consultation meetings with a cross-section of stakeholders, including both employer and worker representatives. Stakeholders were advised that consultations were conducted on a confidential basis and that the source of submissions, both written and oral, would remain confidential regardless of whether or not they were referenced in the report. The rationale for maintaining a confidential process was to encourage frank submissions from stakeholders and to promote open and forthright dialogue regarding respective WHS issues, without the limitations that may attach to a non-confidential consultation process.

Throughout the Review process we sought additional data, research and background information on key issues from the academic team and the Office of Industrial Relations (OIR).

We considered all information received to develop this report and make 31 recommendations. Commentary on each recommendation is included in body of the report.

Chapter 2: Work health and safety laws in Queensland

2.1 Queensland *Work Health and Safety Act 2011*

In 2011, SWA finalised the model WHS laws. Queensland adopted the model WHS laws through the WHS Act and *Work Health and Safety Regulation 2011* (Qld) (WHS Regulation).

The WHS Act provides a framework to protect the health, safety, and welfare of all workers at work and of all other people who might be affected by the work.

The WHS Act aims to:

- protect the health and safety of workers and other people by eliminating or minimising workplace risks
- ensure effective representation, consultation, and cooperation to address health and safety issues in the workplace
- encourage unions and employers to take a constructive role in improving health and safety practices
- promote information, education and training on health and safety
- provide effective compliance and enforcement measures, and
- deliver continuous improvement and progressively higher standards of health and safety.

Throughout the WHS Act, the meaning of 'health' includes psychological health as well as physical health.

Save for safety legislation which is specific to certain industries, all workers in Queensland are protected by the WHS Act. This includes workers, contractors, subcontractors, outworkers, apprentices and trainees, work experience students, volunteers and employers who perform work.

The WHS Act also provides protection for the public so that their health and safety is not placed at risk by work activities.

In addition to the WHS Regulation, the WHS Act is supported by various codes of practice. These codes provide enforceable standards and practical information on specific WHS issues and assist users to achieve legal standards set out in the WHS Act and WHS Regulation.

2.2 Other WHS reviews

Best Practice Review of Workplace Health and Safety Queensland

The WHS Act was last reviewed in 2017 as part of the Best Practice Review. The Best Practice Review considered Workplace Health and Safety Queensland's (WHSQ) effectiveness in light of contemporary regulatory practice and focused on the appropriateness and effectiveness of WHSQ's policies, procedures and activities that support its approach to ensuring that the provisions of the WHS Act are communicated, complied with, and enforced.

The Best Practice Review made 58 recommendations to strengthen WHS in Queensland. This included 16 recommendations for legislative amendments to the WHS Act. Key legislative recommendations, which have since been implemented, include:

- introducing an offence of industrial manslaughter
- establishing an independent statutory office for WHS prosecutions
- expanding the jurisdiction of the QIRC to include hearing and determining disputes relating to WHS
- restoring the status of codes of practice as existed under the repealed *Workplace Health and Safety Act 1995*
- mandating training for health and safety representatives
- reintroducing the Work Health and Safety Officer (WHSO) framework, and
- enhancing regulatory requirements for amusement device safety.

Five years on, it is considered timely to ensure Queensland's WHS laws remain robust and effective.

Review of the model Work Health and Safety laws – Final report

The Boland Review contained 34 recommendations and was provided to WHS ministers in December 2018. Following a regulatory impact assessment process, WHS ministers reached an agreed position on all recommendations in May 2021.

In June 2022, SWA announced the implementation of several amendments to the model WHS laws resulting from the Boland Review. The amendments do not automatically apply in Queensland and work is underway to implement the majority of these amendments in the WHS Act. It is a government commitment in Queensland to implement recommendations of the Boland Review.

We have noted throughout this report where issues relate to, or are the subject of, recommendations in the Boland Review.

Chapter 3: Health and safety representatives

Review ToR 1(a)

Consider and report on any need for amendments to ensure provisions relating to HSRs are effective and operating as intended.

This chapter examines the effectiveness of the HSR provisions in the WHS Act. This includes provisions regarding workers' rights to request the election of an HSR, the process for determining who an HSR represents, the powers and functions of HSRs, HSR training requirements, and discriminatory, coercive, and misleading conduct in relation to HSRs and other workers. Consideration of the effectiveness of these provisions has been undertaken in the context of ensuring the following objects of the WHS Act:

- to protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant
- to provide for fair and effective workplace representation, consultation, cooperation, and issue resolution in relation to WHS
- encouraging unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and assisting PCBUs and workers to achieve a healthier and safer working environment, and
- providing a framework for continuous improvement and progressively higher standards of WHS.[15]

Health and safety representative role and function

Part 5 of the WHS Act sets out the framework for the establishment and function of the role of HSRs. HSRs are workers elected to represent the health and safety interests of their work group and to raise health and safety issues with PCBUs.[16]

The WHS Act sets out specific powers and functions that an HSR can perform in the interests of the workers they represent[17] (a list of these powers and functions is provided in chapter 3.3 below). The powers and functions are intended to enable HSRs to effectively represent the interests of the members of their work group and to contribute to WHS matters.

Where HSRs have been elected, PCBUs must consult with them about WHS matters that will, or are likely to, directly affect workers in their work group.[18]

Key issues

In response to ToR (1)(a), the following topics emerged as key issues for consideration in the Review:

- Should HSRs be mandated instead of elected at the request of workers?

[15] WHS Act, section 3(1).
[16] WHS Act, section 68(1)(a).
[17] WHS Act, sections 68 and 69.
[18] WHS Act, section 48(2).

- Is the current process for determining work groups adequate, particularly having regard to whether the process is timely, clear and facilitates resolution of disputes?
- Are the powers and functions of HSRs clear and operating as intended?
- Are the current entitlements and timeframes to undertake HSR training adequate and fit for purpose?
- Is the ability for HSRs to direct unsafe work to cease effective and operating as intended?
- Is the framework for complying with provisional improvement notices operating as intended?
- Are the provisions relating to discriminatory, coercive, and misleading conduct operating effectively when considering the position of HSRs as well as others exercising a power or performing a function under the WHS Act?

This chapter considers these matters in turn.

3.1 Request for election of health and safety representatives

Current framework

Section 50 of the WHS Act enables workers to request the election of one or more HSRs to represent them in WHS matters. The ability to request the election of an HSR is voluntary and at the discretion of workers. If a worker makes this request, a work group (or groups) needs to be established to facilitate the election.[19]

Issues raised

Several submissions to the Review commented on the voluntary nature of the existing framework to request the election of an HSR. Views from stakeholders on this issue were polarised, including differing views across worker representative organisations, with some stakeholders submitting that the HSR role should be mandated under the WHS Act, while others supported retaining the existing worker-initiated regime.

Submissions in support of a mandatory HSR framework argued that:

- as things stand, if a worker at the workplace does not request the election of an HSR then there is no HSR for the workplace
- many workers are scared to nominate as an HSR, or be nominated as an HSR, for fear of reprisal
- if HSRs were more common, they would become an accepted 'part of the furniture' and be neither feared nor attacked by employers
- if HSRs were mandated, there would be no point in an employer targeting an HSR for dismissal, because they would have to be replaced by another HSR thereafter, and
- many studies prove that there is a positive relationship between objective indicators of WHS performance (such as injury rates or exposure to hazards) and workplaces that have implemented structures for worker participation, such as the presence of trade unions, joint health and safety committees, or union or worker HSRs.

[19] WHS Act, section 51(1).

Conversely, submissions supporting the existing worker-initiated framework argued that:

- mandating HSRs removes workers' self-determination and ownership to actively seek a role in health and safety matters
- for the HSR framework to be effective, workers need to be invested and driven to perform the HSR role rather than being forced to do it due to a mandate
- there is a prospect of manipulation of the role by delinquent PCBUs
- the existing voluntary process allows employers and workers to implement consultation processes that best suit the needs of the business, whereas any mandatory framework may result in workers being forced to undertake roles they are not interested in, which can lead to poor safety outcomes
- even in organisations where HSRs are long established, it is often difficult to secure volunteers for the role, and
- while the HSR framework can be impractical for small business, this is not having an adverse effect on WHS as it is not a requirement to appoint HSRs unless it is worker-initiated.

Alternative suggestions by stakeholders to enhance and encourage the election of HSRs included:

- amending the WHS Act to require and/or increase the PCBU role in the promotion of and education of HSRs in the workplace, and
- introducing a prohibition on coercion of workers around not making or withdrawing a request for the election of an HSR.

Findings

As referred to above in the Executive Summary, one of the principles underpinning this Review was that WHS outcomes are improved when worker participation and representation is improved. The National Review Second Report reveals that there was a consensus that HSRs were an effective mechanism for facilitating worker participation and representation. It is apparent from our consultation with stakeholders that the consensus which existed in 2008 has solidified.

While there is broad support for the HSR role, all the worker representative stakeholders who were consulted, safety experts, and some employer representatives, expressed significant concern that many workplaces did not have an HSR or functioning health and safety committee. Further, submissions from a variety of stakeholders contained examples of circumstances where PCBUs sought to either discourage the establishment of a work group and the election of an HSR or took active steps to prevent this from occurring.

Given the central role HSRs perform in the statutory regime, it is imperative that the take up of the HSR role is improved. To that end, some union stakeholders sought that the role of HSR be mandated at each workplace. This was not sought by some unions and was actively opposed by others. The idea was also opposed by employer organisations and small business representatives.

The introduction of mandatory HSRs has been a long-standing issue. The National Review Second Report set out the divergence in views as to whether HSRs should be mandated, and the perceived concerns associated with the mandating of HSRs. The concerns included forced volunteers, a lack of worker empowerment or self-determination and the potential for manipulation by delinquent PCBUs. These concerns are real. Equally so, the absence of representation which occurs in circumstances where no work group is formed and no HSR is elected is a serious problem which has a deleterious effect on safety outcomes.

The low take-up of HSRs at many workplaces is a serious concern. However, absent a consensus (particularly among worker representatives) that mandating HSRs would be a desirable option, we have not recommended that the HSR role be mandated. Instead, we propose an interim measure which will require PCBUs to regularly advise their workers about the nature of the HSR role, its duties and powers and how that differs from other non-statutory safety roles, and the process for the establishment of a work group and the election of an HSR. The PCBU will also be required to then invite requests for the determination of a work group and the commencement of the process.

This recommendation is in line with the extant research,[20] which indicates the model of workplace representation provided for by the statutory measures to improved health and safety outcomes is subject to the presence of several preconditions before beneficial effects are likely to occur. As well as a strong legislative steer that provides rights and functions for safety representatives, other preconditions include:

- demonstrable senior management commitment to both WHS and a participative approach
- sufficient capacity to adopt and support participative WHS management and implement competent hazard/risk evaluation and control, and
- communication not only between worker representatives and managers but also between HSRs and their constituencies.

The recommendation for PCBUs to advise workers about the capacity for workers to request the establishment of a work group, the election of an HSR and the role, functions, and powers of an HSR provides an opportunity for management to demonstrate this commitment and for workers to develop this capacity.[21]

Along with other recommendations dealing with dispute resolution and prohibitions on discouraging persons from requesting the establishment of a work group or nominating for the HSR role, we believe this will encourage the take up of the HSR role.

We are mindful that implementing this recommendation will increase the burden on PCBUs. To that end, the recommendation embraces that PCBUs with fewer than 10 workers could comply with the obligation in a less onerous way.

[20] Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.
[21] Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.

We also consider that express prohibitions on a PCBU hindering or discouraging the request for the establishment of a work group or nomination for the position of HSR should be added to the WHS Act.

Recommendation 1

A. That the Minister consider amending Part 5 of the WHS Act to impose an obligation on PCBUs to, at least annually, advise workers in the business or undertaking:
   (a) about Part 5 of the WHS Act, in particular the capacity for workers to request the establishment of a work group, the election of an HSR, and the role, functions and powers of an HSR
   (b) that the PCBU invites a request for the establishment of a work group or work groups and the election of HSRs and deputy HSRs.

B. That the Minister consider the manner and form of the advice by the PCBU to its workers should depend on the size of the business or undertaking. For PCBUs with less than 10 workers, the obligation could be discharged by the provision of a written form or other suitable means of prescribed information.

C. That the Minister consider any necessary action, including amending the WHS Act, that should be taken to prevent PCBUs from discouraging or hindering worker(s) from:
   (a) requesting the establishment of a work group, and/or
   (b) nominating for election as an HSR or deputy HSR.

3.2 Determination of work groups

Current framework

If a request is made for the election of an HSR, a PCBU must facilitate the determination of one or more work groups for the HSR to represent.[22]

Work groups are determined by negotiation between a PCBU and the workers who will form the work group, or their representatives.[23] PCBUs must, if asked by a worker, negotiate with the worker's representative, and must not exclude the representative from the negotiations.[24] The current definition of 'representative',[25] in relation to a worker, includes the worker's HSR, a union representing the worker, or any other person the worker authorises to represent them.[26]

PCBUs must take all reasonable steps to start negotiations with workers within 14 days after a request is made to form a work group.[27] Negotiations must determine the

[22] WHS Act, section 51.
[23] WHS Act, section 52(1).
[24] WHS Act, section 52(5).
[25] Note, amendments to the definition of representative are proposed in recommendation 19B.
[26] WHS Act, Schedule 5.
[27] WHS Act, section 52(2).

number and composition of work group(s), the number of HSRs and deputy HSRs, the workplace(s) to which the work group(s) apply, and the business or undertakings to which the work group(s) apply.[28]

Negotiations to determine work groups must ensure workers are grouped in a way that most effectively and conveniently enables the WHS interests of workers to be represented and have regard to the need for HSRs to be readily accessible to each worker in the work group.[29]

Matters that must be considered in work group negotiations include the number of workers, the views of workers, the nature of each type of work carried out by the workers, the number and grouping of workers who carry out the same or similar types of work, the areas or places where each type of work is carried out, the extent to which workers move from place to place while at work, the diversity of workers and their work, the nature of any hazards or risks, the nature of worker engagement, the workers pattern of work and times when work is carried out, and any arrangements at the workplace relating to overtime or shift work.[30]

If work group negotiations fail, any person who is a party to the negotiations may ask the regulator to appoint an inspector to decide the matters being negotiated (or assist the negotiations where the negotiations relate to multiple businesses). Negotiations are deemed to have failed if a PCBU has not taken all reasonable steps to commence negotiations within 14 days after a request to elect an HSR is made, or agreement cannot be reached within a reasonable time after the negotiations have commenced. A decision by an inspector in relation to work groups is taken to be an agreement and can be subject to internal and external review under Part 12 of the WHS Act.

Issues raised

The effectiveness of the existing framework for determining work groups and electing HSRs featured heavily in stakeholder submissions to the Review. Key issues raised included the need to clarify:

- the process and timeline for negotiating work groups, electing HSRs, and the appropriate avenues for resolving disputes about these processes
- the meaning of HSRs being 'readily accessible', and
- who can represent workers in the negotiation of work groups.

Process and timeline for negotiating work groups and resolving disputes

In relation to the process and timeline for the negotiation of work groups, key issues raised by stakeholders included that, although section 52(2) of the WHS Act provides for negotiations to commence within 14 days of the request, and section 54(3)(b) of the WHS Act provides for the parties to reach agreement after a reasonable time before negotiations are deemed to have failed, these provisions are vague and do not provide clear timeframes for resolution. Similarly, in relation to the election of an HSR, it was

[28] WHS Act, section 52(3).
[29] *Work Health and Safety Regulation 2011* (Qld) (WHS Regulation), section 16.
[30] WHS Regulation, section 17.

identified that section 19 of the WHS Regulation also uses vague language in stating that a PCBU must not 'unreasonably delay' the election of an HSR.

Stakeholders indicated that in practice, the lack of specific timeframes can lead to delay in establishing work groups and ultimately a lack of genuine consultation. The case of *Transport Worker' Union of NSW and Ors v SafeWork NSW and Anor* [2021] NSWIRComm 1018 was referred to as an egregious example of how the current provisions are drafted in a way that enables PCBUs to delay the processes of negotiating work groups and electing HSRs.

In response to these issues, several stakeholders recommended that more specific timeframes be put in place for the procedural provisions in Part 5 of the WHS Act. Suggestions for prescribed timeframes included completion of negotiations within 14 days, with an extension of this timeframe available by consent of the parties involved in the negotiations.

It was also suggested by several stakeholders that disputes regarding negotiation of work groups should be lodged directly with the QIRC rather than being determined by an inspector, as is the existing process.[31] Concerns were raised about inconsistency between decisions made by the inspectorate between individual inspectors, and between regions. Similar concerns were also raised about how inspector decisions can be stayed while an internal review of a decision is underway, further extending delays experienced in establishing work groups. To address these concerns, it was suggested the QIRC be provided with jurisdiction to determine disputes about work groups, where they have been unable to be resolved at the workplace level directly between the PCBU, workers and their relevant union.

Meaning of HSRs being 'readily accessible'

In relation to work group disputes, it was noted by several stakeholders that one of the most frequently disputed matters when determining work groups is the number of work groups and HSRs. Stakeholders expressed concern that, in practice, the WHS Regulation remains ambiguous about the meaning of 'readily accessible' and workplaces can apply a broad interpretation that leads to unintended consequences. It was noted that many PCBUs often look at the costs of a system of HSRs and seek to minimise the number of HSRs by delaying or obstructing the process with workers.

It was also noted that workers need convenient access to an HSR, once elected, so that they can express any concerns regarding their health and safety and so that they can quickly be consulted by the HSR about health and safety matters in the workplace.

To ensure that HSRs are accessible in practice, it was recommended by some stakeholders that the WHS Regulation be amended to provide a more prescriptive definition of 'readily accessible' or to provide legislative examples to clarify the meaning of an HSR being 'readily accessible' to each worker in the work group.

[31] WHS Act, section 54(1).

Who can represent workers in the negotiation of work groups

In relation to the negotiation of work groups, it was raised that further clarification is required about who can be party to the negotiations as a worker representative. It was noted that section 52 of the WHS Act provides that a PCBU must, if asked by a worker, negotiate with the worker's representative, and must not exclude that representative from the negotiations. However, stakeholders submitted that 'representative' is not clearly defined in the WHS Act, and this can lead to disputation between unions and allow pathways for non-registered associations and other organisations to represent workers in WHS matters. To address this issue, stakeholders recommended the WHS Act clarify that a 'representative' of a worker is a relevant union for section 52 of the WHS Act.

Findings

Process and timeline for negotiating work groups and resolving disputes

The Review received numerous submissions about inadequacies in the current procedures for the negotiation of work groups and dispute resolution about those matters.

A worker representative stakeholder provided an example where workers had requested the negotiation of a work group at a building site, the negotiations failed, and the workers requested the regulator to appoint an inspector to assist in resolving the dispute. The inspector interviewed the workers at the work site and formed a view that there should be three discrete work groups. The PCBU was unwilling to accept this. A notice was issued by the inspector requiring the establishment of three separate work groups. This notice was the subject of an application for internal review and was immediately stayed. The notice was subsequently set aside. After the notice was set aside, the inspector re-attended the workplace for the purposes of assisting in resolving the dispute. The inspector proceeded to re-interview all the workers and reach a new determination. After deciding that three work groups were appropriate, an additional notice was issued. This notice was the subject of an application for internal review. The decision was immediately stayed. The internal review affirmed the decision. The PCBU then sought external review of the decision and a stay of the decision. The application for external review has not yet been litigated to finality but the project has finished, and no work groups were established.

This example is alarming. The current provisions relating to the negotiation of work groups do not identify when the negotiations are taken to have failed. Further, the current dispute resolution mechanism does not provide for an expeditious resolution of disputes about the establishment of a work group. Given the central importance that the establishment of a work group and the important role HSRs play in ensuring that the workplace is safe, it is desirable that any dispute resolution process provide for an expeditious outcome.

Accordingly, recommendations have been made which provide for the negotiations to be deemed to have failed if an agreement has not been reached within 14 days of a request from the workers to establish a work group. The provision should also provide for the parties to mutually extend that period if necessary.

Once the negotiations have failed, a party to the negotiations may request the appointment of an inspector by the regulator. The inspector should be empowered to resolve the dispute within seven days. Despite some of the concerns raised by stakeholders, we believe that the inspector plays an important role in the dispute resolution process and that this first step is important to provide an avenue for onsite resolution of the dispute. We would encourage OIR to ensure adequate training is provided to the inspectorate to deal consistently with these disputes.

Any decision made by the inspector should not be subject to the internal review mechanism. However, the parties should have the capacity to challenge that decision in the QIRC. The amendments should identify that the QIRC has all the usual powers available to it when arbitrating a dispute about an industrial matter.

Subject to any interim order of the QIRC, the decision of the inspector would stand in the interim. This would ensure that the process of electing an HSR could proceed while the parties litigated their dispute. If ultimately either party was successful, then new elections could be undertaken if the composition of the work groups was changed. However, this process would ensure that there was an HSR appointed in the interim.

The major weakness in the present dispute resolution procedure is the absence of there being any status quo for the establishment of a work group during the period of disputation. It is difficult to see what prejudice would be caused to a PCBU by having to establish a work group in the form determined by an inspector. Against this, if the disputation about the establishment of work group leads to no decision being made and there being no work group established, then there is obvious prejudice to the workers who are denied the important representative that is an HSR.

Similarly, there is no prejudice to workers in such a scheme. While workers may dispute the decision of the inspector; absent such a decision the status quo would be no agreement and no work group being established. Therefore, while the workers may not agree with the work groups determined by the inspector, that decision will lead to the establishment of a work group and the election of an HSR pending the resolution of any dispute by the QIRC. That interim position, even if disputed, is better than no work group being established.

We acknowledge that the introduction of this dispute resolution scheme would not provide the right of internal review for an administrative decision of an inspector. While it is often desirable that administrative decision be subject to internal review, that must be balanced against the rights of workers to be safe at work. That is the primary object of the WHS Act. The desirability of an internal review step does not outweigh the need for such disputes to be resolved expeditiously.

Meaning of HSRs being 'readily accessible'

The Review also received substantial submissions from stakeholders about the inadequate determination of work groups at workplaces. Numerous examples were given about workplaces that were geographically distinct and had one HSR across all locations. Similarly, numerous examples were given of workplaces where there was one HSR across multiple divergent work types which had different interests, and which had different shift arrangements. The effect of this is that often there was no HSR at the

workplace or if there was an HSR present, the HSR had no experience or knowledge relevant to many of the workers in the work group.

As it currently stands, section 16 of the WHS Regulation requires that negotiations for work groups be directed at ensuring workers are grouped in a way that 'has regard to the need for an HSR to be readily accessible to each worker in the work group'. However, no context is given to that phrase. Similarly, section 17 of the WHS Regulation sets out a list of matters which must be considered during the negotiations.

It is apparent from the examples we have been given that there are many times where a work group has been selected where the HSR will not be readily accessible. To that end, we recommend that section 16 of the WHS Regulation be amended so that the phrase 'readily accessible' expressly incorporates reference to the geographical locations in which work is performed, the work stream or work type, and shift arrangements. While those are matters which are referenced to some degree in section 17 of the WHS Regulation, incorporating them into the definition of readily accessible will ensure that any negotiations must not just take those matters into account, but must produce an outcome which is readily accessible for each geographical location, work stream or work type, and shift arrangement.

Who can represent workers in the negotiation of work groups

As identified in the Executive Summary above, one of the guiding principles for the recommendations is that registered unions have an institutional interest in safety outcomes for the work they cover.

Research evidence clearly demonstrates the positive impact of trade union supported workforce participation and compliance with WHS standards and WHS management

practices.[32] It is also clear that unions are a principal source of support for HSRs[33] and can assist in creating a positive assessment by employers of the role of the inspectors.[34]

In Australia the introduction of measures for worker representation was one of the most important aspects of the 1970s reform of WHS regulation. As much as any other feature of the reforms of that time, it has been responsible for changing the landscape of thought and practice on managing health and safety at work. The introduction of provisions for worker representation was an important element of the strategy to achieve 'regulated self regulation'[35] of WHS, primarily in the form of rights and functions for safety representatives and arrangements for joint safety committees. As part of this system of regulation, which continues to form the cornerstone of our

---

[32] Gallagher, C. (2001) 'New directions: innovative management plus safe place' in Pearse, W., Gallagher, C. and Bluff, E. (eds) Occupational health and safety management systems, Proceedings of the first national conference, University of Western Sydney, July 2000, Crown Content, Melbourne, 65-82; Gallagher, C., Underhill, E. and M Rimmer, M. 2003, 'Occupational health and safety management systems in Australia: barriers to success' (2003) Policy and Practice in Health and Safety 1(2): 67-81; Hale, A. and Hovden, J. 1988, 'Management and culture: the third age of safety. A review of approaches to organisational aspects of safety, health and environment', in A Feyer and A Williamson (eds), Occupational injury. Risk prevention and intervention, Taylor and Francis, London, 1998: 129-166; Johnstone, R, Quinlan, M. and Walters, D.R, (2005) 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market', Journal of Industrial Relations, 47 (1): 93-116; Morantz, A. D. (2013). Coal mine safety: Do unions make a difference?. ILR Review, 66(1), 88-116; Shaw, N. and Turner, R. 2003, The worker safety advisers (WSA) pilot, Health and Safety Executive Research Report RR 144 prepared by York Consulting with Fife College of Further and Higher Education, HSE Books, Sudbury, 2003. Online at http://www.hse.gov.uk.; Walters D. R., Nichols, T., Connor, J., Tasiran, A.C., and Cam, S. (2005) , The role and effectiveness of safety representatives in influencing workplace health and safety,' HSE Research Report 363; Zanko, M., & Dawson, P. (2012). Occupational health and safety management in organizations: A review. International Journal of Management Reviews, 14(3), 328-344; Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.; Walters, D., Quinlan, M., Johnstone, R., & Wadsworth, E. (2016). Cooperation or resistance? Representing workers' health and safety in a hazardous industry. Industrial Relations Journal, 47(4), 379-395.; Walters, D., Johnstone, R., Quinlan, M., & Wadsworth, E. (2016). Safeguarding workers: A study of health and safety representatives in the Queensland coalmining industry, 1990-2013. Relations Industrielles/Industrial Relations, 71(3), 418-441.Walters, D., & Wadsworth, E. (2020). Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.; Walters. D. R and Nichols, T. (2007) Worker Representation and Workplace Health and Safety, Palgrave Macmillan, Basingstoke.

[33] Fan, D., Zhu, C. J., Timming, A. R., Su, Y., Huang, X., & Lu, Y. (2020). Using the past to map out the future of occupational health and safety research: where do we go from here?. The International Journal of Human Resource Management, 31(1), 90-127.; Walters, D., Quinlan, M., Johnstone, R., & Wadsworth, E. (2016). Cooperation or resistance? Representing workers' health and safety in a hazardous industry. Industrial Relations Journal, 47(4), 379-395.; Walters, D., Johnstone, R., Quinlan, M., & Wadsworth, E. (2016). Safeguarding workers: A study of health and safety representatives in the Queensland coalmining industry, 1990-2013. Relations Industrielles/Industrial Relations, 71(3), 418-441.Walters, D., & Wadsworth, E. (2020). Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.

[34] Kvorning, L. V., Hasle, P., & Christensen, U. (2015). Motivational factors influencing small construction and auto repair enterprises to participate in occupational health and safety programmes. Safety science, 71, 253-263.

[35] Wilthagen, T (1994) Reflexive rationality in the regulation of occupational health and safety, in Rogowski, R. and Wilthagen, T., Reflexive Labour Law, Kluwer, Deventer.

regulatory system today, the incorporation of unions and their central role in supporting safety representatives was both explicit and implicit.

It is also not to be forgotten that registered unions have long been recognised in Australia as having an institutional role in the resolution of disputes concerning work within their eligibility rule. As Bromberg J observed in *Energy Australia Yallourn Pty Ltd v. AMWU* [2017] FCA 1245 at [101] and [102]:

> *[101] There is one further matter of background to which I accord little significance but is nevertheless interesting. The involvement of the Unions as party principals in the resolution of disputes under cl 28 may reflect an historical view about the nature of the involvement of registered organisations in the resolution of industrial claims. Although the role of registered organisations is much diminished under the FW Act when compared to predecessor legislation, for over 100 years unions registered under federal industrial law were regarded as industrial participants who were not mere agents of their members but who were party principals. In Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association [1925] HCA 7; (1925) 35 CLR 528, Starke J said at 551:*
>
> *An organization registered under the Arbitration Act is not a mere agent of its members: it stands in their place and acts on their account and is a representative of the class associated together in the organization. It is, as my brother Higgins said, "a party principal," and "not a mere agent or figurehead."*
>
> *[102] Those observations were endorsed and applied by Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ in R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia [1957] HCA 19; (1957) 97 CLR 71 at 84 and represented the dominant understanding of the role of unions in the Australian industrial landscape at least until the enactment of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth).*

Those observations are equally applicable in respect of safety matters. Indeed, it is well accepted that unions have an interest in the conditions afforded to both members and non-members alike.[36] That reasoning is even more apposite to questions of WHS. A workplace cannot be simultaneously unsafe for the non-members and safe for the union members. Safety at a workplace affects all persons across the workplace irrespective of whether they are a member of the union. Further, the work practices and conditions for those who are not members of the union have a direct impact on the safety of the union members who perform work alongside them.

It should also be noted that in the United Kingdom, recognised trade unions may simply appoint HSRs to represent the employees for the work groups. Any disputes between

[36] See *Burwood Cinema Limited v. Australian Theatrical and Amusement Employees Association* (1925) 35 CLR 528.

employers and trade unions about recognition are dealt with through the normal employment relations machinery.[37]

As it presently stands, registered unions may participate in various matters under the WHS Act as a 'representative' of a worker. That requires the worker to identify themselves as a member of the union *and* as the person who requested the union to participate in the discussions on their behalf. It is entirely understandable that workers would be reticent to identify themselves as either a member of a union or the person who had asked for assistance from the union. There are many examples of employers taking action against workers for having raised safety matters.[38]

Given the clear evidence-based connection between the involvement of registered unions and an improvement in safety,[39] the well accepted institutional role played by unions and the obvious impediments for workers to request union involvement, recommendations have been made which recognise that a relevant union, being a registered union with constitutional coverage for work the subject of the negotiations, should be a party principal to the negotiations for any work group. This will ensure that PCBUs and workers have the benefit of the longstanding experience and expertise in dealing with the issues associated with the negotiation of work groups.

Recommendation 2

A. That the Minister consider amending Part 5 of the WHS Act to provide that:
   (a) negotiations for a work group be completed within 14 days of the request to establish a work group. This period may be extended by mutual agreement between the parties to the negotiations.
   (b) a party to failed negotiations may request the regulator to appoint an inspector to resolve the dispute.
   (c) Any inspector appointed to resolve the dispute must first attempt to assist the parties to resolve the dispute on their own and if such resolution is not

[37] Health and Safety Executive (HSE) (2022) Consulting Workers on Health and Safety. https://www.hse.gov.uk/pubns/priced/l146.pdf

[38] By way of example only see *CFMEU v BM Alliance Coal Operations Pty Ltd (no 3)* [2022] FCA 1345 and *AMWU v Visy packaging Pty Ltd and oths (No 3)* [2013] FCA 525.

[39] Shaw, N. and Turner, R. 2003, The worker safety advisers (WSA) pilot, Health and Safety Executive Research Report RR 144 prepared by York Consulting with Fife College of Further and Higher Education, HSE Books, Sudbury, 2003. Online at http://www.hse.gov.uk.; Walters D. R., Nichols, T., Connor, J., Tasiran, A.C., and Cam, S. (2005) , The role and effectiveness of safety representatives in influencing workplace health and safety,' HSE Research Report 363.; Zanko, M., & Dawson, P. (2012). Occupational health and safety management in organizations: A review. International Journal of Management Reviews, 14(3), 328-344.; Walters, D. & Wadsworth, E. (2020) Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.; Walters, D., Quinlan, M., Johnstone, R., & Wadsworth, E. (2016). Cooperation or resistance? Representing workers' health and safety in a hazardous industry. Industrial Relations Journal, 47(4), 379-395.; Walters, D., Johnstone, R., Quinlan, M., & Wadsworth, E. (2016). Safeguarding workers: A study of health and safety representatives in the Queensland coalmining industry, 1990-2013. Relations Industrielles/Industrial Relations, 71(3), 418-441.Walters, D., & Wadsworth, E. (2020). Participation in safety and health in European workplaces: Framing the capture of representation. European Journal of Industrial Relations, 26(1), 75-90.; Walters. D. R and Nichols, T. (2007) Worker Representation and Workplace Health and Safety, Palgrave Macmillan, Basingstoke.

possible, make a decision as to the constitution of the work groups within seven days. This decision would be excluded from the internal and external review process.

(d) The parties to the negotiations have the capacity to refer a dispute about the inspector's decision to the QIRC for conciliation and/or arbitration, but that subject to any order of the QIRC, the decision of the inspector will stand and be implemented until the matter is heard and determined by the QIRC. Specific legislative provisions will need to be added granting the QIRC power to deal with such matters. These provisions should be based on the usual powers provided to the QIRC to resolve disputes.

B. That the Minister consider amending section 16(b) of the WHS Regulation so the phrase 'readily accessible' expressly incorporates reference to the geographical locations in which work is performed, the work stream or work type, and shift arrangements.

C. That the Minister consider amending section 52(1) of the WHS Act to:

(a) add a relevant union as a party principal to the negotiations. The phrase 'relevant union' should be defined to mean a union who is entitled to represent the industrial interests of the workers who are a party to the negotiation, and

(b) provide that the parties are to agree on the details of when and where the negotiations will occur.

3.3 Powers and functions of health and safety representatives

Current framework

Currently the WHS Act sets out specific powers and functions that an HSR can perform in the interests of the workers they represent. Powers and functions of HSRs include:

- representing the work group in health and safety matters
- monitoring compliance measures taken by the PCBU that relate to the workers in their work group
- investigating WHS complaints from members of their work group, and
- inquiring into any risk to the health or safety of workers in the work group that arise from the conduct of the business or undertaking.[40]

In exercising a power or performing a function, HSRs may:

- inspect the workplace, or any part of the workplace, where work is carried out by a worker in their work group, either with reasonable notice or at any time without notice if there is an incident or a situation involving serious risk emanating from immediate or imminent exposure to a hazard

[40] WHS Act, section 68(1).

- accompany an inspector during an inspection of the workplace, or part of the workplace, where workers in the HSR's work group work
- with the consent of a worker, or one or more workers, the HSR represents, be present at an interview concerning WHS between the worker(s) and an inspector or PCBU
- request the establishment of an HSC
- receive information concerning the WHS of workers in their work group, and
- whenever necessary, request the assistance of any person.[41]

PCBUs also have the following obligations in relation to HSR powers and functions to:

- consult, so far as is reasonably practicable, with HSRs on WHS matters at the workplace
- confer with an HSR, whenever reasonably requested by the representative, to ensure the health and safety of the work group workers
- allow an HSR access to information that the PCBU has relating to hazards and risks affecting the health and safety of the workers in the work group
- allow an HSR access to information relating to the health and safety of the work group workers
- allow HSRs to attend interviews concerning WHS between one or more workers (with their consent) and an inspector or another PCBU at the workplace (or their representative)
- provide HSRs with resources, facilities and assistance that are reasonably necessary to enable the HSR to exercise their powers and perform their functions under the WHS Act
- allow a person assisting an HSR to have access to the workplace if it is necessary to enable the assistance to be provided
- permit HSRs to accompany an inspector during an inspection of any part of the workplace where a member of the HSR's work group works
- provide any other assistance to the HSR required by the WHS Regulations
- to allow the HSR as much time as is reasonably necessary to exercise their powers and perform their functions under the WHS Act, and
- pay HSRs for the time spent performing their role at the same rate that they would be entitled to receive if performing their normal duties during that period.[42]

Issues raised

Clarity regarding HSR powers and functions, and PCBU obligations to facilitate these powers and functions, was a key issue raised by several stakeholders in response to the review. Stakeholders identified the need to clarify the:

- interaction between HSRs and inspectors
- HSRs' right to receive information
- the meaning of monitoring measures in section 68(1)(b) of the WHS Act, and

[41] WHS Act, sections 68-69.
[42] WHS Act, section 70.

- the resources, facilities, and assistance HSRs must be provided.

Requirements for HSR and inspector interaction

It was raised by stakeholders that currently under section 68(2)(b) of the WHS Act an HSR has the right to accompany an inspector during an inspection at the workplace. However, it was noted there is no corresponding obligation on a PCBU, under section 70 of the WHS Act, to advise the HSR of the attendance of an inspector. It was reasoned that, if an HSR has a right to accompany an inspector, it should be clarified that the PCBU has the obligation to notify an HSR that an inspector is on site, and that an inspector should be required to request to speak to HSRs on site and ask them to accompany them in relation to matters relating to WHS in their work group.

Further, it was expressed by several stakeholders that from their experience the interactions between an inspector and an HSR (or worker) can be transactional rather than engaging and transparent. There was a sense that inspectors do not always contact HSRs when they enter workplaces, and that inspectors rarely consult HSRs during workplace visits. This is supported by research that there is limited consultation between HSRs and employers.[43]

It was acknowledged that while there is an existing requirement in the WHS Act for an inspector to contact the HSR when they attend a worksite (section 164(2)(c)), it was submitted that the provisions should be strengthened to ensure that an inspector must identify and engage with the HSR when they attend the site and ensure they consult with them and include them in the inspection regardless of the reason the inspector is on site. It was also suggested that while on site the inspector should consider any issues raised by the HSR in relation to their work group, including those issues in their inspection, and debrief the HSR at the end of the inspection outlining the results of the inspection and any follow up by the regulator.

Conversely, it was put to the Review that it should not be up to the inspector to ensure the requirement to notify HSRs when they enter a workplace is met. It was also indicated that it should not be at the discretion of the PCBU to notify the HSR, other than where the matter for which the inspector is visiting the workplace is directly related to a request from the HSR (e.g. following the issue resolutions process, or the provisional improvement notice (PIN) process).

To address these issues, stakeholders recommended to the Review that:

- section 70 of the WHS Act be amended to clarify that a PCBU has an obligation to notify an HSR that an inspector is at the workplace and allow the HSR to accompany the inspector during an inspection of the workplace or part of the workplace at which a worker in the work group works, consistent with section 68(2)(b) of the WHS Act
- section 164 of the WHS Act be amended to clarify that an inspector must, as soon as is practicable after entry to a workplace under section 163, take all reasonable steps

[43] Johnstone, R. (2009) The Australian framework for worker participation in occupation health and safety. In D. Walters & T. Nichols (Eds.) Workplace Health and Safety: International Perspectives on Worker Representation (pp. 31-49). UK: Palgrave Macmillan.

to advise any relevant HSR of their presence and their right to accompany them during an inspection of the workplace or part of the workplace at which a worker in the work group works, and
- specific and explicit requirements should be introduced for inspectors inspecting a workplace to consult HSRs on all matters relevant to the HSR's work group, and the Victorian provision requiring an inspector to debrief with HSRs at the end of their visits should be adopted.

HSRs right to receive information

In response to the Review, it was raised that there is limited guidance or information in the WHS Act about the type of information HSRs have a right to access. It was indicated that further clarity is required around HSRs having a positive right to access information about workplace incidents, the presence of an inspector, any compliance notices given by an inspector, and that this should be accompanied by a corresponding obligation on the PCBU to provide the information as soon as practicable after the matters come to the PCBU's knowledge.

To address these issues, it was recommended by stakeholders to the Review that:

- section 68(2)(f) of the WHS Act be amended to clarify that an HSR has the right to receive information and be informed about any: matter relating to any workplace incident that has occurred at the workplace; notice given by an inspector about a matter; and relevant hazard or risk relevant to the HSR's work group
- section 70(1) of the WHS Act be amended to ensure HSRs are: informed about workplace incidents; compliance and/or other notices issued by an inspector; relevant identified hazards or risks; and any proposed change to the workplace, plant or substances used at the workplace that may affect the health and safety of workers in their work group, and
- section 70(1) of the WHS Act be amended to clarify that information should be provided to an HSR as soon as is practicable after the PCBU becomes aware of the information, or within 48 hours on request of information by an HSR.

The meaning of monitoring measures in section 68(1)(b) of the WHS Act

In seeking further clarity on HSR powers and functions, stakeholders advised that while section 68 of the WHS Act provides that HSRs have the power to monitor the measures taken by the PCBU or their representative in compliance with the WHS Act, it is unclear how this operates in practice, particularly in relation to the resources required to perform this function. It was acknowledged that the SWA Worker Representation and Participation Guide (WRPG) outlines that the resources, facilities, and assistance that a PCBU is obligated to provide to an HSR under section 70(1)(f) of the WHS Act includes access to a telephone or relevant technical equipment (for example, a noise meter). However, in practice, it was advised that this type of assistance is rarely granted or, when requested, is often disputed. The Review was advised that common types of equipment that HSRs seek to use in investigating matters and ensuring compliance are a smartphone to take photographs or videos, and equipment such as a noise meter or dust monitor for hazards such as coal dust or silica.

To address these issues, stakeholders recommended to the Review that section 68 of the WHS Act be amended to clarify that the monitoring of measures outlined in section 68(1)(b) includes similar matter to those outlined under section 165 of the WHS Act for inspectors, with a legislative example of the use of a smart phone to take photographs or videos and a noise meter or dust monitor to take appropriate measurements.

Resources, facilities and assistance for HSRs

The Review was advised that common feedback from HSRs is that they are not provided with sufficient resources, facilities or assistance to perform their powers and functions. This includes relevant time off to perform their duties during normal working hours and lack of access to a computer or smartphone. Research indicates that HSRs do not have enough to time perform their core functions.[44]

It was acknowledged that the WRPG outlines examples of what 'resources,' 'facilities' and 'assistance' may include. However, it was raised that this is only guidance material and many PCBUs and HSRs are not aware of the information.

It was therefore recommended by stakeholders that the information in the WRPG on the types of resource, facilities and assistance that should be provided to HSRs be incorporated into the WHS Regulation. This would ensure that they are an enforceable component of an HSR's rights and functions. The WRPG currently advises that resources, facilities, and assistance may include:

- access to a private room, desk and chair for discussions or interviews
- a computer with internet and email access
- access to a telephone
- facilities for photocopying and filing, including a lockable filing cabinet and shelves
- access to a room for work group meetings
- access to relevant technical equipment, for example, a noise meter
- the use of notice boards, and/or
- if required, transport or travel expenses to commute between workplaces.[45]

Findings

For HSRs to be able to perform the role envisaged by the WHS Act, it is necessary for HSRs to be completely integrated into the identification and resolution of safety issues at a workplace.

Numerous submissions were received from stakeholders to the effect that inspectors did not always seek out the assistance of HSRs when conducting inspections at the workplace. Further, one employee representative conducted a survey of HSRs and only 36% of respondents said that the PCBU advised them if there was an inspector in

[44] Johnstone, R. (2009) The Australian framework for worker participation in occupation health and safety. In D. Walters & T. Nichols (Eds.) Workplace Health and Safety: International Perspectives on Worker Representation (pp. 31-49). UK: Palgrave Macmillan. See also Australian Council of Trade Union (2005) A Report on the 2004 National Survey of Health and Safety Representatives, Australian Council of Trade Unions, Melbourne, November.

[45] Safe Work Australia, *Worker Representation and Participation Guide*, p.26.

attendance, and only 32% indicated that they were advised of any statutory notices issued by an inspector.

It is impossible for an HSR to be effective in the performance of their functions and powers if they are not apprised of the safety issues that have been identified at a workplace. Specifically, if an inspector attends a workplace and issues a notice, it is imperative that the HSR be aware of that attendance, the issue identified and the compliance action sought.

Further, numerous submissions were made from stakeholders about difficulties that HSRs had in obtaining relevant documentation from the PCBU. Finally, some stakeholders also made submissions that the resources and facilities provided by a PCBU to the HSRs were substandard and did not permit them to perform their roles adequately.

Considering those submissions, we have made recommendations which provide for the integration of an HSR into the identification and resolution of safety issues at a workplace. This involves the PCBU making the HSR available when a statutory inspector or WHS entry permit holder attends the site and requiring PCBUs to provide any copies of statutory notices or entry notices to the HSR. We have also recommended that the powers of the HSR be amended to clarify that they are entitled to take photographs, videos, and measurements and or samples in the performance of their role and that, where they request the provision of information relevant to a safety matter from the PCBU, the PCBU is under an obligation to provide it to them. We have also proposed that the SWA guidance on reasonable resources be incorporated into the WHS Regulation.

Recommendation 3

A. That the Minister consider amending the WHS Act to impose an obligation on PCBUs, so far as is reasonably practicable, to inform an HSR, and where the HSR is present on site make them available, when an inspector or WHS entry permit holder is on site and the visit is relevant to their work group.

B. That the Minister consider amending the WHS Act to impose an obligation on PCBUs to provide HSRs with copies of any:
   (a) statutory notices issued by an inspector
   (b) entry notices issued by WHS entry permit holders, or
   (c) mandatory incident notifications made to the regulator by the PCBU.

C. That the Minister consider amending section 68 of the WHS Act to make clear that:
   (a) HSRs have the capacity to request the provision of information from a PCBU about a safety issue, and
   (b) the PCBU is obliged to comply with such a request.

D. That the Minister consider amending section 68 of the WHS Act to clarify that HSRs are permitted to take photographs, make videos, and take measurements and/or samples in the performance of their role.

E. That the Minster consider introducing a regulation which provides that the resources, facilities, and assistance to be provided to an HSR by a PCBU are consistent with the relevant SWA Guidance.

3.4 Obligation to train health and safety representatives

Current framework

The WHS Act requires PCBUs to ensure HSRs complete an initial five-day training course approved by the regulator within three months of their election, or as soon as practicable if the initial five-day course is not reasonably available.[46] A one-day refresher training course is then required at least every three years.[47]

PCBUs must allow HSRs time off work to attend training and pay the training fees and any other reasonable costs associated with the HSR's attendance at the training.[48]

Any time the HSR is given off work to attend training must be with pay that they would otherwise be entitled to receive for performing their normal duties during that period.[49]

The WHS Act is silent as to whether an HSR can choose the training course they attend.

Issues raised

The adequacy of the current entitlements and timeframes to undertake HSR training was a common feature of stakeholder submissions on ToR (1)(a). Stakeholders raised concerns regarding:

- the ability for HSRs to choose their own training provider
- whether the timeframes to access initial HSR training and refresher training were fit for purpose, and
- whether worker remuneration and entitlements while they attend HSR training are sufficiently clear.

HSR choice of training provider

In response to the Review, stakeholders advised that a common dispute for new HSRs is access to a training provider of their choice. Stakeholders indicated that advice from the regulator is that generally HSRs should be able to select the training provider of their choice, except where there is a disproportionate cost involved. However, it was argued that this is advice only, and different views from different inspectors are often encountered in practice.

[46] WHS Regulation, section 21(2)(b).
[47] WHS Regulation, section 21(1)(b).
[48] WHS Act, section 72(2).
[49] WHS Act, section 72(4).

It was also acknowledged that the Queensland Government intends to amend the WHS Act to ensure elected HSRs can choose their training provider, as per the Queensland Government's response to the Boland Review. This action is supported by stakeholders, and they indicated it will ensure the timely delivery of such training as well as the independence of the HSR.

To address these concerns, it was recommended by numerous stakeholders that section 72(1) of the WHS Act be amended to provide that an HSR can attend a course of training in WHS that is approved by the regulator, that the HSR is entitled to attend under the WHS Regulation and that is chosen by the HSR.

Timeframe to access initial HSR training

In response to ToR (1)(a), several stakeholders raised concerns that the current three-month timeframe to access initial HSR training is not fit for purpose. In particular, the consensus across stakeholders who submitted comments in relation to HSR training requirements indicated that the timeframe to complete initial training should be reduced. There were several reasons presented as to why the three-month timeframe is problematic. This included:

- where a workplace is established for a short-term project that may be completed within three months, meaning an HSR may never be provided the opportunity to undertake the required training
- where the HSR is on a short-term contract which may end prior to the three-month period for training to occur, and
- the fact that workers are denied effective HSR representation until training is completed, as some HSR powers and functions are contingent on training being completed.

Concerns were also raised in relation to reported instances where an HSR's access to training was further delayed beyond the three-month timeframe due to disputation over access to training.

Several alternative timeframes were proposed by stakeholders. These included training being undertaken within a 28-day period after an HSR's election, or training being booked within 14 days of an HSR being elected and commenced within a month of that date.

Timeframe for accessing refresher training

Stakeholder submissions highlighted that Queensland is the only jurisdiction that requires HSR refresher training once every three years, for a one-day period. All other jurisdictions, and the model WHS Regulations, provide for annual one-day refresher training, with the entitlement commencing one year after an HSR has completed their initial five-day training course.

Concerns raised by stakeholders with the existing three-year timeframe included that, given the movement of staff within workplaces, the changing nature of work and changes in technology, HSRs should be required to undertake their refresher training more regularly. It was advised that this would ensure currency of regulatory knowledge and better management of WHS risks.

It was therefore recommended by stakeholders that the WHS Act and WHS Regulation be amended to require a one-day refresher training course for HSRs to be undertaken annually.

Worker remuneration and entitlements to attend HSR training

In response to the Review, several stakeholders advised that they are aware of ongoing challenges associated with the payment of an HSR's equivalent wages that they would have otherwise received while attending training instead of their normal work. It was argued that, as many workers do not work standard Monday to Friday 38-hour week arrangements (such as part time workers and shift workers), they are often left either out of pocket for attending training, or they are not provided with payment for training hours that are additional to their normal hours of work. It was subsequently reasoned that attendance at an HSR training course for non-standard workers is a disadvantage and a disincentive to take up the position of HSR.

In response to these issues, it was recommended by several stakeholders that the WHS Act be amended to ensure all HSRs receive the usual remuneration they would have otherwise received, and that an HSR should not incur a reduction in their ordinary pay or the usual remuneration they would have otherwise received for working their normal rostered or scheduled hours during the equivalent period.

Findings

It is noted that the Boland Review recommended that the model WHS laws be amended to make clear that HSRs are entitled to choose the provider of their training.

The value of training for HSRs goes beyond ensuring they have the skills and knowledge base to perform their role. Training, and particularly union provided training, constitutes a prominent form of institutional support for HSRs.[50] Support comes not only in terms of delivery of training, but also in the conceptualisation and design of its curriculum and content. In this respect, the pedagogy of labour education has often succeeded in transforming conventional technically or legally orientated health and safety concepts into participant-centred and experience-based materials, and adopted ways of understanding health and safety at work that are more relevant to the needs of representatives.[51] The predominant pedagogy adopted in trade union health and safety courses is derived from labour education principles and provides for the development of a particular understanding of health and safety issues grounded in workers' collective experience and values. Also, training concentrates on the role of the representative in

[50] Biggins, D. and Holland, T. (1995) 'The training and effectiveness of health and safety representatives', in Eddington, I. Towards Health and Safety at Work: Technical Papers of the Asia Pacific Conference on Occupational Health and Safety, Brisbane.; Culvenor, J., Cowley, S., and Harvey, J. (2003). Impact of health and safety representative training on concepts of accident causation and prevention. Journal of Occupational Health and Safety Australia and New Zealand, 19(3), 279-292.;
Walters, D. R, Kirby, P. and Daly, F. (2001) Training and action in health and safety, TUC, London.

[51] Walters, D. R and Kirby, P.(2003) The impact of trade union education and training in health and safety on the workplace activity of health and safety representatives CRR 321/2001, HSE Books, Sudbury.

the labour relations processes involved in workplace representation on health and safety, rather than being concerned solely with technical or legal matters.

Fundamental to these understandings is the idea that health and safety issues cannot be separated from those of work organisation since successful resolution of many health and safety matters requires a deeper and wider understanding of their organisational context. Increasingly, an understanding of the causes and resolution of WHS risks requires a more holistic view of WHS that encompasses the design of organisational structures and work processes, such as work intensification and work scheduling.[52] This wider view merges the more established technical aspects of WHS with aspects of work organisation traditionally considered an industrial relations arena, and increasingly implies a relationship to the control of the organisation of work requiring union engagement.[53]

Furthermore, with the challenge of addressing complex health issues that are prominent in the modern workplace, such as those of psychosocial risks, the role of HSRs is now broader than the isolated 'safety technician' role sometimes attributed to, or expected of, representatives in the past.[54] HSRs now emphasise the complexity of the issues involved in workplaces, their underlying links to matters of work organisation, and the need for a collective effort when the WHS matter relates to less tangible risks like stress and things that relate to the culture of the workplace.[55] HSRs having the opportunity to decide on their training provider adds to opportunities for collective efforts and support.

Considering the evidence, we endorse recommendation 10 of the Boland Review. We also consider that OIR should take steps, if changes are implemented, to ensure that elected HSRs are aware of their right to choose the trainer of their own choice.

Worker representatives also raised concerns about delays in training for newly elected HSRs. In circumstances where the substantial powers conferred on HSRs cannot be exercised until they are trained, the efficacy of the legislative regime is adversely affected if there are delays in the provision of that training. Accordingly, we consider that the three-month timeframe for the provision of HSR training should be shortened to 28 days. From time to time there will be circumstances where it is simply not possible for that to occur. That may be because of the nature of the work performed by

[52] James, P. (2004). Changing occupational safety and health contexts and their policy challenges. Policy and Practice in Health and Safety, 2(1), 1-3.

[53] James, P. (2004). Changing occupational safety and health contexts and their policy challenges. Policy and Practice in Health and Safety, 2(1), 1-3; Hasle, P., & Petersen, J. (2004). The role of agreements between labour unions and employers in the regulation of the work environment. Policy and practice in health and safety, 2(1), 5-23.

[54] Walters, D. (2011). Worker representation and psycho-social risks: a problematic relationship?. *Safety Science*, 49(4), 599-606.

[55] Loudoun, R., & Walters, D. (2009). Trade union strategies to support representation on health and safety in Australia and the UK: integration or isolation?. In Workplace Health and Safety (pp. 177-200). Palgrave Macmillan, London.. See also Walters, D. (2011). Worker representation and psycho-social risks: a problematic relationship?. Safety Science, 49(4), 599-606.

the HSR or unavailability of training. In those circumstances, the period should be extended.

We note that difficulties in terms of the availability of training should be addressed by HSRs being able to choose their own provider. If the provider the HSR wishes to attend is not available to provide the training, then they should be at liberty to choose another provider which is available during the relevant window. Further, submissions were received from stakeholders to the effect that there was more than adequate capacity available in the various training schemes.

Submissions to the Review also identified that, unlike other states and territories which had adopted the model WHS laws, the refresher training for HSRs in Queensland is every three years. We agree that Queensland should be brought into line with the model WHS laws and other states and territories on this matter.

Section 72(4) of the WHS Act provides that a worker undertaking HSR training is entitled to be remunerated for their time. Submissions were received from stakeholders which indicated that an issue arose in respect of shift workers only receiving the ordinary time rate and not their usual remuneration which included overtime and shift allowance. Undertaking HSR training will be undermined if workers are placed at a financial disadvantage for participating in the training. Accordingly, we have recommended that section 72(4) of the WHS Act be amended to provide that a worker should receive their usual remuneration for the period which they were in training.

Recommendation 4

A. That the Minister consider, consistent with recommendation 10 of the Boland Review, HSRs be permitted to choose their training provider.

B. That the Minster consider amending section 21(2) of the WHS Regulation so the requirement for an HSR to complete their initial training in three months be shortened to 28 days, save for any circumstances where training is not available in the 28 day period, or where there is some pressing necessity at the business or undertaking which renders it impractical for the HSR to attend the training in that period.

C. That the Minister consider amending section 21(1) of the WHS Regulation to reduce the requirement that HSRs conduct refresher training every three years to every 12 months.

D. That the Minister consider amending section 72(4) of the WHS Act to reflect that during a period of training, HSRs are entitled to receive payment of the usual remuneration they would have received if they had been at work instead of at training.

3.5 HSR right to direct unsafe work to cease

Current framework

Currently, if an HSR has a reasonable concern that the health and safety of a worker in their work group is at serious risk, the HSR can direct the worker to cease work.[56] In these circumstances, the serious risk must emanate from an immediate or imminent exposure to a hazard.

An HSR, before giving such a direction, must first consult the PCBU and attempt to resolve the matter using the issue resolution process under section 81 of the WHS Act.[57] However, if the risk is so serious or imminent that it would not be reasonable to consult before giving a direction, the HSR can give the direction without consultation and then conduct consultation as soon as practicable after giving the direction.[58] HSRs must also inform the PCBU of any directions given by them to workers.[59] HSRs cannot give directions to cease work unless they have completed HSR training.[60]

Under section 84 of the WHS Act, workers also have the right to cease or refuse to carry out work if the worker has a reasonable concern that carrying out the work will expose the worker to a serious risk to their health and safety emanating from an immediate or imminent exposure to a hazard.

A PCBU, worker or HSR may request an inspector to attend the workplace and assist in resolving an issue arising in relation to the cessation of work.[61]

Issues raised

Feedback from stakeholders indicated that the application of the scope of when a worker can cease work, or an HSR can direct cessation of work, is an area of continual disputation between PCBUs, unions and the inspectorate with respect to the meaning of what is a serious risk, and what is imminent and immediate. They also advised that, in their experience, matters are disputed with the inspectorate in attendance to delay or frustrate workers' rights to cease work in the face of serious risks to their health and safety. Stakeholders also suggested that in many cases, cease work provisions are rarely exercised because of lack of awareness about WHS issues and/or fears about job security.

Findings

The National Review Second Report recommended that, in addition to the provisions in the model WHS laws which permit an individual worker to cease work in unsafe situations, a power should be conferred on an HSR to give such a direction. The rationale for this was that HSRs have additional knowledge and training and would be

[56] WHS Act, section 85(1).
[57] WHS Act, section 85(2).
[58] WHS Act, section 85(3)-(4).
[59] WHS Act, section 85(5).
[60] WHS Act, section 85(6).
[61] WHS Act, section 89.

better placed to progress discussions with the PCBU and, if the matter could not be resolved, issue a direction to cease work.[62]

The power conferred by section 85 of the WHS Act is subject to several requirements. Importantly, save in an urgent case, the HSR must consult with the PCBU about the risk prior to the giving of the direction. Further, the giving of the direction is conditioned upon the HSR having formed a reasonable concern that the work exposes the workers to a serious risk of illness or injury emanating from an immediate or imminent exposure to a hazard.

A difficulty which arises in respect of section 85 of the WHS Act, is that many of the pre-conditions to issue a direction are not known to the workers. That is, when faced with a direction from their HSR, workers will often not know one way or the other whether the HSR has fully complied with the pre-conditions to issue the direction. Further, in circumstances where there is some disputation as to whether the direction is validly given because it is a direction given to the workers, there is capacity for a contrary direction to be given by the PCBU or the employer of the workers. In those circumstances, the workers are faced with an invidious choice of following the direction of their elected HSR and potentially acting inconsistently with a direction from their employer, or complying with their employer's direction and disregarding the statutory direction issued by the HSR.

There have also been other examples where workers have ceased work in accordance with what they understood to be a direction from their HSR, only for subsequent litigation to allege that the HSR's direction was not valid because it did not comply with the statutory pre-conditions and that in those circumstances, the cessation of work by the workers was unlawful industrial action.[63]

The capacity for workers to direct that work cease is not novel to the model WHS laws. It exists in other safety legislation in Queensland (see section 101 *Coal Mining Safety & Health Act 1999* (Qld) (CMSH Act)). Similarly, in Italy, Decree No. 81/2008 provides the authority for occupational health and safety (OHS) representatives and inspectors to cease unsafe work using different methods.[64] Specifically, an OHS representative may make a cease work order directly to a competent authority to investigate and action. In Sweden, the *Work Environment Act of 1977* allows an OHS representative to issue a cease work order directly to the PCBU and the Work Environment Authority.[65]

In our view, the right for an HSR to direct work to cease is an important one. It ensures that in circumstances where there is disputation between the workers and the PCBU about whether work is safe, a direction can be given which requires the cessation of work. This removes the need for individual workers to decide by themselves,

---

[62] See National Review into Model Health and Safety Laws – Second Report (2009), paragraph 28.36.
[63] See *ABCC v AMWU (Australian Paper Case)* [2017] FCA 167 at [118] to [130].
[64] Legislative Decree No 81/08 Consolidated Text On Health And Safety In The Workplace 2008 (Italy). https://www.ispettorato.gov.it/it-it/Documenti-Norme/Documents/Testo-Unico-Dlgs-81-08-edizione-di-luglio-2018.pdf
[65] Legislative Decree No 81/08 Consolidated Text On Health And Safety In The Workplace 2008 (Italy). https://www.ispettorato.gov.it/it-it/Documenti-Norme/Documents/Testo-Unico-Dlgs-81-08-edizione-di-luglio-2018.pdf

particularly in situations where they may feel unduly pressured, or incapable of deciding because of a lack of skills or expertise. However, it is undesirable for an HSR's direction to put workers in a position where they are faced with choosing between the direction issued by their elected HSR on the one hand and either the PCBU or their employer on the other. Further, it is highly undesirable that at some point after the direction had been issued, there may be litigation which calls into question the validity of the HSR direction, for reasons the workers would never have known, which has the consequence that the workers engaged in unprotected industrial action.

In our view, the solution is relatively simple. Section 101 of the CMSH Act provides for the site safety and health representative to give a direction that work cease. However, rather than the direction being given to the workers, the direction is given to the site senior executive who is responsible for the operation of the mine. This means that after the direction is given by the site safety and health representative, the person operating the mine is under a legal obligation to stop work until such time as the issue is resolved. That removes many of the undesirable consequences from the current framing of section 85 of the WHS Act. If the PCBU requires that work cease, there can be no suggestion that the workers have engaged in unprotected industrial action or acted contrary to a direction of their employer.

We also consider that section 85 of the WHS Act should retain the ability for the HSR to give a direction directly to a worker. There will be many emergent circumstances where the HSR sees something which is inherently unsafe, and it will not be practical to raise the matter with the PCBU.

We also note that by amending section 85 of the WHS Act so that the direction is given to the PCBU, this may give rise to a situation where a delinquent PCBU ignores the direction. In this regard, we note that this does not appear to be an issue which has arisen under the CMSH Act. This may be because section 102 of the CMSH Act creates an offence for failing to comply with such a direction with a maximum penalty of 200 penalty units. No recommendations have been made as to the precise enforcement mechanism to be adopted. However, serious consideration needs to be given to the protections for workers if a PCBU ignores the direction and what enforcement mechanisms are to be put in place.

Recommendation 5

That the Minister consider amending section 85 of the WHS Act to provide that:

(a) any direction to cease work by an HSR be issued to the PCBU, and
(b) the PCBU has an obligation to cease work that is the subject of the direction until such time as the issue is resolved or the direction is set aside in accordance with the dispute resolution process.

Section 85 of the WHS Act should still maintain the capacity for an HSR to issue a directive to a worker in circumstances where there is an immediate exposure to risk.

3.6 Provisional improvement notices

Current framework

Currently under the WHS Act, if an HSR reasonably believes that a person is contravening, or has contravened, the WHS Act in circumstances that make it likely the contravention will continue or be repeated, they may issue a PIN requiring the person to remedy the contravention.[66] However, an HSR must not issue a PIN without first consulting the person to whom the PIN will be issued.[67]

PINs are not designed for critical or urgent matters, rather they:

- are a tool to improve health and safety in a workplace, encouraging PCBUs and workers to openly discuss health and safety hazards and risks in their workplace
- are a written direction from an HSR to a person who holds a duty under the WHS Act requiring them to fix a WHS problem, and
- should only be used if agreement to fix the problem cannot be reached through the normal consultation processes.

PINs can include directions on how to remedy a contravention. These directions may refer to a code of practice and offer the person a choice of ways to remedy the contravention.[68] The PIN must also state a day the person is required to remedy the contravention by.[69] This day must be at least eight days after the PIN is issued.[70]

Within seven days of a PIN being issued, the person who was issued the PIN can ask the regulator to review the notice.[71] In this circumstance, the operation of the PIN is stayed until an inspector can attend the workplace to confirm the notice, confirm it with changes, or cancel it.[72] A confirmed PIN must be complied with and is taken to be an improvement notice issued by an inspector.[73]

HSRs cannot issue a PIN unless they have completed HSR training.[74]

Issues raised

In response to the Review, it was raised that under the existing framework for PINs, the risk identified by an HSR in a PIN can remain unaddressed for at least eight days before it is remedied. While some time is required for remedial action or rectification work to be undertaken, eight days is considered excessive. It was further argued that eight days cannot be justified noting the recipient of the PIN can request a review of the notice, and the notice is subsequently stayed until the inspector decides. As an alternative, it was proposed that the timeframe for compliance be reduced to two days.

---

[66] WHS Act, section 90.
[67] WHS Act, section 90(3).
[68] WHS Act, section 93.
[69] WHS Act, section 92(d).
[70] WHS Act, section 92(d).
[71] WHS Act, section 100(1).
[72] WHS Act, sections 100(2), 101 and 102.
[73] WHS Act, section 102(3).
[74] WHS Act, section 90(4).

Findings

The issuing of PINs is a significant power which is conferred on HSRs. The present legislative provisions provide that the time for compliance with the PIN must be within eight days.

Several worker representative stakeholders made submissions to the effect that the eight day period was too long. Similarly, some employer representatives agreed that the subject of many PINs could be actioned immediately and that in circumstances where the timeframe was within eight days, the natural human tendency was to wait until close to the expiration of the period before taking action.

While we accept that many matters that may be the subject of PINs could be actioned quickly, and while some submissions sought that the period for compliance be reduced to two days, we are uncertain as to what unintended consequences may flow from shortening the period so significantly. Accordingly, as an interim measure, we propose that the period for compliance with a PIN be reduced to at least four days. It should be noted, in some circumstances (e.g. complex issues requiring testing or external technical advice) more than four days may be required. When this occurs the HSR should be able to extend the timeframe. Further, if the issue raised in the PIN requires substantial structural work and the HSR does not allow sufficient time for it, this could be a basis for the review of the notice by an inspector. Accordingly, in our view it is appropriate to reduce the minimum time for compliance to four days. That period can further be reviewed once there is operational experience as to the effects of that shortening.

Recommendation 6

A. That the Minister consider amending the WHS Act to reduce the time for compliance with a PIN from eight days to four days, except in circumstances where all parties agree to extend the timeframe.

B. That the Minister consider reducing the period for when a person can ask the regulator to review a PIN to three days to align with the proposed timeframe in recommendation 6A.

3.7 Discriminatory, coercive, and misleading conduct

Current framework

Currently under Part 6 of the WHS Act, a person must not dismiss, terminate a contract with, refuse to hire or detrimentally alter the position of a worker, or treat them less favourably, because they:

- are, were or propose to be a WHSO, HSR or member of an HSC or perform a function in this capacity
- exercised a power or performed a function (or refrained from doing so)
- assisted a person to exercise a power or perform a function

- raised a health and safety issue with a PCBU, inspector, WHS entry permit holder, HSR, WHSO, member of an HSC, or another worker
- are involved in resolving a work health and safety issue, and/or
- acted to get another person to comply with their duties.[75]

A person also engages in discriminatory conduct if they terminate or refuse to enter a commercial arrangement with another person for these reasons.

Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct can be heard in the Magistrates Court, by application from a person affected by the contravention or a person authorised as a representative by the person affected.[76]

Issues raised

Several submissions to the Review identified concerns with the utility and effectiveness of discriminatory conduct provisions under the WHS Act. Matters of importance to submitters included:

- clarifying the meaning of discriminatory conduct
- the jurisdiction for hearings related to discriminatory, coercive or misleading conduct, and
- standing to commence proceedings for discriminatory, coercive or misleading conduct.

Meaning of discriminatory conduct

Several submissions to the Review indicated a view that discriminatory conduct under the WHS Act is of a lesser standard than that provided for workers under industrial law. Comparisons were drawn to section 342 of the FW Act and section 282 of the *Industrial Relations Act 2016* (IR Act), which provide for the meaning of adverse action. Section 282 of the IR Act provides –

> (1) Adverse action is taken by an employer against an employee if the employer—
>
> (a) dismisses the employee; or
>
> (b) injures the employee in his or her employment; or
>
> (c) alters the position of the employee to the employee's prejudice; or
>
> (d) discriminates between the employee and other employees of the employer.

It was noted that, while discriminatory conduct under the WHS Act includes dismissal of a worker or altering the position of the worker to their detriment, the FW Act and IR Act extend this to where the employee suffers injury in their employment, has their position altered to their prejudice, or where the employer has discriminated between the employee and other employees of the employer.

[75] WHS Act, section 104, 105, and 106.
[76] WHS Act, section 112.

It was further argued that discrimination under both federal discrimination laws and the *Anti Discrimination Act 1991* (Qld) (AD Act) occurs where a person either directly or indirectly discriminates against a person because of a protected attribute (e.g. trade union activity), by treating them less favourably than another person without the same attribute in the same or similar circumstances. This is referred to as the 'comparator' test.

However, it was noted that there is differing case law about the meaning of discrimination under the FW Act. Generally, the term is not considered to be discrimination within the meaning of federal discrimination law because there is no statutory definition of 'discrimination' in the FW Act, with the courts generally relying upon its interpretation according to its ordinary meaning.

Stakeholders advised that to rectify this issue in the general protections provisions under the IR Act, the definition of 'discrimination' was amended by the *Industrial Relations and Other Legislation Amendment Act 2022* (Qld) (IROLA Act) to mean 'discrimination that would contravene the AD Act', thereby encompassing both direct and indirect discrimination and requiring the use of a comparator.

To address these concerns, it was recommended that the Review consider amending the definition of 'discriminatory conduct' under the WHS Act to incorporate where an employer discriminates between an employee and other employees of the employer, and that the definition of 'discrimination' be as per the IR Act.

Jurisdiction proceedings for discriminatory, coercive or misleading conduct

In response to the Review, stakeholders also advised that unions and workers rarely pursue discriminatory conduct claims under the WHS Act due to applications being before the Magistrates Court. It was advised that matters heard in the Magistrates Court are not progressed like they would be before an experienced employment tribunal, and the Magistrates Court is a costs jurisdiction where parties are required to be legally represented.

It was also suggested that due to the breadth of matters that the Magistrates Court deals with, magistrates may not be intimately familiar with the WHS Act requirements or discrimination legislation more generally. Conversely, it was argued that the QIRC has the skills, experience and understanding of workplace matters of this nature. It was also raised that the QIRC is a low-cost jurisdiction, and it would be cheaper and more convenient for workers to use this jurisdiction and would provide greater access for workers and their registered unions to protect workers and HSRs.

Stakeholders subsequently recommended that section 112(1) of the WHS Act be amended to transfer the civil proceedings jurisdiction under Part 6 of the WHS Act to the QIRC.

Standing to commence proceedings for discriminatory, coercive or misleading conduct

Consistent with proposals to clarify the meaning of 'representative' in the WHS Act (see commentary in Chapter 6.1), it was suggested to the Review that section 112(6) of the

WHS Act be amended to clarify that an eligible person is either a person affected by a contravention, a relevant union, or their legal representation.

Findings

Section 105(1)(a) of the WHS Act contains four discrete types of conduct which constitute discriminatory conduct. That conduct is similar to the conduct which constitutes adverse action under section 282 of the IR Act. Given the similarity in the purpose of Part 6 of the WHS Act and Part 2(a) of the IR Act, section 105(1)(a) of the WHS Act should be amended to include a fifth category which is the same as section 282(1)(d) of the IR Act.

Further, having regard to the QIRC's status as a specialist tribunal and its existing jurisdiction where it is alleged that a person has taken action against another person because they have exercised a protected attribute, the proceedings for contravention of Part 6 of the WHS Act should be litigated in the QIRC and not the Magistrates Court. This outcome is agreeable to both jurisdictions.

Recommendation 7

A. That the Minister consider amending the definition of 'discriminatory conduct' in section 105 of the WHS Act to reflect the definition of 'adverse action' in the IR Act.

B. That the Minister consider amending section 112 of the WHS Act to enable proceedings to be conducted in the QIRC and clarify that a relevant union has standing to commence the proceeding. Relevant union should be defined to mean a union who is entitled to represent the industrial interests of the worker/s affected by the contravention.

Chapter 4: Worker representation and assistance

Review ToR 1(b)

Consider and report on any need for amendments to ensure workers are appropriately represented and assisted in the workplace for the purpose of health and safety matters.

This chapter examines the effectiveness of provisions in the WHS Act related to worker representation and assistance for WHS matters. Following on from the focus on HSRs in chapter 3, this chapter considers other mechanisms of representation and assistance, including through consultation with workers, the nature and role of HSCs, and workplace entry by WHS entry permit holders. Consideration of the effectiveness of these matters was undertaken in the context of ensuring the following objects of the WHS Act are achieved:

- to protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant
- to provide for fair and effective workplace representation, consultation, cooperation, and issue resolution in relation to WHS
- encouraging unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and assisting PCBUs and workers to achieve a healthier and safer working environment
- securing compliance with the WHS Act through effective and appropriate compliance and enforcement measures, and
- providing a framework for continuous improvement and progressively higher standards of WHS.[77]

In response to ToR (1)(b), the following topics emerged as key issues for consideration in the Review:

- Can consultation with workers benefit from including worker representatives where requested?
- Are existing timeframes to establish HSCs adequate and fit for purpose, particularly in high risk industries?
- Are existing avenues for disputes regarding the constitution of HSCs adequate, including enabling timely resolution?
- Are there opportunities to provide clarity, and minimise disputation, in the right of entry provisions in Part 7 of the WHS Act?
- Is the WHS civil penalty provision framework operating effectively and providing sufficient opportunity for recourse where breaches occur?

[77] WHS Act, section 3(1).

4.1 Consultation with workers

Current framework

Part 5 of the WHS Act sets out the framework for consultation, representation, and participation in WHS matters. This includes the requirements for PCBUs to consult with workers.

Currently, PCBUs must, so far as is reasonably practicable, consult with workers who are, or are likely to be, directly affected by a WHS matter.[78] This includes consulting workers when:

- identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out
- making decisions about ways to eliminate or minimise those risks
- making decisions about the adequacy of facilities for the welfare of workers
- proposing changes that may affect the health or safety of workers, and
- making decisions about procedures: for consulting with workers; resolving health or safety issues at the workplace; monitoring the health of workers; monitoring the conditions at the workplace under the PCBU's management or control; and providing information and training for workers.[79]

Consultation includes PCBUs ensuring that:

- relevant WHS information is shared with workers
- workers are given a reasonable opportunity to express their views and to raise health or safety issues
- workers are given a reasonable opportunity to contribute to the decision-making process relating to the health and safety matter
- the views of workers are taken into account, and
- workers are advised of the outcome of any consultation in a timely manner.[80]

If workers are represented by an HSR, the consultation must involve the HSR.[81]

Issues raised

In response to the Review, it was recommended that consideration be given to enabling consultation with workers to include a worker's representative 'where requested' by the worker. It was raised that, due to the nature of some hazards and concerns of reprisal, some workers may feel more comfortable with a representative to assist in raising WHS concerns during consultation. It was also argued that, if workers were provided the option for consultation to include a representative, this may address concerns of fear of reprisal, as well as providing the worker access to more specialised resources to participate in the consultation process.

[78] WHS Act, section 47.
[79] WHS Act, section 49.
[80] WHS Act, section 48(1).
[81] WHS Act, section 48(2).

Findings

An important obligation within the scheme of the WHS Act is for PCBUs to consult with workers about matters concerning WHS issues. However, unlike other provisions in the WHS Act which involve discussions between the PCBU and the worker, section 47 of the WHS Act does not contain the capacity for a worker to nominate a representative for those discussions.

Usually, the matters consulted over will be ordinary day-to-day matters which affect the workplace. However, as is exemplified by the Full Bench of the Fair Work Commission's decision in *Construction, Forestry, Maritime, Mining and Energy Union and Another v Mt Arthur Coal Pty Ltd trading as Mt Arthur Coal* [2021] FWCFB 6059, consultation can sometimes be about macro issues which are complicated and involve more discussion. In that case, the requirement to consult concerned the introduction of a COVID vaccine requirement. This is the type of matter which would be complicated, emotive and benefit from workers being able to appoint a representative. The representative might have some technical expertise or otherwise be able to assist the workers in understanding the issue being consulted on and assist with formulating their response to the consultation.

Accordingly, we have recommended that section 47 of the WHS Act be amended to require PCBUs to consult with a worker's representative, where requested by the worker.

Recommendation 8

That the Minister consider amending section 47 of the WHS Act to require:

(a) PCBUs to consult with a representative[82] of a worker, where requested by the worker, and

(b) provide that, where a representative is requested by a worker, the parties agree on the details of when and where the consultation will occur.

4.2 Establishing health and safety committees

Current framework

Part 5 of the WHS Act establishes a framework for HSCs, with the intent to:

- facilitate cooperation between a PCBU and workers to develop and carry out measures to ensure workers' health and safety at work
- assist in developing health and safety standards, rules, and procedures for the workplace, and
- perform other functions prescribed by regulation or agreed with a PCBU (note – currently there are no specific regulations in relation to this).[83]

Under the HSC provisions, PCBUs must set up an HSC within two months of:

[82] Note, amendments to the definition of representative are proposed in recommendation 19B.
[83] WHS Act, section 77.

- being requested to do so by an HSR
- being requested by five or more workers in a workplace, or
- when required by the WHS Regulation (note – currently there are no specific regulations regarding this).[84]

PCBUs can also establish an HSC on their own initiative.[85]

An HSC must meet at least once every three months and at any reasonable time at the request of at least half of the members of the committee or if the WHSO requests a committee meeting.[86]

It is an offence not to establish an HSC within two months of being requested to do so.[87]

Issues raised

In response to ToR (1)(b), the timeframe for establishing HSCs was identified as a key issue. Several submissions focused on the need to ensure HSCs are established promptly following a request. It was noted that current legislative requirements provide a timeframe of two months for PCBUs to establish an HSC. This timeframe is considered unnecessarily long by several stakeholders who argued that this denies workers relevant consultation and issue and dispute resolution functions.

It was also argued that, in some high risk industries, such as the construction or film industry, the timeframe for establishing an HSC becomes even more critical. It was noted that construction sites are by their nature hazardous from their inception and the role of HSCs is essential to the coordination of health and safety activities and compliance across the site, including for various contractors and sub-contractors.

In response to these issues, it was proposed the timeframe to establish an HSC be reduced to seven days or as soon as practicable thereafter, noting any reduction in the timeframe would need to address genuine circumstances of impracticality or unavailability. Alternatively, it was proposed that a standalone provision require the establishment of an HSC, particularly in the construction industry, but also within other hazardous and high risk industries within seven days.

Findings

Various stakeholders made submissions about the substantial length of time taken for PCBUs to establish an HSC after being requested. This was particularly in the context of high risk work such as film shoots, dive boat operations, construction and project based work where the project may only have a short duration. Presently, section 75(1)(a) of the WHS Act provides that an HSC must be established within two months of a request by an HSR or five or more workers.

We consider that the concerns raised in these submissions are legitimate. In circumstances where work groups have been determined and HSRs have been elected, determining the composition of an HSC should not take two months. To that end we

[84] WHS Act, section 75(1).
[85] WHS Act, section 75(2).
[86] WHS Act, section 78.
[87] WHS Act, section 75.

have recommended that the period for establishing an HSC should be shortened to 28 days. We have also recommended that consideration be given to whether a specific regulation should be introduced in respect of high risk work, noting that that term is used in its ordinary sense and not the defined sense in the regulations, to require the establishment of an HSC before work starts. In circumstances where the work is of a short duration and particularly dangerous, there is no reason why the HSC should not be in place before the high risk work starts.

Recommendation 9

A. That the Minister consider amending section 75 of the WHS Act to provide that an HSC be established as soon as practicable but no later than 28 days after a request is made.

B. That the Minister consider whether section 75 of the WHS Act should permit the making of regulations which identify a definition of high risk work and provide that in the case of such high risk work, an HSC must be established before the commencement of the high risk work.

4.3 Constitution of health and safety committees

Current framework

Currently, the constitution of an HSC may be agreed between PCBUs and workers.[88]

At least half the members of an HSC must be workers who have not been nominated by the PCBU.[89] An HSR can also consent to be a member of the committee and, when a workplace has more than one HSR, they can choose one or more to be members.[90] If there is a WHSO for the workplace, the WHSO must be a member of the committee.[91]

If agreement cannot be reached on the composition of an HSC within a reasonable time, any party can request an inspector's assistance to decide the matter.[92] An inspector may decide the constitution of the HSC, or that the committee should not be established. [93] A decision of an inspector is taken to be an agreement between parties.[94] A decision by an inspector relating to the constitution of an HSC is a reviewable decision and can be subject to internal and external review under Part 12 of the WHS Act.[95]

Issues raised

In response to the Review, it was raised that disputes regarding the constitution of HSCs should be lodged directly with the QIRC rather than being determined by an inspector.

[88] WHS Act, section 76(1).
[89] WHS Act, section 76(4).
[90] WHS Act, sections 76(2) and 76(3).
[91] WHS Act, section 76(2).
[92] WHS Act, section 76(5).
[93] WHS Act, sections 76(6).
[94] WHS Act, sections 76(7).
[95] WHS Act, Schedule 2A, section 3.

Stakeholders noted that the involvement of inspectors in the issue and dispute resolution process does not always assist in the resolution of matters and can extend the time for resolution due to lack of powers of inspectors and the review processes that can be applied to any decisions made, including how decisions made can be stayed while a review is underway. Stakeholders also identified concerns about inconsistency in decisions made by the inspectorate between individual inspectors, and between regions.

It was argued that, like other submissions on procedural matters in the WHS Act, the decision-making power currently provided to inspectors should be transferred to the jurisdiction of the QIRC. It was proposed that such a change would align the HSC provisions with the general approach to the discussion, escalation and resolution of disputes found in other parts of the WHS Act.

Findings

Similar to the recommendation made in respect of disputes arising out of the determination of a work group (see chapter 3.2 above), we consider that the dispute procedure for the establishment and constitution of HSCs is not fit for purpose and should be altered.

Given the importance of HSCs, if there is a dispute which is resolved by the inspector, that resolution should stand, and if it is the subject of challenge by one of the parties, it should proceed directly to the QIRC for resolution. That would permit the parties to be fully heard about the matter, with the QIRC conducting a full merits review of the decision. However, subject to any interim order from the QIRC, such as an injunction or stay order, the decision of the inspector should stand.

The major weakness in the present dispute resolution procedure is the absence of there being any status quo for the establishment of an HSC during the period of disputation. It is difficult to see what prejudice would be caused to a PCBU by having to establish an HSC in the form determined by an inspector. Against this, if the disputation about the HSC leads to no decision being made and there being no safety committee established, then there is obvious prejudice to the workers who are denied the important tool that is an HSC.

Despite some of the concerns raised by stakeholders, we believe that inspectors play an important role in the dispute resolution process and that this first step is important to provide an avenue for onsite resolution of the dispute. We would encourage OIR to ensure adequate training is provided to the inspectorate to deal consistently with these disputes.

While we acknowledge that the introduction of this dispute resolution scheme would remove the right of internal review, this is warranted in circumstances where the current regime is not fit for purpose and does not adequately serve the objects of the WHS Act.

Recommendation 10

That the Minister consider amending Part 5, Division 4 of the WHS Act to provide that in the event there is a dispute about the formation or composition of an HSC:

(a) A party is entitled, at any time during the 28 day period proposed in recommendation 9A, to request that the regulator appoint an inspector to resolve the dispute.
(b) Within seven days of being appointed, the inspector must first attempt to assist the parties to resolve the dispute on their own and if such resolution is not possible, make a determination about the formation or composition of the HSC. This decision would be excluded from the internal and external review process.
(c) The parties to the dispute may notify the QIRC about a dispute over that determination. However, pending any order of the QIRC, the determination of the inspector will remain in force until the matter is heard and determined by the QIRC. Specific legislative provisions will need to be added granting the QIRC power to deal with such matters.

4.4 Entry to inquire into suspected contravention – rights that may be exercised

Current framework

Part 7 of the WHS Act provides workplace entry rights for a WHS entry permit holder.

A WHS entry permit holder is a union official who has completed an approved training course and, in addition to a WHS entry permit, also holds, or will hold, an entry permit under the FW Act or the IR Act.

A WHS entry permit allows the holder to enter a workplace to:

- inquire into suspected contraventions of the WHS Act that relate to, or affect, a relevant worker[96]
- inspect employee records or information held by another person,[97] and
- consult on WHS matters with, and provide advice on those matters to, relevant workers.[98]

When a WHS entry permit holder enters a workplace to inquire into a suspected contravention they may:

- inspect any work system, plant, substance, structure, or other thing relevant to the suspected contravention
- consult with the relevant workers in relation to the suspected contravention
- consult with the relevant PCBU about the suspected contravention

[96] WHS Act, section 117.
[97] WHS Act, section 120.
[98] WHS Act, section 121.

- require the relevant PCBU to allow the WHS entry permit holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention and is kept at the workplace or is accessible from a computer that is kept at the workplace, and
- warn any person whom the WHS entry permit holder reasonably believes to be exposed to a serious risk to his or her health or safety, emanating from an immediate or imminent exposure to a hazard, of that risk.[99]

When inquiring into a suspected contravention, a WHS entry permit holder can also inspect or make copies of employee records that are directly relevant to the contravention or other documents that are directly relevant that are not held by that PCBU.[100] In this case, at least 24 hours' notice of the entry must be given to the person from whom the documents are requested, the relevant PCBU and the person with management and control of the workplace.[101] The use or disclosure of personal information obtained in this manner is regulated under the *Privacy Act 1988* (Cth).

Issues raised

The need to reduce adversarial interactions related to workplace entry by WHS entry permit holders and the rights they exercise while on site was a key focus in several submissions to the Review, particularly the ability for these interactions to be counterproductive to the WHS issues central to the purpose of the entry. Key concerns raised included the need to clarify:

- WHS entry permit holders right to remain on site after entry
- notification requirements
- whether photographs and measurements can be taken, and
- how information or documentation obtained during entry can be used.

Entering and remaining

A February 2020 decision of the District Court of Queensland – *Commissioner of Police v Seiffert & Ors* [2020] QDC 50 (*Seiffert*) – considered the interaction of the trespass offence and the right to enter a workplace to inquire into suspected breaches of WHS laws under section 117 of the WHS Act. The court found certain union members trespassed when attempting to exercise a right of entry under the WHS Act. In coming to this conclusion, the court focused on a distinction between rights to enter and rights to remain at premises in sections 11(1) and (3) of the *Summary Offences Act 2005* (SO Act), which covers an exemption to trespass laws for industrial officers.

The court invoked the presumption by courts that the legislature does not intend to interfere with fundamental common law rights, immunities, freedoms, or principles, unless there is a clear statement to that effect (also known as the principle of legality). The court found a clear intent to displace common law privacy rights with respect to

[99] WHS Act, section 118.
[100] WHS Act, section 120.
[101] WHS Act, section 120(5).

entry, but not with respect to remaining (in the event of a dispute). While section 11(1) of the SO Act refers to a right to remain, section 11(3) does not.

On 16 June 2020, Queensland Parliament passed the *Corrective Services and Other Legislation Amendment Act 2020* (Qld), including amendments to section 11 of the SO Act relating to the offence of trespass. Section 11(3) of the SO Act and related provisions—namely sections 12(4) and 13(4)—were amended to ensure that the exceptions to trespass extend to remaining on as well as entering a workplace, and to include within the definition of 'authorised industrial officer' a WHS entry permit holder under the WHS Act.[102]

The amendments to section 11(3) of the SO Act entail a legislative intent to displace the presumption of privacy rights with respect to authorised industrial officers both entering and remaining in a workplace.

Several stakeholders drew attention to this issue in their submissions to the Review and recommended that the Review consider whether the WHS Act requires amendment to clarify that a right to enter also includes a right to remain when exercising a WHS entry permit, consistent with the amendments made to the SO Act.

Scope of notice requirements

Section 120 of the WHS Act covers the topic of entry to inspect employee records or relevant information held. Section 120(5) of the WHS Act requires notice to be given at least 24 hours, but not more than 14 days, before the entry.

It was raised in submissions that section 120(5) of the WHS Act has resulted in disputes about the purpose of 24 hours' notice and proposed that it be clarified that the 24 hours' notice is only required with respect to accessing employee records and for information held by a person other than the PCBU at the workplace. It was argued that this would make clear that documents held at the workplace, such as risk assessments, do not require 24 hours' notice.

On the same general topic, section 122 of the WHS Act, which falls within Division 3 (Entry to consult and advise workers), provides that at least 24 hours' notice is required to enter a workplace to consult with and advise workers.[103] It was noted that this approach is inconsistent with the FW Act and proposed that entry to hold discussions should not require 24 hours' notice and therefore delay discussions on safety matters, particularly where the discussion relates to a suspected contravention.

Taking photographs and measurements

Stakeholders raised that the precise scope of what is considered to fall within the term 'inquiring' into a suspected contravention is not spelled out in the WHS Act in detail. Several activities that are considered a common component of a workplace inquiry were identified as not explicitly permitted by the WHS Act at present. Examples included information gathering activities such as using a smartphone to take photographs or videos, using a noise meter, or using a dust monitor. In relation to these

[102] SO Act, Schedule 2.
[103] WHS Act, section 122(3).

issues, parallels were drawn with section 89(1)(ba) of the *Occupational Health and Safety Act 2004* (Vic), which specifically allows for photographs, measurements, sketches, and recordings.

It was recommended to the Review that section 118 of the WHS Act be amended to clarify that WHS entry permit holders have the right to:

- take photographs or measurements or make sketches or recordings at the workplace
- bring to the workplace and use any equipment required to assist in relation to a suspected contravention
- take measurements, conduct tests, or make recordings, and
- take and remove substances for analysis.

Findings

Several submissions were made by stakeholders about the rights that may be exercised by WHS entry permit holders when entering premises pursuant to section 117 of the WHS Act. A number of those submissions concerned clarifications of the rights that may be exercised to bring section 118 of the WHS Act into line with existing practice.

The first issue which arose was making section 118 of the WHS Act consistent with the SO Act. In *Seiffert & Ors v Commissioner of Police* [2021] QCA 170, the prosecution alleged that WHS entry permit holders who had lawfully entered a premises in accordance with section 117 of the WHS Act were not entitled to remain at the premises where their entry was disputed by the occupier. Ultimately, the Court of Appeal held that Part 7 of the WHS Act conferred a right to enter and remain for so long as was necessary to investigate the suspected contravention which was the subject of the entry. To avoid further disputation, section 118 of the WHS Act should be amended to make clear that WHS entry permit holders are not only entitled to enter a premises but to remain for so long as is necessary to carry out their statutory function.

A further issue which arose in the stakeholder submissions concerned confusion arising from the power in section 118(1)(d) of the WHS Act for WHS entry permit holders to inspect documents related to the suspected contravention. Section 120(5) of the WHS Act requires a WHS entry permit holder to wait 24 hours for any requested documents relating to an employee. Often, the suspected contravention being investigated by a WHS entry permit holder will concern the adequacy of the training or qualifications of a particular worker to perform work. In circumstances where the employer's records about that employee are relevant to the suspected contravention, it would undermine the scheme and the entry under section 117 of the WHS Act if the WHS entry permit holder had to wait 24 hours. Accordingly, section 118(1)(d) of the WHS Act should be amended to confirm that the documents a WHS entry permit holder may inspect include employee records where they are relevant to the suspected contravention without waiting 24 hours.

A similar issue concerned the interrelationship between sections 118, 121 and 122 of the WHS Act. Section 121 of the WHS Act provides that a WHS entry permit holder may enter a premises for the purpose of consulting about WHS matters. Section 122 of the

WHS Act provides that 24 hours' notice must be given. Section 118(1)(b) of the WHS Act provides that a WHS entry permit holder may consult a relevant worker.

Submissions were made about circumstances where WHS entry permit holders enter a premises in respect of a suspected contravention, the PCBU accepts that the suspected contravention exists and takes steps to remedy that contravention, and the workers request that the WHS entry permit holders provide them advice about what steps were taken to close out the safety issue. In those circumstances, the suspected contravention has been addressed and the basis for entry has dissipated and the WHS entry permit holders would not be permitted to conduct such consultations under section 118(1)(b) of the WHS Act. This is a defect as the provision of detailed advice to the workers about the steps taken to remedy an issue is an important matter. Accordingly, section 118(1)(b) of the WHS Act should be amended to make clear that a WHS entry permit holder may consult with workers about the rectification of any suspected contravention.

Another issue which arose in the submissions concerned WHS entry permit holders' capacity to take photographs, make videos, or take measurements or samples when conducting an inspection. In *Kirby v JKC Australia LNG Pty Ltd* [2015] FCA 1070, White J, in an interlocutory judgment, expressed the preliminary view that section 118 of the model WHS laws did not permit a WHS entry permit holder to take photographs.[104]

In our view, there is obvious merit in WHS entry permit holders being able to take photographs, make videos, take measurements and/or samples of the issues they are investigating. A central part of the WHS entry permit holder role is to investigate suspected contraventions and take steps to have those matters addressed. We also note that there was general consensus among employer representatives consulted that such conduct was common and the inclusion of it in section 118 of the WHS Act would be uncontroversial. This is also consistent with the amendments that have been made to section 89 of the *Occupational Health and Safety Act 2004* (Vic). Accordingly, section 118 of the WHS Act should be amended to make clear that WHS entry permit holders may take photographs, make videos, and/or take measurements and samples during any entry.

A corollary issue arises in respect of the recommendation to permit WHS entry permit holders to take photographs and the like. Section 148 of the WHS Act limits the use of information gathered in accordance with Part 7 of the WHS Act to the purposes described in that section. There are several exceptions. During consultation, both union representatives and some employer representatives agreed that photographs and videos taken by WHS entry permit holders about safety issues were regularly used as educational tools by both employers and unions. Those employer representatives indicated that this was of significant value in the training they provided.

We consider that this would be permitted by section 148(a) of the WHS Act as it presently stands. However, to avoid any confusion, section 148(a) of the WHS Act should be amended to make clear that the risk of injury or danger to public safety is not related to the suspected contravention but to a risk of injury or danger to public safety at large. That is, if a photograph of a particular dangerous act is taken, that photograph

[104] See [46] to [49] of the decision.

can be used to highlight the danger associated with the particular practice and not just the incident that is the subject of the photograph.

Recommendation 11

That the Minister consider amending section 118 of the WHS Act to:

(a) provide that WHS entry permit holders are permitted to remain at the premises for so long as is necessary to complete the exercise of their statutory powers, subject to the limitation imposed by section 126 of the WHS Act

(b) confirm that a WHS entry permit holder is entitled to gain access to employee records that relate to the suspected contravention without needing to wait the 24 hours provided for in section 120 of the WHS Act. This would also require changes to allow WHS permit holders to consult with workers about the resolution and finalisation of any suspected contraventions without the need to give 24 hours' notice as required by section 122 of the WHS Act, and

(c) provide that WHS entry permit holders may take photographs, take videos, or make measurements and/or samples while at the premises.

Recommendation 12

That the Minister consider amending section 148(a) of the WHS Act to make clear that the risk of injury or danger to public safety referred to is not related to the suspected contravention, but a risk of injury or danger to public safety at large.

4.5 Entry to inquire into suspected contravention – notice of entry

Current framework

Under the WHS Act, a WHS entry permit holder must, as soon as is reasonably practicable after entering a workplace to inquire to a suspected contravention, give notice of the entry, and the suspected contravention, to the relevant PCBU and the person with management or control of the workplace.[105] However, the requirement to give notice does not apply if giving notice would defeat the purpose of the entry to the workplace or unreasonably delay the WHS entry permit holder in an urgent case.[106]

Issues raised

In response to the Review, it was raised that the timing and purpose of notices required under section 119 of the WHS Act are sometimes misunderstood. It was suggested that sometimes notice of entry under section 119 of the WHS Act is interpreted as being required prior to entry, despite section 119 containing the words 'after entering'. For the avoidance of doubt, it was recommended that a more explicit statutory statement be provided to prevent misunderstanding.

[105] WHS Act, section 119(1).
[106] WHS Act, section 119(2).

Findings

Several submissions were made about disputation that occurs between PCBUs and WHS entry permit holders over the provision of a notice of entry under section 119 of the WHS Act. The inspectorate also provided information which revealed that, at least in the construction sector, disputation about entry and the adequacy of the notice were not uncommon.

In short, the submissions reveal that, when disputation occurs, it is usually in circumstances where a notice of entry had been provided prior to entry and there is debate as to whether the notice is adequate, or the WHS entry permit holder proposed to provide the notice after entry as provided for in section 119 of the WHS Act, and the PCBU refused entry because notice had not been provided.

To consider this issue, it is necessary to say a few things about the statutory scheme of entry. Section 117 of the WHS Act provides:

> (1) A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of this Act that relates to, or affects, a relevant worker.
>
> (2) The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring.

Section 119 of the WHS Act makes provision for notice of entry which must be given as soon as reasonably practicable *after* entering the workplace.

The statutory scheme provides that if a WHS entry permit holder reasonably suspects a contravention of the WHS Act they may enter a workplace for the purpose of inquiring into that suspected contravention. As soon as reasonably practicable after entry to the workplace, the WHS entry permit holder must give a notice recording his or her entry to the PCBU and the person with management or control of the workplace.[107]

Under the FW Act, a right of entry is not conditioned upon a permit holder giving sufficient or indeed any particulars of the contravention to the occupier prior to the entry. As Justices Dowsett and Collier (with O'Callaghan J agreeing) said in *Ramsay v Menso* (2018) 260 FCR 506 at paragraph 30:

> *We agree with his Honour the right of entry under WHS Act is subject to strict guidelines. However, contrary to his Honour's findings, neither the completion nor the provision of a notice of entry by the permit holder to the person conducting a business or undertaking, or the person with control or management of the workplace, is a pre-requisite to the exercise of right of entry.*

The statutory intention behind this part of the scheme is clear. First, it obviously permits entry to be effected without entry notices being prepared in urgent circumstances. However, more importantly, it prevents the possibility of arguments

[107] WHS Act, section 119(1).

occurring about whether a notice is sufficient to warrant entry. The notice is no more than a record of the entry and a record of the relevant suspicions. It is not a pre-condition to entry.

As was identified by the majority in *Ramsay v Menso* at [40], the fact that the legislation requires the notice to be provided after entry counts against the contention that non-compliance with a requirement for the notice would invalidate the entry.

The evident legislative purpose of the provision of a notice is to provide a record of who entered and the purported basis on which they entered.[108] That creates a contemporaneous record against which subsequent justification for entry can be tested. However, there is no suggestion in the legislative scheme that defects with the notice somehow invalidate the entry. If that was so, one would reasonably expect that the notice would have to be given prior to entry. The fact that it is given after entry indicates that non-compliance with the requirements would not invalidate the entry. Further, WHS entry permit holders can refuse to provide a notice if they feel that the provision of the notice would frustrate the purpose of their entry.

In circumstances where the entry notice is not required to be given until after a WHS entry permit holder has entered, we consider that section 119 of the WHS Act should be clarified to make clear that the validity of any entry does not depend upon the entry notice. This should avoid issues with PCBUs or persons with management or control of the workplace refusing to grant entry on the basis that no notice had been given prior to entry or puerile disputes about the adequacy of the notice.[109]

To avoid doubt, nothing in this recommendation usurps the need for an official of a federally registered union to be a federal permit holder under Part 3-4 of the FW Act to exercise a state or territory WHS right, including a right to enter a workplace conferred by state WHS laws. This includes entry under section 70(2)(g) and 81(3) of the WHS Act. In particular, the decision in A*ustralian Building and Construction Commissioner v Powell* [2017] FCAFC 89 should be considered in light of 70(2)(g) and 81(3).

Recommendation 13

That the Minister consider amending section 119 of the WHS Act to clarify that the provision of the notice is not a pre-condition to entry and that any defects or invalidity in the notice issued does not affect the validity of an entry pursuant to section 117 of the WHS Act.

4.6 Requirements for WHS entry permit holders

Current framework

Part 7, Division 4 of the WHS Act outlines requirements for WHS entry permit holders, setting out eight forms of prescribed activity from sections 123 to 130.

[108] See *Ramsay v Menso* at [42].

[109] See Ramsay *v. Menso* (at first instance) where the dispute was whether the failure to include the permit holder's middle name rendered the entry invalid.

Work health and safety requirements

Section 128 of the WHS Act provides that:

> A WHS entry permit holder must not exercise a right of entry to a workplace under Division 2 or 3 unless he or she complies with any reasonable request by the relevant PCBU or the person with management or control of the workplace to comply with—
>
> (a) any WHS requirement that applies to the workplace; and
>
> (b) any other legislated requirement that applies to that type of workplace.

This is a WHS civil penalty provision carrying a maximum penalty of 100 penalty units.

Disclosing names of workers

Section 130 of the WHS Act provides that:

> (1) A WHS entry permit holder is not required to disclose to the relevant PCBU or the person with management or control of the workplace the name of any worker at the workplace.
>
> (2) A WHS entry permit holder who wishes to disclose to the relevant PCBU or the person with management or control of the workplace the name of any worker may only do so with the consent of the worker.

No penalty is attached to section 130 of the WHS Act.

Other prescribed activity in Division 4 of the WHS Act includes contravening conditions imposed on a WHS entry permit,[110] holding a permit under other law,[111] having a WHS entry permit and photo identification available for inspection,[112] exercising rights only during usual work hours at a workplace,[113] exercising rights only at relevant parts of a workplace,[114] and not entering a place only used for residential purposes.[115]

Issues raised

Work health and safety requirements

In response to the Review, it was identified by some stakeholders that section 128 of the WHS Act lacks clarity and therefore gives rise to divergent views as to what is a 'reasonable' WHS request. It was submitted that section 128 of the WHS Act is being used to frustrate entry by WHS entry permit holders. Examples include:

- requiring WHS entry permit holders to be inducted into a workplace, even though they have been inducted previously or induction would require travel to a different location away from where entry is sought

[110] WHS Act, section 123.
[111] WHS Act, section 124.
[112] WHS Act, section 125.
[113] WHS Act, section 126.
[114] WHS Act, section 127.
[115] WHS Act, section 129.

- requiring WHS entry permit holders to 'sign in' at a workplace, even though the WHS entry permit holder has already been identified through their entry notice/permit, and
- prohibiting entry by WHS entry permit holders to certain areas, including the area that relates to the suspected contravention, on the basis that the area has been identified as an exclusion zone.

To address this issue, it was recommended to the Review to include clear guidance within the WHS Act, as to what are, and are not, reasonable WHS requirements under the WHS Act. It was also suggested that clarity be provided around the completion of an induction course on WHS for the worksite and wearing of appropriate personal protective equipment (PPE).

Worker anonymity

In deliberating the requirements on WHS entry permit holders, the Review identified a further concern with section 130 of the WHS Act. Specifically, while section 130 prohibits a WHS entry permit holder from directly disclosing the name of any worker who has provided information to them without the worker's consent, it appears this information can still be obtained indirectly by way of a subpoena to a third party who is not the WHS entry permit holder.

Findings

Work health and safety requirements

Several submissions were received about section 128 of the WHS Act and WHS requirements being used as a means for stifling or hindering WHS entry permit holders exercising their right to enter under section 117 of the WHS Act. In summary, the submissions provided that when WHS entry permit holders sought to enter certain work areas, their entry was frustrated either by an assertion that a WHS entry permit holder could not enter without first completing an induction which could only be completed at a location which was hours away, or alternatively could not investigate the suspected contravention because it was in part of the worksite which was deemed to be an exclusion zone; that is, an area where dangerous work was being performed and only the workers performing that work were entitled to enter.

Section 128 of the WHS Act has three elements, being:

(a) there must be a WHS requirement at the workplace
(b) there must be a request from the PCBU for the WHS entry permit holder to comply with that requirement, and
(c) the request must be objectively reasonable.

The structure of section 128 of the WHS Act recognises that the WHS requirements which apply at a site do not automatically apply to a WHS entry permit holder exercising the rights conferred by sections 117 and 118 of the WHS Act. If they did, there would be no need for the PCBU to make a reasonable request to comply. Further, such an outcome would permit the PCBU's policy to defeat the statutory rights conferred by sections 117 and 118 of the WHS Act.

The rationale for section 128 of the WHS Act being framed in this way can be illustrated by Justice Gray's observations in *Curran v Thomas Borthwicks & Sons (Pacific) Ltd* (1990) 26 FCR 241 which was a non-safety right of entry case. At [257] his Honour held:

> *Applying this approach to the statutory provisions applicable in the present case, it will be seen that the content of the obligation not to hinder or obstruct may differ as between an employer confronted by an officer seeking to exercise the rights of entry, inspection and interview, and the officer exercising those rights whilst employees are carrying out their work during working hours. A few examples may suffice. It may only be possible to inspect a particular part of premises by standing in one spot. That spot may happen to be part of a passageway used for the wheeling of trolleys, which is an essential part of the work of employees on those premises. Trolleys cannot be wheeled through the passageway while an officer is standing inspecting the part of the premises. There will be no hindrance or obstruction of the work of any employee, even if one attempts to wheel a trolley through the passageway and is unable to do so. If remaining in the spot for the legitimate purpose of inspecting amounted to a hindrance or obstruction of the employee, the right to inspect would be negated entirely. In contrast, a refusal to move from the passageway after the completion of the inspection of the particular part of the premises would amount to hindering or obstructing an employee.*

As is illustrated by this passage, it goes without saying that sometimes the nature of the suspected contravention will mean that the investigation of it requires that work must cease so that the investigation can be safely performed. It is for that reason that the WHS requirements at a particular workplace do not automatically apply to WHS entry permit holders. However, whilst the WHS requirements do not automatically apply, they can be invoked by a reasonable request from the PCBU.

It is a serious concern that the right granted by sections 117 and 118 of the WHS Act could be frustrated by reliance on a purportedly reasonable request to comply with WHS requirements, which is, in truth, no more than a scheme to defeat the entry.

To address this, section 128 of the WHS Act should be amended to clarify that a PCBU cannot require a WHS entry permit holder to comply with a WHS requirement at the site if compliance with that requirement would unreasonably hinder or delay the exercise of the statutory rights. This would make clear that the mere fact that the suspected contravention being investigated required a particular process or work type to be temporarily suspended does not mean that the right of entry could be defeated by saying that it is a WHS requirement that no person could go in that area except the workers performing the task.

Worker anonymity

There is an issue in respect of section 130 of the WHS Act. The explanatory note to section 130 of the WHS Act provides as follows:

Clause 130 provides that a WHS entry permit holder is not required to disclose the names of workers. The operation of the definition of 'relevant worker' means that a WHS entry permit holder may only exercise a right of entry at a workplace where there are workers who are members, or eligible to be members, of the relevant union.

Clause 130 protects the identity of workers by providing that a WHS entry permit holder is not required to disclose the names of any workers to the relevant PCBU or the person with management or control of the workplace. However, a WHS entry permit holder can disclose the names of members with their consent. Note that Clause 148 deals separately with unauthorised disclosure of information and documents obtained during right of entry in relation to all workers.

(Emphasis added)

The evident purpose of section 130 of the WHS Act is to protect workers who provide information to WHS entry permit holders that gives rise to a reasonable suspicion.

While section 130 of the WHS Act prohibits a WHS entry permit holder from directly disclosing the name of any worker who has provided information to them in respect of their entry, the provision does not operate in respect of a person other than the WHS entry permit holder. What that means is while the WHS Act ensures that a WHS entry permit holder cannot be required to directly disclose which worker it was that provided them with information concerning their suspected contravention, that information can be obtained indirectly by way of subpoenaing a third party (such as a telecommunications company or the WHS permit holder's union) who is not the WHS entry permit holder. This loophole should be closed. If the legislation recognises that a PCBU should not be able to obtain the identity of the worker who provided information to the WHS entry permit holder directly from the WHS entry permit holder, that information should not be able to be extracted from a third party.

There are other examples where legislation deems that it is in the public interest for certain information not to be capable of being produced in court. For example, section 19 of the *Hospital and Health Services Board Act 2011* (Qld) provides that documents or information obtained in a root cause analysis cannot be accessed under any court order and are not admissible in any proceeding. A similar provision would close the loophole that presently permits the identity of an informant to be extracted from a party other than a WHS entry permit holder.

Recommendation 14

That the Minister consider amending section 128 of the WHS Act to clarify that a PCBU cannot require a WHS entry permit holder to comply with an occupational health and safety requirement at the site if compliance with that requirement would unreasonably hinder or delay the exercise of the statutory rights conferred by sections 117 and 118 of the WHS Act or would otherwise defeat the exercise of those rights.

Recommendation 15

That the Minister consider requesting OIR to explore all mechanisms available to ensure the anonymity of the worker and prevention of any adverse action including any necessary amendments to clarify section 130 of the WHS Act.

4.7 WHS civil penalty provisions

Current framework

If the words 'WHS civil penalty provision' appear in a provision of the WHS Act or WHS Regulation in conjunction with a monetary penalty, the provision is a WHS civil penalty provision.[116] Where this occurs, this means that any penalty for a contravention is imposed on a civil, rather than criminal, basis.

In the WHS Act, WHS civil penalty provisions are mainly found in Part 7 which sets out the framework for workplace entry by WHS entry permit holders. The exception is section 102C of the WHS Act which applies a WHS civil penalty for contravening an order by the QIRC to deal with a dispute under Part 5, Division 7A of the WHS Act.

For WHS civil penalty provisions under Part 7 of the WHS Act, some of the prohibitions relate to WHS entry permit holders themselves (e.g. a WHS entry permit holder may exercise a right only during the usual working hours at the workplace).[117] Others relate to persons who interact with WHS entry permit holders in the performance of their functions and powers (e.g. a PCBU must not, without reasonable excuse, refuse or unduly delay entry to a workplace).[118]

Currently there are no WHS civil penalty provisions in the WHS Regulation.

Proceedings for a contravention of a WHS civil penalty provision may only be brought by the Work Health and Safety Prosecutor (WHSP).[119] The proceedings can be brought in the Magistrates Court[120] within two years after the contravention first comes to the notice of the WHSP.[121]

A contravention of a WHS civil penalty provision is not an offence.[122]

Issues raised

In response to the Review, several stakeholders identified concerns regarding who can take action for breaches of a WHS civil penalty provision. It was noted that while a union or a WHS entry permit holder can bring a dispute to the QIRC about the exercise of their rights under section 142(4)(b) of the WHS Act, they are unable to bring a matter

[116] WHS Act, section 254.
[117] WHS Act, sections 123-126; and 128-129.
[118] WHS Act, sections 118(3), 143, 144(1), 145-146, 147(1)(b), 148(e), 149(1), and 150(c).
[119] WHS Act, section 260.
[120] WHS Act, section 255(1).
[121] WHS Act, section 261.
[122] WHS Act, section 257.

for an order that a PCBU or other person has obstructed, delayed, or hindered access to a workplace by a WHS entry permit holder under the WHS Act.

It was argued that this is inconsistent with the FW Act where a person affected by a contravention, including a registered union, has standing to bring an application for a civil penalty under section 539, item 25 of the FW Act. It was noted this includes circumstances when the permit holder has been obstructed in exercising their rights. It was argued that it is not appropriate for only the WHSP to have standing to pursue these matters, and it was recommended that the Review consider giving registered unions and other persons affected by a contravention of the WHS Act standing to bring an application for a breach of a civil penalty provision, including for prohibitions in the exercise or application of WHS entry permits.

Findings

When the model WHS laws were first introduced, considerable thought was given to the question of who should have the right to prosecute. After a lengthy debate, it was determined that the right to prosecute should be restricted to the regulator. Accordingly, only the WHSP may commence proceedings for an offence against the WHS Act, including proceedings for a WHS civil penalty provision.[123]

Sections 144 to 148 of the WHS Act are civil penalty provisions which regulate the right of entry for WHS entry permit holders. These sections impose obligations both on permit holders and persons at the workplace in respect of their conduct.

Part 3-4 of the FW Act makes provision for right of entry to work sites by permit holders under the FW Act. It does this in two different ways depending on the type of entry sought to be exercised. Division 2 creates a right of entry in respect of investigation of contravention, or to hold meetings with members. Division 3 operates in respect of state OHS rights.[124]

Under Division 3, state OHS rights can only be exercised if the requirements of that division of the FW Act are met. In effect the FW Act superimposes additional obligations on state permit holders (in sections 495 to 499 and 503-4), but it also provides them with additional protections (in sections 501-2).[125]

Section 501 of the FW Act provides that a person must not refuse or unduly delay entry onto a premises by a permit holder who is entitled to enter the premises in accordance with that Part. Section 502 makes similar provision in respect of obstruction or hindrance.

As was identified by Reeves J in *Ramsay & Anor v. Sunbuild* (2014) 221 FCR 315, provided that the permit holders have complied with the requirements of Part 3-4 of the FW Act, the civil penalty offence contained in section 501 is available where a

[123] WHS Act, section 260.

[124] Section 27 of the Fair Work Act excludes state occupational health and safety laws from the ambit of s.26 which makes provision for the Fair Work Act to prevail over state laws.

[125] Interaction of the Federal and state legislative schemes was considered generally in *Ramsay v Sunbuild Pty Ltd* (2014) 221 FCR 315. That decision was approved in *Ramsay v Menso* (2018) 260 FCR 506 by the plurality at 23, the third member of the Court, O'Callahan J agreeing at 74.

person refuses entry or unduly delays entry. Equally, the civil penalty offence contained in section 502 is also available – see [101] and [102]. The effect of this is that WHS entry permit holders under the WHS Act, who are also permit holders under the FW Act and who seek to enter premises of a PCBU who is covered by the FW Act, may commence proceedings in the Federal jurisdiction alleging that the occupier hindered or obstructed them. Similarly, under the FW Act, an occupier may commence proceedings alleging that the permit holders have misbehaved.

In light of the fact that WHS entry permit holders who are officials of federal unions and occupiers who are covered by the FW Act are presently able to bring proceedings for contraventions of sections 500 to 502 of the FW Act, which are effectively the same provisions as sections 144 to 147 of the WHS Act, in either the Federal Circuit Court of Australia or the Federal Court of Australia, there is no longer any utility in the restriction on standing to commence proceedings for contraventions of sections 144 to 147 of the WHS Act. Accordingly, the WHS Act should be amended to give registered unions, WHS entry permit holders and occupiers the capacity to commence proceedings for contravention of those civil remedy provisions.

Further, in circumstances where the QIRC deals with all matters concerning right of entry disputes under the WHS Act and the IR Act, and has a civil penalty jurisdiction, it is appropriate for those proceedings to be brought in the QIRC and not the Magistrates Court.

Recommendation 16

A. That the Minister consider amending the WHS Act to give registered unions, WHS entry permit holders, and persons affected standing to commence civil penalty proceedings for contraventions of sections 126 and 144 to 147 of the WHS Act. Further, in consultation with OIR, consideration be given to whether it is desirable for the persons identified to be given standing to commence civil penalty proceedings for the balance of civil penalty offences contained in Part 7 of the WHS Act.

B. That the Minister consider amending the WHS Act to transfer civil penalty proceedings for a contravention of a WHS civil penalty provision to the QIRC.

Chapter 5: Review of enforcement notices

Review ToR 1(c)

Consider and report on any need for amendments to ensure the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act.

This chapter examines the effectiveness of the legislative framework for review and stay provisions with enforcement notices. The effectiveness of these provisions has been considered with reference to the objects of the WHS Act, in particular:

- securing compliance with the WHS Act through effective and appropriate compliance and enforcement measures
- ensuring appropriate scrutiny and review of actions by persons exercising powers and performing functions under this Act, and
- providing a framework for continuous improvement and progressively higher standards of WHS.[126]

The legislative framework empowers inspectors appointed under the WHS Act to enforce compliance by issuing notices, as set out in Part 10 of the WHS Act. Notices include:

- an improvement notice – may be issued where an inspector reasonably believes that a person is contravening a provision of the WHS Act, or has contravened the WHS Act in circumstances that make it likely that the contravention will continue or be repeated[127]
- a prohibition notice – may be issued if an inspector reasonably believes that an activity is occurring, or may occur, at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard,[128] and
- a non-disturbance notice – may be issued if an inspector reasonably believes that it is necessary to do so to facilitate the exercise of their compliance powers[129] to preserve an incident site or prevent the disturbance of an incident site.[130]

Enforcement notices issued for non-compliance are subject to review rights. A person whose interests are affected by a notice may apply for an internal review of the decision to issue the notice. Applications for review must be made within 14 days or, if the decision relates to an improvement notice, the period stated for compliance with the notice or 14 days, whichever is the lesser.[131]

[126] WHS Act, section 3(1).
[127] WHS Act, section 191(1).
[128] WHS Act, section 195(1).
[129] WHS Act, section 198.
[130] WHS Act, section 199(1).
[131] WHS Act, sections 224- 228.

Based on submissions received from stakeholders and targeted consultation meetings, the review found that overall, the legislative framework for review and stay provisions with enforcement notices is functioning well and as intended. One specific issue raised with the review was legal costs associated with external review hearings conducted in the QIRC. This issue is considered in further detail below.

5.1 Application of review and stay provisions to enforcement notices

Current framework

Part 12, Division 1 of the WHS Act identifies what decisions made under the WHS Act are reviewable, who is eligible to apply for review of a reviewable decision, and the body to hear and decide the review.[132] Examples of reviewable decisions include:

- a decision following failure to commence negotiations for a work group[133]
- a decision relating to the constitution or establishment of an HSC[134]
- a decision on a PIN[135]
- issuing of an improvement notice,[136] and
- a decision regarding an extension of time for compliance with an improvement notice.[137]

In general, workers, HSRs and PCBUs affected by a decision have standing to apply for a review of that decision.

Internal review

Internal reviews are undertaken by OIR's Review and Appeals Unit. The Review and Appeals Unit is an independent unit responsible for managing the dispute resolution functions across all regulatory schemes administered by OIR, including WHS, electrical safety, workers' compensation, and labour hire licensing. Review and Appeals staff have specialist capabilities in statutory interpretation, administrative decision-making, and litigation.

Under section 228 of the WHS Act, when an application is made for an internal review of a reviewable decision, the notice is automatically stayed. However, a decision on a prohibition notice or non-disturbance notice is not automatically stayed.[138]

If an application for internal review is made regarding a prohibition notice or non-disturbance notice, the internal reviewer may stay the operation of an inspector's decision to issue the notice. The decision can be made by the internal reviewer on the reviewer's own initiative or on request by the applicant.[139] Where an applicant has

[132] WHS Act, section 233(1)(a) – (c). All reviewable decisions are set out in Schedule 2A of the WHS Act.
[133] WHS Act, section 54(2).
[134] WHS Act, section 76(6).
[135] WHS Act, section 102.
[136] WHS Act, section 191.
[137] WHS Act, section 194.
[138] WHS Act, section 228(1).
[139] WHS Act, section 228(3).

requested a stay, the internal reviewer has one working day to decide whether to stay the notice or not,[140] otherwise the notice is stayed.[141]

On application by an eligible person for internal review of a reviewable decision, the internal reviewer must review the decision and make a decision within 14 days after the application is received. [142]

External review

Following internal review, applicants may choose to apply to the QIRC for external review of decisions relating to enforcement notices. A stay of the operation of a decision is not automatic on an application for external review. However, the QIRC may grant a stay on application by a party to secure the effectiveness of the review.[143]

Applicants can be self-represented in proceedings before the QIRC and generally parties bear their own costs of a proceeding unless a party applies to the QIRC for a costs order. The Review was advised that, in practice, legally represented applicants will seek such a costs order where they are successful at external review.

Issues raised

Stakeholders generally expressed positive feedback in relation to the review and stay provisions under the WHS Act. Industry representative stakeholders were of the view that the current review and stay process is appropriate.

However, some stakeholders raised concerns that review provisions can be used to allow unmanaged hazards to remain unaddressed pending the review process. The Review was made aware of complaints that some PCBUs routinely seek review of notices in order extend the time they have for compliance.

Concerns were also raised regarding the automatic stay of a decision under section 228(1) of the WHS Act and the effectiveness of this provision. It was highlighted that improvement notices can be stayed for extended periods of time because of the internal and external review process without any associated risk assessment being conducted, potentially exposing workers to heightened risks.

It was suggested that there be a higher bar to initiate a stay, or that where there is a stay in place, the internal review is to be expedited in a timelier manner. It was also suggested that an alternate solution is to remove automatic stays on application for review, and instead require an application to be made for a stay.

Findings

OIR advised that for the 2021-22 financial year, 151 internal review applications were made. A total of 25 applications were cancelled or withdrawn, with the remaining 126 applications decided upon. Of the 126 decided applications, 67% were confirmed.

[140] WHS Act, section 228(4).
[141] WHS Act, section 228(5).
[142] WHS Act, section 226(1).
[143] WHS Act, section 229C.

Further, there were 56 external review applications in 2021-22, however 43 of these applications were withdrawn or lapsed. Only five external reviews in 2021-22 were decided in the QIRC, with the regulator determining that the remaining eight appeals could not be defended and recommending the inspectorate cancel the notices.

In the 2021-22 financial year, there were 13,212 improvement notices issued. Of those improvement notices, 0.84% were the subject of an internal review application. Further, there were 1,768 prohibition notices issued and 50 applications for internal review in respect of those prohibition notices. Of the 50 applications for internal review of the prohibition notices, nine were subject of an application for a stay which was allowed in three cases.

By far, most statutory notices were issued to PCBUs in the construction industry. For the same period (2021-22), 6,567 improvement notices and 1,267 prohibition notices were issued. Similarly, there were 55 applications for internal review concerning the improvement notices and 10 applications for internal review were made in respect of the prohibition notices. That means that, within the construction industry, approximately 0.84% of the improvement notices were the subject of an application for internal review and automatic stay.

Several submissions made to the review raised concerns about the internal review process and the automatic stays which operate in respect of applications for internal review. It is acknowledged that the automatic stay provisions could be the subject of abuse. Indeed, the example referenced above at Chapter 3.2 in respect of reviews about decisions over work groups provides an example of how the internal and external review processes might be used to avoid the operation of the WHS Act's beneficial provisions. However, in circumstances where such a small percentage of the improvement notices are the subject of an application for internal review and automatic stay, it is difficult to see the justification for broad changes to the regime.

The alternative mechanism would be to make the stay for an application for internal review optional. If that was the case, a senior officer within OIR would have to be responsible for receiving those applications and determining them. As it presently stands, those applications in respect of prohibition notices are dealt with at the director level. Given the relatively small number of applications for stays of prohibition notices, that workload is not particularly high. However, real concern exists that if stays could be sought with every internal review application and had to be decided by an officer of OIR, resources would be diverted away from important compliance work to dealing with those applications.

In circumstances where the empirical evidence suggests that the internal review applications and automatic stays only affect a very small number of improvement notices, and given the real concerns about the deleterious effect on compliance resources if the stays were not automatic, we have not recommended any change to these provisions. However, given the capacity for abuse, the regulator should continue to monitor the number of improvement notices which are the subject of application for internal review, the results of those applications, and the identity of the persons making them. If it becomes apparent that those provisions are being abused, even by a small number of PCBUs, the legislative position should be reviewed.

5.2 Costs for external review

Current framework

The QIRC has jurisdiction over dispute resolution for most decisions of two statutory regulatory bodies, being the workers' compensation regulator under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCR Act) and the regulator under the WHS Act. While the WCR Act contains specific provisions in relation to costs of representation on workers' compensation appeals, the WHS Act is silent in terms of costs of representation on external review hearings and applications for stay of operation of the decision under review.

Issues raised

Regarding the effectiveness of the legislative framework in relation to external reviews and stay applications in the QIRC, costs of representation associated with external reviews and/or stay applications are determined under the QIRC's general power to award costs under the IR Act.[144]

It was submitted that the costs provisions of the IR Act were targeted at general industrial disputes between employees and employers and arguably do not adequately address the complexities of litigation between individuals and a regulatory authority (e.g. on an application for external review).

Section 229D(1) of the WHS Act provides that:

> (1) The procedure for an application for a review is to be under the rules applying to applications for review by the commission under the Industrial Relations Act 2016 or, if the rules make no provision or insufficient provision, in accordance with the directions of the commission.

It was noted that, at the time an external review application is filed in the QIRC, an applicant (e.g. the PCBU) is aware of all relevant facts in relation to the workplace as at the date of the alleged breach. The Review and Appeals Unit (as delegate of the regulator), however, must investigate the relevant facts, including in-depth conferencing with witnesses such as the inspector who issued the notice, when determining whether to consent or object to a stay application and when deciding whether to continue to defend the internal review decision.

According to the Review and Appeals Unit, applicants are increasingly seeking costs of external review proceedings in circumstances where the regulator has performed timely investigations which have resulted in the inspectorate withdrawing notices well in advance of a hearing being listed. The Review and Appeals Unit provided examples where applications for costs have been made by applicants in circumstances where a decision was made by the inspectorate to withdraw notices following investigations by the regulator.

[144] IR Act, section 545.

It was proposed to the Review that the WHS Act be amended to reflect that costs may be awarded in relation to a hearing, as opposed to costs of the proceeding. It was suggested that this would ensure that WHS disputes are resolved effectively as intended. The potential outcomes of adopting this approach are that:

- applications for stay and external review can be appropriately considered by the regulator by focusing on the health and safety of workers and other persons, unencumbered by the risk of having to defend a costs application when further investigations are required to be made
- applicants and the regulator retain the legal right to seek costs of a hearing if successful at hearing (for workers' compensation appeals, the QIRC applies a general principle that costs follow the event), and
- similar to workers' compensation appeals, wherein costs are limited to costs of the hearing, rather than costs of the proceeding, smaller, financially limited PCBUs will have greater access to justice as the financial risk of seeking external review will be reduced.

Findings

Notwithstanding the prohibition in the IR Act that costs should not be awarded unless the proceedings commenced, or were opposed with no prospects of being successful, it has been not uncommon for applications for external review to be the subject of an application for costs. Those applications take up time and resources of the parties and the QIRC.

Rather than the position where the parties are required to attempt to justify an application for costs based on the conduct of the other party or the prospects of success, we consider a more efficient process would be for the WHS Act to provide that the costs of the hearing of the external review application follow the event. Such a provision would save the wasted costs which are being spent on supporting an application for costs. Further, limiting the costs payable to those of the hearing would be an incentive for parties to settle a matter after a consideration of the other side's material, and before a hearing.

Recommendation 17

That the Minister consider amending the WHS Act to provide that, in the case of an application for external review, the costs of the hearing follow the event and that no other order for costs may be made.

Chapter 6: Issue and dispute resolution

Review ToR 1(d)

Consider and report on any need for amendments to ensure provisions relating to issue and dispute resolution are effective and operating as intended.

This chapter examines the effectiveness of the issue and dispute resolution processes in the WHS Act. Consideration of the effectiveness of these provisions has been undertaken in the context of ensuring the following objects of the WHS Act are achieved:

- providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to WHS
- encouraging unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and assisting PCBUs and workers to achieve a healthier and safer working environment, and
- providing a framework for continuous improvement and progressively higher standards of WHS.[145]

Issue and dispute resolution

The issue resolution provisions are set out in Part 5, Division 5 of the WHS Act. The provisions outline how a WHS issue can be resolved, with the aim of enabling timely and conclusive resolution of the issue at the workplace. The intention is that issues should be resolved 'once and for all' to the extent that is possible in the circumstances. An 'issue' is any matter about health and safety at the workplace that remains unresolved after it is discussed by parties to the issue.[146]

Sections 80 to 82 of the WHS Act establish the framework for issue resolution. These provisions require that if there is a health and safety issue at a workplace, the relevant parties must make reasonable efforts to achieve a timely, final, and effective resolution of the issue in accordance with an agreed procedure or the default procedure set out in sections 22 to 23 of the WHS Regulation.[147] Any agreed procedures must include the default procedure as a minimum, and must be set out in writing and communicated to all workers that the procedure applies to.

To assist with resolving the issue, section 81(3) of the WHS Act enables a representative of a party to enter the workplace for the purpose of attending discussions with a view to resolving the issue. Where an issue has not been resolved after reasonable efforts have been made to achieve an outcome, the WHS Act enables a party to ask the regulator to appoint an inspector to attend the workplace to assist in resolving the issue.[148] A request to the regulator does not prevent:

[145] WHS Act, section 3.
[146] WHS Act, section 81(1).
[147] WHS Act, section 81(2).
[148] WHS Act, section 82.

- a worker from exercising their right to cease unsafe work under Part 5, Division 6 of the WHS Act, or
- an HSR from issuing a PIN under Part 5, Division 7 of the WHS Act or a direction for a worker to cease unsafe work under Part 5, Division 6 of the WHS Act.

Where an inspector is called to assist with resolving an issue, the inspector may exercise any of their compliance powers under the WHS Act.[149] If an issue remains unresolved at least 24 hours after any of the parties have asked the regulator to appoint an inspector to assist in resolving the issue, a party can apply to the QIRC to have the matter conciliated, mediated or arbitrated.[150]

Other disputes that can be referred to the QIRC include:

- an issue about cessation of work under Part 5, Division 6 of the WHS Act
- a request by an HSR for an assistant to have access to the workplace under section 70(1)(g) of the WHS Act, or
- access to information by an HSR under section 70(1)(c) of the WHS Act.[151]

The dispute resolution process does not replace the issue resolution process under the WHS Act, but rather provides a subsequent avenue for disputes where they remain unresolved or where there is not agreement with a decision or action taken by an inspector in relation to the issue.

In response to ToR (1)(d), the following topics emerged as key issues for consideration:

- Who can be a party in the issues resolution process?
- Who can be a representative in the issues resolution process?
- Are the current issue resolution and dispute resolution processes effective and operating as intended?

6.1 Parties to an issue and representation

Current framework

Under the WHS Act, the following parties having standing to participate in the issue resolution process under Part 5, Division 5 of the WHS Act:

- the PCBU or their representative
- each PCBU or their representative if the issue involves more than one PCBU
- the HSR for the work group or the HSR's representative, if the worker(s) affected by the issue are in a work group, and
- the worker(s) or their representative, if the worker(s) affected by the issue are not in a work group.[152]

[149] WHS Act, section 82(4).
[150] WHS Act, Part 5, Division 7A.
[151] WHS Act, section 102A.
[152] WHS Act, section 80(1).

'Representative' is defined in the WHS Act to include 'an HSR, a union representing the worker or any other person the worker authorises to represent them'.[153]

A 'union' is then defined as an employee organisation registered under the FW Act or the IR Act, or an association of employees that might be recognised under state or territory law.[154]

The default procedure in section 23 of the WHS Regulation also provides that a party may, in resolving the issue, be assisted or represented by a person nominated by the party.[155]

Issues raised

In response to the Review, concerns were raised by stakeholders regarding who can be a party in the issue resolution and dispute resolution processes and who can be a representative. In particular, it was raised that there is a need to clarify the definitions of 'representative', 'union' and 'relevant union' and address inconsistencies across these definitions and how they are applied in the WHS Act.

Concerns raised by stakeholders crossed a myriad of parts in the WHS Act, including the issue resolution provisions. Matters raised included:

- the enactment of the model WHS laws introduced several inconsistencies between definitions in different sections of the WHS Act, and for worker representation during issue resolution
- the role of registered unions as representatives for HSRs and workers in the issue resolution process requires clarification
- inconsistencies between parties listed in section 80(1) of the WHS Act, and related definitions, and the reference to parties being able to be assisted or represented by a 'person' nominated by the party in section 23(5) of the WHS Regulation needs to be addressed
- the definition of 'representative' or 'person' when read in conjunction with the definition of 'union' is too broad to constrain an official of a union from representing and accessing the workplace for those workers whose industrial interests they have no right to represent
- the current definitions potentially provide for a worker to be misrepresented by an organisation that ultimately cannot industrially represent them, or enforce their WHS or industrial rights at work, and
- there is a need to ensure there is consistency in who the parties to a WHS issue are, and who a party to a WHS dispute is under the WHS Act.

Speaking more broadly to the definitions of 'union', 'relevant union' and 'representative' under the WHS Act, the following was also raised:

[153] WHS Act, Schedule 5.
[154] WHS Act, Schedule 5.
[155] WHS Regulation, section 23(5).

- the WHS Act should be amended to include a clear statutory definition of 'union' and ensure references to union are limited to unions that are registered or taken to be registered under industrial laws
- the inclusion of subsection (c) in the definition of 'union' under the WHS Act does not reflect the recognised status of unions under either the FW Act or the IR Act, and the term 'industrial association of employees' has caused disputation with non-registered associations seeking to use the term to seek rights and protections under industrial laws, and
- to ensure consistency and to prevent misunderstanding as to who can represent the industrial interests of workers, the definition of 'relevant union' should be amended to include that it must be a registered organisation for the purposes of the *Fair Work (Registered Organisations) Act 2009* (Cth) (FW(RO) Act) or the IR Act, and that it be entitled to represent the industrial interests of the worker or group of workers at the workplace or work group.

Multiple proposals to address these concerns were identified by stakeholders, with the general principles being to amend the WHS Act to:

- ensure there is no doubt that registered unions are considered an authorised party under the WHS Act, and that a worker or an HSR may be represented by their relevant union during issue resolution
- clarify that a 'relevant union' means a registered employee organisation under the FW(RO) Act or the IR Act who is entitled to represent the industrial interests of a worker, workers, or an HSR at the place where the WHS issue is
- remove subsection (c) from the definition of union in the WHS Act, and
- add 'is entitled to represent the industrial interests of a worker at a relevant workplace' to the definition of union.

It was argued that these proposed amendments are consistent with the objects of the WHS Act to ensure that "unions and employer organisations take a constructive role in promoting improvements in work health and safety practices."[156] It was also noted that these proposals align with commentary from the recent review of the IR Act about ensuring "the primacy of registered organisations by providing a scheme whereby organisations can seek and provide representation rights for employees, including standing rights in relation to particular matters" and "ensure that union and employer organisations behave with probity and in the interest of their members".[157]

It was also submitted that, in relation to the current definition of 'parties to an issue' in section 80(1) of the WHS Act, where delays in the election of an HSR occurs, a worker may be in a position where a work group has been determined but an HSR is yet to be elected or trained.

Where a worker is not represented by an HSR, but is in a work group, it was argued that the worker should have access to someone who has adequate knowledge, skills and abilities to assist them with resolution of the issue. To address this potential gap it was

[156] WHS Act, section 3(1)(c).
[157] Five Year Review of Queensland's Industrial Relations Act 2016 – Final Report (November 2021) p.7.

suggested that section 80(1)(c) of the WHS Act be amended to enable a work group to choose a representative where an HSR has not been appointed.

Findings

Parties to an issue

For the reasons above, there is a substantial benefit in unions being a party in their own right to disputes which arise under the WHS Act. A union's status as a party principal prevents any disputes about whether a member has requested their assistance and enables the union to assist in the resolution of the dispute about work which they have a legitimate registered interest. Accordingly, we consider that section 80(1) of the WHS Act should be amended to identify a registered union who has coverage for the work the subject of the dispute as a party to the dispute.

There will obviously be occasions where a union does not wish to involve itself in a dispute at a workplace. In those circumstances if the union has not sought to be involved in the dispute, the union will not be a party. This ensures that at workplaces where there are either no relevant unions or for which no relevant union has ever sought to represent or organise the workforce, the PCBU will be able to deal with its employees without concern about failing to comply with the dispute resolution procedure.

Definitions of 'union' and 'representative'

The recent review into the IR Act noted that there has been a considerable increase in the number of associations and other bodies corporate which purport to act on behalf of employees but are not registered under the FW(RO) Act or the IR Act. Those entities are not subject to the regulation contained in either Act and their members do not have the protections offered by that legislation. Further, there are no restrictions as to the types of worker that those organisations can enrol. For the reasons explained in the review in the IR Act, the existence of such unregulated bodies purporting to represent employees is undesirable.

Unfortunately, various provisions in the WHS Act have been drafted in a way which does not pay close attention to the definition of what is a union or who may be appointed as a representative. Accordingly, we consider that the WHS Act should be amended to make clear that where the phrase 'union' is used, it refers to a registered union. This ensures that the bodies granted the rights and privileges under the WHS Act also have the corresponding obligations under the relevant industrial legislation and their members have the necessary protections which those acts afford. Further, we consider that the definition of 'representative' in the WHS Act should be amended to preclude persons who are officers, employees or agents of a body which purports to collectively represent employees but is not registered from acting as a representative. This will prevent such organisations from using the WHS Act as a loophole to gain access to workplaces and workers which they are not otherwise permitted under industrial relations legislation.

In addition to the above, any circumstances where ambiguity may persist in the WHS Act in relation to the use of terms such as 'union', 'representative', 'person assisting' and

the like, should be considered and addressed to the extent possible. For example, section 70(g) of the WHS allows a 'person assisting' an HSR for a work group to have access to the workplace if that is necessary to enable the assistance to be provided. However, what appropriately constitutes a 'person assisting' is not clarified.

Recommendation 18

That the Minister consider amending section 80(1) of the WHS Act to:

A. include a relevant union as a party principal to the dispute. Relevant union should be defined as:
   (a) a union who is entitled to represent the industrial interests of the workers who are affected by the dispute, and
   (b) which has sought to be involved in the resolution of the issue.

B. clarify that where a worker(s) is in a work group where an HSR has not yet been elected, the worker(s) may appoint a representative.

Recommendation 19

A. That the Minister consider amending the definition of a 'union' in Schedule 5 of the WHS Act to delete sub-paragraph (c) which includes "an association of employees or independent contractors, or both, that is registered or recognised as an association".

B. That the Minister consider amending the definition of 'representative' in Schedule 5 of the WHS Act to exclude an employee or officer of, or acting for, an entity (other than a union as defined in Schedule 5) that purports to represent the industrial interests of employees or employers.

C. That the Minister consider clarifying, to the extent possible, any other circumstances in the WHS Act where ambiguity may persist in relation to the use of terms such as 'union', 'representative', 'person assisting' and the like.

6.2 Work health and safety disputes

Current framework

The dispute resolution provisions are outlined in Part 5, Division 7A of the WHS Act. These provisions are intended to facilitate timely resolution of WHS disputes and provide certainty for parties where a matter remains unresolved.

The dispute resolution provisions apply if any of the following matters remain unresolved at least 24 hours after the regulator has been asked to appoint an inspector to assist in resolving the matter under either section 71(6), 82 or 89 of the WHS Act:

- access to information by an HSR under section 70(1)(c)
- a request by an HSR for an assistant to have access to a workplace under section 70(1)(g)

- a matter about WHS that is subject to the issue resolution process under Part 5, Division 5, and
- cessation of work under Part 5, Division 6.

Unless a party to the matter has requested the assistance of an inspector, the dispute resolution provisions under Part 5, Division 7A of the WHS Act do not apply.

Where a dispute remains unresolved at least 24 hours after the regulator has been asked to appoint an inspector to assist with resolving a dispute, a party to the dispute may give the QIRC notice of the dispute[158]. Under the WHS Act, 'dispute' means a dispute about a WHS matter that exists between any of the following persons:

- the PCBU
- a worker affected by the matter
- an HSR affected by the matter, and
- a relevant union (i.e., a union who has members or is eligible to represent workers involved with the matter).[159]

Notice of the dispute must be in writing and include information on:

- the names of the parties involved in the dispute
- the workplace where the dispute exists
- the WHS matter being disputed, and
- whether a decision made by an inspector to exercise, or not exercise, their compliance powers under Part 10 of the WHS Act (e.g., to issue an improvement or prohibition notice to assist in resolving a dispute) is subject to review under Part 12 of the WHS Act.[160]

In dealing with a dispute, the QIRC may:

- consider the matter by means of mediation, conciliation or arbitration and, if dealt with by arbitration, make any order it considers appropriate for the prompt settlement of the dispute
- review a decision made by an inspector to use their compliance powers to assist in resolving the matter (e.g., if an inspector issues an improvement notice to assist with resolving a dispute, the QIRC can review the inspector's decision and confirm, vary or set aside the inspector's decision), and
- decide not to deal with a dispute, and order costs, if they consider the matter to be frivolous, vexatious, misconceived, or lacking substance.[161]

Issues raised

In response to ToR (1)(d), it was submitted by several stakeholders that the involvement of inspectors in the issue and dispute resolution process does not always

[158] WHS Act, section 102B.
[159] WHS Act, section 102A.
[160] WHS Act, section 102B.
[161] WHS Act, section 102C and 102D.

assist in the resolution of matters. It was argued that, in many cases, inspector involvement extends the time for resolution.

It was suggested that in practical terms, this has meant that the 24-hour lapse in being able to access the QIRC jurisdiction is, in many cases, considered a waste of time and a waste of inspectorate resources. This is because the inspectorate are still required to continue their investigation into the matter, even if the matter is subsequently resolved by the QIRC through the dispute resolution process.

To address this issue, it was recommended to the review that consideration be given to waiving of the 24 hour 'gateway' through the regulator for all matters other than for an imminent risk to health and safety that could result in a serious physical or psychological risk, or a fatality or serious illness or injury.

Findings

When the model WHS laws were first promulgated, they included provisions that provided for parties to a dispute to attempt to resolve that dispute. They also made provision for the regulator to appoint an inspector to assist. Section 82(4) of the WHS Act expressly provided that an inspector performing their dispute resolution functions retained their compliance powers.

Throughout the Best Practice Review, concerns were expressed as to the adequacy of the dispute resolution mechanisms and the lack of any capacity for there to be an arbitrated outcome. Accordingly, Division 7A of the WHS Act was introduced. Division 7A of the WHS Act permitted all parties to a dispute to seek to litigate that dispute in the QIRC. However, when Division 7A of the WHS Act was introduced, the ability to notify the QIRC of a dispute was contingent upon the parties having first sought the assistance of an inspector appointed by the regulator.

Various submissions were received about the adequacy of the dispute resolution procedure. Representatives from the inspectorate frankly conceded that at times, because of the capacity for parties to notify a dispute to the QIRC, there was confusion for inspectors as to who had responsibility for trying to resolve the dispute. Further, the QIRC advised that litigants had regularly indicated that whilst they had sought the assistance of an inspector as they were required to do, they simply waited the minimum 24 hours before filing in the QIRC. Other stakeholders noted that in the course of having an inspector appointed to resolve disputes, inspectors often indicated that their role was simply advisory and that they could not take any action in respect of issues that were the subject of the dispute.

It seems from the submissions received that there is a degree of confusion in the dispute resolution process. Undoubtedly some of that confusion comes from the requirement that the parties embark upon the process of having an inspector appointed to assist in resolving disputes before the matter can be taken to the QIRC. In this regard, it should be noted that the nature of WHS disputes can be varied. Some disputes are apt to be resolved by an inspector providing either expert advice or using their compliance powers. For example, disputes about whether the performance of a particular task is safe are more suited to resolution by an independent inspector, who is a subject matter expert and is present at the workplace. Such disputes are not particularly suited to

resolution by way of litigation. Equally so, there are some protracted disputes, which are not apt for resolution by an inspector. Long-standing allegations about workload or resourcing of particular workers, which fall short of giving rise to a basis for an HSR to issue a direction that work stop, are not the types of matters which are capable of being resolved by an inspector. Those matters are much better suited to resolution by the QIRC.

In our view, having regard to the various types of disputes which may arise, some of the confusion is caused by the requirement that the parties seek to resolve a dispute with the assistance of an inspector first. This mingling of the streams of dispute resolution, without clear guidance as to who has responsibility, is undesirable. In our view, the parties to a dispute should be at liberty to choose the dispute resolution pathway which they consider is most apt. In some circumstances, one of the parties will consider that an inspector ought to be appointed as the dispute could be resolved by the exercise of compliance powers. Similarly, a party may consider that the QIRC is better suited to addressing a structural, longstanding dispute.

Accordingly, recommendations have been made that section 102B(1) of the WHS Act be amended to remove the requirement that parties first seek to have an inspector appointed to resolve the dispute. Further, we consider that the inspectorate should undertake a comprehensive internal education program to ensure that inspectors are aware that when they are appointed to resolve a dispute, they retain their compliance powers, and powers should be exercised if they consider that the situation warrants it.

Recommendation 20

A. That the Minister consider amending section 102B(1) of the WHS Act to delete the requirement that the parties first seek to have an inspector appointed to resolve a WHS dispute before notifying a dispute to the QIRC.

B. That the Minister consider requesting the inspectorate to undertake a comprehensive internal review of procedures and conduct an education program to ensure that inspectors are aware that when they are appointed to assist in resolving a dispute, they still retain their compliance powers and that they should exercise those powers if they consider that the circumstances warrant the exercise of a compliance power.

Chapter 7: Other matters

Review ToR 2

Any other matters relating to the WHS Act's overall effectiveness and performance in ensuring a balanced framework to secure health and safety of workers and workplaces and consider whether any legislative or administrative amendments are required.

This chapter covers a broad range of WHS issues across multiple parts of the WHS Act. This ToR gave stakeholders the opportunity to provide the Review with suggestions and commentary into WHS issues not otherwise addressed by ToR 1(a) through to (d).

Submissions were received from employee representatives, employer representatives and from units within OIR. The varied topics provided the review with valuable insights into the current operation of the WHS Act, the perceived problems and difficulties resulting from existing provisions, and proposed solutions. The Review considered these submissions, with reference to the main object of the WHS Act, being to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.[162]

The matters addressed in this chapter are:

- managing risks to health and safety
- incident notification
- recurring non-compliance
- provision of false or misleading information by accredited assessors
- codes of practice
- definition of high risk plant
- high risk work licences
- industry consultative arrangements
- affected persons committee
- WHS considerations for amenities
- industrial manslaughter, and
- other prosecutorial considerations.

7.1 Managing risks to health and safety

Current framework

A PCBU, in managing risks to health and safety, must identify reasonably foreseeable hazards that could give rise to risks to health and safety.[163] This risk management duty requires a PCBU, in managing risks to health and safety, to eliminate risks to health and

[162] WHS Act, section 3(1).
[163] WHS Regulation, section 34.

safety so far as is reasonably practicable, and if not reasonably practicable, it must minimise those risks.[164]

When not reasonably practicable to eliminate risks, a PCBU must apply the hierarchy of control measures set out in the WHS Regulation.[165] Furthermore, a PCBU must review and revise the control measures it has implemented.[166]

A hierarchy of controls is not contained within the WHS Act, nor is a mechanism by which control measures are to be reviewed.

Issues raised

A number of stakeholders recommended that the hierarchy of controls be elevated to the WHS Act. It was noted that because the hierarchy of controls sits within the WHS Regulation, it is only required to be applied to regulated hazards. This is in contrast to sections 27A(1) and (2) of the former *Workplace Health and Safety Act 1995* which provided that duty holders were required to identify **all** hazards, assess their risks, determine control measures in accordance with the hierarchy of controls, and monitor and review their effectiveness, regardless of whether they were in the WHS Regulation or otherwise.

It was suggested that including the hierarchy of controls in the WHS Act will remind the PCBU of their upstream duties and make it easier for regulators and registered unions to educate and enforce such duties so that "the risk isn't pushed back down on workers".[167]

It was noted that recommendation 27 of the Boland Review was to amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with section 36 of the model WHS Regulation) and making any necessary corresponding amendments to the model WHS Regulations. SWA is scoping this matter further to inform the development of guidance, particularly for small business, on the risk management process and the application of the hierarchy of controls.

Findings

We endorse the Boland Review recommendation that the hierarchy of control should be elevated from the WHS Regulation to the WHS Act.

Recommendation 21

That the Minister consider elevating the hierarchy of controls from Part 3.1 of the WHS Regulation to the WHS Act.

[164] WHS Regulation, section 35.
[165] WHS Regulation, section 36.
[166] WHS Regulation, section 38.
[167] Employee representative stakeholder submission, dated 23 September 2022.

7.2 Incident notification

Current framework

The primary purpose of incident notification provisions, as outlined in the WHS Act explanatory notes, is to enable the regulator to investigate serious incidents and potential WHS contraventions in a timely manner.

Part 3 of the WHS Act sets out the requirements for a PCBU to immediately notify the regulator when a notifiable incident occurs. Under section 35 of the WHS Act, a notifiable incident means one of the following:

1. the death of a person
2. a serious injury or illness of a person
3. a dangerous incident.

'Serious injury or illness' is defined as any injury or illness requiring a person to receive immediate treatment as an in-patient, or immediate treatment for certain injuries.[168]

A PCBU has a duty to ensure that the regulator is notified immediately after becoming aware that a notifiable incident has occurred. A PCBU may be fined for failing to notify the regulator immediately after becoming aware of a notifiable incident.[169]

The failure to comply with incident notification and reporting provisions, specifically that a PCBU must keep a record of each notifiable incident for five years after notification, is a priority infringeable offence.[170] This means that if an inspector identifies a contravention of the provision, an infringement notice will be issued.

Infringement notices are issued under the *State Penalties Enforcement Act 1999* and may be issued by an inspector if they believe, on reasonable grounds, that a person is committing or has committed an infringement notice offence under the legislation. Infringement notices may be issued to an organisation, individual or both.

Issues raised

Stakeholders raised a range of issues in relation to incident notification provisions, including concerns relating to:

- the definition of serious injury or illness
- capturing near-miss incidents, and
- reporting.

Definition of serious injury or illness

It was suggested by employee and employer representative groups alike that the definition of 'serious injury or illness' is too narrow.

It was raised with the Review that community awareness is increasing in relation to occupational illnesses that develop as a result of personal exposure to substances (e.g., dust), physical illness hazards (e.g., noise, vibration), and psychosocial hazards. The

[168] WHS Act, section 36(b)(i) through (viii) lists the criteria regarding immediate treatment.
[169] WHS Act, section 38(1).
[170] WHS Act, section 38(7).

Review heard that there is an opportunity for the definition of 'serious injury or illness' to be expanded to accommodate these matters.

A number of proposals were put forward by stakeholders. One stakeholder suggested the trigger for notification of an incident be where a worker has sustained a work-related serious injury or illness that requires more than four shifts off work. Another stakeholder suggested amending section 36 of the WHS Act to explicitly refer to injuries that result in a person to be absent from the person's voluntary or paid employment for more than four days as a serious injury. It was suggested this definition could assist with psychological injury notification.

The Review noted that recommendation 20 of the Boland Review considered the matter of a notification trigger for psychological injuries and that this particular recommendation and the broader issue of regulator visibility of WHS incidents is under consideration nationally.

Near miss incidents

Stakeholders submitted that the definition of 'notifiable incident' is not wide enough to capture the mandatory reporting of a near miss incident that could have otherwise resulted in a notifiable incident or a dangerous incident. It was argued that this has the potential to result in a hazard remaining unrectified, which could ultimately result in an actual notifiable incident once a worker has been injured. The effect of this is that a worker could continue to be exposed to a risk to their health and safety which would have otherwise been avoided through a mandatory reporting process for near miss incidents.

Reporting

Non-compliance with incident reporting was also raised as an issue of concern by stakeholders. There are several factors that can contribute to why a PCBU might fail to notify the regulator of an incident, such as not being aware of the incident occurring, being unaware of incident reporting obligations, or purposeful non-compliance with the WHS Act. It was suggested to the review that the failure to notify the regulator of a notifiable incident can:

- hinder the regulator's ability to commence a prosecution
- affect heath and safety interventions, given the data for the incident was not recorded and the regulator was deprived of the opportunity to incorporate this information into its decision making, and/or
- limit the regulator's ability to identify the cause of the incident which results in workers remaining exposed to the relevant hazard.

Findings

Definition of serious injury or illness

Various submissions were received from stakeholders concerning provisions requiring the notification of serious incidents. In particular, concern was raised about the definition of a 'serious injury' being one which requires admission to a hospital as an in-patient. Many of the submissions identified that routinely, due to resource concerns, a

person's non-admission at a hospital has less to do with the seriousness of their condition and more to do with the availability of resources. Further, the question of whether a person is admitted to hospital may be decided on the basis of precaution rather than the severity of their illness or injury. Accordingly, we consider the definition of 'serious injury' should be amended to refer to an injury or illness where the worker has been absent from work for four consecutive days. It is noted that this definition was proposed as part of the Work Health and Safety and Other Legislation Amendment Bill2015, but that the relevant clause was removed during consideration in detail. The vote saw 44 ayes and 44 noes, with the Speaker casting their deciding vote with the noes.

In saying this, it is understood that the incident notification provision under the model WHS Act is under review, following the Boland Review. The Review believes that, should a more beneficial definition of 'serious injury or illness' be determined through this process, then that definition be considered for implementation in Queensland.[171]

Near miss incidents

There is also considerable evidence that the identification of near misses is essential for the improvement of safety outcomes[172] because it:

- provides a qualitative insight into how (small) failures or errors develop into near misses and actual accidents, from a systems perspective
- provides a statistically reliable quantitative insight into the occurrence of factors leading to incidents, because near misses occur more frequently than actual accidents, and
- maintains alertness to danger even when actual injury rates are low within an organisation.[173]

We were presented with evidence suggesting that identifying and reporting near-misses is common practice internationally. For example, in the United States, although the Occupational Health and Safety Administration (OSHA) does not legally require companies to report near misses unless the incident resulted in injury or property damage, it is common practice for employers to conduct near miss reporting for safety management and incident recordkeeping.[174] Also, a 2016 final rule requires certain establishments to submit injury and illness information electronically to OSHA. Employers who are not in a partially exempt industry and have more than 10 employees must also prepare and maintain records of serious occupational injuries and

[171] Queensland Parliament, Record of Proceedings (Hansard), 14 October 2015 (https://documents.parliament.qld.gov.au/events/han/2015/2015_10_14_WEEKLY.PDF)
[172] Thoroman, B., Good, N. & Salmon, P. (2018) System thinking applied to near misses: A review of industry-wide near miss reporting systems. Theoretical Issues in Ergonomics Science, 19(6), 712-737.
[173] Van Der Sehaff, T. W., Lucas, D. A., & Hale, A. R. (eds) (1991) Near Miss Reporting as a Safety Tool. Oxford: Butterworth-Heinemann.
[174] Safety Culture (2022) Near Miss Reporting: A Safety Guide. https://safetyculture.com/topics/near-miss-reporting/#:~:text=Requirements,safety%20management%20and%20incident%20recordkeeping.

illnesses.[175] Reporting near misses to the employer helps identify hazards or weaknesses in the employer's risk management programs and correct them to prevent future incidents. Near misses are symptoms of undiscovered safety concerns. Near miss reporting can help the company be proactive when it comes to identifying negative trends and safeguarding employees. This, in turn, can help reduce workplace accidents overall and increase workplace safety culture.[176]

Britain's national regulator for workplace health and safety, the Health and Safety Executive, [177] identifies the following types of dangerous occurrences (specified near misses) that require reporting:

- general (incidents occurring at any workplace) – include incidents involving, lifting equipment, pressure systems, overhead electric lines, electrical incidents causing explosion or fire, explosions, biological agents, radiation generators and radiography, breathing apparatus, diving operations, collapse of scaffolding, train collisions, wells, and pipelines or pipeline works
- incidents occurring at any place other than an offshore workplace – include structural collapses, explosions or fires, releases of flammable liquids and gases, and hazardous escapes of substances
- incidents occurring at specific types of workplace – industries with specific requirements are offshore workplaces, mines, quarries, and relevant transport systems.

We also note that a range of topics were raised during the Review where stakeholders suggested substantive changes to the WHS Act. However, those submissions could not be considered because the data available to OIR only concerned incidents which were notified and not near misses. Accordingly, it is impossible to ascertain, in an evidence-based way, the true extent of a particular problem. Notification of near misses and amending the definition of 'serious injury' will better enable government to identify areas where substantive changes are necessary.

Reporting

Presently, the failure to notify the regulator of a notifiable incident is an offence under the WHS Act. However, it is not an infringeable offence. This means that in order to enforce the provision, prosecution has to be brought on the matter. There is a substantial burden on resources in bringing a proceeding.

Given the importance of ensuring compliance with the requirement to notify such incidents and the substantial drain on resources as a result of those matters being

[175] United States Department of Labour (2022) Occupational Safety and Health Administration: Near Miss Reporting Policy. https://www.osha.gov/sites/default/files/2021-07/Template%20for%20Near%20Miss%20Reporting%20Policy.pdf
[176] United States Department of Labour (2022) Occupational Safety and Health Administration: Near Miss Reporting Policy. https://www.osha.gov/sites/default/files/2021-07/Template%20for%20Near%20Miss%20Reporting%20Policy.pdf
[177] Health and Safety Executive (HSE) (2022) Dangerous Occurrences. https://www.hse.gov.uk/riddor/dangerous-occurences.htm

prosecuted, it is recommended that OIR confer with the Department of Justice and Attorney-General (DJAG) to explore arrangements necessary to permit the non-compliance of a notifiable incident to be an infringeable offence. It should be noted that non-compliance being an infringeable offence would not preclude a prosecution. However, it would assist in a compliance campaign as it would enable the provision to be enforced without the need for an impact on public resources.

Recommendation 22

A. That the Minister consider amending the definition of 'serious injury' to refer to where an employee has been absent from work for four consecutive days, or a more beneficial definition if one is identified through the considerations of incident notification that are occurring nationally in response to the Boland Review.

B. That the Minister consider amending the WHS Act to introduce a new obligation for a PCBU to notify an incident which did not result in a serious injury or illness but had the capacity to do so.

C. That the Minister consider requesting OIR to confer with DJAG as to whether non-compliance with the notifiable incident reporting requirements should be an infringeable offence.

7.3 Recurring non-compliance

Current framework

Duty holders must comply with their obligations under legislation to ensure workers and others are not exposed to unacceptable risks that may result in death, injury or illness.

The regulator uses regulatory enforcement measures to ensure duty holders are meeting their legislative duties, and to create credible deterrents for contravening the legislation.

The purpose of monitoring compliance and, when required, enforcing compliance, is to ensure duty holders comply with their obligations. The possibility of being caught and the deterrent effect of a strong regulator are generally considered to provide a better environment where the risk of exposure to injury, illness or death is eliminated, or where that is not possible, minimised.

Compliance and enforcement measures available to the inspectorate include:

- issuing compliance notices (prohibition notices, improvement notices electrical safety protection notices, and unsafe equipment notices)
- issuing infringement notices
- seizure of unsafe plant, substances or workplaces, and
- referral of matters to the Office of the Work Health and Safety Prosecutor (OWHSP) for consideration to commence legal proceedings.

Compliance and enforcement measures available to the regulator include:

- suspending or cancelling a licence or other accreditation
- seeking an injunction to enforce a compliance notice, and
- accepting an enforceable undertaking by a person relating to a contravention or alleged contravention.

In determining which enforcement responses are appropriate within a given circumstance, a number of factors are taken into account to ensure the response is specific and proportionate. These factors include: the level of risk; the level of actual or potential harm; the availability, clarity and status of standards or guidance; any relevant history of non-compliance; and whether the contravention has been identified as a priority area for enforcement or an area of increased risk.

With regard to any relevant history of non-compliance, the regulator considers any relevant examples of non-compliance by a PCBU, as a repeat of similar contraventions could be indicative of a systematic WHS management failure.

Notwithstanding the above, there are no obligations in place requiring the regulator to inform the OWHSP when a PCBU accumulates multiple statutory notices.

Issues raised

It was raised with the Review that consideration needed to be given to whether the regulator should be required to inform the OWHSP where a PCBU has been issued with multiple statutory notices over a prescribed timeframe. It was suggested this approach could improve compliance with WHS duties.

Findings

We noted the concerns raised that, in some cases, PCBUs have a long history of statutory notices being repeatedly issued to them. It was identified that the continued issuance of statutory notices indicated that the PCBU had a poor approach to compliance with its duties and that in those circumstances a more severe incident was likely in the future.

The existence of PCBUs with a history of being issued with multiple statutory notices is of concern. However, the solution to such an occurrence is not straightforward. We consider that the inspectorate should consider what administrative arrangements may be necessary to bring such matters to the attention of the WHSP for the purposes of ascertaining whether a prosecution might be brought on the basis of the history of non-compliance.

Recommendation 23

That the Minister consider requesting OIR to assess what administrative arrangements may be necessary to ensure that the inspectorate is bringing cases where a PCBU has multiple statutory notices issued to them to the attention of the WHSP. The purpose of this would be to ascertain whether the history of non-compliance reveals a systemic failure to comply with the duties imposed by the WHS Act and whether a prosecution is appropriate.

7.4 Provision of false or misleading information by accredited assessors

Current framework

A licence to perform high risk work authorises individuals to carry out particular classes of work. A worker must not carry out high risk work unless they are the holder of a high risk work licence for the particular class of work.[178] Additionally, this means a PCBU cannot direct a worker to carry out high risk work until the worker is licensed to do so.

The WHS Regulation sets out the 29 high risk work licence classes recognised in Queensland (e.g., scaffolder, dogger, tower crane operation, forklift operation).[179]

Under the WHS Regulation, to obtain a licence a person must be trained in accordance with the relevant unit of competency by a registered training organisation (RTO) and then be assessed as competent against the relevant assessment instrument by an accredited assessor.

To obtain a high risk work licence, a worker must complete:

- formal classroom training provided by an RTO with approval to deliver the particular course
- informal learning, such as workplace training with a supervisor who holds the relevant high risk work licence, and
- formal assessment conducted by an accredited assessor.

Only an accredited assessor can assess competency for a high risk work licence.[180] The regulator approves assessor accreditation.[181] The purpose of accreditation of assessors is to provide a consistent standard of assessment of individuals applying for high risk work licences. This assists employers and others who have duties under health and safety laws to be satisfied that workers are competent to perform high risk work, in order to ensure the health and safety of workers and others in the workplace.[182]

The regulator may impose conditions on the assessor when granting accreditation under the WHS Regulation, and a person must comply with the conditions of any authorisation given to that person under a regulation.[183]

Issues raised

OIR submitted that, under the current provisions, the regulator's ability to prosecute accredited assessors who provide false and misleading information is limited. While accredited assessors can be prosecuted for failing to comply with the conditions of their authorisation, a more direct ability to prosecute an accredited assessor for providing false and misleading information has been suggested. In particular, OIR has proposed a

[178] WHS Regulation, section 81.
[179] WHS Regulation, Schedule 3,
[180] WHS Regulation, section 113.
[181] WHS Regulation, section 115.
[182] Accredited assessors for high risk work (HRW) licences | Business Queensland
[183] WHS Act, section 45; WHS Regulation, section 121.

more specific ability to pursue prosecutions under section 268 of the WHS Act, which makes it an offence to give false or misleading information under the WHS Act.

Findings

Provision of false or misleading information by accredited assessors to the regulator carries significant safety risks in the high risk work environment, particularly when it involves assessing students as competent when, in fact, they are not. This creates a risk for licence holders and their workplace, and undermines the integrity of the high risk work licensing framework.

Prosecution action in these circumstances can be a powerful deterrent mechanism. This includes deterrence through the visibility of prosecutions and the type of offence prosecuted. Accordingly, it is important that serious breaches of assessor conditions that involve providing false or misleading information are to be prosecuted against appropriately.

Although an accredited assessor can be prosecuted under section 45 of the WHS Act, for non-compliance with the conditions of accreditation, the Review does not consider this to achieve appropriate visibility and deterrence regarding the provision of false or misleading information.

To address this issue, we recommend consideration be given to clarifying and strengthening the link between the WHS Act, WHS Regulation, and accredited assessor conditions to enable an appropriate framework for accredited assessors to be prosecuted for providing false or misleading information while conducting assessments. Consideration should specifically be given to facilitating prosecutions under section 268 of the WHS Act.

Recommendation 24

That the Minister consider ensuring effective enforcement action can be taken against an accredited assessor for providing false and misleading information in the context of conducting assessments.

7.5 Codes of Practice

Current framework

An approved code of practice is a practical guide to achieving the standards of health, safety and welfare required under the WHS Act and the WHS Regulation. A code of practice establishes minimum, enforceable standards for duty holders.

While approved codes of practice are not law, they are admissible in court proceedings. Courts may regard an approved code of practice as evidence of what is known about a hazard, risk or control and may rely on the relevant code to determine what is reasonably practicable in the circumstances.

Under the WHS Act, a PCBU must

- comply with a code of practice, or

- manage hazards and risks arising from the work carried out as part of the conduct of the business or undertaking in a way that is different to the code but provides a standard of health and safety that is equivalent to or higher than the standard required under the code.[184]

There are 44 codes of practice approved under the WHS Act; two of these are new codes of practice that have been approved to commence in 2023 and one code is currently under development, with more likely to be created where a need arises.

Under section 274(4C) of the WHS Act, codes of practice expire five years after they are approved. This amendment was made to the WHS Act in 2017 following the recommendation of the Best Practice Review that sought regular review of all codes of practice, given their enforceability.

Issues raised

An employer representative stakeholder submitted that WHS laws should be flexible enough to accommodate changes in technology and work practices at any time. This is consistent with the objects of the WHS Act, namely providing a framework for continuous improvement and progressively higher standards of work health and safety.[185]

OIR concurred with stakeholder views that the lack of flexibility afforded by the introduction of section 274(4C) of the WHS Act does not allow the review of codes to be driven by risk or degree of technological change, but instead by an inflexible schedule. This has presented challenges, given the number of codes and the unique context for each. This is not believed to be supporting the effective operation of the WHS Act nor assisting in achieving the WHS Act's objects. OIR is seeking to be able to prioritise code reviews based on need while still ensuring codes remain up to date.

Additionally, an unintended consequence of expiring codes after five years has been that the Queensland Treasury Office of Best Practice Regulation (OBPR) also requires a sunset review of each code before it can be remade. Not only is it resource intensive and unnecessary to run dual reviews for each code review, it has also introduced the grave risk that the code may be deemed expired by the OBPR on the basis that it has not sufficiently satisfied a sunset review requirement within the required timeframes.

Terms upon which a code may be deemed expired by the OBPR include if the code is seen to have improved safety to a level where the code is considered to be no longer required, or if the costs of complying with a code have significantly increased. A full review of a code of practice to support a sunset review is undertaken in collaboration with stakeholders and can take up to two years to complete. OIR submitted that this appears to go well beyond the intent of the Best Practice Review recommendation.

Findings

We are of the opinion that a rigid requirement to review a code of practice every five years does not meet the intent of the Best Practice Review recommendation to ensure

[184] WHS Act, section 26A.
[185] WHS Act, section 3(g).

codes of practice are reviewed and updated to reflect current industry best practice. We were informed that there are several circumstances where flexibility in the timing of a code of practice review may be required, for example:

- a code of practice review may identify consequential amendments to other related codes of practice that are not due for review for some time. For example, the Mobile Crane Code of Practice review will likely identify amendments to be made to the Tower Crane Code of Practice
- the 21 national model codes adopted in Queensland are generally subject to a five year review process through SWA. The timing of the national review does not always align with the expiry date for the Queensland code. For example, the Managing Risks in Stevedoring Code of Practice is to be reviewed by SWA in 2023 but expires under the WHS Act in March 2023, and
- rapid and significant changes to technology and work practices may signal the need for a review in less than five years.

To better meet the objects of the WHS Act and address the unintended consequences arising from the legislative drafting of the Best Practice Review recommendation, we recommend that the automatic expiry of codes of practice after five years be removed. Instead, codes of practice should be regularly reviewed, at least every five years, to the degree required by prevailing circumstances and should not automatically expire.

Recommendation 25

That the Minister consider amending the WHS Act to remove the automatic expiry of codes of practice after five years and instead provide for a review of codes of practice at least every five years with the level of review to be determined by OIR.

7.6 Definition of high risk plant

Current framework

The WHS Act applies to the operation or use of high risk plant affecting public safety. In particular, parts of the WHS Act and WHS Regulation apply to specific items of plant even if they are not situated, operated or used at a workplace. In Queensland, 'high risk plant' is defined in the WHS Act to mean:

(a) air conditioning unit

(b) amusement device

(c) cooling tower

(d) escalator

(e) lift,

(f) LP gas cylinder.[186]

[186] WHS Act, Schedule 1, section 1,

Each term within the definition of 'high risk plant' is separately defined in the WHS Act. In particular, the definition of 'amusement device' in the WHS Act preserved the definition of that term in Queensland's former *Workplace Health and Safety Act 1995* and means a device:

> (a) used for commercial purposes, and
> (b) used or designed to be used for amusement, games, recreation, sightseeing or entertainment, and on which persons may be carried, raised, lowered or supported by any part of the device … while the part of the device is in motion.[187]

The definition of 'amusement device' in the WHS Regulation (Qld) is based on the national model WHS Regulations definition and differs in some respects to the definition in the WHS Act. Under the Queensland WHS Regulation, 'amusement device' means plant operated for hire or reward that provides entertainment, sightseeing or amusement through movement of the equipment, or part of the equipment, or when passengers or other users travel or move on, around or along the equipment.[188]

Under the Queensland WHS Regulation , 'high risk plant' refers to the definition in the WHS Act.[189]

Defining 'high risk plant' within the WHS Act is in contrast to the model WHS laws. The model WHS Act provides that 'high risk plant' means plant prescribed as 'high risk plant'. This approach has provided jurisdictions with the flexibility to use a regulation to define the scope of plant to be covered.

Issues raised

OIRinformed the Review that the inconsistency between the definitions outlined above creates confusion, leads to problems with interpretation, and raises policy concerns about the scope of plant covered, particularly in relation to amusement devices. To address this issue, OIR proposed adopting the same approach as the model WHS Act by defining 'high risk plant' to be plant prescribed by regulation. This would enable the definition of 'amusement device' to be consistent, regardless of whether it is used at a workplace, and allow other items of plant identified as high risk in relation to public health and safety to be amended for consistency or updated as needed.

OIR also raised concerns about the limited ability of inspectors to appropriately regulate compliance with inspection and maintenance requirements for plant items due to the current structure of section 195 of the WHS Act (power to issue prohibition notice). This is because the ability to determine that there is imminent risk, as required by section 195 of the WHS Act, is based on the inspector's capacity to assess the physical safety of the device.

The purpose of the maintenance and inspection provisions of the WHS Regulation is to ensure the safety of a plant item by placing clear provisions on the scope and interval of maintenance and inspections. Due to the complex engineering of plant such as

[187] WHS Act, Schedule 1, section 1,
[188] WHS Regulation, Schedule 19.
[189] WHS Regulation, section 702.

amusement devices, cranes and concrete pumping plant, it is possible that a plant item appears to be visually sound but has significant safety issues that can only be identified through regular maintenance, inspections and testing.

A failure to evidence the required inspection, maintenance and testing may therefore be an indicator of potential imminent risk, and due to the high risk nature of some plant items OIR suggested the regulator should be able to prohibit operation of such plant and ensure the plant is not operated until the required inspection, maintenance and testing has been carried out.

It is therefore proposed that section 195 of the WHS Act be broadened to allow inspectors to issue prohibition notices in specific circumstances for certain items of plant.

Findings

We agree that defining 'high risk plant', such as amusement devices, to be plant prescribed by regulation will help to eliminate inconsistency and confusion between the WHS Act and the WHS Regulation. Consideration should be given to what items are included in the definition of 'high risk plant' within the WHS Regulation with the purpose of achieving the greatest health and safety outcomes.

In relation to section 195 of the WHS Act, we support this provision being broadened to allow inspectors to issue prohibition notices in specific circumstances for certain items of plant. However, the power to issue a prohibition notice is a significant power with an immediate impact on the duty holder, and should be exercised prudently. It is recommended that specific items of plant be prescribed for this purpose due to the risk of catastrophic failure associated with non-compliance with proper inspection and testing.

Recommendation 26

A. That the Minister consider amending the definition of 'high risk plant' in Schedule 1, Part 1 of the WHS Act to reflect Schedule 1, section 6 of the model WHS Act, that high risk plant means plant prescribed as high risk plant.

B. That the Minister consider requesting OIR to assess the definition of plant items included in 'high risk plant' to ensure it is current and achieving intended public health and safety benefits.

C. That the Minister consider whether inspectors should have the ability to issue prohibition notices for plant items that present a risk of catastrophic failure if inspection, maintenance and testing requirements are not evidenced (e.g., amusement devices, cranes and concrete pumping plant).

7.7 High risk work licences

Current framework

Schedule 3 of the WHS Regulation lists the high risk work licences that are required for particular classes of high risk plant operations, such as operating mobile cranes and fork lift trucks. Schedule 4 of the WHS Regulation outlines the competency requirements for each licence class. Individuals seeking a high risk work licence must hold certification in the specified vocational education and training course for the licence class.

There are some operations that do not require a high risk work licence following harmonisation with the model WHS laws in 2012, particularly earthmoving and particular crane (EPC) operations. The current WHS legislative framework manages risk associated with these operations through the PCBU's primary duty of care (e.g., providing and maintaining safe plant; providing information, training, instruction or supervision; safe use, handling and storage of plant)[190], requiring a person with management or control of a plant to ensure the plant is without risk to health and safety of a person,[191] and requiring them to manage risks to health and safety, including through control measures.[192]

The *Managing the risks of plant in the workplace Code of Practice 2021* provides further guidance on the operation of plant in order to eliminate or minimise risks to health and safety. WHSQ also provides guidance on its website on how to meet legislative obligations in relation to EPC operations.[193]

Issues raised

Stakeholder submissions were received seeking expansion of the categories of high risk work for which a licence is required by amending Schedules 3 and 4 of the WHS Regulation. Those submissions were sought on the basis that there were a high number of dangerous incidents involving mobile plant and the reintroduction of a licensing requirement would assist in the improvement of safety outcomes.

Findings

OIR advised that in August 2021, the Queensland Training Ombudsman (QTO) released the Interface with Licensing within the Queensland Construction Industry – a follow-up to the 2018 Review (the Licensing Review). As part of the scope of the Licensing Review, the QTO analysed the training delivery across a range of identified qualifications and competencies, including the level of training activity occurring relevant to discontinued licences, specifically EPC licences.

---

[190] WHS Act, section 19.
[191] WHS Act, section 21.
[192] WHS Regulation, section 203.
[193] See WorkSafe.qld.gov.au, Earthmoving or particular crane occupational classes. Accessed via https://www.worksafe.qld.gov.au/licensing-and-registrations/work-health-and-safety-licences/what-licence-do-i-need/cranes-and-hoists/earthmoving-or-particular-crane-occupational-classes

The Licensing Review analysed training and labour market data to determine whether employers are still relying on formal training qualifications for operators of earthmoving machinery, including backhoes, excavators, graders, and skid steer loaders.

The Licensing Review also considered data held by WHSQ in relation to plant-related incidents in the construction sector pre and post 2012 when the EPC licensing framework was abolished.

The Licensing Review found that the number of workers accessing training was comparable to the number of workers in, and entering into, the construction industry. In addition, there was no notable increase in the number of plant-related incidents in the sector since the cessation of EPC licensing in 2012. Therefore, the training data analysed in the Licensing Review did not justify the introduction of licensing earthmoving machinery operations.

Against this information, the academic literature suggests that throughout Australia the prevalence of deaths or injuries from mobile plant is high. In Australia, 154 workers lost their lives in the construction industry between 2016 and 2020. Construction plant and machinery are responsible for 15% of these fatalities. Truck drivers, mobile plant operators, stationary plant operators were the major occupations involved in plant and machinery fatalities.[194] Lingard et al.[195] analysed 80 plant and machinery related fatal incidents in Australia between 1997 and 2008. Among these 80 plant-related fatal incidents, 17 deaths (i.e., 21%) were related to trucks and excavators/backhoes, 15 deaths (i.e., 18.5%) were related to crane and 10 deaths (i.e., 12.3%) were related to compactors/rollers and forklifts, cherry pickers, front-end loaders, concrete pumps, and bulldozers/graders.

It is difficult to resolve the apparent conflict on the one hand between the stakeholders' submissions about the prevalence of incidents involving mobile plant, the academic research and the statistics provided by OIR. It appears to the reviewers that this is a particular area where the requirement to report near misses will be particularly important. It seems to the reviewers that the most likely explanation for the divergence in positions stems from the fact that near misses concerning mobile plant do not need to be reported and therefore the statistics available do not represent an accurate statement as to the true position.

In our view, given the requirement that the review be evidence based, we do not consider that any legislative amendment can be recommended at this time. However, we consider it appropriate that a recurring 12 month review for a period of three years following the introduction of any requirement to report near misses. Those recurring 12 month reviews should reveal the extent of incidents involving mobile plant and the question of whether there is an issue with respect to mobile plant and whether licensing should be reintroduced.

---

[194] Safe Work Australia. (2020). Work-related Traumatic Injury Fatalities. Safe Work Australia.

[195] Lingard, H., Cooke, T., & Gharaie, E. (2013). The how and why of plant - related fatalities in the Australian construction industry. Engineering, Construction and Architectural Management, 20(4), 365-380. https://doi.org/10.1108/ECAM-09-2011-0085

Recommendation 27

That the Minister consider conducting an annual review for a period of three years, following the introduction of any requirement to report near misses. The purpose of such a review will be to establish the extent of incidents involving mobile plant and whether licensing for mobile plant should be reintroduced.

7.8 Industry consultative arrangements

Current framework

The Work Health and Safety Board (WHS Board) is established under Part 2, Schedule 2 of the WHS Act. The primary function of the WHS Board is to give advice and make recommendations to the Minister about policies, strategies, allocation of resources, and legislative arrangements, for WHS.[196]

The WHS Board is the primary industry consultative arrangement established to give effect to tripartite arrangements in the WHS Act. The WHS Board currently has 14 members – a Chair, five worker representatives, five employer representatives and three expert representatives.

Industry sector standing committees (ISSCs) provide support to the WHS Board to undertake its primary function to give advice and make recommendations to the Minister.[197] The WHS Act establishes the following ISSCs:[198]

- construction sector standing committee
- manufacturing sector standing committee
- rural sector standing committee
- health and community services sector standing committee
- retail and wholesale sector standing committee, and
- transport and storage sector standing committee.

Schedule 2, section 14(2) of the WHS Act allows for the Minister to establish ISSCs by gazette notice.

Issues raised

The WHS Board raised with the Review that the relevant provisions of Part 2, Schedule 2 have not been considered or amended for approximately 20 years. The WHS Board flagged with the review concerns in relation to the legislative provisions governing its functions.

One particular issue identified by multiple stakeholders, including the WHS Board, was the need to review the naming and composition of ISSCs. It was noted that the naming of

[196] WHS Act, Schedule 2, sections 2 – 13.
[197] WHS Act, Schedule 2, sections 14 – 23.
[198] WHS Act, Schedule 2, section 14.

the ISSCs in the WHS Act is aligned to the now outdated Australian and New Zealand Standard Industrial Classification released in 1993.

Furthermore, it was raised with the Review that legislation pertaining to ISSCs is restrictive in that only six ISSCs are established for a specific set of industries, and the provision for the Minister to establish other ISSCs by gazette notice has never been used. To keep pace with the changing mix of industries and the kinds of work being undertaken, some ISSC industry coverage has expanded to include additional areas outside of ISSC titles. For example, the retail and wholesale sector standing committee now includes amusement and other recreational activities. The coverage of additional sectors across existing ISSCs has led to an increase in the number of committee members, with a number of ISSCs exceeding the Queensland Cabinet Handbook's recommended size of 12 members.

It was proposed the WHS Act be amended to reflect updated naming conventions, and to better facilitate changes to the number of ISSCs.

Findings

An in-depth analysis of all matters raised by the WHS Board was not possible within the scope of this review. However, we recognise the important role of the WHS Board, as described in the WHS Act. An advisory board is a powerful tool to support a Minister in their considerations, as well as to provide sectoral intelligence to assist with internal departmental decision making. The advice provided by an advisory board is non-binding in nature, which gives the board flexibility to raise the issues they see as most important and to build knowledge of emerging issues.

In relation to ISSCs, the review agrees that the naming convention for ISSCs is outdated and industries that are of highest priority are not appropriately covered under the current naming convention. Consideration should also be given to the number, size and complexity of ISSCs to ensure high priority industry sectors are appropriately represented.

Recommendation 28

A. That the Minister consider clarifying the role of the WHS Board and the interaction between the WHS Board and OIR to ensure a singular focus on improving WHS outcomes.

B. That the Minister consider reviewing the current ISSCs to ensure appropriate coverage of relevant industries, and that specific consideration given to the size and complexity of the ISSCs. The Minister could consider subsequent legislative or administrative changes.

7.9 The Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee

Current framework

Part 2A, Schedule 2 of the WHS Act establishes 'The Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee' (the committee).

The committee was established to ensure there is an ongoing consultative forum for injured workers and families affected by a workplace death, illness or serious incident. The purpose of the committee is to provide:

- advice and recommendations to the Minister about the information and support needs of people impacted by work-related deaths, serious incidents and illness, and
- a forum where Queenslanders impacted by work-related deaths, serious incidents and illness can connect and share information.[199]

The committee consists of nine members appointed by the Minister.[200] A committee member holds office for a term not longer than three years.[201] Each financial year the committee must give the Minister a written report about the performance of its functions during the year.[202]

Issues raised

The committee raised with the Review that the name of the committee, as per the WHS Act, is not commonly used and does not accurately reflect the membership of the committee. The committee has submitted that the name be changed to the 'Consultative Committee for Work-related Fatalities and Serious Incidents' to ensure consistency and ease for the general public.

Findings

We recognise the critical work of the committee and the dedication of its members, who serve in a voluntary capacity. We agree that updating the committee's name within the WHS Act will ensure consistency and better reflect the committee's purpose and functions.

Recommendation 29

That the Minister consider amending Schedule 2, section 23B of the WHS Act so that the Affected Persons Committee is renamed the Consultative Committee for Work-related Fatalities and Serious Incidents.

[199] Consultative committee for work-related fatalities and serious incidents members | WorkSafe.qld.gov.au

[200] WHS Act, Schedule 2, section 23D.

[201] WHS Act, Schedule 2, section 23E.

[202] WHS Act, Schedule 2, section 23O.

7.10 WHS considerations for amenities

Current framework

Under the WHS Regulation, employers have a duty to provide and maintain adequate facilities for all workers, including toilets, drinking water and washing facilities. The facilities must be maintained so that they are clean, safe, accessible and in good working order.[203]

Schedule 5A of the WHS Regulation prescribes additional amenities requirements specific to construction work. Construction work is any work carried out in connection with the construction, alteration, conversion, fitting-out, commissioning, renovation, repair, maintenance, refurbishment, demolition, decommissioning or dismantling of a structure.[204] The additional requirements include:

- toilets are reasonably available (at a location reasonably convenient and the person's use of the amenity is not unreasonably restricted) to each construction person
- there must be at least one toilet for each 15, or part of 15, construction persons
- If the workplace is at least four levels (excluding ground level), there must be at least one toilet on the ground level, the fourth level and each third level after the fourth level
- if there are fewer than 15 construction persons, the toilet must be a connected toilet or a portable toilet
- if there are at least 15 construction persons, each toilet must be, a connected toilet (if a sewerage or septic connection is available) or a portable toilet
- each toilet must be located in a position that gives privacy and in a cubicle or room that is fitted with a lockable door that gives privacy and is constantly supplied with fresh air
- each toilet must have an adequate supply of toilet paper, and
- each toilet made available to a female construction person must have facilities to dispose of sanitary items and be separated from urinals so that no urinals can be seen from the toilet.[205]

The WHS Regulation is supported by the *Managing the work environment and facilities Code of Practice 2021* (the Facilities Code), which is a model national code. Although Schedule 5A of the WHS Regulation only applies to construction work, the Facilities Code applies many of these amenity standards to all other worksites.

In Queensland, the Facilities Code provides minimum legally enforceable standards for bathroom amenities. For example, access to clean, private, lockable and ventilated toilets must be provided for all workers. Toilets should be supplied with toilet paper, hand washing facilities, rubbish bins, and, for female workers, hygienic means to dispose of sanitary items.

[203] WHS Regulation, section 41.
[204] WHS Regulation, section 289.
[205] WHS Regulation, Schedule 5A.

The Facilities Code also refers to standards around numbers of toilets on site. Separate toilets must be provided in workplaces where there are both male and female workers, unless there are very small numbers of workers. In the case of small workplaces, the Facilities Code provides that one unisex toilet may be provided in a workplace with both male and female workers when there are 10 or fewer workers, and there are two or fewer workers of one gender. If a unisex toilet is provided, it should include a washbasin and means for disposing of sanitary items. Employers can choose to provide a higher standard of facilities for workers than is required by the Facilities Code but cannot provide facilities that are of a lower standard.

Unhygienic toilets, toilets without toilet paper or sanitary bins, locked toilets, inaccessible toilets, and toilets located some distance from the work location, are in breach of the WHS Regulations. Inspectors routinely check for these breaches, and, when non-compliance is identified, inspectors can take enforcement action.

Issues raised

While standards regarding adequate amenities are enforceable under the current legislative regime, there have been calls for more prescriptive minimum requirements. Stakeholders raised challenges associated with compliance with the current legislative framework, and that the issue is particularly acute for workers that do not have a fixed work site (e.g., for bus and train drivers). It was also noted the impact insufficient amenities can have on the psychosocial work environment of workers.

Furthermore, the Review is aware of a report released by the Electrical Trades Union in August 2021 detailing the barriers to participation resulting from inadequate workplace amenities for female workers in male dominated occupational industries.[206]

OIR highlighted the importance of leadership in male dominated mobile-location industries to take seriously existing legislative requirements relating to amenities, and to act on any discrimination and harassment towards of women in those sectors, including when it is applied through pressure on female workers around amenities.

Findings

Submissions were received from stakeholders about the ongoing issues concerning inadequate amenities being provided in workplaces generally, but particularly for women workers in the construction industry. In addition to the impact insufficient amenities can have on the psychosocial work environment of workers, as raised by stakeholders, poorly located amenities can also cause safety concerns for women, particularly during night work shifts.[207] The review also notes that research in male

[206] Hasan, A. & Kamardeen, I. (2022) Occupational health and safety barriers for gender diversity in the Australian construction industry. Journal of Construction Engineering and Management, 148 (9), 04022100-1. https://doi.org/10.1061/(ASCE)CO.1943-7862.0002352

[207] Laborers' Health & Safety Fund of North America (LHSFNA) (2020) Improving Safety & Health for Women in Construction. https://www.lhsfna.org/improving-safety-health-for-women-in-construction/

dominated industries such as construction provide support to the claims made in the Electrical Trades Union 2021 Report.[208]

It goes without saying that in 2022, the failure to provide adequate amenities for women workers on construction sites and for workers more generally across all industries is beyond unacceptable.

Taking into account the matters raised, there can be no doubt that there are substantial cultural problems which are leading to this outcome. As identified earlier, legislation cannot give rise to cultural change. However, robust regulation and active enforcement can help drive changes in industry behaviour.

One issue identified in the course of the review is that the obligations in respect of amenities are spread across multiple different sources. For example, in respect of construction there is a construction specific regulation which imposes some obligations and there is also a facilities code of practice which imposes additional obligations. It is undesirable for prescriptive obligations about these matters to be located in different places. That only serves confusion amongst PCBUs and workers. Accordingly, it is recommended that where provision is made for amenities in the regulations, all of the obligations contained in the code of practice should be repeated in those provisions and harmonised so that the obligations are described in the same way.

Similarly, there should be consultation with the DJAG to ensure that the non-compliance with the amenity requirement are infringeable offences. This would make enforcement actions more common and less resource intensive.

It goes without saying that these changes by themselves will be insufficient to address the broader cultural problems. These legislative changes will need to be supported by an aggressive and well-resourced compliance campaign. In appropriate cases, prosecutions should be considered to re-enforce the seriousness of the obligations owed and how dimly contraventions are viewed.

Recommendation 30

That the Minister consider elevating existing requirements for toilets in the code of practice into the WHS Regulation and harmonising the language used in the new provisions. Consideration should also be given to, consistent with the *Guidelines for the prescription of penalty infringement notice offences* under the *State Penalties Enforcement Regulation 2014*, prescribing non-compliance with toilet requirements (including the requirements specific to construction workplaces in Schedule 5A of the WHS Regulation) as a penalty infringement notice offence.

[208] Hasan, A. & Kamardeen, I. (2022) Occupational health and safety barriers for gender diversity in the Australian construction industry. Journal of Construction Engineering and Management, 148 (9), 04022100-1. https://doi.org/10.1061/(ASCE)CO.1943-7862.0002352

7.11 Industrial manslaughter

Current framework

The offence of industrial manslaughter was included in the WHS Act in 2017 as a result of a recommendation from the Best Practice Review.

In Queensland, industrial manslaughter applies to situations in which a worker,[209] dies or later dies, in the course of carrying out work for a PCBU, and the PCBU's conduct was negligent and caused the death of the worker.

In addition to industrial manslaughter, there exists the offence of manslaughter under the *Criminal Code Act 1899* (Qld).[210] The maximum penalty for manslaughter is life imprisonment, compared to 20 years imprisonment for industrial manslaughter.

The Australian Capital Territory, Western Australia, the Northern Territory and Victoria have each enacted an industrial manslaughter offence. South Australia recently released a draft Bill for public consultation to make industrial manslaughter a criminal offence. New South Wales and Tasmania do not currently have an industrial manslaughter offence.

Issues raised by stakeholders

Various submissions were received about the industrial manslaughter provisions. It was noted by stakeholders that the current industrial manslaughter provisions do not capture suicide of a worker due to bullying and harassment, sexual harassment, psychosocial hazards and occupational violence in the workplace, and that that the scope of the offence should be extended to capture the death of a worker by suicide. Stakeholders also suggested the industrial manslaughter provisions be extended to include bystanders, in addition to workers.

The Review noted that industrial manslaughter was the subject of recommendation 23b of the Boland Review.

Findings

In circumstances where there is ongoing discussion about the introduction of uniform industrial manslaughter provisions and where a new WHSP has been recently appointed in Queensland, it is undesirable for this review to express any firm views about the issues raised above. Further, given the short timeframe in which this Review was to be completed, we do not consider that industrial manslaughter was a matter that could be properly canvassed. However, given the importance of the issues raised in the submissions, we are of the view that the Minister should give serious consideration to commissioning a separate piece of review work to explore these issues.

Recommendation 31

That the Minister consider establishing a review to examine the scope and application of the industrial manslaughter provisions to determine if amendments are warranted.

[209] WHS Act, section 7 – meaning of worker.
[210] *Criminal Code Act 1899* (Qld), sections 300, 303, and 310.

7.12 Other prosecutorial considerations

Current framework

OWHSP is an independent prosecution office established in 2019 under the WHS Act. As part of the WHSP's functions, the WHSP may be responsible for prosecuting breaches under the WHS Act. As the head of the OWHSP, the WHSP's functions also include conducting proceedings under the WHS Act, advising the regulator on matters relating to the WHS Act, and any other functions given to the WHSP under the WHS Act.[211]

Issues raised

The Review had the opportunity to consult with the recently-appointed WHSP regarding a range of issues relevant to the OWHSP. Key issues addressed with the WHSP were also raised in consultation with other stakeholders, such as recurring non-compliance by PCBUs, considering near misses as a notifiable incident, and potential amendments to the industrial manslaughter offence.

An issue raised unique to the OWHSP was that of creating the role of a deputy WHSP. It was suggested that a deputy WHSP would assist the WHSP in meeting prosecutorial requirements and would serve to increase the efficiency as the OWHSP carries out its statutory functions.

A range of submissions were also received about issues concerning the interaction between the WHS Act and the criminal justice system. These submissions concerned the question of the appropriate jurisdiction for WHS Act prosecutions, the resourcing of those jurisdictions and the development of specialist decision-makers. For example, it was noted that the decisions of the Magistrates Court imposing sentences for breaches of the WHS Act are not published. Rather, those sentences are the subject of a brief summary prepared by the relevant prosecutor, which do not contain the presiding magistrate's reasons or application of the relevant laws. That presents a range of problems in respect to other magistrates, prosecutors and defendants relying upon those summaries, and for the purposes of general deterrence. The lack of published decisions which are publicly accessible may be an impediment to both the specific and general deterrence.

Findings

We note that several issues raised during consultation with the WHSP have been addressed elsewhere in this report. However, in relation to the specific suggestion to create the role of a deputy WHSP, the reviewers agree that this is an issue of significance that warrants further consideration. While we are not in a position to make a recommendation on this matter, it is believed that ideally, OIR should work with the OWHSP over the next 12 to 18 months with the aim of providing advice to the Minister on the proposal.

Similarly, the nature of the issues raised by stakeholders in relation to the interaction between the WHS Act and the criminal justice system required broader consultation

[211] WHS Act, Schedule 2, section 27.

than could be undertaken within the timeframe allocated for the review. However, we note that if further consideration is deemed necessary due to the seriousness of the issues raised, the Minister could request OIR to work with the WHSP accordingly.

Appendix A: Terms of reference

Scope of the Review

The Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing (the Minister), instructs the reviewers to undertake a five-yearly review of the *Work Health and Safety Act 2011* (the Act). The review is to consider the overall effectiveness of the key components of the Act in achieving the objects of the Act, including:

1. Consider and report on any need for amendments to ensure:

    a) provisions relating to health and safety representatives are effective and operating as intended;

    b) workers are appropriately represented and assisted in the workplace for the purpose of health and safety matters;

    c) the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act; and

    d) provisions relating to the issue and dispute resolution are effective and operating as intended.

2. Any other matters relating to the Act's overall effectiveness and performance in ensuring a balanced framework to secure health and safety of workers and workplaces and consider whether any legislative or administrative amendments are required.

The reviewers will report to the Minister on their findings on the operation of the Act and make recommendations for key amendments for improvement.

The review will be evidence-based and include consultation with employers, registered industrial organisations, the legal profession and academics, in addition to other interested stakeholders.