



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Better Regulation Division

Statutory Review of the *Work, Health and Safety Act 2011*

20 February 2017



contents

ABOUT THE HOUSING INDUSTRY ASSOCIATION	3
1. INTRODUCTION	4
2. THE ACT	4
2.1 OBJECTIVES OF THE ACT	4
2.2 CONSULTATION, REPRESENTATION AND PARTICIPATION.....	6
2.3 WORKPLACE ENTRY BY WHS ENTRY PERMIT HOLDERS.....	6
2.4 ENFORCEABLE UNDERTAKINGS.....	6
2.5 REVIEW OF DECISIONS	6
2.6 LEGAL PROCEEDINGS.....	7
2.7 REVIEW OF THE ACT.....	7
3. THE REGULATIONS.....	7
3.1 REPRESENTATION AND PARTICIPATION.....	7
3.2 HAZARDOUS WORK.....	8
3.3 REVIEW OF DECISION.....	8
4. CODES OF PRACTICE.....	8

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.



1. INTRODUCTION

HIA welcomes the opportunity to provide input to the Statutory Review of the *NSW Work, Health and Safety Act 2011* and respond to the Discussion Paper.

In HIA's view, generally the legislation is working well.

The introduction of the *Work, Health and Safety Act 2011 (WHS Act)*, on the whole represented an improvement on the previous *Occupational Health and Safety Act 2000*. One of the most significant changes was the restoration of the presumption of innocence and the removal of draconian reverse onus of proof provisions that denied directors and employers the presumption of innocence.

Another improvement has been a cultural shift within SafeWork NSW and their focus on assisting businesses, particularly small businesses with their compliance obligations and the use of enforceable undertakings as a more effective compliance tool. However, elements of a 'tick the box' approach to safety persist. HIA understands that SafeWork NSW is continuing to work towards the embedding of a safety culture across the State, and for HIA members, across construction sites.

Disappointingly, the Statutory Review has been confined to **NSW specific** provisions only. This is at odds with section 276B of the WHS that contains no such limitation. A state based review should be just that; it should consider how the WHS Act is operating in NSW and not be limited by any other reviews that have taken place. This is particularly the case in circumstances in which the outcomes of the COAG Examination are unknown.

In HIA's view a further focal point for this review should be the review of pre-WHS codes of practice. While dealt with in further detail below, HIA submits that a stand-alone process is required to review these Codes in order to clearly contemplate the interaction between the national and state codes of practices, look for potential gaps and overlaps and any consequential regulatory burden such duplication may impose. Such a process could be administered through consultative forums such as the Housing Industry Consultative Committee and other similar stakeholder groups that represent industry sectors.

HIA also notes that Safe Work Australia has published a number of amendments to the model WHS laws. HIA submits that this Statutory Review provides an opportunity to consider those amendments, particularly in light of the focus of those changes on reducing regulatory burden for business.

2. THE ACT

2.1 OBJECTIVES OF THE ACT

Are the objects of the Act still valid?

No.

The current objects contain many unnecessary statements about harmonisation and national consistency.



Whilst the objects were drafted as part of the Council of Australian Government (COAG) agreement for nationally consistent framework for health and safety laws and provide political context, they were drafted nearly a decade ago.

In 2017, they distract from the legislation's main goal, namely to ensure the work, health and safety of New South Wales workplaces. Ongoing reference to matters such as '*balanced and nationally consistent framework*' are unnecessary, particularly when most other jurisdictions, including New South Wales, include jurisdictional modifications.

The purpose of including objectives within legislation is to establish a legal framework for which the rights and obligations detailed within the legislation are derived. In HIA's view, the objects under the WHS Act are somewhat aspirational, going well beyond the legal framework and potentially place rights and obligations on individuals outside that which is required by the regulatory framework.

The objects of the NSW *Occupational Health and Safety Act 2000 (OHS Act)* were as follows:

- to secure and promote the health, safety and welfare of people at work,
- to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,
- to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,
- to provide for consultation and co-operation between employers and employees in achieving the objects of this Act,
- to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,
- to develop and promote community awareness of occupational health and safety issues,
- to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,
- to deal with the impact of particular classes or types of dangerous goods and plant at, and beyond, places of work.

Of note, the above:

- link the objects back to OHS Act;
- highlighting the need for community awareness of safety issues under the OHS Act; and
- confine the object of 'progressively higher standards' to enable changes in technology and work practices as opposed to a more generalised object under the WHS Act.

HIA submit that the objects of the WHS Act be reframed to reflect the current work, health and safety environment by amongst other things, removing the focus on harmonisation and including state specific factors of import.

2.2 CONSULTATION, REPRESENTATION AND PARTICIPATION

Do you have any comments regarding the Industrial Relations Commission(IRC) being the forum that can receive and decide whether to disqualify a HSR?

HIA notes that the procedure for making such an application is unclear, there is no information on the Industrial Relations Commission (IRC) website, nor is there very detailed information available from SafeWork NSW.

It is equally unclear as to how many (if any) applications have been made.

HIA also notes that the jurisdiction of the IRC to hear and determine category 3 offences has been removed via the *Industrial Relations Amendment (Industrial Court) Act 2016*. HIA submit that in light of the increasingly limited role of the IRC consideration should be given more broadly to the role of the IRC is all Work, Health and Safety matters.

2.3 WORKPLACE ENTRY BY WHS ENTRY PERMIT HOLDERS

Do you wish to comment about the IRC being the Authorising Authority for NSW?

The Authorising Authority has a range of important roles in relation to the issuing of permits, revoking permits, and right of entry disputes.

As has been noted within these submissions the role of the IRC in relation to safety matters has been reduced, as such and given the importance of these function HIA submit that further consideration be given to the most appropriate forum for dealing with these matters.

2.4 ENFORCEABLE UNDERTAKINGS

Do you have any comment regarding the District Court being the forum that can receive applications by the regulator about noncompliance with notices?

Do you have any comments about the District Court being the nominated forum to receive and hear in application or orders where a person is alleged to have contravened a WHS undertaking in NSW.

HIA considers that the District Court is the appropriate forum for these matters to be heard.

2.5 REVIEW OF DECISIONS

Do you wish to comment about the IRC being the nominated external body to receive and decide an application for review of a reviewable decision made by the regulator?

Do you wish to comment about the IRC being the nominated external body to receive and hear an application for review of a decision made, or taken to have been made on an internal review by the regulator?

The removal of the jurisdiction of the IRC to hear category 3 offences, presents an opportunity to re consider the role of the IRC in reviewing decisions of the regulator. For example, it may be more appropriate for the Administrative Appeals Tribunal to deal with such matter given their specialist role in reviewing administrative

decisions. Alternatively such matters could be best heard at the NSW Civil and Administrative Tribunal (NCAT) which similarly exercises functions in reviewing various decisions of NSW Government agencies and already has power to review safety related decisions made under the *NSW Work, Health and Safety Regulations 2011* (WHS Regulations).

2.6 LEGAL PROCEEDINGS

As indicated above, HIA understands that s229B(2) was removed by the *Industrial Relations Amendment (Industrial Court) Act 2016*. The consequence is that all WHS offences can be heard by either the Local or District Court. In HIA's view, this is appropriate.

Do you wish to comment about the provision from the secretary of a union to bring proceedings for an offence against the Act.

HIA maintains its opposition to the ability of a union to bring proceedings in circumstances in which the regulator chooses not to.

The unions should have no powers of prosecution. The role of prosecutor should be completely separate from the parties representing stakeholder interests

HIA is however supportive of the more confined right under the WHS Act than under its predecessor legislation.

2.7 REVIEW OF THE ACT

Do you have any comment regarding ongoing reviews of the Act?

The current Greiner Review of the NSW Regulatory Policy Framework discusses the method and frequency of periodic legislative reviews.

HIA reiterates the views put in response to the Greiner Review, that ongoing statutory reviews are necessary and appropriate and that such mechanisms should be adopted in relation to other regulatory instruments such as Codes of Practice.

Ongoing reviews are particularly relevant for the NSW WHS Act in light of the harmonisation agenda for safety laws.

3. THE REGULATIONS

3.1 REPRESENTATION AND PARTICIPATION

The purpose and intent of the Note is unclear particularly when comprehensive information on the training of HSR's is contained within the ***Worker Representation and Participation Guide***.

HIA submits that the Note is unnecessary and may cause confusion. As such it should be removed.



3.2 HAZARDOUS WORK

HIA is not aware of any moves to re-agitate a national occupational licensing regime.

In light of this, the purpose of the 'Note' at Clause 143 of the *NSW Work, Health and Safety Regulations* and the consequent retention of the notice requirements for demolition work contained in Chapter 10 of the OHS Act seems to be no longer relevant. On this basis HIA submit that it is appropriate for the relevant elements of the OHS Act to be formally incorporated into the WHS framework.

3.3 REVIEW OF DECISION

Do you wish to comment on the Civil and Administrative Tribunal being the forum that is nominated to hear and decided applications for external review of decisions?

As examined above reviewable decisions under the WHS Act are currently heard by the IRC, while reviewable decisions under the WHS Regulations are heard in the NSW Civil and Administrative Tribunal.

It is HIA's view that the Civil and Administrative Tribunal is the appropriate forum to hear and decide applications for external review of decisions for both reviewable decisions under the WHS Act and WHS Regulations.

4. CODES OF PRACTICE

HIA notes that the pre-WHS codes of practice generally cover subject matter for specific hazards and risks, as opposed to the more general nature of the model WHS codes.

The pre-WHS codes that are of most relevance to the construction are:

- Cutting and drilling concrete and other masonry products code of practice
- Formwork code of practice
- Moving plant on construction sites code of practice
- Safe use of synthetic mineral fibres code of practice
- Overhead protective structures code of practice
- Safe work on roofs part 1 commercial industrial code of practice
- Work near overhead power lines code of practice
- Tunnels under construction code of practice

HIA is concerned that whilst some of the content may still be relevant given their specific nature, the material is presented in a manner that is problematic and detrimental. HIA submit that a stand-alone review of these pre-WHS codes be undertaken and that the position that these codes should be left as they are be displaced for a view which is open to reducing any potential confusion and burden on business by having multiple codes of practice applying in relation to the same or similar subject matter. Ultimately, further decisions can then be made as to the utility of the pre-WHS codes of practice and what, if any useful guidance material these documents could serve as.

HIA have a number of concerns with the ongoing operation of the pre-WHS codes of practice.



Firstly, the pre-WHS codes of practice were developed under the Occupational, Health and Safety laws and therefore reflect the requirements of those laws, not the requirements of the WHS Act and WHS Regulations. Some are very old and most are inaccurate and often inconsistent with the WHS framework. This is confusing for duty-holders and can lead to unnecessary disputes and even to non-compliance.

Secondly, most of the pre-WHS codes of practice refer to duties or mandatory matters that are not in fact mandatory and in some cases that are inconsistent with current requirements. For example, the Code of Practice *Safe Work on Roofs Part 1: Commercial and Industrial Buildings*:

- Contains control measures, for example the hierarchy of controls for falls that are inconsistent with the WHS Code of Practice *Managing the Risk of Falls at Workplaces*.
- Refers to regulations that do not exist, for example, Part 4 Legislative requirements.
- Contains provisions that are not mandatory, for example at paragraph 3.2.5 it states that a principal contractor must be appointed where the work involves high risk construction work. There is no such requirement under the WHS Regulations.

These are just a few examples but there are many others within this code, and many more in other codes.

Finally, there is duplication of content that is already covered in other WHS codes (again the Safe Work on Roofs Code of Practice is an example).

These matters can cause much confusion and in some instances may lead duty-holders to believe they would comply with current requirements when in fact they may not, industry requires certainty in relation to their work, health and safety obligations.

In light of this and the requirements prescribed by section 274 of the WHS Act, HIA proposes that the WHS Act be amended to accommodate the requirement to review and repeal (or recast as guidance) pre-WHS codes of practice. The intent of section 274 was not to capture pre-WHS codes of practice, it was to ensure that Model Codes of Practice, adopted through the COAG harmonisation process, could not be amended by individual governments without extensive national consultation.